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THE SYRACUSE CONFERENCE ON A WORLD RULE OF LAW: AMERICAN PERSPECTIVES

AN INTRODUCTION

Malcolm M. Feeley*

On April 16 and 17, 2005, a remarkable event took place in Syracuse, N.Y. The occasion was a celebration in honor of the career and scholarship of Richard E.D. "Red" Schwartz. As one might expect, if one knows Red, it was not the standard retirement bash, with eloquent speeches and recycled papers assembled for a Festschrift. Red is a man of great seriousness, expansive vision, and boundless energy. He, and not his protégées or his colleagues, controlled the invitation list and generated the agenda. It was decidedly not a retrospective, an appreciation of his gems, a string of articles each more polished and more sparkling than the next. Invitees were not asked to reflect on Red's influence on them or his contribution to the field. Rather they were charged to deliver. It was to be a working group; people were required to consider democracy and the rule of law.

And it was to be more than the analysis of majority rule and the separation of powers. The spirit of John Dewey infused the discussion over the course of two days, in the formal sessions, in informal conversations at coffee breaks, in talk at meals, and in arguments well past bed time. Some of these themes were set by the panels Red had organized at recent meetings of the Law & Society Association: the search for a modern natural law, a concern for norms that transcend specific cultures, and the idea of an evolutionary movement toward a world rule of law, all ideas that have been close to Red's heart and research agenda throughout his long career. The theme, the excitement, and the challenge of the event were indicated by Schwartz at the outset, in his charge to the participants: "Suddenly," he wrote, "the world as we have known it seems to be coming apart, and we find ourselves asking how we can restore order and security in a just and decent way. . . . In our times, we have seen a 'tipping point' toward democracy, and it is a great privilege for all of us to contribute to the process that seems at the point of taking."

Casual inspection of the names on the list of participants might lead some to be hard-pressed to identify the commonality of interests

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that would be shared among us. However, a more careful review of paper titles and session themes and the distilled outline that constitutes the table of contents for this volume would reveal much more. The working group was charged with exploring virtually all facets of democracy and the rule of law, as they pertain to established constitutional democracies, societies undergoing “transitions to constitutional democracies,” and those societies where democracy remains little more than a hopeful wish. Papers and much of the discussion during the two days probed beneath the structural formalities that are obvious and important requisites of democracy, to explore the subtexts of and cultural conditions for democracy and the rule of law, those features that may be so taken-for-granted that they usually go unacknowledged, let alone unexplored in discussion of democratic theory. Much of what was written and discussed concerned the “social bases” of democracy.

A latter day John Dewey (this may well be an apt characterization of Richard Schwartz!) supported by say the Carnegie Endowment could not have come up with a more impressive mix of participants, themes, and topics than those posed by Schwartz. I’m not sure that the conference got very close to his goal of establishing a “workable consensus” on the social requirements of democracy, but it did in the best public intellectual tradition explore the many facets of the issue, and in doing so contribute to defining issues, and occasionally offering partial pragmatic solutions to what to many may seem like insoluble problems.

The working papers from the conference that appear in this volume touch on a great variety of facets of democracy. The four papers in Part I, *Democracy and the Rule of Law*, all seek to place their subjects in broad historical and cultural context. All offer a robust notion of democracy that link it with the idea of a free and open society, and public institutions that exhibit patience, skepticism, and tolerance. In his article, *American Society and the Rule of Law*, Philip Selznick “unpacks” the simple idea of the rule of law, and then repackages it as a much more subtle concept, arguing that at its core law is much more than a system of positive prescriptions and negative proscriptions. At its heart, Selznick argues, law is an expression of ideals and aspirations. It is a vehicle for giving expression to interests in a way that integrates state and civil society. Daan Braveman’s contribution, *On Democratic Law and Development*, elaborates on this theme, but in a more concrete way. He explores the role that a judiciary plays in a democratic order. Pondering the issue addressed in the *Federalist Papers*—the “counter-majoritarian difficulty” posed by judicial review—Braveman argues

that the dilemma may be more apparent than real, since when understood in actual context those who embrace the idea “judicial supremacy” (through the power of judicial review) and those who fear it and embrace the idea of the popular constitution may not be so far apart. Even in the most vigorous defense of judicial supremacy, he reports, one finds a “substantial role for the ‘people’” that assures that constitutional interpretations remain in line with the public consensus.

Historian Lawrence Friedman’s paper, *Roads to Democracy*, reminds us that there are many paths towards and many forms and shapes of democracy. It would, he warns us, be a mistake to assume that the evolutionary nature of Westminster democracy in Great Britain is “the” form of democracy, or indeed that democracy must always emerge as an evolutionary process if it is to take root and flourish. He points to Japan, Italy, and Germany as illustrations of robust and flourishing democracies that have, to a considerable degree, had democracy “imposed” from the outside in the wake of defeat. Indeed he notes the irony that in Japan the American occupying authority used its virtually dictatorial powers to *impose* democracy. Finally, he identifies the United States as a democracy that emerged in evolution from the “bottom up” as it were. All this is the good news, he seems to be saying; there are any number of paths that can lead to democracy. But he is far from Pollyannaish; despite modernization and globalization, and the individualism and taste for freedom that they bring, autocracies continue to persist and are likely to continue to exist indefinitely. David Shomar addresses another of the central concerns of the conference in his article, *Democracy and the Arab World*. He explores the challenge of securing the rule of law and democratic society in the Arab World (and by extension, perhaps in many other “traditional” societies) that is able to provide a modicum of financial and personal security through age-old hierarchical ties between individuals, their extended families, and other families and tribes. If democracy is to take root, he reminds us, it must be demonstrated that expanded individualism necessary for the success of a market economy and democratic institutions can perform as well or better than these traditional arrangements. This task alone is substantial enough, but as he further reminds us, it becomes even more complicated in light of the legacy of lasting animosity that Western imperialism has left in the Arab World, and in light of the many problems confronted by consumer-oriented Western democracies.

All the contributors to this volume would agree that democracy depends on much more than adherence to formal constitutional guarantees, and authors of the papers contained in Part II dig deep to structure and identify the cultural requisitions of well functioning

democracies. Ultimately, they would all agree, a robust democratic order depends upon a culture of respect, a culture of inclusiveness, and a culture of participation. Psychiatrist Robert Daly explores the now not-so-fashionable idea of a “democratic personality” in his article *On Democratic Personalities*. It is an ambitious and indeed inspiring enterprise, squarely in the tradition of John Dewey and Philip Selznick, both of whom understand democracy and the rule of law, to depend upon a populace animated by ideals and aspirations, rather than narrow self-interest insistence on rigid politics, as well as a willingness to explain and experiment. Although he does not explicitly draw on Dewey’s and Selznick’s works in his discussion, he could easily have done so in his examination of the psychological predispositions that he maintains are necessary for successful “self-government.” The other three papers in this section follow nicely from this initial exploration of the “democratic personality.” In her contribution, *Constitutional Responsibility to Provide a System of Free Public Schools*, Denise Hartman ponders the question of whether free public education is a necessary condition for the maintenance of a stable democracy. She identifies the challenges posed in providing a constitutionally guaranteed free public education in a sharply pluralistic society, but offers a robust defense of public education, arguing that it has been one of the cornerstones of successfully integrating diverse populations into an emerging national culture in the United States. In *The Contribution of Brown v. Board of Education to Law and Democratic Development*, Charles Willie picks up on the important link between education and democracy, and explores it in light of development and the American creed. Interestingly, Willie proposes that the United States would do well to learn from South Africa; he proposes that the United States establish a Truth and Reconciliation Commission to address the centuries of failed promises to incorporate African-Americans as full participants in the American experience. Brian Tamanaha’s contribution, *The Tension Between Legal Instrumentalism and the Rule of Law*, constitutes a powerful indictment of American law, American legal scholars, and American lawyers. He regards instrumentalism, which is now the dominant approach to law in the United States, as a danger. Instrumentalism, he maintains, undermines aspiration and ideal, and as such weakens the very fiber of democracy and any meaningful idea of the rule of law. His argument may appear to be over-stated or even melodramatic, but when read in light of Daly’s discussion of the democratic personality, or Selznick’s explication of the aspirational features of successful legal orders, and still other contributions in this volume, Tamanaha’s observations are not so far-fetched. Indeed, they

are frightening.

The articles in Part III explore how democracy and law work together, and in doing so explore a variety of concrete problems confronting modern democratic orders: globalization, privatization, and terrorism. Samuel Krislov, in *Do Free Markets Create Free Societies?*, explores the challenges globalization poses for the social contract in Western societies. Globalization has fostered neo-liberal economics, deregulation, a retrenchment of social benefits, and a major reassessment of the social welfare state. He wonders whether competitive pressures will doom the welfare state. His tentative and provisional answer is no, although he does foresee continued substantial adjustment and retrenchment as globalization continues apace. In *Reinventing Public Administration while "De-inventing" Administrative Law*, David Rosenbloom and Suzanne Piotrowski explore another challenge to democracy, privatization. Privatization, the authors remind us, does not mean that the government's responsibilities are reduced. It merely means that government turns to private contractors to provide public services. The challenge for democracy, they inform us, is that contracted services are not subject to the same degree of oversight and scrutiny that public agencies are. Public officials performing public functions are subject to scrutiny under the Administrative Procedures Act (APA), private contractors performing public functions are not. And to the extent they are not, democratic government is impoverished and the rule of law suffers. The authors' solution is set forth in their subtitle: *an "APA" for Regulating Outsourced Government Work*. Jerome Skolnick, in *Democratic Policing Confronts Terror and Protest*, explores still another challenge confronting governments in a shrinking world—international terrorism. Terrorism, he reminds us, is both real and serious. It is real in that it poses a concrete threat to security, and it is serious because it is more than a response to a nuisance. It also poses a threat to democratic government. His article explores the response of the New York City Police Department to the aftermath of the attacks on the World Trade Center, first unsuccessfully in 1993 and then again with spectacular success in 2001. His argument: the dilemma is not insoluble; the experience of the police department in New York City provides a valuable case study in how concern with terror and successful policing to guard against it can be compatible with accountability, democracy, and the rule of law.

Part III ends with a contribution by Richard Schwartz, *Franklin D. Roosevelt's Psychological Contribution to the United Nations*. As the organizer of the conference, it is not surprising that Schwartz's contribution incorporates so many of its themes—the aspirational nature

of law, the educative features of robust and mature democracy and democratic leadership, the evolutionary nature of political and legal development, and the quiet search for universals and general principles underlying liberal legal orders. In his analysis of FDR's leadership, Schwartz shows how Roosevelt garnered support first for unprecedented government action to respond to catastrophic depression, then global warfare, and finally an internationalism that culminated in the first successful steps towards a world rule of law.

To sum up. I return where I began. The conference from which these papers spring was an occasion dedicated to the exploration of the many facets of the rule of law and democracy and their evolution. In particular it was an occasion to explore the cultural and psychological dimensions of these ideas, features that make them such protean concepts that capture the ideals and imagination of so many of the world's people, and make them essential components in almost every thinking person's idea of a stable and humane form of social ordering. As I indicated at the outset, the purpose of the conference was to explore the many facets of these concepts. I trust that this brief introduction to the volume has indicated just how successful the conference was. The reader is now invited to judge for himself just how successful its follow-up results are.