

REVIEW ESSAY

Walls and Bridges: A Comment on Philip Selznick's *The Moral Commonwealth*

THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY. By Philip Selznick.† Berkeley and Los Angeles, California: University of California Press, 1992. Pp. xvi, 550. \$40.00 cloth.

Reviewed by Martin Krygier‡

It is common enough in American legal scholarship to find work which combines a bit of this and a bit of that, even a lot of this and a lot of that. Indeed it sometimes seems hard to find much else. It is less common to find a work which, as Selznick's does, systematically interweaves close and deep familiarity with philosophical traditions and mastery of social theory, to contribute to a "social science of moral ordering" (p. 37).

In philosophy, Selznick's special allegiance is to American pragmatism, not in its fashionable postmodern reincarnations, but in the version, particularly, of John Dewey. Selznick's conception of social theory is a broad one that includes sociology, psychology, and organizational theory. His theory is built up and deployed in a large array of contexts without sacrifice of its cohering aims. These aims are, above all, to develop a theory of the moral person, institution, and community, addressed to their preconditions, character, and development; and to embody a form of liberal communitarianism which "will bind the ideal of liberty to a more secure ethos of social responsibility" (p. 373).

Many themes of this work are worthy of discussion: Selznick's conception of normative theory; his account of pragmatism; his understanding of and attitude toward modernity and postmodernism; his parallel and cumulative theories of the moral person, institution, and community; his discussions of civility and piety, of rules and principles, of legal positivism and natural law; his appraisals of liberalism and community, and much besides. Indeed, the work is so rich and its themes so various that it will be plundered and pondered for many different purposes for some time to come.

Copyright © 1994 California Law Review, Inc.

† Professor Emeritus of Law and Sociology at Boalt Hall School of Law and the Department of Sociology at the University of California, Berkeley.

‡ Associate Professor of Law, University of New South Wales, Sydney, Australia.

My own purposes have to do with the rule of law: what it presupposes and what it promises, what supports it and what it supports, what it offers and what it fails to offer. *The Moral Commonwealth* is wise on these matters, and this essay is a reflection on what we might learn from it.

On the way, I seek to uncover some underlying themes which are pervasive in the work and, I believe, important. The first has to do with the characteristic ways in which Selznick thinks about moral ordering; in particular with his profoundly undogmatic, indeed *anti*-dogmatic style of normative theorizing. The second concerns what he believes to be at stake. Here he demonstrates an ability to do what Gerald Ford was said to be unable to do: two things at once. Specifically, Selznick manages to think seriously both about avoidance of evil and about pursuit of the good; about threat, about promise, and about their interplay. This salutary combination is rarer than it might be.

At the end of Part II below, I will suggest a relationship between these aspects of the work. In Part III I will discuss how that relationship, in turn, affects how we should think about the rule of law—both where it is relatively well established, as in the United States, and where it is not, as in the emerging polities of post-communist Europe.

I

Relatively briefly and long ago, Philip Selznick was a Trotskyist. It might seem eccentric to begin discussion of such a book in such a way, but that is how *The Moral Commonwealth* itself begins, and it is right and significant that it should. In the first lines of his preface, Philip Selznick recalls his “intense, fruitful, and in some ways extraordinary” (p. ix) period of involvement with American Trotskyism. This encounter with revolutionary socialism, he writes, established a central theme of his later work—“the fate of ideals in the course of social practice . . . the conditions and processes that frustrate ideals or, instead, give them life and hope” (p. x). Note the two aspects that concern Selznick—what *frustrates* ideals, on the one hand, and what gives them “life and hope,” on the other. I am intrigued by the sustained way, and the success with which, the book manages to keep a hold on both these aspects at once.

Trotsky, of course, learned something about frustrated ideals, but he never learned the lessons that Selznick has to teach. Indeed it may well have been the intense dogmatism associated with the Trotskyism of that that left its mark, a negative mark, on Selznick. For even if one does not know Philip Selznick personally or through his other work, one can soon see why the fading, feuding Fourth International could not long be for him nor he for it.

There is only one substantive discussion of Trotsky in *The Moral Commonwealth*. Fittingly, it involves a debate between Trotsky and John

Dewey in 1938 (which, needless to say, Dewey wins). It is used to illustrate a central methodological theme of the work:

A serious consequence of losing touch with experience is intellectual hubris or pride, which often becomes a kind of arrogance. People who think that everything depends on the *premises* you select and that *argument* is the key to moral decision become easy prey to closed systems and impenetrable ideologies. Armed with what seems to be irrefutable logic—often heavily defended by an arcane vocabulary—the adherent accepts and justifies whatever conclusions the system generates (p. 46).

By the time Selznick was interested in him, Trotsky typically had a dogmatic answer ready for every question—usually the same answer, whatever the question, derived through the same increasingly bizarre casuistry.¹ Selznick, on the other hand, is the most anti-dogmatic and anti-ideological of thinkers, convinced that the most important problems we face are not amenable to *any* such answer. The attempt to find, let alone impose one is the deepest folly. When, moreover, the attempt is the result of “ideological thinking,” it is “an assault on civility” as well (p. 412). However clever and impassioned, such an attempt displays intellectual vice—obstinate rationalism at the expense of reflection on relevant experience. It also displays moral vice—a domineering lack of respect “for the integrity of persons, events, institutions, and ideas” (p. 412).

The Moral Commonwealth, by contrast, is not only a deeply considered work, but a richly *textured* one. It is driven by a relentless insistence upon the complexity of the human condition and the style of thought appropriate to it. From this insistence stem the dominant tones of the book: its refusal to avoid, smooth over, or abridge moral choices and dilemmas, but also its refusal to over-dramatize them; its attention to the range of values in play in difficult decisions, to the variety of circumstances, and to the variety of ways in which circumstances alter cases; its sensitivity to nuance, ambiguity, and distinctions of degree; its irritation with the “[i]ndifference to variation [which] is a persistent failing among critics of domination . . . [and] itself a strategy of domination” (p. 257). Selznick gives no recipes, short-cuts, or cribs; no formulae or algorithms for practical decision. Indeed one learns to distrust such things, not simply as wrong in themselves but as wrong ways to go about business. Instead, we see an abundant display of deep and reflective intelligence—learned wisdom, in fact—pondering particular problems in the light of a complex moral theory and a sophisticated understanding of social processes.

1. On both answer and casuistry, see Martin Krygier, “Bureaucracy” in *Trotsky’s Analysis of Stalinism*, in *SOCIALISM AND THE NEW CLASS* 46 (Marian Sawer ed., 1979); Martin Krygier, *The Revolution Betrayed? From Trotsky to the New Class*, in *BUREAUCRACY: THE CAREER OF A CONCEPT* 99 (Eugene Kamenka & Martin Krygier eds., 1979).

In a sense, Selznick's first answer to any question can be expected to be: "It depends." But that is never his last answer, for it never *all* depends. Attention to particulars is necessary since "[t]o determine the good requires an appreciation for particular circumstances, variable contexts, and competing values" (p. 36), but it is never sufficient, for there are general things that can and must be said about human affairs, too.

According to Sheldon Messinger, there are two laws of social science: (1) deep down, everyone everywhere is basically the same; (2) it takes all kinds.² Many thinkers, particularly Enlightenment thinkers, have insisted upon the first law. Others, particularly critics of the Enlightenment, insist on the second. Selznick insists on both,³ for his theory is grounded in enduring and common features of the natures, circumstances, problems, and aspirations of individuals and communities, yet equally in the irreducible variety, particularity, and idiosyncrasy that persons exhibit in living their lives. Like his mentor John Dewey, Selznick claims that there are objective and general truths about "humans *in nature*," but that the only sort of reasoning appropriate to social affairs is "anchored rationality," connected to "funded experience," grounded in and attentive to contexts and particulars. While there are goals and aspirations common to mankind, and ones which Selznick applauds, he has no Procrustean ambitions. In fact he has anti-Procrustean ones.

In some ways, his "high tolerance for ambiguity" (p. 371) makes Selznick an uncomfortable figure and this an uncomfortable book. He sees good where many people see only bad—piety, say, or modernity; bad where others see only good—piety or modernity, again. This comes not from a spirit of contradiction but from a deep appreciation of the moral plurality, ambiguity, and complexity of the societies we find ourselves in; the institutions we inherit, enhance, build, destroy; the values we affirm or deny; the choices we face; and the lives we lead.

Unlike some who enjoy standing "against the current," Selznick does not adopt a cussed position but a morally complex one. Like Max Weber, he is acutely aware that much of what we value comes, and comes inextricably, at a price. Often he adds, as of modernity, a high price worth paying. Like Isaiah Berlin, he knows that not everything we want is compatible with every other thing we want. It is simpler to praise *or* blame; much harder to praise *and* blame. For western intellectuals, it has often been easier just to blame. Selznick's preferred "spirit of critical affirmation," drawn from "sound knowledge of what the world is like, including what there is to like in the world" (p. 120), can succeed in annoying critics and

2. Personal communication from Professor Messinger. I have added a third: it's different in Japan.

3. Almost explicitly: "Every human being is unique, as is every culture. But it is just as true that people and groups are the same in important respects" (p. 104).

affirmers at the same time. It persuades and pleases me, however. Let me say why.

II

Like much of the best contemporary moral and political philosophy, *The Moral Commonwealth* is a work of high moral ambition. It aims to show what it is to be morally *successful* as a person, institution, or community. In relation to everything Selznick discusses, his book takes us far beyond what is *necessary* to be a person, institution, or community, for Selznick is primarily interested in moral excellence, in flourishing, rather than in simple survival. Much discussion will rightly focus on his various but intertwined explorations of the nature of moral development, of virtue and relatedness, of his communitarian supplementations—for they are not alternatives—to liberalism, and of the truly *moral* commonwealth. These explorations are individually absorbing, and they are also linked by his impressively substantiated claim that “[t]he moral logic we apply to institutions is in important respects the same as that we apply to persons” (p. 244).

My own primary focus, however, is less elevated. It deals with matters perhaps more basic, certainly more base: restraint of evil, as much as pursuit of the good. In contemporary political theory there is little said about such matters, but there is obviously much to be said about them. Selznick has a lot to say about them, which I fear might go unnoticed. I suspect he might also have come to dwell on these matters as a result of his encounter with revolutionary socialism, or at any rate from his involvement in the issues of that period.

Embroidered in the arguments—so many arguments!—of the heretical, embattled wing of a totalitarian movement, whose primary concerns at that time were the twin monsters Stalin and Hitler, Selznick learned about evil. Certainly he learned about it somewhere, and it was a central presence there and then. Wherever he learned it, he came to treat evil seriously in his social and political thought—more seriously, it seems to me, than is common in contemporary American writing on cognate themes or, as he points out, than was common among the American pragmatists, otherwise the deepest influence on his thought.

The one criticism Selznick voices of John Dewey and pragmatism has to do with their failure

to meet the challenge of modernity, which requires a robust understanding of evil, especially evil encouraged by the sovereignty of will. . . . Human frailty and recalcitrance; the persistence of domination; genuinely tragic choices; the collusion of good and evil: these are theoretical orphans. They are by no means wholly overlooked, but they have no secure place in the pragmatist interpretation of moral experience. The need to modify pragmatism in this respect

informs our discussion at a number of points in subsequent chapters (p. 31).

Though, as we shall see, this does not exhaust his thought, Selznick is an advocate of a "inoral realisin" that

presumes a tough-minded conception of evil. It is not enough to recognize that corruption and oppression are pervasive. Nor is it enough to think of specific evils as problems to be solved or as obstacles to be overcome. Rather, the perspective of inoral realism treats some transgressions as dynamic and inescapable. They can be depended on to arise, in one form or another, despite our best efforts to put them down (p. 175).

What is particularly hard for pragmatists and other American optimists to come to terms with is that the worst evils are not always foisted on us from outside. Rather, in the perspective of the inoral realism that Selznick commends,

evil is a sickness of the soul. In its most serious forms it is a pathology brought on by forces at work *within* the human psyche and *within* groups and communities. The most important evils are those we generate ourselves, from ourselves, rather than those imposed upon us by external conditions. This is a lesson liberals and radicals have been slow to learn and loath to accept (p. 175).

With that in our nature and that as our predicament, it is not surprising to learn that "[i]n the design of human institutions Hobbes must be taken seriously. He showed what in human nature we must guard against" (p. 208). Like Hobbes and Freud, but unlike Dewey, Selznick demands acknowledgment of "the darker side of human life . . . the demonic and destructive aspects of personality and society" (p. 172). Like Hobbes, he warns us to attend to our defenses, whatever our hopes might be.

Selznick repeatedly distinguishes between what we can rely on and what we aspire to, emphasizes conditions of survival, and draws moral baselines. He worries, for example, that preoccupation with subtle forms of domination might lead us to

forget that resistance to domination must begin with the obvious and the unsubtle. Arbitrary power is all too often blunt and crude; the pain it inflicts is readily apparent; there is no need for a guide to suffering, no need for consciousness-raising. Rather, we require elementary constraints on the abuse of power. When these are discounted—as "inere structures" or as "liberal legalisin"—people are left unprotected where protection is most urgent (pp. 263-64).

The primary way to take these matters seriously is to realize that "[i]n the end only power can check power—and the opportunity to do so must be a secure resource in every inoral community" (p. 174). This is one reason why forms, procedures, and structures are important: they help secure the

institutionalization of restraint on power. Principles of governance and the rule of law constitute "the most important way repressive authority can be countered" (p. 289), and thus institutional autonomy has a special significance:

Institutional autonomy is, indeed, the chief bulwark of the rule of law. . . . The twentieth century has brought many reminders that legal autonomy *of some sort* is a necessary condition for justice. As the dictatorships of our time have shown, repressive law is hardly ancient history. In those regimes a primary victim has been the integrity of the legal process. High on the agenda in the struggle for freedom—in Eastern Europe, for example, or South Africa—is the building, or rebuilding, of legal institutions capable of resisting political manipulation. For those who suffer oppression, criticism of the rule of law as "bourgeois justice" or "liberal legalism" can only be perceived as naive or heartless, or both (p. 464).

Selznick, then, is a threat expert. He understands fragility, vulnerability, and the need to guard against them. Moreover, his normative reflections are sustained and deepened by his understanding of social processes in general, and of the dangers to which organizations and institutions are susceptible, in particular. He has a lot to tell us about ways in which those dangers might be avoided. Hobbes, too, was a threat expert and it is an honorable, if not always popular, profession.

Selznick's special expertise, moreover, explains much of what is affirmative in his spirit of "critical affirmation" of American liberalism. Liberalism is, at its base, a tradition concerned with restraining arbitrary power. The Madisonian experiment, and the institutions it spawned, have accomplished difficult, precarious, and precious achievements, particularly precious when viewed against the totalitarian competitors they have faced throughout this century. Selznick knows this, and he celebrates it. Given that not everyone knows or celebrates it, that is a job worth doing.

But this, of course, is only half, perhaps less than half, of the story; threats and security against them are only part of Selznick's concern. Liberalism is to be prized not merely for what it guards against, but for what it promises: an alternative to Marxism/Leninism, to socialism, but also to neo-conservatism, that accommodates "the faith that reason, love, and justice can be vital and transforming ingredients of human society . . . that can embrace moral, political, and economic realism without yielding to complacency" (p. x). Selznick's affirmation throughout is *critical*, not unqualified, for his book speaks—powerfully, eloquently, and often—to aspirations, liberal communitarian aspirations, many of them unfulfilled.

In this combination of awareness of risks and striving for aspirations lies some of the peculiar strengths of *The Moral Commonwealth*. Hobbesians are often disdainful of idealists who, they believe, ignore many of the lessons of dark times; idealists often rightly complain that there is

more to life than survival. Selznick agrees with both. When he distinguishes between the requirements of survival and those of flourishing, between baselines that we can rely upon and higher aspirations, it is not to favor either side of these contrasts. Rather it is to demand respect for them both and to explore how the sometimes inconsistent demands of each can be given their due. On virtually every subject Selznick treats, there is the same careful attention to the demands of survival, on the one hand, and to those of flourishing, on the other. Whether he is speaking of institutions, of governance, of justice, or of law, he only begins with what they *restrain*. His heart, and much of his head, lies with what they might *encourage*. Thus, governance "is always constraining, to some extent. But it can also summon and elaborate, form and develop, the impulses that sustain a moral order" (p. 46). Again, Selznick begins his discussion of justice with a sympathetic account of a minimalist conception concerned with "the institutions and motivations we can *rely on* to mitigate oppression and win cooperation" (p. 429). Such a conception is Hobbesian in spirit, procedural in focus, negative and prophylactic in aim. But, though he respects it, Selznick does not rest with this conception. He seeks to push it further:

[J]ustice has a vital part to play, not only in the bare survival of moral systems, but in their flourishing as well. The struggle for justice has its own dynamic and reaches well beyond restraint of domination. Justice affirms the moral worth of individuals; sustains autonomy and self-respect; domesticates authority; and establishes a framework for moral discourse on public matters. Although justice *emerges* as a response to practical urgencies, it *eventuates*, under appropriate conditions, in ideas and practices that are subtler and more value-laden.

If we reduce justice to a negative virtue or to a way of achieving minimal cooperation, we lose a great deal of its resonance and promise. We fail to garner the psychological and intellectual benefits that come from receiving justice and doing justice. Most important, we miss the full contribution justice can make to the enrichment and enlargement of community (p. 431).

Similar examples abound in *The Moral Commonwealth*. Thus, institutional learning must balance moral realism, which looks to what we can rely on, and moral idealism, which looks to what we can aspire to: "The conditions of *survival* are easier to meet than those of *flourishing*, which are more complex and more fragile. It does not follow, however, that we should fail to treasure what is precarious or cease to strive for what is nobly conceived" (p. 38).

In a discussion of Marx and Durkheim, we learn that the former represents prophetic idealism and the latter moral realism, and that people often feel torn between the two, "[b]ut from the standpoint of theory and policy *there is no need to choose*. Rather, we should appreciate the different but

complementary functions the two perform in moral judgment and institutional design" (p. 146). To understand the moral person we must incorporate insights from the study of moral development, which tell us what we can hope for, but "[t]o avoid undue optimism we need a complementary understanding of moral vulnerability, recalcitrance, and malevolence" (p. 171).

As we have seen, Hobbes needs to be taken seriously, but "[t]he premises of Hobbesian moral realism do not tell us . . . what it means to be a moral person or what it takes to have a flourishing moral order" (p. 208). Judicial independence is indispensable, but "[a]n *excellent* judge must be more than independent" (p. 260). Legal positivism speaks to baseline values associated with legal autonomy and emphasizes rules; natural law speaks to the *inclination* of law toward justice and emphasizes principles, the "*points of transition from law to justice*" (p. 439). Lest one conclude that baselines are proper subjects for reasoning, while flourishing is simply a matter of taste, the book concludes:

It is tempting to limit the covenant of reason to the conditions of survival or of minimal well-being. The community would be neutral—would not apply "the method of intelligence"—where flourishing is at issue. . . . Such a perspective would vindicate Tocqueville's theory that democracy is good for avoiding misery and promoting comfort—but not for achieving noble objectives or a cultivated spirit.

This book has offered a different interpretation (p. 538).

Now if Selznick were saying merely that survival is important and flourishing is nice too, we might not be discussing this work. These are of course both good points, the latter often ignored by Hobbesians, and the former by Marxists, other utopians, and even by common or garden optimists. But Selznick's observations take us further. They concern the distinct importance and requirements of survival and flourishing, the pathologies associated with excessive devotion to either, circumstances in which it is appropriate to stress one or the other, and ways in which one might safely and fulfillingly manifest attachment to both.

Most would like to combine survival and flourishing, yet, as Selznick shows, the requirements of one can imperil the other. I will take one example, though a representative and intrinsically important one: law. Baseline morality of law requires autonomy and rules, but the "morality of aspiration is not easily captured or readily cabined by rules and systems" (p. 260), in law or elsewhere. Aspiration in law, according to Selznick, encompasses *responsive* law, and this aspiration corresponds to a more "pervasive discontent with detached, formal, or wholly instrumental modes of argument. The alternative is a quest for more substantive, more contextual, more experiential criteria of judgment" (p. 42). Autonomous law

tries to draw a sharp line between law and politics; it upholds a court-centered, rule-centered, rights-centered jurisprudence; and its main concern is with procedural fairness rather than substantive justice. Each of these attributes sustains the independence and legitimacy of the legal system. Each must be modified . . . in a regime of responsive law (pp. 464-65).

Elsewhere, Selznick observes that "[t]he virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way. . . . Legal 'correctness' has its own costs. . . . Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law" (p. 437). Yet it was precisely the "autonomy and integrity of law" which were supposed to be indispensable guards against arbitrary power, so perhaps they will be "undone" when there is too great a commitment to upholding substantive justice. Of course nothing comes pure in social affairs, so one can expect any real legal system to have a mix of tendencies and logics. Still, if autonomy is so crucial and substantive justice so valuable, what should be sacrificed to what, how much, and when?

Many who share Selznick's understanding of evil and appreciation of the rule of law are reluctant to compromise on the rule and the autonomy of law. They compare relatively autonomous legal orders with those of regimes, frequently despotisms, which lack them, and conclude that legal autonomy is altogether a *good thing*. From this they infer: the more the better, the less the worse. They insist on the importance of clear legal baselines, and watch with anxious skepticism those who demand more substantive contributions from law. They fear that law will become indistinguishable from, or the servant of, politics. Max Weber notes the tensions between form and substance,⁴ but considers them ineradicable and suggests nothing that might resolve them. Others suggest that tendencies toward responsive law are part of a crisis in contemporary law which is either dangerous,⁵ or fruitful,⁶ according to their taste in these matters. Still others, notably some members of the critical legal studies movement, do not share Selznick's understanding of evil even though they seem to see evil all around them. In particular, they fail to register the precious *achievement* that the rule of law represents, perhaps because they fail to register the comparisons with which this paragraph began. For them, nothing much is at stake in impinging on the autonomy of law, since that autonomy is illusory in any case. The distinction between law and politics is a sham.

4. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 882-88 (Guenther Roth & Claus Wittich eds., 1968).

5. See *Beyond Bourgeois Individualism—The Contemporary Crisis in Law and Legal Ideology*, in *FEUDALISM, CAPITALISM AND BEYOND* 127-44 (Eugene Kamenka & R. S. Neale eds., 1975).

6. See ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 43-46 (1976).

How does Selznick accommodate his deep respect for the rule of law, which I share, with his commitment to responsive law, which I am tempted to share? First, of course, he does not see them as necessarily contradictory. Part of his pragmatist heritage is to deny that analytic contrasts are necessarily real-world contradictions. It is one thing to aspire to responsiveness, and even to consider it morally a higher achievement than autonomy. It is another to deny autonomy its place or, with spurious drama, claim that autonomy and responsiveness cannot be combined. Responsive law is to be built *upon* an autonomous legal order; it is not intended to undermine it. Still, how much weight should be given to the demands of each, if they pull in different directions or if they come at each other's cost?

There is no general answer, of course, but there is the powerful observation, drawn from Selznick's understanding both of persons and of institutions, that people, institutions, systems, communities, have what might be called moral careers. When he speaks of individuals, he talks of "moral development," and the point can be generalized.⁷ At certain stages in the career of an institution, for example, particularly formative stages, certain values rightly rank high because they are not yet established or institutionalized, or because they are at risk. Such values must be secured, and it is dangerous to compromise them. When, however, they *are* secure, the balance of emphasis in our moral ambitions can change, and striving toward aspirations can more safely supplement the establishment of baselines. We can even take some risks, not because the baselines become less important, but because they are more firmly in place and the risks are less risky. Thus:

For many institutions, a large measure of autonomy is especially important in its *formative* stages. When policies and perspectives must be nurtured—given a chance to become established and secure; in a word, institutionalized—they need the protection autonomy can give. Once the system or policy is secure, that need becomes less compelling. Then more precision is required as to *what kind of* autonomy and *how much* is required or desirable (p. 335).

Again:

the very stability of the rule of law, where that has been achieved, makes possible a still broader vision and a higher aspiration. Without disparaging (to say nothing of trashing) our legal heritage, we may well ask whether it fully meets the community's needs. . . . So long as the system is basically secure, it is reasonable to accept some institutional risks in the interests of social justice (p. 464).

The reverse also applies. Values which might be fruitful where institutions are strong might be dangerous where they are weak or absent. So we

7. See PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 18-27 (1978).

return to Selznick's methodological emphasis on attending to particulars, to contexts, and to variety. It is common to discuss law in the abstract, to pit rules against principles, legal positivism against natural law, autonomous law against responsive law. In relation to all these contrasts, Selznick suggests that the truth lies in complex and variable balances, in continua, in possibilities of growth and development, rather than in stark and universal dichotomies.

III

I am fond of the rule of law, and there is a reason for that. I have long been interested in the Soviet Union and Eastern Europe, ruled until recently by despotisms of a sometimes totalitarian, sometimes slovenly authoritarian cast. Until recently law played sometimes no, sometimes little, and always subordinate functions there.⁸ For a long time the rule of law and the autonomy of law were rejected in principle. For almost all the time, they were denied in practice.

Things are different now. But how different are they and how different should they be? How autonomous should law be? How responsive? I am now investigating prospects for the rule of law after communism, particularly in Poland. Rhetorically, the rule of law has little opposition in Poland today. According to the new Article 1 of the Constitution, Poland is a "democratic law-governed state." Everyone is for the rule of law, and it is not all talk. But for my liking there are too many echoes of old-style instrumentalism combined with a taste for inscribing requirements for "flourishing" into law. All sorts of people want to harness the law to their conception of the good; fewer are interested in establishing or deferring to legal institutions which might constrain anyone's pursuit of it.

There are several sorts of demands for a "responsive" Polish law: among the more important, Roman Catholic pressure to write the Church's values into law and into the activities of legal and political institutions; authoritarian and nationalist pressures to establish "order from chaos" by "conventional and unconventional means";⁹ egalitarian pressures to ease the pains of transition; and the unenviable demands of governing an unruly

8. I have written elsewhere about the relationship between Marxism and the absence of the rule of law in formerly communist countries. See Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633 (1990); Martin Krygier, *Marxism, Communism, and Narcissism*, 15 LAW & SOC. INQUIRY 707 (1990); Martin Krygier, *Marxism, Communism, and the Rule of Law*, in MARXISM AND COMMUNISM: POSTHUMOUS REFLECTIONS ON POLITICS, SOCIETY, AND LAW 133 (Martin Krygier ed., forthcoming 1994); see also Martin Krygier, *Legal Traditions and their Virtue*, in PRAWO W ZMIENIAJĄCYM SIĘ SPOŁECZEŃSTWIE 243 (Grażyna Skąpska ed., 1992).

9. These quotations are from an interview I conducted with a spokesman on law from one such party—the Confederation for an Independent Poland (KPN). Martin Krygier, *Four Visions of Post-Communist Law*, Address at the American Law and Society Association Annual Meeting (May 29, 1993), in IDEAS AND IDEOLOGIES: ESSAYS IN HONOUR OF EUGENE KAMENKA (David Lovell & Nicolaas Rupke eds., forthcoming 1994).

country in dramatic circumstances.¹⁰ These pressures come from different groups that are often hostile to each other. They share, however, a highly insubstantial and instrumental attitude to law, at least in areas that matter to their proponents: "insubstantial" because it gives little thought to what legality and legal integrity require; "instrumental" because law is primarily considered as a means to specific substantive ends.¹¹ In the process of treating law in this way, something valuable might be lost or might never be realized.

In strong legal orders, vast cadres of people are trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialized to strong legal values. Western legal orders, for example, are bearers of value, meaning, and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders are rule of law values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them. Efforts to render such institutions more responsive are unlikely to destroy them in a hurry. Or so one might infer from *The Moral Commonwealth*, and so it seems to me.

Not every legal order is so strong. The governing traditions of the once-communist world have been highly equivocal and in the past fifty years (which include not only communist rule, but the War as well) quite unequivocally hostile to legal traditions and the restraint of power by law, that is to say, to the rule of law. In Poland, and even more in many other ex-communist states, the question remains whether the rule of law can be built in post-communist societies, where problems are great, state traditions unsympathetic, and the social foundations unpromising.

The religious, authoritarian, egalitarian, and technocratic forces I have referred to have in common an overriding concern with ends and a subsidiary concern for means. They also tend to be impatient with restraint. Theirs are not the only agendas that exist, though each is very powerful. It does not seem to me that processual agendas have similar power. Instead, in a situation that is far from desperate but is serious where law is concerned, the only questions that seem to count are substantive ones. What is lacking, or at least weak, is a real and acted-upon concern for the *institutionalization* of a relatively autonomous legal order.

The constitutional moment¹² has possibly passed, and Poland will limp along for some time with its 1952 Constitution, heavily but not comprehen-

10. For an overview of some predominant aspirations for the future of Polish law, see *supra* note 9.

11. See Adam Czarnota & Martin Krygier, *From State to Legal Traditions? Prospects for the Rule of Law after Communism*, in *FROM A ONE-PARTY STATE TO DEMOCRACY: TRANSITION IN EASTERN EUROPE* 91 (Janina Frentzel-Zagórska ed., 1993).

12. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46-68 (1992).

sively amended. There are some somewhat promising institutions.¹³ There are also many new laws, probably too many. However, as Selznick observes,

[t]he starting mechanism [of institutions] is often a formal act, such as the adoption of a rule or statute. To be effective, however, the enactment must build upon preexisting resources of regularity and legitimacy and must lead to a new history of consistent conduct and supportive belief. Institutions are established, not by decree alone, but as a result of being bound into the fabric of social life (p. 232).

If this is so, then institutionalization of the rule of law has a long way to go in Poland and *a fortiori* in most other ex-communist polities. In these circumstances, precisely the urgent agendas and difficulties which appear to have overwhelmed a *processual* consciousness among Polish leaders seem to me to make such a consciousness indispensable. In such circumstances, where no institution apart from the Church yet has a secure or enduring shape, one might wish for publication of a Polish selection from *The Moral Commonwealth*: say, *Selznick on Formative Stages*. It might begin with Selznick's observation: "If an institution is too weak (or too inept) to defend its integrity, we should call it opportunistic rather than responsive" (p. 336). The American selection should be different: perhaps *The Power of Positive Pragmatism*.

13. Most notably, the Polish administrative courts, the Ombudsman, and a Constitutional Tribunal.