

Organizations, Institutions, and the Story of Shmuel: Reflections on the 40th Anniversary of the Law and Society Association

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Today I would like to speak to you about *Organizations, Institutions, and the Story of Shmuel*.

Now, I figure everyone here knows what an organization is, and pretty much everyone at least *thinks* they know what an institution is. But I'm pretty sure you all are wondering, "Who's Shmuel?"

Shmuel was a Jewish fellow who was shipwrecked on a desert island. After he had lived many years by himself on the island, a rescue party located him. Before leaving the island, Shmuel offered to give his rescuers a tour. "You won't believe the good life I have had here," he told them.

"This is the general store," he said, pointing out an area where fruits and nuts were attractively displayed on tables. "Each morning I come here and select the finest fresh produce for my breakfast."

"This is the fitness center," he said, pointing to a workout area, where vines were strung up to create a ropes course and where there was a large oval track lined with shells.

"And this is the synagogue where I pray each day," he said, taking them to a serene cul-de-sac, where there was an altar and a bench carved out of an old log.

With that, he was ready to board ship and go home. But one of the rescuers stopped him to ask, "Shmuel—what about the building over there?" pointing to an intriguing structure that Shmuel had not mentioned.

"Yeeech!" Shmuel exclaimed, with a disgusted look on his face. "That's the *other* synagogue. . . . No way would I set foot in there!"

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This address was delivered at the Law and Society Association (LSA) Annual Meeting, May 29, 2004, in Chicago. Rather than turn it into something other than the lunch address that it was, I have retained its format as a speech and made just a few changes. I am indebted to the twenty LSA members who shared their thoughts anonymously in informal interviews, and to Laurie Edelman, Pam Erlanger, Marc Galanter, David Garland, Mauricio Garcia-Villegas, Laura Beth Nielsen, Ron Pipkin, Konstanze Plett, Red Schwartz, Bette Sikes, Mark Suchman, Dalia Tsuk, and Bob Yegge for their helpful insights and comments. Please address correspondence to Howard S. Erlanger, Institute for Legal Studies, University of Wisconsin Law School, Madison, WI 53706; e-mail: hserlang@wisc.edu.

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The story of Shmuel might apply to a professional organization I've been studying this past year. It was founded on November 17, 1964, by what could only be called a bunch of deviants and misfits—each of them had an academic affiliation in another discipline, but felt marginalized there. Following traditional research protocol, I will, of course, disguise the name of this organization. Let's just say it is a gardening club, and I'll refer to it as the "Lawn Society." Or maybe it's a folklore group—and we'll call it the "Lore and Society Association."

OK, I've blown my cover. You have met the organization, and it is us.

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Our 40th anniversary is an opportune time to reflect on the Law and Society Association (LSA) as an *institution*, not just as an organization.¹ Drawing on the insights of last year's Kalven Prize winner, Philip Selznick, I use the term *institution* to refer to the idea that organizations are more than formal structures that are set up to achieve specific goals. Rather, organizations are living entities with rich internal lives, and they develop values and commitments that exist quite apart from their formal purposes. Drawing on this concept, my comments today explore the institutional life of LSA. I examine the values and commitments of the Association, based on a perusal of documents, interviews with some of the founders, interviews with some current members, and very productive conversations with Laurie Edelman and Mark Suchman. It is also very much a personal statement, drawing on my own 37 years as part of LSA.

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By and large, the founders of LSA—a number of whom are with us this weekend—were people who were uncomfortable with the traditional image of law.² Most particularly, the founders believed that empirical research could provide an understanding of how the

¹ For valuable discussions of the history of LSA, see Felice Levine's presidential address (Levine 1990), the previous work she cites, and Garth and Sterling (1998).

² The key figures in the founding of LSA are discussed in Levine (1990). The following people appear on the earliest known LSA membership roster (dated March 1967) and are still members today or maintained their membership to the year of their death (indicated by an *): H. W. Arthurs, James Atleson, Harry Ball, Rosemary Bannan, Frederic DuBow,* Leonard Cottrell Jr.,* Robert Emerson, Daryl Fair, Johannes Feest, Lawrence Friedman, Marc Galanter, Arthur Galub, Sheldon Goldman, Joel Grossman, Joel Handler, John Heinz, Herbert Jacob,* Robert Keeton, Hans Klette, Milton Konvitz, Richard Lempert, Ezra Levin, Jethro Lieberman, Michael Lowy, Sheldon Messinger,* Laura Nader, Ronald Pipkin, Arnold Rose,* H. Laurence Ross,* Stuart Scheingold, Richard Schwartz, Philip Selznick, Rita James Simon, Jerome Skolnick, Lance Tibbles, Austin Turk, James Wallace, Stanton Wheeler, and Robert Yegge.

legal system actually works, and of how law could become an effective agent of progressive social change. These ideas were hardly new, and owed much to the American legal realism of Oliver Wendell Holmes, Karl Llewellyn, Jerome Frank, and Thurman Arnold; the sociological jurisprudence of Roscoe Pound; and the “living law” of the European scholar Eugen Ehrlich. By the early 1960s, a number of universities in the United States—including Wisconsin, Berkeley, Denver, Northwestern, and Yale—had interdisciplinary programs in law, with quite substantial funding from the Russell Sage Foundation and also from the Walter E. Meyer Foundation. In addition, by this time there was a growing literature on what we now call the “law in action,” as well as an optimism that social scientific studies of law could influence legal outcomes.

Nonetheless, whether located in law schools or in social science departments, most—possibly all—scholars working on law and society issues felt at least somewhat marginalized. Legal education and legal scholarship continued to be primarily based on the formalist approach. Social science departments, while comfortable with the idea of law as a social institution, still considered the topic to be at the periphery of their fields. And while this story is primarily one of U.S. scholars and U.S. universities, it seems to apply as well to the handful of non-U.S. scholars who were early members.³

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So what is LSA all about? If we look at the formal documents that established us as a nonprofit corporation, we find that our purpose is:

To promote the study of society, giving particular attention to law, through research and teaching; to do any acts, create any entities, establish any procedures and do any business as may be necessary, convenient or desirable to accomplish these purposes.

Not to mention that:

For said purposes aforementioned, the Association shall have the power to take, receive, lease and acquire, sell, transfer, let, convey, pledge and mortgage real and personal property; to borrow money and pledge, mortgage or otherwise transfer its property or any part thereof as security therefore; to contract for, solicit and receive voluntary contributions of money, property, or services; to employ persons; and to do all other things necessary, convenient or proper for the purposes of the Association.

³ For a comparative discussion of the law and society movement in the United States and Europe, see García-Villegas (2004).

This language evokes the image of an organization as a “lean, no-nonsense system” that Selznick criticized (1957:5), and it hardly captures the essence of the LSA. To capture that essence, we need to understand LSA as a *living institution*. If we do that, we will find that we are a community of scholars that make up an organization “infuse[d] with values beyond the technical requirements of the task at hand” (Selznick 1957:17).

What are the values that characterize LSA? We are committed to each other and to the development of the field, even though we are not always sure what “the field” is. We are a community that is open to new theories, methods, and substantive topics. And we are a community that seeks to be welcoming to new scholars and to those who aren’t the predominantly white, male, U.S.-based scholars who founded LSA. Although we may not always get it right and more work remains to be done, I believe that the history of LSA as an institution is the history of a commitment to these values. This can particularly be seen in our past 15 years, the period since Felice Levine’s assessment of the LSA on our 25th anniversary (Levine 1990).

Felice was the first woman to be president of LSA, and at the time no woman had been editor of the *Law & Society Review*. But since then women and men have been fairly evenly represented in the leadership of the association.⁴

Increased representation of scholars of color in the leadership of LSA has been slower in coming. Only one person of color has ever served as an officer or member of the Executive Committee; about 10% of Board members over the past ten years have been persons of color from the United States. To some degree, this reflects our demography. Only about 5% of our members are people of color from the United States, which in turn reflects the low representation of people of color in our field. But we have an obligation to change those demographics. With the creation of the Diversity Committee in 1999, LSA has become proactive in its attempts to recruit and retain minority members, and in recent years a significant number of scholars of color have served on committees as members and chairs. More important, we have worked to increase the critical mass of scholars of color studying law and society. Last year we applied for National Science Foundation funding for a Minority Fellowship and Mentoring Program. As many of you know, the Program was initially slated for funding, and this spring we began to solicit applications. Although the program was

⁴ Since 1988, the year Felice Levine became president, half the presidents, more than half the people who have served on the Executive Committee, and more than half the people who have served on the Board have been women. Of the six editors of the *Review*, two have been women.

canceled because of legal concerns, we remain fully committed to the enterprise and have submitted a revised proposal.

Another way in which we have worked to enrich our community is by encouraging linkages between U.S. and non-U.S. law and society scholars. Aside from the significance of the comparative perspective in its own right, scholars interested in the U.S. legal system have much to gain from engaging with non-U.S. scholars and scholarship.⁵ Non-U.S. scholars (mostly from the British Commonwealth, Western Europe, and Japan) now make up about one-quarter of our membership, and 20% of the current trustees are from outside the United States.⁶ At its May 2004 meeting, the Board approved several measures that will help us make LSA activities more accessible to people from all parts of the world; they will also facilitate LSA members who want to learn about and work on comparative and transnational issues.⁷

Finally, significant financial resources are focused on our two outreach programs for newer scholars—the Graduate Student Workshop and the Summer Institute⁸—and the proceeds of the 40th Anniversary Campaign, which raised more than \$160,000, will be devoted to the support of newer scholars and scholars of color, as well as to international scholarship and exchange.

* * *

A second aspect of LSA as an institution concerns our approach to scholarship—what might be called our intellectual culture.

In seeking to understand our intellectual culture, I conducted telephone interviews with a nonrandom sample of twenty members, including older and newer members and those identified with very different types of scholarship. The interviews ranged from about half an hour to well over an hour. Some were focused; others covered a broad range of topics.

In the interviews, I tried to get at the essence of how we define ourselves by asking my respondents to talk about what they see as the “core” and “boundaries” of LSA and of the field. One

⁵ Lynn Mather’s 2002 presidential address (Mather 2003) lays out the case for LSA’s increased commitment to international scholars and scholarship; the accompanying commentaries both expand the discussion and raise important caveats.

⁶ Non-U.S. scholars are now well-represented as committee members and chairs, and in 2004 John Braithwaite became the first non-U.S. scholar to receive the Kalven Prize.

⁷ These measures are part of an initiative proposed by the LSA International Activities Committee, under the leadership of David Trubek; they begin to implement some of the ideas suggested in Trubek (2003).

⁸ From the earliest years, graduate students have been welcomed into the Association and treated as junior colleagues, and this year an ad hoc Connections Committee has worked to strengthen the integration of newer scholars and newer members into the LSA community. Our programs also include the Didactic Workshop at the Annual Meeting and our Mentoring Program for junior faculty.

surprising finding is that most of the people I spoke with said that the core and boundaries of law and society are not compelling issues. When pressed to define them anyway, people who work in very different perspectives said quite similar things, such as:

“The core of law and society work is that we don’t take law at face value; law doesn’t have a meaning apart from its context.”

“We’re interested in anything that illuminates where law comes from, how it is understood, how it operates, and how it leads to change.”

Of course, the devil is in the details: Does law and society include postmodern analyses of law? Radical positivism? Law and economics?⁹ Critical race theory? As would be expected, people have definite opinions about what type of work they like and what they find problematic. In fact, people often had very strong things to say about work in genres different from their own, and they didn’t hesitate to name names or to vent their frustrations.

But what does this tell us about LSA as an institution? To get at this issue, if an interviewee was intensely critical of a particular type of work, I would search for the boundary by asking: “OK, should people who do that type of work be run out of LSA?”

The reply was invariably—albeit with varying degrees of enthusiasm—that they should *not* be run out: The tent is big enough for all of us, and we are better because of it. Let me give a few representative examples:

From a senior scholar strongly identified with the postmodern turn: I don’t care if people do what I do; what I care about is whether their work is interesting. Postmodern work examines the basis of claims to truth. There doesn’t need to be a tension between that approach and scientific work itself. When I question the understandings of law, I am not saying that they should be discarded. I have something to learn from those analyses.

From a senior scholar whose traditional empirical scholarship is highly regarded: While I have no interest in doing postmodern work myself, the issues that postmodern scholars raise have forced me to ask myself where my questions come from, and what I can do to be more confident in my interpretations of data.

From a junior scholar who does both qualitative and quantitative empirical work: I think the great strength of LSA is that people come from different traditions; people ask the hard questions and you don’t get away with as much. People trained in the humanities

⁹ On the relationship between law and society and law and economics, see Laurie Edelman’s presidential address, “Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality” (2004).

have to account for the production of text and for multiple meanings. It's easy to lose sight of that when you only talk to people who do traditional empirical work.

One explanation for these responses is that they reflect a "social responsibility bias." People know that they are supposed to say that the best thing is for everyone to work together, even when they don't believe it and don't take advantage of the opportunity to learn from others. But if people feel social pressure to answer that way, this may in itself be an indicator of the culture of LSA.

Another way to get a sense of LSA as an institution is to look at how we handle controversy. In his 1992 presidential address, Joel Handler came as close as anyone has come to publicly setting a boundary. Joel argued that the postmodern focus on radical indeterminacy undermines what are, in his view, some of the core aspects of sociolegal research: the ability to identify stable social structures, to show how they lead to perverse results, and then to advocate for change (Handler 1992). It was a comprehensive, tightly argued essay, and it held nothing back, addressing what he saw as the disabling political impact of specific studies carried out by members of LSA.

Handler's address spurred plenty of buzz in the halls that year, but the consequence was not a turf war. Instead, it was a 130-page symposium in the *Law & Society Review* that actively engaged the issues that he delineated. The exchange stands today as an excellent entree to the social science/postmodern debate, and it exemplifies as well the character of LSA as a community of scholars.¹⁰ Perhaps most telling, the protagonists who were active participants in LSA at the time remain so today, and a number of people recall fondly the late-night debates that followed the speech.

* * *

Reflecting on the observations of my respondents, I have come to the conclusion that the core of LSA is our shared belief that law is a social and political beast. Within that broad core, there are many theoretical and methodological approaches. We might think of each of those approaches as centered around a node, or set of assumptions and questions—for example, that society is stratified, so the purpose of sociolegal scholarship is to investigate how law interacts with class, race, or gender stratification; that law is diffused throughout society, so the purpose of sociolegal scholarship is

¹⁰ For example, the contribution by Kitty Calavita and Carroll Seron articulated the multiple perspectives that are at the core of LSA, called for an avoidance of "separate but equal" enclaves, and argued that rather than rejecting postmodernist insights, social scientists should engage with the postmodernists to gain a deeper understanding of how society works (1992:771).

to assess the relevance of law in everyday life; or that law is a central social structure and that it is important to uncover the sources and effects of legal change. There are many nodes in sociolegal scholarship, and they have overlapping sets of questions and concerns. Since none of these nodes is truly dominant, looking out from any one node will tend to make that node seem marginalized—a Lake Wobegon effect in reverse, you might say. Already feeling marginalized in one’s home discipline, it is uncomfortable to feel marginalized again in LSA. But in fact, these multiple and overlapping nodes are the strength of our field because we can move freely among them, drawing insight from each.¹¹ And however variant the meta-theoretical assumptions or methodological approaches, all remain solidly grounded in the core supposition that law is more than a set of static rules. The big tent works because of our common acceptance of this central idea.

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All this is not to say that valuing diversity in scholarly style is cost-free. LSA started as an informal support group, and the big tent is the natural outgrowth. But in following this route we have made at least one significant tradeoff: we have valued breadth over focus and parsimony. The idea of LSA as a broad scholarly community is in tension with the idea of law and society as a discipline. To the extent that law and society seeks to be an independent discipline with its own theory and methods, there will be pressure to define a much more focused core, and to set boundaries. This is especially true when a new discipline is trying to define itself and gain professional recognition. While the big tent doesn’t preclude law and society becoming a discipline, it does make it more difficult.

Our institutional culture costs us in other ways as well. Some scholars find us too diffuse or too tolerant of critical analyses, and have left us for other professional associations with more focus. And new members sometimes find the atmosphere somewhat anomic—it can be hard to figure out what LSA is really about, and how to fit in.

* * *

Given that we’re paying a price to have a big tent, it is important that we draw on the benefits it gives us. One of the highlights of the Annual Meeting is the opportunity for each of us to connect with people doing the same type of work that we do. Yet if the positivists

¹¹ A similar point is made by Galanter and Edwards in their discussion of the need for a rapprochement between the fields of law and economics and law and society, where they identify the need to “forsake the narcissism of small differences” (1997:384).

gather in one corner of the tent and the postmodernists gather in another, we will spend the weekend together without ever actually *being* together—handling controversy and disagreement by staying out of each other’s way, rather than by engaging with each other to our mutual benefit.

Yet if we do that, we will have lost one of the key elements of LSA as an institution, because to a great extent it is our values—as much as the topic of our scholarship—that define us. We have grown and prospered because of our expansive view of community, our openness to new ideas, and our commitment to engagement with each other. It’s easy to become complacent about these values, and to give in to the inclination to define ourselves in part in opposition to others.

But then we’ll have a problem—we’ll be just like Shmuel.

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