

# A Jurisprudence of “Pragmatic Altruism”: Jon Van Dyke’s Legacy to Legal Scholarship

Harry N. Scheiber\*

Writing of a senior colleague in international law whom he greatly admired, Jon Van Dyke referred to him as a dreamer—but a dreamer “many of [whose] dreams have come true.”<sup>1</sup> It would be impossible to conjure up a better description of Jon himself. In a brilliant career of teaching, research, and activism, he made an enormous number of lasting contributions to the advancement of both legal scholarship and the public weal. While the sheer volume of his writings lends him special distinction among his contemporaries in his several research fields, it is more important that we remember what made him nearly unique: it was the extraordinary range and scope of his research accomplishments. In any assessment of his legacy to legal scholarship, as I attempt in this study, one must get beyond these quantitative and “wingspan” aspects of his contributions, however, and remember that the transcendent characteristic of his work was its scholarly excellence. Jon’s legacy to legal scholars—or, more accurately, his several legacies—consists of writings that will long stand in the literature as enduring contributions to both local and global discourses, speaking to key issues of law, policy, and ethics.

## I. THE WRITINGS

A recapitulation of the range and scope of subject matter in Jon’s corpus of work can serve as our starting point. Prominent among the topical areas in which he wrote was the jurisprudence of international law, and especially subjects within the broad spectrum of topics under heading of “Law of the Sea.” He also devoted a sustained effort over many years to the analysis and advancement of human rights law, including especially scholarship on (and litigation of) the rights of indigenous peoples. Among his most widely cited writings is a large set of important works relating to topics in state, national and international environmental law. In addition, he produced important analyses of contemporary policy innovations in fisheries management law and

---

\* Riesenfeld Chair Professor of Law and History, Emeritus; Director, Institute for Legal Research; Director, Law of the Sea Institute, School of Law, UC Berkeley. M.A., Ph.D. Cornell, J.S.D.(h.c.), Uppsala University, Sweden. Fellow, American Academy of Arts and Sciences. Honorary Life Fellow (and former president), American Society for Legal History.

<sup>1</sup> Jon Van Dyke, *Louis B. Sohn and the Settlement of Ocean Disputes*, 33 GEO. WASH. INT’L REV. 31, 32 (2001-2).

implementation, including whaling regulation and the special legal issues involved in the international law of highly migratory species. His contributions and scholarly style in his ocean law studies will be treated at length in Sections IX and X, below, but it needs to be noted here that he was especially influential in his role as an expositor and champion of the precautionary principle, and as an authoritative commentator on both marine boundary delimitation and East Asian ocean issues.

In fact, an important regional emphasis is found throughout much of Jon's career in research. In articles, chapters and books he addressed the legal and policy questions posed by the difficult, and often-tragic, resource-use challenges and environmental conservation issues specific to the vast Pacific Ocean area—a region where he travelled extensively to the small island nations that he came to know so well. Also specific to the Pacific area were his studies of maritime and security conflicts in the South China Sea. Law and society of Korea, and also that country's international maritime relations, provided the focus of many of his later writings. He visited Korea more than forty times, and he formed close academic connections there, especially with Inha University-Incheon.

Special note must be taken of Jon's exceptional expertise in the complex law of maritime boundaries. He concentrated much of his attention on international law respecting jurisdiction and navigation in straits; and he gave much study to the law of islands (including the many rocks spuriously claimed as islands, a focus of some intensive debates in the literature!). Once he had taken up residence and embarked on new lines of work in Hawai'i, he began on a parallel career of research, litigation, and public advocacy on constitutional and environmental issues in Hawai'i state law. His monumental book on the Hawai'i Crown Lands is only one product of his devotion to protection and advancement of native rights, but it also stands as a work of special authoritativeness in the historical literature of America's record in the Pacific.<sup>2</sup>

Jon's commitment to all these studies was sustained over many years. It seems as though he never entirely dropped a problem or situation that he found interesting. Thus, typically he returned at varied intervals (ranging from a few weeks to a decade or more) to write yet another essay reconsidering or sharpening earlier insights, or else to put together a new monographic article analyzing a newly emergent problem—often ingeniously identifying an

---

<sup>2</sup> JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? (2007). It is beyond the scope of the present Article to provide a suitable appreciation and analysis of all his work relating to Hawai'i law, culture, and environment; this aspect of his career is represented in the bibliography of his writings available in this symposium issue. See *The Scholarship of Jon M. Van Dyke: A Bibliography*, 35 U. Haw. L. Rev. 1013 (2014); see especially his articles cited in note 45 *infra*.

opening that he used to champion what he felt would be a useful legal or policy innovation.<sup>3</sup>

The sheer volume of his scholarly work—some 120 articles and chapters, in addition to his several books—was produced while Jon meanwhile was pursuing often-arduous litigation, and often was playing the role of leading voice and organizing genius in numerous public causes. He did so sometimes on his own but more often in partnership with his wife, Sherry Broder, in the academic, judicial, and public arenas of environmental law, civil liberties, native rights, and governmental reform. Jon was also a dedicated citizen of his university. He was revered as a professor at Hastings College of the Law and later during his long career at the William S. Richardson School of Law. For his part he rendered distinguished service to the Richardson School as faculty leader, institution-builder, administrator, and liaison with the alumni, the Hawai'i bar, and, more generally, the citizenry and governmental institutions of Hawai'i.<sup>4</sup>

He was also a stalwart in the leadership group of the Law of the Sea Institute during the long period when the Institute was based at his own university in Hawai'i. He never flagged, however, in his devotion to the Institute after the organization's headquarters was moved in 2002 to Berkeley and was reorganized as a unit of the UC Berkeley School of Law. My co-director of the Institute, Professor David Caron, and I could always rely on Jon's readiness to offer his time, effort, and wise counsel. He also contributed from several of his research projects to every one of our publications in the last decade, and in addition he co-edited two of the books in the Institute's ocean law series.<sup>5</sup>

It needs to be mentioned too that Jon was one of the leaders in the 1990s in the founding and the conference program of an active inter-university group of scholars, the Ocean Governance Study Group. This group, after its initial meeting at the University of Hawai'i, undertook the serious interdisciplinary

---

<sup>3</sup> His practice of revisiting highly diverse themes, for example, the rights of students in public schools, nuclear activities regulation, or South China Sea issues, is evident in the bibliography of his writings available in this issue.

<sup>4</sup> Many of Van Dyke's contributions to public life and to important causes in state and federal litigation were highlighted in some of the many tributes that were posted on a memorial website just after his unexpected death in November 2011; the site is currently available at [http://www.surveymonkey.com/sr.aspx?sm=asSuIUcv3rOXkRMMaxqhTmkG8g8Wby2GtUSDsPDsETCQ\\_3dotos/InMemoriamJonVanDyke02](http://www.surveymonkey.com/sr.aspx?sm=asSuIUcv3rOXkRMMaxqhTmkG8g8Wby2GtUSDsPDsETCQ_3dotos/InMemoriamJonVanDyke02).

<sup>5</sup> One of these two books is *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); and the other is *GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES, A TRIBUTE TO JUDGE CHOON-HO PARK* (Jon Van Dyke, Sherry P. Broder et al., eds. 2013). For a full listing of the book series of the Law of the Sea Institute-UC Berkeley, see the organization's website at <http://www.law.berkeley.edu/5898.htm>.

study of ocean and coastal policy issues while also sponsoring briefings on ocean issues for legislators; the group also engaged in advocating both integrated coastal management and the cause of a comprehensive national oceans policy review.<sup>6</sup>

## II. FIRST BOOK: ON U.S. WAR STRATEGY IN VIETNAM

Over the years, Jon won a position of great standing among ocean law experts—a small, exceptionally congenial international cohort that is tightly interconnected and linked by both international institutional and personal relationships. It was in this context that I knew him best, both as colleague and great friend over more than thirty years' time. Therefore, it was an astonishing discovery for me when I learned—indeed, only after commencing on work for the present Article—that Jon's first research publication was not in the field of ocean law at all. It was, rather, a book entitled *North Vietnam's Strategy for Survival*.<sup>7</sup> Published in 1972, this ambitious work was an expansion and revision of research that he had embarked upon some five years earlier for a seminar paper in a Harvard Law School class co-taught by Henry Kissinger (a figure, it is intriguing to contemplate, whose philosophy of international relations can be fairly described as an almost perfect reverse image of Jon's own!).<sup>8</sup>

The book provided a painstakingly detailed account of the massive American air-bombing campaign against the North during the Vietnam War—and the failure of the bombing strategy to crush the resistance of the people and government that were its target. Jon's writing style here was in a pervasively low-key tone, leaving the impression of determined, objective detachment. This, of course, is in contrast to the passionate engagement that one might expect of Jon on such a subject given the explicit—and often passionately stated—moral conviction (or, at minimum, the well delineated normative conclusions) found in most of his writings. Instead, the book may be fairly described as a “documentary” work, intensely factual in both content and presentation,

---

<sup>6</sup> The other members of the organization's steering committee included the eminent marine policy scholars Robert Knecht and Bilianna Cicin-Sain of the University of Delaware; and also David D. Caron and the present writer, of UC Berkeley School of Law. The group's agitation for a policy review was joined by many other marine policy groups, and it successfully produced action in Congress and a parallel effort by the Pew Foundation, to produce their separate famous “ocean reports.” For the Pew Oceans Commission 2003 report, see [http://www.pewtrusts.org/our\\_work\\_detail.aspx?id=130](http://www.pewtrusts.org/our_work_detail.aspx?id=130); for the national commission's 2004 report, see <http://govinfo.library.unt.edu/oceancommission/>.

<sup>7</sup> JON M. VAN DYKE, *NORTH VIETNAM'S STRATEGY FOR SURVIVAL* (1972).

<sup>8</sup> Kissinger and his co-instructors chose the seminar paper for permanent deposit in the Widener Library at Harvard, commending it for its distinction of scholarly research (Information from Jon Van Dyke's C.V. and bibliography of writings, unpublished manuscript, and family papers on file with Attorney Sherry Broder (Apr. 19, 2013)).

falling more readily into the category of "national security study" than a work on law, or on law and society. Unrelenting, however, is the laying out of the bare facts (which Jon compiled through research in depth, in widely diverse sources). Told in stunning detail is a recapitulation of the bombing campaign in all its dimensions, vividly conveying how devastating it was in the damage that it wrought to life, property, and environment: There were more than 100,000 bombing missions in a total of 350,000 sorties during February 1965 to November 1968, we are told; and a total of nearly three million tons of explosives was rained down on North Vietnam, with the attacks continuing until 1971 while their range was also expanded to hit additional targets in Laos and Cambodia.<sup>9</sup>

The enormity of the particulars is difficult for one to absorb and fully comprehend: for example, a million pounds of explosives dropped in a single raid on a September day in 1968. Jon reconstructs the story of the forced evacuation and dispersal of North Vietnamese civilians in response to the bombing; and then the reader is taken through the facts as to how dikes and irrigation complexes were destroyed and agricultural capacity decimated, with inundation and destruction of fields and villages.<sup>10</sup> He also documents the record as to how North Vietnam's industrial plants were relocated and production levels astonishingly revived.<sup>11</sup>

The resistance mounted by North Vietnam in the face of this devastation, as a resilient civilian population cooperated with the harsh strategies imposed by their own determined government, is set forth in this book with great clarity. The large story is framed against the essential irony of the American strategy—which is that, despite the incessant bombing, and despite the associated tremendous losses of planes and the casualties suffered by the U.S. armed forces, North Vietnam successfully endured, but the U.S. government was seemingly immovable. Jon underlined this irony by recounting how the top U.S. generals and Defense Department officials periodically admitted what became the main conclusion of his book, viz., that the bombing completely failed in its objective of bringing North Vietnam down or even shortening the duration of the war.<sup>12</sup>

Coming away from this book, the reader is left to draw moral lessons independently. The empirical data for making a judgment are abundant: it offered a massive quantity of hard evidence drawn from government sources, including North Vietnam's own publications (presumably in translation from U.S. government sources); the reports of French, American and other war journalists

---

<sup>9</sup> See Van Dyke, *supra* note 7, at 240-42, 247.

<sup>10</sup> See *id.* at 240, 126-59, 184-85 *et passim*.

<sup>11</sup> See *id.* at 189-215.

<sup>12</sup> See *id.* at 22-23, 29, 34-35, 208.

on the ground; and congressional hearings and Department of Defense documents. The overall effect of this enormous trove of data was assessed by the eminent Asian affairs expert Edwin Reischauer (professor at Harvard and one-time ambassador to Japan), who praised the book as providing "the clearest picture the general public has as yet had" of the U.S. strategy. Beyond that, he asserted, Jon's research was "a major contribution toward the continuing reassessment of America's policies in East Asia."<sup>13</sup>

This first book was a remarkable achievement for a neophyte academic. It was to be only a precursor, however, of writings of similarly high quality—but in a different style—that Jon would start producing almost immediately after its publication. These writings would prove to be only the first burst of scholarship and commentary in what became a prodigious flow of new work that he turned out in the nearly forty years to follow.

### III. SCHOLARLY WORK AMIDST THE WINDS OF CHANGE

By the time his book on the Vietnam bombings appeared in 1972, Jon had taught on the law faculty of Catholic University for two years, following his graduation in 1967 with the JD *cum laude* at Harvard; had participated in a summer 1986 seminar on human rights law at the School of Law, UC Berkeley; and had clerked for Chief Justice Roger B. Traynor during 1969-70, then held a one-year research appointment at the Center for the Study of Democratic Institutions at Santa Barbara. He was in the midst of his initial year of a new appointment on the faculty of the Hastings College of the Law in San Francisco, and was teaching courses in constitutional law, administrative law, and international law.

These early years of his academic life were a period of dramatic changes in American society and in the nation's politics. The rush of dramatic events reflected or instigated new racial tensions and interracial violence, political radicalism that arose in reaction to the Vietnam War and especially its impact on the nation's youth; and then came angry, often-repressive responses to this radicalism mobilized by both centrist and right-wing elements in the private sector and, in the Johnson and Nixon years, from the government itself. The Watergate scandal and the Nixon impeachment intensified and broadened an existing mood of crisis in governance and impelled new constitutional debates. Also influencing domestic change were the Cold War confrontations of the superpowers, including the threats of their nuclear arsenals and missile strength, and the destabilizing impact of anti-colonialism and emergence of third world nations as a major force in international diplomacy. And as is now well

---

<sup>13</sup> Edwin O. Reischauer, *Foreword* to JON M. VAN DYKE, *NORTH VIETNAM'S STRATEGY FOR SURVIVAL* at 7 (1972).

recognized, in retrospect, deep cultural changes were more than transitory phenomena; for decades to come, they would challenge many of the longest-held traditional social norms in both Europe and America.<sup>14</sup>

Domestically, many of these tensions and challenges became the stuff of famous litigation that placed the state and federal courts in the eye of the cultural storm. A parade of high-profile cases involved school desegregation strategies, church-state relations, claims against agency discretion (especially with regard to welfare program administration) that were being advanced in the name of individual dignity and autonomy, and advocacy of a radically expanded right of privacy. Campaigns for no-fault divorce legislation and community property in marriage law; conflicts over the constitutionality of the regulations of students' behavior alleged to be in violation of freedom of speech; various expansions of regulatory agencies' jurisdiction and enforcement powers, especially in the advent of environmental protections; and a revisiting of the rights of persons enmeshed in criminal process, the rights of prisoners; and yet more: It was a formidable list, building up at a time of turmoil and challenge. In these years, the politics and direction of legal change in some states of the federal union reached a peak of "legal liberalism," yet there was also a powerful conservative response at every level of politics and in every arena of discourse and power.<sup>15</sup>

As a real-life context for teaching law, all this was an unsettling environment. The cool tone and relentlessly factual approach of Jon's book on Vietnam, suggesting a preference for distancing himself from what might seem a polemical engagement in controversy fraught with contested moral content, would be put aside in Jon's new writings, even before his book had gone to press.

#### IV. MORAL CONTENT BROUGHT TO THE FOREFRONT OF ANALYSIS

The first of Jon's new writings to appear was an article, "The Laws of War—Can They Ever Be Enforced?" published in mid-1971 in *The Center Magazine*, a journal issued by the Center for the Study of Democratic Institutions, where Jon held his research appointment as a visiting fellow during 1970-71.<sup>16</sup> He provided in this article a systematic accounting—or,

---

<sup>14</sup> See, e.g., RICHARD POLENBERG, *ONE NATION DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938* (1991); RICHARD M. ABRAMS, *AMERICA TRANSFORMED: SIXTY YEARS OF REVOLUTIONARY CHANGE, 1941-2001* (2006).

<sup>15</sup> See, inter alia, LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1998); EARL WARREN AND THE WARREN COURT (Harry N. Scheiber ed., 2007); *THE BILL OF RIGHTS IN MODERN AMERICA* (David Bodenheimer & James Ely, Jr. eds., 2008).

<sup>16</sup> Jon Van Dyke, *The Laws of War—Can They Ever Be Enforced?*, *THE CENTER MAGAZINE*, July 1971, at 22.

more to the point, systematic indictment—of actions by the American military in the Vietnam War that he argued were violations of customary international law and, more specifically, of the Geneva Conventions of 1949 and predecessor humanitarian treaties codifying what has traditionally been termed more generally “the law of civilized nations.”

Jon's new focus on international human rights law, and the international conventions that addressed war crimes, was evident in virtually every line of this new study. His sense of outrage, it may be said, was now finding full expression. Thus he deplored the American violations of a wide set of the norms for protection of civilians; he condemned the U.S. government for war crimes for many of the very same features of the disastrous bombing strategy that he had catalogued in his book so methodically but without legal or ethical comment; and he recounted the findings of several international initiatives and informal tribunals that had addressed the war crimes issue in Vietnam. His focus was on the United States and its allies, and so he did not choose to explore the question of policies of the Viet Cong that I think he would have deemed to be similarly in violation of humanitarian precepts of customary law.

Special focus was given to the notorious My Lai Massacre, in which an entire village of civilians, including women and children, were brutally murdered by a U. S. Army unit, a disaster paralleled by a series of massacres perpetrated by a South Korean unit allied with the American forces. The officers and foot soldiers responsible for the My Lai outrage were long protected, as Jon pointed out, by the Army in an elaborate cover-up. Only Lieutenant William Calley, unit commander on the ground, was brought to trial and convicted; and then almost immediately President Nixon reduced his sentence to house arrest.

Taking the My Lai tragedy and its sorry legal aftermath as a case in point, Jon pushed his analysis a significant step forward by turning to the general question of how best to implement legal instruments in the field of human rights. He proposed the need for trials and punishment of the high-level officials of the U.S. military and of civilian government who, he contended, should be seen as ultimately responsible for the decisions and policies that permitted such a massacre to occur in the ground half a world away. Such trials, however, must be conducted at an international level: Experience had clearly shown, he maintained, that a belligerent government could never be trusted to impose just punishments for such violations in time of war.

Such was his answer to the question (as posed in the title of the article) as to whether the laws of war could be enforced. His confidence in international institutions, empowered to “give teeth” to norms and treaty requirements—essentially an endorsement of the jurisprudence legitimized by the Nuremberg



trials—would become a recurring theme in Jon's later writings.<sup>17</sup> Both the strongly moral tone and his preference for exercise of institutionalized, supranational legal authority seem now to have moved to the very core of Jon's jurisprudence. Hence his early book on the bombing campaign can best viewed, in retrospect, as an anomalous beginning in Jon's overall record of scholarly contributions. The moral and ethical dimension of his systematic marshaling of evidence for war crimes by America in the Vietnam War, as he constructed it in his 1971 article, revealed a new research priority and foretold accurately the intellectual style of his future scholarship.

#### V. UC BERKELEY SEMINAR ON HUMANITARIAN LAW, SUMMER 1986

How did he come to adopt this new normative and judgmental style? There seems little doubt that an important influence on him, impelling this shift in his scholarly stance, was his participation a few years earlier in a summer seminar at the School of Law in the University of California, Berkeley. The seminar was held in 1986 and was devoted to the subject of human rights law. It had the stated and very specific goal of drafting a set of rules for implementation of the recently concluded International Convention for the Elimination of All Forms of Discrimination.<sup>18</sup> Organized by Frank Newman, a Berkeley professor of administrative law and former law school dean, and funded by a foundation grant, the seminar brought together a small group of law students and early-career scholars, including Jon as visiting scholar. They were introduced to human rights law by several distinguished visiting consultants and special lecturers who had written important studies of Europe's experience with implementation of human rights law. The participants undertook an intensive program of readings on humanitarian law, and then they went on to collaborate in developing a paper with two purposes. The first was to identify and analyze the types of issues that would most likely come up in implementation of the Convention; the second was to construct a set of detailed procedural rules for the international committee of experts that was established to oversee the process.

---

<sup>17</sup> Late in his career, for example, he would similarly become a strong proponent for establishing the International Tribunal for the Law of the Sea (ITLOS), praising its formation as a step forward in giving teeth to customary law—that is, in obtaining just and effective dispute resolution among nations confronting one another in dangerous situations on the world's oceans. Van Dyke, *supra* note 1. Similarly in his many and varied writings on the international conflicts in East Asian ocean waters, he counseled privately and insisted in publications that referring disputes to ITLOS, or the International Court of Justice (ICJ), or arbitral tribunals was a clear imperative if fair resolution of disputes and an atmosphere of peaceful relations were to be achieved.

<sup>18</sup> The International Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

Professor Newman published the resulting document, under his name as author, in the 1968 volume of the *California Law Review*.<sup>19</sup>

Two of the UC Berkeley Law School students who participated with Jon in this seminar are today among the world's leading experts in human rights law. They are Professors Dinah Shelton of George Washington University and David Weissbrodt of the University of Minnesota.<sup>20</sup> According to their recollections, the seminar—the first to be organized in a law school west of the Mississippi River, as they recall—had a catalytic effect on their academic focus and career goals, as it did on Jon's. Professor Shelton has remarked that, when asked how she became interested in human rights law, she routinely answers that she was “in the right place at the right time, and the right place was Berkeley.”<sup>21</sup>

An interesting sidelight on the Berkeley seminar is that Professor Newman—who would later become one of the giants internationally in the human rights field, both as activist and in his academic pursuits—was initially introduced to the field, and became committed to it, as the result of the seminar.<sup>22</sup> There is little reason to doubt that Jon's consuming interest and enthusiasm for advancing the cause of human rights (which came to a strong focus later, for him, on indigenous peoples' rights) and its pursuit through the development of international law, similarly owed much to the seminar. In any case, we know from the record of his subsequent scholarship and activities in public life that this interest blossomed into a passionate commitment that never dimmed during the rest of his life.

## VI. CLERKSHIP WITH CHIEF JUSTICE TRAYNOR

A second experience in this initial period of Jon's career that arguably influenced in a profound way his view of the law—and helped shape his concept of how he might best contribute to legal development in his own future work—was his service during 1969-70 as judicial clerk to Chief Justice Roger B. Traynor of the California Supreme Court. Traynor was one of the nation's most respected state judges, renowned for his learning in the law, but also for his activist posture as a judge. The hallmark of his jurisprudence was his willingness to innovate boldly when he deemed it necessary to protect and advance the public interest in response to changing social and economic conditions. He regarded it as unrealistic, ultimately as damaging, and in every respect insupportable, for courts

---

<sup>19</sup> Frank Newman, *Rules of Procedure for the New Tribunal: A Proposed Draft*, 56 CAL. L. REV. 1569 (1968).

<sup>20</sup> See Dinah Shelton, *The Inter-American Human Rights Law of Indigenous Peoples*, 35 U. Haw. L. Rev. 937 (2014); see also DAVID S. WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* (2008).

<sup>21</sup> Private communication to the author.

<sup>22</sup> In separate private communications to the author, both Professor Weissbrodt and Professor Sheldon recalled this distinct change in Newman's personal agenda.

to adhere slavishly to inherited doctrines without assessing them continuously in the light of contemporary changes in community values.<sup>23</sup>

Traynor had been at the forefront in the California court's leading role nationally in shaping the "tort revolution" in the common law, a famous (and as it proved, enduring) shift in the premises and doctrines of liability. He was similarly ahead of his times in applying the imperatives of equal protection doctrine, in several areas of law well ahead of the Warren Court's egalitarian decisions. A well-known example of Traynor's jurisprudential style was his court's invalidation of the California "miscegenation law," which had forbade interracial marriage; this decision was handed down almost twenty years before the U.S. Supreme Court adopted, in *Loving v. Virginia*, the same view of such discriminatory laws.<sup>24</sup> In their often-dramatic expansion of constitutional rights in criminal process, too, Traynor's opinions enshrined basic new doctrines in state law well ahead of the federal judiciary's own innovations—as, for example, in applying the exclusionary rule to admissibility of evidence in state court trials.

In an insightful summarizing of Traynor's jurisprudence, an historian of California law has written: "His concern for the powerless, his tendency toward social egalitarianism, his fear of the 'police state,' and his pro-consumer policy orientation resonated with contemporary liberalism. He unabashedly articulated policy-based justification for legal reform giving clear indications of his conception of the public interest and the values that shaped it."<sup>25</sup>

During the period of Jon's service in Traynor's chambers, the Court decided the landmark case of *Gion v. Santa Cruz*,<sup>26</sup> mandating another great change in California law. In their unanimous decision in *Gion*, the Justices denied the right of a recent purchaser of oceanfront land to exclude the public from a beach property to which the public had long enjoyed unchallenged access. The court drew from common law concepts, constitutional language, and legislative history

---

<sup>23</sup> For documentation and full citations in support of the following brief summary of Traynor, see, for example, the excellent study of Traynor's jurisprudence by BEN FIELD, *JUSTICE ROGER TRAYNOR AND HIS CASE FOR JUDICIAL ACTIVISM* (2000); see also *Rationality and Intuition in the Process of Judging*: Roger Traynor, in G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (3rd ed. 2009). Traynor's accomplishments as creative judicial innovator in the law are usefully compared with the renowned contributions of Chief Justice Lemuel Shaw in a classic article by Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASHINGTON L. REV. 229 (1980-81).

<sup>24</sup> 338 U.S. 1 (1967). The opinion by J. Traynor declaring the California statute unconstitutional is *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

<sup>25</sup> FIELD, *supra* note 23, at 18.

<sup>26</sup> *Gion v. Santa Cruz*, 465 P.2d 50 (Cal. 1970).

to rule that a "strong public policy" required protection of general access.<sup>27</sup> The language of this decision expressed in powerful terms the strength of this court's concept of public interest and public rights, as against claims of private property that had to be subordinated to the higher good of the community.

Jon retained in his law school office files until his tragic death in November 2011 his manuscript drafts of the court's opinion in *Gion*, containing notes on the authorities that he identified either on his own, at Traynor's direction, or by following leads from references in the briefs. It is impossible to say with any certainty, on the evidence at hand, to what extent the final opinion incorporated specific analysis or language that originated with Jon. What can be said confidently, however, is that he was witness at close hand to an historic moment in American property law.

There seems little question, moreover, that the confrontation between private claims to the state's natural resources and what the court regarded as in the imperative public interest—the issue faced so explicitly in the *Gion* litigation—foreshadowed in a general way issues that would be prominent in litigation that Jon would conduct in future years in Hawai'i, in his cases on water law and environmental protection. And it is evident, too, that Jon's posture with regard to the judiciary's proper role in upholding public policy and the public interest, even when critics might decry *Gion*-style "judicial activism," expressed principles that had been creatively articulated in the exciting environment of the Traynor Court.<sup>28</sup>

Perhaps his experience as Traynor's clerk in fact served merely to reinforce a principled liberalism that Jon already had considered and already held dear. Even if that were so, his work on the *Gion* decision and, more generally, the environment of judicial innovation that prevailed in the court, seem to have had a vital influence on his personal philosophy and his later scholarship. One must think that his clerking year served to strengthen and energize Jon's personal commitment to the brand of "legal liberalism" and progressive jurisprudence that Traynor and his colleagues had impressed on the landscape of American state law, just as the Warren Court was doing in the larger national context.<sup>29</sup>

---

<sup>27</sup> *Id.* at 59. On the deep historical roots of public rights jurisprudence, see Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984).

<sup>28</sup> References to his notes on the case and drafts of the opinion, in the Van Dyke office files at the Richardson School, were located and generously provided by Sherry Broder.

<sup>29</sup> The phrase "legal liberalism" is used here as it has been analyzed by Professor Laura Kalman. See KALMAN, *supra* note 15.

## VII. RESEARCHES ON THE JURY SYSTEM: LAYING DOWN A MARKER

Jon had embarked, meanwhile, on yet another and distinctly different line of research during this early phase of his career: a set of studies of the American jury system. He published an article, "The Jury as a Political Institution," in *The Center Magazine* in March 1970, a year before his war crimes article appeared. It was a stunning work, for the forcefulness of his style of argumentation and for the content of his policy recommendations.

The trial jury, he contended, was the only element in criminal process in which there was no discretion as to the legitimacy or applicability of a law: the police had discretion to arrest; the prosecutor had discretion to decide whether to charge; and the trial judge, who controlled day-to-day process, enjoyed full discretion in giving his or her interpretation of the relevant law in the charge to the jury. Only the trial jury itself had no discretion in this regard; it was required to obey the judge's instructions on the law. There was no constitutional imperative that juries should be subordinated in this way to a judge's view of the law under which defendants were tried, Jon argued. Juries should be free to act as "the conscience of the community," acting in defense of "community values," and in that way to assure that justice according to those values should prevail. He wanted to enshrine jury nullification in the very fabric of criminal process. The power to nullify, in his view, was a logical element in the essential justification for having juries at all.

But he went further, in an intellectual move that would become the hallmark of his style in addressing issues of law and policy: *He lay down a marker*, placing that marker well out at the farther boundaries of the mainstream, or even beyond the outer limit of reformist discourse. Students of modern ocean law will recognize immediately this strategy of argument—and of reform—in Jon's work in their field.<sup>30</sup> In this instance, regarding juries, Jon proposed that in addition to accepting that jury discretion as to the law would be legitimate, judges should actually be required to *instruct* juries that they had the authority to nullify! This proposal brought criticism down on him, of course, with a bevy of eminent scholars warning that Jon's position on juries would simply produce "anarchy" both in the courts and in the jurisprudence of criminal process.<sup>31</sup> But Jon found such criticism misplaced, and he was unmoved by it.

---

<sup>30</sup> Cf. Van Dyke, *infra* notes 53, 54 & 56 (with regard to Jon's views on the precautionary principle and on South China Sea issues).

<sup>31</sup> The scholarly criticisms and the concern about "anarchy" in particular are discussed in Alan W. Scheflin & Jon Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 165-66. Sanford Kadish of the University of California, Berkeley, law faculty, and a leading figure in study of criminal law, was among the critics. It is instructive that Professor Kadish, serving as editor of a major scholarly encyclopedia of

The boldness of his views on the jury—the marker he laid down—expressed what may fairly be called the radical-reformist aspect of Jon's emergent intellectual posture on the law. He had become convinced, as is revealed by his later writings, that bold proposals, explicitly asserting moral imperatives and expressing ideas that others might deem utopian, could make a difference in the world. This conviction became an article of faith for him; and I think he never deviated from speaking or acting on that faith in later years.

In the years that closely followed publication of that first article of 1970 on the jury, Jon went on to write on other aspects of jury functions. The major focus of his research now shifted, however, to the discrete problem of jury selection. During the five-year period 1975 to 1980, he produced a series of monographic articles presenting analyses of his own and other scholars' empirical field-research to document what he declared was systematic bias in jury selection working against the inclusion of women, minorities, and low-income persons. Although the U.S. Supreme Court had taken notice of selection bias and its effects in the racially segregated South, Jon contributed a persuasive body of empirical data from a broad cross-section of the country. Again, a pervasive theme in his argumentation was the issue of how juries could perform the function that he regarded as essential, that is, protection and assertion of "the values of the community."<sup>32</sup>

This sustained line of new research culminated in 1977 with publication of a major book, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*.<sup>33</sup> This study won wide attention and was much admired in the academic field of criminal process studies. Only by adopting procedures to assure that juries would be representative, Jon declared in the book's concluding passages, could "a stamp of democratic legitimacy" be achieved in the decision making that led to trial verdicts. To tolerate jury selection as it was widely

---

criminal law, nonetheless later selected Jon to contribute the article "Jury Trial." This does not suggest that Professor Kadish changed his mind on jury nullification, but it is intriguing evidence of how well respected Jon had become for the depth of his research on jury procedures and performance. The article is Jon M. Van Dyke, *Jury Trial*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 932-941 (S. Kadish ed., 1983).

<sup>32</sup> He did not overlook the counter-argument that community sentiment could be tyrannical, as, for example, when an all-white middle and upper class jury, representing the prevailing community racial prejudices among whites, passed judgment on poor black or other minority defendants. In such case, he pointed out, federal courts had already moved in to monitor such situations and had begun to intervene when prejudice had been manifest; and in any event, even a single minority person on an otherwise all-white jury could prevent an unjust verdict.

<sup>33</sup> JON. M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* (1977).

practiced in America, he wrote, would be to deny "the community's norms and collective conscience" their proper influence in criminal justice.<sup>34</sup>

#### VIII. THE CENTER AT SANTA BARBARA AND THE NEW CHALLENGES IN OCEAN AFFAIRS

Jon's resident fellowship during 1970-71 at the Center for the Study of Democratic Institutions in Santa Barbara—an interim year between the clerkship with Traynor and his appointment at Hastings—provided him with a stimulating academic milieu. In the case of the Center, it was a milieu with a distinctly progressive-liberal bent that reflected the political and ideological orientation of the Center's leadership.<sup>35</sup> With its core of resident fellows, with visiting fellows from several academic fields, journalism, and public life, and with its energetic program of international conferences, the Center provided a fertile ground for Jon's expanding academic and activist interests. It was an environment of debate and discourse in which normative analysis and the systematic application of moral standards were encouraged. And as such, it would have been a setting in which the trajectory of Jon's values as a scholar would be given new impetus.

During his residency at the Center, he advanced the preparation of his first book for publication. He also composed his 1971 "Law of War" article, which, as we have noted already, announced his entry into the arena of moral discourse about the war and forcefully raised questions about the need to enforce international humanitarian norms.<sup>36</sup> He also joined with other lawyers in signing on to an amicus brief in the case of *Massachusetts v. Laird*, in which the state government unsuccessfully challenged the constitutionality of the Vietnam War policies and actions.<sup>37</sup> His concentrated work on the subject of juries apparently lay ahead, however, since his next study on the subject was not published until 1975; but in

---

<sup>34</sup> *Id.* at 219.

<sup>35</sup> The Center was founded in 1959 by Robert Hutchins, former president of the University of Chicago, and its board members included Justice William O. Douglas, the journalist Harry Ashmore (who would later become director), and other figures known for their liberal views on domestic issues and their internationalist approach to foreign affairs. See, e.g., Michael Redmon, *Center for the Study of Democratic Institutions*, SANTA BARBARA INDEPENDENT (May 28, 2009), available at [www.independent.com/news/2009/may/28/center-study-democratic-institutions/](http://www.independent.com/news/2009/may/28/center-study-democratic-institutions/).

<sup>36</sup> Van Dyke, *supra* note 16.

<sup>37</sup> 400 U.S. 886 (1971); Anthony A. D'Amato, *Brief for Constitutional Lawyers' Committee on Underdeclared Wars as Amicus Curiae*, *Massachusetts v. Laird*, 17 WAYNE L. REV. 67-151 (1971) (where the brief was published).

1971 he did author a major article on the right to counsel in California's parole revocation proceedings.<sup>38</sup>

The most prominent specific result of his residence at the Center, however, was that it set him on his course toward preeminence in the field of ocean law and policy. The catalyst was his colleagueship there with Elisabeth Mann Borghese, who was one of the senior academic researchers on the core research staff. Borghese was then becoming an important voice in ocean law debates, and she would soon exercise a major influence internationally on the developments leading to the UN Convention on the Law of the Sea (UNCLOS). In 1968 she wrote a proposed "statute" (setting forth core principles plus detailed rules and procedures to be included in a global treaty) for the peaceful uses of the oceans. This study, perhaps better termed a manifesto, was published by the Center and evoked wide discussion in the United States and internationally among diplomats and international lawyers.<sup>39</sup>

Borghese's activity in this cause of a treaty for a universal law of the sea was at an intensive pitch by the time Jon arrived at the Center. The moment was ripe for Borghese's campaign, for in 1970-71 the UN General Assembly was moving quickly in a process of initiating positive steps to organize a global conference on the subject.<sup>40</sup> In December 1970 the General Assembly passed, by a vote of 108 to 0, with 15 abstentions, UNGA Resolution 2749, entitled "A Declaration of Principles Governing the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction," adopting the principle that resources of the seabed under the high seas were the "common heritage of mankind."<sup>41</sup> Shortly afterward, the General Assembly formally called for the convening of the long-contemplated

---

<sup>38</sup> See Jon M. Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CAL. L. REV. 1215 (1971). This article was used by Justice Tobriner in his opinion in *In re Tucker*, 5 Cal. 3d 171, 186, 486 P.2d 657, 666 (1971) (dissenting opinion), and was cited by Justice Douglas in his opinion in *Morrissey v. Brewer*, 408 U.S. 471, 498 (1972) (dissenting opinion) and by Justice Powell in the majority opinion written for *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). While serving on the Hastings faculty, Jon also was active in the public activities of the Bar and in focused law reform studies.

<sup>39</sup> See Betsy Baker, *Uncommon Heritage: Elisabeth Mann Borghese*, INTLAW GRRLS, (Feb. 8, 2012), available at <http://www.intlawgrrls.com/2012/02/uncommon-heritage-elisabeth-mann.html>.

<sup>40</sup> An authoritative and succinct historical study of the UN conferences to frame a treaty on law of the sea, in the context of other contemporary developments, is provided in LAWRENCE JUDA, *INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE* 138-243 (1996).

<sup>41</sup> Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), U.N.Doc.A/RES/2749 (Dec. 17, 1970).



conference on law of the sea. The terms of this further resolution, as to agenda, went beyond seabed questions to embrace the entire range of issues left outstanding after failure of the 1960 conference in Geneva to satisfactorily resolve deeply rooted conflicts of legal opinion (and the conflicts of national interests in the Cold War world).<sup>42</sup>

With the Center's financial resources at her disposal, Borghese was then sponsoring a stream of seminars, lectures, and consultants' visits on oceans policy—events that captured Jon's attention and concern. These contacts were a superb source of education, and inspiration, on ocean affairs; and they served Jon well, as events proved, when, later in his career, he would make a serious commitment to the field. Borghese, a colleague much admired by Jon, recruited him as an enthusiastic (and professionally well-credentialed) ally in her campaign. The larger goal of advancing internationalist and global approaches to problem-solving and the attainment of world peace, the objective that framed her position on ocean law, was, as those who knew Jon personally can attest, entirely consistent with his own position on the moral basis and essential purpose of legal ordering. Borghese never wavered from a demand that the world community honor the famous concept voiced by Ambassador Pardo in a Malta resolution before the General Assembly in 1967—that the seabed was a "common heritage" and should not be susceptible of capture and ownership by any State or other entity. It became for her (as it was ultimately enshrined in the text of the UNCLOS of 1982) the core principle for the legal ordering of the oceans more generally.<sup>43</sup>

Jon was thus drawn into an active role in assisting Borghese in a project for organizing a high-level international conference to be held in Rhodes and entitled *Pacem in Maris*. He aided the project in its organizing phase, in the development of agenda statements, and then in his personal participation in the conference, one presumes in the capacity of an assistant to Borghese in administration. It was an ambitious enterprise in its scale, notable for the prestige of participants; and it received abundant publicity

---

<sup>42</sup> ANNE L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 234-39 (1981); Jon Van Dyke & Christopher Yuen, "*Common Heritage*" vs. "*Freedom of the High Seas*": *Which Governs the Seabed?* in THE LAW OF THE SEA AND OCEAN DEVELOPMENT: ISSUES IN THE PACIFIC BASIN: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE, FIFTEENTH ANNUAL CONFERENCE, OCT. 5-8, 1981, HONOLULU, HAWAII 206, 221-26 (Edward L. Miles and Scott Allen eds., 1981), also published under same title and authorship, in 19 SAN DIEGO L.REV. 493 (1981).

<sup>43</sup> I rely upon personal discussions with Jon Van Dyke over many years, and with Sherry Broder, April 2013, for this description of how Borghese and the Center residency affected Jon's expansion of the scope of his interests; and upon correspondence with Dr. Betsy Baker on Borghese's career during the time period referred to here.

when it met in Rhodes during the last weeks of Jon's formal association with the Center.<sup>44</sup> As soon as it had ended, Jon needed to move his residence from Santa Barbara north to San Francisco, where he would immediately take up his new teaching appointment at Hastings.

Almost ten years would pass, however, before Jon would return in earnest to the subject of ocean law and policy. Presumably he followed closely the progress of the momentous debates in the UN conference's negotiations on the subject during 1973-81; but his attention as teacher and research scholar was focused on other things. These other projects included two collaborations, written soon after he moved to Hawai'i, that issued in major studies on water rights and of constitutional issues relating to growth management policies. Both of the latter were prepared for the Hawai'i Department of Budget and Finance, signaling Jon's entrée in 1977 into the arena of Hawai'i state policy and state constitutional law—an arena in which he would maintain a high-profile presence through the thirty years' time that remained to him.<sup>45</sup>

#### IX. REASSERTED FOUNDATIONS OF THE VAN DYKE LEGACY IN OCEAN LAW SCHOLARSHIP

When Jon decided to rededicate his research focus to embrace ocean law, around 1980 or 1981, it marked a dramatically new beginning for his scholarship. The shift back to ocean law was significant in itself; but at the time, few even of his friends or colleagues could have imagined how wide a swath he would cut through nearly all the subfields of ocean law with his important scholarly writings in the years to follow.

It was especially appropriate that it was in 1982, the very year when UNCLOS was opened to signature and ratification, that Jon's wife and colleague in the law, Sherry Broder, co-authored Jon's first article on marine boundaries.<sup>46</sup> This is an excruciatingly technical area of ocean law, one that has roiled the doctrinal waters in the International Court of Justice, the learned treatises, and briefs and opinions in diverse arbitral awards. The

---

<sup>44</sup> Baker, *supra* note 39.

<sup>45</sup> Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori, & Ralph Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141-333 (Hawaii Dept. of Budget and Finance, 1979); Carl M. Selinger, Jon Van Dyke, Riki Amano, Ken Takenaka, & Robert Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L. Q. 639-714 (1978), reprinted in GROWTH MANAGEMENT ISSUES IN HAWAII 129-201 (Hawaii Dept. of Budget and Finance, 1977).

<sup>46</sup> Sherry P. Broder & Jon Van Dyke, *Ocean Boundaries in the South Pacific*, 4 U. HAW. L. REV. 1 (1982).

field became for Jon a subject in which he worked assiduously over the years, and in which by the 1990s he had become a world-class authority.<sup>47</sup>

Especially appropriate, as well, was the *regional* focus of the coauthored 1982 article—entitled “Ocean Boundaries in the South Pacific”—in the sense that it foretold Jon’s perduring interest in the life, law, and socio-cultural issues in the Pacific region. This interest, too, would be expressed in many of his most influential later writings. By the mid-1980s, he had also embarked on a project for analysis of the baffling conflict of legal views over “islands” and “rocks” (as each was defined in arbitral and judicial decisions, and in the UNCLOS). This analysis bore on a crucial issue in both the academic debates and the geopolitics of ocean law, since whether such mid-ocean structures were entitled to a 200-mile EEZ would be at issue. In 1982-83 he coauthored with Robert Brooks two articles on international law relating to uninhabited islands—yet another variant of boundary issues in this daunting subfield of international law.<sup>48</sup>

After the conclusion and opening for signature of the UNCLOS in 1982, there was ever-rising public discussion of the Convention’s merits and potential impact. This was evidenced in debates within many countries over whether to sign and ratify. They were accompanied by a wave of new scholarship, articles in popular publications, a proliferation of conferences, and the appearance of journalistic and political commentary regarding the treaty and its proposed innovations in law. A “North-South” division over implications for the post-colonial economies of the new coastal economic zones; the fundamental coastal vs. distant-water fishing interest views on the high seas area and the law of highly migratory species; innocent passage vs. the concept of free transit; military and scientific activities that might be constrained and limited; and other important points—cutting across them, of course, the Cold War alignment of the great powers—lent great urgency

---

<sup>47</sup> Sherry Broder also was coauthor of numerous later works in this and allied areas of ocean law and policy; and she also was the co-litigator with Jon in numerous human rights cases, including the famous 1986 tort suit on behalf of the victims of the Marcos regime’s torture and killings in the Philippines. See, e.g., *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), and 103 F.3d 762 (9th Cir. 1996); *Merrill Lynch, Pierce Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885 and 467 F.3d 1205 (9th Cir. 2006); *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). See also Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHIPP. L. JNL. 169-93 (2001).

<sup>48</sup> Jon M. Van Dyke & Robert E. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources*, 12 OCEAN DEV. AND INT’L L. 265 (1983); Jon M. Van Dyke & Robert E. Brooks, *Uninhabited Islands and the Ocean’s Resources: The Clipperton Island Case*, in LAW OF THE SEA: STATE PRACTICES IN ZONES OF SPECIAL JURISDICTION, 13 L. Sea Inst. 351-92 (T. Clingan ed., 1982).

to the debates.<sup>49</sup> Jon became a leading voice in this discourse. Two of the research fields in which he quickly established a major position internationally were, first, the law of seabed mining under terms of UNCLOS, and, second, the regulation of nuclear activities on the world's oceans.

Regarding seabed mining, he pursued the basic issue: On what basis should States and private parties have access to engage in exploitation of the seabed in the "high seas," that is, the vast oceans area beyond the outer limits of coastal States' claims to sovereignty or of special jurisdiction? This had been an intensely contested issue since the possibility of mining valuable nodules from the seabed first captured attention from industry and academe in the 1960s; and the debate of principles and specific rules continued even after the signing of UNCLOS in 1982.<sup>50</sup> For Jon, as it had been for other deeply committed internationalists, the proper legal and moral perspective on this problem was clear: it held that the seabed, as had been so famously proposed by the Malta delegation in the UN General Assembly, was part of "the common heritage" of humankind. To permit its resources to be captured by the first successful prospectors, whether they be nations, companies, or individuals, was for him in violation of this basic precept—and in violation, as well, of the essential spirit of what the UNCLOS had been intended to accomplish. As Jon viewed the doctrine of "freedom of the seas" (a fine sounding phrase, suggesting idealism, as he conceded), it was a concept that provided rhetorical cover for a host of rudely exploitative activity that damaged resources and disadvantaged the poorer nations. And so, in a presentation in 1981 to the Law of the Sea Institute annual meeting, revised for publication in the *San Diego Law Review* the next year, Jon and coauthor Christopher Yuen (his third-year JD student at the time) published a seminal study, setting forth a

---

<sup>49</sup> See, e.g., HOLLICK, *supra* note 42.

<sup>50</sup> The terms of the original 1982 Convention were so unacceptable to the United States and other industrial nations that it was not until 1994 that a compromise was reached and a new agreement concluded that downgraded the jurisdiction and powers of the UN Seabed Authority as formulated in the Convention, and substituted a version more congenial to the interests and ideological position of private companies and some of the States with a stake in the exploitation of seabed minerals and hydrocarbons. See HOLLICK, *supra* note 42, at 340-398; Bernard Oxman, *The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 15-36 (Davor Vidas & Willy Østreng eds., 1999). The terms of the seabed debate in its initial phase are captured well in presentations to the first Law of the Sea Institute (LOSI) annual meeting, held in February 1965. See the proceedings of that meeting, in THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 160-86, 302-9 (Lewis M. Alexander ed., 1967) [hereafter *LOSI Proceedings*]; and readings in OCEANS: OUR CONTINUING FRONTIER 162-71 (William Menard and Jane L. Scheiber eds., 1976).

comprehensive position on the basic ethical and legal issues that were at stake in the seabed-law debate.

Their paper, entitled "'Common Heritage' vs. 'Freedom of the High Seas': Which Governs the Seabed?"<sup>51</sup> was at the time of its publication, and remains today, a model of carefully crafted and brilliantly creative legal argumentation. (Indeed, I often have assigned it, for that reason, as the introductory reading on my syllabus for students in my ocean law seminar class at Berkeley.) In support of their interpretation of the "common heritage," the authors draw upon the history of customary law, the formal resolutions of the UN General Assembly, assertions of principle drawn from arbitral awards, assessment of "economic realities" of how seabed mining could affect developing countries, policy statements by U.S. administrative and elective officers, and International Law Commission (ILC) commentaries. The logical anatomy of the arguments on either side is put under the microscope, starting with the historic seventeenth-century doctrine of "freedom of the seas" and ending with the varied contested views of their own day.

Very typical of Jon's approach to this type of important doctrinal issue, he and Yuen phrase the objective as determining "if any of the attitudes [*sic*] that have developed have risen to the level of legal obligations."<sup>52</sup> This transitional moment in the argument is a smooth one, indeed sedulously so: "attitudes" can morph into "legal obligations." The authors do concede it is not a seamless process; and to the conservative legal mind, their invocation of "attitudes," rather than the more established formal concept *opinio juris*, would seem rather evasive. But Jon had once again put out a "marker" that could not be ignored by any thoughtful participant in the debate: it was a challenge to readers to consider whether an accretion of "attitudes" expressed in a wide range of varied sources can be said plausibly to have created new *hard law*, which is to say, created *legal obligations*. In what represented yet another thread running through much of Jon's later work in a reformist bent, on the subject of the "common heritage of mankind" concept, Jon and his coauthor concluded:

Although the concept has its ambiguities, it does impose some legal duties. Nations are not free to do as they please on the seabed; they are not free to pretend that the 'common heritage' is an empty phrase without meaning. They are bound by the common heritage principle to provide meaningful sharing of

---

<sup>51</sup> Van Dyke & Yuen, *supra* note 42, also published in 19 SAN DIEGO L. REV. 493-551 (1982); it was reprinted in Jon's own collection, FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (J. Van Dyke, D. Zaelke, & G. Hewison, eds., 1993) and other publications; and it is widely used by scholars and teachers of law.

<sup>52</sup> *LOSI Proceedings*, *supra* note 50, at 220.

the benefits of the seabed with other nations, particularly the developing nations.<sup>53</sup>

Not to be overlooked here, we must note in a parsing of this paragraph, is the further “marker” that it puts down: the claim that commonality of ownership requires sharing, and that sharing, in turn, requires attention to “particularly the developing nations.” To be sure, the argument here is grounded in the specific issue of the seabed mining controversy, and the UN debate included discussion as to whether revenues should be allocated to poorer nations unable themselves to finance such mining ventures. But Jon’s concern to advance the resource-sharing idea, in which was embedded the special consideration to developing nations (and small island nations), would broaden greatly over time: It became an integral feature especially in his later writings on the precautionary principle, regional fishery management programs, and the economic possibilities of bilateral and multilateral “sharing” arrangements in areas of disputed marine space and resources.<sup>54</sup>

#### X. THE ETHIC OF “PRAGMATIC ALTRUISM” AND OCEAN LAW

From his fresh re-commitment to oceans studies in 1981-82, Jon moved on to produce a rich corpus of work in ensuing years. Specific aspects of his scholarly contributions are well recognized and appreciated, as in various articles by other authors in the present symposium issue of the *Review*.<sup>55</sup> Viewed in a chronological framework, Jon’s inaugural moves in

---

<sup>53</sup> Van Dyke & Yuen, *supra* note 42, at 551.

<sup>54</sup> To cite only one example, consider Jon Van Dyke, *Sharing Ocean Resources—In a Time of Scarcity and Selfishness*, in *THE LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES* 3-36 (Harry N. Scheiber ed., 2000).

<sup>55</sup> See, inter alia, David VanderZwaag, *The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Joustings*, 35 U. Haw. L. Rev. 617 (2014) (praising Jon’s advocacy of the precautionary principle); Maxine Burkett, *A Justice Paradox: On Small Island Developing States and the Quest for Effective Legal Remedy*, 35 U. Haw. L. Rev. 633 (2014) (discussing Jon’s scholarship on climate change); David Freestone, *Can the UN Climate Regime Respond to the Challenges of Sea Level Rise?*, 35 U. Haw. L. Rev. 671 (2014) (referencing Jon’s attention to sea level rise); Yann-huei Song, *Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 U. Haw. L. Rev. 485 (2014) (lauding Jon’s contributions to the development of ocean law and the study of the East and South China Sea disputes); James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 U. Haw. L. Rev. 983 (2014) (acknowledging Jon’s pioneering work in the areas of international law and indigenous rights); and Sherry P. Broder, *Responsibility and Accountability for Harm Caused by Nuclear Activities*, 35 U. Haw. L. Rev. 575 (2014) (paying tribute to and adopting Jon’s calls for a more robust international nuclear liability and compensation regime).

the 1980s into new topical areas included research on the threats of nuclear waste and the carriage of ultra-hazardous cargoes in ocean shipping; on U.S. law and Pacific island legal rights; and on the merits of modes of collaboration and initiatives for new treaty-based environmental protections in the Pacific islands. In the 1990s decade, he continued work on these lines, analyzing new developments on a range of nuclear issues, on boundary delineation, and on the South China Sea. A book, jointly authored, also appeared in 1997 on conflicts and the possibilities for their resolution in the latter, chronically troubled, ocean region.<sup>56</sup>

Jon enjoyed a close friendship with Dr. Choon-ho Park of Korea, who as a young scholar held an appointment at the East-West Center in the University of Hawai'i and later became the leading figure in bringing studies of ocean issues in East Asia into the orbit of scholarly work in international law. Jon was an enthusiastic recruit for this cause as well; and throughout a career that carried Dr. Park first to a distinguished professorial post in Korea and then appointment as a judge on the ITLOS bench, he and Jon kept in constant touch on scholarly and policy issues. Their mutual and intersecting interests reinforced the intensity of Jon's expansion of research scope in his studies of the Pacific area.<sup>57</sup>

From 2000 onward, Jon's outpouring of work on ocean law continued apace. In the space of a decade, he continued—alone and with coauthors and the help of carefully credited research assistants—to publish new, original analyses of navigation rights, hazardous cargo at sea, sustainability of marine resources, human rights—especially in connection with the Marcos tort suit—and Native Hawaiian rights. However, he also opened up two new research fronts that have proven to be especially noteworthy. One was a set of important studies on international tensions and ocean law in the East Asian ocean area. He addressed in particular the political confrontations, threats of military engagements at sea, and issues generated by legally questionable (or patently spurious, but emotionally charged) claims centering on rocks *qua* islands, the assertions by several States of "historic rights" and rights from "first occupation" often impossible to

---

<sup>56</sup> MARK VALENCIA, JON VAN DYKE, & NOEL LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (1997, reprint ed. 1999).

<sup>57</sup> See Harry N. Scheiber, *Judge Choon-ho Park the Law of the Sea Institute and Modern Scholarship in Ocean Law*, in *GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES, A TRIBUTE TO JUDGE CHOON-HO PARK* 17 (Jon Van Dyke, Sherry P. Broder et al., eds. 2013). Judge Park and Jon were involved in its activities at every critical juncture in the history of the Law of the Sea Institute, and in recent years both of them were instrumental in shaping a new program of LOSI collaboration in research and publication with Inha University and, more recently, the policy studies staff of the Korean Institute for Ocean Science and Technology.

support plausibly, and, above all, the claim made by China for some 80 per cent of the South China Sea on the basis of a unilaterally redrawn map (the "Dotted Line" map). This map-based claim dated from the last years of the Nationalist regime in the late 1940s and was ignored until recent times by the successor Communist government of the People's Republic of China (PRC) and almost everyone else. Jon also became increasingly bold in articulating his criticisms of Japanese claims, the intransigent opposition of the PRC to multilateral modes of agreement or adjudicated solutions through international courts or arbitral bodies, and these governments' tolerance and/or encouragement of militant nationalism that fueled the political tensions. In this area of research, culminating in some of his last writings before his death, Jon joined forces with his teacher at Harvard Law School forty years earlier, Professor Jerome Cohen of New York University, one of the world's leading authorities on Chinese law and governance.<sup>58</sup> On the conflict between Japan and Korea over control of Dokdo in the Sea of Japan/East Sea, in individual writings and in collaboration with Professor Seokwoo Lee, he came down in support of the Korean claim—but at the same time he sought to emphasize that the overarching desideratum was not to force surrender of sovereignty claims but to create joint development zones for collaborative economic uses and sharing of benefits.<sup>59</sup>

The other especially notable area of his sustained work was dedicated to articulation and advancement of the "precautionary principle." He was out ahead of most international lawyers and diplomats in recognizing the potential of this principle (also variously termed a "doctrine" or, especially by its detractors, as an "approach") for the protection and sustaining of resources. To be sure, in the 1980s and early 1990s there were other strong champions of the principle, especially in the environmental NGOs and in small corners of the diplomatic offices of many States. The idea came into its own, however, with incorporation into the language of the Rio Conference and the Biodiversity Convention in 1992.<sup>60</sup> Here again, as the

---

<sup>58</sup> See Jon Van Dyke, *What's at Stake in the South China Sea?*, in SHARING AND DISTRIBUTING OCEAN RESOURCES 107 (Jin-Hyun Paik & Seokwoo Lee eds., 2012); and Jerome A. Cohen & Jon Van Dyke, *China and the Law of the Sea*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA: STUDIES IN OCEAN GOVERNANCE 245-56 (Harry N. Scheiber & Jin-Hyun Paik eds., 2013). Professor Cohen has informed the present author that he maintained a friendship with Jon and his family throughout the long intervening years, but only in the last few years did he and Jon re-connect in a research context and begin on their collaborative writing.

<sup>59</sup> Seokwoo Lee & Jon Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo*, 9 CHINESE JNL. OF INT'L LAW 741 (2010).

<sup>60</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993). For aspects of the complementarity of this Convention with UNCLOS; see



idea moved closer to the core of mainstream thought, Jon laid out markers ahead of the trend. He leapt on the opportunity offered by the Rio meeting to declare that there should be a formal requirement of an environmental impact assessment, as an essential element of the precautionary principle as applied, when resource exploitation or other activities potentially endangering to the environment were proposed. Moreover, States should not be seen, he argued, as "the only relevant international decision makers;" indigenous peoples, certainly, and animals too "deserve to be heard from." He also drew out from the basic concepts an expanded theory of precaution, with elements integral to it beyond duty to cooperate as a generalization: He contended for the matrix of these elements to include the "polluter pays" principle, a liability and compensation regime ("crucial, of course, for any commercial activity"), linked with a strict liability standard, long periods of liability in statutes of limitations, compulsory insurance requirements, and the like—all of these elements consistent with, or mandated, by provisions of UNCLOS.<sup>61</sup>

Framing these arguments, and others on parallel lines in other writings, was Jon's insistence that the foregoing precepts "are not mere idealistic mantras, but are important and practical principles that the world must embrace . . . ." It was this generation's greatest challenge "to make *that ethic of pragmatic altruism* meaningful so that the common resources will remain available to us and to those who follow."<sup>62</sup>

## XI. JUDGMENTS

At some crucial junctures in the present analysis of Jon's scholarship and his ethical values, it has been necessary for me to speculate on the sources of inspiration that set his research trajectory and infused its normative content with meaning for him. Without minimizing for the reader the limitations of the Article in these regards, we do have some excellent evidence from two of Jon's own writings that help one to judge the reliability of the interpretations that I have ventured. Each of these writings

---

Harry N. Scheiber, *The Biodiversity Convention and Access to Marine Genetic Materials in Ocean Law*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 187-200 (Davor Vidas & Willy Østreng eds., 1999).

<sup>61</sup> Van Dyke, *Ocean Transport of Radioactive Fuel and Waste*, in THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 160, 166; and Van Dyke, *supra* note 54, at 35. Again with an eye to the interests of developing nations, he contended that when regional fishery management organizations imposed regulatory regimes that might serve to exclude new entrants, "developing nations from the region would appear to have a greater right to enter the fishery than would developed nations from outside the region." *Id.*

<sup>62</sup> Van Dyke, *supra* note 54, at 36.

presented Jon's evaluation of the scholarly legacy of a giant in international law, each of his subjects an individual who left a large footprint on the literature and on twentieth century jurisprudence.

One of these studies was an appreciation—though not merely an uncritical tribute—of Louis B. Sohn, one of the most prominent and respected leaders of the international movement that led to successful negotiation of the UNCLOS. Jon's focus, in this piece, was on what he termed his subject's "great contribution to the field of international law," viz., an "unrelenting effort to confirm that it is a real and enforceable body of sound legal principles," and to advance the formation of permanent organizations and dispute-settlement bodies that will assure that violators would be punished and victims compensated.<sup>63</sup>

The basic principles and objectives of policy that Jon singles out from his review of Sohn's scholarship give us a window through which to view Jon's own values. *First*, there was Sohn's contention that there had been an acceleration of legal development, so that in legal analysis "The old theories of customary law evolving over a long period of time no longer apply."<sup>64</sup> Jon was impatient with the old-style concept that recognition of a rule of customary law must be the product of decades, or for some substantial rules even centuries, of state practice. We have noted already the ways in which Jon put down markers out ahead of mainstream or at the outer margins of reformist thought, both in regard to juries and later, in his ocean law writings, especially as to the seabed question and as to the precautionary principle, contending that there was abundant evidence that customary law, and hence legal obligation, had taken mature and binding form. In these various arguments, Jon's use of precedent mirrored what Sohn had contended was legitimate under modern conditions of accelerating change in the international legal and institutional order. Change on all dimensions has been going forward with great rapidity (just as technological change, population growth, and resource crises have accelerated the pressures for change).<sup>65</sup> Reflecting Sohn's contentions, Jon believed that non-binding resolutions of international bodies, dissenting opinions in arbitrations, diverse writings by legal commentators,

---

<sup>63</sup> Van Dyke, *supra* note 1, at 31. Other references to Sohn's ideas in the paragraphs following here are from *id.* 31-47.

<sup>64</sup> Sohn, *Dispute Settlement*, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS 126, 126, *quoted in* Van Dyke, *supra* note 1, at 32 n.4.

<sup>65</sup> See, e.g., Harry N. Scheiber, *Economic Uses of the Oceans and the Impacts on Marine Environments: Past Trends and the Challenges Ahead*, in THE WORLD OCEAN IN GLOBALISATION: CLIMATE CHANGE, SUSTAINABLE FISHERIES, BIODIVERSITY, SHIPPING, REGIONAL ISSUES 65-98 (Davor Vidas and Peter Johan Schei, eds. 2011).

accumulating in the record of speeded-up life in the global order, could and should be cited as evidence in identifying creation of new "customary law."

For some colleagues, Jon sometimes seemed willing to cast too wide a net, indeed a large-mesh conceptual net. Though my own values and view of legal methodology were aligned with Jon's in almost all regards, I confess, I occasionally suggested to him, albeit collegially, that at least he should leave the adjective "*emerging*" in place before flatly declaring one of his dearly held values or causes to be "customary law."

A second theme in Sohn's work that was reflected in Jon's career and scholarship was an indomitable optimism about what careful analysis and dedicated advocacy could achieve. The odds were clearly against an international conference producing a comprehensive treaty, applicable universally, covering a huge spectrum of ocean uses and points of legal doctrine, when Sohn took a leading role in the American arena in the 1950s through the 1970s, campaigning for the UN (and the United States Government) to act on the idea. In the same spirit of admiration he expressed for Sohn, that "relentless" campaigning could produce meaningful change, one can say of Jon himself that he, too, was relentless in pursuit of his own causes.

Finally, Jon regarded the creation of the International Tribunal for the Law of the Sea as something close to a personal triumph for Sohn. He shared Sohn's keen satisfaction that compulsory mechanisms for settlement of ocean law disputes had become a central feature of the UNCLOS agreement, but where Sohn was cautiously optimistic about future performance Jon went further, as was his wont: He set forth a hypothetical case for the ITLOS tribunal, one in which a small nation's interest was pitted against that of a larger, richer nation. If ITLOS were to uphold the poorer nation's cause, "then the rights and duties of all states would be enunciated and international law would take greater shape." His optimism that this happy result could be realized in future adjudication before ITLOS was buttressed, it appears, by his evaluation of the slender record of three cases which had been decided to the date of his writing. He did concede that in one of those cases, the Tribunal disappointed by declining to reach the merits.<sup>66</sup> Nonetheless Jon deemed the results in the other two cases to be ample evidence on which to celebrate that "the Tribunal is prepared to act boldly and decisively with regard to highly contentious disputes." His optimism was indeed indomitable, a point on which other commentators too have remarked! It was twenty years ago, after all, that he announced that

---

<sup>66</sup> This was what he termed the "crabbed conclusion" of the arbitral tribunal to which the case was referred, that it could not reach the merits. *Southern Bluefin Tuna cases* (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280.

"we may be on the threshold of an era in which the goal of universal respect for human rights is at hand."<sup>67</sup> We do well to keep in mind, as was remarked in the first sentence of this paper, that many of Jon's dreams have actually come true.

To the foregoing observations on Jon's own style in scholarship and advocacy, it may be said again that his efforts to advance rule of law also had a powerful regional focus in the Pacific. He was respectful of the cultures and needs of the Pacific island communities, and on important occasions served as counsel in their internal and international legal activities. One of his last major projects was to document and evaluate the record of judicial reform and legal development in the island states; and he worked closely with leaders of the U.S. federal judiciary in developing collaborative projects with the bench and bar in the Pacific area. In this element of his career, too, optimism and devotion to making judicial institutions effective—parallel to his and Sohn's concern with building international institutions—were constant features of his work.<sup>68</sup>

A second major figure in international law on whom Jon wrote an appreciative essay was Shigeru Oda, the great ICJ judge and leader of legal scholarship in his native Japan. Judge Oda positioned himself in a conservative stance on doctrine as reliably as Jon did in a reformist stance. Yet, as Jon generously asserted in this study, both he and Judge Oda, each in his own way, was committed to the common cause of trying to advance the rule of law.<sup>69</sup> Jon praised Judge Oda for his dedication to careful, scholarly analysis in constructing the historical and juridical foundation of his ICJ opinions. He placed his fellow judges and the field in his debt, Jon stated, for the way in which he offered constructive criticism of colleagues' views, helping to clarify the issues before them; his opinion on those issues had to be taken into account, even if they did not prevail. In this regard, Judge Oda "assumed the important role of being the 'conscience' of the ICJ in . . . boundary cases," Jon stated, and thus "*played the role of the canary in the mine shaft*, providing warnings when his colleagues on the ICJ have strayed too far from the moorings of traditional customary law."<sup>70</sup>

---

<sup>67</sup> Jon Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENVER J. INT'L L. & POL'Y 244, 266 (1991-92).

<sup>68</sup> Jon Van Dyke, *The Pacific Judicial Conference: Strengthening the Independent judiciary and the Rule of Law in the Pacific*, 22 WESTERN LEGAL HISTORY 127 (2009) (providing a historical review and analysis of such efforts, in many of which Jon himself was actively involved).

<sup>69</sup> Jon Van Dyke, *Judge Shigeru Oda and Maritime Boundary Delimitation*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1197-1203 (Nisuke Ando, E. McWhinney, & Rüdiger Wolfrum eds., 2002).

<sup>70</sup> *Id.* at 1197 (emphasis added).

Jon Van Dyke also played the indispensable role of “the canary in the mine shaft.” Judge Oda sounded the alarm when he believed his court was betraying the established principles and rules of customary law—law in the mode that Professor Sohn had announced could no longer be legitimately sustained. Jon sounded the alarm when, instead, he believed that progress toward humane goals and rule of law was being blocked and impaired by misguided orthodoxies. Respect for, and adherence, when appropriate, to the inherited doctrines and the limited jurisdictions and structures of inherited institutions were not scorned or abandoned by Jon. But his legacy to legal scholarship was to raise challenges; and he called on his students and his colleagues to look forward, instead of routinely giving to the “stability” of law, so valued by conservatives, priority over what he regarded as paramount humane values. The challenges he poses for us will long be heeded, just as respect for his learning will be enduring, and the memory of his friendship will long be treasured in all the many circles in which he was so illustrious a presence.

