Inside:
- One world, many peoples: Can Spaceship Earth survive as Global Village?
- Brave Old World: Poland tries anew—with help from friends in Bloomington
Table of Contents

1 Dean's Message
   Lawyers Need Courageous Imagination

3 The Law and Its Practice: Silver & Tarnish—Promise & Challenge
   by Edward R. Becker

FROM THE INAUGURAL ISSUE OF INDIANA JOURNAL OF GLOBAL LEGAL STUDIES:

7 Globalization of Law, Politics, and Markets—A European Perspective on Implications for Domestic Law
   by Jost Delbrück

22 A World of Regions: America, Europe, and Asia
   by Peter J. Katzenstein

31 Is Democracy the World's Best Hope?
   by Benjamin R. Barber

37 Motley Is Distinguished Jurist in Residence
   by Lauren Robel

39 From Bloomington to Warsaw:
   Connections with the New Frontier
   by Lauren Robel

43 Around the School

50 Alumni News

Inside Back Cover  Calendar of Events

Cover: In this issue on the theme of globalization, we offer a NASA photo of the world from an unusual perspective. Orient yourself by finding the Red Sea.
Lawyers Need Courageous Imagination

On May 8, Dean Alfred Aman addressed the 1993 law graduating class. These are excerpts from his remarks.

Anyone who has been around the Law School this year knows that this has been a very special year. It has been a year of celebrations, all dedicated to the sesquicentennial of our Law School. We've had parties and picnics, music and art, lectures and conferences, and even a clown—all in honor of our Law School's past, present, and future. It has been a wonderful year, marking wonderful achievements spanning 150 years.

But all of these celebrations pale in comparison to the one we are enjoying today, and that is the graduation of our Sesquicentennial Class. In this year of celebration and rededication, nothing could be a more powerful emblem of our enduring mission than this commencement, the commencement of the Sesquicentennial Class. Your legal education is the fruit of the legacy of the last century and a half. You are what all of these celebrations have been about.

As graduates, you join a long line of distinguished alumni and alumnae. Some of these graduates are famous. Others have served society and the bar with quieter distinction. All of them have achieved their own brand of greatness, whether they are well known by the state and nation, or within the smaller circle of their clients, families, and communities. Whether their greatness is known by many or just a few, we value our graduates equally.

Today, we celebrate you as unique individuals, now qualified by your education and your spirit to join the legal profession. The purpose of this ceremony is to acknowledge your individual achievements—and the collective stewardship of the legal profession and this school.

Individuals, communities, professions—the connection among these is another theme that we celebrate today. Some have called this connection "vocation"—the sense of one's own calling to some particular form of service. Others call it professionalism. I want to call it by another name, and that is "imagination."

I believe that what ties together all of our graduates—thir successes and fulfillments—is their individual imaginations.

A legal career requires imagination. At the Law School, we have aspired to educate your imaginations, to give them space and safety, but we have always known that imagination cannot, fundamentally, be taught. Certainly, it cannot be standardized. As your faculty, we could try to nourish students' imaginations, but we could not make them grow. We could challenge them, but we could not make them strong. We have always known that your growth and your strength as lawyers would be as much or more your doing as ours. Teaching is cooperative. Learning is mutual.

The law also is collaborative. The wonderful paradox of the law—its profound humanity—is that it is a collective endeavor built from the inspiration and courageous imaginations of individuals who act in the law's name. A courageous imagination guarantees a deeply fulfilling life and career; it defines its own sense of what is worthwhile and the terms of its own success.

Lawyers—good ones, anyway—must have courageous imaginations: The imagination to create new legal arguments in the courtroom; to help solve difficult political problems in communities; to create opportunities for people less advantaged than themselves; to envision a just society.

It is easy to underestimate the courage it takes to be a lawyer every day. When you look at the careers of those who have achieved great things—and I don't mean only the rich and famous—it is easy to imagine, in retrospect, that their legal arguments, their actions, and the choices they made over the span of a career were always obvious and clear to them.

My own feeling is that most of the important moments in one's life and career are about challenges faced for the first time. All of us—no matter how long we have been in the business—write on a clean slate every day. It takes imagination, creativity,
and courage to do this, in the classroom no less than in the courtroom: the courage to take positions, the courage to take risks for the sake of one’s priorities, the courage to make commitments and to take on responsibilities.

For examples of courageous imagination in the law, I invite you to look to your right, look to your left—as I do, looking to our guests, and my faculty colleagues on this stage. This year, we celebrated two particular witnesses to the kind of courageous imagination it takes to be a lawyer. One was a former student—now a justice—Shirley Abrahamson, the first—and still only—woman to serve on the Wisconsin Supreme Court. The other was a former member of this law faculty, the late Ralph Fuchs. I want to say a word about each of them.

In her Sesquicentennial Lecture on Dec. 3, 1992 (150 years minus two days from the Judicial Address that inaugurated this Law School), Justice Abrahamson reflected on the history of the school, and also on a bit of her personal history—what it meant to be a member of the tiny minority of women in the law school, facing the demands of beginning a career without any (or many) women role models to advise or reassure her that it could be done. Mostly, she talked about the judiciary—but it was clear that to this powerful judicial mind, the reality of the Constitution was linked to another, the reality of personal courage and intellectual imagination on the bench and at the bar.

Also this year, just a few weeks ago, the Law School inaugurated the Ralph Fuchs Lectureship, in memory of a beloved colleague and distinguished member of our faculty from 1945 to 1985. Fuchs had left a teaching position elsewhere because that campus was too slow to integrate. In Bloomington, he was a dedicated teacher and scholar, and a tireless and effective civil libertarian. As president of the Indiana Civil Liberties Union, he confronted many of the abuses of the McCarthy era. He took the same leadership role in combating racial discrimination.

On the national stage, the legal profession lost a courageous imagination this year, when United States Supreme Court Justice Thurgood Marshall passed away. Justice Marshall argued Brown vs. Board of Education as a young lawyer and led the NAACP at a time when legal apartheid ruled the South.

In today’s retrospect, it seems as if all of the legal challenges he mobilized could have come out only the way they did—successfully. It is easy to underestimate his personal role as an agent of change and to imagine that the civil rights he fought for were destiny. It is easy to imagine that our times are different or that we ourselves are different. But if we imagine instead what it might have been like to invent a new vision of justice and to take the risk of persuading with it, then perhaps we can grasp just how much intellectual (and, at times, even physical) courage was necessary in that splendid legal lifetime.

My point is—there is still plenty to do, and you have the means to do it. You are well-educated and well-trained lawyers; you succeeded here, and that proves you are qualified to succeed anywhere. Your education here and the diligence and dedication it has required of you (not to speak of intellectual talent) will serve you well in your search for the sort of career we wish for you, and that is a courageous one. As a very wise person once said, “talent, like love, is only useful in its expenditure, and it is never exhausted.” The rewards of a career go to those who go beyond the call of technical competence to use their imaginations courageously in the service of others.

You are individuals; you will make your own choices in your own way; you will persuade and be persuaded in your own way, in the language and the name of the law. You will have countless opportunities to exercise your courageous imaginations—sometimes in ways that will be very public, but more often in ways that will be intensely private. Some of these might be known only to you, your client, and perhaps a judge and jury. Some may even surprise you.

We have faith that your careers will be long ones, stretching well into the 21st century. Courageous imaginations, too, are long term; they are both patient and impatient. Justice takes constant work, demanding ongoing collective effort and personal struggle. Wherever your careers take you in the law, your creativity and values will meet daily challenges. My wish for you is that you will relish this adventure, and thrive on it.

—Alfred C. Aman Jr.
Dean and Professor of Law
I am honored to have been invited to deliver the keynote address at the sesquicentennial commencement of one of America's great law schools. As a student of American history, I have always had a fascination with the state of Indiana and know much about its famous sons and daughters. The roster of graduates of this law school is impressive—Justice Sherman Minton, Wendell Willkie, and Paul V. McNutt, to name a few. I must confess, however, that as an enthusiastic hack piano player, I am impressed most by the fact that one of your graduates was the composer whose tunes I most love to play—Hoagie Carmichael!

It is a joy for me to share in the excitement of this law school graduation and to talk to a group of newly minted young lawyers. I have always enjoyed association with young lawyers. Indeed, the most satisfying aspect of my 22-and-a-half years on the federal bench has been my association with the young lawyers who have served as my law clerks.

First, I take this occasion to congratulate you, the graduates, upon your achievement. This law school has a rigorous course of study. The diploma you receive today represents the culmination of three years of demanding labors. You have read and analyzed countless cases in preparation for class, though when prepared you were not always called upon (frustrating, wasn't it?). You have parsed dense provisions of the tax code. You have researched and written about legal developments. You have, with the aid of a sterling faculty, explored the range and plumbed the depths of the law. Amidst this challenging endeavor, you have expanded your thinking, nuanced your arguments, and observed that the judges often get it wrong. Above all, you have learned to dissect and analyze, argue and persuade—in sum you have learned to think like lawyers. And so you have achieved a great milestone today.

But if it hasn't been easy, it has certainly been worth it. For you are embarking on what I, at least, believe to be the most satisfying of all professional careers—the practice of law. I make this judgment because the practice of law combines intellectual challenge, interesting and extremely diverse subject matter, real-life fact situations that constantly change, and, most important, direct and intimate involvement with human beings in a way that significantly affects their lives and often affects the course of public affairs. Cementing it all, this role is played in the context of a sacred relationship of trust—that between lawyer and client. This unique relationship melds and energizes the spirit of intellect and service I have described in a way that gives the lawyer's role a heightened meaning. I know of no other profession that can make all of these claims. You will understand what I mean when you do a good job for a client and feel the wonderful satisfaction of having earned his or her trust.

There is so much I would like to say to you graduates—and to your parents and friends. But the reality is that commencement speeches are conventional necessities at occasions happily occupied with other matters. Brevity is prized. And so I feel like Sir Winston Churchill who, in his later years was reproved by his wife for his incessant tippling. She queried: "Tell me, Winston, do you intend to drink all the brandy in England?" Sir
Winston is said to have replied “Ah, yes, Clemmy, so much to do, so little time!”

I will nonetheless attempt to develop several themes, though, like Churchill, I regret that there is so little time to develop them in detail.

I do not share the pessimism of some about the prospects for young lawyers, notwithstanding the ever-increasing number of students in our law schools. I say this because it seems clear to me that our society will continue to grow more complex, that our demography will continue to change, that the earth’s resources will continue to dwindle, and that all of these changes and many more will be dealt with by the typically American response of more laws and regulations, designed to create incentive while preserving resources and preventing excess. This response means that we will need plenty of lawyers and there will be plenty of work to do. In 1835, DeTocqueville sized us up. He said “There is hardly a political question in the United States that does not sooner or later tum into a judicial one.” In the United States as elsewhere, to quote another Frenchman, the more things change, the more they are the same. Moreover, I tell you frankly, you are much brighter and much better trained than the law students of my day. Your futures should be bright as polished silver.

Also encouraging is the fact that the American legal system is basically sound. After 36 years at the bench and bar, my verdict is that the bedrock elements of the American legal scene—the adversary system, the jury system, and the system of common law development—are alive and well, and provide a better brand of justice than any other extant system. Despite its shortcomings, I believe that the adversary system provides the best possible means by which to get as close as mortals can to the truth. I have seen very few juries—even in the most complex cases—that I wouldn’t trust more than any judge to come up with a sensible and fair verdict. Juries make mistakes—so do judges—but not often. And the genius of the common law, developed by accretion, stone upon stone, demonstrates its efficacy every day in courts state and federal across the land.

However, I am not so happy about several developments in the law, and also about much of what I see in the practice of law today. Permit me, briefly, to share my thoughts about these matters.

What troubles me most about the current state of the law is the promulgation by too many courts, including the Supreme Court, of bright-line rules, in contrast to more general precepts that allow the law to develop flexibly in light of the varying factual matrices presented in case after case. This trend is saddling the system with wooden rules that are often incapable of accommodating new situations. In other words, instead of lawmaking through a process, we are developing a system of judge-made codes. I think this most unfortunate.

My judgment of the etiology of this syndrome may seem farfetched—I am but an amateur historian, but I trace it to what I describe as the epidemic of our age—the distrust of all public officials, including judges. Recent public opinion polls confirm erosion of public confidence in our justice system. I believe that this attitude arose in the 1970s from a convergence of two factors: the ascendancy of the mass media, particularly the electronic media, and what I view as a watershed event in American political history—Watergate. Many of you were starting elementary school when Watergate suffused the American consciousness with distrust of public officials. The constant pummeling by the post-Watergate media of public officials—and lawyers—who are suspected of wrongdoing, and the pervasive and sensational coverage of such matters, constantly reinforces the public’s distrust, and in the end, has evoked a certain response from courts and from legislators.

The response has been a jurisprudence and a statutory regime of mistrust—one that doubts the ability of judges to achieve just results on a case-by-case basis, and a consequent effort to cover every imaginable situation with a proliferation of bright-line rules. While the effort to achieve certainty is commendable, and if attainable would reduce transaction costs, certainty in the law is more of an ideal than a reality in a dynamic society. The bright-line syndrome, in my view, causes more problems than it solves.

My point is illustrated by federal sentencing guidelines, mandated by an act of Congress and rigidly construed by the federal appellate courts. Doing away with the old system of indeterminate sentencing, in which judges were allowed to use
discretion based upon the infinitely variable context of the particular criminal offense and offender, we are developing under the guidelines a virtual Internal Revenue Code of sentencing, highly detailed in its application. Sentencing by the district courts—and review of sentencing by the courts of appeals—has become an incredibly time-consuming exercise. Federal appellate courts, whose dockets have gone from 4,000 cases in 1960 to 40,000 in 1990 with a projection of 125,000 cases in 2015, cannot afford to spend a quarter of their time developing this sentencing code, which a return of discretion—of trust—to the district courts would render unnecessary.

In recent years, the Congress has evinced other forms of distrust—especially distrust of the state courts—by federalizing many crimes, such as drug and gun cases, even though they may have only local implications. Again, the result has been an enormous burden on the federal courts. Federal district courts are becoming drug courts. Congress has federalized car jacking and may soon federalize stalking and certain types of domestic violence cases. Cases that are not federal in character belong in state, not federal courts. We need to develop effective definitions of what constitutes a federal case, both civil and criminal, lest the federal courts be forced to expand to a point where they lose their distinctive character and are forced to abandon their historic mission, the subtle and difficult task of adjudicating questions of federal constitutional and statutory law. I hope that your generation of lawyers will be able to reverse this trend.

I turn now to what I believe are the related problems I see with the current practice of law. As I suggested earlier, the practice of law is alive and well. Lawyers have achieved a higher level of expertise and sophistication than ever before. They employ new technologies and, by and large, are giving better representation to their clients than when I came to the bar. The world of word processing and Westlaw is a far cry from the manual typewriter and Federal Digest I relied upon as a young attorney.

Some opine that the practice of law is going to hell in a handbasket because of the creation of mega-firms, the inclusion therein of non-lawyers, and the increasing specialization of law practice, but I am underwhelmed by these concerns. These journalistic Jeremias ignore that these phenomena are a response to the forces of the marketplace in a dynamic economy and a free society. The republic and the profession will survive these trends. We are already seeing more and more split-offs from the mega-firms. As for specialization in law, it can be a good thing, just as in medicine, for it allows for better quality of service.

Besides, general practice is alive and well, not only in the smaller cities and towns but in the neighborhoods of the larger cities—and in corporate practice, for in-house counsel are usually general practitioners. Thus, I think that the dangers have been exaggerated and that the positive aspect of the recent trends has been overlooked.

I am, however, deeply concerned with what I have seen as a decline in civility at the bar. Discount among lawyers is unprofessional, and it has become endemic. A committee on civility formed by the Seventh Circuit made an extensive study of the problem and concluded that there has been a dramatic increase in incivility, characterized by the lawyers refusing to extend basic common courtesy to one another, and, instead conducting legal matters with a mentality of warfare and bitterness. Most of the problem exists in litigation, which the committee found to be characterized by widespread over-adversariness, particularly in discovery. The committee found not only rudeness but frequent misrepresentation, stonewalling, scorched earth policies, and ad hominem attacks on other counsel. One commentator related that: "Lawyers think that being a 'tough' litigator means not agreeing to routine extensions and, most disturbingly, lying." Another opined that: "The inclination of lawyers to attack each other rather than the facts of the case is increasing."

These phenomena have unfortunately become a part of the culture of the bar, especially in the big cities. I have a law school classmate, who has practiced for years in a mid-sized city in the West, who hates to litigate in the largest city in his state because of the uncivil atmosphere there. We have, it seems, raised a generation of gladiators who want to fight every point, make every possible objection, and who, in discovery, turn over every pebble, not just every stone. This is expensive to clients in the age of the billable hour, and, as a result, too many middle-income people have been priced out of the legal services
market. We need more of what Judge Learned Hand referred to as the "spirit of moderation"—"the temper that does not press a partisan advantage to the bitter end, that can understand and respect the other side...."

My criticism of the law and my criticism of lawyers converge. It boils down to issues of professionalism—trust and judgment. Indeed, the most important facet of good lawyering, like good judging, is neither knowledge nor smarts but judgment. And you, as lawyers, must learn to exercise judgment about what is worth fighting over and what is not. If you do not, a harsh regime will be imposed by the courts enamored of bright-line rules in the form of more and more sanctions. We must return to the time when courtesy was the hallmark of the profession and when cooperation, not confrontation, was the dominant mode of lawyers' relationships. Toward this end, I offer now a very basic, yet important, piece of advice for your own professional behavior as lawyers.

One of the most uncivil—and common—traits of discourtesy is the failure to return phone calls. The best advice I give to young lawyers is to make it a practice to always return phone calls promptly. In fact, make it a religion. When anyone calls, not only a client, make it your first order of business to return the call as soon as you can, from wherever you may be. To do so is a mark of professionalism, of professional courtesy, and of just plain "class." The same is true for answering correspondence. You will be surprised how far this practice will go toward establishing solid relationships with clients and fellow lawyers.

Another antidote is to instill in the bar the understanding that the highest form of justice that our legal system can realistically deliver is not a verdict after trial, but a freely negotiated settlement between or among the parties. Lincoln put it well: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time."

The judicial system, I confess after all these years, is less than perfect. Judges are human; we make mistakes. A settlement, however, avoids the risk of error. A good settlement, by the way, is best defined as one with which both sides are a little bit unhappy. But your clients will want to settle. Learn to settle early, rather than make clients endure the risks and costs of litigation. Above all, don't view entering into settlement negotiations, as all too many young lawyers do, as a sign of weakness. Rather, it is a sign of strength and confidence in your professional judgment.

I hope that I have not demeaned the judicial profession by admitting our capacity for error, but this is something that young lawyers need to know. I think you can get the wrong impression in law school about judging. Law students tend to see the judge as some kind of detached Olympian figure, for most of what they know about judging is gleaned from opinions in casebooks, often written by our greatest jurists. But the truth is that there is no mystique about judging. There are no special techniques for judging. The best advice I can give you in determining whether to make an argument is the advice I once got from a law professor. When I approached him after class and inquired what he thought of a certain argument, he responded: "Is it reasonable, does it make sense? If so, he continued, make the argument—it's probably right." That advice has sustained me in the practice of law and of judging and I commend it to you. The law is not mysterious. It is rooted in the experiences of people. It is logic and common sense.

I challenge this generation of lawyers to change the culture of the bar—to eliminate incivility, overdiscovery, and over-adversariness. Polls show that public confidence in the legal profession is at an all-time low, with particular concern over costs and ethics. Above all, therefore, the challenge of your generation will be to help restore trust in the legal profession and our whole legal system. To accomplish these ends, we will need a new generation of leaders with courage, animated by high principle. I hope that you will be among them.

I conclude by welcoming you to the legal profession. The future of the profession is bright. The futures of graduates from this elite law school are even brighter. But great too are the challenges before you—the challenge of maintaining a flexible and dynamic jurisprudence, and of promoting a culture of professionalism and trust, to serve the legal needs of all our citizens. I have confidence that you, our newest professionals, will address these challenges to preserve what is best in our system of justice—the envy of the rest of the world. Good luck and godspeed.
Globalization of Law, Politics, and Markets—
A European Perspective on Implications for Domestic Law

The international system after the end of the Cold War has become vastly more complex in structure, tasks, and perceptions on the part of the old and the new international actors. Processes of globalization and internationalization as well as strong countervailing forces of old and new nationalisms are but three major facets of this new vexing complexity. If one sets out to assess the implications of the globalization of law, politics, and markets for domestic law and its adaptation to the new situation in the United States, in European countries, or within the European Community (EC), one must have a rather precise picture of what globalization of the respective subjects actually means, where it happens and to what extent. It is also necessary, however, to put the phenomenon of globalization into proper historic perspective in order to understand the causes and forces leading to processes of globalization within the international setting.

This article deals with the new complexities of the international system and, specifically, with aspects of globalization, in three steps. In the first section, it elaborates on the notion of globalization and on the international setting in which it does or does not take place. It then proceeds to describe and analyze some of the strategies, mechanisms, and instruments applied in the process of globalization in the areas of trade and the environment within the frameworks of the General Agreement of Tariffs and Trade (GATT), the Organization for Economic Cooperation and Development (OECD), and, of course, the European Community (EC). The third and final section draws some conclusions from the preceding analysis, and it then gives some tentative answers as to where and how the process of globalization of law, politics, and markets can and must be strengthened, which changes or reforms in the domestic legal orders are necessary, and asks for a modification of traditional nation-state centered perceptions of international political, economic, and legal transactions, special attention being paid to United States—EC relations.

Countervailing forces: globalization, internationalization, re-nationalization
For more than a century an increasing number of hitherto domestic or national matters have become "internationalized," i.e., made the subject of bi- or multilateral cooperation, mostly in an institutionalized framework, a process that in a wider sense could be called internationalization. In the more recent past, however, the term globalization has entered into the vocabulary of

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1 Interesting contributions to the globalization of markets are also made by the International Labour Organization and the Council of Europe, particularly in the field of promoting the movement of workers. Since this article focuses specifically on trade and the environment, the ILO and Council of Europe experience is not dealt with here.

2 This term in international law originally had a narrower meaning, see Rüdiger Wolfrum, Internationalization, in 10 Encyclopedia of Public International Law 268 (R. Bernhardt et al. eds. 1987); for a historically oriented account of the process of internationalization in the broader sense, see G. Dahm, J. Delbrück & R. Wolfrum, 1/1 Völkerrecht 11-14.
Globalization denotes a process of de-nationalization of clusters of political, economic, and social activities.

Although it seems, at times, as if the new term is rather carelessly used as a trendy synonym for the word “internationalization,” such interpretation of the term “globalization” would fall short of its distinct meaning. For instance, certain serious threats to the environment such as ozone layer depletion or climate change caused by the so-called “greenhouse effect” are of global rather than international concern since they affect humankind everywhere, regardless of national boundaries. Similarly, today’s financial markets are globalizing rather than internationalizing (which they did in earlier decades) since, for instance, the movement of capital has largely become independent of the sovereign control of state agencies. Thus, it seems that globalization as distinct from internationalization denotes a process of de-nationalization of clusters of political, economic, and social activities. Internationalization, on the other hand, refers to cooperative activities of national actors, public or private, on a level beyond the nation state but in the last resort under its control. Another difference between the two notions is that internationalization serves as a supplement to the nation-state’s efforts to satisfy the needs of its people, i.e., the national interest, while—at least ideally—globalization is to serve the common good of humankind, i.e., for instance, the preservation of a viable environment or the provision of general economic and social welfare. In this sense, globalization is a normative concept since it is related to a value judgment, that the common good is to be served by measures that are to be subsumed under the notion of globalization. At the same time, one has to realize that globalization also signifies a factual process based on the dynamics of, for instance, the markets.

On the basis of the foregoing considerations, globalization as understood here may be defined as the process of de-nationalization of markets, laws, and politics in the sense of interlacing peoples and individuals for the sake of the common good. Internationalization, on the other hand, may be defined as a globalization of international policies, see Dieter Senghaas, Weltinnenpolitik—Ansätze für ein Konzept, 47 Europa Archiv 643 (at 647-648) (1992).

This was pointedly observed by Professor Bruce Markell during the Interdisciplinary Conference on the Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform Celebrating the 150th Anniversary of the Indiana University School of Law—Bloomington, March 4-7, 1993.

3 As early as 1943, Wendell Willkie in his farsighted book One World (1943) touched on the notion of globalization. However, the term became “common coin” after influential institutions such as the Club of Rome called attention to the global challenges posed by the ecological crisis. See, for instance, Dennis Meadows et al., The Limits of Growth (1972); The Global 2000 Report to the President: Entering the Twenty-First Century (1980). For a perceptive analysis of processes of globalization of international policies, see Dieter Senghaas, Weltinnenpolitik—Ansätze für ein Konzept, 47 Europa Archiv 643 (at 647-648) (1992).

4 This was pointedly observed by Professor Bruce Markell during the Interdisciplinary Conference on the Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform Celebrating the 150th Anniversary of the Indiana University School of Law—Bloomington, March 4-7, 1993.

means to enable nation-states to satisfy the national interest in areas where they are incapable of doing so on their own. A short survey of the evolution of the international system during the last century will show that the two processes can be identified as consecutive stages in the development of the international system. But such a survey will also reveal that globalization and internationalization are still met by strong countervailing forces of old and new nationalisms, with the result that neither internationalization nor globalization may be understood as exclusive and dominant characteristics of the present international system. Particularly, globalization is neither a universal process nor is the concept universally applied. Nor is globalization involving all states and regions alike, nor is it global in the sense that all major aspects of political, economic, or social life are actually encompassed by the process.

The international community has been witnessing one of the most profound upheavals in the international system since the breakdown of the old Eurocentric order after World War I. The seemingly stable bipolar power structure dominating the post-World War II order, reinforced by or based on the ideological division between the Soviet-led socialist camp and the Western World, has vanished. The apocalyptic threat of nuclear annihilation of most of the “civilized world” has become remote or even eliminated altogether. Yet the international system is far from
entering the millennium of perpetual peace, general welfare, and universal observance of human rights. On the contrary: Although a number of serious regional conflicts have been eased in the wake of the end of the Cold War, other grave conflicts, such as in the Near East, persist with unpredictable implications for international peace and security, and a host of new, rather vicious conflicts have surfaced, e.g., ethno-nationalist struggles for political and religious self-determination as in the former Soviet Union and in the former Yugoslavia, but not confined to these areas. The causes of these violent struggles are partly historically rooted, but they are also indicative of a new phenomenon that will have a strong impact on the future development of the international, nation-state-based system. Ethno-nationalism has re-emerged after the breakdown of the overarching power structures suppressing longstanding ethno-nationalist antagonisms. But today’s ethno-nationalism has another, modern dimension to it. As people worldwide have become politically more conscious and, therefore, less ready to accept public authority as such, they are turning to measures of “self-help”—violently if necessary—and to religiously-based (mostly fundamentalist) group identification. As a result, we see the international system confronted with a fast growing diversity of political actors—new states and nations striving to become states—who are highly politicized and suspicious of public authority whether international or national. Tendencies of re-nationalization can also be observed even within well-institutionalized frameworks of supranational cooperation such as the EC.

On the other hand, the network of international organizations, which started to be set up in the late 19th century and have continuously grown in numbers and scope of competence, has largely remained intact. In fact, the central international organization, the United Nations, has been re-vitalized as a result of the end of the Cold War. It is well worth remembering that international organizations have their raison d’être in the fact that states realized their structural inability as independent entities to satisfy the economic and security needs of their societies in a time that was characterized by dramatic technological and social change. International organizations reflect the international community’s resolve to take on international responsibility for the maintenance of international peace and security, the protection of human rights, economic and social welfare, international communication in the widest sense, and cultural exchange. However, with the exception of the recent and, so far, unique phenomenon of supranational cooperation within the EC, exercising international responsibility in the fields named above remained, at least de facto, nation-state oriented. The decision-making rules continued to be based on the principle of sovereignty. Institution-alized international cooperation was perceived as an instrument to supplement national governments where they were unable to fulfill the domestic needs of their people, not as a means of serving the international community at large. States came to think internationally to a certain extent, but they did not yet think globally, nor did non-governmental actors.

However, the post-World War II era saw a gradual change. It is not by chance that the United Nations was empowered to take binding decisions

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5 On the character and causes of the new ethno-nationalism, see Dieter Senghaas, Vom Nutzen und Elend der Nationalismen im Leben von Völkern, in Aus Politik und Zeitgeschichte—Beilage zur Wochenzeitung Das Parlament B 31-32(1992) 23 (at 30-31), see also David Hamburg, *Ethnische Konflikte—Ursachen, Eskalation und präventive Vermittlung*, 48 Europa Archiv 117 (1993); Peter Coulaus, Das Problem des Selbstbestimmungsrechts—Mikronationalismen, Anarchie und innere Schwachen der Staaten, 48 Europa Archiv 85 (1993). 6 The changed attitudes of the electorates in Denmark, France, and Germany toward greater integration of the EC into a union with a common currency are indicative of this trend of cherishing national sovereignty; see the report on the French referendum on the Maastricht Treaty and public opinion polls in the other states named, in *New York Times* of Sept. 21, 1992 A 1; the Danish electorate, which has rejected ratification of the Maastricht treaty by a small margin, may come out in favor of the treaty after some modifications accommodating Danish anxieties, but the majority again will most likely be marginal. 7 See Dahm, Delbrück & Wolfrum, supra note 2, at 13-14. 8 Dahm, Delbrück & Wolfrum, supra note 2, at 11-13. 9 J. Delbrück, *International Communications and National Sovereignty: Means and Scope of National Control over International Communications* (Sea, Land, and Air Traffic, Telecommunications), XV Thesaurus Acroasium 77 (1987); see also the earlier work by Charles Henry Alexandrowitz, *The Law of Global Communication* (1971). On the globalization of information policies and its impact on domestic law see Fred Cate, *Global Information Policymaking and Domestic Law*. 

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Bill of Particulars / 9
Underdevelopment has become a global problem of the first order.


12 On the phenomenon of the new mass migrations, see Eberhard Jahn, Migration Movements, 8 EPIL 377 (1985) with further references to earlier comprehensive works on the subject; for shorter accounts of recent developments in migration movements, see Stiftung Entwicklung und Frieden (ed.), Globale Trends. Daten zur Weltentwicklung (1991); Albert Maßhun, Armutswanderung, Asyl und Abwandererhalt. Globale und nationale Dilemmata, in Aus Politik und Zeitgeschichte. Beilage zur Wochenzeitung das Parlament, B 7(1993) 3; Clemens Geißler, Neue Völkerwanderungen in Europa, 47 Europa Archiv 566.

politis“ (world interior policy)—a term I borrowed from C.F.v. Weizsäcker. But it is also evident that the process of globalization with regard to the issues named largely occurs on the level of adhoration rather than in fact. The instances where globalization in the areas named has already entered the stage of realization, e.g., in the form of conventional international law (climate convention, ozone layer protection convention, ecological trade regulation) and its impact on domestic law, politics, and markets will be dealt with further down.

There remains the question of where else and to what extent globalization has entered the real world of actual implementation. Here we are referred to a fifth set of factors that have contributed to a process of actual globalization, i.e., to the establishment of international and to some extent global (or de-nationalized) markets. The grand vision of an international or world economic order based on the principles of non-discrimination and free trade backed by the foundation of an International Trade Organization, as it was enunciated at the Bretton Woods Conference, was never realized. However, the pragmatic implementation of the General Agreement on Tariffs and Trade (GATT) together with the establishment of the World Bank, the International Monetary Fund, and the Organization for Economic Cooperation and Development (OECD) has contributed to the foundations of an international economic order that now also forms the basis of the ongoing globalization of the economic order. But besides the basic framework of a non-discriminatory and free trade-oriented economic order, additional factors were necessary to start the process of globalization of markets, politics, and law. These factors are to be found in the technological evolution, or rather revolution, of transnational communication. The rapid advancement of air traffic has brought the economic community closer together than ever before. But much more important, the telecommunications revolution has truly globalized international markets, particularly financial markets.

What happens at the Tokyo stock market is of instantaneous relevance in Frankfurt, London, and—with little delay—in New York. The movement of capital, once a matter of weeks or days, is a matter of seconds today. A domestic decision on interest rates in many cases immediately affects trade policies worldwide. This momentous acceleration of market transactions does not only amount to quantitative time savings. It is actually changing the market and the agents’ behavior qualitatively. A third factor contributing to the globalization of markets, closely linked to the high international mobility of capital, goods, and services, is constituted by the emergence of transnational corporations.

However, here a caveat is necessary. We have to remember that this globalization is confined to the “sunny side of the globe”: It is the globalization of markets within the framework of GATT and OECD and, to some extent, of the EC. The large rest of the world is either only loosely linked to the world of globalizing economies or left out altogether. The EC is a special case in this context. Certainly, the European Community constitutes a prime example of transcending the parochial perspective of narrow national markets. The completion of the internal market has created an extensive zone without internal tariffs and other barriers to free trade. In this sense the EC could be perceived of as the result of “regional” globalization, if one could create such a paradoxical term. However, the EC, particularly if the Maastricht Treaty enters into force, is more than a “globalized market”
and may eventually become something quite different: Although there is not yet a clear consensus with regard to what the status of the European Union is to be, it cannot be denied that the Union in many ways has traits of a federal entity. Union citizenship, obligatory judiciary, binding legislative powers by majority vote, and supremacy of EC law over domestic law are the major characteristics of this new supranational organization. A common foreign and security policy—if it ever comes to be—added to the picture may force one to recognize that the EC is—to say the least—an ambivalent example of what one may understand by globalization. The “Fortress Europe” perception of the EC by observers from the outside world is evidence of not totally unfounded anxieties that the “globalized European market” may turn into a large but domestic market.

To sum up this first section, we may conclude that the international system is, indeed, a rather complex one and that it is necessary to approach the issue of globalization of law, politics, and markets rather carefully in the light of its limited actual scope and in the face of the various countervailing forces. Particularly, the ambivalent nature of the EC has to be realized. Yet, there is enough evidence to allow discussion about globalization, i.e., the denationalization of markets, relevant laws, and politics in the sense of interlacing peoples and individuals for the sake of the common good, not the mere enhancement of national interests. And in view of the evidence at hand, we are able to draw on the experiences in the various areas where globalization has been realized beyond the mere adhortative level in assessing the impact of these processes on domestic legal orders, politics, and markets.

Strategies, mechanisms, instruments of globalization: Experiences from GATT, OECD, EC

The spectrum of strategies, mechanisms, and instruments of globalization extends from the establishment of international authorities with ex ante “legislative” and ex post “repressive” liability enforcement powers to consensual coordination of globalization efforts and to decentralized market-oriented approaches. One may identify preferences for these means of globalization with two opposing credos: the belief in centralized planning or interventionist strategies and mechanisms on the one hand, and reliance on decentralized, liberal market-oriented strategies or mechanisms on the other hand. The propagation and application of these two basic approaches and a pragmatic mix of both means of globalization can be identified on the different levels of globalization, as well as in different subject areas. But we can also observe that market-oriented strategies, mechanisms, and instruments tend to be applied where the globalization of trade as a means of maximizing economic welfare for the greatest number constitutes the policy goal. Intervention into the market is accepted only when there is market failure. Five areas of market failure can be identified:

- supply of public goods (public
Intervention into the market is accepted only when there is market failure.

The decentralized decision-making process of the market is believed to be unable to provide for the necessary uniformity of concerted efforts necessary to cope with transborder and, even more so, global threats of the destruction of common resources. These arguments amount to contending that in the area of common resources there is per definitionem no market mechanism that could be set to work. From the point of view of pure economic theory, this is not true. According to one school of thought, the fallacy of considering common resources not to be tradeable lies in the fact that it is not the public good (e.g., clean air) as such that is at issue but the right to use it. This right, once allocated to a user for an adequate price, becomes a private good and the costs for it become “internalized.” Under conditions of market competition, the user of a common resource comes under pressure to reduce the amount of internalized cost, i.e., to reduce the use of the resource. This reduction of the use of the common resource turns into a reduction of, for instance, air pollution. As an additional advantage, the user provides for technological innovation as a means of reducing the costs for the use of a common resource—a typical achievement of the laws of the market. Another, probably more realistic, school of thought does not deny the necessity of certain regulatory measures, but is inclined to accept a decentralized scheme of regulation. For instance, if states are left free to set their own standards of environmental protection, a process of

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30 For this kind of approach, see Brun-Otto Bryde, Von der Notwendigkeit einer neuen Weltschaftsordnung, in Brun-Otto Bryde, Philip Kunig & Thomas Oppermann (eds.), Neuordnung der Weltschaft 29 (1986); for a market-oriented approach in the same context, see Thomas Oppermann, Über die Grundlagen der heutigen Weltschaftsordnung, ibid., 11.
31 For a pertinent discussion of the notions of “public” and “private” goods in the context of environmental policies, see Gerhard Prosi, Statische und dynamische Effizienz der Umweltpolitik, 66 Bayerisches Landwirtschaftliches Jahrbuch 259 (1989).
32 Prosi, supra note 31.
33 Prosi, supra note 31, at 260.
34 See Siebert, supra note 27, 32 et seq., who discusses a market-oriented approach, based on the concept of institutional competition, to a European environmental policy; also Prosi, supra note 31, passim.
35 See Prosi, supra note 31, 260-261.
36 Prosi, supra note 31, 269 et seq.
37 A clear example in point is Siebert’s study “The New European Economic Landscape,” supra note 27.
"institutional" competition would still ensue. Although under the principle of origin, goods with lower environmental quality remain freely tradeable, the level of environmental standards will still improve because—given the acceptance of an improved environment as a high social value—the goods conforming to higher standards of environmental quality will be more competitive.38 Rigid central ex ante regulations, on the other hand, will not provide for incentives to strive for improved environmental standards and respective innovative technology.39 But even more important in an international environment, lacking a central legislative authority, for all practical reasons the achievement of maximum or optimum regulations does not seem a realistic assumption.

The theoretical dispute over the validity of these and similar strategies cannot be pursued here any further. Instead, experiences at the different levels and subject areas of globalization processes will be looked at: first, the globalization of markets in the area of free trade and, second, the strategies and instruments used by international organizations like the GATT, and the OECD, on the one hand, and the EC, on the other.

Viewed from the perspective of the original concept of GATT, this treaty embodies the core principles of liberal market theory.40 The most-favored-nation principle, reduction of customs tariffs, the principle of non-discrimination, and removal of nontariff trade barriers are to be implemented with the ultimate goal of increasing the world trade volume, raising the standard of living, and providing for full employment (Preamble, para. 1 GATT). The scope of GATT that applies de iure to well over 100 states and de facto to roughly another 30 states, is restricted to trade in goods. Services and movement of capital are not covered by the agreement and negotiations on questions of transborder services are carried out formally outside the GATT.41 But even with these limitations on its scope, GATT's global reach is without question. This is also borne out by recent trade statistics that show that about 85 percent of the world's trade takes place within the realm of GATT.42

The globalization of markets by a basically deregulatory approach, however, in the fields of customs tariffs, non-tariff trade barriers, and non-discrimination has been modified over the decades in favor of strengthening the global reach of GATT. Although not in conformity with the basic market philosophy of GATT, exceptions to the most-favored-nation principle have been granted for member states entering customs unions or free trade areas or regional arrangements of a similar kind but falling short of the strict regimes of the former.43 Parties to such arrangements are not obliged to extend the internal advantages to third states. Another exception to the most-favored-nation principle is the acceptance of preferential treatment, e.g., for underdeveloped countries.44 These regulatory deviations from the pure free market philosophy are being justified by reason of their directly beneficial effects on the countries or regions concerned and their indirect promotion of world trade at large by strengthening the economies of the privileged states.45 It may be noted here, however, that the establishment of the EC did not meet with the unanimous consensus of the GATT community. It was not privileged under the exception to the most-favored-nation principle mentioned before. GATT members only took notice of the EC, which has not become a member of GATT but is representing the EC member states in the GATT decision-making process.46 Other deviations from the free market concept are temporarily allowed under the so-called escape clause (Art. XIX GATT)—a bow to the principle of sovereignty in that states are accorded the right in cases of

38 Siebert, supra note 27, 32 et seq.
39 Prosi, supra note 31, 269.
40 For a summary description of the basic GATT principles, see Jaenicke, supra note 16, at 22-26; Benedek, supra note 16, nos. 9-20 at 203-207.
41 Benedek, supra note 16, no. 14, 205.
42 Benedek, supra note 16, no. 3, 202; Oppermann, supra note 30, at 13, sees of only 80 percent.
43 For more details, see Jaenicke, supra note 16, at 23; Benedek, supra note 16, no. 18, at 206.
44 These preferences are granted by the industrialized countries under the Generalized System of Preferences, see Jaenicke, supra note 16, at 23; Benedek, supra note 16, no. 18, at 206.
45 With regard to this preferential treatment, see Oppermann, supra note 30, at 18-19, who takes a positive view of the underlying policy determination, but emphasizes that the preferential treatment should be seen as a temporary exception to the basic market-oriented philosophy of GATT, not as a structural change towards a new international economic order.
46 See Benedek, supra note 16, no. 18, at 206 and no. 3, at 202; Jaenicke, supra note 16, at 20.
The complex of goals and principles of the EC constitute the core credo of a market-oriented strategy.

Discriminatory basis in accordance with international obligations.” In implementing these policies the OECD has engaged in a sweeping program of liberalizing trade by dismantling quantitative restrictions, but it has also included the liberalization of capital movements and invisible transactions. A major focus of the OECD’s activities has been to mitigate adverse effects on member and non-member states’ economies and free trade on account of the energy (oil) crises. Thus the OECD’s scope of activities ratione materiae is broader than that of the GATT, but is more limited than the GATT ratione personae. It comprises 19 northern, western, and southern European countries and five non-European countries (United States, Canada, Japan, Australia, and New Zealand). The OECD thus comprises the core of the industrialized countries, which also form the backbone of industrialized countries in the GATT. The EC is not formally a member of the OECD but together with EFTA participates in the work of the OECD on the basis of an express provision of the OECD Convention (Art. 13) and a Supplementary Protocol No. 1 to the Convention (EC) and by a Ministerial Resolution (EFTA). The characteristic feature of OECD’s work is that it is predominantly based on consensual coordination of the sovereign member and non-member states’ policies. Lawmaking and strict enforcement by the organization have played a decreasing role. Yet the achievements in the field of trade liberalization have been high. It is no exaggeration to state that the work of the OECD has made a considerable contribution to the globalization of markets. The special issue of trade and the environment under the auspices of the OECD will be treated below.

The overall goal of the European Community is a high degree of economic and ultimately political integration. The preamble and Art. 2 of the EEC treaty contain a rather long list of goals and tasks set for the organization. The Single European Act and the Maastricht Treaty have added even more tasks and competences, for that matter, all aiming at the dynamic integration of the member states. Because of the dynamics built into the integration process, the EC has potentially comprehensive jurisdiction over all areas of economic, social, and cultural activities within the EC territory.

The overall aims for establishing, first, the common and, second, the internal market are specified in the so-called four freedoms (freedom of movement of goods, services, persons, and capital) and in the provisions on the removal of customs barriers, free competition, and the observance of the principle of non-discrimination, an overriding principle applicable in the process of implementation of the other basic goals. The complex of goals and principles of the EC—like those of the GATT and the OECD—again constitute the core credo of a market-oriented strategy. But this complex of goals and principles is much larger—
or even unlimited—in scope than that of the other organizations.

The process of implementation of the four freedoms may properly be called one of "globalization" in a figurative sense: The formerly domestic markets are becoming global ratione personae and materiæ. The EC has also engaged in enhancing the globalization of markets—much in line with GATT and OECD—in that it has opened the EC market to third states, at least to a certain extent. The several Lomé Conventions have granted preferential treatment to formerly dependent areas of member states. Recent agreements with former member states of COMECON (Poland, the Czech and Slovak Republics, and Hungary) have granted these states access to the EC market. Although not in line with pure market theory, these accords and agreements tend to strengthen the future full participation of these countries in a global market—universal or regional. The policy of globalization is also followed in the EC by the establishment of the European Economic Area, i.e., the extension of most of the liberal trade regime of the EC to the EFTA area except for Switzerland.

However, the EC did not solely rely on the mechanisms of a liberalized market in achieving the goals of the community. It used its broad legislative regulatory powers, on the one hand, to enhance and accelerate the harmonization of the laws within the EC, not leaving it to "institutional competition." On the other hand, it legislated in order to set common standards securing unimpaired conditions of free competition or to further technological development in the EC, as, for instance, in the area of telecommunications and in other fields. While legislative intervention aimed at maintaining fair conditions for competition is clearly in line with modern market theories, regulations (mainly directives, but also programs of subsidies) to further the technological or other industrial capabilities of the EC are clearly of a central authority-backed interventionism nature. A complete deviation from the principles of market-oriented globalization of the domestic markets of the member states has taken place in the area of agriculture. The agricultural "market" constitutes a highly regulated, actually non-market, system. It is neither globalized nor based on the principles of free-market theory. It is a "rent-seeking" and protectionist subsystem of the EC.

The regulatory powers have also been extensively used in the cause of environmental protection—an area to be covered further below.

The overall picture of the process of globalization within the framework of the EC shows that both the mechanisms of a free market and the instruments of central regulation, backed by central enforcement authorities (commission and court) have been applied. In this regard, the EC differs from the other organizations mentioned, particularly from the OECD, in the way it has strived for the globalization of intra-community commerce. In some areas, it has acted more like an emerging domestic market than an open, globalizing one. On the other hand, the steps taken to widen the scope of the EC market with regard to developing countries, some former Socialist countries, and to EFTA is evidence of the globalizing thrust of the EC enterprise.

In the first section of this article, it was pointed out that problems of genuinely global dimension have emerged in the field of environmental protection. The international community has come to realize that the abuse of the natural resources of the globe (such as the atmosphere, air, water, soil, the rain forests, and the
living resources, to name but the most important elements of the environment) has reached a level where protection activities by individual states are not commensurate to the existential threats to the survival of Space Ship Earth. Production and consumption of goods necessarily draw on the natural resources and thus have a negative effect on the environment. This is of no concern as long as these resources are amply available or are renewable. But once these resources, particularly fresh air, clean water, etc., become scarce because of overexploitation, production of, trade with, and consumption of these goods becomes a matter of public concern. Overexploitation of common resources is the result of the fact that their use traditionally has been considered to be necessarily free. Common resources, as has been mentioned before, are not held to be marketable goods. In principle, it is possible to privatize their use and thereby subject them to the laws of the market, i.e., to set an adequate price for their use and thus internalize the costs at the producers' or consumers' level. Practice shows, however, that for whatever reasons, states and also the international community at large tend to intervene in the market and bring protectionist regulation to bear. "Protectionist" measures in a double sense: Domestic environmental measures are used to literally protect the environment, but they are sometimes also used as unilateral measures to enforce national standards of environmental protection on third states to the effect that trade with those third states may be impaired in favor of domestic goods. In other words, domestic environmental regulations can and often do collide with the laws of a free market. Yet economic theory teaches us that discriminatory domestic protective measures even for the high goal of environmental protection as a rule do not result in optimum solutions. Based on the premise that environmental protection and international commerce are not necessarily antagonistic goals, GATT, OECD, and the EC have tried to work out regulatory régimes for their respective realms either by a trial and error settlement of the conflicting interests or by relevant laws or conventions. The principal instruments and regulatory principles applied are the "polluter pays" principle and imposing non-discriminatory charges, taxes, and various economic incentives to induce producers and consumers to abide by environmental standards and to engage in innovative technologies or in the reduction of uses of scarce natural resources.

Based on a number of rulings rendered in dispute settlement proceedings, the GATT has established a clear distinction between permissible national environmental regulations, i.e., non-protectionist or non-discriminatory unilateral measures, as distinct from protectionist discriminatory ones. The essence of these rulings is that as long as national environmental protection measures (penalties, charges, taxes, etc.) are applied equally to domestic and imported goods, such measures are not considered to impede on free trade. The legal basis for these rulings is Art. III GATT. The rationale of the rulings in related cases—e.g., the U.S./Mexico tuna fish case, the U.S./Canada herring case, the EC, Canada, Mexico/U.S. Super Fund Act
case—has also been applied to the problem of reconciling implementation of the 170 or so conventions on environmental protection concluded outside the GATT. The goals pursued by these conventions were held by the GATT to be beneficial for both the exporting and the importing country. As long as the obligations ensuing from the conventions are realized in a non-discriminatory way and means and ends are proportionate, respective measures are deemed to be compatible with the GATT.

Furthermore, GATT encouraged mutual recognition of technical standards of equivalent efficiency. Subsidies for strictly environmental purposes were accepted as permissible. Thus GATT has set an example of reconciling environmental concerns with the principles of free trade, at least in principle. Thereby, GATT has added a dimension of global environmental responsibility to its global aspirations in the field of commerce.

The OECD has followed pretty much the same policies. After lengthy deliberations the OECD Council of Ministers adopted in 1991 a Joint Report on Commerce and Development that recommended a revision of the 1972 Guidelines for the Protection of the Environment and an Open Trade System. OECD relies on the principles of “polluter pays” and environmental damage prevention, charges, taxes, and incentives to further the cause of environmental protection and at the same time preserve an open market. But it also holds against protectionist measures intended to make up for disadvantages ensuing from particularly high environmental standards that impair competitiveness, a course not quite in line with a pure environmental stance as it “punishes” states upholding particularly high standards of environmental protection.

In the field of environmental protection the EC faces the same basic problems of reconciling environmental goals and free trade aspirations as the GATT and the OECD. However, the EC’s approach to the problem has been (and still is) a very different one. The, in every sense of the word, global scope of environmental threats is evidently perceived as being so overwhelming that neither pure market mechanisms such as competition over the environmentally best products fueled by consumer preferences, nor national regulation as the basis for “institutional” competition between the different legal systems are considered adequate to cope with the environmental threat effectively. A rather illuminating statement of the regulatory credo of the EC is found in a recent article by a lawyer of the Commission of the EC who unequivocally states:

“There are transnational environmental problems. Pollution of the Atlantic, the North, the Baltic, or the Mediterranean seas, air pollution, the disappearance of fauna and flora species, and other environmental problems cannot be resolved by national or regional activity alone. International conventions are not fully enforced; they lack the necessary legal authority on the one hand and effective enforcement procedures on the other.” One could hardly imagine a more typical paraphrasing of the EC’s philosophy (which does not apply only to the environment): Globalization the EC way is the only effective means to solve imminent problems (here in the environmental field), international and national approaches are dismissed, and so are economic instruments such as the polluter-pays principle. Although referred to in the treaty in one instance (Art. 130r para. 2) “the principle [as it] stands at present,... is, without concrete measures indicating what shall be paid for, a political guideline.” Economic instruments may be applied by the member states, and they are encouraged to do so, but they are of no concern to the EC as such.

The body of environmental law is contained in the treaty (Art. 130r—objectives—, 130s and t), in international conventions to which the EC is a party, and in a host of secondary laws (regulations and directives). As
The EC strongly believes in central law making and central enforcement.

EC law, these rules and regulations take precedence over national law of the member states but national law is allowed to set higher standards of environmental protection as long as these are compatible with the treaty. But even this reference to the treaty, i.e., the principle of non-discrimination and free trade, has been modified in practice by the ECJ, for instance, in the Danish Bottle Case. Although the Danish national law restricting the import of non-returnable containers (bottles in this case) was considered to constitute a trade impediment by the ECJ under Art. 30, the court upheld the Danish ban on such bottles because of overriding environmental concerns, the measure being in itself non-discriminatory, not arbitrary, and proportionate.

As in the case of the geographic extension of EC's trade laws to non-member states in the cause of globalization, EC's environmental laws aim at globalization in two ways: They are aimed not only at preventing and reducing environmental damages within the EC, but they are also directed towards global goals like stopping the depletion of the ozone layer and other environmental hazards of global dimensions. Furthermore, EC law provides the possibility for individuals to have resort to national courts and ultimately to the European Court of Justice (for instance, via Art. 177) in cases where directives are not properly transposed or not complied with otherwise. Thus individuals and other economic agents are directly involved in the enforcement of environmental rules and standards irrespective of national borders and national status. This is a major difference from the GATT system, which gives primary consideration to producer interests in a rather mercantilistic manner, while the EC recognizes that the principles of free trade and environmental protection create rights for consumers and EC market citizens that have to be protected by the national courts and by the ECJ if called upon by the national courts under Art. 177 EC Treaty.

The EC deals with the environmental problems predominantly in a regulatory way. The role of the domestic legal orders and domestic economic approaches to environmental protection are largely reduced to a supplementary role. The EC strongly believes in central lawmaking and central enforcement by the authority of the commission and ultimately the ECJ. The principles of free trade, although also upheld in principle in the field of environmental protection, have suffered major modifications, environmental protection having been given priority in a number of major cases. This certainly has ramifications for the external commercial relations of the EC but also for the national economic orders of the member states. From this perspective, the EC is globalizing in the environmental field internally as well, but with the further result of behaving more like an emerging large domestic market of a federal entity than as a globalizing agent of an open, free world market.

Implications of different processes of globalization for domestic law, policy choices

Processes of globalization have been taking place and are still in progress. The strategies, mechanisms, and instruments applied on the different levels of globalization are market oriented to different degrees, mainly depending on the subject area being globalized and on the political feasibility of replacing market-induced strategies of globalization by central law making and enforcement. From the preceding overview and analysis of the experiences of GATT,

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87 In this respect, EC environmental law follows the general principles governing the relationship between EC law and domestic law as enunciated by the ECJ in the leading case Costa v. E.N.E.L. [1964]ECR 585; see also Krämer, supra note 73, at 163.
88 Setting higher domestic standards, as a rule, requires authorization by Community legislation, which it normally provides. In exceptional cases, more stringent domestic standards may also be provided without prior authorization provided that they are compatible with the higher EC law; see Krämer, supra note 73, at 164.
89 See Commission v. Denmark, Case 302/86, [1988] ECR 4607; see also Petersmann, Umweltschutz und Welthandelsordnung, supra note 65, at 265-266.
90 See Petersmann, Umweltschutz und Welthandelsordnung, supra note 65, at 266.
91 See Krämer, supra note 73, at 153.
92 On enforcement of EC environmental law, particular on rights of individuals to participate in the enforcement process, see Krämer, supra note 73, at 168 et seq.
93 For a conspicuous example, see the Danish Bottle Case, supra note 89.
OECD, and the EC it seems to be quite obvious that on all levels but the EC level, a mix of market-oriented strategies and consensual coordination of efforts with some regulatory/interventionist touches dominate. While this is also true with regard to the EC in the area of trade, a heavy reliance on the regulatory approach can be observed in the area of the protection of the environment with clear repercussions for the principles of free trade and their implementation EC-wide and beyond, as well as domestically. Before examining the implications of these general findings for preferences of policy choices, the purely legal implications of the two basic approaches to globalization for the domestic law of the states concerned shall be looked at.

The GATT and OECD approaches, hereafter referred to as the international model, rely on the globalization, i.e., harmonization and de-nationalization of the domestic legal orders, through international agreements that oblige the states parties to transpose the international legal obligations into domestic law. This means that the actual process of globalization is left to the sovereign decision-making authority of the states or their respective legal provisions on the relationship between international law and the domestic legal order. In addition, the globalization is left to the market agents whose commercial practices under the international regime mold the emerging global order. Particularly international arbitral dispute settlements under the terms of the international and nationalized rules of international commerce (GATT rules, OECD rules, UNCITRAL, Codes of Conduct, etc.) and environmental protection contribute to the growth of a global lex mercatoria, which is mainly informed by the interests and needs of the actual participants in the economic transactions. Thus there is no immediate effect on the domestic law by international rule making and standard setting under the auspices of the international model. However, the process of globalization is less

94 On this approach, according to the dualist concept of the relationship between international and domestic law, see Dahm, Delbrück & Wolfrum, supra note 2, at 98 et seq.; Partsch, International Law and Municipal Law, 10 EPIL 238.
95 See Ernst A. Kramer, Globalisierung der Wirtschaft—Internationalisierung des privaten Wirtschaftsrechts, in Österreichisches Bankarchiv (TBA) 9/91, 621 et seq., pointing out the various methods of unifying domestic law; on the emerging new lex mercatoria, ibid., at 625 with further references.
96 Although the relationship between the law of supranational organizations such as the EC and the internal law of the member states—because such organizations and their respective law are considered to be of a different kind than international law—it has to recognized that supranational organizations are also based on international treaty law, the status of which within the internal legal order of the parties to the founding treaty has to be determined, and this is done so, in the case of the EC, along the lines of a monistic approach. At least part of the law of the EC is directly applicable in the member states; see the case of Costa v. E.N.E.L., supra note 87.

20 / Bill of Particulars
it is unique in terms of the necessary political preparedness of the member states to accept the supranational authority wielded by the EC.

When it comes to the question of choices, i.e., what course of action is preferable—the supranational approach or the international model—a number of political decisions have to be made. First, it has to be decided that globalization is a desirable end. Considering the urgency of resolving the vexing problems mentioned in the first part of this article, it appears that a global approach to the serious global problems of our time is without real alternatives. Second, it has to be decided which means of achieving the necessary degree of globalization of problem perception and of problem-solving capabilities are preferable: Are slightly modified market-oriented strategies preferable over central interventionist ones? Here the answer is difficult. There are persuasive arguments, particularly on the part of economic theory, in favor of a modified market approach. First of all, reliance on *ex ante* central lawmaking has to rely on the assumption that the central authorities—the politicians—own the better quality insight and knowledge to legislate in the right way for reaching the better solutions than the decentralized market process would bring about. Economic theory provides serious evidence that central regulation in the long run arrives at less possible short-term higher efficiency." Third, the supranational approach with its inherent inclination towards using *ex ante* regulation as the tool of globalization presupposes a degree of political homogeneity and basic consensus, which is not the rule in the international system at large. Thus it seems a tenable position to take that in the long run a market-oriented approach along the lines of what is called in Europe, particularly in Germany, the social-ecological market economy is the best choice. But it is such only if certain political conditions are met:

- States have to ensure that globalization of markets, law, and politics becomes effective for societies and individuals at large, not only for specific market agents.
- States have to gear their domestic legal orders to a swift and effective reception of the norms of international or rather of the emerging global law, and, particularly, courts have to be bound to have due regard for the norms of international/global law; and
- States have to topose international obligations faithfully into the domestic legal orders;
- States have to forego the option of unilateralism, whether with regard for protectionist temptations or overzealous goals of enforcing free trade or standards of environmental protection beyond their domestic realms;
- States have to ensure that globalization of markets, law, and politics becomes effective for societies and individuals at large, not only for specific market agents.
- States have to topose international obligations faithfully into the domestic legal orders;
- States have to forego the option of unilateralism, whether with regard for protectionist temptations or overzealous goals of enforcing free trade or standards of environmental protection beyond their domestic realms;
- States have to ensure that globalization of markets, law, and politics becomes effective for societies and individuals at large, not only for specific market agents.

This is probably the most important and difficult adaptation of the domestic legal order and domestic politics because it requires an exchange of the basic paradigms of traditionally market-oriented (capitalist, if you want to call it that) societies. To think and act globally means to focus on societies as a whole, not on some powerful interest groups. A lasting cooperative relationship between the United States and the EC (and Japan as well) seems to depend on whether these powerful actors in the emerging global order will be able to achieve this resetting of the leading paradigms of their respective value systems. Whether the EC will really become Fortress Europe as has been suggested by some political observers, is an open question. Whether the United States will grow into the role of a truly global leader rather than remaining an international hegemonic power (wholesome as the existence of at least one powerful pillar of the international system actually is) is a question just as open.

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97 Boadway & Wildasin, supra note 29, at 5.
A World of Regions: America, Europe, and Asia

Recent events in world politics are creating a substantial break in the history of international politics comparable in this century only to the years 1917-22 and 1947-53. With specific reference to Germany and Europe as well as Japan and Asia, this essay argues that these changes in world politics tend to reinforce a new political regionalism that expresses to some extent different norms that in the foreseeable future are unlikely to be assimilated fully into one normative global order.

Cold War victors and vanquished

The main protagonists of the Cold War, the United States and the Soviet Union, both lost that war to two trading and welfare states, Japan and Germany, that learned similar lessons from their disastrous involvement in power politics in the first half of the 20th century.

The power shift from the United States to Asia, and specifically Japan, was a very prominent trend in the 1980s. It can be traced along many dimensions relevant to economic competitiveness and regional political power. Most dramatic and probably most important is the shift in global capital markets. In the history of capitalism there has never occurred a comparable shift of capital in as short a time. In the 1980s, the United States moved from a position as creditor of about $350 billion in 1980 to a position as debtor of about $350 billion in 1990. This $700 billion turnaround is reflected in the growing global importance of Japanese banks. In the second half of the 1980s, most of the largest 10 banks worldwide were Japanese, and Tokyo became the richest capital market in the world, which defined the daily mood for trading on Wall Street—a development unthinkable at the beginning of the 1980s.

Japan’s technological dynamism, furthermore, is heralding an important shift in political and military relations in coming decades. In the 1980s, civilian technologies came to drive military technologies, an unforeseen development, which was appreciated fully by Japanese bureaucrats only when American defense officials became increasingly insistent on having access to some of Japan’s civilian technologies with potential military applications. The “spin-on” from commercial to military products is beginning to replace the “spin-off” from military to commercial products. In areas such as electronics, infrared sensors and optics, avionics, new materials, and ceramics, Japan’s leading manufacturers are often well ahead of American defense corporations. And Japanese firms enjoy a substantial lead across the board in virtually all aspects of production technologies relevant for the defense industry. The Department of Defense has been aware of this development since the early 1980s. Even though only a few voices anticipate that Japan would wish to exercise direct political power over the United States, the indirect use of Japan’s

1 Professor, Cornell University School of Law. This paper was originally prepared for delivery at the Indiana University Law School conference on “The Globalization of Law, Politics, and Markets: New Perspectives on Domestic Law,” Bloomington, Ind., March 4-6, 1993. I am grateful to the participants in the colloquium for their critical reactions. The paper draws also on a forthcoming book on Japanese security policy, as well as an essay published under the title “Regions in Competition: Comparative Advantages of America, Europe and Asia,” in Helga Hafendorf and Christian Tuschoff, eds., America and Europe in an Era of Change, pp. 105-26, Boulder, Co.: Westview Press, 1993. —P.J.K.
growing commercial-military power is another matter altogether. And while the American public was mesmerized by the success of America’s high-tech weapons in the Gulf war in 1991, specialists know that the victory was won with weapons that embodied new technologies every three to five years, or three times faster. Japanese military officers watching the war on CNN must have been very much aware that the restraints on Japan’s military power are primarily political, not technological.

Finally, as a prosperous and successful trading state Japan has developed a deep confidence in the efficacy of markets. It thus took a very different attitude toward Iraq’s invasion of Kuwait than did the United States. Because of the energy efficiencies that it has built into its economy since the oil shock of 1973, any increase in the price of oil will enhance rather than diminish its competitiveness over Europe and, in particular, the United States. From Japan’s perspective, Saddam Hussein would have had to sell Iraq’s and Kuwait’s oil eventually. And since Japan could afford to pay for the oil at almost any price, in contrast to the Bush administration Japan preferred a diplomatic over a military solution to the Gulf conflict. Even an Iraqi assault on Saudi Arabia would not have altered the economic logic of Japanese calculations. In contrast to the United States, the objective of protecting a friendly leadership of OPEC did not figure heavily in Japanese calculations. And Japan conspicuously lacked the ideological and political instincts that guided American diplomacy in the Mideast after Aug. 2, 1990. However, when war turned out to be unavoidable, Japan joined Saudi Arabia and Germany as America’s most generous financial supporter.

In the foreseeable future, there appear to be two limits to Japan’s increasing power. First, Japan’s political imagination is still too constricted to have developed a clear-cut view of Japan’s role in global politics. The criticisms levied against Japan in the wake of the Gulf War and anticipation of the substantial political changes that the end of the Cold War might bring about in Asia are providing a strong impetus for Japan’s political leadership to remedy that shortcoming. But it is not clear whether the blueprints that undoubtedly will be generated in the coming months and years will transform Japan’s cautious, follow-the-leader approach to diplomacy. It is, for example, widely acknowledged that a thorough modernization of American-owned manufacturing industries is essential for a long-term, stable political relationship with the United States, and in particular the United States Congress. Yet Japan’s political leadership has made no concerted efforts to address, let alone deal with, this problem. Instead the investment strategy of Japanese corporations in Europe points to a magnification of Japan’s political troubles in the industrial world in the coming years.

Second, political constraints, both domestic and international, militate against a dramatic rise in Japan’s military power. Some shrill voices (magnified by American publishers with a good instinct for what it takes to sell books in Tokyo) talk of “the coming war with Japan.”4 But hardly anyone in Asia or the United States takes such talk seriously at this time. The real change since the late 1970s is rather a gradual military build-up that is creating technological options for a national strategy that did not exist 10 or 20 years ago. But as long as Japan is not developing interballistic missiles, stealth technologies, and offensive, conventional military power in Asia on a large scale, we can be reasonably certain that Japan will operate within the political limits that it has imposed on its exercise of military power since 1945. This is hardly a surprise. Japanese policymakers define national security in comprehensive terms, to include economic, social, and political issues besides military considerations. They are thus much more attuned to finding an appropriate political role for Japan rather than seeking to develop national military options in a world marked by decreasing international tensions. Playing a central, perhaps the central, role in an Asia that is defined so broadly to encompass also the United States, is a far more urgent and appealing task.

The decline of the Soviet Union and the ascent of Germany has also been a marked trend that found its visible expression in the opening of the Berlin Wall in 1989, German unification in 1990, and the promise
of the withdrawal of the last Soviet soldier from German territory by 1994. Several examples illustrate the drastic divergence in the political fortunes of the Soviet Union and Germany. German unification within the context of an integrating Europe and the Western alliance is a culmination of West Germany’s foreign policy objectives as articulated by Chancellor Adenauer in the early years of the history of the Federal Republic. This contrasts sharply with the growing problems of cohesion that mark the Soviet Union. Ethnic and political tensions have become very strong in the crumbling central pillars of the Soviet Union. It remains to be seen whether the Soviet Union will survive this period of retrenchment and reform as a decentralized state, whether it will move to a confederate or commonwealth-like structure, or whether it will in fact break apart into different sovereign states.

In economic terms as well, the difference between Germany and the Soviet Union is striking. In the winter of 1990–91, Germans organized an unprecedented, spontaneous, massive private economic assistance program to help stave off hunger and starvation in the major Soviet cities where food supplies were reported to be barely adequate. This assistance supplemented extensive credits of the German government running into the tens of billions of dollars over the next several years. Furthermore, Germany has become the most ardent advocate pressing the Soviet cause in international meetings trying to persuade a United States and Japan that are much less ready to develop a broadly based international economic assistance program to help revitalize the Soviet economy.

The contrast between the economic crisis in the Soviet Union and that in East Germany underlines the great difference between the two countries. Germany is rich enough to have mobilized in 1991–92 alone more capital for the reconstruction of East Germany than did the United States with the Marshall Plan for the reconstruction of all of Western Europe after World War II. The German economy will turn inward for a few years to repair some of the material damages that 40 years of socialism has wrought. But few doubt that it will emerge from this period as a major, if not the major, export economy in the global economy.

Finally, the contrast between the Soviet Union and Germany is striking in terms of the model they provide for other states in Central and Eastern Europe. The Soviet Union in 1945 offered not only a political vision to many Europeans, but also had a transnational political structure, the Communist Party, through which it could affect political developments in most major European states. Forty years later, the failure of the Soviet model and that of its former satellites in Central and Eastern Europe has been so dramatic that in the foreseeable future no political leadership can hope to gain or retain positions of power under a program dedicated to
building “socialism in one country.” The dissolution of COMECON and the Warsaw Pact in 1991 symbolize the political exhaustion of the Soviet model.

Germany’s social market economy, on the other hand, is inspiring political confidence in Central Europe as a form of capitalism worth emulating. Economic efficiency, private affluence, and good public services in a political economy that is fully integrated into a larger Europe both economically and politically—these are the targets of economic and political reform efforts throughout Central and Eastern Europe, doubly so if the reform and modernization of East Germany succeeds within the next 10 to 15 years. During the failed coup d’etat in the Soviet Union, the EC has basically agreed to accommodate the desire of the governments in Central Europe to become associate members of the EC at an early date. This expresses both the lack of political alternatives in the East as well as the confidence Central European governments place in the political models of the West, in particular in the German model.

As is true of Japan, Germany’s political role in world politics will remain restricted in the coming years for two reasons. The end of the Cold War as well as the Gulf War showed deep fissures in Germany’s political culture. There is no consensus about the role that Germany should play in the world. The mix between political, economic, and military dimensions of power as well as the balance between national initiatives and international obligations remains very much contested. Second, as is true of Japan, Germany is unlikely to emerge as a major independent military power in the near future. German unification brought about a 50 percent cut in the combined military strength of West and East Germany. The German army is an integral part of NATO. In terms of men and equipment the Soviet forces outnumber Germany’s by a ratio of about 10:1. Furthermore, contrary to the claims of some who see Germany producing a national nuclear force to protect itself against ethnic strife in Eastern Europe and in the Soviet Union, a growth in Germany’s nuclear military power is highly unlikely under national auspices. Only an integration of Europe’s defense policy might make Germany conceivably part of a European deterrent force. Rather than moving back to the politics of 1912, European integration as it is reflected in the EC92 process, offers Germany the chance to participate in a European regional process that will help to define its role in the world in the next century.

New Regionalism in International Politics

Germany and Japan are the centers of a new regionalism in Europe and Asia that will increasingly complement the system of strategic bipolarity—as long as Europe does not unite militarily and Japan forgoes the technological options it has for becoming a military superpower. This regionalism differs from Hitler’s New Order and Japan’s Co-Prosperity Sphere in the 1930s and 1940s, as well as from George Orwell’s nightmarish projection of a tripolar world in 1984. What separates the new from the old regionalism is the difference between autarchy and direct rule on the one hand and interdependence and indirect rule on the other.

Japan’s growing role in the six member states of the Association of Southeast Asian Nations (ASEAN) (Indonesia, Thailand, Malaysia, Philippines, Singapore, and Brunei) can be easily traced in the areas of trade, aid, investment, and technology transfer. In the two decades preceding the Plaza Accord of 1985, Japan accounted for close to half of the total aid and direct foreign investment that the region received. The dramatic appreciation of the yen after 1985 led to a veritable explosion of Japanese investment, which between 1985 and 1989 was twice as large as between 1951 and 1984. And the flow of aid has continued to increase as Japan seeks to recycle its trade surplus with the region. All governments in Southeast Asia are bidding for Japanese capital as it is illustrated by the massive deregulation of their economies as well as the lucrative incentives that they are willing to grant to foreign investors. More important, Japan’s “developmental state” has become a model of emulation in both the public and private sector. The establishment of private trading companies and a general commitment of governments

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in the region to vigorous policies of export promotion give testimony to the widespread appeal of the Japanese model.

The massive inflow of Japanese investments in recent years has created severe bottlenecks in the public sector infrastructures of countries like Indonesia and Thailand. And these bottlenecks are turning out to be a serious impediment for the future growth of Japanese investment. Roads and ports are insufficient and need to be expanded and modernized. The same is true of national systems of communications and the public services more generally. The New AID Plan (New Asian Industries Development Plan), which Japan revealed in 1987, signals that Japan has serious, long-term interests in the region. The plan addresses the needs of the public sector as they relate to Japanese industrial investments and to the restructuring of the Japanese economy more generally. Broadly speaking the program offers investment incentives for selected Japanese industries to relocate to ASEAN countries. A large number of Japanese government agencies are cooperating in this plan, which makes explicit Japan's hierarchical view of the international division of labor in Southeast Asia.

To some extent this is also true of Japan's view of its relations with the Newly Industrialized Countries (NICs) in Northeast Asia: South Korea, Taiwan, Hong Kong, and Singapore. Their take-off into self-sustaining rapid growth occurred earlier than in Southeast Asia. In several of these countries, Japanese trade, aid, investment, and technology transfer were crucial for the rapid success that they have enjoyed in international markets. And Japan proved to be an important model for several of these states as well.

Greater Asian regional cooperation appears to be an idea whose time has come—at least in terms of public debate. Enhanced regional cooperation is often invoked as a necessary response to the process of European integration, as well as to the Canada-U.S. Free Trade Agreement (soon to be joined by Mexico). Demands for an Asian equivalent to the European CSCE have subsided after it became clear that in the near future the CSCE was playing no more than a subordinate role in Europe. The Asia Pacific Economic Cooperation Conference (APEC), on the other hand, held its first meeting in Canberra in December 1989. Like the Asian Development Bank, it is a forum for the discussion of economic policy and thus may turn out to be useful for strengthening regional economic cooperation.

The sharp growth in Japanese influence and power in Asia has created widespread unease about the political consequences of intensifying economic relations for an emerging regional political economy. Japan's power is simply too large to be met in the foreseeable future by any coalition of Asian states. With the total GNP of ASEAN amounting to more than about 15 percent of Japan's GNP, a world of self-contained regions in the northern half of the globe would leave the ASEAN members at the mercy of a Japanese colossus. In the view of the other Asian countries, only the United States can act as an indispensable counterweight to Japan's growing power.

With the American Navy firmly committed to retain a strong position in Asia and with the consolidation of U.S.-Japanese security arrangements in the 1980s, the United States is likely to remain an Asian power. Furthermore, since virtually all Asian countries run a substantial trade deficit with Japan and a large surplus with the United States, the United States is essential for regional economic integration in Asia. An Asia that includes the United States has several virtues. It can diffuse the economic and political dependencies of the smaller Asian states away from Japan. And it can provide Japan with the national security that makes unnecessary a major arms build-up, and the hostile political reaction it would engender among Japan's neighbors.

Regionalism in Europe is a force that is better defined than in Asia. This is mostly due to the presence of the European Community and the process of accelerating European integration that led up to the elimination of all internal barriers in 1992. Furthermore, the EC has developed such a strong political momentum that formerly neutral states such as Sweden, Finland, and Austria, and possibly even Switzerland, have made formal applications for mem

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European regionalism is better defined than Asian regionalism, and politically more easily constructed.

bership, or are considering doing so. And as was true of Southern Europe in the late 1970s, the emerging democracies in Central Europe look to the EC rather than any individual European state as the political and economic anchor during their difficult period of transition. A united Germany will figure prominently in an integrating Europe. But Germany is unlikely to want to build a “Fortress Europe,” a concept coined by Josef Goebbels and for that reason alone lacking political appeal and support in Germany.

Throughout the postwar era, German foreign policy has always sought to avoid having to choose between France and the United States, between the European and the Atlantic option. There is little indication that in the coming years German foreign policy will deviate from this past line. Both Germany’s economic and security interests are best served by a closer European integration that does not isolate itself from the United States. In economic terms it would be outright foolishness for one of the largest export nations in the world to favor building economic barriers. Furthermore, the success of American corporations operating in Europe in preparing for 1992 and the European investment strategy of Japanese firms in important industries such as automobiles show that trade protection is no longer a very effective instrument for isolating national or even regional markets.

Furthermore, the EC92 program is excluding security policy. British and French interests may converge with German interests in building up one or several European options on questions of security policy. The political revival of the West European Union (WEU) and the growing importance of the European pillar in NATO reflect this fact. But German unification has probably increased French and British resolve to retain a national nuclear option and to keep the United States involved, both politically and militarily, in European affairs. While French and British policy differ in their emphasis, on this basic point they converge with German interests. NATO remains of fundamental importance in Germany’s security policy. And so does an American presence in Europe, symbolically with ground forces and strategically with sea- and possibly air-based systems of nuclear deterrence, at least for the foreseeable future. The CSCE is in German eyes potentially a useful instrument of diplomacy that can supplement NATO and the EC because it avoids a narrow definition of Europe and keeps the United States, as well as Canada and the Soviet Union, involved in European and thus German security affairs.

Germany’s weight in Europe and Europe’s weight vis-a-vis the United States is, however, likely to increase both economically and politically. This redistribution in power is unlikely to find political articulation in military terms. Instead it will be fed by the compatibility between the German model of an efficient, capital-
The U.S. will be part of both the emerging Asia and the new Europe, in economic terms no less than in security issues.

welcomed by virtually all European states.

Different norms in international system

Different regions in world politics embody norms that are to some extent different. These norms are important for one simple reason. The interests informing state policy are defined, and become intelligible to the analyst only in relation to this normative context. For example, in Japan it is typically a dynamic relationship between social and legal norms, specific to particular situations, that helps define the interests guiding policy. This makes it difficult for Japanese decision makers to conceive of international norms in the society of states as distinct from enlightened self-interest. In contrast, in Germany the difference between legal and social norms is much less important. Legal norms often define social norms. Furthermore, the abstract character of legal norms makes it quite easy for German decision makers to be politically active in an international community of states to which they feel they belong and which, in their minds, they help shape through political practice, thus furthering German interests.

To take but one example. The norms characterizing Germany’s domestic policy of internal security are centered around the idea of the lawful state (Rechtsstaat). It is the central concept that informs the self-understanding of the police, the elite not based on any substantive rule of law. It is the state, not social norms or moral values, that is the foundation for Germany’s legal norms. The police do not simply enforce the law. In the words of the Police Administrative Law of 1931, the police are the business of the state. The power of the state is legally controlled, but in the interest of defending state security, also can be legally imposed. West Germany’s Basic Law balances its commitment to the primacy of individual rights with the provision that they can be limited, among others, by the principle of loyalty to the constitution. Organizations hostile to the constitutional order are explicitly prohibited (Article 9.2). On questions of state security, and perhaps more broadly, the state legitimizes itself.

Germany’s changing social norms are typically codified in legal language. Constitutional amendments are thus passed with great regularity. Between 1949 and 1983, 49 articles of the Basic Law were altered, 33 were added and seven were deleted. By contrast, Japan’s constitution has not been altered even once since the end of World War II, and the constitution of the United States has been changed only about two dozen times during the last 200 years. The abstract universalism that typifies Germany’s domestic norms has made it easy for German officials to view the German state as part of an international community of states seeking to protect itself. Since 1945,
In contrast to Germany, Japan’s legal norms are deeply embedded in social norms.

Germany has participated with great energy in the process of furthering the evolution of international norms and in no arena more actively than in Europe. This active role in furthering the evolution of international legal norms since 1949 was partly a concerted attempt to regain a measure of the legitimacy that the Nazis and their international legal specialists of the New Order had squandered. More important, in the last three decades this active role was shaped by the characteristic weight that German political leaders have given to the importance of legal norms in domestic and foreign affairs.

From the perspective of the German government, Europe combined the advantages of furthering the evolution of international norms in a setting of relative political homogeneity. In the area of human rights, for example, Western Europe has developed a strong regime in comparison to other regions in the world, such as Asia. Germany’s active participation in the process of furthering the evolution of international law was also apparent in the central role it played in developing the European Convention on the Suppression of Terrorism passed in 1977, arguably the most important international convention that established international norms and procedures for combating terrorism. Based on a political initiative of the German Minister of Justice, the convention was drafted by the Council of Europe. Broadly speaking, the convention shifts attention away from a concern with the individual right to political asylum—characteristic of the 1930s, 1940s, and 1950s—toward the preoccupation with the threat of terrorism that marked the 1960s and 1970s. With some justification one critic of the Convention has argued that it is an “international manifestation of the theory of the ‘strong state’—that states hold in reserve strong and wide-ranging powers with which to suppress possible dissent. Germany particularly... is generally associated with this view.”

In contrast to Germany, Japan’s legal norms are deeply embedded in social norms rather than constitutive of them. In contrast to Germany, none of Japan’s radical organizations have been declared illegal since 1945. And because it has cultivated close links with the Japanese public, the Japanese police lack some of the instrumentalities of police power that the German police take for granted. Wiretapping, for example, is severely constrained by law—even though it may not be uniformly adhered to, as a scandal in 1986 confirmed. With the exception of some drug-related crimes the use of undercover agents is constitutionally prohibited. And compared to Germany, the Japanese police have been very reluctant to invest heavily in high-technology search methods.

Furthermore, on questions of state security, Japan has avoided passing a spate of legislation. In the 1970s and 1980s, the Diet passed only a handful of laws or amendments dealing with internal security. The reason for this legal passivity lies in a political stalemate over the attempt to strengthen the legal and political position of the police that dates back to the late 1950s, despite intermittent efforts by conservatives in the Liberal Democratic Party (LDP) to revive the issue. Confronted with this political reality, the police have adapted Japan’s practice of bureaucratic informalism to cope with problems of internal security. The police practice of informalism (umyo) does not amount simply to arbitrary police discretion. But in permitting a very flexible application of police powers, it gives a very broad definition to the legal restraints under which the police operate. Leading police officials in the 1980s have been very explicit about the fact that the police strategy of providing “comprehensive security” is self-conscious in making intelligent use of the police powers to conduct investigations.
The globalization of law is a process of undeniable importance in the modern world.

under all existing laws and ordinances.
The normative context of Japan's internal security policy, in contrast to Germany, is not intelligible without referring to the power of public opinion. The conceptual basis of German jurisprudence is informed by the wrongfulness of the conduct proscribed, as John Haley has shown in his analysis of German and Japanese anti-trust law. The apparent identity of legal and social norms which thus results is strikingly different from their dynamic interaction in Japan. In all its actions, the Japanese police, for example, have been careful not to lose their case in the court of public opinion. The media are cultivated and the pulse of the public is taken regularly. Patience in the face of prolonged provocation, as in the case of the student radicals of the late 1960s, was dictated not by legal considerations but primarily by the police assessment of public sentiment. This sensitivity to the public has permitted the police to rise dramatically in the esteem and trust that the general public places in it, occasional corruption scandals to the contrary notwithstanding. And the public's good will is reinforced by the daily activity of the police in community life, as well as the deliberate efforts of the police to convince the public that public and police are on the same side in the effort to maintain, literally, a civil society.

With only few exceptions, Japan appears to be in full agreement with evolving international norms, for example in the area of human rights. But the social embeddedness of Japanese law and its situational logic have made it more difficult for Japan than for Germany to involve itself actively in furthering the evolution of international legal norms prohibiting terrorism. Furthermore, a strong social consensus has favored the notion of Japan's uniqueness in the contemporary international system. Japan's international isolation is such a fundamental challenge because the Western system of international law is based on the presumption of universally valid principles that do not reflect how norms work in Japan's domestic political arrangements.

The extension of the abstract universalism of German law into a larger European space thus has no Japanese analog. The process appears to have worked rather in reverse. In certain crisis situations, for example the dangers that the Japan Red Army posed while operating abroad in the 1970s, the Japanese government passed domestic legislation so that it could ratify five international treaties that it had signed previously. In this instance, international norms shaped the evolution of Japan's domestic legal norms on questions of internal security. However, the effect of these security laws had little bearing on the practical work of the police and the legal profession dealing with questions of internal security.

In contrast to Germany, in none of the international organizations has Japan taken a leading role in seeking to further international norms. And
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This has been an extraordinary week: It started on Monday with an after-breakfast visit from President Clinton at the Whitman Center at Rutgers, and it has culminated this evening in a dinner with your great chancellor, Herman Wells. I am delighted then to be with you for this sesquicentennial of a great law school and to join with this group of distinguished lawyers and social scientists to talk about the globalization of law. I have only one problem: There is no globalization of law. Law has always been the destitute camp follower of the itinerant armies of transnationalism—historically, imperialism or communism or international commercialism or markets; today, telecommunications, ecology, markets, and pop culture. Law is dragged along behind these forces in the most awkward fashion. The image I have before me is not of a man pulling a somewhat reluctant dog along a smooth path, but of a helicopter hauling a puppy on a long tether across an obstacle course on the ground. The chopper sails along, but the poor puppy dog....

International law in 1993 is all pleading, a rhetoric of “must” and “should” and “ought to” rather than a language of action. The rule of law across boundaries would not then seem to represent the road to globalization, though it may eventually become a consequence of it. Sovereignty, so porous in other areas, remains an obstacle blocking the application of law across borders. Thus my embarrassment. However, the defect of law points us in the right direction: democracy. Because, historically, while the rule of law often preceded and set the framework for the emergence of democracy (as happened in England), nowadays, at the global level, democratization is likely to precede the establishment of the rule of law.

As I suggested in an article in the Atlantic last year, there are not one but two specters haunting Europe. “The first is the specter of retiralization and bloodshed—a threatened Lebanonization of national states in which culture is pitted against culture, people against people, and tribe against tribe, in what looks more and more like a hydra-headed Jihad in the name of a hundred tribal faiths against every kind of interdependence, every kind of artificial social cooperation, every conceivable kind of civic mutuality. The second is the specter of globalization: of economic and ecological forces that demand integration and uniformity and that mesmerize the world with fast music, fast computers, and fast food—with MTV, Macintosh, and McDonald’s—pressing nations reluctantly into one commercially homogeneous global network: one McWorld tied together by technology, ecology, communications, and commerce. The planet is coming reluctantly together and falling precipitously to pieces at the very same moment.”

Neither democratization nor law have benefited much from either trend. And in recent months, the forces of retiralization seem to have gained the upper hand in their opposition to globalization.
Is it possible that America's constitutional faith proffers a solution to Europe's recidivist tribalisms?

contest with McWorld.

Talk of international law seems almost risible in the context of Bosnia or Iraq or Somalia. England, France, Germany, and other continental nations were once relatively homogeneous. They were nation-states in the 19th-century sense, with a shared language, culture, history, and religion. In their early history, nationalism was actually a force of integration binding together Burgundians, Normans, and Provencels into a greater France. Today, they are increasingly fractious and disintegrative—multicultural with a vengeance. The language of tribes has become commonplace in international politics, as new books by Daniel Patrick Moynihan (his called, aptly, *Pandaemonium*) and Joel Kotkin make clear. The United Kingdom—sceptred isle, blessed plot and all—has absorbed large and increasingly unassimilable populations from its ex-commonwealth: up to a million Hindus, up to two million Muslims, who, when they are not being abused by their hosts, are warring with one another. Since the Second World War, France, hospitable as ever to its French Community ex-colonials, has accommodated more than five million citizens from the Maghreb, along with many others from French West Africa and the West Indies. The French are no longer sure whether their historical commitment to civic assimilation can work in the face of this resurgent and often angry Muslim culture that no longer is willing to be integrated into a mother France. Germany is in a fearful tumult with a volume of immigrants that has led to globally reported skinhead excesses.

German developments are eerily reminiscent of the 1920s, suggesting both the radical polarization that destroyed Weimar and the weak-state response for which its pallid and legalistic constitution was notorious. Who can predict whether Germany can even absorb its "cousins" from East Germany as "natives," let alone the floodtide of immigrants from further east? The refugee problem, truly a global challenge, is putting post-war German tolerance to a very expensive trial and one whose outcome remains quite uncertain (although there has been a welcome civic response from ordinary Germans who, in candlelight demonstrations attended by hundreds of thousands, have protested against rightist radicalism). Even Switzerland, Europe's traditional standing tribute to sustained multiracial nationalism, is at risk, its Francophone and Germanic populations angrily divided over the new relationship to Europe. In autumn 1992, a substantial majority of Ger-

If not law, then what? The civil

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3 Arthur Schlesinger Jr., *The Disuniting of America*.

McWorld remains Jihad's most formidable rival.

Old ideologies, new constitutional faith

In truth, old memories linger on, poisoning every attempt at establishing new forms of artificial unity and defeating those who would weave the pieces together with the thread of law. There were once colonial and neo-colonial alternatives to constitutional faith—effective, if costly, antidotes to ethnic factionalism—but their time is past. Ethnic nationalism was frequently kept in check, and the politics of difference offset by imperialism in both its capitalist-colonialist and its neo-colonialist communist variants. Ironically, these two versions of civic faith have themselves been rival ideologies for the last 100 years, not least of all during the Cold War. Yet both communism and capitalism hoped to unify the peoples over whom it sought dominion through the imposition of radical economic secularism, whether in the form of transnational capital markets or transnational proletarian rule. The cry “Workers of the world unite!”, like the call for free trade and open markets, is always a threat to ethnic identity. Imperialist economic strategies (whether statist or market), however odious they might have been, did keep rival ethnic factions in check. The great 19th-century empires, rooted in economic rather than ethnic suzerainty, held together quite astonishing coalitions of peoples who were naturally at odds and offered common civil codes, common courts, and common laws, even though their codes were sanctioned by authoritarian rather than democratic force.

The rapid disintegration of whatever unity had been achieved in the Baltics, Eastern Europe, Yugoslavia, and the Soviet Union reveal both how important to continuing transnational

unity the victory of communist imperialism was and how Pyrrhic in the long run it turned out to be. What then is left that can bind together multi-ethnic and multi-religious societies?

The capitalist market remains an alternative of sorts: I have already alluded to “McWorld”—those economic and ecological forces that are pressing nations into one commercially homogeneous global network: a McWorld tied together by technology, ecology, communications, and commerce. McWorld certainly remains Jihad’s most formidable rival, and in the long run it may even manage to attenuate the force of the globe’s current recidivist tribalisms.

McWorld is ecological and technological, but most of all it is a product of popular culture driven by expansionist commerce. Its template is American. Its form is style—though it is style as produce to be sold for a profit. Its goods are as much images as material, an aesthetic as well as a product line. Thus it is about culture as commodity, apparel as ideology. Music, theater, books, films, video, all construed as image exports creating a common world taste around common logos, advertising slogans, starts, jingles, trademarks, videos, and celebrities. It is a new world of global franchises where, in place of the old cry “Workers of the world unite! You have nothing to lose but your chains!” is heard the new cry “Consumers of the world unite! You have everything to gain from our chains!”

McWorld brings with it an extraor-
In Stallone, the extremists murder Muslims, more language, in 1992 saw fit to bestow Jacques Lang, long-time cultural Jordan. Taco Bell. Dunkin' Donuts. The volume of customers was upon Mr. Rocky himself, Sylvester Times, Sunday supplements. Stallone. CNN. Madonna. The Dream Section among its multiplying style, of course, that must be pur-


Like Dewey's democracy, culture's McWorld is a way of life, a style for everman and everywoman—but a style, of course, that must be purchased. Even the staid New York Times, ever on top of what is fit to print, has introduced a "Style" section among its multiplying Sunday supplements. The past dozen years have changed the face of the globe, erasing national cultural distinctions. In Japan in 1992, the number-one restaurant by volume of customers was McDonald's. Number two was the Colonel's Kentucky Fried Chicken. In France, they talk now of the Sixieme Republique, adding quickly, "la Republique Americaine." And Jacques Lang, long-time cultural minister who only a decade ago was cursing "franglais" and its mangling of authentic French and calling for legislation to protect the French language, in 1992 saw fit to bestow upon Mr. Rocky himself, Sylvester Stallone, the Chevalier des arts et lettres. In Bombay, even as fanatic Hindu extremists murder Muslims, more than 100,000 upper-class homes are wired with cable so that their inhabitants can receive satellite transmissions from TNT and CNN and pretend that their true country is the world.

These extraordinary changes hasten globalization: They invite law to regulate the anarchy of rival national markets and smooth the way for global markets. They mandate rules that will permit human survival. But they neither democratize nor liberalize and can point backwards as easily as forward.

And only in the esoteric world of rational choice theory does economic calculation outweigh ethnic passion. Only in the imagination of advertisers can Nikes and a Walkman prevent their wearer from murdering their neighbors. Only in the small minds of political scientists who think democracy can be established by Fed Ex-ing a copy of the Bill of Rights to an ex-communist country with no other foundation can the rule of law be established by the stroke of a pen. In a McWorld where sovereignty continues to constrain the enforcers of global public goods (like law) even as markets liberate the agents of global privatization and thus hasten the pursuit of public "bads," we cannot really look to global commerce as a source of liberal or legal solace, let alone democratization.

Democracy and confederalism

There may be a form of constitutional faith that responds to the new tribalism, but it will not be a faith simply borrowed lock, stock (rock?), and barrel from America or Switzerland or some other successful multicultural society. Nor will it be based on the importation of another society's civil codes. Nor can it in the long run be derived from unilateral actions by superpowers acting as surrogates for the missing world government (the Pax Americana idea), although this may actually attenuate the force of subversive nationality in the short term. Civic faith depends in part precisely on its adaptability to the circumstances and conditions of particular peoples at particular historical moments. Attempting to paper over the fissures in ex-Yugoslavia by importing an American civic ideology is no more likely to succeed than attempting to prop up its democracy by importing American party institutions. Technology transfer sometimes works; institution transfer almost never does. Democratic institutions succeed because they are molded to the landscape in which they are to be grounded and planted in the soil of a well-established civil society. This has been the lesson of all political theory from Montesquieu and Rousseau to Madison and Tocqueville, both of whom demanded a new science of politics for a new society.

Nonetheless, there are several formal principles involved in establishing a successful civil society that are relevant. A constitutional faith pertinent to nations comprised of rival ethnic fragments requires a civic ideology in which difference itself is recognized and honored. This is the secret of Switzerland's remarkable multicultural, multiconfessional success: Italian, though the language of only a tiny minority of Swiss, remains a national language; Romansch, though spoken by only a few tens of thousands in the single
In America, difference has served to legitimize inclusion; in Europe, it has too often served to rationalize exclusion.

canton of Graubuenden, is an official language of that canton.5

Second, the honoring of difference must be accompanied by some territorial or geographical expression of it, ideally through federal or confederal institutions.

Partition destroys a civil society; federation preserves it while acknowledging the relative autonomy of the parts. The Owen/Vance solution for Bosnia tries to find its way between partition and federalism, in a situation that manifests the worst-case situation: hostile ethnic groups intermingled in populations that are not geographically discrete and nearly impossible to disentangle other than by relocation (a euphemism for expulsion); or, as with the Owen/Vance plan, carving ethnic “regions” into units the size of a town street or three or four adjacent houses or apartments! In the case of Bosnia-Herzegovina, the difficulties are overcome by giving Muslims the short end of the stick, a politically prudent but morally dubious solution at best, and one the Clinton Administration initially refused to accept. In any case, solutions that do no more than try to keep rival groupings apart are not so much dealing with as yielding to bigotry and hatred. Bloody as the American Civil War was, it was fought in the name of union not dissolution. Most modern civil wars are fought by both sides in the name of partition, the point of contention being only who gets how much of what.

Furthermore, in the American case, separation has always been a short-term tactic that belongs to a long-term strategy of integration. The parts are honored so as to strengthen their tie to the whole and demonstrate that the ideology of the whole represents not the hegemony of one group but a (potentially) genuine inclusiveness. Unless working together is seen as crucial to the survival of the parts, the parts will inevitably come to view themselves as diaspora of some other (perhaps invisible) blood nation whose reconstruction will come to be seen as the only avenue to preservation. Unhappily, the antagonism of one group may actually ignite a defensive separatist identity in some other group that had previously seen itself as assimilated. Thus, Bosnian and Croatian Muslims, secularized and assimilated into Yugoslav life, have only become self-consciously Islamic and separatist in the face of continuing aggression by their erstwhile fellow countrymen and neighbors. Likewise, a Greek Orthodox minority that is not respected inside of Croatia becomes a force not only for an independent Macedonia but a likely candidate for Greek (and then Turkish) intervention into Croatian affairs.

A civil religion of reciprocal rights and mutual respect is not to be contrived from scratch, but must emerge out of civil institutions like public schools, common work, communal customs, and a shared civic consciousness—the very institutions that either have never taken root or have failed in so many of Eastern Europe’s disintegrating states. Law gives legitimacy to a civil society, but cannot establish it, unless, as with common-law nations such as England, it has been a part of the civil fabric from the start.

It is civil society and its supporting institutions that create the basis for multiple identities: cross-cutting cleavages that allow people to think of neighbors separated from them by ethnic or religious background as sharing other objectives and ends—the common values arising out of, for example, union or parent-teacher association or political party membership. Difference needs not only to be offset against common membership but understood as a claim to common membership: “As African-Americans, we deserve equal respect and equal treatment before the law!” rather than an argument for separation: “As Croatians, we deserve a country of our own!” In America, difference has served to legitimize inclusion; in Europe, it has too often served to rationalize exclusion. Our civic faith in “we the people” as a formula for inclusion has much to do with whatever success Americans have had.

Most important of all in establishing a viable constitutional faith, however, is democracy itself in Whitman’s generic sense. Democratic civic and cultural institutions put flesh on the bones of civic identity. They turn mutual respect into a set of necessary political practices. More than anything else, it has been the absence of a culture of democracy in Russia, Yugoslavia, Afghanistan, Somalia, Liberia, Czechoslovakia, and

all the other disintegrating multicultural nations that has aided and abetted tendencies to ethnic fragmentation and national dissolution. By the same token, it has been America's and Canada's and Belgium's and Switzerland's democratic civic practices that have held together peoples and tribes that have on their own been little less vulnerable to the siren call of ethnicity than the Yugoslavs or the Afghans. To the degree that the new Europe has ignored political participation in favor of commercial and technological integration, it too risks long-term failure.

As strategy, this suggests a need to reprioritize: Put democracy first as the foundation of civil society, and resistance to fragmentation may follow. Ethnicity is unlikely to create a form of democracy that can contain and limit it; democracy can create a form of ethnicity that is self-limiting. When rights get taken seriously and permitted to define individuals, it is easier to attach them to minority ethnic groups under pressure and to persuade majority ethnic groups that their own identity expressed as exclusion is in violation of their civil faith. Putting democracy first means treating it as a way of life and not just as a set of institutions. When democratic political practice is rooted in membership in the community and empowers community members in a larger civic polity, ethnic and religious traits grow less crucial in forging a public identity. The American separation of church and state not only protected the state from religion, it also protected religion from the state and other rival religions, and thus strengthened it. When liberal democracy separates public and private, it actually enlarges the space for the exercise of private religion and ethnicity while insulating them from the baleful consequences of making them public—official intolerance, for example.

Ethnicity is a healthy expression of identity that is, however, like a healthy cell, susceptible to pathologies that turn the growth mechanism against itself. The resulting cancer destroys not only the body around it (the larger nation) but the cell itself (the ethnic entity). Democracy seems to be ethnicity's immunological key: the source of its normalcy and its capacity to control its own growth so as to make it compatible with the growth of other cells and hence the basis for its ability to participate in the building of a stable body politic. Perhaps the time has come for those states around the globe falling into warring pieces to stop worrying about how to keep the parts together and to start worrying about how to make the parts democratic; to recognize that the true source of America's measured and all too partial, but still significant success, as a multicultural society is its democratic civic faith.

It may be that globalization, and with it the globalization of law, is more likely to succeed genuine democratization than the other way round. It has often been remarked that democratic nations are less prone to make war on each other than other kinds of nations, and whatever success Europe has had has arisen out of its common democratic civic culture—certainly not from its historically rival cultures. We noted at the outset that law has played a powerfully integrating role in Europe, but I would suggest this is a consequence of its democratic sensibilities.

A genuinely democratic Bosnia and a genuinely democratic Serbia might not only cease to make war on Muslims or Croats but might also discover in their democratic ideals and practices sufficient common ground to refashion a confederation that would permit renewed civic coexistence. If the democratic solution sounds improbable, think of the “realistic” solutions currently being debated—whether expulsion, partition, dismemberment, United Nations trusteeship, or foreign intervention—and consider how improbable it is that they will succeed in restoring sanity, let alone stability, to peoples caught up in the spreading global fires of ethnic Jihad.

In a nation at war, Lincoln saw in democracy a last best hope. On our paradoxical planet today, with nations falling apart and coming together at the same moment for some of the same reasons, and with toothless international law hardly able to talk, let alone bite, democracy—however frail, however demanding—may now have become our first and best chance.
The Honorable Constance Baker Motley, senior district judge for the United States District Court for the Southern District of New York, will visit the Law School on Oct. 4-8 as a distinguished jurist in residence.

Spanning almost five decades, and a number of "firsts," Judge Motley’s remarkable career has truly been one of "courageous imagination." After graduation from Columbia Law School in 1946, she went to work for the NAACP Legal Defense and Educational Fund under then-chief counsel Thurgood Marshall. During the ’40s and ’50s, she traveled the country trying civil rights cases and arguing cases in the federal appeals courts. Among other clients, she represented James Meredith in his fight to enter the University of Mississippi and Charlene Hunter and Hamilton Holmes in their attempt to enter the University of Georgia.

Known for her skill as an oral advocate, she argued 10 cases before the United States Supreme Court between October 1961 and December 1964, winning nine. She was the author of major briefs in Brown v. Board of Education.

Judge Motley writes: "One of the things I remember about my career in the 1950s and 1960s is being the only woman in the court room. I think on one occasion in the Fifth Circuit there was a woman, a patent lawyer, an elderly woman who argued a case. In the period from 1949 to 1964, I tried school desegregation and other cases in 11 Southern states and the District of Columbia, and, at that time, I saw only one woman argue a case in the Fifth Circuit." In 1964, Judge Motley became the first African-American woman elected to the New York State Senate, and after that, president of the Borough of Manhattan. In that position, she became the only woman on the powerful New York Board of Estimate. When Lyndon Johnson appointed Constance Baker Motley to the Southern District of New York in 1966, she joined only four other women on the U.S. district court bench and became the first female African-American federal judge.

In 1983, her string of firsts continued as she became chief judge of that court. As chief judge, she continued her work for civil rights. A legal newspaper reported at the time, "As might be expected, a number of her projects have focused on the needs of minorities and women, both as clients and as attorneys. For example, under her leadership a pro bono panel of judges and attorneys from throughout the Southern District was convened...to begin recruiting attorneys to assist in the hundreds of civil court cases initiated by individuals who cannot afford legal representation." She also instituted "a six-week refresher course in federal procedure for criminal lawyers—especially minority attorneys—who otherwise are not qualified to practice on the federal level. On a related project...the court is attempting to recruit minority and women attorneys to serve on the Criminal Justice Act Panel."

Yet this distinguished jurist is quick to attribute her opportunities to a few "good guys." Graduating from high school in 1938 as the ninth of 12 children of West Indian immigrants, "her parents could not raise even the $400 for admission to the local teacher's college.... At that point, Clarence Blakeslee, a construction executive entered her life. Blakeslee had heard her speak, checked her high school record, and offered to pay her way through college, even through law school, which was [her] ambition."

Looking back, Judge Motley says she is pleased by the progress of the last 20 years. "I remember when I first went on the bench in New York, women were not hired in the U.S. Attorney's Office on the criminal side. They were limited to the civil side.... I expect that...it is going to be largely a woman's profession in the next century."
Indiana University's lengthy connections with Warsaw University in Poland have gained greater urgency as Poland struggles to become a full economic player in the modern world and to reinvent democratic government after a generation of communist rule. The Law School has been host to scholars from Poland, and two of its faculty members returned to Poland this summer to give a series of lectures, attend conferences, and see how Poland has weathered recent changes.

**Pat Baude: Present at a modern founding**

Six years ago, when Professor Pat Baude attended a conference in Warsaw on the three great constitutions of the 18th century—the American, the French, and the Polish—the country was under martial law. He returned this year to talk with people involved in a modern founding: the drafting of a new Polish constitution.

"The constitution of 1791 was a liberal republican constitution that created a hereditary monarchy with liberal protections. However, Poland had an incredibly weak state and, despite the constitution, never completed the 18th century as a nation-state," says Baude. "It still remained a series of loose confederations of powerful nobles bound together by common language, common culture, and religion. The constitution of 1791 created a strong central government on the American model. In that context, a strong government meant a hereditary monarchy and a bill of rights to limit the power of the monarch. It was this constitution that established a really independent Polish state and that led to the crushing and the partition of Poland."

The current Polish constitution dates from the end of the Second World War. "Until Gorbachev turned some documents over to the Poles last year, nobody knew that the Constitution of 1952 had been written by Joseph Stalin. In fact, the Polish constitution is much like the Russian constitution. It gives everybody rights to a paid vacation, to education, to many of the subsidies that are common in socialist constitutions. When Walesa came to power after the collapse of martial law, they wrote what they called the 'little constitution.' It consisted of amendments to the Constitution of 1952 to create the job of the president and to define the relationship of the president to the parliament. They planned to revise the whole constitution later. But in fact the slower process is one of the secrets of Poland's strength right now. There is no doubt about the legitimacy of the government. They're not having the problems that Yeltsin has had, for instance."

Baude met with many of the people involved in the current drafting of a constitution, primarily through the auspices of Lech Garlicki, a professor of law at Warsaw University who visited the IU Law School several years ago. Garlicki is the principle academic adviser on the new Polish constitution and heads the parliamentary commission on the revision process. Baude participated in an International Congress on the Writing of the Constitution, meeting with the academic advisors to the constitutional process in Warsaw.

"Poles are very much aware that this may be the one chance they have," says Baude. "People in Poland who are looking for governmental models have decided that it is unrealistic to look at the United
What they are looking at are Greece, Portugal, and Spain—three countries that went from despotic governments and abject poverty to membership in the European Community in 15 years. And because Poland wants to join the European Community, it must sign the European Convention on Human Rights, which obligates it to make certain constitutional choices in the European way.”

One of the most serious questions the Poles face is whether to amend the current constitution to include a bill of rights. He notes that many Poles would prefer that rights be given in a separate document.

“The current constitution is full of rights,” says Baude, “that people never had in reality, and it could be easily amended by Parliament. Putting a serious bill of rights in the constitution is not a top priority, because it would suggest that the rights were amendable. The current thinking is to adopt a bill of rights in a separate document, and then attempt to create a stable political attitude toward it.”

The other pressing issue is the role of the Catholic Church. “Free speech in Poland is not an issue,” says Baude. “Religion is the issue. Ninety-five percent of the Polish population is Catholic. The Catholic Church has been the most important institution in Poland for hundreds of years, even under martial law.

“With urbanization, industrialization, and commerce with the West, Poland will become more secular. But the position of the Church under the new government is a serious issue.”

What made the meeting “wonderful,” says Baude, “was that it wasn’t particularly an academic meeting. The people who were there were actually writing drafts of the constitution. People in Warsaw are very shrewd, and they know more than we do about creating democracy. Lech Garlicki was at the roundtable talks that resulted in Walesa coming to power. The people at the conference have been involved for the past five or six years in the process of creating government. It was the closest I’ll ever come to discussing the kinds of questions we discussed at the founding.”

Lech Garlicki, of Warsaw University, left, visits with other conference participants who came together to discuss the new Polish constitution.

Julia Lamber: Polish women face new choices
Professor Julia Lamber first went to the University of Warsaw three years ago to participate in a conference on “Women and Work.” She returned this summer to lecture in the American studies department.

“I wanted to use law,” says Lamber, “as a way of looking at American culture. I lectured on the feminist critique of American culture, using family law and employment discrimination as examples. The graduate students who were primarily my audience were fluent in English. Their view of America is based on the courses they take—usually in very specific subjects, such as the Vietnam War—and movies, books, TV, so that their view of American popular culture is really quite popular. They were interested in and surprised to find out about the consequences of no-fault divorce in
the United States, or that women in the United States don't typically get alimony upon divorce, for instance."

Lamber found the students, who are coming of age in a post-communist era, to be enormously optimistic. "Of recent generations, the future for them is the brightest. They have the most hope of getting good jobs, of getting skills and using them, and they're much more willing to stay in Poland. I think that the generation between 30 and 60 would have emigrated if it had been possible. The student population is less influenced by the Church and they are less influenced by communism, so they're really, in some very interesting way, looking for a way to invent their lives. They're skeptical about using the United States as a model, and they're clearly skeptical about using Russia as a model."

Lamber's lecture was heavily attended by women. As with their counterparts in America, Polish women were interested in how professional women manage careers and families. She says: "When you look at women in American society and women in Polish society, it's very—curious, I think is about the right word. Especially for the last 50 years, Polish women have experienced workplace equality, at least at some levels, in some jobs. You find women doctors, women lawyers, women professionals, women scientists, and you'll find women in..."
low-paying, low-skilled jobs along with men. And women have been expected to work, so that working and having a family is no big deal. Now there is the possibility that women won’t need to work, or women won’t be required to work. For the first time, there’s a real possibility of making choices about whether to spend time in the home taking care of children. The women students were curious about what the consequences of that kind of choice would be for their lives. They know it’s not possible to have a full-time career in a truly competitive atmosphere, which is what it’s going to take in Poland, and spend a full-time amount of energy in the home taking care of children and taking care of the extended family.”

Jan Olszewski: Antitrust law here and there
Jan Olszewski, a professor of law at Silesian University in Poland, visited the Law School in spring semester 1993. As part of a law faculty training program sponsored by the ABA’s Central and East European Law Initiative and the U.S. Department of Commerce Commercial Law Development Program, Olszewski, whose specialty is commercial law, did research in antitrust law and presented a talk on “Antitrust Law in Poland.” He also visited classes to study American law teaching methods. During his stay, Olszewski developed a seminar on American Antitrust Law.

“The goal of the seminar is to acquaint students with the rich experience of the United States in the area of antitrust law,” says Olszewski. “Knowledge of U.S. antitrust law may be useful in Poland through adaptation to the newly-passed Polish anti-monopoly statute, by making known generally tested solutions in the area of the law of organizations, and by acquainting future lawyers with law that has extraterritorial dimensions so that they will be able to avoid conflicts of law.”

Michael Ausbrook: What role for American lawyers?
Michael Ausbrook, JD ’93, has a long-standing interest in Poland. He did graduate work in Slavic studies, speaks both Polish and Russian, and studied in Poland as part of an Indiana University exchange in 1984. But after a stint as a computer salesman—selling computers to the Poles from a base in Singapore—he returned to Bloomington.

“There was a revolution in ’89,” says Ausbrook, “and I figured the revolution needed lawyers too, so I came back to Bloomington for three years to get a law degree.” He turned down a job offer last year in the Ministry of Privatization in order to complete his law degree. Now he is returning to spend the next year doing graduate legal work at the University of Warsaw and teaching in either the law school or the American studies program, again under the auspices of the IU exchange program.

While Ausbrook hopes to learn skills that help facilitate international transactions, he is somewhat skeptical of the role American lawyers can play in building a strong Polish economy. He is convinced that Poland’s future is with Europe, not the United States. But wherever the future of Poland lies, Ausbrook is sure that for now, that is where he wants to be.
IU names Lamber dean for women's affairs

On July 1, Professor Julia Lamber assumed the position of dean for women's affairs for Indiana University. As dean, Lamber's responsibilities include overseeing the Office for Women's Affairs, which is charged with advocacy for issues involving women staff, faculty, and students at the university. The dean and her staff promote changes at Indiana University to improve the status of women in all areas of campus life.

Lamber, who teaches Employment Discrimination, Family Law, and Administrative Law, has long been interested in legal issues involving women, not only in her teaching, but in her scholarship and service as well. She has written extensively on issues of employment discrimination. Her previous work for the university included chairing the dean of the faculties' family and work committee, which developed a family leave policy for the campus. She has also served as an adjunct professor in the women's studies department.

Lamber notes that she begins her tenure as dean at a time when the Office for Women's Affairs has a history of successes in programs serving students.

"I want to focus on career development for faculty, graduate students, and undergraduate students, in different ways, obviously, for those different groups," she says. "Now that there are senior faculty women on campus, I would like to continue to make sure that women faculty feel they have mentors, that there are places to go and people to talk to. I'd also like to work with women in what we might think of as non-traditional areas, or at least areas where women are underrepresented, such as mathematics and the sciences, and see how we can increase the numbers of women faculty and graduate students in those disciplines."

Lamber will continue to teach one course each year in the Law School.

Greenebaum calls for alternatives to litigation

The Indiana Supreme Court recently joined the voices calling for increased use of alternatives to litigation. Professor Edwin Greenebaum sees familiarity with such alternatives as "essential to lawyers' competence."

His new course offerings at the Law School are Alternative Dispute Resolution (ADR) and Mediation. "All methods of ADR," says Greenebaum, "are most accurately described as alternative methods of settlement. Litigation is a process in which people must participate if they are summoned to do so and they are bound by the results. But due process and separation of powers means that it can only be done within the framework of the court system. Once one takes a step away from litigation, one is talking about voluntary methods of dispute resolution and, therefore, contract-based methods of dispute resolution. Even arbitration, which is an adjudicatory method of dispute resolution, is an alternative method of settlement in the sense that the terms upon which the arbitration takes place are those agreed to by the parties. The parties can agree not only to the procedure but even within limits to whose and what rules will substantively determine the outcome. For instance, parties could contract to decide their case according to the rules of some private association, be it commercial or religious or otherwise, and the parties are then bound by the results because they have agreed to be bound."

The ADR course places various settlement methods within their larger legal context. Greenebaum notes that the course is especially useful for students heading to commercial practices, where sophisticated clients are demanding cheaper, more efficient methods of resolving disputes than litigation. The increased move to ADR is an international phenomenon, as he discovered.
in 1991 when he was studying how law firms in England trained their associates.

"One of the factors driving the commercial interest in ADR is the international nature of practice," he says. "It is attractive to many businesses to be able to agree to the source of the substantive rules that will govern dispute resolution and to be out from under the provincialism of a particular court system. The commercial firms of one country often seem to distrust the courts of another country. They prefer the stability of international arbitration."

While the ADR course is a traditional law course, the mediation course involves students in more clinical experiences. Greenebaum received training in the mediation of family disputes in preparation for teaching the course.

"In the class, we'll take a model of mediation and work through its various phases, not with the ambition to make the students skilled mediators, because a single course is not sufficient, but to have the students develop a clear idea of what's involved in the process, and to develop some ideas about what skills are involved in operating the process. Even if they won't be able to operate as skillfully as necessary, they should have some ideas of what skillful practice would be, both from the point of view of being a mediator and from the point of view of working with clients who might wish to engage in mediation. The course should give students a basis for further development if they want to become mediators. At the very least, it should give them a clear idea of who their clients might like to have as mediators, what their characteristics ought to be, and how to know whether the people who are serving their clients as mediators are skilled and knowledgeable and able to do the right kind of job for the particular needs of the clients."

Greenebaum believes that lawyers should at least consider ADR as they plan each case. "In any case, attorneys should ask what's the best way to go about resolving the dispute with an understanding of there being a range of alternatives and with some knowledge of the resources involved. Many cases can be quite successfully resolved by the parties themselves or the parties' lawyers negotiating directly with each other and disposing of the matter without bringing in third parties or simple or elaborate supplementary procedures. But many disputes drag on for some time and take substantial negotiation time between the attorneys, and often the range of results available in the framework of litigation, which is the background of the unassisted negotiation, may be unfortunately narrow. In such cases, practitioners should consider alternatives."

Conrad puts Thomas Jefferson in perspective

At the 250th anniversary of his birth, Thomas Jefferson has not become as "politically incorrect" as "Columbus did [during the quincentenary of his discovery of America]—but he's getting there."¹ This provocative pronouncement by an eminent American legal historian comes in a review of Jeffersonian Legacies (ed. Peter S. Onuf, 1993), a collection of papers presented at a conference designed to reassess Jefferson's life and contributions to our civic imagination. Professor Stephen A. Conrad participated in the conference and contributed an essay, "Putting Rights Talk in Its Place," to the conference proceedings.

The conference, which has been broadcast on PBS, involved academ-
ics, politicians, and citizens brought together to reassess Jefferson’s contributions to our nation. The most contentious parts of the conference involved Jefferson’s role, not as drafter of the Declaration of Independence, but as one of the major slaveholders of his time.

But Conrad believes that suggestions that Jefferson’s legacy is diminished on that account are ahistorical and unfair.

"Jefferson said and wrote so many great things that have been so useful to Americans and people around the world that despite revisionist attacks on Jefferson in every generation, those attacks remain marginalized,” says Conrad. “Such scholarship doesn’t threaten to undermine Jefferson’s many salutary effects or his symbolic role as a hero, because it’s only by comparing him unfavorably to some of his peers who were unusually virtuous that he falls short. He didn’t play any faster or looser with the Constitution than virtually any of the other presidents surrounding him before or after; his management of his plantation and his treatment of his slaves seems to have been marginally better than average, just not as good as George Washington’s or some others, and some of his racist remarks and some of his condescension towards Native Americans—remarks that can seem incendiary and insulting—were made in private correspondence. It is the kind of thing even great men and women do."


“It’s an anomalous fact that the single text in which Jefferson uses the word ‘rights’ most frequently and where he talks about the widest variety of rights is a text familiar to historians,” says Conrad, “but it typically gets one or two sentences of treatment in standard texts, and you have to go back decades to find even an article or two about it.”

The “Summary View,” in fact, sheds light on the Declaration of Independence, which followed it.

“You can read the Declaration of Independence as a manifesto of rights, and that’s the characterization of it that’s more common than any other. You can read it, as J.G.A. Pocock does, as a declaration of war—he wants to make the slightly eccentric but defensible point that that’s what it formally was. However, as with the “Summary View,” the Declaration has multiple significances.

You can read the ‘Summary View’ as a brief for what later became, in the Declaration, a formally drafted bill in equity or as a set of preliminary notes that a lawyer made before he sat down to actually draw up the formal bill.”

Shreve issues second edition of popular text

Students of procedure will be delighted to learn that the second edition of Professor Gene Shreve’s hornbook Understanding Civil Procedure (with Peter Raven-Hansen) will be out early next year. The book has proved extraordinarily popular with students as well as procedural scholars.

In the short time since the book’s initial publication, procedural changes, ranging from the codification of supplemental jurisdiction to a host of new civil rules, have necessitated a new edition.

While the book focuses on civil procedure and federal jurisdiction, Shreve’s scholarship reaches into a number of procedural areas, including choice of law, which he teaches.

As a member of the American Law Institute, he has recently been involved in considering the work of that group’s Complex Litigation Project, particularly as it relates to choice of law questions.

Choice of law, Shreve notes, is a field known for its contentiousness. "There is a great conflict in choice of law scholarship between those who
hate one kind of problem and those who hate another kind of problem. On the one hand are those who would create a regime of territorial rules to decide cases in advance. On the other are those who would give judges discretion to consider a range of policies that might or might not apply.

Shreve finds himself in sympathy with the latter group, jokingly describing the rules-oriented approach as “like an Arthur Murray correspondence course where they lay the feet on the floor and tell judges where to step.”

Shreve comments that the ALI Complex Litigation Project, which completed its work recently, melds the two approaches—rules and discretion—by directing judges to follow certain rules unless the judges feel that the rules are inappropriate. While Shreve is skeptical about this result, believing it “captures the schizoid thinking in American conflicts law,” he has sympathy for the difficulties facing anyone in the area.

“The best thing about the Complex Litigation Project is that it helped everybody understand how hard it is to make things significantly better than they are in this area. Conflicts of law became part of the concern of the project because the drafters do not contemplate autonomous pockets of litigation. Rather, they are concerned with how conflicts of law operate once related litigation is centralized. The cases with which the project is concerned are all minimal diversity cases; there is no core of federal law around which to organize procedural thinking, nor is there a reasonable prospect of developing one. Therefore, the ALI decided to approach the problem [of the complex case] procedurally, and create a vast system of procedural veins and tissue to hold these cases together. Whenever I criticize the ALI’s work I have to stop and think about how difficult their task has been and how illuminating for students of civil procedure it is to realize that there is no consensus on these issues.”

Shreve is also working on an anthology of scholarly articles on conflicts law for Anderson Publishing. It is intended as a resource for students working with cases and problems in the classroom who want a starting point for entry into the critical literature.

“Conflicts is a natural for such an anthology because it is a creature of academic writing, beginning with Justice Story’s treatise and Beale’s work that led to the first Restatement. It is an interesting question why so much of the undertaking of creating conflicts law has been ceded to academics. One of the reasons I like conflicts so much is that as a consequence, the area is heavily theoretical and conceptual and has always been insistent that scholars think about issues of process and jurisprudence.”

**Popkin publishes text on legislation**

Recent years have seen an explosion of interest in issues of statutory interpretation, fueled by judges like Justice Scalia who have self-consciously adopted particular approaches to the task of determining the meaning of legislative words and by academics who challenge the coherence of approaches like “plain meaning.” The Law School has long contributed to the debate on interpretive issues through Reed Dickerson’s watershed work on statutes.

That tradition is continued by Professor William Popkin, whose *Materials on Legislation: Political Language and the Political Process* was published by University Casebooks this year. The book, intended for classroom use, traces how statutes emerged from a common law background and how that history colors the ways in which we look at statutes today. It then turns to an analysis of how statutes are viewed in contemporary legal theory, including theories (such as public choice theory) that are grounded in empirical views of politics. Finally, the book looks at approaches to the meaning of statutes.

“The perspective adopted in these materials,” says Popkin, “is that
legislation is a much richer phenomenon than a command of a legislative sovereign to be interpreted by courts and agencies. It is part of a dynamic, ongoing relationship among political institutions.” Popkin notes that he is most attracted to understandings of statutory interpretation that acknowledge the role of the judicial reader of statutes.

“If you are focusing on the statute’s text, how do you know the meaning of words? You must look at the context in which they are used. But what counts as the context of legislative language for someone interested in what words mean? Consider the following: the common understanding of language shared by writer and reader when the statute was written; the surrounding text of the statute; the historical problem the statute dealt with; the statute’s general purpose; the social, political, moral, and legal background out of which the statute emerged.

“If you look for legislative intent,” he asks, “what counts as evidence of statutory meaning? Is legislative intent determined by the same elements of text and context noted above, or is there a difference of emphasis, drawing the interpreter away from the text and its common understanding to broader elements of context? Is there even a coherent notion of legislative intent? After all, a federal statute is the product of more than 500 people voting in two legislative houses and an executive branch.

“The emphasis on the writer and the text overlooks the judicial interpreter of the statute. If we look at what the interpreter does, we may want to shift our attention away from both the author’s intent and the statutory text. The judicial reader interpreting the text brings various perspectives to interpretation. These are not necessarily what the writer had in mind, they may not produce a meaning that coincides with the common understanding of the text, and they might not even be faithful to the historical context underlying the statute. The judge may do this grudgingly, acknowledging but not embracing its inevitability. Or the judge may consider this to be an essential feature of the court’s role in deciding cases and controversies.”

Popkin notes that the “debate about the judicial reader’s role is at the heart of contemporary arguments about statutory interpretation.” His text gives more attention to the role of the judge than any of the other current texts available.

Popkin has been looking forward to having judges as students this summer in the University of Virginia’s LLM program in judicial process. “The program acknowledges that judges bump up against ideas in their work and would appreciate an academic setting that allows them to organize their ideas within a framework, or to see how the organization they learned has changed since they went to law school. Legislation is an area, of course, many judges never studied in law school,” says Popkin.

“One of the things I want to learn is the extent to which judges self-consciously adopt various approaches to statutory interpretation. The other thing I want to convey to the judges is that, whether they think they are adopting a particular approach or not, they must be adopting one implicitly in order to determine what statutes mean.”

Who ya gonna call? Career Services!

Alumni looking for new legal opportunities often think of headhunters, legal newspapers, and the grapevine. One often-overlooked resource is the Law School’s revamped Office of Career Services.

Under the direction of Assistant Dean Kelly Toole Townes, the office has greatly expanded its alumni services. A new Weekend Alumni JobLine, (812) 855-0038, has been established to provide alumni access to current job listings. The JobLine is updated each week and operates from Friday at 5 p.m. until Monday at 8 a.m. For additional job opening information, alumni can subscribe to the monthly Alumni Job Bulletin. The
bulletin, free to graduates for one year from date of graduation, contains not only the JobLine listings, but also approximately 50 additional openings gathered from legal publications nationwide. After the first year, alumni can request a six-month subscription for $6. The office has also entered into reciprocity agreements with other law schools to allow graduates access to career services offices in their own cities. Finally, the Career Services staff can develop employer contact lists for graduates beginning a job search.

When visiting Bloomington, alumni can access 500-750 more job listings. The office maintains a 4,000 employer database with current information on law firms, corporations, public interest organizations, and governmental agencies throughout the country. Lexis and Westlaw terminals are also available in the office for alumni use. In the past year, the office has added more than 150 new directories, job-search books, and newspapers, and developed a handout series on job search skills and career options. Each semester, the office sponsors about 30 seminars on various topics, including interview skills, Lexis/Westlaw employment searches, and both traditional and non-traditional career options for lawyers. All seminars are videotaped for personal viewing in the law library.

To assure IU’s visibility with employers, the Career Services staff embarked on a national publicity campaign this past year. They sent out more than 4,000 new brochures introducing employers to the Law School, the students, and the quality of educational experience available at Indiana. The brochure also describes the office’s services and encourages employers to recruit from IU’s outstanding law classes. Dean Townes encourages alumni to get involved with the Office of Career Services: “Alumni assist us throughout the year by delivering seminars, preparing written information on career options, and by serving as contacts for their city or practice area. Our alumni are the greatest inspiration to our students. They provide great examples of what Indiana lawyers can accomplish.”

Call the Office of Career Services with questions or requests at (812) 855-0258.
Craig Bradley

Bradley argues that no shift in ideology, no commitment of resources, and no refinement of Supreme Court jurisprudence would resolve the inadequacies of the current system. These problems arose from a constitutional system that has allowed the United States to develop its rules of criminal procedure on a piecemeal, case-by-case basis, rather than through a unified code of criminal procedure, as other countries have done. Only the United States, Bradley says, expects its police to follow a set of rules so cumbersome, and so complex, that one area of criminal procedure alone — search and seizure — requires a four-volume treatise to explicate.

Bradley proposes that the United States should, in keeping with the international trend, regulate police procedures through a comprehensive and nationally applicable code. He examines why the present system is a failure and how other countries have developed their criminal procedure law. He further argues that a national code would be constitutional and outlines what its features should be, how it would function, and what alternative approaches are possible and practicable.

The Failure of the Criminal Procedure Revolution advocates systematic and essential reform in America’s court system. It will be of interest to students and scholars in law, political science, and criminology.

Conferees Discuss ‘Medical Technology and the Law’

Does a former spouse have the right to bring to term an embryo frozen before the divorce? Questions such as these arise with increasing frequency as advances in medical technology pose confounding—and ethically troubling—legal questions.

Participants in the Law School’s 17th annual Law Conference were challenged to think about such issues at “Changing Medical Technology and the Law,” held in Bloomington on Sept 10. Professor Roger Dworkin presided at a session on “Assisted Reproduction and Maternal-Fetal Conflict,” which explored the moral and legal dilemmas that have been created by artificial insemination, surrogate motherhood, and in vitro fertilization. The session also looked at the extent to which a pregnant woman can be required by society to behave in a way that the medical profession or others have determined is best for the fetus. Dworkin has served for the past year as Nelson Poynter Scholar and director of medical studies at the Poynter Center for the Study of Ethics and American Institutions. He is one of a core group of investigators for the NIH-funded study “Ethical Guidelines for Family Studies in Human Genetics.”

The ethical questions exposed by our increasing knowledge of the map of the human genetic code were the subject of two sessions. Karen Muskavitch, IU professor of biology, explained the scientific background of the Human Genome Project, a $3 billion effort to develop a genetic map of the human body. Muskavitch discussed clinical applications arising from that research. Then a panel, led by David Smith, professor of religious studies and director of the Poynter Center, with professors Roger Dworkin, Fred Cate, and Aviva Orenstein examined the ethical issues posed by the project and its impact on the legal system.

The United States relies on a voluntary consent system for obtaining organs suitable for transplantation. Fred Cate, who has written extensively about organ transplants, presented a session on legal and ethical issues that result from trying to increase the supply of organs.

Questions about the withholding of life support and other issues that surround death and dying occupied the last two sessions. Dworkin led a session on judicial responses to these issues that looked at a number of high profile cases. Cate explored the effectiveness of the federal Patient Self-Determination Act and various state legislative approaches to death and dying.
Before 1960

Walter F. Kerrigan, LLB'42, JD'67, of San Diego, Calif., was a delegate to the 103rd congress of the National Society of the Sons of the American Revolution in June, where he met IU alumni Bob Lentz, of Jeffersonville, whose son is a student in the Law School, and John Kesler, of Terre Haute, whose son is a graduate of the Law School.

Ronald L. Baker, JD'59, of Indianapolis, is in the general practice of law, with emphasis on business and commercial matters and personal estate planning.

Robert A. Lucas, JD'49, founder of Lucas Holcomb & Medrea, Merrillville, has established a professorship in the IU School of Law. He has served the university in many capacities, as trustee and member of the IU Foundation board of directors, past president of the IU Alumni Association and IU Alumni Club in Gary, and former president of the IU Law Alumni Association. In 1988, he was inducted into the Academy of Law Alumni Fellows.

As a senior in law school, Huntington attorney J. Edward Roush, LLB'49, JD'67, began his political career as a member of the Indiana House of Representatives, where he served for one year until recalled to the U.S. Army. After working from 1955 to 1959 as prosecuting attorney for Huntington County, he became a member of the U.S. House of Representatives and worked for 17 years on committees for environmental control, technology utilization, and the National Science Foundation. He also led the EPA's Office of Regional and Intergovernmental Operations for two years as director. Currently with the law firm Matheny Michael Hahn & Bailey, he received a Purdue honorary doctor of laws for his professional and civic contributions.

1960–69

Retired Monroe Circuit Court Judge James Dixon, JD’60, continues to serve as senior judge in the state's judicial system despite his 1992 retirement. Dixon gave 29 years of service on the Monroe County bench and received the first Liberty Bell Award for community service from the Monroe County Bar Association and the Law Day Committee.

Gary Becker, LLB'63, operates his own law practice, specializing in personal injury cases, Louisville, Ky.

Attorneys Stephan C. Cline, LLB’63, Michael W. Owen, JD'67, and Jan J. Kinzie, JD’85, have formed their own law practice, Cline Owen & Kinzie, Indianapolis.

John Leslie Duvall, JD’67, retired from the Public Service Commission, was named the Outstanding Volunteer by Justice Fellowship, a subsidiary of Prison Fellowship, which deals with government and reform of the criminal justice system. He was honored for his help in expanding utilization of community corrections.

Thomas R. Lemon, JD’66, partner with the Warsaw, Ind., law firm Rasor Harris Lemon & Reed, specializes in product liability law and serves as president of the Indiana State Bar Association. He and his wife, Betty Jo McFarren, BS'62, live in Warsaw and have three children.

Michael Maurer, JD’67, besides maintaining a law practice from 1969 to 1988, has also owned one of the nation’s largest chains of racquetball clubs, a network of cable television companies, several radio stations, and a movie production company. He is majority owner of the Indianapolis Business Journal and WTPI-FM radio station. Maurer serves on the boards of 13 civic and educational organizations, including the United Way of Central Indiana, where he is the 1993 general campaign chair. He and his wife have endowed a scholarship at the IU School of Law for students with high academic achievement and a commitment to public service.

V. William Hunt, JD’69, is executive vice president of Arvin Industries Inc., Columbus, Ind., where he has worked since 1976. He also serves as director of Wells-Gardner Electronics Corp., the Association of Governing Boards, and the Indiana Manufacturers Association.

1970–79

Milton R. Stewart, JD’71, is a partner with Davis Wright Tremaine, Portland, Ore., where he is a member of the executive and management committees and chairs the business law group.

John Seddelmeyer, JD’74, has been named associate general counsel in the law department at Exxon Co., Houston.

After 28 years of government service, Robert E. Hayes, JD’76, retired and began a second career in administrative law, serving as judge with the Illinois Department of Employment Security, Chicago. He lives in Wheaton, Ill.

Frona M. Powell, JD’76, assistant professor of business law in IU’s
School of Business, has been invited to join the editorial advisory board of the Real Estate Law Journal.

Ann DeLaney, JD'77, of Indianapolis, is chair of the Indiana Democratic Party. She served the organization for more than two years as executive director and worked as manager of Governor Evan Bayh's successful 1992 re-election campaign.

Brenda E. Knowles, JD'77, IU South Bend associate professor of business law was named 1993-94 Eldon F. Lundquist Faculty Fellow, the most prestigious honor given to a faculty member on that campus. She is a former staff editor of the American Business Law Journal, immediate past president of the international Academy of Legal Studies in Business, and major co-author of the textbooks Business Law: Principles and Cases and Comprehensive Business Law. She teaches and researches employment discrimination and intellectual property. A former vice president of the IUSB Academic Senate, she has played leading roles in affirmative action efforts and in establishing athletic programs for women.

Jeff Richardson, JD'77, is executive director of the non-profit organization Gay Men's Health Crisis, New York City. Previously, he was secretary of the Indiana Family and Social Services Administration under Governor Evan Bayh. Richardson was president of the IU Bloomington Student Association in 1972-73.

Charles P. Sammut, JD'77, is counsel to the intellectual property law firm Limbach & Limbach, San Francisco.

1980-89

Roy Michael Roush, JD'80, operates a private law practice that specializes in business and individual tax clients, tax planning, real estate, and estate planning and administration. Roush, also a CPA, lives in Plymouth.

David L. Ferguson, JD'81, attorney with Ferguson Ferguson & Lloyd, Bloomington, has been inducted as a fellow of the Indiana Bar Foundation.

Nina Harding, JD'82, focuses on labor management issues in her home-based law practice in Seattle.

Rebecca T. Clendening, JD'84, partner of Mallor Clendening Grodner & Bohrer, Bloomington, wrote an article titled "A Young Lawyer's Guide to Rainmaking," which was published in Res Gestae, the Indiana State Bar Association magazine.

Daniel P. Harris, JD'84, was recently named principal at the Seattle law firm of LeSourd & Patten. He has articles published in National Law Journal, Environment Reporter, Washington Journal, and Toxics Law Reporter.

William McIntyre, JD'84, works as resident partner in the Palm Beach-based law firm Alley Maass Rogers & Lindsay, Stuart, Fla.

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Your news

Date

Name

Address

IU degree(s) / date(s)
Mark R. Kruzan, JD‘85, state representative from Bloomington and member of the Commission on Abused and Neglected Children and Their Families and of the Indiana Chapter for Prevention of Child Abuse, recently spoke at a rally sponsored by the commission.

Marilyn Hanzal, JD‘86, is associate director of Loyola University School of Law’s Institute for Health Law in Chicago.

Stephan Hodge, JD‘86, was named state securities commissioner in February. Previously, he worked six years with the Chicago law firm Winston & Strawn, where he specialized in transactions with an emphasis on taxes. He replaces as commissioner Miriam Smulevitz Dant, BS‘84, who is on maternity leave but will return to another job in state government.

Earl R. Singleton, JD‘86, spent several years practicing business law before becoming director of the Community Legal Clinic, an IU School of Law service that lets third-year students handle local civil cases.

Mark Waterfill, JD‘86, of Plainfield, is an attorney with Bose McKinney & Evans, Indianapolis.

William F. Wentworth, JD‘86, is following in the footsteps of football legend Woody Hayes after taking on the role of head football coach at Denison University, Granville, Ohio, a NCAA Division III school. While studying at IU, he worked as a graduate assistant with IU’s football team before moving on to assistant coaching jobs at Louisiana State University, Idaho, Fullerton State, and Washington, where he was part of the Huskies’ 1991 co-national championship season.

Jennifer J. Burns Abrell, JD‘87, associate with DeFur Voran Hanley Radcliff & Reed since 1987, was recently named partner in the Muncie law firm. She is an assistant Muncie city attorney and a member of the Isanogel Center board of directors.

Matthew Pierce, JD‘87, is an attorney for the Indiana House of Representatives. He was appointed deputy chair of the Monroe County Democratic Party and to the Bloomington Telecommunications Council, of which he is also president.

Joel K. Stein, JD‘87, partner of Grand Slam, corporate sponsorship and sports licensing firm, Indianapolis, works to promote anti-drug messages by his work as founding president of the Hoosier Alliance Against Drugs.

Robert J. Howell, JD‘88, was elected judge of the Martin County Circuit Court.

Juan C. Basombrio, JD‘89, practices commercial litigation with the law firm Hanley White Kinney & Patch, Irvine, Calif.

Caryl M. Bowers, JD‘90, has been an associate with the Bloomington law firm Mallor Clendening Grodner & Bohrer since 1990. She was recently certified as a family mediator in introductory business, family, and divorce mediation by the Academy of Family Mediators.

Daniel L. Branstine, JD‘89, works for the law firm Pinto Gromet & Dubia, Irvine, Calif., in commercial litigation.

1990–Present

C. Corey Berman, JD‘90, concentrates on product liability and medical malpractice as a litigation associ-
September 9
Law Alumni Association
Executive Council and Past Presidents meetings reception, and dinner;
Bloomington

October 28-30
Indiana State Bar Association annual meeting;
Indianapolis (Law Alumni Reception, Radisson Hotel; Thursday, Oct. 28)

December 2
Law Alumni Association
Board of Directors meeting;
Indianapolis (Annual Law Alumni Reception; Columbia Club; Indianapolis)

September 10
1993 Law Conference;
Bloomington

January 5-9
AALS meeting; Orlando, Fla. (IU Law Alumni Reception; Friday, Jan. 7, 1994)

September 11
Class reunions for the classes with years ending in -3 and -8; Bloomington

November 4
Willard Carr Lecture

April 27-30
Indiana State Bar Association spring meeting;
Merrillville (IU Law Alumni Reception; April 30)

October 21
Annual IU Law Alumni Reception; University Club; Chicago

November 5-6
Board of Visitors fall meeting; Bloomington

May 7
Commencement;
Bloomington