THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 39 • NUMBER 1

SPRING 1996

LAW QUADRANGLE NOTES

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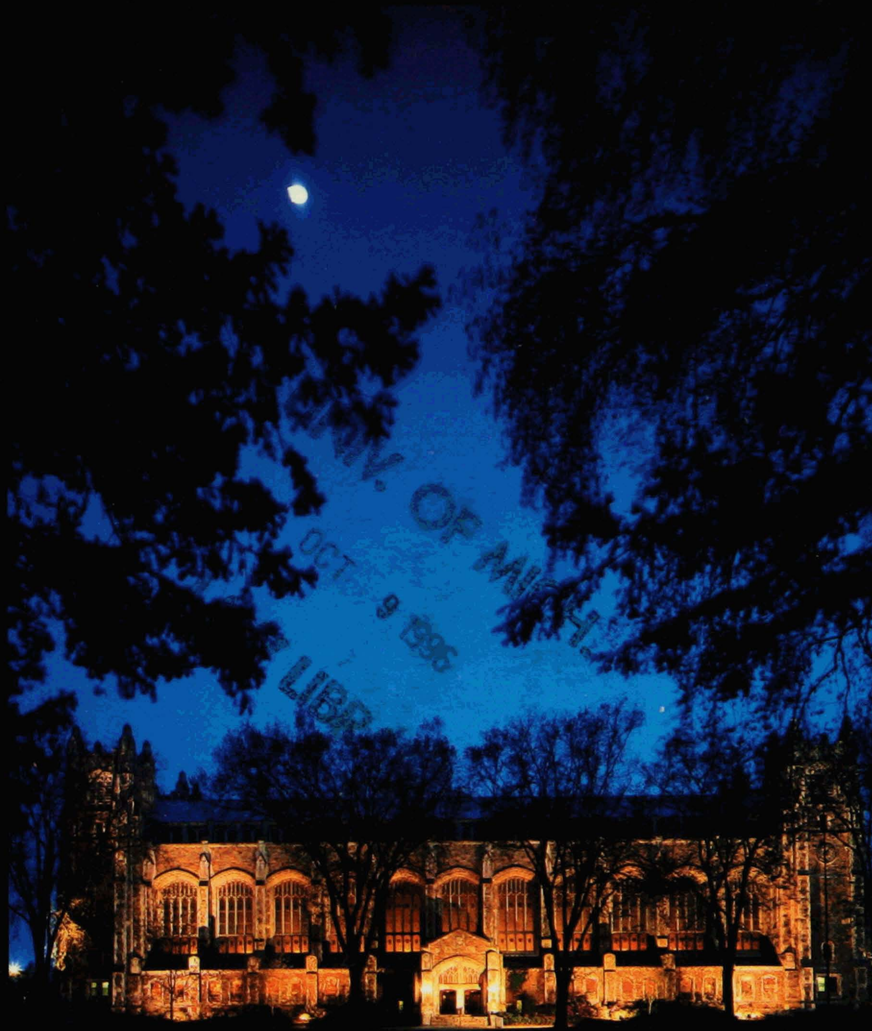

Investing in World Harmony
Telling the Story of the Hughes Court
Who's Afraid of the 'New World Order'?

UNIVERSITY OF MICHIGAN
LAW SCHOOL

UPCOMING EVENTS

April 25	Senior Celebration and Send-off Law Quadrangle
May 10	Honors Convocation
May 11	Senior Day Hill Auditorium
June 7	Emeritus Weekend Law School Luncheon Lawyers Club Lounge
Aug. 5	ABA Alumni Breakfast Orlando, Florida
Sept. 27-29	Reunion Weekend For Classes '41, '51, 56, '61, '66
Oct. 11	California State Bar Alumni Luncheon Long Beach, California
Oct. 18-20	Reunion Weekend For Classes '71, '76, '81, "86, '91
Oct. 17-20	Committee of Visitors Weekend
Dec. 7	December Senior Day

Oct. 16-19, 1997 **International Reunion**
Ann Arbor

The Law School's 2nd International Reunion will bring together international alumni who are residing and practicing either abroad or in the U.S. for a weekend of catching up with fellow graduates, the Law School faculty and programs, and Ann Arbor. American alumni who would also like to receive information about the reunion should contact:

Julie Levine, Development and Alumni Relations
721 South State St.
Ann Arbor, MI 48104-3071
313.998.7969 ext. 218
jalevine@umich.edu

Cover —
the Law School Reading Room.
Photo by Gary Quesada/Korab, from *The Michigan Law Quadrangle, Architecture and Origins*, forthcoming from the University of Michigan Press.

Have you moved lately?

If you are a Law School graduate, please send your change of address to:

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POSTMASTER, send address changes to: Editor, *Law Quadrangle Notes,* University of Michigan Law School, 801 Monroe St., Ann Arbor, MI 48109-1215.

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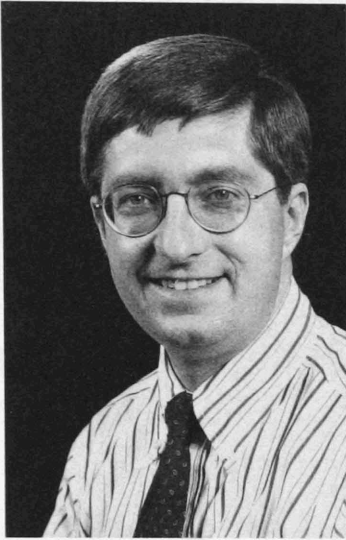
MESSAGE FROM DEAN LEHMAN



AT THE MIDWINTER GATHERING of legal academics in January, wedged in among the looseleaf services and the CD-ROM publishers, a dealer in rare books was displaying one of his prized offerings: a collection of the correspondence of our former student Clarence Darrow. The collection belongs to Darrow's granddaughters, and it features letters from many people who would rank high in a list of America's most notable citizens during the first half of the twentieth century from Jane Addams to W.E.B. duBois, to H.L. Mencken. I was enthralled.

Darrow and his accomplishments have been frequently in my mind these past few weeks. For it is the season when we undertake the difficult task of choosing a new class of law students (the Class of 1999, to be precise). And it is therefore also the season when, from among that class, we select our Clarence Darrow merit scholars.

Over the past decade, several of our graduates have made generous gifts to the Law School to endow merit scholarships named collectively in honor of our former student. As dean, one of my most enjoyable tasks is to receive the dossiers of the students whom the faculty committee has selected to become Darrows, and to notify them that they are winners. I must say that reading the files of our Darrows gives one cause for great optimism about the human condition.

"As dean, one of my most enjoyable tasks is to receive the dossiers of the students whom the faculty committee has selected to become Darrows, and to notify them that they are winners."

— DEAN LEHMAN

For one thing, they reflect a breathtaking range of backgrounds, including prior studies in almost any field one can imagine studying and prior work in all manner of occupations, both paid and unpaid. For another, they reveal profound commitments to deepen understanding and to improve our world. The sheer quality of their accomplishments inspires awe. But I find most exhilarating the letters of recommendation that convey the writers' sense that they have been privileged to know people of extraordinary integrity, people whose words and actions are an example and an inspiration to others.

In late February, our Board of Regents asked me to chair the committee that will recommend to the Board a set of candidates from which to select the next President of the University of Michigan. In presenting us with our charge, the Regents listed the qualities we should be seeking. The list is long, and it expresses their expectation that, among other things, the next President will have a distinguished record of accomplishment, be able to motivate others, be willing to take measured risks for the achievement of academic excellence, and possess the highest degree of personal integrity. I am optimistic that we can meet this worthy challenge. In a way, what we are doing is searching for another Darrow.

Jeffrey S. Lehman

Student co-founds organization to aid the homeless

Susan Hassan

"It shows extraordinary motivation and sensitivity to playing a constructive role in society that she has done this. This is a very good program and it fits in with my view of how all lawyers — and anyone — can make a difference."

ROB PRECHT,
DIRECTOR OF THE OFFICE OF PUBLIC SERVICE

THE FEDERAL GOVERNMENT directs billions of dollars annually toward social services for underprivileged citizens in hope of helping the poor, elderly, and homeless. But people like third-year Michigan law student Susan Hassan are tackling such problems in a rather unconventional way. Hassan's belief that the homeless can rise above their situation given opportunities influenced her to co-found the Homeless Empowerment Relationship Organization (HERO), a non-profit organization dedicated to ending homelessness.

HERO's roots developed in 1992, while Hassan was an undergraduate economics student at Michigan. She and comedian-author Louie Anderson frequently debated what they felt was a common but inappropriate attitude toward "vagrants": feed them, shelter them, and don't expect too much. Few current programs seemed to optimistically address the future of their clients. But Hassan and Anderson felt a proactive approach was the only way to get to the heart of the problem. "We wanted to do something to affect peoples lives for the long run," explained Hassan, who knows Anderson through her brother's work as his manager.

For some homeless people, the obstacle that keeps them where they are is their inability to take advantage of opportunities, services, and agencies available to the average person, Hassan and Anderson agreed. The Homeless Empowerment Relationship Organization, which they founded in 1993, is therefore designed to help break down these obstacles. HERO pairs motivated homeless persons with volunteer mentors to create a relationship that serves as a basis for a new lifestyle for the homeless person. The idea is gaining a foothold in Michigan — where a national office and two local programs have been established — and in other major cities like Minneapolis and Ashville, North Carolina, where HERO is sometimes operated by an existing agency.

Rob Precht, director of the law school's Office of Public Service, commended Hassan, "the latest in a long line of students from the University of Michigan who have made a difference in the world." Michigan students, he said, have left their mark on society in a variety of ways, including the Peace Corps, which was introduced by President John F. Kennedy at the urging of a group of Michigan students.

"It shows extraordinary motivation and sensitivity to playing a constructive role in society that she has done this," Precht said. "This is a very good program and it fits in with my view of how all lawyers — and anyone — can make a difference."

Founding HERO was another step in Hassan's history of volunteerism, which has mainly included globally-oriented projects. Turning her focus to the United States, she said she realized that homelessness "is our weakest link in this country, especially in places

like Ann Arbor," where most people are untouched by this particular tragedy.

Flint was the site of the HERO Pilot Program, launched in 1993 with the financial support of the W.K. Kellogg Foundation. Ten homeless persons and 10 volunteer mentors together helped develop the existing two-part series: the Pathfinder Program, in which participants undergo personal assessments and formulate goals with trained staff; and the Partnership Program, in which volunteer mentors provide ongoing support to help them meet their goals. In order to succeed in this program, participants must already exhibit some motivation, or they must develop it prior to the Partnership Program, Hassan said.

Fifty-four individuals have graduated Pathfinder, 31 Partnerships have been established, and 22 Partners have achieved their goals and remained independent for at least six months, most for more than a year, said Executive Director Darin Day. "We don't serve a lot of people, but after a year in HERO, most aren't homeless any more," said Day, who works out of the national office in Ann Arbor.

Now president of HERO's board of directors, Hassan will graduate in May and has accepted a position as a corporate attorney with Skadden, Arps, Slate, Meagher & Flom in Chicago. "HERO is always going to be a really important part of my life," she said. "I have always believed in people and their ability to help themselves."

(For more information on HERO, call (313) 669-8128. The national office is located at 411 Huron View Boulevard, Suite 106, Ann Arbor, Michigan 48103.)

LQN

International Law Workshop —

In February, the International Law Workshop hosted Nuala Mole, left, founder and director of the "Advice on Individual Rights in Europe" (AIRE) Centre in London, which provides legal advice, information, and representation on all aspects of international human rights law. Mole spoke to the workshop on "Human Rights and Eastern Europe: The Extension of the European Convention" and gave a paper in the Human Rights seminar. Professor Michael Heller, right, organizes and moderates the workshop series, which is intended to introduce today's most debated issues in international and comparative law. Workshop speakers this fall and winter have included distinguished alumni, visiting faculty, and regular faculty: John Toulmin, Q.C. and Professors Renaud Dehousse, Meinhard Hilf, Catharine MacKinnon, Jozef Moravcik, Ulrich Petersmann, Frances Olsen, Andreas Reindl, Bruno Simma, and Phillip Trimble.

Resource Center opens

The Michigan Child Welfare Law Resource Center is now providing training and technical assistance to attorneys, judges, and others involved in child protection and foster care litigation. The center is one part of the comprehensive child welfare law program at the Law School and was created with funding from the W.K Kellogg Foundation.

The center offers research support, technical assistance and consultation on legal issues related to foster care and child placement. It also organizes interdisciplinary workshops and conferences on related topics.

"Securing safe and permanent homes for children is a difficult task and is further frustrated without a legal system sensitive and responsive to the needs of maltreated children and their parents," says the center's program manager, Kathryne O'Grady. "The Michigan Child Welfare Law Resource Center will help the legal community meet these needs."

The center is also publishing a newsletter with updates on case law and related topics. For more information on center membership and services, those interested should contact the Child Welfare Law Program, University of Michigan Law School, Ann Arbor, MI 48109-1215; or ogrady@uich.edu or phone (313) 763-5598.

Higginbotham keynote speaker at symposium on civil rights —

Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit, the Honorable A. Leon Higginbotham, Jr., was the keynote speaker for the opening program of a symposium, "Toward a New Civil Rights Vision," held by the Michigan Journal of Race & Law *in October. Other keynote speakers for the symposium included Derrick Bell, Jr., professor of law at New York University Law School, and Kimberle Crenshaw, professor of law at Columbia University School of Law; they were joined by more than two dozen distinguished panelists during the course of the two-day event. In addition to participating in the symposium, Higginbotham, a former adjunct professor at the Law School, was also a Helen L. DeRoy visiting fellow, meeting with small groups of faculty and students to discuss his current work. He is writing two books, his autobiography, and one on Race and the American and South African Legal Process which will be part of his series on Race and The American Legal Process.*

Two graduates named Skadden Fellows; Dean named to Foundation

Audrey Richardson, J.D. '95, and Kristin Kimmel, a 3L graduating this spring, are among the twenty-five recently named Skadden Fellows. Fellows provide legal assistance through various non-profit organizations in this two-year program. Their salary is paid by the Skadden Fellowship Foundation. Richardson will work for the Lawyers' Committee for Civil Rights Under Law in Boston and Kimmel for Lawyers for Children in New York City.

"I'll be representing low income people in employment discrimination litigation, including early proceedings before the Massachusetts Commission Against Discrimination," says Richardson, who is presently clerking. "It's an important stage at which people without financial resources often cannot obtain legal representation and where much of the groundwork for litigation is set. And I'm very pleased to have the opportunity to do this kind of work — public interest organizations like the Lawyers' Committee for Civil Rights Under Law often don't have the financial resources to allow them to hire recent graduates."

Kimmel is equally enthusiastic about her fellowship. "Lawyers for Children works with children who have voluntarily been placed in foster care in Manhattan. Foster care review hearings, termination of parental rights, and custody disputes will all be part of the day-to-day effort to see that kids are getting the representation they need.

"We'll also be creating a sexual abuse survivors manual for child sexual abuse victims and one for foster parents who are caring for children who have been sexually abused. . . I feel honored and lucky to be able to do child advocacy since I dedicated my law school education toward this." Kimmel was previously a caseworker during summers while she was in college and she was a student in the Law School's Child Advocacy Clinic as well as a research assistant there.

This is the eighth group of Fellows to be selected from the hundreds who apply each year; there are now 200 law school graduates and judicial clerks who have worked full-time for legal and advocacy organizations through the program.

In related news, Dean Jeffrey Lehman has joined the Skadden Foundation Board of Trustees and will participate in Skadden Fellowship selection in the future. Along with an Advisory Committee of partners representing Skadden, Arps, Slate, Meagher & Flom's domestic offices, and with the Foundation's director, the board discusses the candidacies of Skadden Fellow finalists. In addition to members of the firm and Dean Lehman, the board includes Archibald Cox, former Solicitor General and professor at Boston University Law School; Marian Wright Edelman, founder and president of the Children's Defense Fund; Patrice Kunesh, tribal attorney for the Mashantucket Pequot Tribe and former Skadden Fellow; Jose Lozano, publisher and president of *La Opinion*; Kurt Schmoke, mayor of Baltimore; Sargent Shriver, attorney, first director of the Peace Corps and of the Office of Economic Opportunity; and Xavier L. Suarez, former mayor of Miami.

Corrections and Addenda

Several readers have pointed out that the story on Jeffrey H. Smith, J.D. '71, said he is the second consecutive Law School graduate to serve as general counsel for the Central Intelligence Agency when, in fact, he is the third. Russell Bruemmer, J.D. '77, served as general counsel from 1988 to 1990, followed by Elizabeth Rindskopf, J.D. '68 (profiled in the Fall 1994 issue), and then Smith. LQN regrets this oversight.

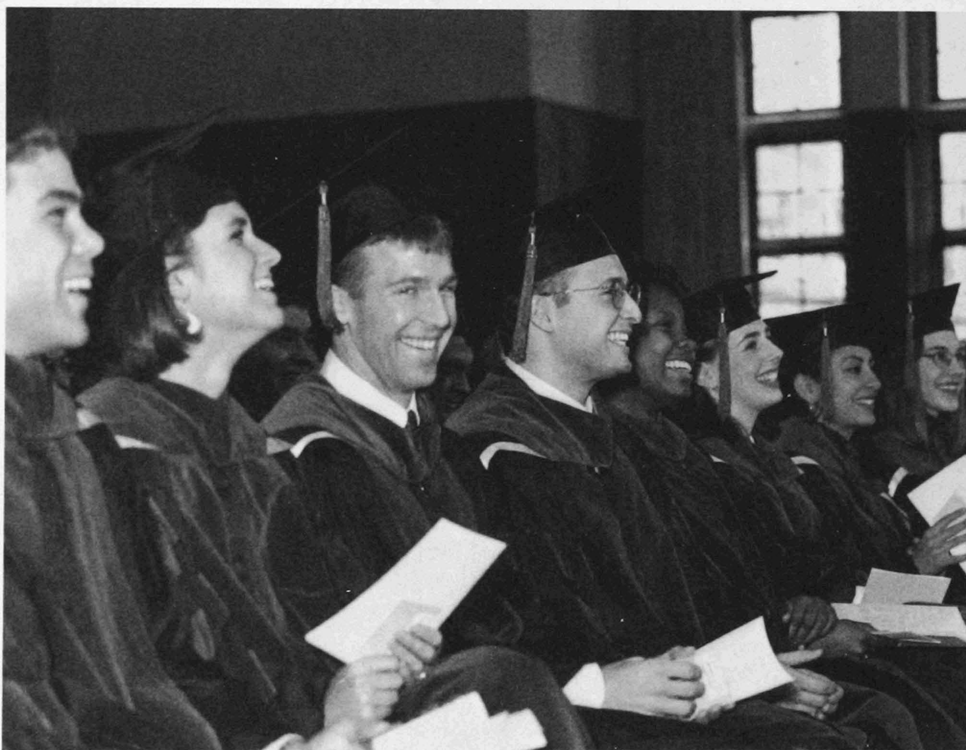
An additional notice of clerkship was received after the winter issue was printed. Robert Greenspoon began clerking last July for the Honorable Brian Barnett Duff in the U.S. District Court for the Northern District of Illinois.

Kyra Kazantzis', J.D. '90, first name was misspelled in the Fall/Winter 1995 Class notes.

And due to an error in records processing, Judge John R. Milligan, J.D. '52, was listed in the obituaries when, in fact, the inclusion should have been for John T. Milligan, J.D. '56.

The paperless trial

The rapidly expanding realm of information technology as applied to law and education was on display as part of the most recent Committee of Visitors program. Brian O'Neill, J.D. '74, gave a demonstration of the technology used for the "paperless trial," using an example of his work on the Exxon-Valdez case. O'Neill spent five-and-a-half-years in Alaska as head of the plaintiff's legal team. In a separate presentation, the Law School's site on the World Wide Web and the information reach of the Internet were also highlighted.



Senior Day '95

(Left to right, front row) David Arroyo, Andrea Axel, Bradford Axel, Dimitri Barinstein, Lisa Barksdale, Danielle Barron, Laurice Bekheet, and Amy Bennett were among the 107 J.D. and 15 LL.M. graduates celebrating their accomplishments at the December 1995 Senior Day. The program included music by the Detroit Concert Brass Quintet and the Law School Headnotes, a welcome from the Dean, and remarks by Alllison Lowery, President of the Law School Student Senate, Marc Schuyler Reiner, a member of the December graduating class, and James J. White, Robert A. Sullivan Professor of Law.

Inaugurating the Law School's Pro Bono program —

Al Guskin, Chancellor of Antioch University in Ohio, talks with Moushumi Khan, 3L, during his visit to campus to commemmorate the creation of the Peace Corps and to inaugurate the Law School's Pro Bono Students America/Great Lakes program. The PBSA creates and uses a national database for matching students who want to do pro bono legal work with compatible organizations. Guskin was a U-M graduate student in sociology when presidential candidate John F. Kennedy stood on the steps of the Michigan Union and asked how many studentes were willing to help the poor. Guskin and others rallied to the question and responded in a way that led Kennedy to subsequently announce he would form a Peace Corps if elected.

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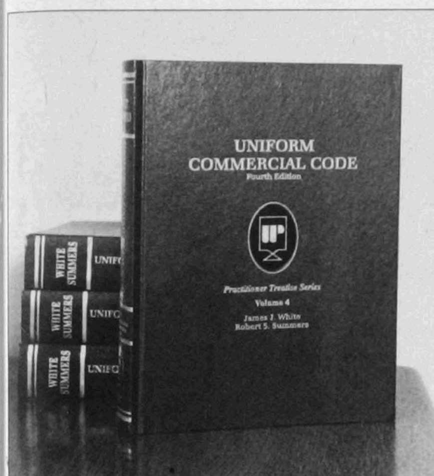
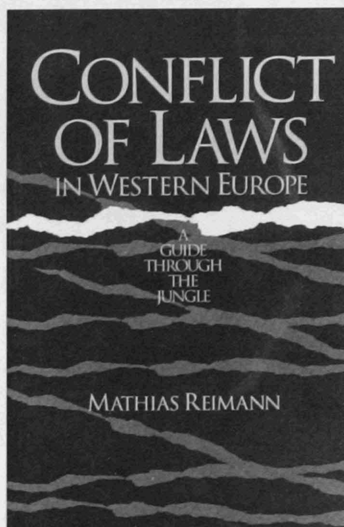


Four-volume treatise on the Uniform Commercial Code published

The White & Summers hornbook on the Uniform Commercial Code — known first to law students as a single-volume green book published in 1972 — has now been published in a four-volume edition for practitioners and scholars. The authors are James J. White of Michigan and Robert S. Summers of Cornell. Although the new set is technically the fourth edition of the one-volume hornbook, the four-volume treatise is in fact a new and different work.

The new edition contains much more extensive citation and discussion than is contained in the one-volume student edition. It addresses the extensive revisions of the UCC. Within the past six years there have been major revisions to Articles 3, 4, 5, 6, and 8. In addition, Articles 2 and 9, the most important articles, are currently being revised. New articles, 2A on leases and 4A on electronic funds transfer have been added. The four-volume treatise deals with all of these issues — past and prospective. The earlier versions of White and Summers have been staples of the students' library. In addition they have had a substantial impact on judicial interpretation of the UCC, having been cited in more than 3,000 published opinions of American courts.

White was on the National Conference of Commiss ioners' Study Committee for revision of Article 2 and has recently completed his work as the Reporter for the revision of Article 5. He is also a member of the drafting committee to revise Article 2A.



Primer on European conflicts of law available

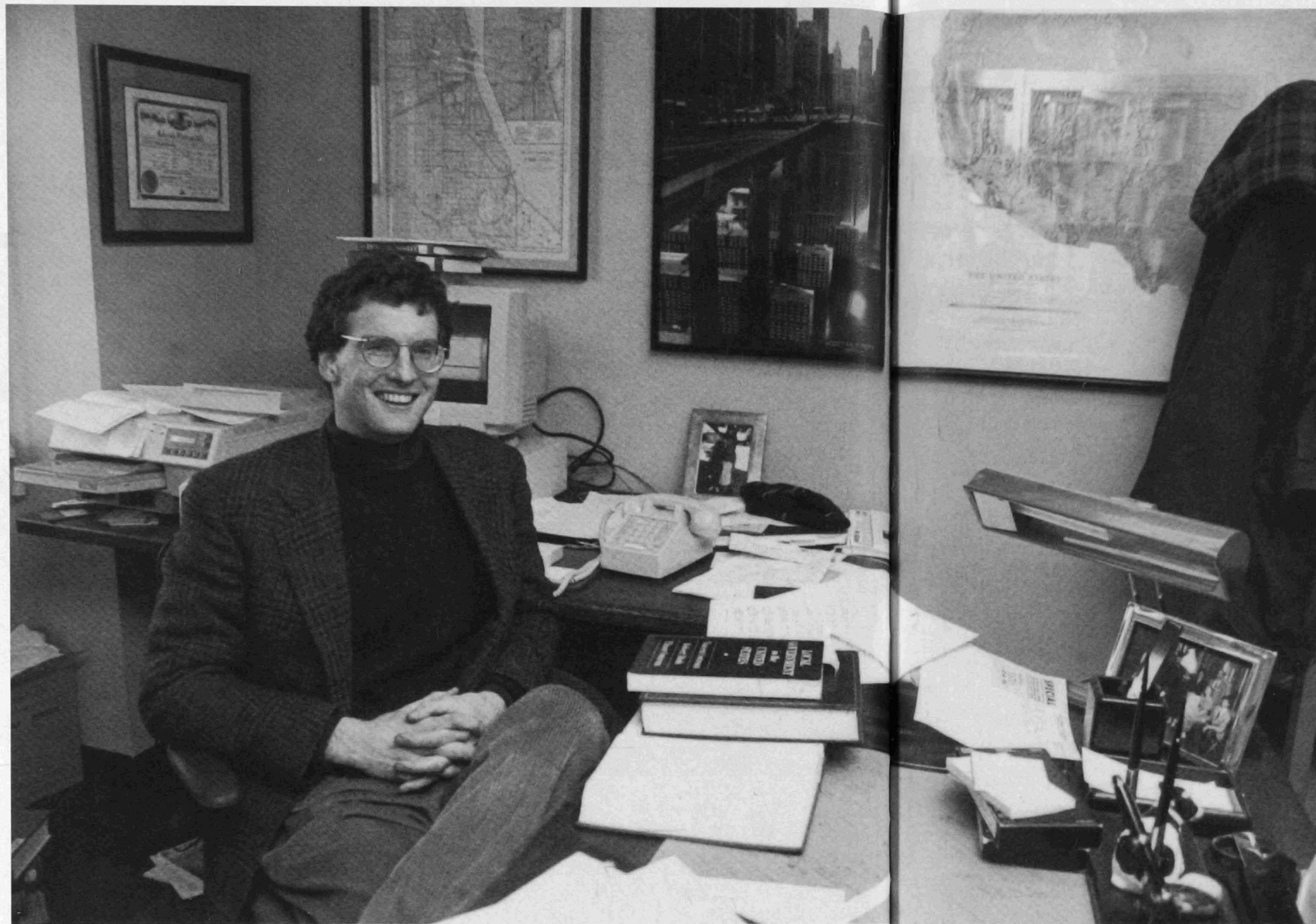
A new book written as a "primer" to overcome the inaccessibility of European conflicts law for audiences familiar with American conflicts law is now available. *Conflict of Law in Western Europe: A Guide through the Jungle*, by Professor Mathias Reimann, is an introduction to this area for American scholars and practitioners.

Concise by design, the book (Transnational Publishers, Inc., 1995) is divided into two main parts. The first, more general section outlines the overall features of European conflicts law, including its profoundly international orientation, its civil law character, the sources of conflicts law and their interplay, and the character of its rules. The second section is more specific, introducing readers to major areas of conflicts law. The conflict of laws in the civil law culture, the levels of conflicts law, jurisdiction, judgments, international context, the types of rules, choice of law and procedure are covered.

As Reimann notes in the book's introduction, "Law in our day and age seems destined, for better or for worse, to become an increasingly global affair.

"Reflecting the growing mobility of people and the internationalization of business, legal practice involves ever more foreign clients and transnational litigation. At the same time, law teachers vow to educate cosmopolitan lawyers for the twenty-first century. This is particularly imperative in the area of conlfict of laws," he adds.

Reimann, who has taught courses on conflict of laws and international litigation in Europe and the United States, is the author of numerous articles and several other books, including, *The Reception of Continental Ideas in the Common Law World* and *Historische Schule und Common Law*.



Rick Hills

HILLS CHALLENGES CONSTITUTIONALITY OF COLORADO AMENDMENT

UNIVERSITY OF MICHIGAN ASSISTANT LAW PROFESSOR RICK HILLS brought more than a bright legal mind to the U.S. Supreme Court battle against a Colorado constitutional amendment restricting legal protections to gays and lesbians.

Ironically, his former boss says, his conservative background was a huge help in fighting the anti-gay Amendment 2.

"I went to law school in the '60s and I'm basically an unabashed liberal," said Colorado attorney Jean Dubofsky, a former state Supreme Court justice who was retained to fight Amendment 2. "So I have troubles understanding where conservatives' concerns on things like civil rights come from. Rick understood which arguments they might make against us and how we could counteract those."

Hills started working on the case while an associate of Dubofsky's, and he was later hired at the Law School. Last October, Hills sat in the second chair before the Supreme Court as Dubofsky made oral arguments in the civil rights case, Evans v. Romer. The case challenged the constitutionality of Amendment 2, which voters approved in 1992. The amendment barred state and local officials from passing any laws or policies that conferred any protected or minority status to gays and lesbians.

Dubofsky, with Hills' assistance, won a permanent injunction preventing the state from enacting the amendment in a state trial court, and that was upheld in the Colorado Supreme Court. The state appealed it all the way to the U.S. Supreme Court, leading to last fall's oral arguments in Washington. A decision from the Supreme Court is expected by June.

Just five years out of law school at age 31, Hills already has made a quick loop of the country, heading from Yale to a clerkship in Texas with Judge Patrick Higginbotham on the U.S. Court of Appeals for the 5th Circuit, two years of legal practice in Colorado, and then a two-year stint as an assistant professor of law at U-M.

Hills grew up in Washington, D.C., in a prominent Republican family. His mother, Carla Hills, was secretary of the U.S. Department of Housing and Urban Development under President Gerald Ford, then U.S. Trade Representative under President George Bush. His father, Roderick M. Hills, headed the Securities and Exchange Commission during the Ford Administration.

By forbidding government officials in Colorado from enacting any legal protections for gays and lesbians, plaintiff-appellees' brief argued, the amendment approved by voters in 1992 prevented elected bodies from acting on their concerns, essentially cutting them out of the political process.

But Dubofsky said family ties played no role in her deciding to hire Hills. He contacted her after his wife joined the faculty at the University of Colorado, and she was impressed by his strong grasp of constitutional law and jurisdiction and by his writing ability.

"He was kind of a gift that came to me out of the blue," Dubofsky said. "I didn't know him at all before he contacted me. I would not have thought I'd have interesting discussions with someone from Rick's background, but he's perhaps the brightest person I have worked with."

In Evans v. Romer, Dubofsky said, "the brief that we filed on the fundamental right to participate relied on some of the voting rights cases in a way that it would not have without Rick's input. He thought about those cases for about a year and was able to come up with a very creative way to bring a 25-year-old, virtually untested theory on voting rights into the case."

That theory "simply states that the state may not single out a particular group and deprive them of the access to the political process that other groups enjoy," Hills said. "It could as easily be barbers or firefighters as gays or lesbians."

By forbidding government officials in Colorado from enacting any legal protections for gays and lesbians, plaintiff-appellees' brief argued, the amendment approved by voters in 1992 prevented elected bodies from acting on their concerns, essentially cutting them out of the political process.

Hills, who had other job offers from Harvard and Northwestern law schools, chose the University of Michigan in part because his wife, Maria Montoya, had an offer from the history department at Michigan State. After a year of commuting to East Lansing, she was hired at U-M, so the couple and their daughters Emma and Sarah are settled in Ann Arbor. Rick Hills is now teaching land use controls as a lecture course, along with a seminar on local government and localism.

Richard Evans, a grants coordinator in the Denver mayor's office who is the plaintiff in the case against Amendment 2, said the academic lifestyle suits Hills well.

"He dressed like an old professor, even as a young man. You know, the wrinkled clothes and everything might not match. I'm sure he fits in perfectly (on campus)."

But Hills was all business in his work on the Evans case. If taken literally, Hills said, "it would authorize all discrimination against gays and lesbians, even by the state. Now that's a bizarre and obviously unconstitutional law."

But officials for the state have argued that it only prevents the creation of special protections for gays and lesbians, though even Supreme Court justices were puzzled over what constitutes a special protection.

"They never defined what they meant by special rights, when our society is filled with a myriad of legal rights and remedies protecting all of us," Hills said. "They gave the impression that gays and lesbians are sort of getting away with something or have some secret rights."

Hills also argued that the amendment serves no relevant purpose, since, he says, "If you take state's narrow view, Amendment 2 has no meaning.

"Apparently, the state's argument means that municipalities can protect gays and lesbians against discrimination, they just can't say they're doing that. If that's what it means, then it's obviously irrational on its face."

Hills said a recent poll showed that 75 percent of Colorado residents oppose discrimination against gays and lesbians in employment or housing, so he doubts that the amendment reflects their true feelings on the issue.

"If you combine people's concerns with sexual morality and gays and lesbians with some vague sense of special rights and affirmative action, I think people in Colorado were confused or misled," he said. "I just hope the Supreme Court agrees."

LQN

Faculty accomplishments

Professor Merritt Fox recently presented papers at several conferences. He spoke on "Mandatory Securities Disclosure Laws: Harmonization or National Treatment" at a conference sponsored by the American Enterprise Institute and the Chicago Federal Reserve Bank, presented on Financial Market Regulation in the Asian Pacific Region at a conference sponsored by the APEC (Asian Pacific Economic Cooperation) study center, and gave a paper on "Choice of Law in a Globalizing Securities Market" at a conference sponsored by the New York Stock Exchange.

Roberta Morris, who teaches copyright and intellectual property, recently presented at a United States Agency for International Development workshop at Michigan State University on intellectual property. The workshop participants came from Asia, Africa and South America and are involved in science and science policy in their own countries. They spent two weeks visiting a variety of places, including the University of Michigan's Technology Office and a law firm in Troy (where Deann Foran Smith, J.D. '91, served as their host). Morris also spoke in March at a State Bar Meeting for the Intellectual Property Section on pending patent legislation.

Andrea Lyon, assistant clinical professor, received the Reginald Heber Smith Award at the National Legal Aid and Defender Association's annual meeting in December. The award recognizes and honors outstanding achievements and dedicated service of a lawyer working as a public defender or legal aid attorney. Lyon is nationally recognized for her expertise in death penalty defense and extensive experience in homicide and capital cases.

In accepting her award, Lyon spoke of the difficult times those involved in legal services to the poor are facing and will continue to face. She talked about how media attacks and assaults on funding have made providing such services more difficult and how this has angered service providers. She noted, however, that it is important that such anger be directed toward fueling hope. "Hope is what causes us to continue to fight, to speak out and to stand tall," she said. "Anger, by itself, will only insure our failure."

Donald Duquette, clinical professor of law and director of the Law School's Child Advocacy Law Clinic, served as co-chair of the State Bar of Michigan's Children's Task Force. The group, co-chaired by Wayne County Circuit Court Judge Cynthia Stephens, worked for three years to assess how children are treated in Michigan's justice system and to recommend improvements focusing on sensitive and efficient resolution of cases involving children. In an article written for the *Michigan Bar Journal* about the work of the Children's Task Force, Duquette and Stephens pointed out that for every high profile case involving children, thousands of others "pass through our courts with little public attention but with consequences to them just as momentous and life altering as those cases featured on the national news." The final task force report offers nearly two-dozen recommendations for change that fall into four categories: adjudication of children's cases; advocacy; children's services and the courts; and training and practice resources.

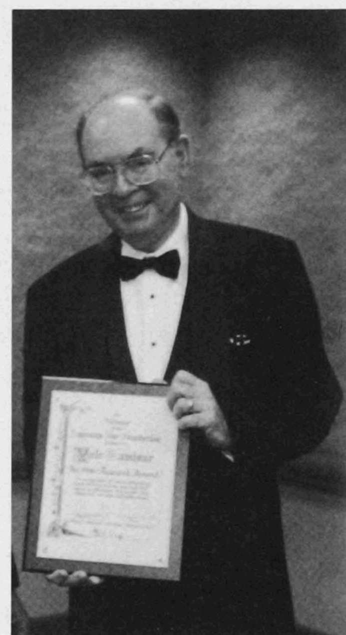
Kamisar honored

Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, is the recipient of this year's American Bar Foundation Research Award. Kamisar was recognized for his "outstanding contributions to the law and the legal profession through his research in law and government." He is the 40th recipient, succeeding Supreme Court Justice Ruth Bader Ginsburg, last year's honoree.

The award is given by the fellows of the American Bar Foundation. Kamisar received the award in February. A previous recipient of the same award and former dean of the Law School, Frank Allen, spoke about Kamisar's contributions to legal research and education at the awards ceremony.

"(His) writing has had enormous influence. A few years ago someone discovered that among all legal scholars, Kamisar was the most freqently quoted and cited in opinions of the United States Supreme Court. If citations in opinions of state and lower federal courts were added, the total would run into hundreds."

And, Allen continued, "(Kamisar) is a teacher as well as scholar. He is an instructor not only to students in his classes but also to a whole generation of younger teachers working in the fields he cultivates. There are surely few, if any, senior professors in American law schools who have had greater influence on young scholars than has Yale Kamisar during the last thirty-five years."



Yale Kamisar

"Their Brains Just Won't Quit" was the accurate headline for a story in a recent issue of *Michigan Today*. And two of the five emeritus faculty members profiled were Law School Professors Frank Kennedy and Peter Steiner. Both are case studies in "retirement" that involves working at least as productively as in earlier career days.

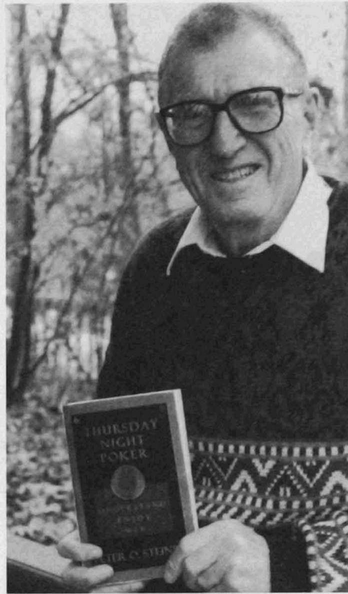
Kennedy has actually retired twice, first from teaching and then from consulting at the Chicago firm of Sidley & Austin. Following his second retirement, Kennedy, at age 81, is hard at work on the first volume of a treatise on bankruptcy. The volume deals with partnerships and partners in bankruptcy and is co-authored with Jack Williams at Georgia State Law School.

"I think there will be at least five volumes," says Kennedy. "The cases keep on coming."

Kennedy began his career at the Law School in 1961, teaching commercial law and courses on secured credit, consumer credit, and commerical credit. He also became a widely recognized authority on bankruptcy law, eventually serving as executive director of the Commission on Bankruptcy Laws.

In addition to his work on the treatise, Kennedy is consulting with the National Bankruptcy Review Commission, a congressional commission studying possible amendments to bankruptcy law, and with a committe of the business law section of the American Bar Association.

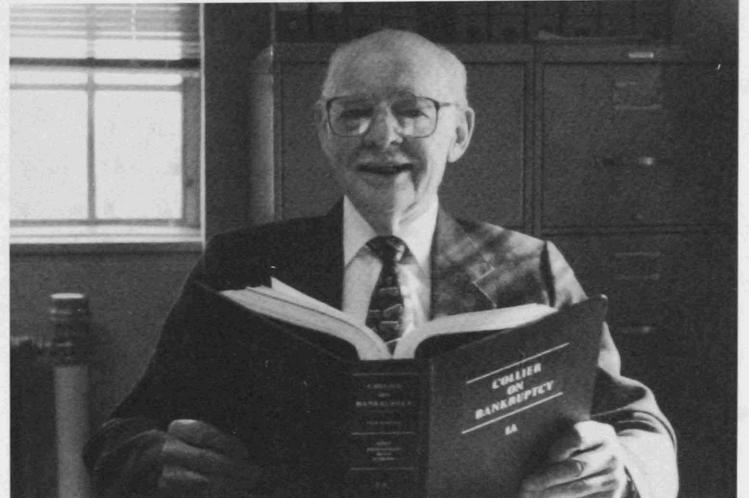
Peter Steiner



"I enjoy working too much to give it up," he declares.

For Steiner, professor emeritus of economics and law and former dean of the College of Literature, Science and the Arts, the latest project is publication of a new book, *Thursday-Night Poker: How to Understand, Enjoy, and Win*, which is now available in major bookstores in paperback, published by Random House. Steiner has been an avid poke player for many years and says the book is for experienced amateurs who play with other amateurs. Steiner himself participates regularly in what is considered one of the highest-stakes games in Ann Arbor. He also plays in a "young faculty" poker game with Law School colleagues.

Frank Kennedy



Not surprisingly, given his career and expertise, the book explores poker's theoretical framework and Steiner did quite a bit of research for the book. But it's not intended to be overly academic. "I was trying to think about the game as it was played — not as sterile math exercises — but with reasoning and calculation playing a role," explains Steiner. To this end, the book covers four broad areas: an overview of the games called poker; a section on probability, odds and risk; discussion of the skills needed to play well; and information and exercises aimed at sharpening and implementing game skills.

"I have often said that in poker you play with cards against people while in bridge you play with people against the cards," he adds.

When asked whether lawyers make particularly good poker players, Steiner gives a lawyerly answer. "Good poker players have a competitive spirit. Some lawyers have it, some don't."

In addition to continuing to hone his game, Steiner does some consulting and is working on a family history "in a relaxed way." Of his retirement, he says, "I'm enjoying it greatly."

Nine faculty members were on panels for the Association of American Law Schools (AALS) meeting, "Legal Educators in a Learning Society," in January. **Jose Alvarez** and **James Krier** participated in a mini-worshop on "The Last Ten Years: What Your Students Know that You Should Know Too," addressing International and Foreign Law, and Property, respectively. **Steven Croley** was a panel speaker for "Corporate Torts: Deterrence and Corrective Justice Reconsidered." **Phoebe Ellsworth** was a speaker in the program on "Judge, Juror, Party and Lawyer: Can We Predict Their Behavior"; the program was moderated by **Samuel Gross**. **Merritt Fox** was a commentator for the session on "Disclosure and Capital Market Theory." **Yale Kamisar** spoke at the session on "Physician-Assisted Suicide." **Lawrence Waggoner** spoke at the program on "Planning for Couples." **Christina Brooks Whitman** participated in a joint program panel addressing "Civil Rights and Federal Courts." In addition, **Susan Gzesh**, a frequent visitor, was a speaker on a program addressing "La Frontera: Perspectives on the U.S.-Mexico Border. And Assistant Dean for Admissions Dennis Shields was a panelist for a discussion on "Making First Year Orientation a Meaningful First Step in the Legal Education Process."

Jerry Israel

A standing "O" for Israel

Jerry Israel, the Alene and Allan F. Smith Professor of Law, received the traditional "standing O" from students and colleagues after teaching his last class on December 6, 1995. Israel, who is retiring, joined the faculty in 1961 and taught criminal law to thousands of students. Though a legend for much of his academic career, Israel stayed modest to the end — his retirement dinner and accompanying recognition will, at his request, occur later this year.

Yale Kamisar, a colleague of Israel's since 1965 and co-author for more than 25 years observed, "From *Gideon v Wainwright: The 'Art' of Overruling* (1963) to *Federal Criminal Procedure as a Model for the States* (1996), Jerry Israel has made many important contributions to the criminal justice literature. And the three-volume treatise he co-authored with Wayne LaFave, *Criminal Procedure*, has been an indispensable tool for anyone interested in the subject. Moreover, every U-M faculty member who has written in criminal law or criminal procedure in the last 30 years will tell you that Jerry has been an invaluable source of ideas and information and an extremely helpful critic and counselor."

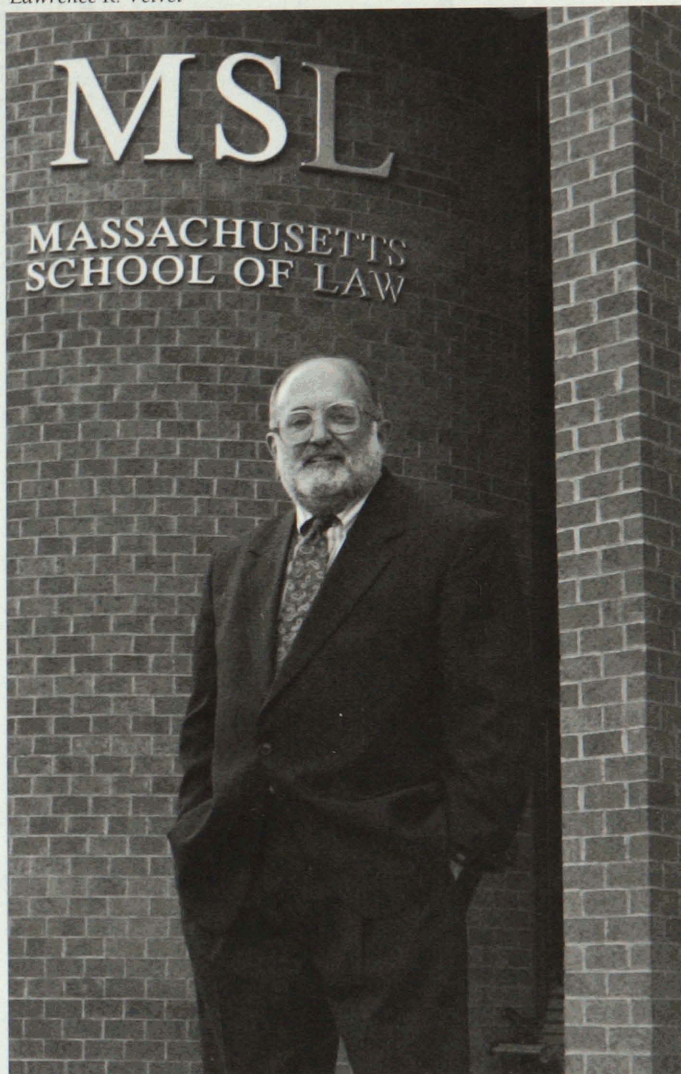
LQN

Legal Education Maverick

Lawrence R.Velvel, B.A. '60, J.D. '63, lives up to his name. One of the Yiddish meanings of Velvel is "little wolf," and the dean and cofounder of what he joyfully calls the "blue collar" Massachusetts School of Law has been nipping at the knees of his neighbors for a long time.

A mix of Don Quixote and the big bad wolf, depending on your point of view, Velvel has been described as intense, demanding, and relentless. In person he is stocky, balding, and bearded, with a fondness for informality. He peppers his conversation with anecdotes, like spicing text with pictures.

Lawrence R. Velvel



The Vietnam war years engaged him deeply, especially the question of whether it is constitutional for a president to fight a war without explicit Congressional authorization. His 405-page book, *Undeclared War and Civil Disobedience*, came out in 1970; from 1971-78, while teaching law at the University of Kansas and then at Catholic University of America, he also aided draftees and Congressmen who opposed the war.

Throughout the 1980s and early 1990s, he and colleagues battled with firms like Conrail, CSX, and U.S. Steel over antitrust violations in the iron ore transportation industry. The resulting $640 million judgment was by far the largest ever affirmed on appeal in an antitrust case.

Higher education has rarely been peaceful for Dean Velvel. In 1987, Michael Boland, founder of the Commonwealth School of Law at Lowell, MA, hired Velvel as dean. But the two men quarreled over how much power

the school's board of trustees should wield — Velvel argued for independence, as required by the Massachusetts Board of Regents in order to gain their approval. Boland fired Velvel in January 1988. Velvel and a core of Commonwealth faculty and students responded by founding the Massachusetts School of Law (MSL). The new school's competition crippled Commonwealth. Boland was subsequently convicted of arson in connection with a fire at MSL's library in October 1988. After the fire, MSL bought the new 90,000 sq. foot office building and 12 wooded acres that make up its current home in Andover.

Velvel's imprint is all over MSL, whose goal is "to provide a sound legal education and social mobility" for those who otherwise probably could not attend law school. MSL's annual tuition is $9,000, half the average for American Bar Association-accredited law schools, and the school has a special four-year program for students who must work and only can attend part-time. Velvel says MSL's graduates have developed an excellent reputation among Massachusetts lawyers and judges.

A Civil War buff and voracious reader of history and biography, Velvel used to play basketball and baseball regularly. Now, the 56-year-old dean says with good-humored ruefulness, he practices "a form of calisthenics." He also enjoys shooting air rifles; the power and velocity of some of them amazes him, he confesses.

In 1993, he took aim at the ABA section on Legal Education and Admissions to the Bar, which has refused to accredit his law school. After that unlikely attack the *National Law Journal* named him runner-up Lawyer of the Year for 1995.

Velvel "may be the Rodney Dangerfield of legal education, but this year the feisty dean of the upstart Massachusetts School of Law in Andover, Mass., may finally have won some respect," the Journal said. "Not that anyone in the legal education establishment would admit it publicly, but Dean Velvel's message that there is a problem with law school accreditation, and his in-your-face, see-ya-in-court style, are slowly winning some converts," it added.

MSL's suit drew unsolicited support when 14 law school deans, led by Dean Ronald A. Cass of Boston University School of Law, signed an unrelated letter to the ABA asking for reform of its accreditation process. And last year, after Velvel and MSL sent a letter of complaint to and met with the Justice Department's antitrust division — Velvel's employer in the mid-1960s — Justice won a consent decree from the ABA to reform its accreditation policies. The ABA, among other things, has agreed to stop compiling and distributing law school faculty salary information and to revise its rules on student to full-time faculty ratios.

Velvel isn't just claiming that the ABA should accredit his 620-student school. He says that ABA's accreditation requirements are a restraint of trade, as shown by the consent decree. MSL's lawsuit, filed after the ABA denied MSL accreditation in 1993, charges, among other things, that accreditation requirements artificially inflate salaries and greatly diminish faculty workloads. They therefore inflate costs and tuitions, he says, and generally make ABA-accredited law schools the classrooms of America's elite. The lack of ABA accreditation also means that MSL graduates cannot immediately take the bar examinations in 42 states.

"The question of social mobility versus elitism has been an ongoing battle in this country since at least the times of Hamilton and Jackson," he says, "and provided one of Lincoln's major motivations. I don't think the ABA understands that we feel very deeply about this, and that we therefore will never, never quit."

No one who knows Velvel is surprised at his suit. He never has feared rocking, or even capsizing, the boat. He knows he's got a tough fight on his hands — "You've got big problems when you're asking judges and others, who are part of the establishment, to take a look and see that the emperor has no clothes," he says — but "I've always had a streak of the activist in me."

Two of Velvel's three children are pursuing legal careers: his younger daughter is studying law at George Washington University and his son is with the U.S. Navy's Judge Advocate General's office. His older daughter is an actress in New York City. His wife, Louise M. Rose Velvel, graduated from the U-M and received her teacher's certification in 1961.

At the Law School, Professor Jerold H. Israel recalls Velvel as "bright, popular, intellectually curious, and a bit of an idealist." Israel, also a 1960s arrival at the Law School, says he thought at the time that Velvel was someone "to take on the big issues."

Velvel says that Law School, where he spent two years on the *Law Review*, was the place that gave him the tough work ethic that replaced his laissez faire undergraduate attitude and that he insists be followed by MSL faculty, students, and administrators. "There were some shortcomings, but on balance I had a great experience at the Michigan Law School," he says. "I loved it. People were wonderful. . . As hard working and competitive as they were, people were so nice and so pleasant to be around. With few exceptions, all of my close friends are people I went to college or Law School with."

Indeed, counting himself, four of MSL's six trustees are Law School classmates, and a fifth is an earlier graduate of the Law School:

- Stefan Tucker, B.B.A. '60, J.D. '63, a founder/partner in the Washington, DC, law firm of Tucker, Flyer & Lewis;
- Undergraduate friend and fraternity brother Alan I. Rothenberg, A.B. '60, J.D. '63 ("Super Soccer," *Law Quadrangle Notes*, Winter 1994), head of the World Cup soccer tournament in the United States in 1994 and former president of the California Bar Association;
- A. Paul Victor, B.B.A. '60, J.D. '63, a partner in Weil, Gotshal & Manges of New York City;
- Lawrence E. Blades, J.D. '60, a former dean of the University of Kansas and University of Iowa Law Schools and a pioneer in the field of unjust termination.

"When we started this law school the [Massachusetts] Board of Regents was insisting on a competent, independent board of directors, people familiar with the law and with legal education," Velvel says. "I also recognized that it was essential to have people whom you could trust, because one of the worst problems besetting the academic world in the last twenty to thirty years is the horrible conflict between the administrations and boards of trustees. I knew this had to be avoided like the plague. . . These people give me plenty of advice that I would rather not get — they are the opposite of 'yes men' — [but] we go back a long way and it is done in an amicable and friendly way."

His own student experience in Law School also thrust Velvel into an intellectual tug-of-war over what he describes as "thinking like a lawyer." The reverence for analogy and the goal of equal treatment that are the soul of analogical thinking cut like a two-edged sword, he says. They lead to "a certain sense of justice via equal treatment of seemingly similar situations," but also "to a tendency to universalize beyond justification. . . It also causes in lawyers a gut level, instinctive opposition to different ideas, particularly if they may prove far-reaching."

Velvel says the passing years have convinced him that "philosophy and character are all. They are much more important than intellectual ability or purportedly sophisticated thinking."

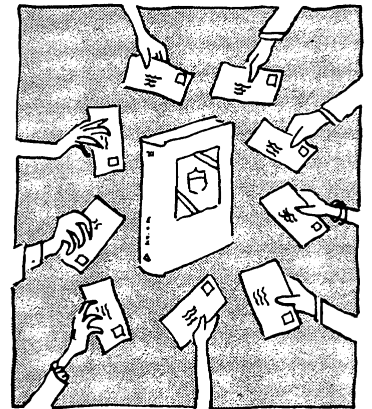
He believes MSL's suit against the ABA will have an effect on American legal education, and that law schools soon must tilt toward the medical model of having many teachers who also are practitioners. "I think we're going to be coming far closer to the model in which law students have lots more hands-on experience as part of their training, and that the trainers will be people who are in practice."

He also hopes that MSL can use its experience to train people to establish other kinds of schools. "While we're a law school, I think we've learned a lot about the business side that is translatable to other areas," he says.

And then?

"If I ever have time, I would like to try writing short stories. I know that I've got a thousand stories filed away. I'm a packrat; I never throw anything away. Of course, I'd have to disguise the people and events to protect the guilty."

LQN



Please watch your mail

All graduates with current addresses will soon be receiving an important questionnaire in the mail. This questionnaire is being sent to give every graduate the opportunity to be accurately listed in the updated Law School Alumni Directory.

Information received from this questionnnaire will be edited and processed by the directory publisher, Bernard C. Harris Publishing Company, Inc., for inclusion. The most recent version of the directory was printed in 1992, with information now almost five years out-of-date. The new directory will include electronic addresses for graduates, in addition to address, telephone, FAX and professional information.

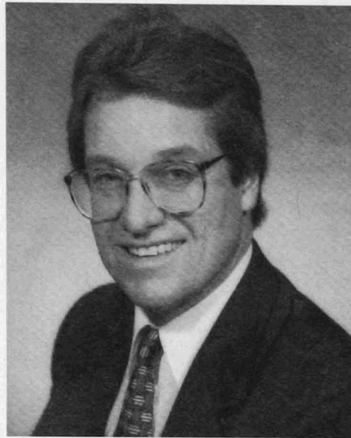
At a later point in the project, before final composition of the book, graduates will be contacted by Harris directly to verify that personal data is correct and to provide an opportunity to order the directory at a prepublicaton price. If you prefer not to be listed in the directory, please contact the Development and Alumni Relations Office in writing as soon as possible (721 S. State, Ann Arbor, MI 48104-3071).

The new directory will be available in early 1997. Please watch for your questionnaire and return it promptly.

— *Thank you.*

Two graduates argue Supreme Court cases

Sara Sun Beale



Stefan B. Herpel

Two graduates, Sara Sun Beale, J.D. '74, professor of law at Duke University School of Law, and Stefan B. Herpel, J.D. '82, a private practitioner in Ann Arbor, gave oral arguments before the United States Supreme Court during the fall.

The principal question in Beale's case, *Libretti vs. United States*, was whether the trial judge had an obligation to determine if there was a factual basis for criminal forfeiture pursuant to a guilty plea. The lower court ruled that the Federal Rules do not require such an inquiry when the defendant pleads guilty and agrees to the forfeiture.

Beale sought to persuade the Supreme Court that judicial review is necessary both to protect the defendant's interests and to ensure that the government does not exceed the statutory authority for forfeiture. In the absence of judicial review, she explained, "a wealthy defendant could buy a shorter sentence by agreeing to forfeit property the government is not entitled to take, and an overzealous prosecutor could force a defendant to agree to such a forfeiture in order to avoid a much longer prison sentence." Libretti, for example, was faced with a mandatory 50-year sentence if he did not agree to forfeit all of his property, including assetts that were not drug tainted, such as his employer funded retirment plan and a bank account his parents started for him in elementary school.

Beale's case was argued the day the verdict in the O.J. Simpson case was announced, and during her argument a marshal entered the courtroom and passed a piece of paper down the bench, presumably the news of the verdict. This was Beale's sixth argument before the Supreme Court.

Herpel's case, *Bennis vs. Michigan*, involves the existence of constitutional limits to civil forfeiture. As Herpel explained, "In civil forfeiture, unlike criminal forfeiture, the government has not been held subject to most of the constitutional protections that apply in criminal cases." The issue in *Bennis*, he said, "was whether the state may punish a person it concedes to be innocent of any wrongdoing by confiscating her property."

Herpel's client, Tina Bennis, used $600 she had saved from babysitting and similar jobs to purchase a used 1977 Pontiac, which she then jointly titled in her name and her husband's name. When Tina's husband was arrested for having sex with a prostitute in the car, her interest in the property — along with her husband's — was declared forfeit under a Michigan nuisance abatement statute. Even though it was undisputed that Tina neither knew about nor consented to that illegal use, the Michigan Supreme Court upheld the forfeiture of her one-half interest in the car.

In his briefs and argument before the Court, Herpel argued that, under both due process and takings principles, the state should bear the burden of establishing at least that a party was negligent when entrusting property to someone who then used it to commit a crime. In a 5 to 4 decision announced on March 4 of this year, a bitterly divided Court affirmed the constitutionality of the forfeiture.

For Herpel, who specializes in appellate advocacy in federal and state courts, this was his first appearance before the U.S. Supreme Court. "Although the result in the case was a bad one for my client and for the country, the tremendous support I have received from members of the public, commentators, law professors, and lawyers has been inspiring," he said, "and I shall continue to be an advocate for this important cause."

LQN

1956

Raymond H. Dresser, Jr., was elected chairperson of the Council of the Probate and Estate Law Section of the State Bar of Michigan for 1995-96.

1957

Robert B. Webster was elected chairman of the board of directors of the law firm Hill Lewis, PC, Detroit.

1959

Mark Shaevksy, a partner with the Detroit law firm of Honigman Miller Schwartz and Cohn, was elected a director of Charter One Financial, Inc., and its subsidiary, Charter One Bank, F.S.B., Cleveland, Ohio. Charter One Bank is the largest thrift in the Midwest.

1964

Edgardo Angara, LL.M., and **Miriam Santiago, S.J.D. '76**, are considered among the top four contenders in the 1998 presidential election in the Philippines. Angara is president of the senate and of the country's second largest political party, the LDP. Santiago, who came in as a close second in the 1992 presidential election, is serving a term as senator.

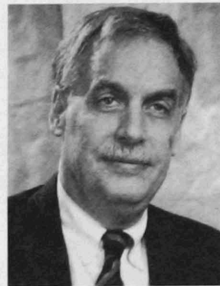
Lloyd A. Semple was elected chairman of the law firm Dykema Gossett PLLC, where he heads the firm's corporate and finance practice group, specializing in acquisitions, divestitures, and mergers, and business law. **Marilyn A. Peters, J.D. '80, Dennis M. Haffey, J.D. '76**, and **Frank K. Zinn, J.D. '59**, were elected members of the firm's executive committee. Peters is a member of the litigation practice group in the Bloomfield Hills office, specializing in construction litigation, securities fraud, and commercial and tort litigation. Haffey is head of the Bloomfield Hills office, where he is a member of the firm's litigation practice group, specializing in commercial litigation. Zinn is a member of the Detroit corporate and finance practice group, where he specializes in corporate and securities law, and mergers and acquisitions.

Wilfred A. Steiner, Jr., a senior member of the law firm of Dykema Gossett PLLC, was appointed chairperson of the Mortgages and Related Financing Devices and Security Agreements Subcommittee of the Real Property Law Section Council of the State Bar of Michigan. Steiner is a member of the firm's real estate practice group in Detroit, where he specializes in property and mortgage law, capital and finance, and commercial development.

1965

Richard L. Blatt is co-author of *Punitive Damages: A State-by-State Guide to Law and Practice,* of which a Japanese language edition was published in 1995 by Hoken-Mainchi Shimbun-Sha of Tokyo. The book was originally published in 1991 by West Publishing Company, St. Paul, Minnesota. Blatt is senior partner of Blatt, Hammesfahr & Eaton, which has offices in Chicago and London.

Former Philippino Supreme Court Justice **Hugo Gutierrez, LL.M.**, is coming out of retirement to publish a book.

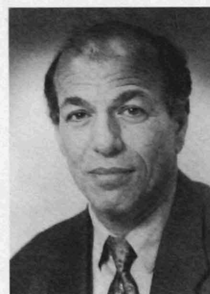


Louis B. Potter, executive director of the Chicago-based Defense Research Institute since 1981, received the Federation of Insurance and Corporate Counsel's 1995 Distinguished Service Award, which honors individuals for oustanding contributions to industry and to the community.

1966

I. William Cohen was elected vice chairman of Pepper, Hamilton & Scheetz. He also is co-chairman of the firm's National Bankruptcy & Insolvency Practice Group and is a partner resident in Pepper's Detroit office.

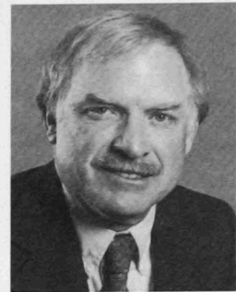
1967



Frank X. Grossi, a senior litigation partner at the Chicago-based law firm of Bates Meckler Bulger & Tilson, was inducted as a Fellow to the American College of Trial Lawyers.

Michael D. Levin has joined Sears, Roebuck and Co. as senior vice president and general counsel. He previously served as one of the company's primary outside attorneys as a resident partner of Latham & Watkins in Chicago.

1968



Boise State University management professor **Michael Bixby** is the lead author of *The Legal Environment of Business: A Practical Approach,* a textbook published by South-Western College Publishing, Cincinnati, Ohio. The book offers advice on how to avoid legal trouble, when to contact a lawyer, and how to get the maximum benefit from a lawyer's expertise.

Bartolome Carale, LL.M., chairman of the National Labor Relations Commission in the Philippines, is trying to set up a University of Michigan Law School Alumni organization in the Philippines.

Michael W. Cotter received an assignment as ambassador to the Republic of Turkmenistan in Central Asia, where he will serve a three-year term in the capital city Ashgabat. He was nominated by President Clinton and confirmed by the U.S. Senate in September.

Edward B. Goldman, medical center attorney for the University of Michigan Hospitals office of the executive director, is co-chair of the Patients Rights Section of the Health Law Section of the State Bar of Michigan.

Cincinnati, Ohio, attorney **Lee Hornberger** was named one of "56 of the Town's Top Attorneys" in the November 1995 issue of *Cincinnati Magazine*.

CLASS *notes*

Elizabeth R. Rindskopf has joined the law firm of Bryan Cave, LLP. In addition to litigation and arbitration responsibilities, she will assist in the coordination and development of the firm's international practice. She will work closely with **John Lonsberg, J.D. '79**, the leader of the firm's international practice.

1969

The Dispute Settlement Body of the World Trade Organization in Geneva has appointed San Francisco attorney **Harry B. Endsley, LL.M.**, to its roster of governmental and non-governmental dispute panelists.

1971

Sally Ganong Pope has joined with state-certified mediator Marc Fleisher in forming Pope & Fleisher Mediation, New York, New York. Pope is a private practice mediator with 14 years of experience working with divorcing couples, families, and businesses.

1972

Charles A. (Tony) Duerr, Jr., has become a principal of the law firm Miller, Canfield, Paddock and Stone, PLC. Resident in the firm's Ann Arbor office, he practices in the areas of education and employment law.

Raymond J. Jast has joined the Chicago office of Wilson, Elser, Moskowitz, Edelman & Dicker as a partner. He will continue his insurance practice in the areas of professional liability and general liability.

Nielsen V. Lewis has become of counsel to the Princeton, New Jersey, law firm of Skey, Dumont & Matejek, where he is concentrating in environmental counseling and litigation, environmental insurance coverage, land use and development. His focus is complex environmental litigation, including Federal Superfund and New Jersey Spill Act matters, and representation of policyholders on environmental insurance coverage claims.

Barbara Rom, a partner at Pepper, Hamilton and Scheetz in Detroit, is being inducted into the Seventh Class of the American College of Bankruptcy on April 24, in Washington, D.C. Rom is president of the Detroit Bar Association, treasurer of the Michigan Democratic Party, and national chair of the Law School's Annual Giving Programs.

1973

David W. Alden has formed a new San Francisco law firm, Alden Aronovsky & Sax, which specializes in environmental law and litigation. Alden previously was with San Francisco and New York-based Orrick, Herrington & Sutcliffe for 22 years. He also was appointed 1995-96 chairman of the California State Bar Environmental Law Section. **William S. Koski, J.D. '93**, also has joined the firm.

Kathleen McCree Lewis, a lawyer with the Detroit law firm Dykema Gossett PLLC, was elected to the Board of Directors of the American Judicature Society, a national organization that promotes improvements in the courts. She specializes in appellatte practice and litigation.

David H. Miller, supervisory assistant U.S. attorney in the Fort Wayne Division of the U.S. Attorney's Office for the Northern District of Indiana, was inducted into the American College of Trial Lawyers, a professional association of lawyers which offers membership by invitation only.

John M. Nannes was appointed Distinguished Visitor from Practice at Georgetown University Law Center in Washington, D.C. He previously taught as an adjunct professor at Georgetown between 1979 and 1983, and this semester he is teaching the basic antitrust course.

Michael L. Robinson, a partner with the Grand Rapids-based law firm Warner Norcross & Judd LLP, was appointed vice chairman of the American Bar Association's Water Quality and Wetlands Committee. In his new capacity, he will coordinate and author the committee's Year in Review, which summarizes developments in United States water law.

Barry R. Smith, a member with the law firm of Miller, Johnson, Snell & Cummiskey, PLC, was re-elected secretary of the Aviation Section of the State Bar of Michigan.

1974

Arnold P. Borish has become an account manager for GCI Consulting Group, Inc., a Malvern, Pennsylvania, company which designs, implements, and administers flexible employee benefit plans. He previously served as general counsel for Tornetta Realty Corp., Montgomery County, Pennsylvania.

Brad H. Giles, LL.M., of Auckland, New Zealand, was appointed as Queen's Counsel, the senior grade of counsel at the Bars of United Kingdom countries.

Louis C. Roberts has become a partner in the Chicago office of the law firm Wilson, Elser, Moskowitz, Edelman & Dicker, where he will continue his trial practice.

James D. Wangelin has become a partner with the Chicago office of Sedgwick, Detert, Moran & Arnold, where he will concentrate his litigation practice in health care and insurance issues. He was previously associated with the Chicago law firm McCullough, Campbell & Lane.

1976

Patric E. Mears, a senior member in the law firm of Dykema Gossett PLLC, was named secretary of the Real Property Section Council of the State Bar of Michigan. Mears is a member of the firm's corporate and finance practice group and loan workout team, specializing in bankruptcy, insolvency, and creditors' rights law.

1977

David K. McDonnell has announced the formation of Law Offices of David K. McDonnell and the relocation of his office to Birmingham, Michigan, where he concentrates his practice on real estate and commercial transactions.

1978

L.R. Curtis, Jr., was appointed managing attorney for the Salt Lake City, Utah, office of Holme Roberts & Owen LLC.

Dennis J. Dlugokinski has become an associate with the Bloomfield Hills law firm of Buesser, Buesser, Black, Lynch, Fryhoff & Graham, PC, where he will practice in the areas of complex commercial litigation, real estate law, business planning, and employment law.

Stephen L. Howard was named joint managing director of Cookson Group PLC, a multinational corporation based in London, England. He is responsible for two of Cookson's four operating divisions, and he has overall responsibility for corporate development activities

1979

Eulogia M. Cueva, LL.M., was appointed vice president of legal services for the Philippines Deposit Insurance Corporation, Republic of the Philippines. She previously served as deputy secretary of the senate electoral tribunal of the Philippine government.

Kim Mitchell has been promoted from manager-corporate counsel to senior corporate counsel for Amway Corporation, based in Ada, Michigan. She is responsible for managing the regulatory group of Amway's legal division.

Steven D. Weyhing has joined Butzel Long's Lansing office as a member of both the Environmental Practice Group and the Administrative Law Practice Group. He has practiced in environmental and administrative law for 16 years, with emphasis on wetlands and land use regulation, water quality, hazardous waste management, air quality, and federal and state administrative enforcement actions.

1980

G.A. Finch, a partner with the law firm of Querrey & Harrow, was featured as an expert panel member at DePaul University Entrepreneurship Program's Private Enterprise Network Push and Lift Symposium. He highlighted intellectual property issues on the four-member panel, which critiqued a start-up company whose purpose is to penetrate and profit from the growth of the Internet. Finch heads Querrey & Harrow's Corporate/General Practice Group, where he concentrates in business law, commercial litigation, real estate, and lobbying.

Stephanie M. Smith was nationally certified in business bankruptcy law through the American Bankruptcy Board of Certification, a program accredited by the American Bar Association. She is a shareholder at the Las Vegas firm of Jolley, Urga, Wirth & Woodbury where she has practiced for more than ten years.

1981

Stewart L. Mandell, a member of the law firm of Dykema Gossett PLLC, was named assistant practice group leader for the firm's Taxation and Estates Group. Mandell, who resides in Beverly Hills, Michigan, specializes in tax controversy and corporate tax issues in the Detroit office.

Marissa W. Pollick has joined the Ann Arbor office of the law firm Butzel Long as a shareholder, with more than 14 years experience in construction law and commercial litigation.

1982

Douglas S. Ellman was appointed to chair the Michigan State Bar Mandatory Continuing Legal Education Committee which will study the development of continuing legal education programs for members of the bar. Ellman and his wife, **Claudia Roberts Ellmann, J.D. '83**, are principals of Ellmann & Ellmann PC, Ann Arbor.

Matthew J. Kiefer has received a Loeb Fellowship from Harvard University for the 1995-96 academic year. The part-time fellowship is designed for mid-career professionals pursuing career objectives related to improving the natural and built environment. Kiefer will continue to practice real estate, land use, and environmental law as a partner in the Boston law firm of Peabody & Brown.

Richard Krzyminski joined the staff of Baxter Hodell Donnelly Preston, Inc., as chief financial officer and associate. He has more than 13 years of professional experience in accounting, finance, and real estate.

CLASS *notes*

Lawrence Savell has become counsel at the New York City office of the law firm Chadbourne & Parke LLP, where he concentrates on products liability litigation defense and counseling.

Alexander Scherr of Lyndon Center, Vermont, was appointed a visiting professor of law at the Quinnipiac College School of Law, Hamden, Connecticut.

1983

J. Gregg Haught has become a partner with the law firm of Benesch, Friedlander, Coplan & Aronoff where he focuses on public law, including legislative representation, election law and litigation, and public finance.

1984

Marie R. Deveney, an attorney with the Ann Arbor office of the law firm Dykema Gossett PLLC, was appointed to the Institute of Continuing Legal Education's Publications Advisory Board for Estate Planning and Probate, and to the Board of Directors for the Washtenaw County Estate Planning Council. She specializes in estate planning, probate, gift and estate tax, and retirement distribution planning.

Gregory K. Frizzell was named general counsel of the Oklahoma Tax Commission, which handles tax litigation, collections, bankruptcy, and administrative proceedings in tax matters affecting the state of Oklahoma.

Kevin W. Saunders, a professor of law at the University of Oklahoma, is the author of *Violence as Obscenity*, which examines the issue of censorship as it relates to media violence. The book is published by Duke University Press.

1985

Emil Arca, a partner in the New York City office of Dewey Ballantine, wrote an article entitled "Auto Loan Securitization," which was published as the July 1995 issue of *The Review of Banking and Financial Services*. Arca also recently spoke at conferences sponsored by the Strategic Research Institute on Emerging Asset Classes in Securitization and Latin American Securitization.

Craig Jones has become of counsel to the Dow Chemical Company Corporate Tax Department in Midland, Michigan. He is responsible for partnerships and mergers and acquisitions on a global basis. Jones previously practiced tax law in the Washington, D.C., office of the New York-based law firm Chadbourne & Park. Working with Jones in Dow's tax department are **Anita H. Jenkins, J.D. '74**, and **Anderson Gilfeather, J.D. '76**.

Stephen Lappert has become a partner with the New York City law firm Carter, Ledyard & Milburn, where he concentrates in the areas of estate planning, trusts and estates administration, taxation, and real estate transactions, with a specialty in unit investment trusts.

Timothy J. Ryan, executive vice-president and general counsel for Warren-based Detroit-Macomb Hospital Corporation, was featured in the September 25 issue of *Crain's Detroit Business* magazine as one of the 40 most successful business executives under the age of 40.

Ronald M. Yolles, a chartered financial analyst for Southfield, Michigan-based Yolles Investment Management, spoke at the October 11-14 National Financial Advisors Conference in San Francisco on the topic, "Providing Quality No-load Portfolio Management and Service to Your Clients in the 21st Century."

1986

Mark H. Canady has become a partner in the law firm Foster, Swift, Collins & Smith, PC, which has offices in Lansing and Farmington Hills, Michigan. He will practice in the Litigation Department.

Karin Seifert Day has become a partner in the law firm of Davis Polk & Wardwell in New York, New York.

E. Edward Hood, a member of the law firm Dykema Gossett PLLC, was named member-in-charge of the firm's Ann Arbor office and was reelected to the firm's executive committee. An Ann Arbor resident, Hood is a member of Dykema Gossett's litigation practice group, specializing in commercial law, libel and slander law, and construction litigation.

Devin S. Schindler, a partner with the Grand Rapids-based law firm of Warner Norcross & Judd LLP, was appointed to the State Bar Standing Committee on Pro Bono, which oversees all pro bono activities in Michigan and works to promote awareness of and participation in pro bono public service. Schindler is a member of Warner Norcross' litigation practice group and specializes in environmental trial work.

Robert R. Shuman of West Bloomfield, has become a principal of the Bloomfield Hills law firm of Beier Howlett, where he concentrates in insurance litigation, real property, environmental law, and general litigation.

Anne E. Stone has become a partner in the law firm of Morgan, Lewis & Bockius LLP, in its Los Angeles office. Stone is a member of the firm's Business and Finance Section, and her practice focuses on mergers, acquisitions, licensing, joint ventures, and distribution and agency arrangements.

1987

Brian Leiter has joined the faculty at the University of Texas at Austin as an assistant professor of law and philosophy, after teaching for two years at the University of San Diego School of Law.

John Mucha, III has become a principal in the Bloomfield Hills law firm of Dawda, Mann, Mulcahy & Sadler, PLC, where he specializes in employment and commercial litigation, primarily from the defense perspective. He previously was an associate with the Detroit office of Pepper, Hamilton & Scheetz, headquartered in Philadelphia. Mucha also was elected to the governing council of the State Bar of Michigan Litigation Section.

Giuseppe Scassellati-Sforzolini, LL.M., has become a partner in the New York-based law firm Cleary, Gottlieb, Steen & Hamilton. He specializes in European competition law and corporate finance.

Jordan S. Schreier has become a shareholder with the law firm of Butzel Long. He practices primarily in the area of ERISA, employee benefits, and compensation, in the firm's Ann Arbor office.

The Young Lawyer Section of the State Bar of Michigan selected **Reginald M. Turner, Jr.**, as co-recipient of the Outstanding Young Lawyer Award for 1995 for his record of leadership and performance in the legal profession and in the community. Turner is a partner in the Detroit law firm of Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes.

1988

Mark S. Bernstein has become a partner in the Chicago law firm of Barack, Ferrazzano, Kirschbaum & Perlman.

Lois Wagman Colbert, a partner in the North Carolina law firm Petree Stockton, was elected to the Tax Section Council of the North Carolina Bar Association. She also was named co-chair of the Tax Section's committee that produces the quarterly publication *Tax Assessments*. She practices in the Petree Stockton's Raleigh office, concentrating in the area of employee benefits.

John A. Francis has joined the Denver, Colorado, office of the law firm Davis, Graham & Stubbs, where he concentrates in antitrust, health care, and First Amendment litigation and counseling. He previously practiced at Dow, Lohnes & Albertson, Washington, D.C.

Douglas A. Graham has accepted an attorney position with United Air Line in Chicago, where he will oversee litigation. He previously was with the Chicago office of Jenner & Block, where he had been since graduation. Also, he married Jennifer Betensley on December 16, 1995.

Vincent J. Hess was named a shareholder of the firm Lockey Purnell Rain Harrell. He practices in the area of commercial litigation at the firm's Dallas office.

Tamara Joseph published an article entitled "Preaching Heresy: Permitting Member States to Enforce Stricter Environmental Laws than the European Community" in the Summer 1995 issue of the *Yale Journal of International Law*. She took a leave of absence in 1995 from the New York office of Morrison & Foerster to work as a specialist in European Community law for Salans Hertzfeld & Heilbronn in Paris and the Foundation for International Environmental Law Development in London.

Andrew M. Kenefick has become a shareholder of the law firm of Heller Ehrman White & McAuliffe. He is in the Seattle, Washington, office of the firm, where he specializes in environmental law, including hazardous waste, solid waste, air and water pollution, and oil spills.

M. Sean Laane has become a partner in the law firm of Arnold & Porter, Washington, D.C.

Judi A. Lamble has become a partner in the Chicago law firm of Robinson Curley & Clayton, PC.

William C. Odle has been named a member of the law firm of Lathrop & Gage, LC. He works in the firm's Missouri office, where he is a member of the Litigation Department, concentrating in employment law and business litigation.

Sharon McConnell has become a partner in the law firm of Petree Stockton LLP, Raleigh, North Carolina, where she practices in the areas of health care and employment law.

1989

Elizabeth E. Lewis, an associate with the law firm Baker & McKenzie, was chosen to serve as 1995-96 chair of the Chicago Bar Association's Young Lawyers Section. YLS is comprised of lawyers who are under the age of 36 or who have been in practice fewer than 10 years. Lewis' law practice involves environmental, health, and safety counseling in the regulatory, acquisition, and real estate contexts.

Janet A. Marvel has become a partner in the law firm McDermott, Will & Emory. She practices out of the firm's Chicago office, focusing on United States and foreign trademark and copyright counseling and litigation in the Litigation Department.

CLASS *notes*

Jeremy Salesin was promoted to vice president of business affairs at Sanctuary Woods Multimedia, a San Mateo, California, a publisher of entertainment and educational software. He will be responsible for negotiating and structuring all third-party agreements covering licensing, publishing and distribution activities, and will continue to serve as general counsel and corporate secretary.

1990

Christine M. Drylie, Brooks B. Gruemmer, and **Jeffrey A. Jung,** were named partners with the law firm McDermott, Will & Emory. They practice out of the firm's Chicago office. Drylie concentrates her practice on construction, employment discrimination, labor, and wrongful discharge in the Litigation Department. Gruemmer specializes in documenting acquisition financings, insurance company loans, and other lending arrangements in the Corporate Department. Jung focuses in the areas of banking and corporate finance, complex securitization financings, and large financial restructurings in the Corporate Department. **Sandra P. McGill,** also in Chicago, practices in general corporate taxation, foreign tax issues, and foreign withholding, in the Tax Department. **Matthew C. Rosser,** based in the Washington, D.C., office, practices mainly in health care antitrust matters in the Health Law Department.

Harold H. Hunter has joined the Dallas, Texas, law firm of Jenkens & Gilchrist as an associate in the litigation section. His practice focuses on toxic torts and product liability.

1991

Robert J. Borthwick left the Los Angeles office of Gibson, Dunn & Crutcher to join the United States Attorney's office in Los Angeles, where he is an assistant United States attorney in the Criminal Division.

Margo S. Kirchner is an attorney with the Phoenix, Arizona, law firm of Gammagae & Burnham, PLC.

J. David Kuntz is an associate with the Houston office of Liddell, Sapp, Zivley, Hill & LaBoon, LLP, where he practices employment law. He previously was an attorney with Exxon Company U.S.A.

Albert Muyot, LL.M., is assisting peace negotiations in the Philippines and continues to write on human rights issues.

Marc J. Pearlman has become an associate with the Chicago office of Sedgwick, Detert, Moran & Arnold, where he will concentrate his litigation practice in insurance law. He was previously associated with the Chicago law firm McCullough, Campbell & Lane.

Stephen L. Scharf was named vice president, secretary, and legal counsel of Kmart Properties, Inc., in Troy, Michigan. He specializes in domestic and international intellectual property law, which includes management of patent, trademark, and copyright litigation for Kmart Corporation.

Samuel C. Wisotzkey is an associate with Bonn, Luscher, Padden & Wilkins, Chartered, in Phoenix, Arizona.

1992

Kristen M. Neller is now an associate in the international trade group of Dewey Ballantine in Washington, D.C. She was previously an associate with Sonnenberg & Anderson, a customs and trade boutique in Chicago, Illinois.

Margaret A. Williams has left an associate position with the New York City office of Nixon, Hargrave, Devans & Doyle LLP, to become an attorney with the Xerox Corporation in Stamford, Connecticut.

1993

Amy J. Broman left the Ann Arbor office of Miller, Canfield, Paddock & Stone to join the University of Michigan's general counsel's office as an attorney in the University of Michigan Medical Center attorney's office.

Christopher C. Cinnamon has become a shareholder in the law firm of Howard & Howard. He practices telecommunications law in the Lansing office, specializing in federal and state regulation of cable television companies.

Andrea Crowe and her husband, Michael McEvoy, are the parents of a daughter, Morgan Leigh McEvoy, born June 30, 1995.

William P. Dani, an attorney with the Grand Rapids-based law firm Warner Norcross & Judd LLP, was elected to the Council of the Michigan State Bar Intellectual Property Section. He specializes in trademarks, copyrights, trade secrets, computer law, licensing, and related antitrust law.

Michael J. Feuerman has joined the law firm Cohen, Berke, Bernstein, Brodie, Kondell & Laszlo, PA, of Miami, Florida, as associate attorney, and continues to practice commercial litigation. He previously was associated with the Miami firm Kluger, Peretz, Kaplan & Berlin, PA.

Nicolette Hahn, an attorney with the Kalamazoo law firm Early, Lennon, Peters & Crocker, PC, has been elected to the Kalamazoo City Commission. Her law practice involves business litigation and arbitration, emphasizing work in telecommunications.

Roshunda L. Price-Harper has joined the Bloomfield Hills office of the firm Howard & Howard Attorneys, PC, where she specializes in business law. Prior to joining Howard & Howard, she served as a law clerk to Judge John Feikens in the United States District Court, Eastern District of Michigan.

David L. Schenberg has become an associate with St. Louis-based Husch & Eppenberger.

1994
Jared Goldstein, who is presently clerking for Judge Louis Pollack of the United States District Court, Eastern District of Pennsylvania, has accepted a position with the Solicitor General's office.

1995
Amy M. Colton and **Jill Mainster** joined the Detroit office of the law firm of Honigman Miller Schwartz and Cohn. Colton concentrates her practice in litigation, and Mainster practices real estate law.

Erik Kuselias was elected as a city councilman in Hamden, Connecticut. In addition to practicing law full time at Updike, Kelly & Spellacy, PC, in Hartford, he is a part-time history professor at Gateway College, New Haven.

Melanie Mayo West has joined the Bloomfield Hills office of the law firm Howard & Howard Attorneys, PC, where she concentrates her practice in business and securities law.

Grand Rapids resident **James D. Zwiers** has become an associate with the law firm of Warner Norcross & Judd LLP.

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Michael A. Halpin, J.D., '79, was posthumously honored by the Isabella County Child Protection Council, which has renamed the former "Service to Children Award" to the "Michael A. Halpin Service to Children Award." The award recognizes individuals who have made a significant contribution to the field of child abuse and neglect in Isabella County. Halpin died in a bicycle/car accident September 29, 1983.

1924 Sydney N. Galvin
January 9, 1996

1925 William Z. Proctor
February 22, 1995

1926 William John Wilkins
September 9, 1995

1927 Edward P. Madigan
December 12, 1995

Paul B. Nichols
July 13, 1994

1928 Norman Freehling
December 9, 1993

1930 Stanley S. Gilbert
April 19, 1995

Frank E. Jeannette
October 24, 1995

John W. Scott
January 7, 1996

1931 Dan Youngs Burrill, D.D.S.
December 1, 1993

George T. Martin
September 24, 1995

Maxwell L. Rubin
May 25, 1995

1932 James K. VanHook
April 1, 1992

1933 Booth Kellough
October 30, 1995

Howard C. Petersen
December 28, 1995

1934 Francis M. Hughes
December 9, 1995

Elbert G. Manchester
August 21, 1994

Richard A. Perkins

John W. Steen
February 19, 1993

1936 Herbert A. Greenstone
October 17, 1995

Dickson C. Shaw, III
May 9, 1995

1937 Louis R. Coffman
May 9, 1995

1938 Harvey N. Kuhr
May 9, 1995

1939 Arthur W. Semppliner
August 29, 1995

Robert C. Keck
May 24, 1995

1940 Elmer Cerin
July 24, 1995

Joseph E. Rinderknecht
May 25, 1994

1941 Joseph F. Bartley, Jr.
August 28, 1995

Sherman J. Bellwood
August 14, 1995

Robert N. Spaeder
December 6, 1993

1942 Robert B. Hartnett
December 3, 1995

Kenneth E. Thompson
January 11, 1996

1943 Abner Vernon McCall
June 11, 1995

Arthur Peter, Jr.

Stuart A. Reading
August 28, 1995

1946 Max V. Hagans
August 1, 1993

Leo Dow Harman

1947 Robert K. Eifler
July 9, 1995

Shubrick T. Kothe
July 23, 1995

1948 L. Russell Heuman
October 25, 1995

F. Chalmers Houston, Jr.
January 18, 1996

Harvey C. Varnum
September 23, 1995

1949 John Wright Bell
August 1, 1995

Stanley J. Ellias
November 19, 1995

John J. Fitzgerald
November 17, 1995

Robert A. Grimes, Jr.
July 15, 1995

1950 Charles W. Elicker II
August 12, 1995

John J. Gaskell
June 12, 1995

William L. McKinley
July 17, 1995

Victor J. Perini, Jr.
January 20, 1996

1951 Arnold F. Bunge, Jr.
March 1, 1995

Erwin K. Johnson
July 23, 1995

Robert J. Swan
July 4, 1995

1952 J. William Commane
December 21, 1993

Geoffrey Davey
October 9, 1994

Robert W. Hansley
July 30, 1995

Richard E. Miller
November 27, 1993

John P. Ryan, Jr.
November 4, 1995

John N. Vlachos
August 23, 1995

1953 Richard B. Barnett
December 6, 1995

Duncan Noble
December 1, 1995

Robert Uvick
September 30, 1995

1954 Richard E. Goodman
November 4, 1994

Donald C. Steiner
July 9, 1994

1955 Herbert Drucker
February 21, 1995

Lawrence N. Ravick
January 22, 1994

William L. Velman
July 14, 1994

1956 John T. Milligan
January 1, 1994

1958 Dirk D. Snel

Emmet E. Tracy, Jr.
November 8, 1995

1959 John Harris Shepherd
August 12, 1995

1960 William L. Ginsburg

Sidney B. Hopps
October 14, 1995

1961 R. Park McGee
October 3, 1993

1963 Donald E. Vacin
January 20, 1996

1964 William G. Bailey
October 30, 1994

John Agnew Shrank
July 29, 1995

1965 Albert James Donohue
July 23, 1995

Frank G. Pollock
October 12, 1995

1967 Dr. Roger W. Heyns
September 11, 1995

Ira B. Rose, Esq.
January 30. 1995

1975 John Thomas Sherwood, Jr.
March 10, 1995

1979 Russell Brooks Reader
August 11, 1995

1983 Daniel E. Meuleman
September 19, 1995

1987 Benjamin J. Brownfain
April 10, 1995

1990 Lloyd Anthony Sandy
December 27, 1995

1995 Gunnar O'Neill
August 10, 1995

INVE$TING IN WORLD HARMONY

Immanuel Kant said that world harmony will arise from a community of democratic nations linked together by international commerce. However, the theoretical possibility of such harmony is not a guarantee of its fruition.

Kant said that it is one's duty to work towards this theoretical possibility; I want to speak of our duty as citizens of the world's leading democratic and capitalist nation to help further this possibility today.

— BY JEFFREY SACHS

Adapted from the second of three talks Professor Sachs delivered in the William W. Cook 37th Lecture Series Jan. 17-19, 1995. The full text of his series of talks is forthcoming from the University of Michigan Press.

I am going to discuss in particular one of the most contentious and, I believe, poorly-understood topics of all of American economic policy, and that is the topic of foreign assistance. I think it is fair to say that foreign assistance probably ranks even above welfare, another gravely misunderstood institution, as the most unpopular part of the American budget. I am here to tell you why, yes, you *should* pour more money down that rathole, as it is popularly conceived. I'll try to give you some historical perspective and theoretical and practical insight into a topic that is vastly confused in the public mind and among our political leaders as well.

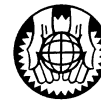
The first point about foreign aid is how little of it there actually is. A recent telephone survey shows that the general public vastly overestimates foreign aid expenditures. The day after the November 1994 elections, the Kaiser Foundation polled people on their attitudes about the budget, about health care prospects, the Contract With America, and so on. (The Contract *On* America, as I inevitably think of it now, calls for sharp reductions in our foreign aid.)

One of the questions in this survey was, "What is the largest single item of the American budget?" The responses were illuminating. While 30 percent of the respondents said that it was defense spending, fully 27 percent said that foreign aid was the number one item in the federal budget. This view is so wrong-headed and so confused that it serves as a starting point to explaining public attitudes about foreign aid and why we, as a nation, continue to make profound policy mistakes in this arena.

Actually, the number one item in the budget is not defense spending, but Social Security spending, which accounted for 21.6 percent of U.S. federal budgetary expenditures in fiscal 1994. Number two was defense spending, which at $279 billion accounted for 18.8 percent of the budget. In third place are health expenditures, basically Medicare and Medicaid, which at $255 billion is 17.2 percent of the federal budget. Nor were the survey respondents right even with respect to fourth place, which is now interest on the public debt at $232 billion or 15.6 percent of federal spending.

It turns out you have to go very very far down on the list to get to something remotely called foreign aid. And foreign aid in its broadest definition includes military expenditures as well as economic assistance. Under that broad definition, foreign aid amounted to $12 billion for the entire world in 1994, not quite reaching one percent of our federal spending and reaching precisely two tenths of one percent of our national income.

So, the starting point of understanding foreign aid and why we seem to get so little out of it, of course, is that we put so little into it. There is almost nothing there; these great battles we have been having about whether to cut aid to Russia in response to the war in Chechnya are over a pittance that by itself could not be of any significance. In fiscal 1995, the Clinton Administration's request for Russia is on the order of $300 million dollars. That is one half of one hundredth of one percent of our national income or, if it were to be achieved, $2 per Russian citizen for fiscal 1995. But before you get your hopes up, you must realize that the vast majority of that would, in fact, go to American consulting firms and almost nothing, in fact, would go to the Russian people directly.



A POLICY ORPHAN

A second and even more devastating misperception is that the possibilities and roles for foreign aid are misjudged across the political spectrum. It is an orphan of policy, the one area of the budget where there is virtually no domestic constituency either on the right or on the left. On the right you have advocates of free market economics (of which, of course, I myself, am one of your rabid examples), and almost all free marketers say foreign aid is a waste because market reform is its own reward. While I share that sentiment if one is thinking about ten or twenty or thirty years of living under a market economy, I believe it is wrong to think that reform guarantees its own success in a short period in countries in profound crises.

On the left it used to be the case that you would generally find more support for giving foreign aid to people in need, but opposition to the conditions of economic reform that would most usefully accompany it. Even that support has disappeared in recent years as the American liberal community has in large part turned its back on the rest of the world in the face of very obvious difficulties in our own country.

My goal is to try to offer what could be the basis for a new and, I believe, desperately needed national consensus on the U.S. role in the world through this enormously misunderstood, highly unpopular, and vastly underutilized form of foreign policy. I will explain how you can give the aid accompanied by measures that will, in a period of years, allow the country a good chance to be on its own, on its feet and indeed enjoying convergent economic growth that market economies in the developing world have accomplished in recent decades.

THE STARTING POINT OF UNDERSTANDING FOREIGN AID AND WHY WE SEEM TO GET SO LITTLE OUT OF IT, OF COURSE, IS THAT WE PUT SO LITTLE INTO IT.

MODELING THE MARSHALL PLAN

Let me put forth some numbers to give you a little bit of historical background on the foreign aid budget. It wasn't always as insignificant as it is today. During much of the postwar period, foreign aid was a critical component of America's efforts to shape the world. These efforts, particularly in the Marshall Plan, were some of the most brilliant foreign policy efforts ever seen by any country in history.

It is often said we can't afford another Marshall Plan for the former Soviet Union, as if we are anywhere close, even literally within two orders of magnitude, to such a plan. Between fiscal years 1948 and 1951 under the Economic Recovery Program — the so-called Marshall Plan funds — the United States gave an average of close to two percent of gross national product per year to the war-ravaged countries of Europe, overwhelmingly in the form of grants, not loans. That does not include other forms of aid to Japan and other parts of the world.

To give a comparable measurement, today two percent of our GNP as in the Marshall Plan would amount to $120 billion. At best, taking the largest definition of foreign aid, we spend one-tenth of that amount. But since a lot of that total is actually military aid or appropriations for international institutions and not really assistance to foreign governments, the amount that we are actually delivering to foreign governments is a tiny fraction. For the entire former Soviet Union, the fiscal year 1995 request was $900 million, with an actual appropriation of $835 million. That comes to approximately one-hundredth of one percent of our GNP. The part for Russia alone amounted to about $300 million. For Egypt and Israel, the two largest aid recipients, we spent $2.1 billion and $3 billion, about half of which is military assistance.

Military assistance has outpaced economic assistance since 1973. Economic assistance per se had been running at around one-tenth of one percent of GNP all through the 1970s and 1980s, and it has taken a sharp drop in the past two years. What I would like to stress is that not only are the percentages declining sharply as a percent of U.S. GNP in the postwar era, but what is left is highly skewed because approximately half of regionally allocated aid goes to Israel and Egypt. What is divided among the rest of the world turns out to be amounts that could not by themselves have the strategic significance that I believe aid can have if properly organized.

In fiscal 1993 the Ukraine — a two-year-old nation struggling under some of the most horrendous economic conditions that we have seen in this century, with an extraordinarily fragile new government in place, loaded with nuclear missiles — received from the United States government $29 million. With a population of 52 million people, that came out to 56 cents per person. I have often thought that was good for one stop in the Kiev McDonalds, at best. Unfortunately, I exaggerate again because I would guess that of that $29 million, probably $28 million was for foreign advisors and no doubt they, not the Ukrainians, stopped at the McDonald's.

Poland received $50 million, so 38 million people got $1.31 each; Russia, in one of the most pivotal years for Yeltsin's attempt at democratic and economic reform, received $183 million, or about $1.22 per person. As for Bosnia, as we were wringing our hands and wondering what to do about the great moral crisis of our age, we apparently couldn't find even a dollar for humanitarian assistance that year.

In broad categories, 1993 foreign aid expenditures dropped rather sharply from $594 per person in Israel and $33 in Egypt to $2.77 per person in sub-Saharan Africa, $3.04 in Eastern Europe, and for the entire Commonwealth of Independent States, $3.47 per person.

THE ROLES AID PLAYS

So, the sad fact is that we don't really have much of a test of what aid can do outside of the case of the Middle East. Obviously we have reaped some very important returns there in our political and security concerns. But for the rest of the world, the question is not, "where has the money gone?" The question is whether or not we were right to have chosen to expend very little national effort in recent years for this purpose. It seems to me that on this issue, we are troubled by a fundamental confusion over what the appropriate role for foreign assistance might be.

There are at least five fundamental roles that have been assigned to foreign aid in our public policy discussions throughout this century. The first is emergency humanitarian assistance. This role engenders little dispute. We are often, in cases of great international economic, social and natural catastrophes, the first and the largest donors.

A second goal, the one that is most associated with economic assistance, is the goal of economic development. The traditional kinds of aid in this realm are infrastructure projects building roads and bridges and so forth. Here, the Peace Corps comes first to mind to most people. The Peace Corps is in fact only a

BUT FOR THE REST OF THE WORLD, THE QUESTION IS NOT, "WHERE HAS THE MONEY GONE?" THE QUESTION IS WHETHER OR NOT WE WERE RIGHT TO HAVE CHOSEN TO EXPEND VERY LITTLE NATIONAL EFFORT IN RECENT YEARS FOR THIS PURPOSE.

very tiny program. Most of our economic assistance aid has flowed through the economic support funds administered by the U.S. Agency for International Development. Similarly, the World Bank's preeminent role in the last 40 years has been infrastructure finance.

The third role for foreign assistance is military assistance. Here there is somewhat less controversy over purpose in many cases, but big debates about effectiveness. In the past two decades, the military component of our foreign assistance budget has been more than half, in fact, of the total. That has meant that in addition to Israel and Egypt, the greatest recipients of aid have been countries where U.S. military bases were located — Greece, Turkey, Spain, the Philippines, and so on.

The fourth goal of foreign aid is simply overtly political aid to support a friendly "client state" or to support a policy objective. Certainly I would put aid to Egypt in that category; after the wars of the Middle East the U.S. committed in the 1978 Camp David Agreement to provide Egypt with large-scale economic assistance as a rather direct and explicit quid pro quo for the peace agreement.

It is the fifth kind of aid that I think is actually the most important and least understood and that is aid to promote economic reform. I would classify the Marshall Plan as that kind of aid; indeed, I would classify the Marshall Plan as the greatest single foreign policy success in foreign assistance that we have ever had, although it has been matched on a much smaller scale by assistance to some developing countries, particularly Korea and Taiwan.

DEVELOPMENT'S POOR TRACK RECORD

Now what do I mean by distinguishing aid to promote economic development from aid to promote economic reform? This is, I think, an absolutely fundamental distinction for good public policy in this area. We now see clearly, and many economists warned us of this fact for years, that aid could not promote economic development. Project building, infrastructure expenditures, long-term building of roads, and so forth would not only not materially change the economic conditions of aid recipients, but in an ironic way could actually set back economic development.

Why set it back? Because one ironic feature of aid is that it tends to be overwhelmingly from government to government. As Milton Friedman warned nearly 40 years ago, economic assistance would strengthen governments and thereby weaken the private sector. Speaking in 1957 in an age when many development economists believed in development planning and state-led industrialization, Friedman's views were very much the outlier. But they have been vindicated by experience. Governments that relied on state development strategies had poor economic growth compared to market economies.

The World Bank, USAID, and others have found that aid for infrastructure projects has had a fairly poor record, depending on the countries. The returns tend to be low. Many of our largest economic assistance recipients over the years went from bad to worse in overall economic conditions. While our aid by itself was probably too small to make a definitive judgment, I think that the portfolio of the World Bank in its long term finance, which is a larger pool of aid, shows that we didn't get very high returns out of this. The World Bank is filled with debts from bad loans made to a lot of very poor sub-Saharan African countries with one-party dictatorships and state-run economies. In such cases, I would agree that all of the aid in the world could not promote long-term economic growth.

However, I think it is absolutely wrong to confuse that kind of aid with the use of aid to promote short-term political stability of democratic governments intent on putting in place the fundamental political and economic institutions that *do* promote long-term economic growth. There, I think, is where we could find a basis for understanding among the right and left and among foreign policy and defense analysts that aid does what Milton Friedman said — it strengthens governments, but sometimes strengthening governments is absolutely vital because governments are vital. Even if you are a minimalist and the most rabid free marketeer, no one could doubt the role of governments in promoting the role of law in providing for internal security, a judicial system, and an orderly system of public administration that is vital for ordered liberty.

Therefore I think that Friedman is right and wrong — right about what aid does do, and absolutely wrong therefore to condemn it fundamentally. Aid can be extraordinarily important, indeed vital, where the goal is to bolster governments that otherwise would fail and thereby never have the chance to create institutions of economic freedom and rule of law which would be the foundation for their future political and economic development.

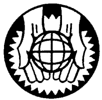
This clearly was the concept of the Marshall Plan founders. In his commencement address at Harvard, George Marshall put the issue in political, not

THE UNITED STATES SURELY IS NO LONGER IN THE POSITION THAT IT WAS THIRTY YEARS AGO TO DO THIS BY ITSELF. THERE IS NO NEED TO DO SO.

economic, terms. He doesn't talk about making Western Europe rich. He doesn't talk about long-term economic growth. He doesn't talk about economic development. He said that the goal of aid is to stabilize economic conditions "so as to permit the emergence of political and social conditions in which free institutions can exist." Dean Atkinson put it even more simply. He said, "We had to show the Germans that democracy could work."

What made the program so fundamentally successful was first that it underwrote these democratic governments in quite a direct way. The Marshall Plan did not build infrastructure projects. What it did, in effect, was give money to governments by giving them merchandise which was then sold to raise funds that supported national budgets.

It was a way to finance the governments and to give them enough stability to go forward. It was a highly conditioned program, requiring economic reforms, market institutions and international trade. It was also short-term, which is enormously important in a successful aid program. The idea was not to create a dependency relationship which would last a generation or two, but rather to help fragile democracies get started once again. And it was known from the beginning that this had a very short lifespan; indeed in effect the Marshall Plan lasted for just three years.



KEY ELEMENTS OF AID

When I speak about a new consensus in foreign aid, I believe that these are the elements that would be most important. *First,* it must be delivered for new governments or governments that are in extreme political flux, for which aid can help to stabilize political and social conditions long enough for the government to carry out economic reform. *Second,* that the aid should be conditional. Aid is not a blank check. It is not delivering the lottery prize without the lottery ticket. Aid comes with actions required of the aid recipients, and we have to be hard-nosed about it because otherwise we won't produce the necessary and desired results. *Third,* and crucially, aid must be temporary and known from the start to be temporary. Indeed if you look at aid to Korea and Taiwan at the end of the 1950s, the great burst of reforms for Korea and similarly for Taiwan came when we told them that we were winding up the aid. Within two years, Korea's inefficient, non-reforming administration was gone; a new government came and opened up the Korean economy dramatically because they saw they had nothing else to live on. From a base of unbelievably low level of exports, Korea became one of the great export powers of the world in the next thirty years.

The *fourth* criterion is that aid must be coordinated with other democracies. The United States surely is no longer in the position that it was 30 years ago to do this by itself. There is no need to do so; indeed, it is imperative that the community of wealthy democratic nations share in this burden of supporting fledgling democracies around the world, on a basis of agreed and established principles. I regard it as highly disturbing that there are almost no agreed-upon principles of foreign assistance between the United States and the other democracies, and almost no discussions even about the basis for foreign aid. When should there be aid? When not? Which dictators do you support? Which ones do you not? What kinds of political conditionalities should be put on? These are issues of enormous significance in the world that are not discussed among our governments.

FROM THE BRINK OF BANKRUPTCY

From a theoretical or conceptual point of view, I want to give some basic reasons why foreign assistance can play a fundamental role necessary to governments attempting reform. The first and most important reason is that most of the governments that are trying to make the traverse from the second and third world back to the first world start the transition in a situation of virtual state insolvency. Despite all of the pleadings of economists and all of the demonstrations of successful market economies, developing countries do not come to this idea of reform easily or at an early point. Of the dozens of countries that have made this shift in the last ten years, almost every one has done so from the brink of bankruptcy, in utter and extreme financial chaos.

This is one of the keys to understanding why these reforms are so incredibly difficult. Almost every one of these countries suffers from enormously high inflation, which is almost always a reflection of state bankruptcy. A government that doesn't have the revenues to pay its bills is going to pay them by printing money, creating hyperinflation. In this last decade marked by nations moving from failed state industrialization to market reform, there have been more hyperinflations than in any previous ten-year period. There were eight hyperinflations in world history up until 1951. Since 1985, there have been 16 in South and Central America, Nigeria, Eastern Europe, and the former Soviet Union.

This has profound implications, because inflation itself is perhaps the most destabilizing phenomenon that can face a peacetime economy. It leads to incredible confusion, arbitrary behavior, panic, and all forms of political instability. It is not an accident that some of the

greatest tyrants in world history in the modern era have come to power in the aftermath of extraordinary inflations, Hitler being the most famous example.

Fiscal insolvency and high inflation provoke various circles of social disorder; one is flight from the currency itself. We know that high inflation can turn into hyperinflation not even because the government prints more money, but because of the population's spontaneous flight from the currency. When people shift to other currencies, there is a smaller money base on which to collect this so-called inflation tax, which forces the government to print even more money to capture the same real resources it was capturing before. And so a vicious circle of spontaneous hyperinflation can arise from merely poor financial conditions.

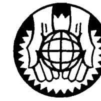
But other kinds of vicious circles are obvious in countries of deep financial instability where governments are not powerful enough to pay allies off, to keep control, and to use the kinds of basic fiscal mechanisms that all governments have to keep at least a sense of order. You get, for example, a contagion of tax evasion in many of these countries.

When most people are paying their taxes and the state is healthy, there are strong reasons why any individual also should pay his taxes. If he evades them he is more likely to be caught. But when you have a general social degradation in which everybody is evading their taxes, then it is the rational response of any individual to do so as well because the value of being within the official system is no longer what it was and the costs of being caught are also vastly reduced. And so what one has seen in Argentina, in Peru, in Bolivia, in Russia today, in Yugoslavia and in Poland is that as countries are on this downward spiral, tax collections plummet, tax evasion and other forms of criminality become rampant, and inflation therefore accelerates.

It is also a mistake to fail to see that the breakup of Yugoslavia and the risks in Russia right now are also related to the inability of the central government to provide even the most minimal levels of social order in the society. There is little stake in staying in a federation which is collapsing. There is little sense of staying in a monetary system which doesn't deliver even the most basic rudiments of monetary order and predictability, where the government no longer holds the power to collect tax revenues. And so when I worked closely with regional leaders in Yugoslavia in 1988 and 1989 in a period of high inflation, the newly emerging republics of what was still Yugoslavia were actively asking themselves, "Why don't we just get out? Federal government is worthless for us."

Beyond its role in backstopping a government to halt the vicious circles of insolvency, a second reason why aid is absolutely needed is that it restores public confidence. In such circumstances, there is such profound pessimism that the adverse expectations of the public itself become a factor in the demise of the social order. Every place where I personally have worked as an advisor, the situation has been deemed to be totally hopeless and on the verge of civil war before the moment of stabilization. That fact alone cripples the chances for enough political consensus to move on a stabilization program.

In Poland in 1989 the expectations were for starvation. Actually, Poland was the recipient of emergency food shipments at the end of 1989. Now that Poland's reforms have succeeded, I am told almost every day that it was obvious aid would work in Poland but it won't work wherever the current crisis is. The same view almost killed the Marshall Plan; the sense of what aid could actually accomplish in Germany, Europe, and Japan was extraordinarily negative, as it still is today. Every Russian specialist is saying that nothing could work, that market reforms couldn't take place there either. The same thing was said in Japan in the 1870s; it was said in Germany and Japan in 1948; it was said in Korea in 1960; it was said in Poland in 1990. It is nonsense in all of these cases in my view.



LIFELINES TOO SHORT, TOO LATE

The bottom line that I am suggesting is that while reform may be its own reward and surely is five or ten or twenty years out for the dozens of new, highly fragile, bankrupt democracies trying to make the transition to the market, a lot of them are going to fall into chaos, into social upheaval, into civil violence, or into renewed dictatorship along the way. Obviously, we are living in an era where states can't cope without aid and institutions such as international bankruptcy that can handle this kind of financial and social upheaval.

We must understand that these nations are crossing the river, and a lifeline from one side to the other is vital. Once they are on the other side, then there is a chance for them to make it on their own. And that is exactly why even the pittance of aid that we are talking about had not proved to be enough in vital cases.

Let me turn to three examples for you. Poland, Russia, and Algeria are all cases of countries attempting to make the move in the last five years from dictatorships with state-led socialist economies to market democracies. In Poland, there was a sense of absolute desperation at the end of 1989. The nation was wracked by hyperinflation, fear of starvation, ominous talk of civil war or military coup, and a sense that Poland could never get back on its feet.

In that one case in Eastern Europe the United States acted wisely and in a timely way, almost entirely for domestic political reasons. There were enough pro-Poland votes in Chicago and Detroit to matter. And so when Senator Paul Simon

IT HAPPENS THAT THERE WERE TWO GREAT BANKRUPTCIES IN JANUARY 1992. ONE BANKRUPTCY WAS THE RUSSIAN FEDERATION. THE OTHER WAS MACY'S DEPARTMENT STORE.

began the bidding process for aid to Poland, the Bush administration had to respond. Fortunately, it responded in an effective way by championing the idea of a $1 billion line of credit back to a new convertible currency in Poland. It was a limited, discrete, highly conditional kind of aid not to build a bridge but rather to put in place the foundation for a fundamental reform.

From inside the Polish government, this was a Godsend. I believe that without that promise, the reformers could not have won over the skeptics within the government to implement such a bold and decisive step on January 1, 1990. Indeed, the whole idea of a convertible currency for Poland, which is now unanimously accepted by analysts of economic transition, was then opposed by almost everybody. The International Monetary Fund and World Bank said it would take five to ten years, yet it happened overnight with great skepticism. The Polish zloty stabilized only because a one-time appropriation of what seems like an incredibly modest amount of money had two decisive effects.

First, the stabilization fund convinced the government of Poland itself to act in the direction of the reformers within the government; second, it convinced the Polish people that this must be a smart thing because the West surely wouldn't put a billion dollars behind it if it were some crazy idea. With the money in the bank, the Poles not only took advantage of this new convertible currency by cashing in their zlotys for dollars, but the first day of the reform they brought their dollars from under the mattress and turned them into zlotys. Confidence in the currency, at least in the short term, was established.

That was the basis for what has become the leading economic success in Central and Eastern Europe and the former Soviet Union. By 1993, what had been a hopeless basket case on the verge of starvation and civil war was the fastest-growing country in Europe. That is not quite as remarkable as it sounds because Europe barely grows, but it was growing at more than four percent in 1993. In 1994, Poland grew at an estimated 4.9 percent. Its industrial production is up 16.7 percent. That is a boom even by East Asian standards, not just European standards.

Poland was the model that Yegor Gaidar and Boris Yeltsin hoped to emulate in December 1991, when Russia became an independent, sovereign, democratic federation with the demise of the Soviet Union. Guydar called for a stabilization fund in January 1992, saying quite explicitly that a $6 billion fund for Russia was vitally needed to provide support for the ongoing reforms. What happened in Russia is, I believe, one of the greatest foreign policy blunders of the West of the 20th century, or at least could evolve into that.

Not only was the request not heard and acted upon, it was absolutely waved away by the Bush administration, by the World Bank, by the IMF, and by the other donors. Russia, it seems, was simply too big to handle. After all, 1992 was a presidential election year. In a heated primary campaign in New Hampshire, Patrick Buchanan was attacking President Bush for being the foreign policy president. The constituency within the United States for aid to Russia, let us say at the very least, was meager. No Senators were jumping up and down for support at that vital time.

It took Russia more than a year and a half to get any form of useable aid from the West. Until this moment there has not been a stabilization support fund for the Russian currency. Today, I wince at articles talking about the IMF's "moment of truth" in Russia as it must decide whether to grant a $6 billion stabilization fund to the Russians now at war in Chechnya. Well, with all due respect, this moment of truth came in 1992, 1993, and 1994. We faced this difficult decision today because we utterly neglected this choice for three years when there wasn't a violent and brutal war raging within Russia, and when Russia had not been taken over on day-to-day policy by a secretive politburo of hard-liners and security officers. This painful choice today is not something that the fates have thrust upon us, but rather something that we thrust upon ourselves by our own neglect.

A TALE OF TWO DEBTORS

It is stunning to compare the treatment that Russia got with the treatment of another important debtor that also went bankrupt at the same time. It happens that there were two great bankruptcies in January 1992. One bankruptcy was the Russian federation. The other was Macy's Department Store.

Because there is no international form of Chapter 11 bankruptcy, for the Russian federation, there is no debt standstill to prevent creditors' rush for payment. There is still no stabilization fund. For Macy's, where things really count, it took exactly one hour of filing to have a standstill in place on debt servicing. Two weeks later, Macy's raised $600 million in a debtor and possession loan under Chapter 11. *Two weeks.* It took Russia sixteen months to negotiate a $600 million loan and start getting disbursements from the World Bank.

The fact of the matter is that we lost a critical opportunity in 1992. This is a matter of the utmost timing. If you lose the support, you lose the confidence, you lose the expectations, and ultimately, you lose. At the time, everybody said, "What could happen? What could happen?" The truth is that we still don't know what could happen. We do know that in a nation as divided and desperate and confused as a country can be, with

20,000 nuclear weapons, two million men under arms, and the world's largest stockpile of non-nuclear weapons of mass destruction, very bad things can happen.

In foreign policy, in protecting ourselves and our children, you don't sit around and tell a country reeling in financial collapse that the market is its own reward. That is exactly what we did. Now, as it is said that we face this painful choice, I am no longer sure that we do. The chance may be too far gone. I am not optimistic; I believe that it would be inopportune to give aid now that should have been given earlier. I'd rather wait to see whether democrats are really in power, or whether they are being dangled forth for our benefit as the war party proceeds with its efforts.

The third example we can posit is the lack of cooperation among the G7 and the lack of any principles in our aid today. In January 1995, the managing director of the International Monetary Fund was touring the world promoting an emergency assistance package for the Algerian military government because the alternative was fundamentalist revolt in Algeria. Without going into all the details, even a casual observer can see that for the IMF and for France to be calling for emergency aid now is a pathetic response to a situation which began at least seven years ago.

At the end of 1988 the Algerian government faced massive riots and a call to eliminate the socialist economic system and non-democratic rule. Indeed, in 1988-89 the government began brave, remarkable economic and political reforms. Democratic elections were set for June 1991. In 1989, Algeria was like Poland, Yugoslavia, Russia, Brazil, Bolivia, Argentina — a collapsed, bankrupt state reeling under massive debt. Obviously, initiatives to stabilize Algeria were of vital security concern to Southern Europe. What was the response? The French government, Algeria's largest creditor, sent through the IMF very explicit instructions to the Algerians that they must not even think about rescheduling their debts. Japan, the second largest creditor, sent the same message.

So foreign debt service payments rose in net transfers to the creditors between 1988 and 1989 from .7 percent of GNP to 4.4 percent. In 1990, again the message came: no debt rescheduling, no ease, not even emergency loans from France. The debt servicing went up again, this time to 4.9 percent of GNP. Inflation started to soar, as happens with bankrupt governments, to sixty percent by 1991.

On June 3, the IMF showed up and gave a loan under strict conditions, two weeks before elections were supposed to occur. The elections were postponed by fiat for six months. Two months before the election, with no real money being offered, the Algerian government did what the IMF had required, devaluing the currency and cutting subsidies. In the elections held in December 1991 and January 1992, lo and behold, the radical opposition wins by overwhelming landslide. The next day, there is a military coup. Thus ends a chance for peaceful democratic economic reform. Thus prompts the call, seven years later, to support the military government because it is our least of bad alternatives.

I am afraid that at this point we have missed vital opportunities. What should have been the glorious post-Communist period marked by the developing world's return to democracy and market economies is now increasingly a destabilized and fractious world. We still very much hope for the best, but begin to see some of the worst risks as not altogether implausible. And we still have vital opportunities and hopes that this Kantian world of democratic states linked together by peaceful commerce can be brought to fruition. It is not going to happen by itself, not on our current trajectory of policies. I think what can be done is not so hard to see. Thank goodness the wealth of the industrial world is greater than at any time in history. We are a $20 trillion democratic industrial community. Even one percent of our efforts is $200 billion that could be put toward the future of our security, but to do that we must establish principles, strategies and international institutions that can help us get the job done. LQN

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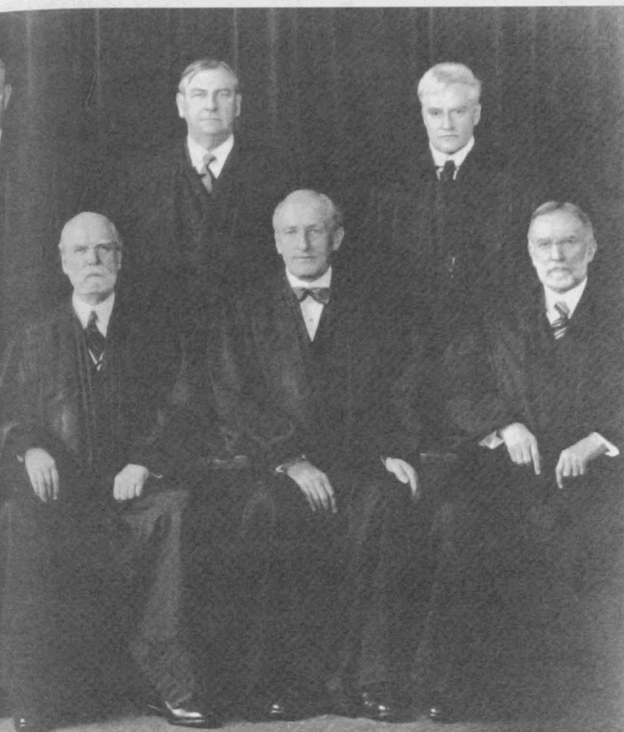
BOTTOM ROW, left to right: Louis D. Brandeis, Willis Van Devanter, Charles Evans Hughes, James Clark McReynolds, George Sutherland. TOP ROW, left to right: Owen J. Roberts, Pierce Butler, Harlan Fiske Stone, Benjamin N. Cardozo.

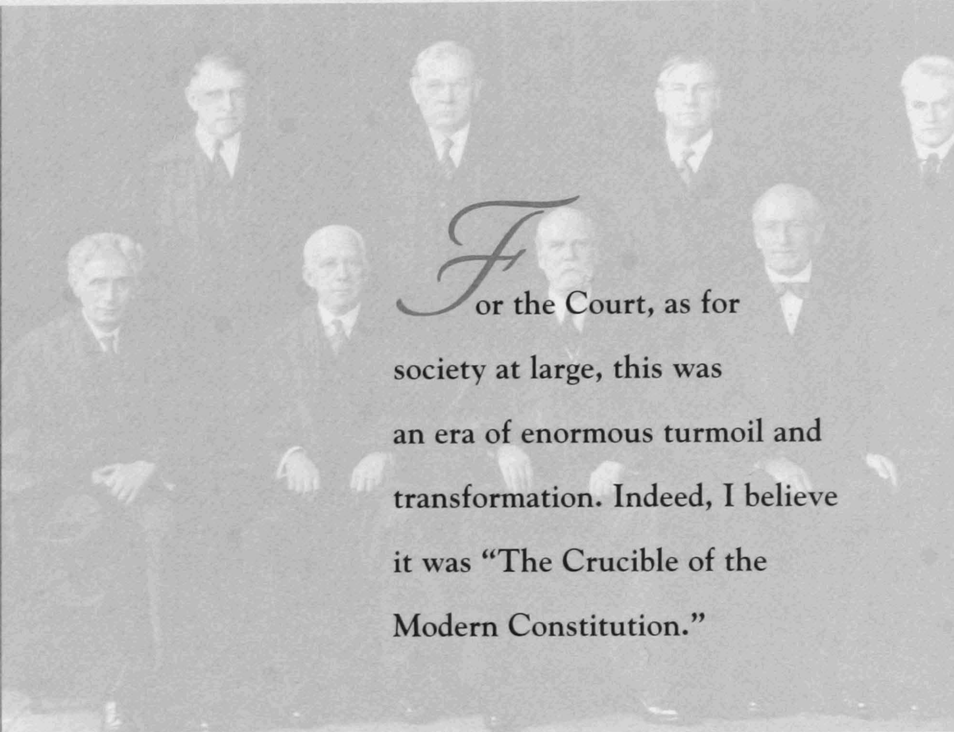
PHOTO COURTESY OF HARRIS AND EWING, COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

Telling the Story of the Hughes Court

This article is based on a paper delivered at the annual meeting of the American Society for Legal History in Houston in October 1995. For a copy of the complete version, with footntoes, please contact LQN or Professor Friedman at (313) 747-1078, rdfrdman@umich.edu

BY RICHARD D. FRIEDMAN





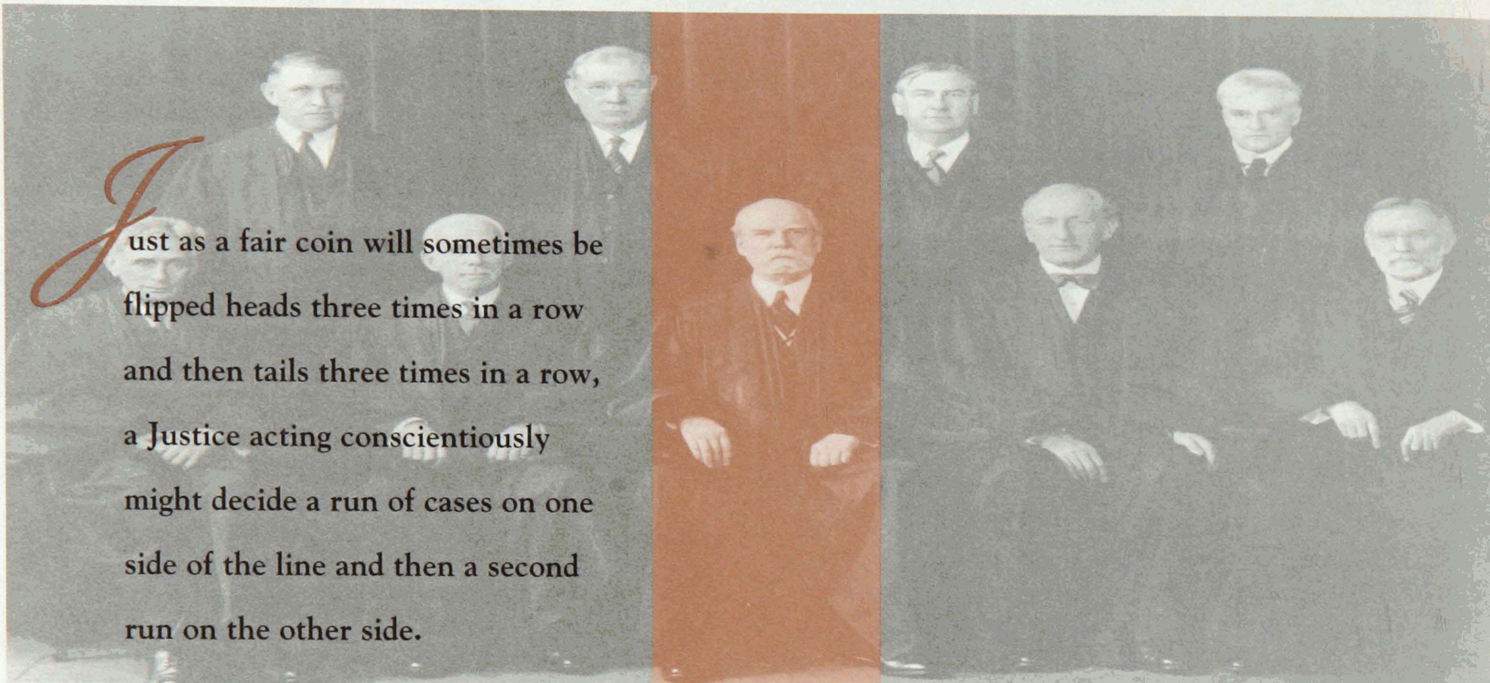
For the Court, as for society at large, this was an era of enormous turmoil and transformation. Indeed, I believe it was "The Crucible of the Modern Constitution."

When Justice Oliver Wendell Holmes, Jr., died in 1935, he left the bulk of his estate to the United States Government. This gift, known as the Oliver Wendell Holmes Devise, sat in the Treasury for about twenty years, until Congress set up a Presidential Commission to determine what to do with it. The principal use of the money has been to fund a multi-volume History of the United States Supreme Court. The history of the project itself has not always been a happy one, for some of the authors have been unable to complete their volumes. Among them was one of my teachers, the late Paul Freund, who was the first general editor of the project and also planned to write the volume on the period in which Charles Evans Hughes was Chief Justice, from 1930 to 1941. I have had the good fortune to receive the succeeding assignment to write this volume.

I feel fortunate to be part of the Devise History not only because it places me in a wonderful neighborhood of authors, but also because it is a tremendously important project; its period of gestation has been very long, but so will be its shelf-life. And I feel particularly fortunate to have the Hughes Court assignment not only because I have already spent considerable time studying the Hughes Court — in what seems like a prior life, I wrote a dissertation on Hughes as Chief Justice — but also because of the importance of the period. For the Court, as for society at large, this was an era of enormous turmoil and transformation. Indeed, I believe it was "The Crucible of the Modern Constitution." That, at any rate, will be the subtitle of my volume. The period began with what has been called the old constitutionalism still apparently dominant, continued through the crisis that culminated in the struggle over Franklin Roosevelt's plan to pack the Court in 1937, and ended as the Justices appointed by Roosevelt consolidated their hold on the Court and on the dramatically new constitutionalism that still prevails.

So I have a story to tell and a mystery to solve. The story is of how this transformation was achieved. And at the heart of the story lies this mystery: In the spring of 1937, shortly after Roosevelt's landslide re-election victory and during the height of the Court-packing battle, the Court seemed suddenly to become more liberal. To what extent, if any, did these political factors account for this apparent switch? But implicit in this question, as I have phrased it, is another: To what extent was there actually a switch?

At the broadest level, of course there was: Constitutional law was far different in 1941 from what it was in 1930. Indeed, the old constitutionalism was effectively dead as soon as Roosevelt's appointees began to replace the conservative Four Horsemen in the fall of 1937. Liberal decisions resulting from these personnel changes do not represent a response by the Court to political pressure; the new Justices were part of the victorious side of 1936, not its cowered foes. But because these person-



nel changes occurred so soon after the Court-packing battle concluded, they may make it harder to discern what the Court's reaction to political pressure was.

Certainly, in the spring of 1937, while the battle was hot, the Court issued a flurry of significant decisions reaching liberal results, far different from the results of an earlier flurry of significant decisions in 1936. The most important cases break down into three sets, which we may refer to as the minimum wage, general welfare, and commerce clause cases. In 1936, in *Morehead v. New York ex rel. Tipaldo*, the Court held a state minimum wage law invalid, but the next year, in *West Coast Hotel Co. v. Parrish*, the Court upheld such a law in overturning the precedent on which Morehead was based. In 1936, in *United States v. Butler*, the Court held that the Agricultural Adjustment Act had exceeded the federal government's power to tax and spend, but in the *Social Security Cases* of 1937 the Court upheld the exercise of those powers in the Social Security Act. In 1936, in *Carter v. Carter Coal Co.*, the Court held invalid a Congressional attempt under the commerce clause to regulate labor relations in a basic productive industry, but in 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld a far more sweeping regulation of labor relations, also under the commerce power.

These developments were dramatic, but we must be cautious in concluding whether, or to what extent, the 1937 decisions represented a sudden adoption of a new ideology. I believe that to answer these questions requires a great deal of attention to the grubby details of individual Justices and individual cases.

It is tempting to think of the Court organically, as an institution that moves and makes strategic decisions like an army. Perhaps this model is an appropriate portrayal of the Court when John Marshall dominated it. But it does not come close to reflecting the Court of early 1937. Obviously, the Court as a whole, acting in conference, could not have been a strategic decisionmaker; it was too badly divided. There were blocs on the court, four Justices on the right and three on the left, that held informal caucuses at which they presumably discussed tactics for conference. But even assuming each bloc remained cohesive (which was not always so) neither could prevail in any case without support from the middle; the conservative Four Horsemen needed the vote of either Chief Justice Hughes or Owen Roberts, and the liberals needed both their votes.

If there was a strategic decisionmaker, therefore, it would have had to be one of these two Justices. Some have thought that this was a role played by Hughes. He was, after all, the Chief Justice, he was a commanding figure, and he stood ideologically near the center of the Court. But there is no basis for concluding that he had strategic control over the Court, and there is sound reason for concluding that he did not. Indeed, Justice Brandeis told Felix Frankurter at a crucial moment that Hughes was depressed because he had no control over the Court. Before the crisis, Hughes was in the dissent in too many cases of political significance to suppose that he had any real measure of control. Hughes did not solicit his colleagues for votes, and he seems to have taken an austere view of his role and the decisionmaking process of the Court: The Justices each had their say in conference, they voted, and they moved on to the next case.

Then how about Justice Roberts? He was not in strategic control of the Court; he controlled no one's vote but his own, and he does not seem to have had significant persuasive power over his colleagues. But certainly Roberts had a

great degree of control over the Court's decisions, because on many significant issues he was the man in the middle, the Justice most likely to join the conservative four to make a majority.

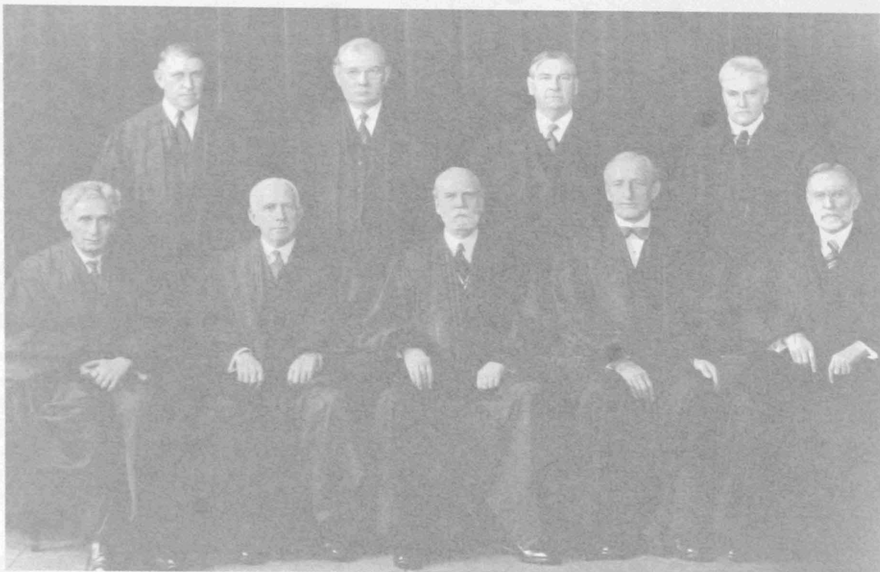
The question, then, should not be phrased as whether, or to what extent, the Court was affected by political pressure. The key question is whether Justice Roberts was affected by political pressure; a subsidiary question is whether Chief Justice Hughes, who also might be thought to have done some switching in 1937, was so affected. To adapt terms used by Graham Allison in his celebrated study, *Essence of Decision: Explaining the Cuban Missile Crisis*, if we want to understand the Court's course of decisions, we are better off dealing not within Model II, treating the Court as a monolithic entity, but within Model III, emphasizing the roles of the individual players.

I emphasize this point not just out of persnicketiness. It is important both for understanding what happened in 1937 and for assessing its significance. First, as to the assessment of significance: Suppose that what I shall call the political hypothesis — that political pressure explains the course of decisions — appears to be correct. It is probably far more difficult to draw historically interesting generalizations from the proposition that Roberts, or perhaps Hughes and Roberts, responded to political pressure than it would be to draw such generalizations from the proposition that the Court responded to such pressure.

In understanding what happened, phrasing the question in terms of the Court rather than of Justice Roberts and Chief Justice Hughes probably would make little difference if we could reliably think of decisions by the Court under this model: Any issue is represented by a point on a continuum running from left to right, and the Justices by fixed links in a rigid chain, running from left to right with Roberts in the middle. If the chain comes down with five or more links to the left of the critical point, then the liberals win, and otherwise the conservatives win.

Now, this model does have some explanatory power, because it rests implicitly on two premises that are usually true. First, judges tend to act consistently on a given issue. Thus, if Justice A is more conservative (whatever that may mean) than Justice B on issue 1 on one occasion, chances are strong that, absent something unusual happening, A will be more conservative than B on issue 1 on another occasion. Second, there is a substantial correlation between certain issues. That is, if we know that A is more conservative than B on issue 1, we may well be able to predict how they will stand in relation to one another on issue 2.

The trouble is that neither of these premises is inevitably true — or anywhere close. Each Justice is subject to his own set of influences, and they may differ, in a multivariate way, from one Justice to another. (The masculine gender, by the way, is appropriate for the Court of the 1930s.) This means that the Justices cannot be put on a simple continuum. The problem for analysis is in part, but not only, that a given Justice may be more liberal on some issues, relative to his colleagues, than on other issues. The more difficult aspect of the problem is that any Justice, even one who seems moderate on most issues, might be affected to a substantial extent by a given factor that seems far less important to his colleagues. If one nevertheless knew with confidence the full panoply of a given Justice's views on matters coming before the Court, then one could test whether his votes and opinions consistently reflected those views. But such confidence is, of course, difficult to attain. To a large extent, a Justice's views are revealed only through those votes and opinions themselves. And this creates at least three significant difficulties.

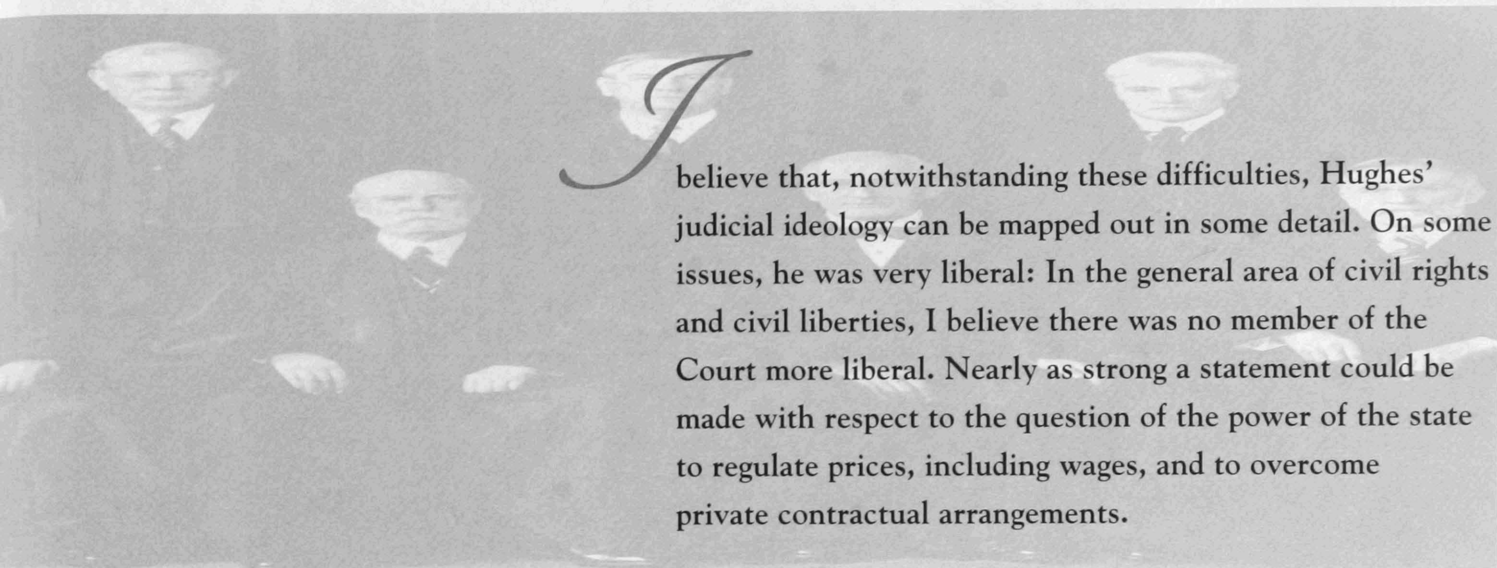


Most obvious perhaps is a large problem of circularity. Suppose that a Justice votes on the conservative side of Case 1 and on the liberal side of Case 2. This does not necessarily mean that anything strange happened, or that the Justice must have responded to political pressure between the two cases — even if it so happens that a political event that might be thought to have created leftward pressure occurred during that interval. It might be that there is a distinction between the two cases that made the liberal side appear more persuasive in Case 2 than in Case 1; to a large extent, the business of appellate judging, and the method by which judge-made law grows, consists of distinguishing cases, invoking a given doctrine in one case but not in another because of material differences between the cases. But if the political factor also provides a plausible explanation for the pair of votes, it may be difficult to know whether this substantive distinction between the two cases really was a significant factor motivating the Justice's conduct.

The same points apply to sets of cases. Suppose a Justice has a batch of conservative votes in one time period and a batch of liberal votes in a later time period. This might be because a political factor intervened, and some historians seem to regard this inference — that the Justice altered his ideological stance, at least temporarily — as inevitable. But it is not. Just as a fair coin will sometimes be flipped heads three times in a row and then tails three times in a row, a Justice acting conscientiously might decide a run of cases on one side of the line and then a second run on the other side.

Second, even putting aside political factors, simply because creative lawyering can expose a potentially material distinction between two cases, it by no means follows that this is a difference that actually persuaded the individual Justice in question. I have suggested that some factor that might appear relatively unimportant to most Justices, or most observers, may appear critical to one Justice. If we are lucky, we may be able to discern these, but I do not think we always can. I find it very interesting that in 1946, when Merlo Pusey, in the course of preparing his prize-winning biography of Hughes, asked Roberts to account for his conduct in the minimum wage cases, Roberts' "initial, semifacetious reply", as Pusey characterized it, was: "Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it." And it may well be that, in the case of Roberts especially, no matter how deeply and accurately we may analyze the factors motivating a Justice's decisions, we will be left with a residue of apparent randomness — a degree to which, though some consistent set of factors might be at work, it will be essentially impossible for us to recognize what they are. There is a significant irony here, I think: To the extent that such factors as the Justice's breakfast help explain conduct that might otherwise appear inconsistent, a political explanation is not necessary.

Finally, because of the group nature of the Court's work, its opinions provide only a limited insight into the beliefs of a particular Justice. The Hughes Court was sharply divided, of course, but as compared to the modern Court it was much less fragmented; often there was a dissent, but in contrast to today cases in which there were more than two opinions were relatively rare. Ordinarily, a Justice would go along with an opinion that reached the result he favored, without feeling the need to write sepa-



I believe that, notwithstanding these difficulties, Hughes' judicial ideology can be mapped out in some detail. On some issues, he was very liberal: In the general area of civil rights and civil liberties, I believe there was no member of the Court more liberal. Nearly as strong a statement could be made with respect to the question of the power of the state to regulate prices, including wages, and to overcome private contractual arrangements.

rately simply because he did not agree with every statement contained in the opinion. Thus, to a large extent a Justice had two principal options in any given case — to join the majority or to dissent — and the Justice's vote does not in itself give more information than which of those two options he preferred; a Justice's concurrence in an opinion did not demonstrate that he agreed with it in its entirety. Of course, the Justice's own opinions are a better guide to his views, but at times the author might be willing to alter the text to make sure that he retained the concurrence of his colleagues.

I believe that, notwithstanding these difficulties, Hughes' judicial ideology can be mapped out in some detail. On some issues, he was very liberal: In the general area of civil rights and civil liberties, I believe there was no member of the Court more liberal. Nearly as strong a statement could be made with respect to the question of the power of the state to regulate prices, including wages, and to overcome private contractual arrangements. (I put aside the troublesome question of why judicial activism is generally considered liberal when what are deemed to be civil rights or civil liberties are at issue, but conservative when asserted rights against state economic power are at issue.) When the reach of the federal government's powers was at stake, he still tended to be liberal — that is, hospitable to such power — though more cautiously so. On many tax matters, however, he was far more conservative, sometimes voting to the right of Justice Roberts, and he was similarly conservative when he believed freedom of individual opportunity was at stake. And certain issues seemed to matter to him so much that they could make him appear, in some contexts, to be one of the most conservative members of the Court. More than any other Justice, it seems, he was willing to put weight on constitutional restrictions against delegation of legislative authority; Brandeis reported that he was "crazy" about confiscation; and he had a distinctive, highly judicialized view of proper administration.

Furthermore, I believe that, with an understanding of Hughes' views, we can state with a rather high degree of confidence that his votes were not affected by political factors, either the public reaction to the Court's decisions, or the Roosevelt landslide of 1936, or the Court-packing battle. I have presented a rather full argument elsewhere, in an article entitled *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994), and will summarize it briefly here.

Any case for a switch must be based primarily on the three sets of cases I have described above — the minimum wage, general welfare, and commerce clause cases. Hughes clearly did not switch in the minimum wage cases; he had been in the liberal minority in *Morehead* in 1936, and the views that he established as law in *West Coast Hotel* case in 1937 were ones that he had long espoused. Nor was there a substantive switch for Hughes in the "general welfare" cases. In *Butler* in 1936, he had voted against the particular exercise of the Government's taxing and

spending power there at issue, an aspect of the Agricultural Adjustment Act that appeared coercive to him. But he clearly favored the expansive general statement of the Government's power in Roberts' opinion for the majority; this, too, echoed a view that he had long held. Indeed, Roberts later told Felix Frankfurter that he had included that dictum "just to please the Chief." In the *Social Security Cases* of 1937, Hughes favored the exercise of the spending power — but these were much stronger cases for the Government, and so they appeared not only to Hughes and Roberts but also to two of the four conservative Justices, Van Devanter and Sutherland.

As for the commerce clause cases, it appears to me that Hughes' opinion for a bare majority of the Court in *Jones & Laughlin* in 1937 is not genuinely consistent with the commerce aspect of his separate opinion the previous year in *Carter*, at least not according to any reasoning that commanded Hughes' conscientious adherence. But it is *Carter*, not *Jones & Laughlin*, that is the aberration. The discussion of the commerce power in *Jones & Laughlin* is written in Hughes' most magisterial and expansive style, and it is consistent with the entire sweep of his career, going back to his days as an Associate Justice. The commerce passage in Hughes' *Carter* opinion, by contrast, is brief, conclusory, and cryptic, and unnecessary given the way he would have resolved the case. I suspect it did not represent his genuine views, and that he inserted it for some political motive. His commerce discussion in *Carter* ended with what was in effect a plea to the public to get off the backs of the Court, amending the Constitution if the Court's interpretation of the commerce power seemed intolerable; this advertisement, I believe, may have provided the motivation for Hughes' skimpy substantive discussion, rather than vice versa. In any event, there is no basis for concluding that Hughes was pushed into *Jones & Laughlin* by political pressure.

As for Roberts, I can not speak with nearly so much confidence. This is in part because I have not spent as much time studying Roberts. But it is also, I suspect, because to a certain extent Roberts defies understanding. His views were not as well settled as Hughes', and they appear to have been considerably more idiosyncratic. Thus, his views seem to have changed over time, and even without a significant passage of time he acted in ways that would appear to most observers as inconsistent; inconsistency in the eyes of others, however, might mean simply that Roberts was motivated by factors that appeared more important to him than to others.

I do have some conclusions, which I have explored more fully in the *Switching Time* article, regarding Roberts and the political hypothesis. Roberts' conduct in the minimum wage cases was strange, and his later explanation of it does not fully hold up. He joined the conservatives in *Morehead* and the liberals in *West Coast Hotel*, and later asserted that he did so because in the latter case, but not the former, the question of whether to overrule the precedent that most strongly

supported the conservatives was not presented. This is not so; at least arguably, that question was actually presented more clearly by counsel in *Morehead*. But I think that it is at least clear that Roberts' vote in *West Coast Hotel*, and not the one in *Morehead*, reflected his previously expressed substantive views. Why he was so much readier in *West Coast Hotel* to overcome any procedural scruples that had prevented him from joining the liberals in *Morehead* is not so clear. He may have decided that he was wrong on this matter, or that the conservatives had taken advantage of him. And he may have been shaken by the furious public reaction to *Morehead*. But the timing of the Court's actions in *West Coast Hotel*, among other factors, suggests that neither the 1936 election nor the Court-packing battle had anything to do with the matter.

Roberts' votes in the "general welfare" cases can probably be explained in the same way that Hughes', as well as those of Van Devanter and Sutherland, can — the *Social Security Cases* appeared to be stronger ones for the Government than *Butler* did. Roberts appears to have been significantly less enthused about the federal spending power than Hughes was, even at the time Roberts wrote broadly about it in *Butler*, and on the commerce clause his record on the Court before 1937 was far more conservative than Hughes'. The most notable, but not the only illustration of this is Roberts' concurrence with the majority in *Carter*.

I am inclined, therefore, to believe that Roberts' concurrence with the liberal side of the Court in *Jones & Laughlin* represented a break for him. But there is no reason to doubt its sincerity; Roberts was capable of changing his mind on short order, his *Butler* opinion suggests that he was then beginning to expand his views of national powers, and his later conduct showed no reservations about *Jones & Laughlin*. Apart from the timing, there is no reason to believe that the Court-packing plan influenced Roberts, and there is good reason to believe it did not: It was not immediately clear what the political impact of upholding the National Labor Relations Act would be, and the Government's victory was far more sweeping that one might expect if the decision was inconsistent with Roberts' conscientious beliefs but motivated by a manipulative desire to help defeat Court-packing. Perhaps the storm of sitdown strikes then compelling national attention made Roberts believe that a national solution to labor problems was necessary, but I do not believe it is possible to be sure.

I have said that I aim to tell a story, but I have not promised that it would be a simple, neat story. It will not satisfy those who wish to view the Court as an ordinary political institution, subject to ordinary political pressures. Nor will it gratify those who are committed to the view that no Justice could have been affected by such pressures. And it may discomfit those who would like to draw conclusions about the Court of the Hughes era without doing the hard work of examining the particulars of the cases it decided, and trying to do so with the mindset of the individuals who happened to constitute the Court. But I hope that it will yield us a fuller picture than we now have of how it happened that the Hughes Court transformed American constitutional law.

LQN

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Who's afraid of the NEW WORLD ORDER?

Since the Oklahoma bombing, I discovered that in moving to Michigan, I moved to the heartland of the American militia movement. As a law professor teaching about the UN system I am regarded by at least some members of these militias as a fundamental threat to American liberties, part of a conspiratorial plot to impose an international world government on hapless U.S. citizens who are already overtaxed, overregulated, and threatened by their own federal government. Many members of these militias reportedly believe that they are the last line of defense against UN peace-keepers intent on creating a totalitarian world order, presumably to be imposed beginning in the American Mid-West.

— BY JOSE E. ALVAREZ

Based on a talk originally given to Michigan alumni in Orlando, Florida in 1995.

I propose to address the grain of truth contained in these conspiracy theses. The notion that the UN, an organization perennially on the brink of bankruptcy whose beleaguered peacekeepers were recently taken hostage in the former Yugoslavia, is about to take over the world is as ludicrous as the proposition that Disney's "Pocahontas" is faithful to history. Let's get the fantasy of UN takeover out of the way quickly. At last count, the UN was operating some 17 peacekeeping operations around the world with some 63,504 peacekeepers, a significant number but hardly enough for world conquest. Of these, over the past year, some 3,000 have been U.S. nationals. As of now and for the foreseeable future, UN peacekeepers, stretched thin given the extraordinary diversity of their missions, will be hard put to seize control of anything larger than downtown Ann Arbor. Further, the Clinton Administration, under severe pressure from Congress, is now legally bound to extensive Congressional consultation prior to any U.S. involvement in UN peacekeeping whether through commitments of U.S. funds or U.S. troops. And the United States is also deploying, whether intentionally or by default, its financial veto over such activities. By the end of 1995, the United States, the UN's largest debtor, will owe the organization over $1 billion in peacekeeping assessments. Unless we believe that UN peacekeepers will be invading us as part of a UN collection effort for debts legally due, U.S. participation in the "aggressive multi-

lateralism" that President Clinton once invoked is becoming less, not more, likely.

President Bush coined the phrase "New World Order" in the rosy afterglow of the UN authorized Gulf War but ever since, it has not just been Gulf War veterans like Timothy McVeigh who have challenged the UN system. If the "New World Order" refers to either the hope (if you are an old fashioned internationalist) or the threat of reinvigorated UN efforts at protecting collective security, these efforts probably died with U.S. peacekeepers in Somalia. Aggressive multilateral military cooperation to battle aggressors or to provide humanitarian relief seems less likely now with governments strapped for cash and foreign aid regarded with contempt by those in the position to give it. Given the new rage for limits on 'government' of whatever stripe and the powerful political winds favoring devolution of power to those supposedly closest to the governed (such as state governments), only a foolhardy government official of any party would dare voice a preference for "world government." Whether under the guise of a new understanding of "federalism" as in the United States, or due to renewed attention to "subsidiarity" as in Europe, UN issues, never a high priority with most nations, get attention today only to the extent they seem to get in the way of "more important" domestic priorities such as a balanced budget.

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Paranoid fantasies aside, are there any legitimate concerns about "international governance?"

Modern militias' antipathy to international organizations is part of a long U.S. tradition, extending as far back as Washington's farewell address warning against "foreign entanglements" and emerging in this century in the Senate's rejection of U.S. participation in the League of Nations, in the 1950s when Congress passed a law forbidding U.S. funding to any international organization which promotes "one world government" or "one world citizenship" and in attempts by Senator Bricker to restrict the effect of U.S. treaties, and in the 1980s' agenda of prominent groups such as the Heritage Foundation which advocated U.S. withdrawal from most international organizations, especially the UN. It helps to explain the hesitancy with which the United States embraced the concept of a "World Court" and the haste with which it departed the Court in the wake of a successful suit by Nicaragua in the mid-1980s; the lengthy delays in U.S. ratification of basic human rights conventions and U.S. reservations when it adhered to some of them; the U.S. failure to ratify hundreds of labor law conventions despite our prominence in the organization that promulgated them. One could go on.

While some see in this a periodic national tendency to "regress" to isolationism, I believe these developments owe something as well to a suspicion of lawmaking by international institutions. International law and organizations seem, to many militia members as well as to Presidential hopefuls like Patrick Buchanan, to be "un-American" or fundamentally "undemocratic." Ironically, the fears of the militia members and Mr. Buchanan are reminiscent of Third World complaints. Developing nations have long criticized "First World" dominance of international legal processes and today voice fears of neo-imperialism through institutions like the UN's Security Council. The militia member who despises the UN shares with Libya's President Quadaffi a fear that international organizations create a layer of regulation by an unaccountable elite that diminishes national sovereignty.

The Libyan government, among others, is critical of the "interstate" democratic deficit. It fears that entities like the UN Security Council, dominated by a few powerful states, will ride roughshod over the rights of other nations. U.S. militia members, more confident that the United States will prevail in these organizations, focus instead on the "intrastate" deficit. They fear that international processes will fail to respect the rights of states within the United States and are not subject to the balancing checks within the federal separation of powers. Their fear is directed not at the undemocratic nature of the Security Council relative to the rest of the UN membership but at the boost given (U.S.) federal executive power by mechanisms like the Council.

Neither of these are irrational concerns. Thanks especially to the efforts of the United States and the United Kingdom, for example, the UN Security Council — an entity dominated by the five permanent members with veto powers reinvigorated by the post-Cold War likelihood of agreement between those five — imposed UN sanctions on Libya to force that government to transfer, for trial in either U.S. or U.K. courts, two Libyan nationals accused of masterminding the bombing of Pan Am flight 103 over Lockerbie, Scotland. Libya went to the World Court to complain that under existing treaty obligations it is only required to extradite or prosecute such individuals. It was seeking the equivalent of an emergency injunction to protect its treaty and customary international law rights from what it saw as illegal Council action. Instead, in April 1992, the World Court rejected Libya's plea, suggesting that the Council has the power, under the UN Charter, to override existing treaty obligations. While Libya's case remains pending on the merits, it remains unlikely that Libya will prevail in that Court. UN economic sanctions remain in effect.

Whatever one's feelings about Libya or the Lockerbie bombing, even the most unsympathetic plaintiffs sometimes raise serious questions. To many non-permanent members of the UN the Council's action and the World Court's response raise the troubling possibility that the Council is now willing to enforce its considerable powers, including the threat of collective use of force, on any nation beyond obvious instances of interstate aggression and at the behest of the five veto-wielding permanent members. The World Court also appeared to be saying that there is no judicial check on the power

of the Permanent Five. Scarcely less disturbing was the specific determination that the Security Council can force a state to give up its nationals to another, even when the requesting state merely alleges certain facts but declines to offer proof. Non-permanent members suspect that any such rule would not be reciprocally or consistently applied: few believe that the United States would, in a comparable case, extradite a U.S. national to Libya merely because Libyan courts have issued an indictment. Similar qualms arise from other recent Council actions — as with respect to Haiti, Somalia, and its establishment of ad hoc war crimes tribunals.

Nor are the intrastate democratic concerns, most prominently voiced by Mr. Buchanan, entirely off the mark. After all, prior to recent Congressional action demanding a consultative role in UN peacekeeping decisions, the U.S. Representative to the Security Council, Madeline Albright, was statutorily accountable to no one except the President when voting to send U.S. sons and daughters to die in a foreign field. Even today, UN authorized "peacekeeping" action, even when this is forceful enough to suggest the very real possibility of U.S. casualties, remains in a legal limbo between the interstices of the UN Participation Act and the War Powers Resolution. No one is quite sure whether Congress is constitutionally entitled to be consulted prior to a vote by the President's representative to the Council that could lead to a de facto war.

If the role of Congress remains dubious in the area of UN peacekeeping, a subject of intense interest after U.S. deaths in UN action in Somalia, its role is all the more attenuated with respect to other international subjects.

Today there is practically an international organization for every human field of endeavor. Many of these organizations negotiate rules, promulgate standards, or interpret existing norms with little scrutiny by any other branch of our government except the executive. Even when their work product is in the form of a treaty subject to Senate approval, and much less when it is merely "soft law," international regulatory schemes or their work product are rarely the subject of Congressional or judicial input. Except with respect to the occasional issue such as UN peacekeeping which emerges in the public consciousness, even the fabled "fourth branch," the press, seems absent.

There are many such examples of international "regulatory" activity. How much influence did you or your representative to Congress have on the President's decision to push through this spring in the UN General Assembly an indefinite extension of the Treaty on the Nonproliferation of Nuclear Weapons, a treaty which for all the good that it does also perpetuates the idea that the use or threat of use of nuclear weapons is perfectly legal under international law? Where is the "fourth branch of government" when it comes to press coverage about the World Court case that is presently examining the legality of the threat or use of nuclear weapons? How many of us even know what the U.S. government position is before that Court with respect to the issue?

The 34 members of the International Law Commission (ILC) codify and progressively develop international law, largely but not exclusively through the promulgation of international treaties. Although the U.S. Senate may, ultimately, have a say on whether the United States will formally accede to ILC conventions, much of the groups' influence occurs without Senate action — as unratified ILC conventions or even drafts come to be cited as binding rules of "custom." The ILC recently promulgated a draft statute for an international criminal court to adjudicate persons accused of international crimes, completed a new treaty (which the U.S. is expected to ratify) which makes it a crime to threaten a UN peacekeeper, and is at work on rules for determining governmental responsibility for such things as cross-boundary pollution. All of these are expected to have an impact on customary international law.

For those of you whose livelihood depends on the internationalization of trade and investment flows, how much did your representative to Congress really have to say about specific provisions in the NAFTA or the newly revised GATT treaty, both of which were subject to fast-track authorization in the U.S. Congress? Or about the on-going initiatives by the Clinton Administration to expand NAFTA to particular Latin American nations? Are you confident that the GATT's internal procedures will give appropriate weight to U.S. environmental concerns or that NAFTA procedures adequately address the concerns of U.S. labor unions?

How much public scrutiny has there been about on-going efforts by the United States and our allies within the Organization of Economic Cooperation and Development (OECD) to reach a multilateral agreement on investment that would rival (and perhaps eclipse) the economic impact of even the most recent GATT round?

How much do you or your member of Congress know about the on-going codification and law harmonization efforts of the UN Commission on International Trade Law (UNCITRAL) whose recent work is yielding the international law equivalent for articles 2, 2A, 3, 4A, 5, and parts of 7 and 9 of the U.S. Uniform Commercial Code? Is there any Congressional scrutiny of other current developments within UNCITRAL, including its Model Law on Government Procurement of Goods, Construction and Services (which establishes harmonized rules for government procurement, including rules for tendering proceedings and bidding) or its proposals for guidelines for preparatory conferences in arbitral proceedings, for a draft convention on independent guarantees and stand-by-letters of credit, or for legal rules on electronic data exchange?

For those involved in Florida's space industry, were you or your corporate clients consulted when the UN's Outer Space Committee promulgated two years ago its set of Principles Relevant to the Use of Nuclear Power Sources in Outer Space

Today there is practically an international organization for every human field of endeavor. Many of these organizations negotiate rules, promulgate standards, or interpret existing norms with little scrutiny by any other branch of our government except the executive.

or are you aware that there is currently pressure within that body to revise those principles? Are your clients aware of pressures by UN members to take away from the International Telecommunications Union the authority to determine what constitutes "fair use" of the geostationary orbit?

The intrastate democratic deficit is inherent and structural. International treaties such as the NAFTA and the GATT, the product of lengthy, complex negotiations between executive branches, cannot practically be re-opened for negotiation on the floor of each national legislature that might be asked to give its approval. Something like the U.S. fast track procedure must exist if there is to be such a treaty at all. Further, not all international obligations come in the form of a treaty approved as a Congressional-Executive agreement by both houses of Congress or a treaty approved by 2/3 of the Senate. There are sole Executive Agreements (like arms control measures) and other Presidential decisions with potential normative impact (such as the Clinton Administration's bailout of Mexico or its executive order refusing to engage in illegal kidnappings in countries with which we have an extradition treaty). Much of international law emerges from custom and practice, without any overt action by any part of our government except the executive (especially but not invariably the State Department). And some international norms, as "lex mercatoria," may emerge without the participation of any branch of government at all, as when UNCITRAL codes to harmonize domestic laws are accepted by powerful business interests.

To the extent that international organizations such as the UN or the GATT are but institutional shells used by governments, they are effectively shells for only the executive branch. When it comes to legal developments within international organizations, most citizens, whether here or in Libya, have to trust that their executive branch representatives are voicing their interests or delegating the proper authority. If what emerges from the international organization is a proposed treaty subject to parliamentary approval, they have to hope that their representatives in the legislature will be given enough information and sufficient time to permit rejection and amendment if necessary. In cases of multi-year international negotiations, such as those surrounding the latest GATT round, citizens have to hope that their legislative and executive branches have regularized consultation procedures in place to permit joint continuous involvement as negotiations proceed, before international positions harden and rejection/amendment becomes effectively impossible.

U.S. courts have tended to proclaim the primacy of the executive with respect to foreign relations. To cite the U.S. Supreme Court circa 1936 (U.S. v. Curtiss-Wright, 299 U.S. 304), the U.S. Constitution gives the President nearly plenary powers over foreign affairs because these require executive dispatch, caution, unity of design, secrecy, and the special expertise of a State Department or the CIA. Our courts frequently affirm that the nation needs to speak with 'one voice' on these issues. That voice is usually the President's. Our courts tend to defer to executive determinations of the meaning of a treaty. The message our courts frequently send — a message that members of U.S. militias, among others, refuse to accept — is that we cannot look for "democratic governance" when it comes to the action of the executive in foreign affairs — not even when these result in sending our children or our taxes to faraway lands, when Haitian refugees are repatriated to certain death, or when foreign nationals are kidnapped abroad.

After all, our UN representative to the Security Council has to respond to an emerging crisis quickly. If UN peacekeepers are being killed in Bosnia and our allies request emergency military assistance, Ms. Albright might be able to consult with the President, and perhaps select members of Congress, but if there is to be an effective UN response, she can hardly be expected to delay a decision until there is full deliberation and a vote in both houses of Congress or resolution of a court challenge. Thus, Ms. Albright recently voted for the creation of an expensive and dangerous rapid deployment force to protect UN peacekeepers in Bosnia, despite warnings from members of the U.S. Congress that they would refuse to pay for it.

As this suggests, Congressional opposition to those few international initiatives that get its (and the public's) attention tends to be manifested through the power of the purse. But exercise of this power, as when Congress cuts the executive's requests for appropriations for UN initiatives, tends to violate existing international obligations and damages the international standing of the United States. Congress' power of the purse tends to be a blunt instrument, appropriate if at all, only in extreme cases. Most international initiatives by the executive put U.S. international "credibility" on the line and Congressional acquiescence, if sought, tends to be a foregone conclusion.

So who should be "afraid" of the "New World Order"? If fear motivates healthy scrutiny, the answer should be anybody who believes in accountable government.

Lobbying and other resources that exist to influence national governmental authorities do not as yet exist for most international organizations. There is no global freedom of information act that permits public access to "restricted" documents issued by these organizations. There is no right of access to "closed" meetings, as within the Security Council or certain human rights bodies. These organizations have also managed to resist granting full scale participation rights, much less a formal vote, to established non-government organizations such as Amnesty International or environmental groups interested in their work. For these reasons, among others, these "foreign" lawmakers appear less accountable than any state or federal agency.

Nor is it clear that international organizations should invariably be seen as only "shells" for governments. International secretariats, formally independent and guaranteed certain privileges and immunities to assure that independence, are not necessarily accountable to governments.

There is considerable evidence that secretariats and secretaries-generals exert influence and, depending on the organization, exercise considerable discretion. Political scientists who study "epistemic communities" of persons with technical expertise who share a particular agenda are only now beginning to study the impact of such groups on international public policy. The possibility of agency "capture" by special interest groups exists here as it does with respect to domestic governmental agencies. Whether, for example, GATT trade experts, free traders all, are capable of giving a full, fair hearing to competing environmental concerns remains an open question.

Nor can we yet entertain a hope that an international judiciary will emerge as a "check" on institutional processes. As the World Court's reaction to Libya's pleas suggest, that body is not yet inclined to declare anything that the Council does illegal and without binding effect. International adjudication is still relatively rare. Although the World Court is busier than it has ever been, it has a mere twelve cases on its docket and many states continue to refuse to submit to its "compulsory" jurisdiction. As far as other organizations are concerned, an adjudicative "check" for international law makers remains to be developed, except with respect to within some regional human rights systems and the European Union. It remains to be seen whether the newly revamped procedures for GATT dispute settlement will successfully "judicialize" the international trading system.

But the absence of clear international "judicial review" as Americans would understand it does not mean that international "caselaw" is insignificant or can be ignored. International adjudicative precedents, produced by a multitude of bodies including under the GATT or NAFTA, in ad hoc or institutionalized arbitrations, or by regional tribunals, increasingly have an impact on domestic law or on interpretations national judges give to treaties, and even perhaps national constitutions. Yet there is considerably less Congressional or public interest in those U.S. nationals who serve on international tribunals than there is with respect to candidates for the national judiciary. Neither Judge Schwebel, the U.S. judge on the World Court, nor Judge Gabrielle McDonald, a U.S. national chosen to serve on the War Crimes Tribunal for the former Yugoslavia, was subject to much public scrutiny. Judge Schwebel over the coming year will probably give an opinion on the legality of nuclear weapons. Judge McDonald is now deciding momentous issues not heard in an international forum since Nuremberg. Given the potential significance of their inquiries, citizens ought in principle to be as concerned about Judge Schwebel's and Judge McDonald's qualifications and judicial philosophies as we appear to be with respect to nominees to the U.S. Supreme Court.

So who should be "afraid" of the "New World Order?" If fear motivates healthy scrutiny, the answer should be anybody who believes in accountable government.

Fear should not generate isolationism. Internationalization, brought on by technology especially, is inevitable and preferable to Hobbesian conflict in an ever shrinking world. A world without the UN to air and ameliorate conflicts between nations, without the GATT to protect us from our and others' protectionist tendencies, without the International Civil Aviation Organization (ICAO) to make flying safer, without human rights bodies to make states more accountable, and without the product of numerous international organizations which make international commerce and business possible would be infinitely more dangerous and less sane.

International organizational rule-making should be under no less scrutiny than internal democratic processes. If the United States is still perfecting national governance after over 200 years, it should scarcely surprise if "governance" by international organizations, scarcely 50 years old, requires continuous reappraisal. At present, there are many proposals to help ameliorate the systematic democratic deficits of international lawmaking — from attempts to make what these organizations do more transparent to increased access to non-state parties; from renewed examination of the membership of particular organs to the possibility of greater consultation between organs that represent different interests; from improvements in international dispute settlement to increased legislative-executive consultations at the domestic level.

These international reform efforts address both the inter- and intra- state democratic deficits. Both deficits merit our attention as U.S. citizens. While most international organizations do not take binding action on the basis of majority vote premised on one state, one vote, an increasing number act on the basis of "consensus," a complex arrangement which puts considerable pressure on particular states, including the United States, not to "break consensus" for the good of the whole. Consensus decision-making procedures, for example, give rise both to politicized UN budgets and to technical rules governing international aviation under ICAO. To the extent the United States reluctantly joins consensus, it is deferring to the will of the majority. For these reasons, while the interstate democratic deficit is particularly pertinent to small states like Libya, not even the United States can afford to remain sanguine about it. Although we are loathe to admit it, we share an interest with Quadaffi in the "democraticization" of institutions like the UN.

Of course, Libya excepted, the "New World Order" consists of a historically unprecedented number of nations credibly claiming to be democracies. There are more newly energized legislatures, legitimized by being popularly elected. There is a growing "globalization" of judicial power as more courts are given the independence to become effective, amidst fervent demands, inspired by concerns for human rights, for a truly free press. The New World Order is also characterized by rising demands for international "regulation" — such that, for example, an increasingly number of today's new democracies have been certified by the United Nations as the product of "free and fair" elections. In the wake of global democratization, we should not be surprised by calls for greater democraticization of international law-making processes. LQN

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