

# Law Quadrangle Notes

The University of Michigan Law School

Volume 22, Number 2, Winter 1978



## Jury Size & the Peremptory Challenge

- 
- 1 U-M Researcher Studies Child Support System
- 
- 2 Carrington To Assume Duke Law Deanship
- 
- 3 Harry Edwards Named to Railroad Board
- 
- 3 "Official Morality" on Euthanasia Criticized
- 
- 4 Alfred Conard Lectures to Tokyo Securities Lawyers
- 
- 5 Four Professors Join "Three-Casebook Club"
- 
- 5 U-M Study Focuses on Mine Reclamation
- 
- 6 Law Students Establish Public Interest Fellowship
- 
- 6 Alumni Notes
- 
- 7 Events
- 
- 8 Jury Size and the Peremptory Challenge: Testimony  
on Jury Reform *by Richard Lempert*
- 
- 14 The Crumbling Institutions of the Post World War II  
Liberal Trade System *by John H. Jackson*
- 

**Photo Credits:** Joan Fahlgren, 1, 2, 3, 7 (Anderson) 13, 19; Bob Kalmbach, U-M Information Services, 6, 7 (Ford).

**Publications Chairman:** Professor Yale Kamisar, University of Michigan Law School; **Managing Editor:** Harley Schwadron, University of Michigan Information Services; **Editor:** Carol Hellman, University of Michigan Publications Office; **Graphic Designer:** Jennifer Magyar, University of Michigan Publications Office; **Law Student Writer and Photographer:** Joan Fahlgren; **Produced by:** University of Michigan Printing Services.

---

Vol. 22, No. 2

Winter 1978

Law Quadrangle Notes, issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication, 409 E. Jefferson, Ann Arbor, Michigan 48109. **SEND FORM 3579 TO:** Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48109.

# u·m notes

## U-M Researcher Studies Child Support System

Throughout Michigan, each county government maintains an agency known as the Friend of the Court which is responsible for enforcing child support and child visitation arrangements after divorce.

In some cases, the agency imposes its ultimate sanction—a jail sentence—in dealing with an absentee parent who has fallen behind in his payments or simply refuses to pay.

Each year more than 4,000 parents, virtually all of them men, are sentenced to Michigan jails as a result of action taken by the Friends of the Court. The Michigan system, which imposes the harshest punishment for non-payment, is now being viewed as a model by other states which are considering a more rigorous enforcement scheme.

Is incarceration—or the threat of jail—really effective in inducing compliance with child support orders? What are the psychological and social consequences? What are the alternatives to the Michigan system? These are among the questions explored in a five-year study by University of Michigan law Prof. David L. Chambers focusing on 28 Michigan counties. The study, funded by grants from the National Science Foundation, the U-M Law School, and the Center for Studies in Criminal Justice at the University of Chicago, will be published in book form in 1979.

Noting that reliance on jailing differs considerably from county to county in Michigan, Chambers said that study found that, indeed, “a well oiled enforcement process capped by a substantial reliance on jail seems to lead significant numbers of men to pay who otherwise would not.”

At the same time Chambers reported that although a vigorous enforcement scheme usually “yields more dollars than it costs,” the system has its human costs.

“America’s county jails are among our most vicious institutions of incarceration,” noted Chambers. “Often jammed with far more inmates than

they were built to hold, they rely on forced inactivity and breed bodily and sexual assault. . . . If Michigan’s aggressiveness were replicated in the rest of the country—as might conceivably occur under the new pressures for collection the federal government is applying in welfare cases—we would find courts sentencing 100,000 American parents for non-payment of support each year.”

Jailing, or the fear of jail, may also damage the quality of the relationship between parent and child, Chambers noted. “How does a parent begin to behave toward a child to whom he feels tied not by affection alone but at least in part by fear?”

Among alternatives to the Michigan system, Chambers suggested consideration of a compulsory pay deduction scheme for the noncustodial parent, similar to Social Security. Another alternative nationally would be creation of full-time enforcement offices, similar to Michigan’s Friends of the Court, with courts imposing jail sentences in only the most extreme cases.

In his study of Michigan counties, Chambers found that counties that have both a high jail rate and a “self-starting” enforcement system—meaning that the Friend of the Court prods non-paying fathers without the necessity of a prior complaint from the mother—have the highest rates of child support payments. These counties collect on the average 25 per cent more per case than was collected by the counties that were both low jailing and not self-starting. Another significant finding was that collections tended to be lower in larger counties.

In general, said Chambers, the payment records in Michigan counties showed “most men either paid nothing or paid regularly, leaving few men in the middle.” Throughout the state, the study showed 25 per cent of the fathers paid 10 per cent or less of the amount of child support ordered, while 51 per cent paid 80 per cent or more.

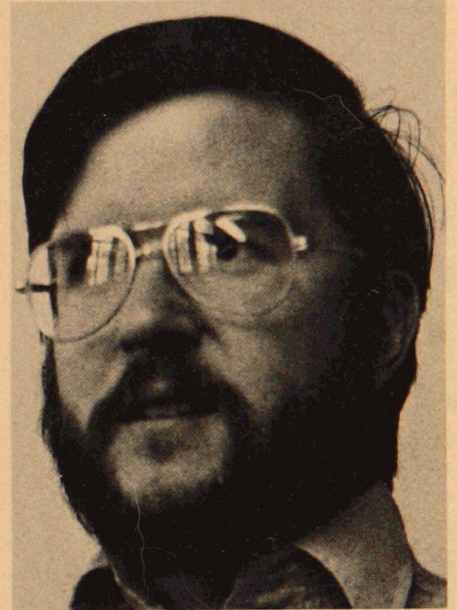
In 1974, in the 28 Michigan counties studied, 3,046 men were jailed for non-payment of child support out of a total caseload in these counties of about 290,000, Chambers found.

Typically, men jailed for failure to pay child support “have unsteady work histories as unskilled workers” and “a high proportion have alcohol problems,” reported Chambers.

This does not mean the Friends of the Court necessarily “wink at non-payment by the doctor” or other professionals. “Rather, the doctors who

fail to pay are more likely, if jail is imminent, to have access to sufficient cash to appease the agency,” said Chambers.

But the U-M professor warns that this jailing trend may be indicative of a more widespread form of social scapegoating: “To the extent that we punish the unskilled worker in order to produce higher payments from thousands of higher-income fathers, we are repeating a familiar and dubious pattern in our society that finds its analogies in the use of jailing for



David L. Chambers

street-corner gambling, as well as medical experimentation on prison inmates.”

Chambers describes the operation of Michigan’s Friend of the Court system this way:

“A Friend of the Court in each county oversees all aspects of the child support process in divorce, separate maintenance and paternity cases. The agency begins each case by gathering financial information from the parents and advising the judge on the appropriate size of the support order. After an order is entered, it collects all payments and forwards them to the appropriate receivers, either the custodial parent or the welfare department. Finally, it pursues parents who fail to pay.

“To carry out these tasks, a few small counties have only one or two full-time employees. By contrast, the Friend of the Court in Wayne County, the core of the Detroit metropolitan area, has a staff of over 300.

“Jailing plays a part in this process because the willful or negligent failure to make payments ordered by

the court is treated as a form of contempt that, by special state statute, can lead to a sentence in jail of up to one year, subject to earlier release upon the defendant's paying his full arrearage or working out some lesser arrangement satisfactory to the court. Most men jailed do in fact purchase their early release by paying an amount less than full arrearage. . . .

"The steps taken before jailing and the extent of reliance on jail vary from county to county, but in every county the agency mails warning letters to delinquent fathers, and nearly all agencies issue orders to show cause directing the men to appear in court and explain their delinquency. Even in the counties that rely most upon jailing, the number of collection efforts short of jail dwarfs the number of sentences."

As part of the study, Chambers compared the Friend of the Court operations in two Michigan counties: Genesee County, including the city of Flint, where a self-starting enforcement process and the jailing of defaulters have long been favored; and Washtenaw County, including Ann Arbor, where the Friend of the Court budget has placed higher priority on the use of social workers and other professionals for marital counseling and child custody matters, rather than on collections. These two approaches have had a noticeable effect on payment rates, according to Chambers.

"During 1974, Genesee County judges imprisoned 224 men for failing to pay support, a rate of five per 10,000 persons in the county, making Genesee one of the high-jailing counties. In a random sample we drew of over 400 divorced men whose cases were open in 1970, the men had paid an average of 74 per cent of the total amount due over a mean period of seven years. Only 14 per cent of the men had paid less than 10 per cent of all amounts due."

By contrast, in Washtenaw County, said Chambers, "it is perhaps not surprising, even if somewhat disheartening, that a random sample of about 400 men under support decrees has paid on the average only 56 per cent of everything due—over 25 per cent less than the average portion paid by the Genesee men. This was true despite the fact that median earnings are higher in Washtenaw, unemployment lower, and the county population only slightly more than half as large. Over twice as many Washtenaw men (30 per cent) had paid less than 10 per cent of their amounts due."

Chambers also studied the distribution of payments in the two counties over a period of years:

"The distribution of payments suggests that in each county a substantial number of men consciously or unconsciously test the enforcement system in the early years. In Genesee a significant number are 'burned' and move toward full payments. In Washtenaw, many who paid nearly in full or in part in the first year move toward non-payment after finding either that a period of haphazard payments is ignored or followed by hollow threats or that, even if they are arrested, they are soon released and forgotten."

In general, Chambers concluded, "the study does seem to confirm one commonplace prediction: swift and certain punishment can reduce the incidence of some forms of undesired conduct so long as potential offenders perceive a clear link between their own behavior and a system that leads to punishment. If a policeman is watching and customers know it, fewer candy bars are stolen. The sad finding of our study has been that, in the absence of sanctions, so many fathers fail to pay. The striking finding has been the effectiveness of enforcement agencies in many Michigan counties in creating a sense of a policeman at the elbow."

Chambers also concluded that the child support study does not have implications for other forms of undesirable behavior—such as rape or armed robbery, for example—because, unlike parents paying child support, the identities of criminals generally remain unknown until they are arrested.

In child support cases, "we can expect that jail will have a greater effect when men know that all their actions are observed," said Chambers. "Most armed robbers and rapists hope that their identity will remain unknown. . . . Thus the very factor that made our study possible—the all-knowing files of the Friend of the Court—makes our findings ungeneralizable to most other forms of conduct."

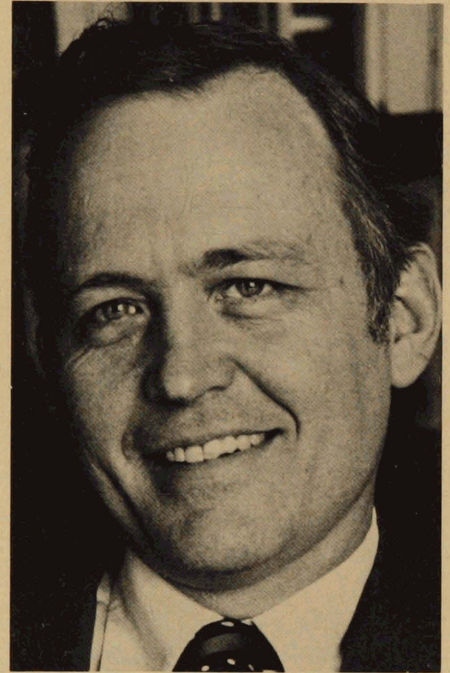
### **Carrington To Assume Duke Law Deanship**

Paul D. Carrington, a member of the U-M law faculty since 1965, has been named dean of Duke University's law school, effective July 1.

A specialist in civil procedure and the appellate courts, Carrington is also an authority on American legal education.

In 1971 he headed a study by the Association of American Law Schools, known as the "Carrington Report," which advocated major changes in the law school curriculum. Among other things, the study recommended reducing the law school program for general practitioners from three years to two, with extra training for lawyers who plan to specialize in a particular field or prepare for law teaching.

U-M law Dean Theodore J. St. Antoine noted that Carrington is "one of



Paul D. Carrington

the acknowledged leaders and most influential thinkers on problems of American legal education. He has been an extraordinarily valuable presence on the U-M faculty. I can't think of Duke's getting a finer dean."

A native of Texas, Carrington graduated from Harvard Law School in 1955. He taught at the universities of Wyoming, Indiana, and Ohio State University before joining the Michigan law faculty.

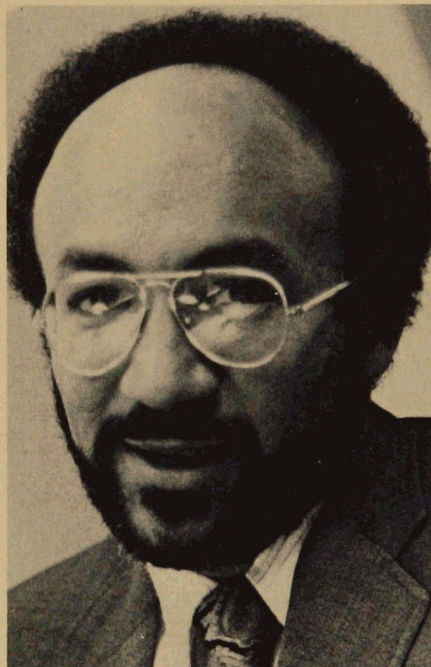
The law dean's post at Duke has been vacant since 1976, when Dean A. Kenneth Pye was named Duke chancellor. Pye called Carrington one of the nation's "most distinguished legal educators, a man of extraordinarily able leadership and expertise in matters of law school standards."

Among other scholarly work, Carrington co-authored a law school casebook in civil procedure. He is currently chairman of the Association of American Law Schools' accreditation committee.

## Harry Edwards Named To Railroad Board

Harry T. Edwards, a U-M law professor specializing in labor law and collective bargaining, is one of five new nominees to the 13-member board of directors of Amtrak, the National Railroad Passenger Corporation.

The five new nominees, along with



Harry T. Edwards

one board member who was renominated, were selected by President Carter. The nominations are subject to confirmation by the U.S. Senate.

Edwards returned to the U-M Law School faculty this fall, having spent the last two years at Harvard Law School, one year as a visiting professor and one as a tenured faculty member.

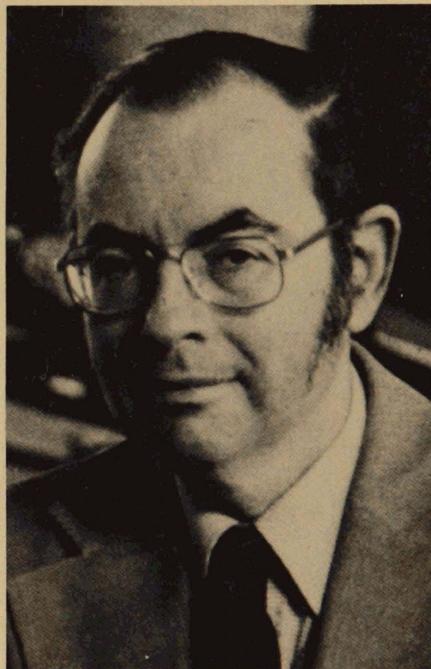
He had been a U-M faculty member since 1970, publishing extensively on such subjects as labor law in the public sector, collective bargaining and equal employment. A 1962 graduate of Cornell University, he received his law degree from Michigan in 1965. He had also worked for the Chicago law firm of Seyfarth, Shaw, Fairweather & Geraldson.

## "Official Morality" On Euthanasia Criticized

Last year, in the well-known Karen Ann Quinlan case, the New Jersey Supreme Court ruled that, in view of

Karen's comatose state, the girl's family or guardian could render the best judgment regarding discontinuance of the mechanical respirators which sustained her life.

Although the case has created much sympathy for legal rights of the terminal patient, the ruling has also tended to blunt the question of legal and moral culpability in "passive" euthanasia cases, where life support



Yale Kamisar

mechanisms or other medical attention is withdrawn, claims U-M law Prof. Yale Kamisar.

Delivering the distinguished James M. Mitchell Lecture at the State University at Buffalo recently — a lecture he titled *A Life Not (Or No Longer) Worth Living: Are We Deciding the Issue Without Facing It?* — Kamisar said that although the Quinlan case has been almost universally reported as a "right-to-die" case, he considered it more accurate to view it as a "right-to-kill" case.

"Up to the time that the Quinlan case caught the nation's attention, there was general agreement that the most important safeguard in the various proposals to legitimize one or more forms of euthanasia was the requirement that the patients personally request or consent to such a course of action. This safeguard was plainly lacking in the Quinlan case," said Kamisar. Karen had not "made a 'Living Will' or executed any directive requesting that she be allowed to die without 'medical intervention,'" said Kamisar. "Both the lower court and the Supreme Court of New Jersey

agreed (although their conclusions went largely unreported) that Karen's alleged previous expressions of her views on this issue were so informal, impersonal, abstract and equivocal as to lack the requisite probative value."

Kamisar said his reading of the opinion, briefs and oral argument led him to conclude that the New Jersey Supreme Court "would have reached the same result — authorizing discontinuance of the respirator — if the consensus were that the device could have kept Karen 'alive for 50 years rather than for one.'"

"Indeed, in the oral arguments some members of the New Jersey Supreme Court implied that, from their vantage point, the longer the respirator could keep Karen alive in this 'vegetative' condition the stronger the case for turning it off."

Thus, maintained Kamisar, "the result in the Quinlan case was not reached because Karen was 'dead' or even because she was 'dying,' but because her tragic condition was most probably 'irreversible.'"

But, observed Kamisar, "there are many thousands of others — severely mentally deficient and congenitally deformed children, adults suffering from senile dementia, severe mental retardation, massive brain damage — whose plight may be regarded by many as tragic as Karen's and whose symptoms may be as unequivocally described as 'irreversible' as is Karen's. The New Jersey Supreme Court, I fear, may have provided euthanasia proponents with something that has eluded them for decades — the bridge between voluntary and involuntary euthanasia, between the 'right to die' and the 'right to kill.'"

Kamisar voiced dissatisfaction with the distinction often drawn between "ordinary" and "extraordinary" means of medical treatment. He said he found the terms "quite spongy and used inconsistently in the literature. . . . To say that a simple operation to remove an intestinal blockage is a non-obligatory 'extraordinary' treatment when the patient is a Down's syndrome baby (commonly known as a mongoloid) or that the use of antibiotics to combat pneumonia is 'extraordinary' when the patient is senile or that insulin is extraordinary for a diabetic patient when he develops inoperable cancer is all very circular. . . ."

"Many proponents of the doctrine of extraordinary means in effect interpret 'extraordinary' to mean 'inappropriate under the circumstances,' but why? Evidently because there is no point in prolonging life under the

circumstances. Thus, as Professor Robert Morison has observed, it is not easy for an outsider to distinguish this interpretation of the 'extraordinary means' doctrine from advocacy of what is often called 'passive' or 'negative' euthanasia," said Kamisar.

Noting he has long opposed the views of Dr. Joseph Fletcher, a prominent theologian and medical ethicist and a leading proponent of euthanasia, Kamisar said he found himself in full agreement with Fletcher on one point — that it is morally evasive to condemn positive acts of euthanasia but to approve negative strategies to achieve exactly the same end.

Added Kamisar: "Dr. Fletcher and I agree on this point for very different reasons. His message is that, although psychologically more repellent, active euthanasia is essentially no worse than the passive kind when the end sought is the same. My message is that although emotionally or intuitively it may be much more appealing, passive euthanasia is essentially no better than the 'active' or 'direct' variety.

"Because he is convinced that 'negative' or 'passive' euthanasia is a *fait accompli* in modern medicine, Fletcher's purpose in belittling the active/passive distinction is to get more doctors (and others) to engage in active euthanasia and to feel more comfortable about it. Because I am dismayed at the degree to which passive euthanasia is evidently being practiced, my purpose in depreciating the passive/active distinction is to get doctors (and others) to re-examine what they have been doing 'passively' and 'negatively' and to feel more uncomfortable about it. For example, if 'negative' and 'passive' euthanasia are essentially the same thing, as Fletcher and I think they are, how can we possibly defend the 'bringing about the death,' albeit left-handedly, of Down's syndrome babies?"

Concluded Kamisar: "I believe [that] a public policy on 'letting die' should have to carry a burden of a social judgment about 'killing.' Some passive euthanasia should be permitted, but only when 'honest' or 'straightforward' euthanasia would be permitted. Not the mongoloid — I find that an easy case. But probably the so-called 'anencephalic monster,' an infant born with no cerebral hemisphere — the way in which one doctor described Karen Ann Quinlan's cognitive function.

"And quite possibly someone in Karen's condition as well. It's not the result I find so objectionable about the

Quinlan case, but the tortured reasoning of the New Jersey Supreme Court (the 'phoniness,' if you want to call it that). A serious case for euthanasia also can be made for some (but not most) spina bifida infants, those who are mentally retarded as well as paralyzed. . . .

"What I have just said may shock some members of the audience, but I feel compelled to say that we can no longer hold the line against euthanasia absolutely and unconditionally. Those who claim that we can and must turn out, on closer analysis, only to be avoiding the term 'euthanasia' — not the practice.

"The 'official morality,' to which many may still pay lip service, is a woefully outflanked 'Maginot Line' — outflanked by those who say they're against euthanasia but hasten to add that passive euthanasia is profoundly different — or that withholding 'extraordinary means' is significantly different — or that not 'prolonging the process of dying' is — or that 'judicious neglect,' whatever that means, is — or that not 'officiously' striving to keep alive, whatever that means, is. The time may well have come to bite the bullet and to try to establish rigid criteria and appropriate procedures for 'honest,' 'straightforward' euthanasia in very limited situations.

"This will be a 'dirty business,' but it is essentially the lawyers' business. For the euthanasia problem raises the most fundamental moral, political and legal questions, and if we lawyers are not well equipped to resolve them, who is? We lawyers do not relish the task, but if we shrink from it we shall be like a famous general who, according to Felix S. Cohen, 'objected to war on the ground that it ruined the discipline of the army.'"

### Alfred Conard Lectures To Tokyo Securities Lawyers

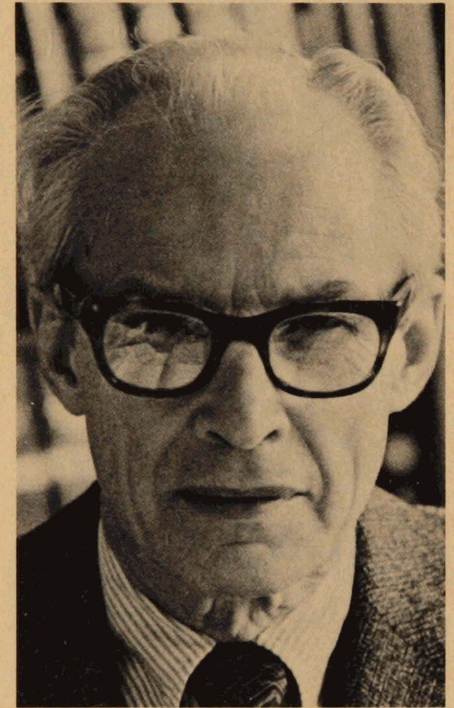
Foreign corporations and investors will have less trouble complying with U.S. Securities regulation in the future if the U.S. Supreme Court continues in its current pattern of legal interpretation, a U-M law professor told a group of Japanese securities lawyers at a recent symposium in Tokyo.

Speaking at the Japan Securities Research Institute, Prof. Alfred F. Conard said the Supreme Court, since 1973, has taken a "restrictive" view of U.S. securities laws, refraining from

extending such laws "to the maximum ambit of the legislative language."

Although most of these cases dealt with domestic rather than foreign investments, Conard predicted that the decisions will have "important implications for cases with dominantly foreign contacts."

Conard said a major factor in the pattern of U.S. judicial interpretation is "the avalanche of cases which is overburdening the federal courts,"



Alfred F. Conard

making the Supreme Court less willing to apply federal jurisdiction to "borderline" cases.

"After futile appeals to Congress for more courts and more judges, they (the Supreme Court) have apparently concluded that the best solution is to give a more restrictive interpretation to the reach of federal statutes. The securities laws, which have spawned a significant segment of the flood of cases, have been the primary target of the new wave of restrictive interpretation," according to Conard.

"The reasoning behind these restrictive decisions applies even more forcefully to cases involving foreign activities," said Conard, noting that foreign investment in the United States was not a major consideration of Congress in passing the securities laws.

The professor said that in securities cases from 1943 to 1972, the Supreme Court took a consistently "broad" interpretation of the reach of the law, while that precedent was reversed dramatically from 1973 to 1977.

Noting the increasing caseload, Conard said the "potential volume of worldwide securities disputes that have some U.S. contacts is frightening."

Conard, who holds the U-M Law School's distinguished Henry M. Butzel professorship, served as consultant to the Japan Securities Research Institute in early November. During his stay he answered questions on U.S. securities and corporation law for the benefit of a Japanese commission on the reform of corporation and securities law in that country.

Among other recent activities, Conard gave the keynote address at the second regional symposium on the "Structure and Governance of Corporations," sponsored by the American Law Institute and the American Bar Association's Section on Business and Banking Law. The symposium was at Sea Island, Ga., and the title of Conard's address was "The Corporation in American Life."

#### Four Professors Join "Three-Casebook Club"

There are probably fewer than 10 law professors in the United States who have authored or co-authored three different casebooks. Four of them are at the U-M Law School.

Last year, Profs. Olin Browder and Lawrence Waggoner joined the elite "three-casebook club" when they teamed with former U-M law Prof. Richard Wellman (now Robert Cotton Alston Distinguished Professor at the University of Georgia School of Law) to publish *Palmer's Trusts and Succession* (third edition 1977). (This is the successor to an earlier work by U-M Emeritus Prof. George Palmer).

The same trio — Browder, Waggoner and Wellman — are also co-authors of *Family Property Settlements* (second edition, 1973). Browder's third book is *Basic Property Law* (second edition, 1973) (with U-M Prof. Roger Cunningham and former U-M Prof. Richard Julin, now Dean of the University of Florida Law School). Waggoner's third book, also published last year, is *Federal Taxation of Gifts, Trusts and Estates* (with U-M Prof. Douglas Kahn).

Prof. Harry Edwards, who recently returned to the U-M Law School after a two-year stay at the Harvard Law School, joins the "three-casebook club" this year with publication of *Collective Bargaining and Labor Arbitration*. His collaborators are Leroy Merrifield and Donald Rothschild, both professors at the George Washington University National Law Center. Edwards' other books are *Labor Relations Law in the Public Sector* (1974) (with U-M Emeritus Prof.



Iron tailings discharge pipe at mine near Ishpeming, Michigan.

Russell Smith and R. Theodore Clark, Jr. of the Chicago bar, a leading labor law practitioner) and *The Lawyer as a Negotiator* (1977) (with U-M Law Prof. James White).

Prof. White is the fourth local member of the three-casebook club. In addition to his and Edwards' teaching materials on negotiation, White is the sole author of *Banking Law* (1976) and co-author of *Commercial and Consumer Law* (second edition, 1974) (with Richard Speidel of the University of Virginia and Robert Summers of Cornell).

#### U-M Study Focuses On Mine Reclamation

Michigan's Mine Reclamation Act, which governs the revitalization of land used in mining operations, is the "poorest such act in the nation" and does little to curb environmental degradation stemming from metallic mining, claims an article in the U-M's *Journal of Law Reform*.

The article argues that the 1970 act, and new 1976 administrative rules for its enforcement, are ineffective because they would do little to curb problems of soil erosion, water stagnation and other environmental and public health hazards caused by the dumping of metallic mining residue.

The article, named best student contribution to the *Journal of Law Reform* for the past school year, was written

by John C. Dernbach, a third-year student from Eau Claire, Wis. Preparation of the article involved a year's research, including visits to iron and copper mines in Michigan's Upper Peninsula, interviews with mining company officials and natural resource personnel, a review of reclamation laws in Michigan and 37 other states, and a study of relevant court cases.

With seven active iron and copper mines in the Upper Peninsula, Michigan is the nation's second largest producer of iron ore and the fifth largest producer of copper.

Because of the importance of the mines to the economy of the Upper Peninsula, claims Dernbach, the industry "has been insulated from a number of state environmental protection statutes, made privy to certain additional privileges, or subjected to legislation whose impact will be minimal."

Since 1970, says Dernbach, "metallic mining has involved the disturbance of more than 13,000 acres of land in Michigan. These operations present a number of largely uncorrected environmental problems.

"Inactive and unvegetated tailings basins are the source of substantial amounts of blowing dust. The construction and use of these basins often interferes with water tables and surface runoff. Waste rock piles are also an existing or potential aesthetic problem."

Among other shortcomings, Dernbach says Michigan's Mine Reclamation Act "contains no permit requirements (for mining operations), no meaningful penalties, no precise performance standards (for reclamation), and no bond forfeiture provisions (in the event reclamation is not carried out)."

He says the goals of the act are "exceedingly modest," dealing mainly with erosion control of inactive tailings basins and rockpiles through vegetation.

"This operational definition of reclamation as vegetative stabilization," argues Dernbach, "fails to consider the desirability of conditioning the land to such valuable future uses as recreation or economic development."

Here are other specific drawbacks of the Mine Reclamation Act, according to Dernbach:

—The range of enforcement sanctions are limited, with no provisions for "civil fines, criminal penalties, bond forfeiture, or the revocation or suspension of a permit upon violation of the act," says Dernbach.

—Michigan mines operate, in effect, under a "quasi-permit" system requiring mine operators to submit a long-range reclamation plan only at the request of state officials. By contrast, in most other states, mining operations "are prohibited prior to the receipt of a permit, which is not issued by the regulatory authority until certain requirements are satisfied," says Dernbach.

—Michigan's "performance standards" for reclamation are too general and do not deal specifically with metallic mining. Among other things, the standards should require that, "if the selected land condition involves a vegetative cover, the operator should be required to manage the area over a period of years bringing it into conformity with native vegetation, where desirable, and maintaining a proper soil nutrient balance until substantially certain that the vegetation

would be permanent," suggests Dernbach.

—Michigan's requirements for posting bond or other assurance that reclamation will be carried out are too loose, requiring that bond be posted only if the state "has reasonable doubts as to an operator's financial ability to comply with the rules." By contrast many other states condition the grant of a permit on the filing of a performance bond by the mine operator, notes Dernbach.

### Law Students Establish Public Interest Fellowship

Michigan law students have been asked to contribute to a new student-funded program designed to provide financial assistance to U-M law students involved in low-paying public interest legal work this summer.

Organizers of the new program, called the Student-Funded Fellowship Program (SFF), have asked that "all students who will be working in private law firms this summer pledge at least \$25" so that several fellowships can be awarded in the first year.

The program is modeled after successful ventures at two other major law schools. Appropriate summer positions include work with public interest or civil liberties organizations, legal aid or public defenders' offices, or government and legislative groups, notes SFF.

"SFF's purpose is to enable students to pursue summer work in public interest law as a prelude to accepting permanent positions in this area. SFF will be of particular interest to students who otherwise might not be able to explore public interest law because of its low summer pay. The program seeks to guarantee that SFF participants' income from all sources will total \$125 to \$140 weekly," says a program announcement.

Robert Santos, Law School Student Senate president, has asked a group of students to formulate criteria for fellowship eligibility and has requested the Law School to administer contributions through the Law School Fund.

Students seeking more information about SFF should contact Robert Santos, Jeff Cecil, Sheila Haughey, Stewart Feldman, or Ed Krauland.

# alumni notes

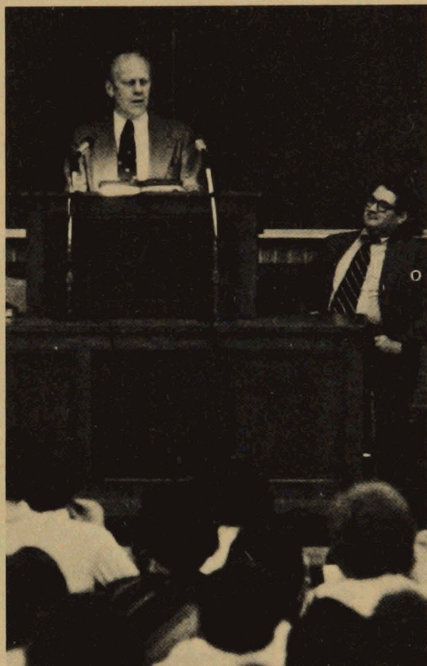


Judge **Cornelia G. Kennedy** of the U.S. District Court for eastern Michigan assumed new duties as the court's chief judge in November, becoming the first woman in the nation serving as chief judge in a federal court. Judge Kennedy, who earned her law degree with highest honors from the U-M in 1947, moved up to the new position on the basis of seniority after U.S. District Judge Lawrence Gubow, a member of the federal bench since 1968, declined the post for personal reasons. Appointed to the federal bench in 1970, Judge Kennedy previously was elected to the Wayne County Circuit bench. Among other firsts achieved by the U-M law alumna, she was the first woman to chair the Negligence Law Section of the State Bar of Michigan, and the first woman elected a director of the Detroit Bar Association. Named by the Greater Detroit Chamber of Commerce as one of the "Top Ten Working Women of 1971," she was cited for "consistently demonstrating wisdom and fairness in dealing with all persons and cases brought before her court."

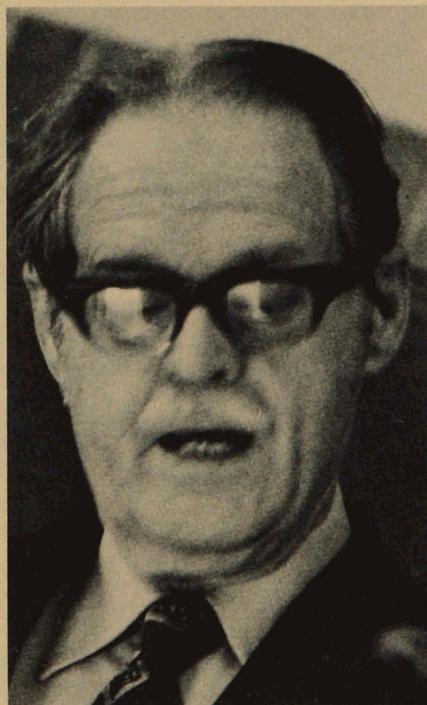


# events

Gerald R. Ford at Law School . . .



. . . and at football strategy session with Coach "Bo" Schembechler.



Norman Anderson

Paying his second visit to the University since leaving the White House, former President **Gerald R. Ford** lectured at the Law School as part of a three-day stay at U-M in November as adjunct professor of political science. A 1935 Michigan graduate, Ford attended U-M Law School during the summer of 1937 before receiving his law degree from Yale. Speaking on "The President and the Congress," Ford told law students that, in his view, the Congress has steadily encroached on Presidential powers in both domestic and foreign affairs since the 1950's. Discussing the Supreme Court's Bakke case dealing with alleged reverse discrimination in higher education admissions, Ford commented: "I strongly support effective affirmative action programs that stop short of arbitrary numerical quotas." And in the international trade field, Ford said he was opposed to instituting high tariffs, more rigid quotas and other permanent protective measures to ward off unfair U.S. competition from foreign manufacturers. Instead, Ford said he would advocate "negotiated temporary quotas" as well as new legislation to out-

law such practices as the "dumping" of foreign products in the U.S. at illegally low prices. As part of his visit, Ford met with U-M football coach "Bo" Schembechler and the Michigan Wolverines, and viewed the future campus site of the Gerald R. Ford Presidential Library.

**Sir Norman Anderson**, a professor of Oriental laws at University of London, delivered the inaugural lecture this fall in a series on Islamic studies, sponsored by the U-M Center for Near Eastern and North African Studies and the Law School. Speaking in Hutchins Hall, Anderson said "the study of another legal system enlarges the study of one's own. Islamic law makes a particularly interesting contrast to the English-American common law system, as the former is regarded by Moslems as divine law firmly grounded in divine revelation, while the latter is essentially secular. Moslems believe that the law was revealed to Mohammed by the Angel Gabriel little by little, and written in the Koran. The law then developed from interpretation of these verses."

# Jury Size & the Peremptory Challenge

## Testimony on Jury Reform

by  
Richard Lempert  
Professor of Law,  
University of Michigan

This article was submitted jointly by the author and Dr. Jay Schulman as prepared testimony, supplementing Dr. Schulman's oral testimony of September 22, 1977, to the Senate Judiciary Subcommittee on Improvement of Judicial Machinery. The subcommittee was considering Senate Bill 2074, an omnibus bill which, among other things, would have required all United States District Courts to switch from twelve to six member juries in civil cases and would have decreased the number of available peremptory challenges in civil cases from three to two. Upon completion of the hearings on this bill, these provisions were deleted from the version sent to the full Committee. It should be noted that most District Courts by local rule use six member juries in civil cases. The argument in the text suggests that the Congress might wish to forbid this practice by statute or at least limit it to certain categories of cases.

In this statement we address two issues raised by Senate Bill 2074: the issue of jury size and that of the peremptory challenge. We begin by discussing the ideals of our system of jury justice and the ways in which the operating system necessarily falls short of the ideals.

### General Considerations

The ideal jury (a) is representative of the people living within the jurisdiction of the court, (b) is unbiased, (c) decides a case on the basis of the evidence presented, (d) evaluates the evidence in the light of the judge's instructions on the law, and (e) in appropriate cases mitigates the rigidity of the law by reflecting in its verdict fundamental principles of justice and morality. With the exception of the last point most of those who have written about the jury should agree with this description of the ideal. Point (e)

causes disagreement because of its obvious inconsistency with points (c) and (d); if an honest evaluation of the evidence and a good faith application of the law always led to just, moral results, arguments concerning the propriety of what has come to be called jury nullification would not arise. We will not comment on the matter of jury nullification except to note that our system has developed a peculiar compromise in this area—in most jurisdictions jurors have the de facto power to nullify the requirements of the law and evidence (or in civil cases to "season" the requirements of law with its own sense of justice) but they are not told they have it. Instead, we wish to note another tension and the compromises our system uses to cope with it. This is the inherent tension between the ideal of the representative jury and the demand that the jury be unbiased, competent in its evaluation of the evidence, and comprehending in its application of judicial instructions.





Representatives drawn randomly from a community share the biases and prejudices that characterize members of that community. The prejudices may be irrelevant to the matter being litigated, they may be benign, or they may run counter to values that are deeply engrained in our legal system. Common prejudices include the belief that a police officer's word is better than the average citizen's as well as the belief that no police officer can be trusted. They range from the feeling that no tort judgment is excessive because the insurance companies exist to pay claims to the feeling that only a chiseler would seek to collect for pain and suffering. Prejudices color the way in which jurors evaluate evidence, yet often even unprejudiced jurors are likely to be incapable of appreciating the true value of evidence presented. Finally, it is clear that jurors sometimes have difficulty in understanding judicial instructions and applying them to the facts of a case.

Others have noted the tension between the demand that juries be competent, unbiased factfinders and the requirement that juries be representative of the larger community. This observation is typically the empirical linchpin in arguments made by those who, at least in civil cases, would abolish the jury and transfer its factfinding functions to the judge. But those who argue this way make a fundamental mistake. They attribute the jury's deficiencies to the fact that individuals chosen arbitrarily from the community are sometimes uneducated, sometimes uncaring, and typically legally naive. In fact, most of the drawbacks attributed to the democratic nature of the jury have little to do with the representativeness requirement. Instead they are attributable to a simpler, inescapable source: the human condition. People collect biases as they go through life. While they may differ in their ability to disregard them, there is probably no one whose observations will not at some time be affected by his biases. Even if such an individual existed, his evaluation of evidence would still be far from perfect. A substantial body of research now exists demonstrating ways in which people consistently misestimate the implications of information given them.

Judges, alas, are also human. They can no more escape the dangers of biased perception and fallible information processing than the jurors over whom they preside. If judges have an advantage over jurors in their presumed understanding of the law, they are disadvantaged in that their public position subjects them to pressures that may systematically reinforce or create biases. Indeed, judges are at times elected or appointed in part because of the appeal of biases that are ideally irrelevant in the factfinding process. Furthermore, judges typically play an administrative as well as a judicial role. As administrators they are necessarily concerned with the efficient functioning of a judicial bureaucracy. Too often behavior which promotes bureaucratic efficiency is antithetical to our system's ideal of individualized justice. In such matters as criminal sentencing, judicial behavior may be influenced by the legally irrelevant consideration of whether the court's time has been "wasted" by a jury trial. In civil trials some judges reportedly engage in considerable "arm twisting" to promote out-of-court settlements. We note these factors not to condemn judges; they would not be human if they were not at some times influenced by the bureaucratic and other pressures brought to bear on them. But these pressures do mean that there is inherent value in an institution, such as jury trial, that guarantees the insertion of a non-bureaucratic element at a key point in the trial process.

What then is the attitude that the Congress should take toward jury reform? It is not a romantic idealization of the jury; there is no reason to think that the jury today is a perfect factfinder or that it ever will be. But by the same

token the jury should not be regarded as an imperfect substitute for a judge, an institution that will necessarily improve as it comes more closely to resemble or be influenced by one exalted individual learned in the law. In particular, the Congress should be skeptical of reforms that merely save money (given that the amount of money expended on jury trials is a pittance compared to our total expenditures on the justice system and this sum is in turn but a minute portion of governmental budgets) and particularly suspicious of reforms whose primary virtue is that they ease the tasks of judges and court administrators. The continued vitality of the Sixth and Seventh Amendments should be accepted as a starting point. This means that jury trial will necessarily be with us in the foreseeable future. The issue is how may the institution be made more effective in promoting the valued goal of fair and accurate factfinding. The starting point for inquiry is with the apparent weaknesses of factfinding by average individuals.

### Jury Size

We specified three possible deficiencies in lay factfinding: the biases may influence perceptions, the probative weight of evidence may be distorted, and instructions on the law may be misunderstood. These are all problems that are ameliorated by group decision making. In groups, expressions of bias may be inhibited or properly dismissed as individuals with conflicting points of view call each other to account. Totally apart from bias, group factual judgments tend to be more accurate than those made by individuals. An individual is at all times left to his own devices while a group may receive contributions from many individuals. Where, for example, memory is important as in recalling the testimony of various witnesses, one individual may recall certain facts while another recalls others. Where a problem is inescapably ambiguous, error variance is reduced when individual judgments are averaged together. Where understanding is difficult, as with a judge's instructions, a lone decision maker is lost if he does not understand. A person in a group may benefit from the understanding of others. Groups, in short, are in many ways as strong as their strongest link.

These advantages of group decision making are more pronounced as group size increases, until the point where the contributions of new members are offset by increasing problems of coordination and morale. However, even before the point of negative returns each additional new member is likely to add somewhat less to the quality of group decision making than the person before him. The question facing the Congress is whether differences in the quality of decisions rendered by six and twelve member groups are likely to be so great that the quality of jury justice will be decreased by mandating the smaller number. Our feeling is that this is the case. In clear cases, six and twelve member juries should decide similarly, although the occasional decision against the weight of the evidence will be more common with the smaller group. In close cases, decisions of larger juries should, on the average, be better with respect to such core legal values as unbiased factfinding, thorough consideration of the evidence, and consistency across similar cases.

It can be shown statistically that minority viewpoints are substantially more likely to be represented in (more or less) randomly chosen groups of twelve than in similarly chosen groups of six. The greater heterogeneity of the larger group makes it a setting in which individual prejudices are more likely to cancel out and in which individuals with valuable specialized knowledge or particularly astute insights are more likely to be available. A further advantage enjoyed by

larger juries is that they are more likely to render similar decisions in similar cases. Where individual judgments are averaged, as is often the case in civil litigation despite the official disrepute of quotient verdicts, averages taken across twelve individuals are likely to diverge less than averages taken across six. Even where judgments are not averaged, groups of twelve are more likely to resemble each other than groups of six, in that larger groups more accurately reflect the population from which they are drawn.

In short, both statistical modeling and the existing research on small groups make it clear that proponents of six member juries cannot substantiate the claim that such juries are likely to be better decision makers than juries of twelve. Indeed, even the weaker burden of showing that the switch to smaller juries will not positively harm the quality of jury justice cannot be met. While proponents of larger juries cannot specify precisely the degree to which the decisions of twelve are likely to be better than those of six, a fair reading of the evidence indicates that the advantage generally lies with twelve, perhaps by a considerable margin. Thus, it is our strong recommendation that Congress not interfere with those federal district courts that have been able to resist the bureaucratic siren song of six member juries, choosing to opt for the higher quality of delivered justice likely to be associated with juries of twelve.

Indeed, our preference is a statute requiring all districts to allow litigants the option of a larger jury, at least in cases where substantial amounts of money are at stake or important values clash. The additional expense of larger juries is miniscule relative to the federal budget and slight relative to total judicial expenditures.

Some have asked, "If twelve jurors are better than six why aren't thirteen or fourteen jurors better than twelve?" This question is put forth as if it were a response to the arguments of those who favor the retention of the twelve member jury. It is not responsive. If fourteen jurors in fact perform better than twelve this fact supports rather than undercuts the conclusion that twelve jurors perform better than six. Those who write on jury size rarely address the issue of juries larger than twelve because the debate over jury size is for practical purposes constrained by political reality and today's political reality is that juries are going to be of no more than twelve members. Nonetheless, it is interesting to speculate about the desirability of juries with more than twelve members. Several points can be made. First, we do not know whether juries of sizes thirteen, fourteen, fifteen, or higher might reach decisions of a higher quality than those reached by twelve member juries in some or all cases. Second, the value of additional jurors apparently increases at a decreasing rate. Thus, any increase in the quality of jury decision making that results from going, for example, from twelve jurors to fourteen is not likely to be as great as the increase brought about by going from ten jurors to twelve.



Finally, as we increase jury size much above twelve coordination and/or morale problems are likely to set in which will more than offset the incremental contributions of the new jury members. At what size this occurs, we cannot say. Given the experience with juries in this country, we are reasonably confident that these problems do not cause grave difficulty in juries of twelve.

### Peremptory Challenges

A second proposed "reform" is reducing the number of allowed peremptory challenges in civil and criminal cases. Some who argue for fewer peremptory challenges view them as a device by which adroit attorneys can pack juries with those biased in their favor, while others believe that peremptory challenges distort juries by making them less representative of the population from which their members are drawn. While we recognize that attorneys do on occasion eliminate people because of their leadership potential or education rather than because of perceived bias, we nonetheless believe that the first view is largely mistaken. Given the limited number of peremptory challenges, their availability to both sides, and the fact that challenged jurors are replaced at random, the most an attorney can usually do is eliminate those jurors likely to be prejudiced against his or her client. Only in special circumstances, where community views disproportionately favor one party or a case appears hopeless to begin with, can an attorney afford the luxury of eliminating the unbiased.

There is more substance to the claim that the use of peremptory challenge lead to a less representative jury, but this by no means makes the case for reducing the number of peremptory challenges. Although maximizing the degree to which the jury represents the community may have value in itself, few would think this value more important than maximizing the likelihood of fair factfinding. Some viewpoints found in the community should not be represented on juries. An obvious case is the viewpoint of one so closely related to a party that his decision is likely to be colored by that relationship. Another obvious example is the viewpoint of one so convinced before trial that a certain outcome is appropriate that he will resist the influence of the evidence.

The right to challenge jurors is essential because where values clash it is more important to have jurors who can be fair in their judgments than it is to have a jury that mimics the demographic or attitudinal composition of the community. Challenges are devices for eliminating from juries individuals whose prejudices are likely to interfere with their ability to be impartial triers of fact. The group of jurors who survive the challenge process may be less representative of the community from which they are drawn than the original group of unchallenged jurors, but they are more likely to render a judgment fairly responsive to the evidence in the case. The trade-off between representativeness and fairness strengthens rather than weakens the quality of jury justice.

Many individuals accept the above argument in the case of the challenge for cause, but do not believe it applies to the peremptory challenge. Those who make this distinction do not realize how the system of challenging for cause is often administered. While there are circumstances, such as a close family relationship to one of the parties, where a

challenge for cause must be allowed, the system is generally one of great judicial discretion. Many judges are reluctant to exclude jurors for cause despite an obvious source of bias if the juror states that his decision will be unaffected by the apparent cause for concern. Appellate courts typically support such lower court decisions. For example, plaintiff's attorney in a suit brought against an insurance company might wish to challenge for cause a juror whose parents were agents for some other insurance company. If the juror states that these family ties will not influence his decision, a challenge for cause will be unavailable in many courts. The decision not to exclude for cause in these circumstances may be justifiable, but it is not justifiable on the ground that the juror can be trusted to disregard the obvious source of bias. A promise to put aside one's biases is inherently suspect because people are often unaware of how their biases affect their judgments. The promise is even more suspect when it is made in a setting where one might be embarrassed to admit that he could not be fair. If the promise is suspect, the quality of jury justice is likely to be enhanced by disregarding disclaimers of prejudice where any likely source of bias is revealed on voir dire.

This alternative, however, has its disquieting aspects. People rarely ask to serve on juries and they surely do not ask to be publicly questioned in ways that cast doubt on their integrity. To dismiss for cause a juror who has asserted his capacity for separating judgment from prejudices may be perceived by the one dismissed and by others as degrading or insulting. We should be reluctant to add this kind of burden to the other burdens of jury service. Furthermore, the likelihood that a person will be influenced by apparent sources of prejudice will not always be as clear as in the example of the preceding paragraph. Judicial intuitions about when an asserted capacity for unbiased judgment should override suspicions of bias almost surely will vary from judge to judge and individual judges might well be inconsistent over time. One situation poses almost insoluble difficulties for a system which relies on the challenge for cause to eliminate individuals whose prejudices would interfere with fair jury factfinding. This is where a suspicion of bias is engendered not by some particular feature of the juror's biography or by some specific prejudice, but rather by a set of diffuse attitudes that characterize the juror's outlook on life. An individual low in tolerance of ambiguity and high in deference toward authority might be likely to approach a criminal defendant with a presumption of guilt rather than innocence. Yet we can hardly expect a judge to attend to all the character traits that might predict to biased judgments. We have even less reason to expect an appellate court to declare that they do predict as a matter of law.

If we relied on judges to exclude for cause all individuals likely to be incapable of fair judgment and if current practice is a guide, the error of failing to strike biased jurors would be more common than the error of striking the unbiased, but both should occur. The latter error should never be grounds for appeal since the struck juror would, in theory, be replaced by one equally unbiased. The former error, being defined by psychological rather than legal theory, would be very difficult for appellate courts to handle. Hence, trial judges would be likely to be given considerable discretion which, in practice, would be largely unreviewable. Thus, attempts to eliminate juror bias by an expanded conception of what constitutes grounds for challenge might lead to a system which was in practice only slightly more effective than the current one.

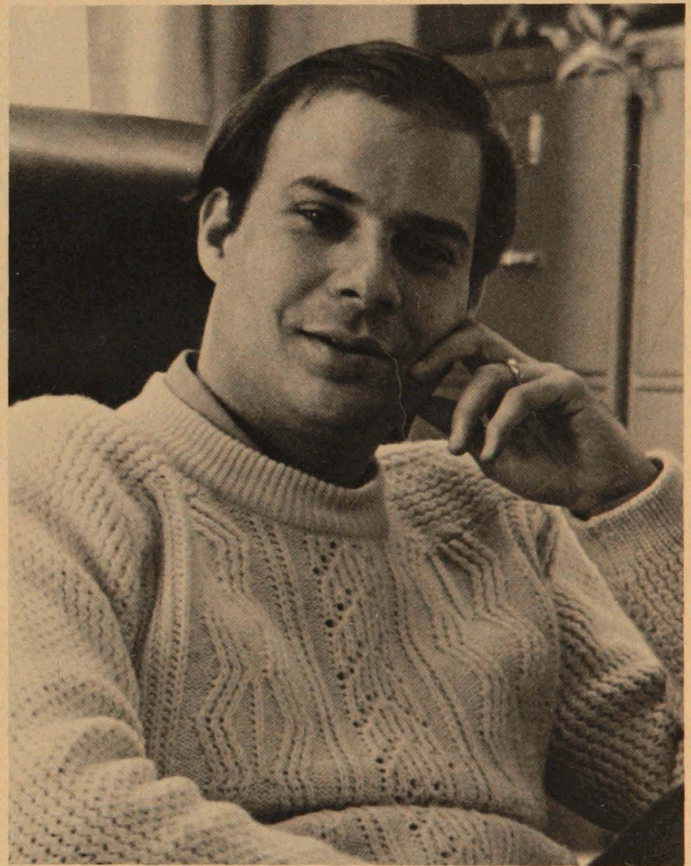
The availability of peremptory challenges minimizes tensions inherent in our system of challenges for cause. The primary virtue of the peremptory challenge is as a device

for eliminating from the jury individuals whose capacity for impartial judgment is suspect, but not so much so as to require their exclusion as a matter of law. The peremptory challenge has the further virtue of saving face for jurors who have asserted a doubtful capacity to decide in an unbiased fashion since these assertions are never rejected by the court in the way that they would be if a challenge for cause was sustained. Mistakes, no doubt, continue to be made, but they are the mistakes of the parties who suffer from them and not the mistakes of the court. Finally, the availability of peremptory challenges allow the courts to take what is, psychologically speaking, an unduly restrictive view of when potential jurors are likely to be impermissibly biased without endangering the quality of jury justice as substantially as would be if prejudiced jurors not challengeable for cause could not be removed peremptorily. By limiting the situations in which challenges for cause must be granted, appellate courts minimize the chance of reversible error during the jury selection process.

There is no ideal number of peremptory challenges. Their availability would vary with incidence of potentially biasing attitudes in the jury population. Generally speaking, people's biases are more likely to be activated in criminal than in civil matters and these biases are more likely to favor the prosecution than the defense. This justifies the decision to grant more peremptory challenges in criminal cases than in civil actions and it would also justify a decision to grant criminal defendants more peremptory challenges than prosecutors. While the number of available peremptory challenges may be made to turn on whether an action is criminal or civil, it is impossible to specify in advance appropriate numbers of peremptory challenges for different types of civil litigation.


Assuming some number is fixed for civil litigation, flexibility may be achieved by judicial administration of the challenge for cause or by judicial discretion to increase the number of peremptory challenges available to one or both parties. Where an action is likely to evoke popular prejudices, the judge should be more willing to allow challenges for cause despite disclaimers of bias than when an action appears less emotionally charged. If popular prejudice is directed largely against one side, that side should have the easier time in excluding jurors for cause or should be allowed extra peremptory challenges. If one party is to be awarded extra peremptory challenges, that party should bear a substantial burden of showing that prejudicial public opinion is widespread and deeply held. Whatever the judge's discretion with respect to challenges, the number of peremptory challenges should be sufficient to allow for the judge who is unduly rigid in his attitude toward for-cause challenges. It should allow room to challenge individuals whose attitudes suggest bias even though their biographies or acknowledged prejudices do not, and it should take into account the fact that individuals often have general biases regarding the kinds of people and organizations who are parties to typical civil actions. At the same time, it should not be so large as to allow an attorney too many opportunities to eliminate those who are likely to be unfavorable by reason of their abilities to rationally evaluate evidence rather than because of bias.

While we cannot specify an appropriate number of peremptory challenges in civil litigation, we feel strongly that with twelve member juries three peremptory challenges are likely to be inadequate in many cases. Cutting the number of available challenges to two would be most unfortunate. Whatever the number allowed, we believe the parties should have the option of increasing the number of available peremptories by mutual agreement.



Richard Lempert

This statement offers no substantiation for the many empirical propositions that lie at the root of it. For substantiation of the argument with respect to jury size see: Richard Lempert, "Uncovering Nondiscernible Differences: Empirical Research and The Jury Size Cases," 73 *Mich. L. Rev.* 643 (1975) and the studies cited therein. For substantiation of the points regarding peremptory challenges see: Barbara Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 *Stan. L. Rev.* 545 (1975); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,* 27 *Stan. L. Rev.* 1493 (1975); Dale Broeder, *Voir Dire Examinations: An Empirical Study,* 38 *S. Cal. L. Rev.* 503 (1965); and Virginia R. Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to The Problem of Jury Bias,* 1968 *Wis. L. Rev.* 734.



# The Crumbling Institutions of the Post World War II Liberal Trade System

by  
John H. Jackson  
Professor of Law  
University of Michigan

Based on a speech  
delivered at the  
Trade Policy Research  
Center, London, England  
October 20, 1977



Many perceptive observers feel that we are currently undergoing the greatest challenge to the liberal trade system, including GATT (The General Agreement on Tariffs and Trade), since the formulation of that system in the immediate post World War II period. Certainly the signs are ominous—in the U.S., in Europe, and elsewhere. Little progress has been made in more than four years of international trade negotiations; formidable domestic political forces are organizing coordinated campaigns for greater limitation of imported competing products; and national governments have been taking actions in blatant disregard of their legal and moral obligations concerning international trade. Where it will end we don't know. Everyone present can easily conjure up a doomsday scenario, some relying on analogies of the disastrous policies of the 1920's and 1930's. But I don't feel such pessimism is warranted yet. Nevertheless, it behooves us to pay attention to the possible causes of the current crisis, and it is instructive to remember that the crisis was predictable and indeed predicted, so that its arrival should not be astonishing even though it may be agonizing.

## 1 The Causes

What are the causes of the crisis of confidence in the international liberal trade system so successfully implemented during the past three decades? I suggest there are at least five such causes, many of them quite obvious.

First, it is obvious that the sustained and often apparently intractable sluggishness of the world economy in recent years would place considerable stress on any system of economic or political organization. Whether this is due to the pricing revolution over oil or more fundamental causes such as a possible reevaluation of the relationship of the quality of life to material production, is not my subject. Clearly the relatively high unemployment coupled with inflationary trends provokes great political pressures, especially in nations with slim government majorities. These circumstances distinguish our current international economic crisis from those of prior decades, such as the period of monetary crisis in the late 1960's.

Second, I think we face a growing skepticism about the economists' model of liberal trade and comparative advantage. The economists themselves have continued to refine the model and have noted the uncertain plausibility of some of the assumptions. For example, the model may not be adequate for policy decisions during a time of declining economic activity, or in the face of monopolistic forces, or in relation to important non-economic goals of particular countries. In particular, the vast majority of citizens in our trading democracies do not, I believe, accept the macro models which preach a greater good for a greater number, when these citizens personally witness heartwrenching dislocations caused by significant loss of employment. Some of

this citizen skepticism, of course, is promoted by clever propaganda—some by simple economic naïveté—but it exists, and powerfully influences government action even when beleaguered public servants strive valiantly to stem the tide.

Third, there is a growing recognition of the dangers and disadvantages of economic interdependence. Thoughtful persons are asking whether further trade liberalization can bring worldwide welfare benefits commensurate with the costs of added insecurity and instability of economies. Thoughtful citizens are entitled to ask whether there may be a theoretical limit to desirable trade liberalization, in other words the need for some trade barrier at the border to prevent economic damage from flowing too quickly from one nation to another, a sort of "bulkhead" conception. Perhaps most significant, it becomes increasingly clear that economic interdependence does in a realistic sense reduce national sovereignty. This means that issues formerly religiously reserved for national control, such as interest rates, monetary supply, government budget policy, unemployment assistance, now become accepted agenda items for summit and other international meetings. It also means that a nation has less scope for experimenting with various models of structuring its economy or society. This is inevitably a source of frustration for national politicians, particularly at a time when citizens tend to impose greater responsibilities on their governments for their material well-being and their quality of life. For example, how can environmental protection or consumer protection policies be developed in the context of international competition?

Fourth, there is, I believe, a greater degree of divergence between the economic structures of major participants in the GATT trading system than formerly recognized. At a time when major economic thought in the United States is influencing a reduction in government control and participation in the economy, manifested by moves to "deregulate" segments of the economy such as airline travel, to reduce or restructure taxes, and to introduce "user charges" for many types of governmental services, Europeans appear to be moving in a contrary direction as manifested by the establishment of significant industrial policy and regional aid, pressure for further nationalization, and continued toleration of a much higher degree of government ownership.

The international trading system assumed by the GATT rules is one primarily of decentralized economic decision making sometimes described as "free enterprise." It has long been recognized that socialist and state trading economies can easily evade the purposes of the GATT rules. Yet, until the success of recent decades of trade liberalization brought the degree of interdependence we have today (along with, one must add, great benefits of comparative advantage and economies of scale), we perhaps did not realize how difficult it would be to obtain a smooth meshing of the gears of the diverse economic systems

manifested by Japan, Europe, the United States, and many developing countries. The current rules on subsidies and countervailing duties, for example, are woefully inadequate to cope with the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) government aids to exports. In a macro sense consumers in the importing economy may benefit—at least temporarily—but in a micro sense the domestic producer feels outraged that while playing by the free enterprise rules he is losing the game to producers not abiding by such rules.

The pressures for power centralization and for uniformity that are caused by greater economic interdependence and trade liberalization are amply demonstrated historically. In the U.S. (a very successful customs union!), we have seen 200 years of progressive centralization. More recently in the European Economic Communities, we see similar tendencies as free trade policies go hand in hand with free movement of workers and of capital, which lead to the need for harmonization of monetary policy, product standards and liability rules, and ultimately to the necessity to coordinate the greatest sovereign hold-out of all—government taxation. How can we reconcile these effects of trade liberalization with notions of sovereignty or economic “federalism,”—that is, the desirability to keep decision making as decentralized as possible to allow diverse societies to pursue particular social, religious, or philosophical goals, and to experiment with economic structures?

In addition, when some advocate commodity agreements on a grand scale, or a system of “organized free trade,” we know that the conception of the world trading system envisaged by that nomenclature is hardly that contemplated by decentralized or enterprise decision making.

Thus in approaches to the rules of world trade—to implement or to reform—there is fundamental disagreement on the goals. No nation today is prepared to tie itself irrevocably to a structure that may require it to abandon its own conception of world trade or of its own goals for its internal economic structure.

Clearly then, we can see in this fourth reason for the current crisis some constraints on possible solutions, as well as defects in the current system. The issue of “government structured” versus “price mechanism or free enterprise” methods of organizing world trade will not and cannot be decided in the near or perhaps even intermediate future of the next several decades. What is necessary is compromise and experimentation. What then is also necessary is the institutional framework which will permit and indeed assist such compromise and experimentation. We do not at present have those institutions, and that brings me to my next point.

The fifth and perhaps the most important cause of our current crisis challenging the trading system is, I believe, the weakness and near breakdown of the international institutional framework for the trading system. By this I mean the GATT, which I must say has served us remarkably well heretofore, as well as the whole mosaic of other international (and to some extent national) institutions that bear on trade, including “Bretton-Woods System.”

This cause may not be so obvious as others that I have enumerated. Institutional causes of events are often less obvious, more remote in a causal chain, and harder to quantify and therefore harder to generalize. Here is my evidence, which you can evaluate in the light of your own judgments.

The GATT has a flimsy constitutional basis, originating in an agreement never intended to become the central organizing mechanism for world trade. Partly as a consequence of this the GATT has never been “definitively applied,” and many of its rules are subject to “prior national legislation” the so-called grandfather rights which have engendered acrimony. Partly because of its ambiguous legal basis, the GATT has not developed a staff and secretariat able to cope with the extraordinary complexity of world trade and to provide substantial leadership for trade policy. The amending process of GATT is cumbersome and some say impossible, so there is a tendency to go outside the GATT structure to conclude ad hoc “side agreements” and as these aggregate, the structure becomes more complex and inconsistent, harder to change and only ambiguously subject to some of the GATT procedural rules such as dispute settlement or waivers. In addition, the voting structure is blunt and subject to abuse, and the principal other technique of positive initiative — massive negotiating “rounds”—may be wheezing its last important gasp in the frighteningly cumbersome Geneva negotiation known as the Tokyo Round. I could go on, but I won't here; I can refer you to other statements on this subjects.

Because of these institutional weaknesses, the GATT which has been called flexible, is actually very rigid. Its flexibility lies in the ease with which parties can evade its rules. Because of the rigidity, it has been impossible to keep the trade rules up to date, and in the face of fast-changing international developments we find that almost every rule of GATT is inadequate to the present problems of world trade. Often this is because of gaps in the rules permitting evasion of their intent, e.g., import deposit schemes, variable levies, government assistance to exports not clearly a “subsidy,” export “inflation insurance,” “surveillance” techniques of inhibiting imports, and on and on. Other rules are inadequate because they are wrong or have become wrong in theory, i.e., they permit what policy makers agree is less desirable, such as import quotas for balance of payments reasons, while prohibiting a preferable response, such as tariff surcharges. The result has been flagrant violation of the rules tolerated by the GATT community. Once some rule breaches are tolerated then it becomes easier to get away with the next infraction, so we see minimum import price protectionist systems, specific mixing requirements, arbitrary valuation systems, and so on, to say nothing of the ubiquitous orderly marketing agreements sometimes called “voluntary.” Furthermore, there is a large category of practices that have barely a colorable argument of justification under the GATT.

Lack of effective dispute settlement mechanisms allow the bold transgressor virtual immunity by simply repeating, time and time again in the halls of GATT, a sophistic legal justification.

Negotiation might be a satisfactory way to pursue rule changes, but the habit of waiting for major trade negotiation rounds as a sort of “shopkeepers haggle” where reciprocity forces every country to preserve its “bargaining chips” for the “big package” to be negotiated, a sort of not-too-figurative game of monopoly, has stymied even modest progress on even relatively simple issues for years. We cannot tolerate a system which inhibits rule changes more often than once every twelve years. Indeed, it is yet to be proven that the trade round negotiations can satisfactorily conclude new rules on non-tariff-barriers, especially under archaic and (inappropriate) notions of reciprocity and most-favored nation treatment.

Even if a rule were clear and up to date, however, it is doubtful that absent good faith of at least all major trading countries the rule could prevent inappropriate conduct in the face of the extraordinarily ambiguous GATT procedures for handling disputes and transgressions. And today we do not have good faith in the participants. Nations are acting shamelessly and fraudulently as some would say governments are always prone to do. The tragedy is that a defective rule system tends to punish those who abide and reward the transgressor. This encourages evasion and further erosion of the rules.

This is not to say no rule transgression can be tolerated; no legal system can survive under such a strict criterion. But when the level and frequency of the transgressions reaches a certain point, the rules and perhaps the whole rule system ceases to be an effective tool for government policy. Citizens or nations can then no longer depend on abiding non-transgressing conduct of others, so they must take defensive action: either carry their own pistols, or build walls around their house or nation.

That is perilously close to an accurate description of the state of nature in which the international trading system finds itself today.

Because of this situation, nations do not trust each other. We have the chicken war, the cheese war, the wine war, and other gastronomic delights. We have in effect a set of sartorial wars also involving shoes and textiles. And with steel, TV's, and automobiles we manage to make the game interesting as well as vital. Europe worries that its fundamental agriculture policy will be challenged and paranoically resists any negotiation on the subject. The U.S. worries that its steel and television industries will drift offshore under the onslaught of foreign governments bound to export their unemployment problems. And so it goes.

The lack of confidence of governments has a broader and more pernicious effect than the promotion of more intergovernmental consultations at culinary capitals of the world. The private businessman, watching these contests unfold, and noting that the rules no longer mean what they say, realizes that he cannot base his business and investment decisions on the assumption that nations will follow the rules. As the recent GATT study so poignantly illustrated, “such uncertainty is inhibiting investment at a time when additional investment is crucial. . . .”

Thus, the crisis feeds on itself, and the vicious circle expands.

## 2 Defects of the System

Before I turn to some of the needs and defects of the institutional system in particular which demand improvement, I would like to say a word about the techniques of conducting international policy. It seems to me that diplomatic techniques can be roughly categorized into two groups: 1) the technique we can call “power oriented,” and 2) the technique which we might call “rule oriented.” Power oriented techniques suggest a diplomat asserting, subtly or otherwise, the power of the nation he represents. In general, such a diplomat prefers negotiation as a method of settling matters, because he can bring to bear the power of his nation to win advantage in particular negotiations, whether the power be manifested as promised aid, movement of an aircraft carrier, trade concessions, exchange rate changes, or the like. Needless to say, often large countries tend to favor this technique more than do small countries; the later being more inclined to institutionalized or “rule oriented” structures of international activity.

A rule-oriented approach, by way of contrast, would suggest that a rule be formulated which makes broad policy sense for the benefit of the world and the parties concerned, and then there be an attempt to develop institutions to insure the highest possible degree of adherence to that rule.

In the case of disputes between countries, a power oriented approach is often utilized in the negotiation, so that the dispute, even if it involves a breach of a rule, may be settled more from the point of view of who has the effective power, economic or otherwise, than from the point of view of determining whether a rule has been breached. A rule-oriented approach, on the other hand, would also involve negotiation for a settlement, but in such a negotiation the negotiators would be more inclined to resolve the dispute by reference to what they would anticipate an international body would conclude about the action of the transgressor in relation to its international obligations. All





diplomacy, and indeed all government, involves a mixture of these techniques. To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, toward a rule-oriented approach. However, never is the extreme in either case reached. In modern western democracies, as we know them, power continues to play a major role, particularly political power of voter acceptance, but also to a lesser degree economic power such as labor unions or large corporations. However, these governments have passed far along the scale toward a rule-oriented approach, and generally have an elaborate legal system involving court procedures and a monopoly of force through its police and military, to insure the rules will be followed. The U.S. government has indeed proceeded far in this direction, as the resignation of a recent president demonstrates. When one looks at the history of England over the last thousand years, I think that the evolutionary hypothesis from power to rule can be supported. More recently when one looks at the evolution of the European Economic Community, one is struck by the evolution toward a system that is remarkably elaborate in its rule structure, effectuated through a Court of Justice, albeit without a monopoly of force.

In international affairs, I think a strong argument can be made that to a certain extent this same evolution must occur, even though currently it has not progressed very far. The initiatives of the World War II and immediate postwar period towards developing international institutions is part of this evolution, but as is true in most evolutions there have been setbacks, and mistakes have been made. Likewise, when one focuses on international economic policy, we find also that the dichotomy between power-oriented diplomacy and rule-oriented diplomacy can be seen. We have tried to develop rules, in the context of the International Monetary Fund and the GATT. The success has been varied. Considerable achievement has occurred in these systems, and in the IMF the rule system has gone through an elaborate restructuring, partly as a result of major rule infractions. In the GATT, too, restructuring is necessary, but the institution of the GATT itself does not as well lend itself to this restructuring.

Nevertheless, I think a particularly strong argument exists for pursuing even-handedly and with a fixed direction the progress of international economic affairs towards a rule-oriented approach. Apart from the advantages which accrue generally to international affairs through a rule-oriented approach, including less reliance on raw power and the temptation to exercise it or flex one's muscles which can get out of hand, a fairer break for the smaller countries or at least a perception of greater fairness, and the development of agreed procedures to achieve the necessary compromises, in *economic* affairs there are additional reasons.

Economic affairs tend (at least in peacetime) to affect more citizens directly than may be the case for political and military affairs. Particularly as the world becomes more economically interdependent, more and more private citizens find their jobs, their businesses, and their quality of life affected if not controlled by forces from outside their country's boundaries. Thus they are more affected by the economic policy pursued by their own country on their behalf. In addition, the relationships become increasingly complex—to the point of being incomprehensible to even the brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their

needs and their perceived complaints. The result of this is increasing citizen participation, and more parliamentary or congressional participation in the processes of international economic policy, thus restricting the degree of power and discretion which the Executive possesses. This makes international negotiations and bargaining increasingly difficult. In the United States, this process has reached a high point in the Trade Act of 1974, which is strewn with varieties of procedures involving public hearings, opportunity for public citizens to complain, congressional and consultations of various kinds, and explicit authorization for citizens to challenge in court the decisions of the executive officers responsible for carrying out international economic policy. As a consequence, many aspects of United States international economic policy are greatly misunderstood outside its borders. When viewed in the context of the American constitutional crisis centering on Watergate, and influenced by the Vietnam War, it is hard to argue abstractly that the congressional assertion of participation rights is inappropriate.

However, if citizens are going to make their demands be heard and have their influence, a "power-oriented" negotiating process (often requiring secrecy and executive discretion so as to be able to formulate and implement the necessary compromises) becomes more difficult, if not impossible. Consequently, the only appropriate way to turn seems to be towards a rule-oriented system, whereby the various layers of citizens, parliaments, executives, and international organizations will all have their inputs, arriving tortuously to a rule, which, however, when established will enable business and other decentralized decision makers to rely upon the stability and predictability of governmental activity in relation to the rule.

### 3

## Improvements

Thus, I have outlined the premises that lead me, and a number of individuals with whom I have consulted, to view the question of institutional improvement and evolution as perhaps the most important aspect today of our current international economic problems. It was premises such as these that led to the formation by the American Society of International Law of a panel to study these institutional subjects, and the result of such panel's work, as you probably know, is a report published about a year ago.

If what I say is true, why is it that there has been so little official attention to these problems? What possibility is there for some improvement? Let me turn first to the problem of rule formation.

Some of the suspicions that I mentioned earlier, particularly those about the desire of governments to maintain enough freedom or "sovereignty" to deal with the burdens of the responsibilities their citizens impose on them, lead governments to be very cautious in further tying their hands through international bodies. This is normal, and it suggests that any further development of international procedures for rule formulation will be timid and will probably depend upon a consensus technique involving primarily negotiation. Indeed, one can state that the international trade negotiating process should be an ongoing *permanent feature* of the system, and not one of periodic up and down "trade rounds."

In addition, there are some very real particular fears and worries about further reform. Europe, for example, is worried about the cohesion and viability of the European Economic Community. European leaders understandably feel that their first attention must be to solidify and make firm the real gains that have occurred through the evolution of the European Economic Community. They worry that acceptance of international constraints may impose too great a strain on the delicate EEC process at least in the present circumstances.

The developing countries, on the other hand, have another set of fears. They enjoy their current majority status in many organizations, when voting proceeds on a one-nation, one-vote system. They consequently fear any change in voting procedures that might turn from that system. Unfortunately, there is virtually no chance of significant rule-making authority developing in any international body today which bases its procedures on the one-nation, one-vote system; the major powerful countries simply will not delegate to such a body any meaningful authority. Consequently, consensus negotiation will undoubtedly continue to be the primary mode of rule development, ironically giving even greater weight to the powerful countries.

Another aspect must be stated frankly: I believe it is fair to say that the European Economic Community representatives have presented some of the more difficult obstacles to the potentiality of reform or evolution of the GATT institutional system. I am not entirely sure what the reasons for that are, although I have alluded to one above. I can't help feeling, however, and the feeling exists elsewhere in the United States, that one of the reasons that the Europeans enjoy the status quo in GATT so much is that they have effective control of GATT, particularly in the voting process. When those nations who belong to the EEC are combined with the nations associated with EEC in one sort of preferential arrangement or another, the total exceeds the two-thirds vote of GATT required for a waiver, and exceeds the majority which could influence decisively most potential issues that might come to a vote in GATT. One result of this has been an understandable reluctance on the part of diplomats from elsewhere in the world, including the United States, to push issues in the GATT context. In short, the United States (as the Congress has explicitly stated in some of its reports) does not trust the GATT voting process nor the related GATT dispute settlement process.

With respect to rule formulation, therefore, I think the obstacles to reform, at least in the short term, are probably decisive, so that I would not anticipate much progress over the next few years (although I think there will develop a series of ad hoc and varied rule-making procedures in connection with particular nontariff barrier codes). With respect to dispute settlement or rule application procedures, however, I do think there is an opportunity for considerable progress. There are many hurdles being put in the way of reform of the dispute-settlement system—again EEC representatives have been reluctant, developing countries have other interests such as seeking legitimation of "special and differential treatment" in the GATT negotiation, and the recent DISC dispute settlement case in GATT may have set back some of the inclination to revise dispute settlement procedures. Furthermore, with so many pressing substantive issues that are more readily understood by political interests back home, governments tend to downplay the importance of the more remotely related procedural questions such as dispute settlement. No

government wants to "pay" for dispute settlement reform under the "reciprocity" rules of GATT negotiations and therefore no government wants to seem to be pushing too hard for dispute settlement which could suggest to other governments that they can obtain an advantage in another sector or on another point in exchange for the reform. Finally, the institutional and bureaucratic problems of trying to advocate longer range solutions in the face of the daily grind, as well as the lack of legal training and sophistication of many of the participants in the negotiation, also play a role. I have been surprised for instance about the misconceptions as to how a legal system or rule-oriented process operates. There seems to be a feeling that it is "all or nothing," that a rule system will always completely bind national official hands, and that the rule is rigid and unremittent in the face of changing circumstances and the need for particular exceptions. Any jurist or legal scholar knows better; but many others do not.

Nevertheless, even now, there is considerable attention to dispute settlement in GATT negotiations, but unfortunately fragmented in connection with different subjects and draft codes. The negotiators realize that the rules which they are negotiating have no meaning except in the context of some broader legal system which involves procedures for applying rules to concrete facts and resolving disputes among nations about them. The danger now, as I see it, is that we will have a fragmented system which will greatly inhibit the possibility of developing a rule system which will be understood by the citizens of the world, and which possesses the potential for growth in prestige so that as time goes on nations will be willing to put more and more within the jurisdiction of such a system.

## 4 Recommendations

Where should we go? There are many ideas, but let me present two for your consideration and thoughtful criticism.

First, with respect to dispute settlement. In my view, an improved dispute-settlement system in the context of GATT, or more broadly in the trading system, should possess the following characteristics, some of which are explained in the ASIL report:

The procedure should be capable of starting modestly, but growing in importance as time goes on.

The procedure should depend in its initial steps on private consultation, followed by the possibility of conciliation utilizing trained mediators supplied by a secretariat.

The procedure should depend heavily on a trusted third party panel-type adjudication of the issues of law and fact, addressed solely, however, to the question whether an agreed rule or norm has been violated. Muddy concepts of "nullification and impairment" should be avoided. Representatives of the disputants should not be members of this panel.

The process should avoid imposing too great a burden on this third-party panel, and thus should leave politically surcharged questions such as "recommendations" or "sanctions" to other bodies of a more policy-oriented nature to act as a check on the practical viability of these steps.

All adjudications should result in a reasoned opinion which will always be published. Only in this way can the opinions be subjected to informed criticism, only in this way can the opinions have influence on the world, and only in this way can a body of "jurisprudence" develop for future guidance of the world community.

The procedure should be capable of being understood by the public and its integrity and impartiality must be nurtured so that public and political acceptance of it will increase as time goes on.

One possibility for achieving this would be to negotiate concurrently with the negotiations now going on, a separate but connected "Dispute Settlement Protocol" which would set forth the procedures and which would have two annexes. Annex A would list all the rules to which the dispute settlement procedure could apply; other issues would remain under GATT procedure. Such annex might include the entirety of some particular non-tariff barrier code, or it might only include portions of agreements, such as some but not all of the Articles of GATT. This would leave to the negotiators the question as to which rules they feel sufficiently comfortable about to entrust to such body. I suspect, for instance, that the European Economic Community would want to omit from such a process, Article XIV of GATT. Such a list, however, would be open ended—that is, it could be added to from time to time. The list would not include customary international law norms. Only conventional norms dealing with economic matters would be included.

Annex B would include the list of countries which were willing to submit themselves in advance to the dispute-settlement process, with respect to the rules on Annex A. It would be permissible for a government to specify exceptions to its submittal, i.e., to specify that it would not submit under the dispute-settlement procedure with respect to specific rules which were nevertheless listed on Annex A. However, countries would have to face the fact that these exceptions are negotiable. The United States and the European Economic Community, for example, might conclude an agreement concerning the elaboration of the escape clause system of GATT. However, one of those parties might feel that such an agreement would be useless unless adequate dispute settlement procedures apply, and therefore would refuse to accept the agreement with respect to the other nation unless both parties agreed that the dispute settlement protocol would include this agreement in Annex A and would not be excepted from application to either party in Annex B. To a certain extent the procedure bears some analogy to the tariff-negotiating process, where each country has its "schedule" of tariff concessions. Here it has its "mini schedule" of dispute-settlement commitments. The gradual evolution towards greater dependence on the dispute-settlement system can occur as greater confidence in that system is achieved.

Secondly, with respect to norm or rule formation, I think it is quite possible that the world, as I have stated above, is not yet ready for important contributions with respect to these institutions. Yet, individual codes in GATT will undoubtedly have systems and procedures within them for further elaboration, if for no other reason than it will be impossible to solve some of the most difficult problems of non-tariff barriers within the time period contemplated for the negotiation. For example, the process of appropriate

responses by importing countries to governmental tax benefits extended by exporting countries to its exporting industries is incredibly complex and even emotional, so that I would suspect it will be many years before even simple rules can be devised. Thus, an international subsidy and countervailing duty code would be ill advised unless there were in it some sort of procedure for ongoing continuing negotiations leading to the elaboration of the rules. It may also be possible to obtain some modest changes in the overall GATT institutional structure, perhaps along the lines of the current "Consultative Group of 18."

However, apart from these approaches, particularly if it looked very unlikely that rule formation improvement could be achieved otherwise, it would be possible for a limited number of nations, such as the major OECD nations plus some key developing countries, to consider entering into a sort of "Multilateral FCN—Friendship, Commerce, and Navigation" treaty for the purpose of establishing a broader framework of continuing consultation and negotiation, contemplating constant evolution of specific norms through specific codes or rules. Analogies for such a structure can be seen in some of the other international economic institutions.

## 5

## Conclusion

Apart from the specifics of institutional reforms, however, it seems clear that the institutions of the international trading system today are crumbling; their problems are exacerbating the current economic difficulties, and these problems are getting worse. Failure to give some attention to these institutional questions during the current trade negotiations will likely nullify the results of that negotiation in a very short time after it is completed. The rules being negotiated are only worthwhile if there is adequate conformity to them, and there is little in the existing institutional system of the trading system to suggest that adequate conformity is likely to occur, particularly in a time of stress, a time of divergent economic philosophy, and in the face of need for experimental but uneasy compromises.



John H. Jackson



Second-Class Postage  
Paid at Ann Arbor, Michigan