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In the articles that follow, six legal scholars explore aspects of the relations between law and moral order. Their common interest in this topic coalesced during a six-week seminar entitled Law, Society, and Moral Order held at Syracuse University in the summer of 1979 under the auspices of the National Endowment for the Humanities.[1] As convenor of the Syracuse Seminar, I will introduce the Symposium by describing in general terms the common conceptual framework within which these papers are located.

Throughout the Symposium, law and moral order are treated as empirical phenomena. The term "law" applies broadly to the primary and secondary rules promulgated by appropriate authorities and to the activities by which these rules are adjudicated and implemented. The term "moral order" likewise refers to an empirical phenomenon: those interrelated beliefs concerning what is right and proper that are widely accepted within a given society. It is important to stress that in using these terms we imply no judgment as to whether or not a particular set of moral ideas accords with our own individual principles or with some larger universal truths. The term "moral" is used in much the same way as John Austin used "positive morality,"[2] to designate "opinions or sentiments held or felt by men in regard to human conduct."[3] The same meaning attaches to such related words as mores, moral ideas, and norms. As we use them, all of these terms describing elements of morality refer to what the people of a given society (or subset of the society) think is right,

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1. The seminar was one of a series called Summer Seminars for Law Teachers held in 1977-79. It was supported by National Endowment for the Humanities Grant No. FP-34828-78-1357.

2. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 125 (1954).

3. *Id.* at 123.

not to the value judgments of the observers.

How do law and moral order, thus defined, affect each other? On the basis of current knowledge, we cannot expect a comprehensive answer to this question. The goals of the participants in this Symposium are more modest. We want only to understand the nature and importance of the question and to begin working on some of its manageable components.

In the discussion that follows, I shall try to convey my own perception of this theme as presented during the Syracuse Seminar. My remarks will not cover all of the materials, nor will they comprise an exact description of the position I presented at that time, much less a consensus adopted by the group. We engaged during that summer in a very lively set of discussions. Then and since, we have differed, argued, learned, and arrived at new positions. Yet we share an enduring concern about common issues whose exploration we consider important. In this introduction I will state these issues as I see them and discuss a few of the scholarly writings which helped us come to grips with them. First, however, I wish to explain why I consider the inquiry important.

I. Importance of the Topic

The survival of open societies,[4] especially in the presence of technological means capable of easily disrupting order, may well depend on the mutually supportive interaction of law and moral order. Let me state the position starkly. In our kind of society law and moral order depend on each other. Unless compatible with moral order, law risks rejection; without law, moral order conducive to an open society cannot be sustained. At the extreme, the very structure of the open society disintegrates if law and moral order nullify each other.

The same idea can be put more cautiously. Complex societies in the modern world do not easily maintain equilibrium. That is observable. A possible explanation may be found by examining the relationship between law and moral order. Determining how well or poorly they support each other may well be the key to stability in an open society.

As a first approximation, the proposed explanation can be phrased in the following terms: Lacking the shared understand-

4. I use the term "open society" as it is used in K. Popper, The Open Society and its Enemies 173 (rev. ed. 1966).

ings of traditional societies, modern nation-states require effective mechanisms for generating and maintaining consensus. Many complex societies, including our own, have looked to the law to achieve these ends. The success of law as an integrative force seems to depend on a close and complex interaction with the moral order of society. To contribute to integration and stability, law must draw from, align itself with, and contribute to moral order. Where this relationship falters, law may be discredited as an instrument for the conclusive resolution of disputes, a source of justice, the repository of authority, and a guide for behavior. If the partnership of law and moral order fails, two alternatives to open society become more likely: chaos (openness without society) and authoritarianism (society without openness).

During the past quarter century, many nations have been subject to instability bordering on chaos. Argentina, for example, has gone through a series of crises of authority which have engendered a succession of troubled military regimes, each employing repressive measures, but unable to cope with armed bands using terroristic methods to fight for dominance. Comparable problems are found elsewhere in Latin America, Africa, and Asia. The tragic situation in Lebanon, traceable initially to constitutional "dissensus,"[5] continues to defy solution. Several Western European nations and the United States have also faced periods of spectacular civil unrest and in some cases terroristic activities, although they have been able to avoid regime changes during the post-World War II period.

Disorders of this kind have led in the past toward authoritarian rule. The classic example is that of Hitler's rise in Nazi Germany following the chaotic period of the Weimar Republic. Although the dynamics of the Weimar era defy neat diagnosis, it is clear that the liberties accorded under the Republic encouraged the expression of enormously diverse ideas concerning every moral, political, religious, and cultural question. The extent to which the resultant confusion may have contributed to a drive toward, in Erich Fromm's phrase, an "escape from freedom" bears some consideration.

Wherever orderly open societies become chaotic or authoritarian, explanations are needed but not easily given. Argentina's

5. The term "dissensus" as used here refers to the opposite of consensus, whatever the reason.

continuing problem is difficult to trace, for a clear end is not in view. The story of Weimar's thirteen years is accessible history, however, and gives rise to important questions: Did the Weimar institutions of law and government in any way contribute to the coalescence of a moral order that might have provided a societal basis of support for the Republic? Or did they instead exacerbate the chaos and even contribute to a moral order consistent with Nazism? Where were the judges, the lawmakers, the lawyers, and the legal thinkers as the open society of Weimar faltered? If similar dangers face our own society, even remotely, should we not be asking comparable questions? What lessons can be learned from the Weimar experience that might be applied to contemporary open societies?

As scholars and citizens interested in the law, it is important for us to know how legal institutions may affect the expression, dissemination, and acceptance of moral ideas in complex societies such as our own. In the face of moral dissensus, what can law do toward resolving disputes and integrating society?

Law, broadly defined, can (but does not necessarily) contribute to moral order. It can bring together individuals or groups initially opposed, calling on them to settle their differences in mutually satisfactory ways. It can generate procedural and substantive norms to guide judicial and administrative decisions with the possibility that these norms might gain societal acceptance as normative standards. It can provide access for citizen participation in the processes of lawmaking and administration (e.g., through legislatures or juries) and thereby heighten the chance that the resultant legal norms will be consistent with and absorbed into the moral order. It can accompany these contributions to normative coalescence with policies affirming the principle, already embedded in the legal subculture, that where we cannot agree we can agree to disagree, to tolerate, to endure our differences and our disadvantages in the interest of maintaining an open and tolerably equitable fabric of society.

On the other hand, law can exacerbate problems of conflict and dissensus. In the midst of social conflict, it can favor one side to an extent that alienates the other. If law appears to be steadily antagonistic to a group in society, that group may question the legitimacy of the system of justice and, accordingly, the entire authority of the government. If equilibrium depends on the balance among many discontented groups, the social fabric may be torn by withdrawal, alienation, crime, and violent pro-

test. Escalating political violence can threaten the very organization of the society, whether the opposing forces polarize against each other (as in El Salvador) or coalesce (as in Iran's Islamic revolution).

By the time a regime reaches the stage of rebellion, it is generally too late. The question for us is whether, before such conflicts become acute, law can help to resolve them in a manner that allays discontent and promotes acceptance and support.

II. HART AND FULLER REVISITED

The first effort by the Symposium participants to approach the topic of law and moral order made use of the famous debate between Professors H.L.A. Hart[6] and Lon L. Fuller.[7] In their exchange, the issue of law and morality came to the center of jurisprudential attention. If we focus primarily on their assertions about reality, their positions do not directly oppose each other. Hart asserted that law need not embody all of the moral sentiments of society (making clear at the same time that he hoped it would not).[8] Fuller expressed the view that law does in fact embody moral sentiments, derived to some extent from the nature and requirements of the society.[9] Analytically, these positions could both be correct. Hart does not deny that some moral sentiments are reflected in the law and Fuller does not insist that *all* moral sentiments of society are incorporated into law. Why then do they differ so fundamentally.

Hart and Fuller both start with a fundamental agreement—that law has an existence of its own, distinguishable from the societal morality.[10] Hart is concerned that the distinction be preserved so that immoral laws can be better identified and reformed and so that law not be overused for implementing all of society's morality. Fuller also recognizes the differences between the ideas of goodness in society and rightness in law. But he sees good law and a coherent morality as mutually supportive.[11] His

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6. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

7. Fuller, *Positivism and Fidelity to Law: a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

8. Hart, *supra* note 6, at 613-14.

9. Fuller, *supra* note 7, at 642.

10. Fuller's phrase "fidelity to law" refers to both the legality of official behavior and societal acceptance of law. For that reason, I have avoided using the phrase in this brief discussion of Fuller.

11. [T]he authority to make law must be supported by moral attitudes that

ultimate focus is on the *internal* morality of law—those general procedural principles such as generality, clarity, consistency, stability, fair warning, and code-consistent administration so vividly discussed in *The Morality of Law*.[12] It is this morality which he believes to be intimately interrelated with society.

Fuller's idea of interrelationship is a subtle one. The internal morality of law is a product not only of the legal institution but also of the society. The influence from society does not occur, however, primarily by the transmission of well-developed ideas of rightness, from society to law. The internal morality of law is a response not to preexistent mores but to the functional requirements which law must meet to operate successfully in the society. If a legal system is to be accepted as legitimate it must be administered in a manner that preserves societal acceptance. Otherwise, Fuller says, law cannot serve successfully as a regulator of behavior and an integrative force. The model is not that societal morality leads to law; rather that societal need for coherent law leads to internal morality of law which in turn leads to societal acceptance of law.

Fuller does not deal in detail with the effect of legal (i.e., internal) morality on the mores, a major question for us. His discussion nevertheless suggests that the internal morality might diffuse into and be accepted by the society and its institutions. Later work by Fuller[13] and others[14] has picked up on that theme.

Fuller's formulation implies that the societal requirements reflected in the internal morality of law characterize all social systems. Although his model may well describe the situation in complex open societies, it does not seem to cover the relation between law and society where moral order is more cohesive and

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> accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible. But this alone is not enough. . . . We still cannot have law until our [hypothetical lawmaker] is ready to accept the internal morality of law itself.
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> In the life of a nation these external and internal moralities of law reciprocally influence one another; a deterioration of the one will almost invariably produce a deterioration in the other.

Fuller, *supra* note 7, at 645.

12. L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

13. *See* L. FULLER, ANATOMY OF THE LAW (1968); Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969); Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. REV. 89.

14. *E.g.*, S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974); P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 3-34 (1969).

legal institutions are less fully developed. In the simplest societies, law does not exist as a differentiated institution.[15] Where it does emerge, its form is likely to be meditative rather than authoritative and its content is heavily influenced by the pervasive mores of the society. Accordingly, it does not need the formal properties (such as generality, consistency) which may be required in complex societies.

In order to gain perspective on the relations of law and morality, the Syracuse Seminar examined the role of law in a range of societies from simple to complex. The examination of legal systems on that dimension helps to identify the potential significance of pervasive mores (such as are found in simple societies) in affecting legal structure and content. It illuminates the particular importance of Fuller-type procedural principles where pervasive mores are lacking, as they are in most complex societies. The internal morality of law might there provide, at least in part, a synthetic alternative or functional equivalent to the mores of simpler societies.

III. Comparing Societies

We began our comparative examination of other societies by reading Roberto Unger's *Law in Modern Society*.[16] His work stressed the way in which culture and social structure affect the type of legal system that develops in a given society. Although our interest was directed primarily to his comparative-historical analysis, we also noted his stress on the significance of legal-order law in providing legitimacy to western-type societies. We did not share his conclusion, however, that such societies are doomed to progressive deterioration by the undermining of generality and uniformity in their legal systems.[17] We accepted such results as possible, but not inevitable.

Unger distinguishes western law (which he describes as "legal-order law") from two other "ideal types" or models of law: customary and bureaucratic.[18] "Customary law" is Unger's term for what we described as moral norms or mores. Not the product of a political entity, customary law is the prevailing or exclusive

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15. *See* Schwartz & Miller, *Legal Evolution and Societal Complexity*, 60 Am. J. Soc. 159, 166 (1964).

16. R. Unger, Law in Modern Society (1976).

17. *Id.* at 193-200.

18. *Id.* at 54-56.

way in which norms of behavior are expressed in simple societies and in other societies dominated by tradition. It is a set of beliefs common to an entire society and is "made of implicit standards of conduct rather than of formulated rules."[19] In this regard, customary law differs from state-made law of either the bureaucratic or legal-order type since these latter bodies of law are "public" (governmental) and "positive" (formally articulated). Legal-order law differs from bureaucratic law in "its attachment to the aims of generality and uniformity in adjudication. . . . Administration must be separated from legislation to insure generality; adjudication must be distinguished from administration to safeguard uniformity."[20] In fulfilling these characteristics, legal-order law tends to be administered by courts which are insulated from the other branches of government.

Unger examines a number of ancient societies (Chinese, Japanese, Hindu, Moslem, Judaic, and Greco-Roman) and tries to explain the reasons for legal-order law emerging (as he contends) in none of them.[21] Turning to Western Europe, he finds that legal-order law emerged there because of the combination of two distinctive circumstances: one social-structural, the other ideological. These he describes, respectively, as (1) the alliance of bourgeoisie and princes against the feudal nobles[22] and (2) the widespread belief that one supreme, transcendent God bespoke the reality of a single moral standard which must be reflected in universalistic, general laws.[23]

Unger's analysis contributed several ideas to the Seminar, two of which were particularly important. First, he illustrated the manner in which social structure and culture might affect the nature and content of law. Whether or not his specific factors provide a satisfactory explanation, the method of relating these societal features to the legal system is plausible. It serves to illustrate a possible relationship—society determining law—which brings vividness to the abstract proposition. Secondly, Unger's description of customary law directed attention toward those societies in which moral order is so well established, pervasive, and uniform that separate legal institutions find no place. By examining folk societies, those attending the Seminar were

19. *Id.* at 50.
20. *Id.* at 53-54.
21. *Id.* at 110-20.
22. *Id.* at 74-76.
23. *Id.* at 83.

able to appreciate the importance of moral order in simple societies and to examine the significance for complex societies and their legal systems or moral heterogeneity.

IV. ETHNOGRAPHIES

Malinowski's classic work on the Melanesians of the Trobriand Archipelago,[24] which examines social order in a society with simple technology, minimal division of labor and face-to-face relationships, provided a good empirical starting point. In such simple societies, the absence of formal legal structure seems attributable, at least in part, to the success of other means for defining and maintaining what is perceived to be proper conduct. Primary reliance is placed on a system of well-understood, mutually-reinforcing norms. These are reinforced by the continuous, well-ordered, interlocking systems of exchange which reward the participants. A byproduct of this well-established system of reciprocities is the availability of sanctions which, in the event of a failure to fulfill obligations, can readily be used by withdrawal of cooperation. These sanctions are rarely invoked, however, because of the success of the prevailing pattern of orderly social relations. Abstractly described here, this pattern can be far better comprehended as the reader joins Malinowski in watching the crew of a canoe carrying out their different tasks in catching fish in a New Guinea lagoon, dividing the catch, and exchanging some of the fish for vegetables supplied by the inland villagers.[25]

Malinowski and other ethnographers help to understand the forms of social control in simple societies when the pattern of order is violated. Because the norms are clear and pervasive, they are readily invoked and socially supported. In a widely cited case among the Trobrianders, a publicly shamed violater of the incest taboo commits ceremonial suicide.[26] Among the Eskimo, another good example of a folk society, even the control of recidivist murder is handled ad hoc—typically through the socially approved execution of the offender by a close relative.[27] Such mechanisms of social control are understood and sup-

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24. B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1951).

25. *Id.* at 18-27.

26. *Id.* at 77-80.

27. For summaries of relevant ethnographies, we used E. HOEBEL, THE LAW OF PRIMITIVE MAN (1954).

ported by a pervasive consensus of the society. In such situations, a specialization in the control function is absent for two reasons: a low degree of specialization and a moral order with clear norms and adequate sanctions not requiring administration by specialists.

This uncomplicated method of social control rarely persists in pure form beyond the simplest societies. With more efficient technology, the complexity of social organization increases and greater specialization emerges. In societies just beyond the subsistence stage, specialization in dispute resolution takes the form of mediation, carried out by persons explicitly recognized in performing this role. Characteristically, this occurs in societies with a symbolic means of exchange and a practice of dealing with disputes by compensating the victim through the payment of damages.[28] In such societies, mediation sometimes is done not by a single mediator but by a council of elders. Where this occurs, there is a tendency for the third-party role to convert from finding a mutually satisfactory settlement point to declaring the proper settlement.

Both the mediator and the council in such societies draw heavily on the pervasive mores of the society. Sharing a common culture, the third parties accomplish their task by using standards shared throughout the society. The force of their decisions is enhanced by the familiarity of the society's moral standards guiding their advice or decision. The literature of legal ethnography contains many striking examples of this close relationship. Among the best known of these are descriptions of the dispute-resolving work of the Ifugao Monkalun (go-between),[29] the Nuer's Leopard Skin Chief,[30] the Soldier Societies of the Cheyenne,[31] and the Kpelle Moot.[32]

V. Double Institutionalization and Legal Evolution

The mediation systems of such societies seem to fit easily the concept of law advanced by Paul Bohannan as reinstitutionalization.[33] An ethnographer himself, Bohannan had seen in his

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28. *See* Schwartz & Miller, *supra* note 15, at 160-61 & n.14.

29. Barton, *Ifugao Law*, 15 Am. Archeology and Ethnology 1 (1919).

30. E. Evans-Pritchard, The Nuer (1940).

31. K. Llewellyn & E. Hoebel, The Cheyenne Way (1941).

32. Gibbs, *The Kpelle Moot*, in Law and Warfare 277-79 (P. Bohannan ed. 1967).

33. Bohannan, *The Differing Realms of the Law*, in The Ethnography of Law 33, 34-37 (supp. to 67 Am. Anthropologist (1965)).

study of the Tiv[34] the operation of a distinctive legal institution whose functioning in relation to custom he thought could be generalized. He saw all law performing the function of setting straight those disputes or difficulties which arise in the other institutions of societies.[35] Legal institutions have the task of settling such disputes where they cannot be satisfactorily managed at their place of origin. In order to do so, the legal institutions must disengage the dispute from its original institutional setting, deal with it within the new context of legal procedure, and then return the matter to whence it came.[36] If it is successful, this procedure provides a redefinition of the norm which is more precise and more authoritative than the custom. The process also generates a gap between law and custom, according to Bohannan, setting up a tension in which each normative system is pulled toward the other without ever becoming identical. The gap is inevitable, he tells us, and it performs a useful function in that it is a source of adaptive change.[37]

Bohannan's concept presupposes, however, that there exists a substantial degree of correspondence between the mores or customs and the corresponding law. In simple societies, this overlap derives from the uniformity of the culture. If the norms of such a culture are pervasive, they will be known to and accepted by those who mediate, arbitrate, or adjudicate. Inevitably in those circumstances, the gap between mores and law will be limited precisely because the law uses the norm of the society as the starting point and guideline for the legal norm. Some limit to the gap may be needed if the legal institution is to retain its general legitimacy, its capacity to settle disputes, the social support needed for the implementation of specific decisions, and the ability to contribute normative content in its own right. Yet, in simple societies, the latter requirement may not constitute a heavy burden. It is precisely because law draws so heavily on a well developed, widely accepted set of mores that it need not add much to those mores.

As societies become more complex, however, this model seems increasingly distant from the way law functions. In protostates, such as the Ashanti of West Africa, the institutions of law and government were used at least in part to bulwark the inter-

34. P. BOHANNAN, JUSTICE AND JUDGEMENT AMONG THE TIV (1957).
35. Bohannan, *supra* note 33, at 35.
36. *Id.*
37. *Id.* at 37.

est of the rulers to tax and to conscript workers and soldiers. In that instance it is possible to trace historically the changes which occurred as the Ashanti state consolidated its power. Dispute resolution, largely mediative before the rise of the state, became increasingly punitive. Capital punishment was prescribed for many offenses. When imposed, it also served as a source of revenue to the state since the condemned person's property was forfeited. These developments were not merely reinstitutionalizations of the basic mores of the society. While the Ashanti rulers drew on the symbols of the folk culture, they built institutions and laws which imposed rules on the society as much as they drew on its mores to formulate the laws.[38]

Proto-states of this kind make clear that the institutions of law and government do not necessarily implement the preexistent mores. Where interests diverge and where power is concentrated, law can obviously become an instrument for imposing on the many who are weak the interests of the few who are strong. If such a regime establishes itself, an equilibrium creating process may develop, however, in which the laws and mores influence each other in a manner which closes the gap.

None of these models seems to apply very well to our own society—a society characterized by such heterogeneity that it has few pervasive mores governing specific behaviors. It is in fact the striking feature of this society, and of many western-style societies like it, that the differences in norms across groups are more numerous than the similarities. The state in such societies has not been available, as among the Ashanti, to enforce compliance with a detailed set of standards through an imbalance of power. Rather, a norm of toleration authorizes the expression of a wide range of ideas concerning what is right. In these circumstances, normative diversity of all kinds has flourished.

The law of course cannot readily take its guidance from a system of pervasive mores where none exists. The Bohannan model thus clearly will not fit our circumstances. On the other hand, the state does not typically impose measures which are utterly contrary to the mores, either. Our situation is thus a mixed one in which neither the state nor the mores clearly dominate. The state is limited in its capacity to dominate because its

38. The standard work is T. RATTRAY, ASHANTI LAW AND CONSTITUTION (1929). The seminar used the account given in E. HOEBEL, THE LAW OF PRIMITIVE MAN (1954), and the discussion of Ashanti and Dahomey in Diamond, *The Rule of Law and the Order of Custom*, in THE RULE OF LAW (R. Wolff ed. 1971).

legitimacy rests on the belief that it governs fairly on behalf of all the people. The maintenance of this fundamental norm depends to some extent, however, on a rough correspondence (i.e., a limited gap) between law and mores. Mores do not give much guidance, because they are so sparse, scattered, or controversial that they usually cannot shape the substance of laws. Such mores as we have tend to emerge as a synthetic product of the interaction between law and society.

VI. Law and Moral Order in Complex Societies

The capacity of law in complex societies to contribute to moral consensus (or lack therof) deserves close attention. How does a society, lacking pervasive mores spontaneously derived from a traditional culture, a uniform social system, or an authoritarian government, achieve the minimal agreement it needs to maintain order and continue functioning? When unified action is needed to meet a challenge to a complex society's most basic interests, what mechanisms are available for drawing its members together? If dissensus and malfunction persist and increase, when do they reach the point where they generate a dramatic change comparable to the revitalization movements found in simpler societies?

What, if anything, can the institutions of law and government contribute toward the consolidation of the required minimum of moral order in a heterogeneous, open society? To what extent can the legal norms express, synthesize, and contribute to a pervasive set of mores? When the Supreme Court refers to "the evolving standards of decency that characterize the progress of a maturing society," does it see itself playing a role in that evolutionary process? Does such a potential exist, and if so, how is it realized?

The participants in the Syracuse Seminar gave serious thought to these questions. The nature of the problem was elucidated by the use of a range of materials, drawing from biology, economics, political science, sociology, anthropology, psychology, philosophy, history, and jurisprudence. We found works readily available which seemed to contribute particularly well to the search for an adequate formulation of the problem. (In addition to those mentioned, I should add Scheingold's *The Politics of Rights*,[39] Piaget's *The Moral Judgment of the*

39. S. Scheingold, The Politics of Rights (1974).

Child,[40] and Walster's work on equity theory).[41] Finding solutions was another matter.

We agreed to search the available literature looking for answers to the major crucial questions. How, to take a central issue, might the law affect the evolution of the mores? I had recently completed an article on capital punishment while thinking about this question.[42] The article suggested that the Georgia capital punishment statute upheld by the Supreme Court in *Gregg v. Georgia*[43] presented a pattern that would aid the society to reach consensus—to evolve its mores—as to when and where the death penalty was unacceptable. The process outlined in *Gregg* involved a partnership between the society (as represented by the aggregate behavior of juries), the legislature (in specifying aggravating circumstances), the trial judges (in guiding the exercise of jury discretion), and the Supreme Court of Georgia (in monitoring capital sentences to determine whether capital punishment had been imposed in comparable cases). This procedure had led to a holding that capital punishment was unconstitutional in rape cases because it was so rarely administered.[44] The same procedure could lead to a similar conclusion regarding use of the death penalty for murder, if juries so indicate by the aggregate of their decisions over a range of comparable cases. In other words, the courts may have provided a framework within which the society can evolve its own mores on a very basic question. Compared with the legislative process, this framework might better isolate issues, intensify experience, and have more profound effects for the moral order.

While such a study illustrates one possible interaction between law and the mores, it can at best be only a start toward enumerating the ways in which these normative systems can influence each other. My colleagues in the Syracuse Seminar decided to look in detail at specific topics in an effort to use and refine the common perspective.

The results of several of those inquiries are presented in this Symposium. In addition to the authors whose articles are

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40. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965).

41. Walster, Berscheid, & Walster, *New Directions in Equity Research*, in EQUITY THEORY 1-42 (L. Berkowitz & E. Walster eds. 1976).

42. Schwartz, *The Supreme Court and Capital Punishment: A Quest for Balance Between Legal and Societal Morality*, 1 LAW & POL'Y Q. 285 (1979).

43. 428 U.S. 153 (1976).

44. Coker v. Georgia, 433 U.S. 584 (1977); Coley v. Georgia, 231 Ga. 829, 204 S.E.2d 612 (1974).

published here, significant contributions to the Syracuse Seminar were also made by James Vaché, Robert Waters, and Alexander Williams. John Cole not only participated valuably in the original seminar, but also delivered a paper at the oral symposium held during October 1980 in Arizona and Utah.

Cole's paper, which he intends to prepare for a later publication, has already contributed substantially to the thinking of the Syracuse Seminar. He argues that the law can most effectively contribute toward normative consensus not by deciding disputes on principle, but by compromising in the settlement of disputes in a manner which accommodates different points of view. In this manner, says Cole, law can best "keep the peace in society so that progress toward consensus can be carried on by other institutions."[45] Cole treats the decision in *Bakke*,[46] disappointing to many commentators because of its undefinitive nature, as an illustration of how he thinks law at its best operates.

The other papers delivered at the Arizona and Utah symposia are presented here in written form. I shall not seek to summarize them for those readers who already have them. Suffice it to say that they cover a range of views. The authors differ in the extent to which they think the courts can develop and implement authoritative principles or specific policies (cf. Baker and Diamond). One expresses concern with the consequences of a large gap between moral sentiments of wide segments of the society and judicial decisions in the abortion area (Wardle). Each of these papers to some extent sounds a warning concerning the limits of what the courts can do, cautioning against the consequences of overreaching efforts (Wardle) or (in Diamond's case) unrealistic expectations and the resultant failure to seek alternative, more effective modes of effectuating change.

While not disputing these cautions, some of the papers propose methods by which the disjunction between law and moral order might be reduced. Bacigal finds such a mechanism within the reach of judicial decision making, if the Court would provide the jury in search and seizure cases with a larger role in determining normative standards.

Rich moves from the courts to an emphasis on lawyers. He argues that instead of relying unduly on the courts and the ad-

45. J. Cole, Law and the Accomodating Principle 2 (unpublished preliminary draft manuscript in possession of author).

46. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

versary relations they promote, the legal profession could aid in dispute resolution more systematically than it does at present by contributing to constructive compromise as "lawyer for the situation." Such a role might not lead so much to the formulation of specific substantive norms as it does to a more general procedural norm. In a society where substantive standards and interests vary so widely, the acceptance of dispute resolving procedures may comprise the best prospect in many situations for an agreed upon norm: Resolve your differences! The suggestion, in effect, is that our specialists in dispute resolution learn from the mediators of simpler societies. Rich's proposals are consistent in this regard not only with the recent literature by legal anthropologists, whom he cites, but also with the little noticed Dispute Resolution Act of 1980,[47] which provides aid to localities for centers set up to facilitate informal methods of dispute resolution.

Agrait's contribution reminds us that some important ways for dealing with the moral order problem may be found in the organization of society itself. His inquiry is directed to those aspects of social organization which inhibit effective participation in community and government. His specific proposals for the restoration of units that foster participation are intrinsically interesting. The article also suggests that a knowledge of all the institutions of society is needed for a thorough understanding of the possible ways in which law can affect the moral order by which it is, in turn, inevitably affected. In this regard, Agrait reminds us of the Durkheimian emphasis on social structures, beyond but affected by the institutions of law and government, as potential generators of norms and reinforcers of moral order.

In its own way, each paper illustrates a very different approach to the central problem. Although no organized program of policy or research can yet be discerned, these initial efforts indicate the significance of the theme in a wide range of subject-matter areas. How and whether such diverse applications will eventually be drawn together remains to be seen.

In bringing this introduction to a close, I would like to express, for myself and my colleagues in this work, thanks to several who helped to make the Symposium possible. Dean Craig W. Christensen and Vice Chancellor John James Prucha of Syracuse University welcomed and facilitated the original Seminar. The National Endowment for the Humanities (NEH) gave gen-

47. Dispute Resolution Act of 1980, Pub. L. No. 96-190, 94 Stat. 17.

erously to support the original Seminar. The grant was extended to facilitate a planning conference looking toward the Symposium. Particular thanks are due to Mort Sosna and Paul von Blum, staff members of NEH during the planning and conduct of the Seminar. Though less directly involved, Julian McDonald and April Hall of NEH generously added their support. At Syracuse, excellent administrative assistance came from the Office of Sponsored Programs, under the direction of William Wilson. The grant itself was efficiently managed by W. Howard Hough and Dona Sobotka. Administrative details were handled capably by Gretchen Goldstein and Molly Spear. Resourceful research assistance was provided during the Seminar by Linda Paez, then a second-year law student.

The oral symposia, held in Tempe, Arizona and Provo, Utah in October 1980 were arranged by one of our colleagues, Professor Lynn Wardle. His initiative, organization, and judgment made these symposia possible. Thanks are also due to the organizations and leaders who provided grants, sponsorship, and facilities. In Arizona, generous assistance was provided by Lorraine Frank, Executive Director, Arizona Humanities Council; Ilene Lachinsky, Director of Continuing Legal Education, State Bar of Arizona; and Dean Alan Matheson, Arizona State University College of Law. In Utah, parallel aid came through the courtesy of Delmont Oswald, Executive Director, Utah Endowment for the Humanities; Dean Sheffield, Executive Director, Utah State Bar, and Dean Rex E. Lee, J. Reuben Clark Law School, Brigham Young University.

Intellectual contributions came from several scholars. The Syracuse Seminar benefited from exceptional sessions conducted at Syracuse by Professor Samuel J.M. Donnelly, who discussed the jurisprudence of Rawls and Dworkin, and Dr. Richard W. Rabinowitz, who discussed Japanese culture and law in light of his twenty-five years of law practice in Japan.

The oral symposia provided us with the first systematic comments on the papers presented in this Symposium issue. We had the benefit of discussions by eighteen panelists, all of whom carried out their assignments carefully. Responses to the papers, sometimes vigorously critical, were remarkably insightful and creative. Several of the papers included in this Symposium have been modified to meet the criticisms or use the suggestions of the panelists. To all of the panelists, we express our sincere appreciation for their valuable help. They seriously performed a

critical function for us at a level of quality rarely seen in academic discourse.[48]

It is obvious from the foregoing account that many have contributed toward making this Symposium possible. Most important of all, from my point of view, are the ten law professors who joined with me in the summer of 1979 to begin a cooperative inquiry which continues to the present. Their interest and intelligence have added much to my understanding. It is a great satisfaction to know that, through this Symposium issue, others will be able to benefit as well from their current thinking.

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48. The panelists in Arizona on October 22 and 23, 1980 were:

Michael F. Bailey, Esq.	Brown & Bain
Hon. James Duke Cameron	Chief Justice, Supreme Court of Arizona
Richard A. Cosgrove	Assoc. Professor of History University of Arizona
John Paul Frank, Esq.	Lewis & Roca
David H. Kaye	Professor of Law Arizona State University
Jeffrie Murphy	Professor of Philosophy University of Arizona
Hon. Sandra D. O'Connor	Associate Justice Arizona Court of Appeals
Mark Pastin	Professor of Philosophy Arizona State University

Panelists in Utah on October 24 and 25, 1980 were:

Dean James Clayton	Professor of History University of Utah
Robert Dalton	Professor of Philosophy Dixie College
Cole Durham	Professor of Law Brigham Young University
Hon. Christine Durham	Judge, Third Dist. Court of the State of Utah
Dean Martin Hickman	Professor of Government Brigham Young University
Hon. Monroe McKay	Judge, U.S. Court of Appeals, 10th Circuit
Merlin Myers	Professor of Anthropology Brigham Young University
Douglas Parker	Professor of Law Brigham Young University
Levi Peterson	Professor of Comparative Literature Weber State College
Noel Reynolds	Professor of Government Brigham Young University
Eugene Woolf	Professor of Philosophy Southern Utah State College