BYU Law Review

Volume 1993 | Issue 2 Article 1

5-1-1993

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Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations

*Mary Ann Glendon, General Reporter**

> Nothing, in my view, more deserves attention than the intellectual and moral associations in America. American political and industrial associations easily catch our eyes, but the others tend not to be noticed. And even if we do notice them we tend to misunderstand them . . . . However, we should recognize that the latter are as necessary as the former to the American people; perhaps more so.
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> *Alexis de Tocqueville*[1]

I. INTRODUCTION: COMPARATIVE LAW AT A CROSSROADS

When the members of two comparative law associations come together for a conference, the tacit assumption is that comparative methods will advance the understanding of whatever questions are before the house. That assumption led to the establishment of the first comparative law societies in France, Germany, and England in the late nineteenth century, and it presided over the founding of the International Association of Legal Science in 1950 and the American Association for the Comparative Study of Law in 1951. In their embrace of comparative methods, legal scholars were no different from their counterparts in the other human sciences who took for granted that serious research ought to include a comparative dimension. Emile Durkheim, for example, went so far as to claim that "[c]omparative sociology is not a particular branch of sociology; it is sociology itself."[2] F.W. Maitland insisted that "[t]he Eng-

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 517 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (1966).

2. EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 139 (George Catlin

lish lawyer who knew nothing and cared nothing for any system but his own, hardly came in sight of the idea of legal history."[3]

The question arises, however: Why, if the benefits of comparative methods are so substantial and obvious, has comparative law remained a relative backwater in the twentieth-century legal world? No doubt there are several reasons, including language barriers and the great difficulty of achieving even minimal competence in another legal system while keeping up with developments in one's own. Circumstances in the United States, moreover, long made it easy for legal scholars to carry on many types of research without casting their gaze beyond national borders. In recent years, though, with unprecedented global interdependence, and with commerce and communication linking all regions of the earth, that posture has become increasingly untenable. As a result, international legal studies are burgeoning to a degree that the founders of comparative law organizations could scarcely have imagined. As we stand on the verge of this new era, however, it is not altogether clear what role comparative law will play in the legal science of the future.

To many legal academics, "international legal studies" means international business law, public international law, area studies, and little else. The comparative enterprise seems quaint and old-fashioned—except so far as foreign law knowledge can be deployed in the service of some immediate commercial or political objective. As for comparatists themselves, most would admit we are in something of an identity crisis.

That we have reached such a stage should surprise no one. Modern comparative law, after all, took shape in the late nineteenth century at a time when differences among European national legal systems in many areas were becoming more accentuated than they had been in the more distant past or than they are now.[4] One of the main purposes of the first comparative law associations was therefore quite practical: to aid national law reformers by studying the ways in which legisla-

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ed., Sarah Solovay & John H. Mueller trans., 8th ed. Free Press 1966) (1895).

3. FREDERIC W. MAITLAND, *Why the History of English Law Is Not Written*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 488 (H.A.L. Fisher ed., 1911).

4. *See* Gino Gorla & Luigi Moccia, *A "Revisiting" of the Comparison between "Continental Law" and "English Law" (16th-19th Century)*, 2 J. LEGAL HIST. 143 (1981).

tors of countries at comparable stages of social and economic development were dealing with the novel problems associated with urbanization and industrialization.

But there was always more to comparative law than that. Comparative lawyers are intellectual cousins to sociologists who have long known that drawing a line around an area on a map and calling it a national boundary does not capture the full complexity of norm systems toward which the people inside orient their conduct, or the differing contexts of habits, practices, and attitudes within which various mutually conditioning norm systems operate. Many legal scholars, moreover, have pursued comparative studies for the same reasons that scholars in other disciplines routinely resort to comparative methods—for the sake of improved knowledge and understanding, and as a way of critically evaluating their own theories and hypotheses.[5] The attraction of comparative law has never been just the study of foreign law as such. It has also been the allure of a glimpse into the origins of legal norms; the prospect of a better understanding of the efficacy and limits of law; and the hope of insight into the connections among law, behavior, ideas, and power. In other words, comparative law belongs not only to international legal studies, but to basic research in law.

The question remains concerning the place of comparatists, with their peculiar set of practical and theoretical preoccupations, in the modern legal world—especially in the world envisioned by those who believe (as Thomas Reed Powell once put it) that the particular gift of lawyers is to be able to think about something that is connected to something else without thinking of what it is connected to.[6] No doubt it is useful to have lawyers around who think that way, just as it's useful for a surgeon who is operating on the hip bone not to be thinking about how the hip bone is connected to the thigh bone, and so on. But neither medicine nor law can do without people who study the functions, contexts, and connections that others, for immediate practical purposes, may temporarily have to assume away. And functions, contexts, and connections are much of what comparative law is all about—whether at the national level, the transnational level, or in the capillaries of the legal

5. *See* Friedrich Kubler, *Rechtsvergleichung als Grundlagendisziplin der Rechtswissenschaft*, 32 JURISTENZEITUNG 113 (1977).

6. *See* Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (noting Powell's observations).

system, or in the institutions that compose the fine grain of society.

In the law-saturated societies of the so-called advanced nations,[7] we need now more than ever to know how legal norms work in practice, how they interact with other norm systems in various social contexts, what indirect effects they generate, and what long-term consequences they may entail. Comparative law is one way to obtain that sort of knowledge. It is Justice Brandeis's "laboratory" concept writ large.[8] However, the very features that furnish comparative methods with their great power deprive them of wide appeal. Comparative law, like basic research in any other field, takes a long apprenticeship; it requires teamwork—not only with one's counterparts in other legal systems, but with experts in related disciplines, especially those engaged in empirical research. Moreover, its outcome is always uncertain; every worthwhile project entails some risk of failure.

The relevance of these matters to the present conference is that the theme of individualism and communitarianism required a certain willingness to take risks on the part of the national reporters. When Cole Durham and I proposed that exploratory and open-ended theme, rather than a precisely defined topic, we were aware that we were inviting the reporters into relatively uncharted waters. Needless to say, we believed the risks would be offset by the chance of being able to demonstrate that cross-national and interdisciplinary teamwork can, in fact, fulfil the mission of the IALS to promote the development of legal science through the methods of comparative law.

II. A TOPIC IN SEARCH OF A NAME

When I say we knew the topic was risky, I mean that, when this conference was in the earliest planning stage, we knew this in the way that a teenager knows that fast driving often produces accidents. We had our first concrete indication

7. *See* Andreas Heldrich, *The Deluge of Norms*, 6 B.C. INT'L & COMP. L. REV. 377 (1983).

8. In New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), Justice Brandeis called attention to the fact that one of the advantages of the American federal system is that it can function as a "laboratory" where "novel social and economic experiments" can be tried by various jurisdictions "without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting).

of how risky it was when we tried to come up with a concise description that would effectively communicate the general idea of the project to people from a wide range of legal systems. From previous international conferences, we remembered the danger of what language teachers call "false friends": words that look the same but that have different meanings in different languages. There was, for example, a mysterious panel on *aeroglisseurs* at the Caracas meeting of the International Academy—which many people did not attend because they doubted whether there was really all that much to be said about the law of gliders.[9] Confusion reigned at another roundtable at that same meeting, when half the national reporters came prepared to discuss adoption, while the other half were under the impression that the subject was foster care.

In our efforts to avoid that sort of trap, we chose a description that was perhaps too general. So it seems appropriate to begin this General Report by unpacking the themes we hoped to evoke when we chose the title "Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations." I can think of no better way to do that than to describe the genesis of the idea for this conference. In 1989, when Brigham Young University indicated its willingness to host an IALS conference, a lively discussion was underway in many parts of the world concerning the role that various voluntary organizations—such as Solidarity in Poland, Civic Forum in Czechoslovakia, and dozens of political discussion groups in Hungary—had played in the downfall of statist socialism.[10]

Among students of politics, this phenomenon reawakened interest in the relationship between "society" and "state." Vaclav Havel gave voice to the questions that were on many minds: How did people who were to all appearances beaten down, atomized, cynical, and apathetic find the strength to embark on great projects of social and political renewal? Where did "young people . . . who [had] never known any other system, find the source of their aspirations for truth, freedom of thought, civic courage and civic foresight?"[11] Havel's answer

9. The panel was actually an interesting discussion of the extent to which hovercraft were subject to aviation or navigation laws.

10. *See* TIMOTHY G. ASH, THE USES OF ADVERSITY: ESSAYS ON THE FATE OF CENTRAL EUROPE 47-49, 191, 203 (1989).

11. Vaclav Havel, New Year's Day Address, FOREIGN BROADCASTING INFORMA-

was, in part, that a certain humane and democratic inheritance had been "dormant" but somehow kept alive in East European societies.[12] Speculation on *how* that inheritance was preserved against all odds has led to a revival of interest in Tocqueville's theory that communities of memory and mutual aid play essential, though insufficiently recognized, roles in underpinning democratic forms of government.[13]

This is not the place to attempt a summary of the body of thought that regards a flourishing associational life as crucial to systems of self-government. I will just mention briefly five points that are commonly made in that literature. First, and most obviously, some types of associations can buttress individual freedom by serving to buffer the power and relativize the ideology of the state.[14] Second, several kinds of groups can nurture the sorts of political skills that a republic requires in its citizens as well as its statesmen. To Tocqueville, townships and other participatory groups were little schools of citizenship where people could form clear ideas about their rights and duties, while acquiring habits of deliberation and mutual accommodation.[15] Third, many of the American Founders counted on small-scale associations to serve as seedbeds for the republican virtues of moderation, self-restraint, sturdy independence of mind, and respect for the rights of others.[16] It was

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TION SERVICE, EASTERN EUROPE, 90-001, Jan. 2, 1990, at 9-10.

12. *Id.*

13. *See* TOCQUEVILLE, *supra* note 1, at 513-17; *see also* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN at xix (1992); MARY ANN GLENDON, RIGHTS TALK 109-44 (1991); THOMAS PANGLE, THE ENNOBLING OF DEMOCRACY 105-59 (1992); Thomas Pangle, *The Constitution's Human Vision*, 86 PUB. INTEREST 77, 88-90 (1987).

Social theorists who have laid special emphasis on associational activity without stressing its relation to democracy are: EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 28-29 (George Simpson trans., Free Press 1933) (1893); PETER KROPOTKIN, MUTUAL AID (1972).

14. In our own day freedom of association has become a necessary guarantee against the tyranny of the majority . . . . [N]o countries need associations more . . . than those with a democratic social state. In aristocratic nations secondary bodies form natural associations which hold abuses of power in check. In countries where such associations do not exist, if private people did not artificially and temporarily create something like them, I see no other dike to hold back tyranny of whatever sort . . . .

TOCQUEVILLE, *supra* note 1, at 192.

15. *See id.* at 62-70.

16. *See* THE FEDERALIST NOS. 55, at 346; 57, at 353 (James Madison), NO. 84, at 544 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 71-72, 190-91 (1985); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVO-

mainly in family settings, schools, churches, and other close-knit communities, they believed, that citizens would develop those qualities of intellect and character. Fourth, the habit of accomplishing goals and projects through mutual aid has been thought to prevent citizens from becoming too dependent on government. When people habitually look to government for solutions to their problems, Tocqueville famously wrote, they become subjects, but no longer citizens.[17] Finally, in the twentieth century, as the liberal democracies have taken on extensive welfare responsibilities, many associations have attracted yet another sort of interest—of a more practical and immediate nature. Caught in the pinch between rising demands for services on the one hand and the limits of high taxation on the other, policymakers are increasingly experimenting with the idea that the state can promote the delivery of services such as health, education, and child care more economically, efficiently, and humanely through nongovernmental groups than it can provide them itself.[18]

No sooner had the structures of civil society begun to be reappraised, however, than many old fears—and a few new ones—concerning them began to surface. To many people, the very idea awakens fears of civil strife, crude majoritarianism, or the glorification of the group at the expense of the individual. Since I have listed five ways in which communities have been regarded as undergirding democratic republics, let me mention five concerns that are most frequently expressed about them. First, there is the notion that allegiance to what Madison called "factions"[19] foments civil discord, impedes national cohesion, and threatens the state. Second, to many intellectuals, the idea of community connotes backwardness and narrow-mindedness. A suspicious attitude toward "small town values" finds support not only among collectivist thinkers (Marx and Engels wrote scornfully of the "idiocy of rural life"),[20] but among libertarians (John Stuart Mill deplored the stifling ef-

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LUTION 333-34 (1992).

17. TOCQUEVILLE, *supra* note 1, at 93-94; *cf.* KROPOTKIN, *supra* note 13.

18. *See* PETER BERGER & RICHARD J. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977); RALPH M. KRAMER, VOLUNTARY AGENCIES IN THE WELFARE STATE (1981); BETWEEN STATES AND MARKETS: THE VOLUNTARY SECTOR IN COMPARATIVE PERSPECTIVE (Robert Wuthnow ed., 1991).

19. THE FEDERALIST NOS. 10, 51 (James Madison).

20. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 14 (1955).

fect of "custom" on the free development of gifted individuals).[21] Third, the frequent figurative use of the word "community" to designate a whole nation or ethnic group evokes associations of racism and totalitarianism, especially in light of the atrocities perpetrated in the name of "folkish community" (*Volksgemeinschaft*) in the 1930s and 1940s.[22] Fourth, in the period of increased attentiveness to "universal" individual human rights after World War II, a heightened consciousness has arisen concerning the ways in which social subgroups can be oppressive to their own members, as well as intolerant of outsiders. Finally, to many people, the current rise of militant nationalism and fundamentalism in various parts of the world has seemed to confirm fears associated with group loyalties.

It will be noted that most of those fears are based on concepts of communitarianism that equate it variously with interest-group pluralism, nationalism, or majoritarianism. This suggests that some refinement of the issues is in order, and that distinctions must be made not only among particular sorts of groups, but according to the actual relations among the state, the market, and the rest of civil society at different periods in history and in different cultural contexts. The debate about individualism and communitarianism, as the French reporter points out, is an old one, but it is one whose terms alter their weight and meanings under different historical conditions. Depending on the circumstances, the sorts of groups that in some countries at some phases of historical development promote individual liberty and participatory politics can operate in other times and places to oppress individuals and to stifle political life.

In 1989, with society unexpectedly asserting itself against the state in many parts of the world, the time seemed propitious for the IALS to explore the *legal* dimensions of these perennial questions that were taking new forms in political theory. In particular, it seemed worthwhile to inquire into the legal status and treatment in various countries of certain especially important social groups—ranging from families, local

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21. JOHN STUART MILL, ON LIBERTY 68 (Currin V. Shields ed., Liberal Arts Press 1956) (1859).

22. National Socialism, like other ideologies claiming community on a grandiose scale, was in fact hostile to local communities and subcultures which competed with the state for loyalty. Just as Marx distrusted groups that tended to perpetuate "bourgeois vestiges," National Socialists regarded many religious and communal associations as *Reichsfeinde* (enemies of the Reich).

schools, churches and neighborhoods, to larger educational, workplace, religious, and professional associations, and to various kinds of governmental organizations at the local and communal level. The United States seemed to be an ideal setting for such a conference, for, as Tocqueville had memorably observed, "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world."[23] In his travels, he was repeatedly struck by the fact that, "Americans of all ages, all stations of life, and all types of dispositions, are forever forming associations."[24]

Tocqueville marvelled at the variety of associations which had no obvious political or commercial object:

> There are . . . a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes, [to proclaim truths, and to instill feelings].[25]

What made these nonpolitical groups politically significant, so far as he was concerned, was the array of skills and attitudes that they fostered. When Americans wanted something built, repaired, cleaned up, praised, or propagated, he observed, they just gathered a group of people together and did it—rather than appealing to "a powerful stranger called the government."[26] When you look behind any new undertaking in the United States, he claimed, "you are sure to find an association," whereas "in France you would find the government or in England some territorial [potentate]."[27]

In sum, then, Cole Durham and I were confident that we had an excellent topic for comparative examination, and one that was particularly well suited for exploration in an American setting. But when we tried to put our idea in the form of a proposal to the IALS, we had great difficulty in deciding what

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23. TOCQUEVILLE, *supra* note 1, at 189.

24. *Id.* at 513. "[E]ven the women," Tocqueville reported, "often go to public meetings and forget household cares while they listen to political speeches." *Id.* at 243. For a description of the rich associational life in certain parts of Europe in the nineteenth century, see KROPOTKIN, *supra* note 13, at 223-92.

25. TOCQUEVILLE, *supra* note 1, at 513.

26. *Id.* at 93.

27. *Id.* at 513.

to call it. What made this problem so intractable, however, was precisely what made it seem promising from an intellectual point of view. The main reason we could not easily come up with a title for this conference is that the vocabulary and conceptual apparatus of modern law and politics is primarily geared to the relations among individuals, the state, and the market. Legal theory lacks adequate terms and concepts for grappling with the "thousand different types" of social groups that provide the immediate context for most people's lives and that flourish within and among the megastructures of the state and the market. Since the existence of a mass of material that does not fit any existing theoretical framework is a classic invitation to further research, we regarded the naming problem as, on balance, an encouraging sign.

We turned next to neighboring disciplines for aid in framing a title, and settled initially on a shorthand expression with a venerable pedigree in social theory. The term is "civil society," an expression that was frequently on the lips of oppositionist political figures like Havel, Konrad, and Michnik in the 1980s.[28] Czeslaw Milosz, the Nobel Prize-winning Polish poet, tersely conveyed the spirit in which that term was used when he wrote in 1986, "Quite contrary to the predictions of Marx, . . . instead of the withering away of the state, the state . . . is eating away the substance of society."[29] The destruction of society by the state, according to Milosz, was "the basic issue of the twentieth century"—and not only in what were then the socialist countries, but also in the liberal democracies of the West.[30] But when Cole and I submitted a proposal to the IALS for a colloquium on "Civil Society," the Executive Committee of the IALS rejected it as likely to be too unfamiliar or confusing to many people. On reflection, we agreed.

When we went back to the drawing board, moreover, we realized that "civil society" was not quite appropriate for what we had in mind. For "civil society," as Hegel, Marx, and many contemporary European thinkers, such as Milosz and Havel have used that term, includes the structures and systems of the market. But in many countries, the size and power of business entities has come to rival the state. Indeed, as Gunther Teubner points out in the German report, the distinction be-

28. ASH, *supra* note 10, at 48, 191, 203; Havel, *supra* note 11, at 9-10.
29. *An Interview with Czeslaw Milosz*, N.Y. REV. BOOKS, Feb. 27, 1986, at 34.
30. *Id.*

tween market and state has become blurred. Those facts prompted the American sociologist Robert Bellah to offer an addendum to Milosz's diagnosis by pointing out that it is not only the state, but the market economy, that can take a toll on the little groups—families, schools, neighborhoods, and so on—that compose the "life-world" of most men, women, and children.[31]

For our purposes, then, the term "civil society" was both underinclusive (because it leaves out small, participatory, governmental bodies, like the New England townships that so enchanted Tocqueville) and overinclusive (because it includes huge private organizations and interest groups that are as inaccessible to participation as large public entities). Taking our bearings from Tocqueville, we wanted to concentrate, not on national parties and pressure groups, or on the megastructures of state and market, but on the smaller social subsystems whose political significance, according to Tocqueville, had been generally ignored.

So what to do? There were a number of sociological terms that came close—intermediate associations, secondary groups, and mediating structures. We could have gone to political science for a snappy acronym like QUANGOS (quasiautonomous nongovernmental organizations). But terms like "group" or "organization" did not capture the porous boundaries and overlapping memberships of associational activity in contemporary societies. Moreover, as Teubner points out, social subsystems do not just "mediate" vertically between individuals and the state. They mediate between political discourse and the discourses of specialized subsystems, and they mediate horizontally with each other. What we really needed was a title that would convey a sense of the dynamic interactions among spheres of meaning, as well as of the constantly changing relations among individuals and the various sorts of communities to which they belong. For a conference title that would evoke the law's relation to social systems and subsystems in constant flux and communication, we could have borrowed Teubner's own term—"autopoietic law."[32] But it is fair to say that

31. ROBERT BELLAH, *The Invasion of the Money World*, *in* REBUILDING THE NEST 227, 228 (David Blankenhorn et al. eds., 1990) (borrowing the term "life world" from Jurgen Habermas).

32. Gunther Teubner, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1 (Gunther Teubner ed. 1988).

autopoiesis is not yet a household word. So we invited Teubner to be a reporter, and went on searching for a title.

Finally, we resolved that we could do no better than to imitate the spirit of the draftsmen of the French Civil Code. That is, we aimed for a general formulation that we hoped would be *fécond en conséquences*—one that would make up in suggestiveness for what it lacked in specificity.[33] Our hope, after all, was not to bind the imaginations of our national reporters, but to kindle them. In that frame of mind, for better or worse, we settled on "Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations."

The project, as we presented it to the national reporters, was to consider the extent to which the individual or communities (variously defined) are emphasized in specific parts of their national legal systems. They were asked to trace the ways that tensions between individualism and communitarianism are manifested, as well as the ways in which accommodations are achieved. This was a vein which the Belgian Reporter, Marie-Thérèse Meulders-Klein, had successfully explored in her brilliant comparative studies of family law,[34] and thus there was reason to think that similar investigations in other areas would be fruitful as well. In particular, we asked the reporters to consider the legal treatment of five overlapping types of social environments of great importance in the daily lives of most individuals: families, local communities, religious organizations, educational institutions, and the world of work (including workers' and professional associations). In keeping with the usual IALS practice, we invited the reporters to concentrate their efforts on as few or as many subtopics as they wished.

On the basis of the reports they produced, it seems clear that, whatever the defects and ambiguities of the topic, they did not in the least dampen the creative impulses of the reporters. No doubt this is because the Scientific Director of the IALS, Petar Šarčević, secured the participation of a truly remarkable group of scholars. Not only are they among the world's experts on various branches of the topic, they are all distinguished comparatists.

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33. Portalis et al., *Discours preliminaire, quoted in* ARTHUR VON MEHREN & JAMES GORDLEY, THE CIVIL LAW SYSTEM 54 (2d ed. 1977).

34. *E.g.*, Marie-Thérèse Meulders-Klein, *Famille, état et sécurité économique d'existence à la fin du XXème siècle, in* 2 FAMILLE, ÉTAT ET SÉCURITÉ ÉCONOMIQUE D'EXISTENCE 1077 (Marie-Thérèse Meulders-Klein & John Eekelaar eds., 1988).

III. THE NATIONAL REPORTS: THE LEGACY OF HISTORY

The national reports disclose a group of countries engaged in what is, in a sense, a common quest: the search for an optimal relationship between private ordering and public regulation; for an appropriate balance between individual rights and the limits on those rights that are required for the sake of life in an organized society; and for effective methods of responding to the needs of their citizens without fostering an entitlement mentality. In most places, however, these goals are being pursued with little attention to specialized social subsystems, or to forms of private ordering other than market ordering. Most importantly, the reports demonstrate that the search does not begin with a clean slate in a mythical state of nature. It takes place under specific historical circumstances that importantly affect ideas of what is optimal as well as the possibilities and means of achieving various political goals.

The tensions and accommodations between individualism and communitarianism appear in quite a different light, for example, in a country just emerging from state socialism like Poland, from the way they manifest themselves in the liberal welfare republics of Western Europe, or in a country like the United States, which has only slowly and partially made the transition from a liberal republic to a liberal welfare republic. Or again, as Tatsuo Inoue's report illustrates, between a country like Japan where certain structures of civil society are relatively strong and countries where social ties have become more attenuated.

A. The Transition from Socialism: The Case of Poland

Through the 1970s and 1980s, few people could remain unmoved and unimpressed by the way in which Polish labor and religious organizations had been able to preserve and nurture the sparks of a vision of human freedom that stood in stark opposition to official ideology. According to the Polish reporter, however, the adoption of "civil society" as a rallying cry took place without much "profound theoretical reflection" on its meaning. Though "the myth of civil society" played a central role in democratic oppositional thinking in the 1970s and 1980s, he reports that it has more or less faded from view in the years since 1989.

At present, civil society has taken a back seat to the "most

important task" of the time, namely, establishing a liberal social state with constitutional protection for individual and economic freedom. In this process of transition to a new form of government, the legacy of civil society has been overshadowed by a more recent inheritance—the legacy of socialism. Although the institutions of civil society, as carriers of democratic humanism (or "bourgeois vestiges"), may have contributed to the downfall of state socialism, it now appears far from certain whether they possess enough vitality to play a major role in raising and sustaining a democratic republic. Ironically, the question now seems to be whether "socialist vestiges" in the form of habits and attitudes acquired over the past few decades are strong enough to block efforts at democratic renewal.

Of the acquired habits and attitudes to which the Polish reporter drew particular attention, one syndrome in particular was anticipated by Tocqueville.[35] Socialism, with its "attractive set of promises" (guaranteed employment, broad social safety net) fostered a mentality of dependency and entitlement that is now in tension with privatization. Another vestige seems to contradict Tocqueville's expectations. For it appears that participation in small groups can serve as a distraction from, rather than as a school for, citizenship in the larger sense. Paradoxically, "participation" in governing the workplace may actually have figured in the subordination of employees by giving them a sense of dignity, of belonging, and a certain feeling of liberty. "There is no doubt," according to the reporter, "that a worker's participation in the management of an enterprise was a particular compensation for the lack . . . of political rights and liberties." Participation, it seems, may or may not be a means of empowerment, depending on whether the group that serves as the theater of participation (union, local government) itself has real power, including the ability to set conditions for its own development.

The picture of the current East European scene painted by the Polish reporter is that of a "landscape after a battle," with the "state" under halting construction and "society" in relative disarray. He observes a "pendulum effect" as governments react to the extremes of the totalitarian past by promoting relatively unlimited individualism, especially in the economic sphere, without sufficient attention to the general welfare. In Poland,

35. *See* TOCQUEVILLE, *supra* note 1, at 86-95.

he notes that the newly constituted state is attempting to create conditions favorable to civil society through laws that delegate power to local communities and provide organizational frameworks for associations. Yet he provides several examples that raise substantial doubts about whether this top-down strategy significantly promotes either decentralization of power or individual freedom.

B. European Liberal Welfare States

The Polish reporter theorizes that the individualism-communitarianism discussion is a discourse peculiarly linked to the democratic liberal (rule-of-law) state, where political theory *in principle* rules out the notion that either one ism or the other should prevail. The idea that neither individualism nor communitarianism should predominate as a matter of principle does in fact seem to be part of the historical and philosophical inheritance of the liberal welfare states of the European continent. But that idea is less clearly a feature of American and Japanese political thought and practice. In fact, the American and Japanese reports suggest that a certain emphasis in principle on individualism (in the former case) or communitarianism (in the latter) is generally regarded as compatible with liberal democracy in those countries. Not surprisingly, these differences in emphasis seem to be attributable in large measure to the different cultural contexts within which democratic experiments have been introduced. It is not only in the emerging democracies of Eastern Europe where vestiges of the past cast long shadows on, and limit the possibilities of, the present.

The French and Belgian reports are the most consistent with the Polish reporter's general observation. The French reporter remarks that "the idea today is to attack excesses of both [individualism and communitarianism], and to protect the sacrosanct human rights (which are primarily individual rights) without compromising the interests of society." He relates these attitudes to the inheritance of the French Revolution, pointing out that excessive liberty, especially in the economic sphere, can run counter to another revolutionary ideal: equality. It is generally accepted today, he writes, that individual rights are not absolute, but are subject to certain limits imposed by collective interests and by the requirements of life in society. Accepted, too, is collective responsibility for an increasing number of risks, manifested in the appearance alongside traditional political and civil rights of new types of "social"

rights—to employment, education, health care, and so on.

The spirit of the French Revolution enters into the French and Belgian reports (and has affected much of continental Europe) in yet another way. The institutions of civil society were particular targets of attack in the revolutionary period. All the *corps intermédiaires* of the old regime—the family, the Church, craft guilds and associations—were to be dismantled. Under the slogan "No intermediaries between citizen and state," revolutionary legislation introduced divorce, broke up landed estates, confiscated church property, and abolished the guilds. For Tocqueville's French readers, that experience was the silent term of comparison in his admiring description of American "intellectual and moral associations." When he wrote of American families and religious groups, Tocqueville was wrestling with the question of what social supports would be available to sustain the effort to construct a free, egalitarian, democratic polity in his own country. In extolling the virtues of the New England township, he was lamenting the virtual destruction of local and communal government in France.

Though the family quickly regained legislative favor in the postrevolutionary period, and workers' associations gradually achieved legitimacy later on, the powerful myth of *la nation, une et indivisible* still casts a cloud of suspicion over groups that might compete with the state for allegiance. Over the nineteenth century, as the French reporter points out, the structures of civil society continued to develop—some organized by the state; some encouraged by the state; some ignored and tolerated by the state; some with legal personality, others without. In the current period, he calls attention to efforts at decentralization in administrative law, and to the proliferation of powerful interest and pressure groups—groups that awaken old fears associated with what Rousseau called "partial societies."[36]

The ambiguous roles of powerful economic and political associations in the polity are of special interest to the German reporter. He maintains that "today a new political arrangement between the state and private organizations is emerging—which I would call 'polycorporatism.'" Polycorporatism, according to Teubner, is characterized by a symbiosis between the public and private sectors, with government agencies and

36. Jean-Jacques Rousseau, *The Social Contract, reprinted in* THE SOCIAL CONTRACT AND DISCOURSES 247-48 (G.D.H. Cole trans., 1973).

private-sector actors cooperating in various ways, with governmental decision-making power to some extent dispersed, and with group autonomy to some extent sacrificed. He theorizes that a new kind of "polycorporate state" has come into being—taking the form, in Germany, of political parties, plus—on the one hand—a network of governmental bureaucracies that have sloughed off (privatized) much of the responsibility for policymaking, and—on the other hand—a network of nongovernmental organizations that have acquired quasigovernmental powers and duties.

As for the smaller-scale associations that were of special interest to Tocqueville, let us now turn to the Belgian report on European family law and the French and German reports on the world of work.

1. Individualism and communitarianism in family law

In family law, as in other areas, legislators do not write on a social *tabula rasa*. The Belgian reporter's comparative essay emphasizes the profound effects that history and philosophy have had on the divergent understandings of the individual and the family (and, one might add, of law and the state) that are operating in the Anglo-American and Romano-Germanic legal traditions. The significance of those differences extends far beyond family law; their spirit penetrates every corner of the respective legal systems. Thus the Belgian reporter's survey of comparative family law sheds light on many issues that recur in the legal treatment of local communities, schooling, religion, and the world of work.

One feature that distinguishes the continental European family laws from the Anglo-American is their relative emphasis on the group as such. It was in family law where French revolutionary assaults on intermediate groups were most short-lived. To Portalis, the chief draftsman of the Civil Code of 1804, the family (the legitimate family defined in the civil law) was the basis of civil society: "It is the cradle of the state, and the domestic virtues are civic virtues." The French Civil Code (and most other European civil codes) established a highly detailed system of rights and duties among family members, animated by a principle of "solidarity." The Belgian reporter remarks, "The continental jurist is in fact astonished at the relative absence throughout the history of the common law of rules of substantive law organizing family relations as such . . . ."

Despite recent transformations in family behavior and

ideas about family life, especially since the 1960s, the Belgian reporter finds that continental European law (with the exception of most of the Nordic countries) still maintains something of the ideal of family solidarity. She acknowledges the appearance, alongside traditional ideas of family solidarity, of a "postmodern" family ideology that regards the group as merely in the service of its individual members as they pursue their separate aims. She notes, as well, the increasing challenges to traditional legal concepts of family life from unmarried and same-sex couples pressing for legal recognition. She wonders whether the increased emphasis on children's rights may be the entering wedge of a new form of individualism in continental family law. Nevertheless, she finds that, in responding to these challenges, the Romano-Germanic legal systems so far "have evolved in a manner that conforms to their own traditions." Thus, for example, obligations of family solidarity have been broadened to include children born outside legal marriage, but unmarried couples as such have not achieved a legal status equivalent to the status of marriage.

She discerns similar tensions and accommodations in public law. Though most European constitutions expressly recognize the family as a social institution that must be accorded special protection by the state, there is vigorous controversy over the definition of the family and over the relation of family protection to the individual rights that are protected in the same documents. European legislatures, however, have managed to reach a variety of pragmatic accommodations of competing values. Confronted with considerable diversity in contemporary sexual and family behavior, the continental welfare states have attempted to steer a course that provides assistance to persons in need without creating new legal statuses and without penalizing families that are based on marriage.

The same overall accommodationist trends are manifested in the activities of supranational European institutions. The European Social Charter engages the member nations to protect the family by setting conditions for its flourishing (*plein epanouissement*). Protection of the family must be accomplished, however, within the context of the norms established by the European Convention on Human Rights. As the Belgian reporter points out, there is a certain internal tension in ECHR Article 8's limited protection of the right to "respect for private and familial life." The right to respect for private life concerns the individual alone, while the right to respect for familial life

concerns both the individual and society (society's interest in the family is explicitly recognized in many constitutions and international instruments). On the basis of recent decisions by the European Court of Human Rights, however, the reporter concludes that the tension can be alleviated, though not eliminated, by treating the notions of private life and family life as complementary.

The task, as she sees it, is to work out, under modern circumstances, "a carefully thought-through equilibrium between individual rights and duties, but also between individual interests and the general welfare, including the welfare of the family, less as an institution, than as a fragile and vulnerable human community." Her analysis, highly nuanced and attentive to numerous trouble spots, comports with the observations of the Polish and French reporters: at least within the vision of liberal democracy that prevails in continental Western Europe, neither individualism nor communitarianism is permitted to predominate as a matter of principle.

2. The world of work

The French report depicts a legal system that appears at first glance to be supportive of organized labor in myriad ways. France has moved so far from its former hostility to workers' associations that the reporter can now speak of "the unceasing extension of powers granted to unions." This legislative trend has been accompanied, moreover, with a firm commitment to union autonomy in the form of a "remarkable abstention" from intervention in the internal affairs of unions. This commitment has weathered many shifts in regime and ideology.

Paradoxically, however, unionism in France is more sharply in decline than in other European countries. The decline is so severe that the reporter describes the situation as reaching a critical threshold. The organized sector has dropped to about 10 percent of the entire labor force, and to only 5.6 percent of private sector employees. How is one to account for this state of affairs? The reporter observes: "If French unions today are facing real difficulties, this is certainly not because the State has denied them means of action: on the contrary, the law has constantly extended their prerogatives." Moreover, he adds, the public authorities increasingly include the unions along with other groups within the framework of social "partnership."

Among the causes of the decline of unionism, the French reporter particularly emphasizes that loss of confidence by the

rank-and-file in their leaders has led to apathy and disaffection. With bureaucratization, internal divisions, and excessive politicization, union officials have grown out of touch with their members. The French reporter notes, too, that there is less of a contradiction than may first appear between the increasing integration of the unions into the apparatus of the state and the unions' loss of influence with the majority of workers. The German reporter agrees, describing the symbiosis between government and "big interest organizations" as creating a "shift in the legitimation gap"—with the burden of enforcing and explaining policy decisions now falling on the cooperating organizations rather than on public officials.

At another level, the French reporter notes that declining confidence by employees in the benefits of collective action reflects many of the same social attitudes that are associated with changes in family behavior.

> In the world of work there is, quite evidently, a phenomenon of withdrawal into oneself that is the sign of an increasingly splintered and divided society. Everyone thinks that it is in his interest to fend for himself and strives only to promote his personal aspirations: this marks the end of the famous "worker solidarity" of the heyday of unionism in former times. The unions today have fewer and fewer "militants" and more and more "clients," who look to them only for the satisfaction of their immediate interests and abandon them as soon as they no longer find them necessary.

Certain well-intentioned legislative measures also may have played a role in the decline of unionism. Has the French state, in a sense, arrogated to itself many of the roles that unions in other nations perform? By extensively regulating numerous aspects of wages, hours, and working conditions that in other countries are left to the collective bargaining process, the state may have undermined the unions' traditional functions and encouraged them to transform themselves into lobbying and pressure groups.

Whatever the explanation, the French reporter does not hesitate to characterize the current situation as dangerous. Workers have become increasingly dependent for protection on the vicissitudes of politics and the market, while employers and society in general are increasingly vulnerable to "spontaneous eruptions" of discontent. A stable democratic regime, he concludes, not only needs unions, but needs them to be strong and

independent enough to perform their roles effectively and to merit the confidence of workers.

C. *A Liberal Welfare State with Emphasis on the Individual: The Case of the United States*

The propositions about individualism and communitarianism that the French reporter describes as generally accepted are actually more controversial in the United States than in continental Europe. In America, although the frontier has long vanished, the myth of the self-reliant, lonely, proud, individual still exerts a powerful influence on culture and law. That myth contributes to the distinctive character of American family law and labor law, and helps to explain the late and reluctant American acceptance of the welfare state. It is worth recalling that at the time of the American Founding, four-fifths of the nonslave population was self-employed in family farms and businesses.[37] Most of the descendants of those independent artisans and farmers—along with successive waves of immigrants—eventually joined the ranks of wage-earners. But their inherited cultural values constituted a significant obstacle to the development of worker solidarity in the United States.[38] American wage earners "grew up in a society which stressed the ideals of classlessness, individual initiative, and opportunity."[39]

1. *Family law*

From the perspective of the Belgian reporter, Anglo-American family law "seems to bear the mark of a profoundly individualistic philosophy, hostile to official normative or judicial interference in private and familial matters." She lists certain features of Anglo-American family law that are particularly surprising to continental observers: the absence, in most jurisdictions, of the concept of a marital property regime; the absence of clear rules concerning the obligations of parents toward children; the absence of support obligations outside the nuclear family; the liberty to change one's name and the ab-

37. Robert Heilbroner, *Boom and Crash*, NEW YORKER, Aug. 28, 1978, at 52, 68.

38. *See* Alice Kessler-Harris, *Trade Unions Mirror Society in Conflict Between Collectivism and Individualism*, MONTHLY LAB. REV., Aug. 1987, at 32.

39. Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1403 (1971).

sence of "family names"; and the relative freedom of testation that prevails in common law countries. In sum, many of the legal expressions of "solidarity" that are so prominent in civil law systems are completely lacking in Anglo-American family law.[40]

Where federal laws and programs affecting family life are concerned, the passing observation of the Belgian reporter that "family associations" are among the most important interest groups on the European political scene may help to explain certain aspects of American distinctiveness. Originally formed with a pronatalist bent in response to the population losses inflicted by World War I, large broad-based European family associations have evolved into powerful lobbies for child-raising families.[41] These groups, which have no counterpart in the United States, have played important roles in the political processes that have produced family allowances, maternity leaves, family housing subsidies, and other protective measures in Europe. Of equal importance, they have assured continuous high national visibility for family issues. In the United States, though many interest groups claim to represent women or to speak for children, there is no organized voice for parents. The fact that so much of family law is state law, moreover, has kept some issues (like divorce reform) from receiving a full national airing.

Further contrasts appear between the United States and continental Europe when family protection clashes with individual liberty in the area of fundamental rights. Unlike most European constitutions, the American Constitution contains no mention of the family. Family protection has gained recognition as a constitutional value in certain Supreme Court decisions, but only sporadically.[42] Individual rights, of course, are well-developed in American constitutional law. The Belgian reporter has rendered a service by illuminating the nuanced, but signifi-

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40. *But see* Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989) for a discussion of some specifically legal reasons for the absence of solidaristic norms, as well as of the ways in which Anglo-American family law does hold up family solidarity as an ideal. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

41. *See* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 425 (1972).

42. *See generally* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

cant, differences in the understandings of human personhood that can inform the concept of the "individual" where fundamental rights are concerned. Legal norms and policy choices cannot help but be affected by whether, as in the American legal system, the individual tends to be imagined as autonomous and self-determining, or, as in the Romano-Germanic systems, as constituted in important ways by and through his relations with others.

It must be stressed, however, that these differences, though significant, are differences mainly of emphasis and degree. The legal systems of continental Western Europe, like the American system, assign a high priority to the free development of the autonomous individual. They accord somewhat greater attention than the United States legal system does, though, to the social contexts, including the family, within which that development takes place. Thus, for example, decisions of the European Court of Human Rights treat the individual's right to private life as protecting a sphere for his full and free development, yet they do so within the limits expressly mentioned in Article 8, and with recognition that privacy rights are implicitly conditioned by other rights protected in the Convention. The United States Supreme Court, by contrast, tends to envision privacy as "a right to be let alone,"[43] and as a species of individual liberty that trumps a wide range of other social values.

2. Legal treatment of religious associations

The American report is the only one of the national reports to give more than passing attention to the subject of individualism and communitarianism in the legal treatment of religious associations. The comparative approach of the report, however, is especially illuminating in this complex and paradoxical area. Individualism and communitarianism are intertwined in the religion language of the First Amendment to the U.S. Constitution, which protects the free exercise of religion and forbids the federal government to make any law respecting the establishment of religion. The establishment language seems to have been intended to prevent the national government from interfering with the diverse state and local arrangements concern-

43. *See* MARY ANN GLENDON, RIGHTS TALK ch. 3 ("The Lone Rights Bearer") (1991).

ing religious exercise. Those arrangements at the time of the Founding ranged from disestablishment to official state establishments, with various cooperative accommodations in between.[44] Until the 1940s, the federal government remained almost entirely aloof from religious liberty issues. The most notable exception, resulting in denial of constitutional protection to religious polygyny, occurred because Utah was not a sovereign state, but a territory under federal jurisdiction.

In the mid-twentieth century, however, the Supreme Court began to make parts of the Bill of Rights, including the religion language, binding on the states. In that process, an individualistic approach prevailed in two respects: (1) Religion was repeatedly characterized in Court opinions as a purely private individual experience; and (2) The Court's understanding of free exercise, with some exceptions,[45] ignored the fact that for many individuals religious freedom has important associational and institutional aspects. At the root of these understandings seems to be the implicit concept of the human person noted by the Belgian reporter in the family context: the autonomous, freely choosing, self-constituting individual. The result of neglecting the social dimension of human personhood has been a bias against individuals and groups for whom free exercise of religion is not merely a private affair but inseparable from participation in a worshipping community.

The Court's expansive concept of what it means to officially "establish" religion, moreover, has impeded legislative experiments with creative use of mediating structures to deliver social services. The tendency of the establishment decisions is either to exclude religious associations from such programs or to allow them to participate only at the price of checking their religious beliefs at the door.[46]

Nowhere has the influence of the Court's excessively narrow view of free exercise and its inflated concept of establishment been more apparent than in the cases involving education. Here, American law has had important effects on the associations that serve as schools for citizenship and seedbeds of civic virtue. The education cases involve not only schools, but free exercise rights of individuals, freedom of religious associa-

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44. Wallace v. Jaffree, 472 U.S. 38, 99 n.4 (1985) (Rehnquist, J., dissenting).

45. Notably, Wisconsin v. Yoder, 406 U.S. 205 (1972).

46. That is the practical effect of the "entanglement" prong of the test in Lemon v. Kurtzman, 403 U.S. 602 (1971).

tion, and the ability of families to control the education of their children. As the law presently stands, the government-run schools are required to be rigorously secular, while parents who desire to protect their children from governmental indoctrination that is profoundly at odds with their religious convictions can do so only if they can afford private education. The American report performs a valuable service by showing that other pluralistic liberal democracies have found means to accord equal respect to believers and nonbelievers without banishing religion entirely from public educational settings or without denying public assistance to families who experience those settings as an assault on their deepest values. Ironically, the American legal treatment of religious groups resembles the stance of pre-1989 socialist countries more than it does the tolerant approaches of the other liberal democracies to which we ordinarily compare ourselves.

D. A Liberal Welfare State with Emphasis on the Group: The Case of Japan

The Japanese report, like the American, reveals an asymmetric balance between individualism and communitarianism, but with a tendency to resolve the tensions in the opposite way. The reporter describes Japanese society as "basically an intricate web of various intermediary communities each of which has a tenacious hold on the lives of its individual members and a relatively strong group autonomy vis-a-vis the state, i.e., the ability to maintain its internal order by extralegal and informal sanctions." If the American reporter (and American General Reporter) tend to take the degree of individual liberty they enjoy for granted while expressing concern about its extremes, the Japanese reporter, coming from the opposite starting point, confidently assumes "the communitarian character of contemporary Japanese society" and warns of the consequences of overemphasis on the group. Yet it does not seem that Japanese communitarianism is characterized by associational activity in the Tocquevillean sense.

The Japanese reporter draws his principal illustrations of Japanese communitarianism and its excesses from the world of work. The enterprise (*kaisha*), he states, has become the principal community, or life-world, of many Japanese. It is "the most vigorous and dominant form of intermediary community in Japan today." The reporter vividly describes how the world of work—with its classlessness, its high degree of job security,

and its close cooperation between labor and management—has absorbed and deflected the energies and loyalties of many individuals from other spheres of existence.

The Japanese word *kaishashugi* ("company-ism") designates the set of habits and attitudes that are associated with such highly absorptive occupational activity. That spirit often has been credited with a major role in Japan's economic success.[47] Recently, however, *kaishashugi* has also been implicated in the phenomenon of *karoshi*—death from overwork, or, more precisely, death from diseases such as stroke and heart disease that are associated with a high degree of physical and psychological stress. Making imaginative use of Durkheim's analysis of the fundamental sociological causes of suicides, the Japanese reporter theorizes that instances of *karoshi* are not just isolated individual tragedies, but also revealing indicators of broader social conditions: "[*Karoshi*] symbolizes the tension and distress of a communitarian society"—not of the premodern sort, but of a new "hyperindustrialized and secularized" communitarian society.

Though the English language has no equivalent word, the phenomenon of *karoshi* has also been documented in the United States. A recent study shows that the working hours of the average American employee have risen steadily over the past twenty years, an increase that has affected nearly all workers across the entire spectrum of industries and occupations.[48] In the manufacturing sector, an American worker now puts in the equivalent in hours of eight work-weeks more per year than his or her French or German counterpart, and eleven work-weeks more than a Swedish worker.[49] (Japanese manufacturing and office employees work even harder, putting in the equivalent of almost six weeks more each year than Americans.[50]) According to Juliet Schor, "Americans are literally working themselves to death—as jobs contribute to heart disease, hypertension, gastric problems, depression, exhaustion, and a variety of other ailments."[51] Schor blames the increase in overwork in

47. See, in addition to the Japanese report, Ezra F. Vogel, *Japan: Adaptive Communitarianism, in* IDEOLOGY AND NATIONAL COMPETITIVENESS: AN ANALYSIS OF NINE COUNTRIES 141 (George C. Lodge & Ezra F. Vogel eds., 1987).

48. JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 1-2 (1991).

49. *Id.* at 2, 153.

50. *Id.* at 153-54.

51. *Id.* at 11.

the United States chiefly on the inherent tendency of capitalist economies to generate strong pressures for long working hours. She attributes the difference between the United States and Western Europe to American consumerism and a relatively weak union movement.[52] Her analysis raises the question of the extent to which Japanese overwork, too, may be mainly the result of the imperatives of the capitalist economy, aggravated by Japanese communitarianism, largely unchecked by the cooperative Japanese labor unions.[53] It seems significant that in Europe, trade unions and labor-oriented parties have made the reduction of work time a major priority, have successfully fought for increased leisure time for employees,[54] and have joined forces with family associations to secure the passage of maternity and family-leave laws.

In the view of the Japanese reporter, Japanese communitarianism, as manifested above all in the workplace, but also in local community life and in the schools, has exacted too high a price from the individual. Precisely contrary to the American situation as presented by the American reporter and the General Reporter, he states that in Japan individual rights "are chronically endangered by the overgrowth and/or overprotection of intermediary communities."

It is difficult to discern from the Japanese report, however, the precise status of small-scale noncommercial associations. The report describes one group, the *kaisha*, as "dominant," and other subgroups as relatively insular. The reporter writes of the need for "a richer form of human communality," and calls for a better balance among various communal spheres. If the *kaisha* absorbs most of a person's participatory energy and sense of social responsibility, he points out, not only will family life suffer, but so will local communal life.

And, as Francis Fukuyama points out, there will be a toll on democratic government as well.[55] Fukuyama, whose account of Japanese emphasis on the group comports well with the description provided by the Japanese reporter, states, "The most significant challenge being posed to the liberal universal-

52. *Id.* at 6, 9, 163.
53. *See id.* at 6, 9.
54. *Id.* at 81-82.
55. Fukuyama writes of the "muting of democratic 'politics' " in a society such as Japan where "[t]he emphasis on group harmony tends to push open confrontation to the fringes of politics." FUKUYAMA, *supra* note 13, at 239-40.

ism of the American and French revolutions today is . . . [coming] from those societies in Asia which combine liberal economies with a kind of paternalistic authoritarianism."[56] That particular hybrid (paternalistic capitalism), which Fukuyama describes as "perhaps never before seen in history,"[57] seems actually to be in tension with a Tocquevillean communitarianism of flourishing local associations. We glimpse that tension in the Japanese reporter's account of the Christian widow who was not permitted to designate her husband's final resting place.

Thus, just as many Americans have concluded that the individual is jeopardized by excesses of individualism, the Japanese reporter concludes that authentic "human communality" is impoverished by a distorted communal structure. "Our communality flourishes in its fullness only if we foster and sustain our multiple belongingness to the different layers or spheres of our communal life, from family and friendship to occupational, religious and various voluntary associations to local, ethnic, national, and global communities."

IV. CONCLUSIONS: LAW AND SOCIAL ECOLOGY

Despite differing historical legacies and cultural settings, all the liberal democracies represented here are wrestling with certain common problems. In all of their legal systems, what Sir Henry Maine wrote a century and a half ago seems to hold true today, though in varying degrees:

> The movement of progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family as the unit of which the civil laws take account.[58]

A generation after Maine remarked on the emergence of the free, self-determining individual from the confining network of family and group ties, Max Weber raised the question of whether that movement was but a passage into another sort of confinement—the "iron cage" of a rationalized and bureaucratized society.[59] Today, individualism, rationalization (special-

56. *Id.* at 238.
57. *Id.* at 235.
58. HENRY MAINE, ANCIENT LAW 139-40 (Dorset Press 1986) (1861).
59. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181

ized division of labor), bureaucratization, and the market economy can be seen to have exacted a significant toll on personal, social, and political life. As families and other communities of memory and mutual aid have become weaker, the individual has become more liberated, but also more vulnerable. In the developed nations today, an individual's economic security and social standing are decreasingly determined by his family and increasingly fixed by his occupation (or, if he is not employed, by his dependence on governmental largesse).[60] As a result, unprecedented proportions of the population in liberal democracies are dependent on large bureaucratic organizations of one form or another. The contrast is great with the situation in many parts of the less-developed world where an individual's status and security are still highly dependent on kinship ties and group alliances.

In most of Europe, though, the processes remarked by Maine and Weber were already well-advanced in the nineteenth century. At the turn of the century, Emile Durkheim, who shared Tocqueville's belief in the importance of associational life, asserted that local communities, religious groups, and families were in irreversible decline. He wrote, "[T]he bonds attaching us [to communities] become daily more fragile and more slack."[61] Religions, he thought, were losing much of their authority and effectiveness, while families were becoming "just a number of individuals united by bonds of mutual affection."[62] As Durkheim explained it:

> Once, when each local environment was more or less closed to others by usages, traditions, the scarcity of communications, each generation remained perforce in its place of origin or at least could not move far form it. But as these barriers vanish, as these small environments are levelled and blended with one another, the individuals inevitably disperse in accordance with their ambitions and to further their interests into the wider space now open to them.[63]

The most promising theater for associational activity that re-

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(Talcott Parsons trans., 1930).

60. *See* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 1-2 (1981).

61. DURKHEIM, *supra* note 13, at 27.

62. EMILE DURKHEIM, SUICIDE 377-78 (John A. Spaulding & George Simpson trans., Free Press 1966) (1897).

63. *Id.* at 378.

mained in the modern world, according to Durkheim, was the world of work. The only intermediate groups that seemed to him capable of providing social cohesion and meeting the needs of individuals for fellowship were "occupational associations"—by which he meant, not labor unions or enterprises as such, but groups of individuals who cooperate in the same profession, trade, or occupation.[64]

It seems significant that more of the National Reporters chose to address the world of work than any other aspect of the conference topic. Their gravitation toward that subject should not be surprising, for in the nations represented here the business world and the workplace have become the primary social arenas. As Durkheim foresaw, these are the places where many men and women now spend most of their waking hours, where they meet and talk with others, and where they form many of their opinions and values. Unfortunately, the workplace also seems to be draining more and more of the energies that men and women might devote elsewhere—to raising their children or to participating in civic life.

Though Durkheim was prescient about the centrality of occupational life, he seems not to have realized how vulnerable it, too, would be to the modernizing forces that weakened other social groups. No form of associational life could remain untouched by the processes of rationalization and bureaucratization, or by the geographical, social, and economic mobility that characterizes all modern and modernizing societies in varying degrees. Moreover, the fraying of one set of connections seemed to produce stresses and breaks in the others. Just as families, schools, churches, small businesses, union locals, and community associations can synergistically reinforce one another, weaknesses in each can undermine the fragile ecology on which all depend.

The principal question that emerges from the reports is whether the weakening of communities of memory and mutual aid should be regarded as a kind of "environmental problem." After all, is this erosion of small social environments not simply the inevitable consequence of the inexorable advance of modernity? Is it not just a necessary step in the movement to universal liberal democracy that some have called the end of history?[65] On these points, the far-sighted Tocqueville pointed

64. *Id.* at 378-84.
65. *See* FUKUYAMA, *supra* note 13, at xi.

out that it matters a good deal what *kind* of democracy comes into being: the democratic project might fulfil the hopes of humankind for equality in liberty or it might lead, in certain circumstances, to equality in servitude.[66] He maintained that the health of small social subsystems is important to the health of the world's diverse experiments in democratic government. But does that claim hold up under contemporary circumstances? Some of the most visible and powerful voluntary associations in the modern world are those through which special interests circumvent or distort democratic processes. Moreover, if the sorts of associations that Tocqueville had in mind remain small enough to command the enthusiasm and involvement of their members, they are apt to be ineffective in modern politics.

Nevertheless, a persuasive case can still be made for the proposition that individual freedom, the rule of law, the welfare state, and healthy markets all depend in crucial ways on the condition of the fine texture of civil society. Regimes of rights, democratic governments, systems of entitlements, and market ordering all silently depend on habits, practices, and attitudes that are nurtured in nonmarket and nonpolitical institutions. Effective protection for individual rights requires citizens who are willing to respect the rights of others even at some cost to themselves. Genuine democracy requires a citizenry capable of participating in civic life, as well as men and women willing to devote some of their skills to public service. A workable welfare state needs citizens with enough fellow feeling to reach out to others in need, but with enough sense of responsibility to assume substantial control over their own lives. The market economy depends on a certain work ethic, as well as a network of social understandings and practices that permit reliable planning and promote the security of transactions. The pluralistic nature of most societies requires, in addition, citizens who are able to respect and appreciate the cultural, ethnic, and religious heritage of others.

Neither historical nor comparative investigation has unearthed examples of institutions that can take the place of families, neighborhoods, and workplace and religious associations as places where these skills and virtues can be generated, shaped, transformed, and transmitted from one generation to the next. Thus, paradoxically, liberal democratic welfare states

66. TOCQUEVILLE, *supra* note 1, at 57, 506.

seem to require the maintenance in their midst of value-generating institutions that are not necessarily organized on liberal principles.[67] Yet, perversely, the liberal state and the free market seem to undermine the social supports upon which they rest. As Fukuyama puts it, "Liberal principles have had a corrosive effect on the values predating liberalism that are needed to sustain strong communities, and thereby on a liberal society's ability to be self-sustaining."[68] The analogies to unrestrained consumption of the world's once-abundant natural resources are suggestive

But if we are in the presence of a species of environmental problem involving endangered *social* resources, to what extent, if at all, can lawyers as such contribute to improvements? How could law help to maintain or bring about a better balance in the complex ecology of state, civil society, market economy, and individual rights? What would an optimal balance look like? By what standards could it be measured? Can government protect the relative autonomy of social subsystems without promoting their excesses? Can it regulate them without co-opting or destroying them? Do we even know how to avoid harm to social environments while carrying out seemingly unrelated governmental activities? Merely to pose such questions is to realize the primitive state of our knowledge about the ways in which the legal system intersects with the criss-crossing networks of associations and relationships that constitute the fine grain of society, and about the efficacy and limits of law in general.

Nevertheless, the reports document the emergence of various sorts of what might be called "social environmental law." The Belgian reporter remarks that, "What is interesting above all is the extent to which measures [affecting families] tend to be *preventive* as well as *reparatory* and that they attempt to associate *families and the state* in *complementary roles*, especially in their efforts to reconcile *family responsibilities and occupational life.*" Polish administrative law, French employment law, and German Codetermination law illustrate various efforts to establish frameworks and set conditions for organizational life by top-down regulation. The idea that a flourishing

67. *Cf.* FUKUYAMA, *supra* note 13, at 222 ("Successful political modernization thus requires the preservation of something premodern within its framework of rights and constitutional arrangements, the survival of peoples, and the incomplete victory of states."); *see also id.* at 334.

68. *Id.* at 327.

organizational life might be more effectively promoted by refraining from direct regulation, and by trying to set conditions for self-government from the bottom-up, characterizes older American, and some newer French, labor law. An ecological approach is also noted by the Belgian reporter in European family policies that consciously address family environments—housing law, tenant protection, zoning, etc. Several countries are experimenting with the idea that using nongovernmental organizations to deliver social services may not only be more economical, effective, and humane than direct governmental action, but might also promote the vitality of the organizations concerned.

As the epigraph from Tocqueville at the outset of this General Report reminds us, the problems treated at this conference tend to escape the notice of those whose eyes are trained on large economic and political systems. In the century and a half since Tocqueville called attention to the political importance of small-scale associations, they have remained more or less neglected in legal and political theory. Thus it seems no small accomplishment that the national reports presented here provide us with a fuller picture of their legal existence. It is worth noting that the word "paradox" recurs so frequently in the national reports. That is a sign, not only of the difficulties the reporters encountered with an awkward and unfamiliar topic, but of the opportunities for further comparative research. For paradox may be the very stimulus that can move legal science from what the German reporter has called "the comforting twilight of closure and openness, separation and interwovenness, autonomy and interdependence"[69] into the sunlit world of experiencing, understanding, judging, and acting.[70]

The great question is how, precisely, does one make that move? The reports confirm that comparative methods can help us to see issues and problems that may not be picked up by other research strategies; and to make connections that may remain invisible to those who confine themselves to the settled categories of a single national legal system. It is no coincidence that it was a foreign visitor to Jacksonian America who was able to acquaint generations of American and European read-

69. Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1444 (1992).

70. *See* BERNARD J.F. LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING (1978) (especially ch. 17, "Metaphysics as Dialectic").

ers with aspects of their own respective cultures that are so familiar as to escape attention. But the question remains whether comparative methods, after taking us deep into the twisted labyrinths of law, behavior, and attitudes, can also help to lead us out of them? Or do they merely sweep us into a dizzying spiral where everything is both cause and effect; different from, but similar to, everything else; separate but intertwined; constituted by and constitutive of everything else; and so on? A sojourn in the disorienting twilight-zone of postmodernism might well make one long for von Jhering's "Heaven of Conceptual Jurisprudence" with its hairsplitting machines and interpretation presses.[71]

Teubner puts his finger on the problem when he points out that fancy legal and social theory in recent years has often lost track of what is distinctively legal, which in turn has made it difficult for theorists to develop any coherent concept of the relations between social and legal phenomena.[72] To move beyond that impasse is likely to require patient empirical work, a good ear for "the multiplicity of social discourses,"[73] and a high tolerance for interdisciplinary cooperation. Comparatists cannot claim a monopoly on these qualities, but their traditional strengths do assure that they will have much to contribute to basic research in law. So far as practical applications are concerned, the liberal democracies seem to be entering an era of experiments with new divisions of labor among larger and smaller public and private structures—at local, national, and international levels. Again, comparatists do not hold the patent on knowledge about forms of federalism and subsidiarity, but they will have much to contribute to, and learn from, these efforts to give bureaucracy a human face.

No doubt, comparative law will remain unappealing to scholars in search of clear-cut solutions, quick fixes, or rapid career advancement. On the other hand, legal fashions do change. It is not inconceivable that someday law schools may once again invite students to submit to a hard apprenticeship in a difficult discipline, and that such an invitation may be accepted. If so, comparative law presumably will garner its share of apprentices. I was impressed, in this connection, by an observation of the Polish reporter, Miroslaw Wyrzykowski.

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71. *See* VON MEHREN & GORDLEY, *supra* note 33, at 70-72.
72. Teubner, *supra* note 69, at 1449.
73. *Id.* at 1462.

Warning that it is unreasonable to expect liberal democracy to rise full-blown from the ruins of socialism, Professor Wyrzykowski alluded to Moses' forty-year pilgrimage from slavery in Egypt to the promised land. The story is an especially appropriate one to recall on this occasion, for the American Comparative Law Society and the International Association of Legal Science are just entering their forties. To my mind, the most poignant detail of the biblical account of the wanderings of Israel in the desert is that Moses himself never entered the promised land, but only glimpsed it from afar.[74] And so it is with the journeys we undertake in any serious form of research. From time to time, we have glimpses that lift our hearts and gladden our spirits, but the pilgrimage continues.

74. *See Deuteronomy* 34.