FROM THE EDITOR

Communication between American and European students of law in society is very largely a one-way street. Europeans are generally knowledgeable about American scholarship; Americans are woefully ignorant of European scholarship. There are many reasons for this: America has dominated the social sciences since the war, motivating many Europeans to study in the United States and discouraging much travel in the other direction; related to this is the fact that English is part of the basic training of most European scholars, whereas few Americans are comfortable in any language other than their own. But whatever the explanations for the current situation, it is neither healthy nor desirable. American scholarship suffers from its parochialism and isolation. The articles in this issue amply demonstrate the vitality, interest, and diversity of current European scholarship, although I certainly do not claim they are necessarily representative. I am grateful to the authors for the trouble they have taken to present their work in English, the new "Latin" of scientific discourse, so as to render it accessible to the predominantly American readership of this journal.

Americans are likely to approach these articles with two basic questions in mind. Do they exhibit characteristics that are distinctive to European sociology of law; do they differ in fundamental ways from American research, thereby stimulating us to ask new questions or answer them in new ways? Second, what light do they throw on issues that are central to contemporary American scholarship? After a few general remarks about the differences, I will illustrate both differences and similarities by selecting some of the significant themes that these articles share with recent American literature, concluding with some thoughts about the way in which European writing can contribute to a reorientation of American thinking about law in society.

The differences, naturally, are more matters of degree than of kind. European sociology of law tends toward the comparative, the historical, and the macrosocial, even when the immediate subject matter is a particular, contemporary, national legal institution. The articles in this issue make comparisons, more or less explicit, between countries (the Netherlands and Ger-

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The views expressed here are entirely my own, and are not necessarily shared by any author in this issue.

many), regions (Northern and Southern Italy), and entire legal systems (communist and capitalist). Each provides more historical context than is customary in American scholarship, and some trace the origins of the institution studied as far back as Roman law. Given the dramatic differences among contemporary societies, and between them and their historical antecedents, the analyses tend to be macrosocial, concerned with larger theoretical questions of the relationship between legal and other social institutions. Let me illustrate these characteristics before turning to the reasons for those differences, and their implications for American studies.

A recurrent theme in these articles is that law is a form of ideology in the double sense that it purports to be something it is not and that this claim is one source of the legitimacy of the state. Thus European sociology of law, like American, is fundamentally concerned with the "gap" between the law on the books and the law in action. The "gap" can be used as a powerful tool of sociological debunking: by showing that actual behavior diverges from legal ideal, it undermines the pretension of law to describe reality; at the same time, critics can invoke the law as an official statement of ideals and thus an unquestionable standard by which the actual behavior of legal and other social institutions may be judged. It is striking that this dynamic shapes sociological questions under both capitalism and communism, despite their very different theories of law. These articles reveal "gaps" between the ideal of an equal distribution among creditors in bankruptcy and the reality of gross inequality; between an ideal that adult children should support their elderly parents and the reality that the state has already assumed much of this burden; between an ideal of the equality of parent and child, husband and wife, and the reality of continued dominance and subordination; between the ideal of worker participation in the governance of industrial enterprises and the reality of elite rule; between the ideal of effective drug control and the reality of selective and symbolic enforcement. Yet these articles do not seek to uncover "gaps" because they believe either that the "gaps" can be eliminated or that such elimination, were it possible, would be a sufficient reform. Ideal and reality, by their very nature, can never coincide. Indeed, the analysis by Pocar and Ronfani of Italian family law reform confirms the notion, previously advanced by Max Rheinstein (1972: chap. 10), that the "gap" represents an implicit compromise between advocates and opponents of change who are unable to make public concessions with respect to such highly charged symbolic issues. As Baronti and

Pitch argue, the inefficacy of law is not accidental and remediable but necessary and inescapable.

This inefficacy of law is another preoccupation. Contemporary Western (and many non-Western) societies have embraced law as a principal tool—often *the* principal tool—of social engineering. Yet the more we study the actual operation of law in society the less justified such reliance appears to be. The investigation of German bankruptcy law in action by members of the Max Planck Institute at Hamburg reveals that: only an insignificant number of insolvencies complete bankruptcy proceedings, which consequently are unable either to deter feckless economic behavior or to instill norms that might encourage more prudent behavior; creditors would hold very low expectations about the benefits they can obtain from such proceedings; and patterns of behavior, both in anticipation of and in reaction to insolvency, are informal and extralegal, and implemented through private agreements. Van Houtte and Breda show that: relatively few of the elderly in Belgium are helped by the legal system to obtain support from their adult children; the awards these few obtain are small, almost inconsequential; and enforcement of even these insubstantial awards is ineffective. Many of the Italian family law reforms described by Pocar and Ronfani represent an admission that the law is unable to control behavior—most notably the liberalization of divorce and abortion. Where the law seeks, instead, to bring about new forms of behavior it remains ineffective, as evidenced by the relatively small number of "special" adoptions approved by judges under the new law and the continued dominance of parents over children and husbands over wives. Furthermore, the new family judges introduced by the reforms have not received widespread use, partly because they are not responsive to social needs and partly because the positions have not been adequately staffed and financed. Drug laws in the Netherlands and Germany, although differing in significant ways, are *both* ineffective to control drug use or marketing. The elaborate forms for worker participation remain a nullity in most Polish factories. This repeated discovery of inefficacy has a double significance. To the extent that we share the ideals embodied in the law it behooves us to consider other means of attaining them, if legal institutions cannot do so. Equally important, the activities—indeed the very existence—of legal institutions are invariably justified today by their instrumental contribution to achieving the values they embody: bankruptcy is said to deter economic negligence; descendant responsibility laws to pre-

serve family stability. If laws do *not* fulfill the utilitarian ends they proclaim we must subject them to further scrutiny to uncover the ends they do serve.

The inefficacy of law is associated with complementary trends in the evolving role of law in contemporary society. On the one hand, the state intervenes ever more actively in the economy. As a result, economic relationships are increasingly relationships between state institutions, or between the state and a private individual or entity; in either case, they tend to be regulated by law. Thus the claims of the social security system in German bankruptcy proceedings have been growing in relative significance, and the claims of employees are now to a large extent satisfied by a compulsory state insurance scheme. Support for the elderly in Belgium is more and more a matter for the state and it, rather than the elderly themselves, tends to initiate legal proceedings against descendants. And in Poland, where all industrial activity is conducted in state enterprises, relationships within them are necessarily governed by law. The more ambitious the efforts of the state to control, or participate in, the economy, the more dramatic will be the failures of legal control.

At the same time, the state has been abandoning its efforts to control noneconomic behavior, partly in recognition of its inability to do so effectively. The reform of Italian family law, the decriminalization of drug use in the Netherlands, even the reluctance of Belgian authorities to pursue an aggressive policy of compelling adult children to support their elderly parents, are all examples of this. However, this trend is not as pronounced as the increase in state intervention in the economy, nor as unidirectional. And it is accompanied by resort to more subtle mechanisms of state control, generally through the substitution of treatment for punishment. Thus the Netherlands treats drug abuse and Italy provides counseling to anticipate family breakdown. This shift from punishment to therapy also expresses a decline in our certainty about individual moral fault and responsibility: it is hard to assign personal guilt for drug use, for the insolvency of a large corporation, or for family breakdown, whether between spouses or generations. But the translation of this therapeutic ideal into law creates the potential for a new gap between ideal and reality—perhaps one that is even larger—as described in the studies of such control institutions as prisons, mental hospitals, and schools, reported by Baronti and Pitch.

The articles suggest several reasons why legal institutions fail to achieve their official purposes and often produce "inad-

vertent" consequences that are even more significant. The first is that, in every society, some actors possess greater ability than others to turn laws and legal institutions to their own advantage. These differences are graphically analyzed by the Hamburg study, which demonstrates the capacity of banks in particular (but also other categories of creditor) to use their superior access to information, greater technical expertise, and more powerful economic leverage to exert disproportionate influence over when bankruptcy proceedings are initiated, how they are conducted, and how much each creditor derives from the bankrupt's estate. The amount of support ascendants obtain in Belgium, and the amounts descendants are required to pay, also vary substantially. Pocar and Ronfani reveal dramatic differences between Northern and Southern Italy in the degree of conformity to the family law reforms. Scheerer points to the loophole in the otherwise stringent German law on drug use, that allows middle class youth to escape with light penalties. And Ozdowski and Alexander describe how management is able to evade the laws giving workers a significant role in factory governance by allying with worker elites.

A second way in which legal institutions are diverted from their ostensible purposes is through the ability of legal officials to manipulate those institutions for their personal benefit. German bankruptcy proceedings consume a very large portion of the estate of the bankrupt—so large, indeed, that many petitions are rejected because the estate is not large enough, and other proceedings are aborted without any distribution to the creditors because the estate has been depleted by the process. Furthermore, legal officials in such proceedings take the contemptuous attitude toward the public that is common to officialdom everywhere and seek to minimize the role of creditors as much as possible. Pocar and Ronfani report that the institutions that care for abandoned children apparently find it so profitable that they have successfully discouraged adoptions that would deprive them of their charges, even when the child would thereby obtain a better home. And the history of worker participation in Polish industry repeatedly shows the capacity of functionaries in the organs of worker control to transform those institutions into personal fiefdoms.

A third reason for the inefficacy of legal institutions is the pervasive tendency of contemporary legal, and other social, institutions to discourage the expression of conflict. Unless grievances are fully aired and resolved through a process that the participants accept, legal institutions will be ignored and

their decrees circumvented. Yet these studies, along with many others, show that legal institutions do not encourage, or even permit, the full expression of grievances. Thus the Hamburg study reveals that: few bankruptcies ever complete official proceedings; the proceedings themselves have been highly bureaucratized and transferred, in most cases, from a judge to a legal executive; few creditors participate; and most of those who do, play an inactive role. Similarly, in Belgium, disputes between parent and adult child over support for the elderly are handled by the Public Assistance Agency according to a highly bureaucratic system of regulations. Indeed, the denial of conflict is part of the official ideology of most contemporary states, capitalist and communist; in both it serves essentially conservative functions.

The capacity of certain actors inside and outside the legal system to use it to increase their antecedent advantage, and the denial and suppression of conflict within it, are significant for several reasons. First, this helps to explain why the "gap" is not an accident but a structural property of functioning legal systems. Second, it should inspire a healthy skepticism about the purposive rationalizations offered for legal institutions: not only are the institutions unlikely to achieve the objectives by which they are justified, but those who advance such justifications are probably the very ones who stand to gain from the operation of the institutions.

Legal institutions have other latent functions, many of which are symbolic. The Belgian descendant responsibility laws may well serve two such purposes: they symbolize the improvidence and immorality of adult children, who do not even support their own parents; and they stigmatize the parents themselves, whose maintenance may be reduced for a "failing" such as being divorced. The controversy over the decriminalization of drug use can be seen as a political struggle over whether the moral authority of the state will be allied with those who use drugs (or tolerate their use) or with those who condemn drug use. And the lengthy political battle in Italy over family law reform is emphatically an instance of symbolic politics. As both Pocar and Ronfani, and Baronti and Pitch, agree, family law has been the principal arena for political debate in Italy throughout the last decade. Nor are these issues any less salient in other countries. Few controversies in the United States are more volatile, more capable of exciting public furor, than those over homosexuality, abortion, or the Equal Rights Amendment.

If it is the essence of politics to be symbolic, it is the essence of mass politics to be obsessed with symbolism. At a time when all contemporary nations are confronted with a wide range of crises, the most urgent of which are political and economic, it is noteworthy that public debate largely shirks the task of analyzing instrumental responses and focuses instead on symbols. This preoccupation may be another expression of the inefficacy of law to achieve instrumental goals. But it also serves other purposes. It distracts the citizenry from struggle over real political and economic power by defining the issues so as to leave the present distribution of power untouched. It divides classes into status groups—along racial, religious, sexual, generational, and cultural lines—which then compete for deference and other symbolic advantages. And it appeases those who win the competition at virtually no cost: law, like talk, is cheap.

The outcomes of these symbolic battles are not without significance, even if the material consequences may be unclear. The articles in this issue contain a wealth of historical incident and theoretical explanation. Family law reform in Italy has consistently lagged behind changes in public opinion. Decriminalization of drug use in the Netherlands, on the other hand, appears to anticipate the liberalization of public opinion. What kinds of theories can explain these differences? A vulgar marxism that would insist upon the identity of bourgeois morality with capitalist law, and of proletarian morality with communist law, is no more than an expression of ideology (as Ozdowski and Alexander argue). Scheerer points to the power of the conservative moral center, which tends to be more capable of exercising a veto where symbolic issues are highly politicized, as often happens in relatively homogeneous societies. This may explain the severity of the German drug law and the long delay in reforming Italian family law, but how, then, to explain the ultimate reform itself? It seems that the "gap" between public opinion and positive law, like that between law and its enforcement, is inevitable, but the particular form of the accommodation between public opinion, positive law, law-in-action, and social behavior is a complex product of social structure, culture, and history.

Although the questions discussed above all have their echoes in recent American writing on law in society they are framed in a way that is recognizably distinctive, and from which Americans can usefully learn. It is not accidental that they constantly refer back to the structure of other social insti-

tutions and of the society as a whole. European states are endowed with ancient legal traditions that invite, even require, the historical study of contemporary institutions. This is particularly so when these institutions have persisted without fundamental change for a century or more, thus posing the problem of how to adapt nineteenth-century laws to twentieth-century conditions. At the same time, all of those countries have experienced two world wars; the imposition, sometimes sudden, of industrialism; and dramatic, often revolutionary, transformations between bourgeois democracy, fascism, and communism. Finally, many of those states are in a condition of extreme fluidity today.

One consequence of this social setting is that European students of law in society tend to entertain more radical solutions (at either end of the political spectrum) in response to urgent social problems, whereas Americans are notorious for their meliorism, their faith in technocratic reform. Thus the Hamburg group are skeptical whether it would be possible to distribute the assets of the bankrupt more equitably among the creditors, but in any case suggest that it may be more important to try to revive the insolvent company, especially given the increasing size of economic actors and the complexity of financial relationships. Van Houtte and Breda express sympathy for the Belgian social workers who would rather not enforce the legal obligation of adult children to support their elderly parents. Pocar and Ronfani are dubious whether symbolic reforms of substantive family law can change family structures that are fundamentally determined by economic, political, and social conditions. Ozdowski and Alexander believe that the internal structure of the Polish factory reflects the larger social structures of Poland, and thus is resistant to change through law; if decentralization of control occurs, it will merely transform political conflict from a struggle between the factory and the central administration into a struggle between workers and management within the factory.

There are several reasons why the explanations and solutions that European writers explore are more radical than those commonly found in American literature. Europe possesses a long tradition of grand theory about the nature of society, and there is considerable pressure upon scholars to relate even the most mundane research to those larger questions. European politics embrace a broader spectrum of ideologies, a wider range of possible futures, than do American. But perhaps most important is the historical moment at which sociology of law arose on each continent. If legal realism and sociological jurisprudence are taken as the forerunners of an

empirical American sociology of law, then the latter began before the Depression and drew strength from the growing faith in planning and technocracy that coincided with the development of the bureaucratic state under the New Deal, the Second World War, and the postwar economic boom. A technocratic, rationalizing approach has thus been the dominant American tradition in law and society for more than half a century, during which time it has become firmly established, subject to challenge only in recent years. But sociology of law as an empirical science did not make significant progress in Europe until the last decade or two. As Baronti and Pitch demonstrate, almost as soon as it claimed to be an autonomous discipline capable of contributing practical solutions for social problems it was immediately attacked in the upheavals of the late 1960s. Now it confronts the political and economic crises of the 1970s. Thus Europeans have never been able to take refuge in purely technical questions, to concern themselves solely with the internal organization of legal institutions.

Perhaps the greatest value to be drawn from communication between European and American students of law in society lies in these contrasts. They force us to engage in the sociology of the sociology of law—an aspect of the sociology of knowledge. That, of course, is a powerful argument for comparative study. The questions we traditionally ask always seem self-evident—the only questions that can be asked. Exposure to a different intellectual tradition shows how contingent they really are—how they are shaped by social and cultural factors—and forces us to question our own questions.

REFERENCE

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