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## Arthur J. Goldberg's Legacies to American Labor Relations, 32 J. Marshall L. Rev. 667 (1999)

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## LECTURE

### ARTHUR J. GOLDBERG'S LEGACIES TO AMERICAN LABOR RELATIONS

GERALD BERENDT, GIL CORNFIELD, PETER EDELMAN, HON. MILTON SHADUR, DAVID STEBENNE, WESLEY WILDMAN AND WILLARD WIRTZ

*Dean Gilbert Johnston:* Welcome to The John Marshall Law School. Today we are presenting the program, Arthur J. Goldberg's Legacies To American Labor Relations. It was 100 years ago that a group of lawyers decided to put together The John Marshall Law School. They had a vision that legal education should be available to minorities, women and children of immigrants who could not find legal education available at other schools. So with that tradition we have continued, and to this day we still believe in that.

As far as we can tell not many other people shared that vision in those days and it was the vision of Edward Lee which then followed on with his son and successor Dean Noble Lee. It was during Noble Lee's time that, Justice Goldberg was on the faculty here.

We are proud of our alumni who have come from that background. We have provided opportunities, and from those opportunities we have seen much achievement from our graduates. And we think that this particular program fits in with that along with the Justice Goldberg's particular legacy to the world of legal education.

And today's conference is devoted to the achievements and legacies of Justice Goldberg who we recognize as one of John Marshall's most accomplished faculty members. Justice Goldberg was on the faculty in the 1930's and 40's before moving from Chicago to Washington, D.C. After he left Chicago he continued on the faculty participating as best as he could with the distance, which was much more difficult in those days than today.

It's really impossible to do justice to all the accomplishments of Justice Goldberg even in several conferences, so we have narrowed ours down today and we have chosen to focus our conference on Justice Goldberg's legacies to the American Labor Relations and his service as Associate Justice of the United States

Supreme Court. In particular our speakers will talk about his representation of the Congress of Industrial Organizations, the merger between the AFL and CIO, his service as Secretary of Labor under President Kennedy and of course his Supreme Court legacy.

In addition we have arranged for the conference to begin with a special set of reminiscences of Arthur Goldberg by people who knew and worked with him. And it's now my pleasure to introduce my good friend and excellent colleague, Gerry Berendt, who put the conference together and is one of our recognized experts in the area of labor law.

*Professor Gerald Berendt:* Thank you so much. Before I introduce our speakers and we commence the program I'd like to acknowledge the contributions of many people who have made this program possible and I'll try to make it brief. First and very significantly to our Board of Trustees for initiating this centennial celebration and particularly to President Louis Biro for his support in the Arthur Goldberg program in particular. And of course our deans, Dean Gil Johnston whom you just met, Dean John Corkery, Former Dean Susan Brody who helped with the planning of these programs and John McNamara, Jim Kreminski and Jane Oswald for supporting the centennial observance. And my special thanks to Ralph Ruebner, the professor who brought the idea of a Goldberg conference to me and who is our centennial planning coordinator and has been with me every step of the way with suggestions and help.

Many administrators and support staff also contributed to the planning of the program. In particular, I appreciate the efforts of Event Management Director Gary Watson, Elinor Kannon, Sofia Rodriguez, Publications Director Patrick Johanson, Rebecca Rassmussen and our Public Relations Director Marilyn Thomas and her support Michelle Graham, and Development Officer Ernie Melichar who collected the old John Marshall catalogs documenting Arthur Goldberg's service to our faculty which I'll comment on later. Thank you also to the faculty secretary and supervisor of secretaries, Gwen Konigsfeld.

Several members of our faculty assisted with suggestions during the planning; Walter Kendall, Samuel Olken, and Leonard Schrage in particular. And outside the law school I received valuable assistance and advice from Justice Goldberg's daughter, Barbara Cramer who is not with us today for reasons of family illness.

Also from Ron Miller of Miller and Schakman. Judge Abner Mikva who was originally on the program but as you know was called to Washington to chair the conference on Holocaust assets that were confiscated by the Nazi's and obviously could not turn that down. Judge Milton Shadur who is sitting to my left, your

right, who was very helpful with suggestions during the planning of the conference. Gil Cornfield, also one of our speakers helped with suggestions. Professor David Stebenne who's on the program. Former steel worker, officer Ed Sadlowski was a big help, and Frances Gilbert, who was Arthur Goldberg's long-time private secretary, was very helpful over the telephone, helping me get in touch with Willard Wirtz, who was also extremely helpful in the preparation. As a matter of fact, as late as yesterday he made me aware of an article that was helpful in the preparation of my remarks here later in the program.

Arthur Goldberg, as Dean Johnston pointed out, served on the John Marshall faculty in the 1930's. We have photographs of him during that period, and you should see the color of his hair. Also in the 1940's and even, as Gil mentioned, into the 1950's.

During World War II he was on leave of absence from the faculty to serve in the newly formed office of strategic services in Washington, which you know is the predecessor to the CIA, and at that time was headed by the legendary Wild Bill Donovan. After the war he returned to Chicago and practiced law in the law firm of Goldberg and Devoe, then Goldberg, Devoe and Brussell and then on and on and on with the different name changes. He resumed teaching at John Marshall at that time after the war. He taught members of our famous class of 1948 which has produced several members of our board of trustees, including President Biro, and our long time Associate Dean, the late Helen Thatcher. President Biro of our Board of Trustees remembers that Arthur Goldberg was the law school's best teacher during the time he was here.

In 1948, Arthur Goldberg again left Chicago for Washington, this time to become general counsel to the Steelworker's Union. He continued to be listed on the faculty but was on leave of absence until 1955. During his extended service here at John Marshall he taught, labor law, equity, torts, municipal corporations, constitutional law and even bills and notes. And if you know anything about the history of the law school and particularly the history of Dean Noble Lee, he probably taught all of them in the same semester.

Like any historical figure with a list of great accomplishments, Arthur Goldberg and his career have taken on almost mythical proportions. Indeed his later career as a Supreme Court Justice, United Nations Ambassador and Democratic nominee for governor of New York, have tended to crowd out in the public memory his earlier accomplishments on behalf of the labor movement and the working class and as the Secretary of Labor in the first two years of the Kennedy administration. In a sense Goldberg eclipsed himself, eclipsed his earlier record with his later record to the extent that the public to some degree has forgotten

his earlier accomplishments. We're going to try to remember those today.

When we planned this conference we decided we wanted to emphasize his early career on the behalf of the labor movement and culminate with his service as an Associate Justice on the United States Supreme Court. We also wanted to humanize our subject, and to that end the first part of the program is devoted to reminiscences about Arthur Goldberg. And it will give me great pleasure to introduce the gentlemen who have agreed to participate in that part of the program.

Our moderator for this part of the program is Judge Milton I. Shadur, who is the Senior United States District Court Judge for the Northern District of Illinois. Judge Shadur knew Arthur Goldberg for more than four decades as a law associate, as a partner in a law firm that bore his and Arthur Goldberg's name, as a lawyer for Arthur Goldberg when Arthur Goldberg entered public service, and of course as a friend.

Also sitting at the far end of the couch, Professor Willard Wirtz, who succeeded Arthur Goldberg as Secretary of Labor for President Kennedy and then served as Secretary of Labor through the Johnson administration. Professor Wirtz was Under Secretary of Labor when Arthur Goldberg was Secretary of Labor. In addition, he's a distinguished law professor most prominently at Northwestern University School of Law, and most recently in San Diego. He is a noted arbitrator and mediator, and time does not permit us to list the various fact-finding boards, Taft-Hartley boards, mediations, committees and government appointments that W. Willard Wirtz has held.

Our third participant in the reminiscences is Professor Peter Edelman. He joins us from Washington where he is a Professor of Law at Georgetown University Law Center. He served as the law school's Associate Dean in the 1980's. He also served as Justice Goldberg's law clerk at the United States Supreme Court from 1962 to 1963. He too has held a number of government posts, including Counselor to the Secretary of Health and Human Services, and Assistant Secretary for Planning and Evaluation at that department.

Again Abner Mikva apologizes, as does Barbara Goldberg Cramer, for not being able to join us for this part of the program, but I'm sure you'll agree with me that the memories will be priceless. Judge Shadur.

*Judge Milton Shadur:* Well, I'm constantly reminded, most often by our Court of Appeals, how important it is that I be careful about the language that I use. Sometimes that reminder comes in gentle forms, sometimes not so gentle. But anyway what I did, which is sort of unusual for me, is to write down the things that I wanted to talk about.

It does not of course need any explanation or amplification to tell you simply how gratifying it is for me to share with all of you, and with my colleagues on the program, in this celebration of a great man's life. There was, I must admit, one troubling note when I learned of my requested role to serve as moderator over the part of the proceedings labeled "Reminiscences." As I suspect is true of everyone in the human condition, my mind's eye holds a much younger image of myself that's unwilling to acknowledge that I qualify for the anecdotal category. But consistently with my adherence to the realist school of jurisprudence, I've managed to banish that element of self-deception. Once having overcome that doubt, I thought that some insights into Arthur Goldberg, the private person, might profitably illuminate the public person about whom we'll be talking this afternoon, and so I turn to that task.

All of us are familiar with, if indeed we don't know by heart, these lovely lines by Robert Frost:

Two roads diverged in a wood, and I - -  
I took the one less traveled by,  
And that has made all the difference.

Less poetically, either Henny Youngman or some other master of one-liners has said that if Moses had only turned right instead of left after the Hebrews crossed the parted Red Sea, Israel would be an oil-rich country instead of having to be content with just milk and honey.

Like the narrator in Frost's poem, I too was fortunate enough to take the road less traveled by. For me the timing of John Marshall's first century celebration, and of today's program, are extraordinarily serendipitous: It was almost exactly a half-century ago, give or take literally just a few days, when I first set foot on that road. In late November or early December 1948, I had just sent to the printer the last issue of the *University of Chicago Law Review* for which I had the editorial responsibility as Editor-in-Chief, and I was able to turn to the question of how I was going to manage to support my young wife, our year-and-a-half old son and myself on graduation at the end of December. One of my professors was good enough to tell me about a three-lawyer firm that he understood to be looking to hire an associate. All three were of an age—each about 40. In any event, I went for an interview.

That firm was Goldberg, Devoe and Brussell. And parenthetically, the reason that they were in the hiring market was because someone else had been hired earlier but hadn't worked out—and whatever shortcomings the partners in the firm may have perceived about my predecessor during that brief

relationship, he did manage to father the playwright David Mamet.

But to return to my own narration, I first met Carl Devoe, then Abe Brussell. Earlier that year, Arthur had been selected as the new general counsel of the CIO and the United Steelworkers of America—a shift from his background, which was that of a general practitioner with increasing emphasis on the labor practice, to becoming a full-time labor lawyer. Although he and Dorothy hadn't moved to Washington, where the CIO's small building a few blocks from the White House was located, Arthur was spending about as much time in the air between Chicago and Washington (with side trips to Steelworker headquarters in Pittsburgh) as he was spending on the ground in any of the three places.

So I got to meet Arthur a very short time later, on his next trip home to Chicago, after Carl had told him about our meeting and the partners had decided among themselves to offer me a job, subject to my passing muster with Arthur—unanimity of decision was of course essential. That first meeting presented in microcosm two things that defined Arthur both as a lawyer and as a man—lessons that placed me at the beginning of the less-traveled road and that I too tried to live by thereafter.

First, even though the firm was then an amalgam of a substantial broad general practice, representing small businesses and individuals in every conceivable area of legal work, something that was highly unusual when coupled with a labor law practice on the side of labor, the Steelworkers were the largest single client in terms of firm income. My guess is that it represented something in the 20 to 25% range of the firm's gross billings. But Arthur said to me that it didn't matter how large or important a client was—if keeping the representation ever meant the need to do something or to take some position that we regarded as fundamentally wrong legally or ethically; or in any way contrary to our deeply-held convictions, even if not perhaps technically a violation of the then-defined Canons of Ethics, a lawyer had to be prepared to tell the client to go to hell—to take its legal business elsewhere. As Arthur put it, all of us should have enough confidence in our legal abilities to believe that we could survive economically without that important client, to rebuild the practice even if it meant some tough times in the interim.

That was brave talk. Though I wasn't of course privy to the numbers at the time, the three lawyers were then occupying unprepossessing offices as subtenants of another firm at 231 South LaSalle Street. My tendencies as a squirrel have permitted me to dredge up at home the firm financial statement of three years later, when I was already a partner, and I can tell you that the firm's gross income from fees in that year, including Arthur's Washington compensation from his general counsel position that

went into the pot—mind you, gross income, not the partners' net income—came to the munificent sum of \$108,000. So as you might guess the figures at my time of hiring, the end of 1948, had to have been appreciably lower.

But whether brave or merely rash, Arthur's statement of principle was firm. It provided me with a major insight into him and into the other partners, for that matter, and I tried to follow that polestar during the next three decades during which I went from brand new associate to the senior active partner in the firm before being appointed to the federal bench.

There was a second statement of principle that Arthur voiced in that first meeting, not as a matter of preaching but as a simple statement of fact. To paraphrase that message, Arthur emphasized that we must never forget that as lawyers we are accorded a monopoly position. No one can practice the profession without a license. And that special privilege, with its combined blessing of education and opportunity, carries with it a corresponding societal responsibility—a duty to return full value to society, to engage in some important social good even though it pays less than market price for our services or more likely involves no payment at all. That early notion of a duty to engage in pro bono activity of some kind, without the law firm either limiting or imposing any collective view on any individual's decision about what he or she considered to be a social good, set Arthur apart not only from the attitudes of that day but from law firm thinking and practice in decades to follow.

In my view, it also set the firm—which remained committed to that notion over the years—apart from the mine run of practitioners. Although you're free to consider this as overly simplistic or as a matter of overweening pride or both, I do believe that ongoing mindset was a major factor in the unique history of the firm, which never numbered more than 20 or some lawyers, in ultimately counting among its alumni judges at every level of the federal judiciary: Arthur on the Supreme Court, Ab Mikva on the Court of Appeals, I myself and since then Elaine Bucklo as District Judges, Ron Barliant as a Bankruptcy Judge and earlier Elaine as a Magistrate Judge. And on the state side of the ledger, just a few years after he left our firm Abe Brussell became a state trial court judge, and he served with great distinction on that bench until his untimely death.

If our good friend and partner Carl Devoe were still among us, I know he would be sure to tell you—as he later told me—about the origin of the firm. In World War II both Arthur and Carl were in the OSS, the CIA's predecessor, under famed General Wild Bill Donovan—Arthur was in the Army and Carl in the Navy. They'd been friends in Chicago before the war, and they made arrangements to meet to talk about their plans if both were



fortunate enough to survive. That meeting turned out to take place on a night in Casablanca—not at Rick’s Café Americana with Humphrey Bogart as their restaurateur-bar-owner host, but on the rooftop of a low-lying building during the wartime-enforced blackout. As Carl told it, the two of them were engaged in a serious discussion about joining forces as partners in the practice of law if and when they got out of the service when Arthur, who was facing Carl, grew strangely silent. Carl turned around to see what had engaged Arthur’s rapt attention and saw a nubile young woman framed in a lighted window across the street in the process of disrobing. So the firm had still another unique distinction—doubtless being the only law firm ever to have had its organizational meeting take place in an exotic setting, disrupted by an amateur but still highly effective striptease.

To return to more mundane matters, after I was hired I quickly learned another attribute of Arthur and his two partners: the willingness, once a judgment had been made about someone’s ability, to back it to the hilt. It was a heady experience for a fledgling lawyer to practice in that environment. During my first year and a half or so in the practice, I had the privilege of handling on my own perhaps a dozen or more matters in appellate courts, in addition to the more humdrum everyday aspects of the practice. Just one example: Late in 1949 or early in 1950, Arthur got the blessing of Philip Murray, then head of the CIO and the Steelworkers, to weigh in as *amicus curiae* in the United States Supreme Court in *McLaurin v. Oklahoma State Regents*, a challenge to the refusal of the University of Oklahoma to admit an African-American candidate for a Doctorate in Education, except under demeaning segregated conditions — sitting apart at a designated desk in an anteroom adjoining the classroom, being unauthorized to use the desk in the library’s regular reading room (again relegated to a separate desk elsewhere), and sitting at a designated table and eating at a different time from other students in the school cafeteria. Arthur asked me to prepare and file the brief.

It may have been another instance of foolhardiness—I was just one year out of law school, not yet a partner though I had been told that was shortly in the offing—but Arthur left it entirely up to me to write and file that brief without clearing it with him, even though his name and not mine had to appear because I wasn’t yet a member of the bar of the Supreme Court. When nearly 30 years later I was putting together my response to the questionnaire from the Senate Judiciary Committee for my own consideration as a District Court nominee, I dredged up a copy of that brief—and I was both surprised and I confess especially pleased that entirely on my own I had committed the CIO to a position urging that *Plessy v. Ferguson* should be overruled and that “separate but

equal” should be excised from our jurisprudence—and that was four years before the decision in *Brown v. Board of Education*. Talk about rashness and brashness!

Even though I had forgotten that, and even though I had also blocked from my mind what it might have done to Arthur’s position if Phil Murray had not shared that point of view, I did remember a disturbing call that I got from Arthur immediately after I had filed the brief directly with the Supreme Court, sending copies to Arthur in Washington:

“What are you doing using a non-union printshop for one of our briefs?”

Panic set in—in those days all briefs were printed, and I had used (as we did for all of the firm’s appellate work) the Gunthorp-Warren Printing Company here in Chicago. So I called Larry Veit there:

“Don’t you use union labor?”

His response:

“Yes, of course, but most of our customers prefer that we not disclose that on the briefs.”

When I relayed that information to a much reassured Arthur, he told me:

“Never let any filing go out without the union bug.” And so he added a less inspiring but equally permanent mark on my psyche.

Well, it’s impossible to encapsulate the many years of association that followed — the time until Arthur left us in January 1961 to join the Kennedy Cabinet as Secretary of Labor, his few years there, the ensuing three years on the Supreme Court, the period of his United Nations ambassadorship and his ensuing years in private life. During all of that time, the separation of space and time would fall away whenever a call—or more rarely a visit—came from Arthur. Invariably he would begin with “Well, counselor . . .” before launching into the question that he wanted to ask or the subject that he wanted to talk about. And I never risked asking him the question whether he was less than serious with that label. For me the idea that Arthur would ever come to me for my views or my advice represented the ultimate in compliments, however undeserved.

Well, I want to desist now in favor of my colleagues on this “Reminiscences” section. If time permits a bit later, I may have the occasion to chime in again, but in the meantime let me turn to my colleagues in this “Reminiscences” section of the program.

Although Willard Wirtz would perhaps more logically come next, he has said that what he’d like to do is to make himself available as a target for questioning. So instead, I’m going to turn to another distinguished guest, Peter Edelman. Peter.

*Professor Peter Edelman:* Thank you Judge and thank you so much for what you said. That was just wonderful to listen to.

Justice Goldberg made such a difference in my life, so to hear you start out with what it was like when you first came into the firm resonates strongly. I take up the story from where you left off in the sense that in 1962 he chose me to clerk for him. I was supposed to clerk for Justice Frankfurter. Having clerked for Judge Friendly on the Second Circuit and having gone to the Harvard Law School, I had been indoctrinated—I hope that is a reasonable word—with the idea of neutral principles in the law, which sounds good but of course works out to be not so neutral in practice. And so when Justice Goldberg replaced Justice Frankfurter and David Filvaroff and I ended up clerking for Justice Goldberg, I had no idea what was about to happen to me, and was quickly immersed in a very different judicial philosophy. It took me a little while to get adjusted, but it made a mark that has lasted to this day and for which I'm very grateful.

He was not only an enormous influence on me philosophically in terms of the values and views that I have about the law, but he made a recommendation to me that affected everything else that happened to me later on. You talk about the road less traveled. What if, Justice Frankfurter had not fallen ill and I had clerked for him? What would I have ended up doing with my life? Justice Goldberg took an enormous interest in anybody who came into his orbit. Everybody became part of the extended family. You went to Passover Seder, it didn't matter whether you were Jewish or not, you came to Passover Seder at his house. The crowd just got bigger and bigger. That's probably why he had to leave Chicago—because he needed to start a new crowd in Washington. By the time I came along there were probably—I don't know, it spilled out into room after room in his house—forty, fifty people at these Seders.

Justice Goldberg asked me one day what I was going to do when the clerkship was over? I said I didn't know. Justice Frankfurter always told his law clerks go home, go back to where you grew up—not bad advice—put your roots down, that's where you know people. Justice Goldberg was certainly not opposed to that, but he said, "Go into the government." He said, "There won't be many Administrations like this one in your lifetime"—President Kennedy was still alive then, of course. I thought, Franklin Roosevelt was the only President I knew until I was 10, and then there was Truman, and Eisenhower was a little bad, but what did he mean there were not going to be that many like it in my life time? But all right, if that's what he said I should do, I would do it. Everything else that's happened to me stemmed from that and I'm very grateful.

Justice Goldberg served as the flower person, I think that would be the correct way to describe it, at my wedding. When Marian and I were married in the back yard of a friend's house in

McLean, Virginia and the Reverend William Sloane Coffin with whom Marian had lived at Yale Law School officiated, Justice Goldberg was kind of the all purpose attendant, sort of the best man. We didn't have a large group of attendants, so when the time came for Marian to hand her flowers to somebody, Justice Goldberg was standing there so he played that role as well.

It was that kind of a relationship. Marian's father had died a long time before that. My father, I'm glad to say, was still alive, but the Justice was a second grandfather to our children. He was so formal in public, always had that three piece suit on I think except at the farm, maybe even sometimes at the farm, but in fact it was so paradoxical. He was warm and wonderful privately.

*Judge Milton Shadur:* Of course he had to have a vest because of the Amalgamated Clothing Workers.

*Professor Peter Edelman:* You've just explained something. It's like the union bug. He had a union bug about wearing a vest. So he was really so warm and wonderful as opposed to that formality that people saw. I do have to add, if we're going to puncture myths, he became a lot more protocol conscious as he got older. As his numerous titles receded into the past, he was more and more insistent on being treated as though they were still current.

But that was paradoxical. I don't know anybody in my experience who was such a distinguished person and absolutely continued to grow with the times as much as Justice Goldberg did. It would have been so easy for his development to have stopped at any step along the way. We know so many people who were liberals during that period of time, especially those who were involved in all the struggles against Communism, as Arthur Goldberg indeed was, who stopped in the 1960's or in the 1970's, and said, that's it, there are all these new issues and I'm not interested. Justice Goldberg kept right on growing. He co-chaired with Ramsey Clark, a commission of inquiry into the Fred Hampton case and the treatment of the Black Panthers because he felt that a wrong had been done. It wasn't that he agreed with their politics, but he felt that a wrong had been done. He represented Curt Flood to challenge the baseball reserve clause. He was always growing, always there.

And he was always on the telephone. He called up all the time. He loved those titles. He would call up and he would say, Professor—and you know he didn't say this is the Justice calling—you just knew who it was on the other end of the phone.

One time in the 80's—I didn't even have tenure yet at Georgetown—somebody asked me if I wanted to be considered to be Dean of the American University Law School which is a fine law school in Washington. So I called him up and I said, "What do you think?" He said, "You should be dean, that's a better title

than professor." He liked those titles.

I might say a word about his departure from the Supreme Court which was, I think, a really unfortunate thing that happened for all of us. There is a dispute among those who knew him well, because there are some who think he had gotten restless on the Court. My impression was that the Court was the fulfillment of his life's dream and that he was very deeply fulfilled. But he also had two characteristics that in this circumstance were fatal flaws. One was his ego, which was not small, and the other was his immigrant patriotism. Mrs. Goldberg's mother was ill, was in fact in the hospital very gravely ill at the time. The Justice was there with Dorothy, watching over her mother and deeply involved in that drama. President Johnson called him up at the hospital and said, "I need your advice about who I should appoint to replace Adlai Stevenson at the United Nations." Goldberg named a number of people. Johnson was really good at this, as we know, so everyone that Goldberg would suggest Johnson would tell him why that was not the right person, and finally he said, "It's you Arthur, I have to have you. You're the only person who can bring peace and you owe it to your country." Johnson always knew his man.

This is vivid in my mind. We all remember where we were when President Roosevelt died or President Kennedy was killed and so on. I remember exactly where this conversation took place, when he told me why he had decided to leave the Court and take the UN job, standing in front of the Methodist Building across the street from the Supreme Court. I was working in the Senate at the time and I was on my way to a meeting and I ran into him. I said, "What is going on? Why are you doing this?" And he told me this story. He said, "Peter, if I can bring peace, if I can make a contribution to that, it's greater than anything I'll ever do on the Supreme Court." So he left the Court which I think was a great tragedy, and went to the United Nations.

Of course, he made great contributions, he was an author of Resolution 242 and so many other things that happened at the United Nations. I don't know of any understanding specifically that he had with President Johnson about whether he would be put back on the Court. I always thought there was, but Goldberg had too much dignity and stature to say one way or the other. But the reason I think there must have been is because it would be Johnson's style. He liked to have something to hold over people, he was very good at that. In any case, Goldberg broke with him on the war and, very characteristically, never said anything publicly. But he realized that he had been had, if I can put it in words of one syllable. You may remember that Johnson sent him on a worldwide peace making tour in the Christmas of 1965 that everybody else knew was absolutely a sham. It gradually dawned

on him that Johnson was not about making peace and that he was being used. He began to agitate internally that there should be a bombing halt so there could be real negotiation. It made Johnson really mad at him.

Finally, Goldberg resigned over the disagreement. He never said a word about it publicly. Many of you know I quit the government recently over my disagreement with a policy and was public about it although I tried to do it in a calibrated way. That was not Arthur Goldberg's style. He believed that you kept your disputes internal. So he never said anything. He left the government and of course was not put back on the Supreme Court because he had broken with Johnson and that was the end of that. It took tremendous courage for him to do that. It was such a statement, so consistent, so representative of who he was that he never went public with it and he gave up what I believe was a promise to get back on the Court, although of course I can't prove that.

Then we come to his candidacy for Governor of New York and I have to tell you that was not his finest hour. I went as the deputy campaign manager. I was the only former law clerk who knew anything about politics and so I was kind of drafted. Steve Smith, the Kennedy brother-in-law who I knew quite well, pulled me into it as well as pulling in Goldberg himself. He was up against Nelson Rockefeller. You just didn't defeat Nelson Rockefeller. Nelson Rockefeller had an unlimited supply of money. If he ran out of campaign contributions he went into his own pocket and had ways to put that money in very useful places. It was going to be tough.

On the other hand, Goldberg started out doing very well in the polls. I think he had this idea that the way you got a public office was to get appointed. He didn't quite get the idea that you were supposed to go out and get votes. He'd been Secretary of Labor and he'd been Supreme Court Justice and he'd been the United Nations Ambassador. In fact, he went somewhere and somebody said to him, "You've had all these titles, which one do you prefer?" Of course, you're the candidate, you're supposed to say, "Oh, just call me Arthur." He said, "I prefer Mr. Justice."

Homer Bigart, the great war correspondent of the New York Times, was in the last years of his career and was assigned to cover Goldberg. He went around with him one day and in a news story the next day—it wasn't too prominently placed, didn't hurt as bad as some other things—the first line was, I spent a week with Arthur Goldberg last night.

I said one time, "You have to be critical of Nelson Rockefeller's record on a whole series of things besides saying what you're going to do." He said, "I said he was a failure, what do you want?"

He thought that the thing that would really win it is if we

wrote a book. He thought if we got all of his positions out there everyone would see how thoughtful he was and he would win. If you judged it by the staff we had working on it, he would have been governor for life. We had Stephen Breyer, we had Alan Dershowitz, we had Donna Shalala, who had just gotten her Ph.D. from the Maxwell School. We wrote an absolutely terrific book, which nobody wanted to publish, so he paid a little money and we put it out on a private basis.

That was an experience that I had to share with you, the whole thing about the campaign. I vowed at the end of that campaign that I was never going to speak to him again, I was finished. It was so awful and he had been so terrible, but of course it didn't work. Very shortly thereafter the phone would ring, I became the Vice President of the University of Massachusetts, and this voice would say, "Mr. Vice President." And, we'd go with the kids out to the farm with the family and he was so wonderful to the kids. It lasted for the rest of his life and we treasured it. Such a tremendous loss when he passed away. His health hadn't been good but there was really no indication that we were going to lose him. His mind was fine, his telephone finger was active.

But Dorothy's passing broke his heart. So it was a great loss, it was a great loss to lose her who we loved, and a great loss to lose him.

*SPEAKER:* Well we're waiting with an expecting ear, tell us something about the labor department in that formative period.

*Professor Willard Wirtz:* Following these two marvelously warm statements, I think of the old story about the teacher putting a question to student A with apologies about whether he had made it clear or not. Student A said, "Yes, professor, it's a very good question but I'm frank to say I'm unprepared." So the teacher turned to student B, whose response was, "Well I'm fully prepared but I don't think the question has anything to do with the subject assigned for the day." This left student C, who replied, "I'm fully prepared, and I think it's an excellent question, but I have nothing to add to what the two previous speakers have said."

Arthur Goldberg was opposed to starting a speech with any kind of canned story. Peter has talked about the fact that Arthur was a very proud man and part of his effectiveness was in the fact that he impressed other people so strongly. It was part of the way he broke some of those labor disputes. He had authority and he used that authority. I believe he thought that the humor diminished his dignity just a little.

I'm glad you both spoke about Dorothy. Dorothy was so large a part of Arthur Goldberg that for us to try and reminisce without making that very clear would be a great mistake. It came through more subtly than it usually does in a case of that kind of human relationship. She was so good at it.

There is time for only one or two reminiscences. I remember first our being together here in late August or early September, 1962, trying to settle the Northwestern Railroad strike. We were in the hotel room and the phone rang. I realized that Arthur was talking with President Kennedy. Then he turned me and said, "The President wants to speak to you." The President asked me to be Secretary of Labor, saying that he was moving Arthur to the Supreme Court. The only point in telling this story is that I became Secretary of Labor because of Arthur Goldberg. It's another illustration of what Peter was talking about. Every one of us who became close to Arthur had a mentor for life. I didn't really know John Kennedy very well. I had no real eligibility for the Secretary of Labor role. Arthur Goldberg was simply doing for me what he had done for so many other people.

My other recollection involves one of the last times I was working with Arthur. This would have been about 1985. I was teaching for part of a semester at Arizona State Law School. It was a brand new law school, a small law school. Arthur spent a lot of his time the last ten or fifteen years of his life talking at various law schools. It was rarely one of the big name law schools; he wasn't looking for points.

Arthur had agreed to visit my class, and I had arranged for the students to read for that day an opinion he had written when he was on the Supreme Court. He didn't ask what he should talk about, but he had requested that a table with nine chairs around it be placed in the front part of the classroom. When I introduced him to the class, he immediately assumed command. Arthur was in command of every situation he ever faced. That was part of his effectiveness.

Glancing around the room, Arthur asked eight students to come forward and join him at the table. Although his selection seemed to be at random, I don't need to tell you, that he managed to select three minority group students and that four of those he included were women.

"Now," he said, "it's Friday. You are members of the Supreme Court. I'm the Chief Justice. We are going to talk about this case we just heard argued. I am going to call first on the one of you who was selected last, and then we are going around the table. Now, sir, how do you think we should decide this case?"

It went on for forty minutes. Every student in that room learned more about that case than about any other in the course. Everybody there was thinking. And I learned more about the pedagogical value of student participation than I had in most of a lifetime of teaching. Arthur Goldberg was, in all the roles he played, a superb teacher.

This room is full today of people who are here because we realize that Arthur Goldberg could put our ideals into operation.



He was a masterful translator of these ideals, "liberal" ideals. He was a supreme activist. He put into effect what you and I believed. His legacy won't be marked in terms of particular monuments or achievements, but in terms of those human relationships which he had with so many people.

He changed our lives by believing in always better and bigger things. He was never content just to win a case or to win a particular argument or even to negotiate a particular settlement. He always found a context of something more important. He would say to law students today, "Stop thinking in terms of being just lawyer/advocate. Think in terms of being lawyer/statesman." Arthur changed the way a great many people in this country felt about labor and about the liberal ideas. He taught us the importance of putting people in the first place instead of someplace else on down the line.

We are all really here to say thank you. It's just that simple.

Voice: One last plea to Judge Shadur about a story that he told me last night involving Esther Kurgans. Are you willing to share that? Again, Mrs. Kurgans was Arthur's mother-in-law.

*Judge Milton Shadur:* Esther Kurgans lived with Arthur and Dorothy in their house in Washington. On the night before Arthur was going to be installed as a Supreme Court Justice, he had a small party for a number of us: former partners in the firm, a couple of long-standing clients and friends, (Jack Potofsky, for example, from the Amalgamated Clothing Workers of America), and the only member of the Supreme Court who was invited, Chief Justice Warren. And to talk about somebody who embraced everybody whom he encountered, Chief Justice Warren had that quality as well. And he was talking with Mrs. Kurgans. Though I won't try to emulate her accent, which was delightful of itself, the Chief Justice said to her:

"Ms. Kurgans, how does it feel to have Arthur on the Court?"

She thought for a second and said:

"Well, Mr. Chief Justice, I'll tell you. That it should happen to Arthur I'm not surprised. That it should happen to me, I'm surprised."

*SPEAKER:* While our panel retreats from the platform here I'm going to tell you a little bit about the next part of the program. The next part of the program is devoted to Arthur Goldberg's legacy to the American labor movement. If you've read our first speaker's book, that is David Stebenne's book, you know that we could have devoted a full day's conference to the subject of Arthur Goldberg's contributions to the labor movement alone. Doctor Stebenne teaches Modern American, Political, Economic Labor and Legal History at Ohio State University. He earned his BA from Yale University and his Ph.D. and JD degrees from Columbia University. Before entering academia Professor Stebenne held

several governments posts including Legislative Assistant to a member of the United States House of Representatives. And he also worked in three Washington area law firms.

In 1996, Oxford Press published his book, *ARTHUR GOLDBERG, NEW DEAL LIBERAL*. His other publications include an article on the Eisenhower Presidency and he is presently working on two new articles on labor, business and government. And also on another book whose working title is *Arthur Larsen, Modern Republican* which it has occurred to me is an oxymoron nevertheless.

I'll introduce your second speaker who will also be talking on this subject after Doctor Stebenne's speech. Doctor Stebenne.

*Professor David Stebenne*: Thank you. It's a pleasure to be here today, in a room full of people knowledgeable about and interested in Arthur Goldberg. That's the biographer's dream. And actually, just to put my own presence in perspective, the way I think of it sometimes, Arthur Goldberg had an impact on three generations really: His brothers and sisters from the labor movement days, his 60's children of whom Peter Edelman is a very distinguished example, and then his grandchildren, young people that he taught either formally or informally during the period of his semi-retirement, especially during the 1980's. And I'm one of Arthur Goldberg's metaphorical grandchildren. So I never knew him when he was on the TV, in other words I was a little kid, I came along later. And what I'm going to give you is an historian's perspective from someone who was not in any sense a contemporary.

All right, so here goes. In the spring of 1960, *Fortune Magazine* published a profile of Arthur Goldberg under the heading, "Labors Plenipotentiary." And the timing of that article could hardly have been more appropriate. For Goldberg in 1960 was in the last of his nearly 13 years as a truly major figure in the American labor movement. The article's title was also very apt. *THE CONCISE OXFORD DICTIONARY* defines "plenipotentiary" as, "A person, especially a diplomat invested with the full power of independent action." And that one word described Arthur Goldberg's role as well as any one word could.

It was March of 1948 that Goldberg first arrived as a high-level figure in the CIO. As is now well known, the President of the CIO (and of the Steelworkers Union), Philip Murray, persuaded Goldberg in March of 1948 to accept the post of CIO and Steelworker's general counsel. And the literal explanation of what Goldberg was suppose to do in those two jobs is deceptively simple. For the CIO Goldberg was to become the chief Washington lobbyist. For the Steelworkers he was to become the chief contract negotiator. And had he been a rather narrow person in terms of knowledge, experience and ability, perhaps that's all Goldberg

would have done for the labor movement. And note when I say that, that would have been a lot. Instead, Goldberg, who was very broad in terms of knowledge, experience and ability, became a strategist and emissary for the American labor movement, who operated as an equal at the highest levels of decision making even though he was never an elected union official. He was almost a unique figure in the history of the American union movement. From the late 40's through 1960 Goldberg played an important part in all of the major developments that took place in the American labor movement. And this is interesting, a challenge for me, to boil down in any coherent way a short list of the most important things he did. Especially because, as Willard Wirtz had stated so clearly and elegantly, much of what he did was almost a kind of mentoring or facilitating or developing of other people.

I came up with five, for what they're worth and here they are. First, Goldberg managed the process of ousting communist-dominated unions from the CIO. Second, he won an historic court decision that made pensions a legitimate collective bargaining concern. Third, he more than anyone else, except George Meany, negotiated the merger of the AFL and the CIO. Fourth, Goldberg headed the effort within the union movement to attack labor corruption. And fifth, Goldberg managed to bring about enough labor support for John F. Kennedy as to make him the winner of the 1960 presidential election. And just doing justice to all five of these would take more time than we have time today. I'm going to talk about the last three of these five. And if you have questions about any of them I'd be happy to answer them.

And so let me start with Goldberg's third major achievement. Negotiating with George Meany, the merger of the AFL and CIO. In part Goldberg was able to bring this about, the merger, simply because the opportunity arose on his watch. In other words, when Goldberg was a leading figure on the labor scene. Partly it is the result of timing. As long as the AFL President, William Green, and the CIO President, Philip Murray, were in charge of their respective federations, prospects for merger were never very good. These men had clashed for too long over too many issues to be able to bring about such a reunification. But when both of them suddenly died, however, in late 1952 an opportunity for merger finally arose. Even so this was not an easy process. To my generation the notion that there's such a thing as the AFL-CIO seems rather natural despite the rather awkward sounding acronym. But there was nothing easy or inevitable about this merger process in the 1950's.

The new federation presidents, the successors to Green and Murray, George Meany for the AFL and Walter Reuther for the CIO were both interested in merger, in the abstract, but did not get along well, because they were very different people. And they

also disagreed about many things. And here is where Arthur Goldberg made a real difference. With Reuther's approval Goldberg drafted an agreement to ban AFL and CIO raiding of each other's members. And for those of you not in the union movement or very familiar with it, this will seem technical. But it really was at the heart of the matter: We're going to stop trying to steal each other's members by formal agreement. And this was the key issue that had defeated all previous discussions about an AFL-CIO merger. This no-raiding agreement which Goldberg drafted and Meany soon accepted without substantial revision was modeled on one Goldberg had drawn up earlier for the CIO itself, to keep the various CIO unions from wasting time and money trying to raid each other.

And the no-raiding agreement that Goldberg devised and Meany accepted, established patterns that the later merger agreement would follow. Among these key patterns was an emphasis on preserving as much of the status quo as was possible. The agreement emphasized gradual, incremental change, adjudicating disputes in a formal legalistic way and gave the arbitrator who resolved such disputes a good deal of discretion. The no-raiding agreement also prefigured the AFL-CIO merger in one of its ratification provisions. The agreement became effective upon its acceptance by the executive board of each union rather than the overall convention, which would have been a much more difficult process to manage and bring about.

What helped persuade the various union executive boards to go along with the no-raiding agreement was a study conducted by a small number of union leaders from both federations. Again Goldberg makes a real difference here, he knows in his heart that raiding overall isn't helping. Let's have a study, he argues. Unlike some people in labor, Arthur Goldberg was never adverse to help from academics or from academic methodologies. The study found that even though some individual unions in the AFL and CIO had been benefiting from raiding, overall the federations were coming out about even. This gave Goldberg and Meany a very strong argument: what is the point of unions spending a lot of time and money on raiding if the overall result for the AFL and the CIO was negligible? And this argument helped convince unions representing a majority of the members of the AFL and the CIO to accept the no-raiding agreement in May, 1954. And the stage was then set for a true merger discussion and negotiation.

Goldberg believed in the merger. It was controversial then and to some degree it still is even today, for several reasons. Goldberg thought the competition between the AFL and CIO was wasteful and did not serve the needs of American workers. He also thought that the effect of the merger over the long term, and Arthur Goldberg was very definitely a visionary, would be to force

both the AFL and the CIO to move toward a more centrist economic and political position similar to the one occupied by the Steelworkers Union. The merger also made sense, he felt in the mid 1950's, because the CIO had decided to support Truman's Containment Policy in the late '40's, thereby putting an end to differences of opinion with the AFL over foreign policy issues. Similarly the CIO had shifted toward a more moderate, domestic agenda from the left. And the AFL had shifted toward a more moderate domestic agenda from the right.

Goldberg was not only a visionary, but a realist. He understood that the CIO stood to gain from a merger in the mid 1950's because the AFL was increasing its strength relative to the newer and smaller CIO. To have waited would likely have meant, Goldberg believed, a future merger on terms less favorable to the CIO's core values. And I think he was very right about that.

Making the merger talks even more urgent was one other provision of the no-raiding pact. Goldberg and Meany came up with the idea that the pact should expire at the end of 1955 unless both parties had moved towards merger. So not only does Goldberg remove—with Meany's help—the key stumbling block, Goldberg also gives both parties a sense of urgency which is one way of facilitating any kind of negotiation.

Even though all of these things had been done in advance, the road to merger during the second half of 1954 and throughout 1955 proved to be a fairly bumpy one. Walter Reuther spoke for an influential minority within the CIO which strongly and vociferously objected to the AFL's stands on such issues as labor corruption and civil rights. There were AFL affiliates such as the Carpenters and the Teamsters that strongly objected to any crackdown led by the new labor federation on corruption within the member unions. And there were also personality conflicts among the various union chieftains that made matters difficult.

I once asked Fran Gilbert, who knew Arthur Goldberg so well, if she could give me a short illustration of the difference in temperament between Reuther and Goldberg. And she said Justice Goldberg would always go to lunch with George Meany even if it was purely social, even if it took an hour, even if there was a lot to do, because Meany liked to have lunch, he liked the break. Walter Reuther's idea of lunch was a chocolate bar, kept in his jacket pocket. And this is not to diminish Walter Reuther, he had a sense of urgency, that things needed to get done. But as a result, the difference in temperament between Reuther and Meany was enormous. If they had taken a lot of pictures of those three men, (like Roosevelt and Churchill and Stalin) of Meany, Goldberg and Reuther, Goldberg would always have been in the middle, like Roosevelt, facilitating. And that's really what he represented in the union movement.

So how did this agreement finally work? Well Goldberg, (once again his superior legal skills make a difference here) says, "Let me draft a proposed merger agreement. I'll do it." He worked very hard on it. And then he took it to the CIO leadership and very cleverly maneuvered them into going along. They took the draft, they read the draft and their initial response was, "This is great, but Meany will never accept it." Goldberg said, "Fine, then you shouldn't have any qualms about voting for it." And, so they did. Goldberg then went to lunch with George Meany, and said to him, "George, if you want a lot of changes it won't work, you will just play into the hands of those in the CIO who are unenthusiastic. If you take it as is we're in business." Meany flipped through it, literally, over lunch and said, "I'll take it," without any real revisions. And so the AFL-CIO merger agreement was really drafted by the CIO, by its lawyer.

The AFL-CIO today has its own perspective on this. Sometimes when you call AFL-CIO headquarters in Washington you encounter people with an AFL background. A friend of mine, an academic called not too many years ago and got one of these AFL sort of people. My friend had a question about the CIO merger, and the person on the other end of the phone asked, "Oh yes, when did they rejoin us?" That is an AFL perspective on these issues, which is not an accurate reflection of what actually happened.

In any event, Goldberg comes back from the lunch, meets with Reuther and says, "Meany says yes, he'll take it." And Reuther's response was, "You're kidding." Reuther had lots of qualms about this, but, Goldberg said, "Don't worry, we'll make it work." They went down to Miami on February 9, 1955 to meet with the AFL leaders and seal the deal. And it seemed to be all done and then a huge argument arose over one final issue, which was what to call the new labor federation. You would think that this would not be a major hurdle after all the others, but in fact the AFL people wanted to retain their name. "Well," they said, "it's the older name, it's the American Federation of Labor, that's inclusive enough." Walter Reuther at this point made a difference, he said, "We'll leave, the auto workers will walk out rather than join something called the American Federation of Labor because that would signal that it isn't a merger." You can imagine what this convention was like, George Meany saying, "Oh come on, be cooperative," and then a meandering discussion on the part of union leaders in the room to try to combine elements of both names, "the Congress of American Labor, COAL, doesn't that sound good." None of it was going anywhere. Goldberg finally came up with the idea, he's again very practical and yet still visionary. He pointed out to these people later in the year when they were still arguing about this, "Well you know the two major

newspapers in Washington, D.C. had just merged and they're going to put both of the names, hyphenated, on the top of the masthead. If they can do that, why can't the new labor federation be called the AFL-CIO?" And, so among Arthur Goldberg's many contributions is that he literally gave the American labor movement its modern name; although of course I suspect that most members of the AFL-CIO today are entirely unaware of it. The other leaders said, "Well, it's not exactly music to our ears, but it works."

And so the merger was on. Which brings me to its consequences. The AFL wing of the labor movement did make some very important concessions. They accepted at least for a while, the CIO challenge to do something about union corruption. Shortly after the merger the Teamsters union, as I'll go on to talk about in a bit later, was expelled. The AFL wing also accepted to CIO's preference for a close relationship with the Democratic Party rather than a more opportunistic position of neutrality that many in the AFL had long favored. To those of us today it seems natural that the President of the AFL-CIO would speak at the Democratic National Convention as he did here in Chicago in 1996 but not attend the Republican one. That's a CIO innovation that has stuck. The AFL wing also agreed to support civil rights legislation in the 1960's and AFL-CIO support was crucial when passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965, although most people today would not be aware of that fact.

In other respects, however, the AFL position prevailed in the short to medium run. Still unclear, however, is whether that will be true in the fullness of time. It was Goldberg's hope that over the long run both sides would move toward a moderate, middle position. And as of today it is still impossible to be certain whether his hope will ultimately be realized. Although historians don't make predictions (that's the province of the political scientist), I'll make one: I think in the fullness of time Goldberg is more likely to be right than anyone else on this issue.

Which brings me to Goldberg's fourth major legacy, a related one to the American labor movement, his fight against corruption within it. And again this is a long and tangled story. I cannot retell it completely here today but there are a few key points I'd like to make about Goldberg's particular contributions in this area. First, he responded much more constructively to this problem than did many other AFL-CIO leaders. When labor corruption first became a major public issue in the late 1950's, anti-labor conservatives tried hard to use it to weaken unions in a variety of ways. And many union leaders understandably responded in a very defensive and even confrontational way, saying that the investigations into labor corruption that Congress was conducting were politically motivated and unfair, which to a degree they were.

Goldberg, however, focused on the underlying problem behind the investigation. In other words, to him it didn't really matter who was saying there was corruption in the labor movement, if the charge was actually true. And if it was, the union movement, he firmly believed had an obligation to its members and to society at large to do something about that situation. And he's a very unusual figure at the top of the union movement in that regard. In other words, there were others who agreed, but he was the most forceful and open. And that was actually a very controversial position for him to take. And so while some union leaders fought the investigations, rejected the notion of outside accountability in this area and so on, Goldberg cooperated with the investigations and endorsed the idea that the AFL-CIO had an obligation to reform itself. He headed a three-member Ethical Practices Committee that did a couple of very important things. First, it devised a set of rules, an ethical practices code to live by. They were not new rules. It isn't as if the American labor movement had functioned in a moral vacuum before, but they were not written down at the time and therefore they were harder to enforce against those who broke them. In addition to drafting this Ethical Practices Code, he and the other members of the Ethical Practices Committee recommended in the fall of 1957 the expulsion of the Teamsters, then the largest AFL-CIO union, the Bakers and the Laundry Workers from the AFL-CIO, and recommended placing several other unions on probation or suspension pending internal reform.

This was a courageous move in a variety of ways. The AFL-CIO general convention adopted those recommendations and once again here is where Arthur Goldberg made a difference. Meany's support was crucial and at first Meany said to Goldberg, "I don't like corruption, I have never liked corruption, but I don't think I have the power as President to go along with ouster." Goldberg said that George Meany was not a lawyer, but he was very interested in law and legal concepts, and he had by the end of his career an astonishing knowledge of law for someone who had never been to law school. And in part that comes from the building trades environment Meany grew up in, policing work sites, learning rules of behavior. In any event, Goldberg sat him down and gave Meany a little tutorial (and he was a truly gifted teacher) about what it meant to be a legitimate labor union in the AFL-CIO. In other words, Goldberg took the position that if you were fundamentally engaged in corruption, that you were not a legitimate labor organization in the meaning of the AFL-CIO Constitution, and could be expelled on that basis. And Goldberg convinced Meany to do so, to support this, which he did.

Even harder to do, Goldberg managed to persuade George Meany to go along, almost kicking and screaming, with supporting



some kind of anti-corruption legislation in Congress that would put the power of law behind this notion that there were certain things union people shouldn't do. And Arthur Goldberg was a wonderful advocate as well as draftsman and counselor. I think he must have used every argument in the book to get George Meany to go along, both practical and principled. Somehow he managed to do it. And while the ultimate result of the legislation was not wholly satisfactory even to Goldberg, it did work to diminish corruption in the union movement. In other words if that law, the Landrum-Griffin Act of 1959, were not on the books, there would have been more.

Even so, there were problems with the overall result. The investigations and labor's admissions of wrongdoing in some instances helped diminish public confidence in the union movement. And again I'm one of Arthur Goldberg's grandchildren as it were and for my generation the notion that most labor people are honest, which is true, is not as well understood because the image that people have received in the media is that the exceptional corrupt union chief is in fact somehow typical, which is not true at all. And again, when you admit there's a problem and you try to do something about it, this is one of the consequences that can ensue.

Second, the expulsions from the AFL-CIO were so controversial within labor that the Ethical Practices Committee soon became dormant. In part that was because the expulsion remedy soon demonstrated its limitations. The Teamsters in particular once kicked out continued to thrive, to add new members and so on, which made it harder to argue that expulsion was an effective remedy, at least against big unions. And that result greatly diminished the ability of Goldberg and others to use the threat of expulsion as a lever for reform. As a consequence, the AFL-CIO by the early 1960's was beginning to move back toward the traditional AFL position of urging and allowing union affiliates, individual unions, to deal with this problem themselves to the best of their ability. And during the 1980's this rationale that expulsion is not effective and so forth was even used to justify the readmission of those unions expelled in 1957. And I don't know—I guess it was Peter Edelman who mentioned the Arthur Goldberg phone calls, or maybe it was Judge Shadur—I used to get these when I was working on the book. And on the day it was reported that the Teamsters union was going to be allowed back in, I got a call from Goldberg. I was a graduate student, he never used a title for me, I must have been one of the very few people he dealt with in the 1980's who didn't have some kind of a title. "David," he said,—he clearly was very upset and he wanted to talk about it, and this was a reminder of how much—he hadn't been in the union movement for years, he had many other things that he

was dealing with—how concerned he was about that issue of corruption. And they're all back in now, I believe, all of the unions that were expelled.

This entire episode also had one other discouraging consequence. It severely strained Goldberg's working relationship with many key labor leaders, most notably George Meany. And so by the end of this episode by 1960, Goldberg's ability to continue to influence the direction of the union movement had begun to wane. Despite that situation, Goldberg was able to make one final, major contribution in 1960 to the union movement. He managed to bring about enough labor support for John F. Kennedy's presidential campaign as to make it successful.

And you know I teach undergraduates in large numbers at Ohio State and these students, having grown up in the 80's and the 90's, tend to view John F. Kennedy's victory in 1960 as somehow inevitable or highly likely. And again, historians like to remind people of the other possibilities and there were many other possibilities, or at least one other possibility in 1960 that was in some ways more likely but did not take place. And again, this is a long and complicated story which I cannot tell in full here, but there are a couple of key points I wish to emphasize, exactly three in number.

First, Goldberg served as Kennedy's unofficial tutor during the late 1950's in the area of labor affairs. This was a very important job. And Goldberg was, as noted earlier, an extraordinarily gifted teacher. You probably only have to know Arthur Goldberg for about an hour before he had taught you something important, if that. During 1959 especially the two men, Kennedy and Goldberg, spent long sessions in Goldberg's law office during which Goldberg explained a great deal about unions, the labor movement, its history and role within the economy and politics of America. He helped prepare Senator Kennedy to be President Kennedy.

Second, Goldberg stopped a movement within the AFL-CIO to condemn Kennedy's presidential candidacy in the spring of 1960. In other words Kennedy, as Senator, had played an important part in drafting and working for anti-corruption legislation. And the building trades union, some of them in particular, were deeply angry about this. And what they wanted to do was issue a public statement on the part of the AFL-CIO essentially vetoing Kennedy's nomination. And in 1960 if the labor movement said you were no good, and you were a Democratic presidential candidate, you were finished. The world has changed somewhat, but not entirely, since that time. And what this led to was a very stormy session of the AFL-CIO executive counsel in February, 1960. And Goldberg, as he had in earlier struggles, managed to prevail, to prevent this kind of labor veto by persuading George

Meany to side with him.

Third, finally and most important, Goldberg persuaded Meany and the other union chiefs to go all out for Kennedy in the fall of 1960, something else that was not preordained. Unlike Goldberg, Meany and some of the other AFL-CIO chiefs were very dubious about Kennedy's prospects for winning the 1960 presidential election. And I could give you a list of reasons why Kennedy was still something of a long shot, but I assume this audience knows: his youth, his Catholicism, and so on.

And so these other AFL-CIO chiefs who were dubious about Kennedy's prospects for winning quietly said among themselves that to make the maximum effort against Richard Nixon who seemed likely to win, struck them as foolhardy. In other words, Nixon had started out as a rabidly anti-labor congressman but had moderated his views somewhat during Eisenhower's presidency. "Why run the risk of provoking Nixon's almost legendary vindictiveness by going all out in what would likely be a losing effort to defeat him?" some AFL-CIO leaders said. And Goldberg strongly disagreed. He believed that an all out effort by labor in 1960 could carry Kennedy to victory and that labor stood to gain substantially from such a result. And once again his counsel carried the day both with George Meany and enough of the other union leaders to bring about that result.

Although keep in mind of course it was breathtakingly close. It was another example of Goldberg, the visionary. To truly believe early in 1960 that Kennedy could win was a visionary position. I once had a conversation with Ted Sorensen about this and I said, "When it comes to Kennedy's supporters in 1960 what's the key distinction?" Sorensen replied, "Were you for him before Wisconsin?" In other words, the number of people who were for Kennedy before he won his first major primary was relatively small.

Now there were some drawbacks to this outcome, Kennedy's victory, for labor. Labor's efforts led directly to an electoral result in 1960 that greatly embittered Richard Nixon. When he finally became president eight years later Nixon was less moderate and restrained than he would have been had labor not helped defeat him in 1960. Labor's efforts on Kennedy's behalf also strengthened the most anti-union forces within the Republican Party, which veered sharply to the right after Nixon's defeat that year. Even so Goldberg seems to have been right in believing that putting the Democrats back in charge during the 60's would better serve labor's interests. The late 50's and early 60's were an unusual time in American history, one in which the American people really came to a crossroads. And what has been lost, especially among younger people such as myself, is an understanding of how close the country came then to taking a

more conservative road in the 1960's, one that would have hurt labor in important ways. It's not clear to me, to give only one example, that we would have had a huge explosion in public employee unionism in the 1960's and early 1970's if the Democrats had not come back to power during that decade.

Try to imagine what the AFL-CIO would look like today if it didn't have many public employee members and you'll get some sense of what I'm talking about. And so in retrospect Goldberg's last major contribution as a top union official may have been his most important of them all. Which brings me to the end of this paper and I'm sure you're all relieved to hear that. Listening to someone reading is not easy for most audiences, but Goldberg did so many things that if I don't organize my notes in this way it's almost impossible to keep them all straight. I do have two more points that I'd like to make about his legacies to the American labor movement.

First, his work reminds us how a single individual if he or she be gifted, determined and courageous enough can make a real difference in the life of a social movement and a society. Arthur Goldberg did enough to be five or ten people but he was in fact just one human being. Even though many people then and now were largely unaware of just how influential he was, Arthur Goldberg was fond of quoting a remark, he always attributed to John L. Lewis that is instructive in this regard, "He who does not tooteth his own horn, his horn shall not be tooted."

And this brings me to my second and final point, Goldberg did not toot his own horn during his heyday as labor's plenipotentiary. But those of us here today need to do so, to make certain that he gets the credit, for all of his many accomplishments, that he truly deserves. Thank you all. And if you have questions I'd love to hear them. Questions anyone? Thank you, you've been merciful. If you want to talk to me privately afterwards I'd also be happy to do that.

*Professor Gerald Berendt:* Again, I strongly recommend those of you who are interested in Arthur Goldberg if you have not read Doctor Stebenne's book to definitely pick it up. As a matter of fact, we have boosted your sales by purchasing a whole bunch of them which we are going to prevail upon you to sign for us and we're going to give to all of our guest speakers today.

Our second speaker on this part of the program is an old, old friend of mine. When I first got into Illinois labor relations one of my mentors, as a matter of fact a couple of my mentors, one of them is sitting here, Art Malinowski, suggested that I meet the named partners in the law firm of Cornfield and Fellman, both of whom are sitting in front of us. Gil Cornfield is a fixture in the Chicago labor relations community where he has practiced law on behalf of a wide range of labor relations, labor organization

including the American Federation of State, County and Municipal employees and the Illinois Federation of Teachers. He's a graduate of the University of Chicago Law School. He's a member, of course, of the law firm bearing his name, Cornfield and Fellman. A firm which incidentally evolved out of one of the early incarnations of the Goldberg law firm, Goldberg, Devoe and Brussell. Mr. Cornfield is, in my opinion, that rare combination of a successful practitioner and a thoughtful academic. And he is frequently summoned by law professors and industrial relations professors throughout this city and throughout this region to help them put together programs to serve as a guest lecturer and so forth. It's with great pleasure that I introduce Gil Cornfield.

*Gil Cornfield:* Thanks Jerry. I have prepared notes, not a prepared speech. We've heard from spiritual brothers, children and grandchildren of Arthur Goldberg. I guess I'm a spiritual nephew twice removed. I came on the scene in 1958 at the point that Abraham Brussell had established his own labor law firm. You heard Milt Shadur describe the Goldberg law firm at one point as Goldberg, Devoe and Brussell. I became an associate of Abe Brussell in 1958 through the intervention of Ab Mikva, who was still with what we then called the old firm. Brussell had been in the OSS with Goldberg. I never did know if they knew each other before the war or not. But, in any event, Brussell and Goldberg shared their OSS experience.

As we've heard, in 1948-49, Goldberg left for Washington become General Counsel to the CIO and the Steelworkers. The firm continued by long distance between Chicago and Washington for a period of time. Sometime in the 50's, Brussell divided from the old firm and basically took the core of the regional labor business with him. So when I came on the scene, Brussell was General Counsel to the District of the Steelworkers and to locals of the Oil, Chemical and Atomic Workers Union in the greater Chicago area. That constituted the core of the practice. When Milt Shadur described the amount of money they were making in the 40's, I was actually astounded it was that much. We relied mostly on fees from workers compensation cases to support the representation of the labor organizations.

By 1958, industrial unionism had become an established part of the national life. A situation quite different than the time that Goldberg had become involved as a movement lawyer with the Newspaper Guild and the Steelworkers in the 1930's. In those days the organization was called the Steelworkers Organizing Committee. When I come on the scene the communist element in the old CIO and Steelworkers had been eliminated. The CIO had already gone through internal strife over those issues. It was shortly after the McCarthy experience in the country and the McClellan Hearings which ultimately led to the Landrum-Griffin

Act. So that was the scene. It was a transitional period between the social movement led by the CIO of the 30's and 40's and the post-Landrum-Griffin period of labor movement.

Brussell had also been General Counsel of the CIO in Illinois. By 1958 the AFL and CIO had merged in Illinois. He was Co-General Counsel with Les Asher, who had been the General Counsel of the AFL in Illinois. Interestingly enough in my conversations with Brussell over the years, I learned that he had not been an advocate of the merger and he and Arthur Goldberg had disagreed over the matter. Brussell was not a political ideologue; but probably was more ideologically based than Arthur Goldberg. In any event, Brussell represented the viewpoint that the merger of the AFL and CIO would destroy or effectively vitiate the CIO as a social movement.

The late 50's was just before the advent of the "Rust Belt," the movement of industry in the north to the south, overseas, combined with the dramatic increase in automation and computerization.

In 1958, this District of the Steelworkers represented by our firm was made up of 150,000 members within northern Illinois and northwest Indiana. It was larger than the top 50% of the international unions constituting the AFL and CIO. In 1958, the Civil Rights Movement was just in its early stages. I think the bus boycotts were beginning but the major thrust of the Civil Rights Movement in the South had not yet come about. This is also prior to the tremendous domestic conflicts attendant to the Viet Nam War that we heard about earlier in our program. It was also just prior to the resurgence of an anti-labor ethic in this country.

When I started practicing labor law, collective bargaining and unionization were part of the American way of life. Employers would generally not openly oppose the idea of unionization, collective bargaining. It was accepted. It was some time in the 60's, I can't recall exactly when, it wasn't too long after I started to practice that this ethos abruptly changed. A moral high ground of expressed hostility to collective bargaining began to be claimed by the management labor community. They no longer ceded to labor the morale imperative. The whole scene began to dramatically change.

The year of 1958 was also prior to the rise of the public employee labor movement. Interestingly, our firm's role in supporting this new movement was, and continues to be a vital part of our role as labor attorneys.

For those of us that are of the succeeding generation of labor lawyers, Goldberg stands as a model of the union labor lawyer—a special occupation I believe almost unique to the American society and culture—for a variety of reasons. I'll just indicate some of these to you. Goldberg came out of the west side of Chicago at a

time when the industrial union movement was beginning to emerge, reaching its momentum in the 1930's. There is a nexus between Goldberg as a member of the second generation of Jewish immigrants and the emergence of this new social movement. This connection between people like Goldberg and the labor movement was peculiar to American society because people like Goldberg represented in some way the link between the workers and a broader, liberal community; between the "intellectual" with higher education degrees and the leaders of the labor movement of the depression years. The labor lawyer during that time was a product of the American experience. In western Europe labor unions generally developed along with political parties and were part of a broader political and social community. Those of us that have been labor lawyers in the United States still carry to a great extent that kind of particularized role established by Goldberg with respect to elements of organized labor which still bear the character of a broad based movement.

I listened to Milt Shadur's account of starting to practice as an associate of three lawyers on LaSalle Street. Can you image today the Editor-in-Chief of the University of Chicago Law Review going to work for a three-person law firm in Chicago? But, Goldberg's and Shadur's starts in the profession were not uncharacteristic of a new Jewish attorney in the years preceding and after World War II, whether or not they were outstanding graduates from prestigious law schools. I remember some years ago, on behalf of the Illinois Humanities Counsel, I participated and assisted in a program on the relationship of the Jewish labor lawyer to the labor movement. I interviewed Les Asher, Joe Jacobs and others who were from an older generation and in many cases these people became involved in labor movement partially because they had become professionals and there weren't other positions available to them. They did not even consider the possibility of working for the large LaSalle Street law firms. So, it was a very natural relationship that occurred between young attorneys like Goldberg and the labor movement when he became a professional. Thus, in a certain sense, my class of labor lawyers bridged the ending of an era as it was being transformed into another.

I'd like to discuss a little bit the institutional legacy of Arthur Goldberg beyond the personal professional connection. In particular, in noting Gerry Berendt's program for this afternoon, the merger of the CIO and the AFL; and, what I will call, from competition to cooperation. As it turned out, it is my view the merger was inevitable. I think the timing of the merger favored the CIO. The CIO based upon a substantial membership founded upon industrial mass unionization. If the merger had taken place ten years later, those same industrial unions would have

witnessed a tremendous and dramatic loss in membership. As it turned out, therefore, Goldberg's timing was very, very meaningful in maximizing the CIO's impact upon the merged relationship.

The merger was inevitable, in any event, because of the general decline in union membership in the private sector, and particularly industrial unions. As we've seen, since the merger there's been continuation of mergers of international unions, including the mergers of CIO and AFL internationals. So the whole process was inevitable. The timing of the merger to a great extent was because of particular efforts of Arthur Goldberg.

What about the effects of that merger on the American political life? As we look back in hindsight now, the fact that the AFL-CIO has existed rather than the CIO and the AFL, as separate organizations, was and remains a counterbalance to the politically conservative forces that have reached out to the white blue-collar craft and skilled workers. We can recall the Nixon hard hat appeal in enlisting support for the Viet Nam War and in reaction to the emergence of the Civil Rights Movement. This era began a continuous political effort to separate the white craft and skilled workers from the Democratic Party and other workers. What if the AFL and the CIO had remained separated? The CIO would have been much more identified with the Civil Rights Movement than probably the AFL because of the latter's craft and skill based workers. Under those circumstances, the efforts of conservative political forces to move labor out from its association with the Democratic Party and into the Republican Party and other conservative political organizations would have been even more forceful. The Reagan Democrats continued the same appeal that started during the Nixon period to divide the white worker from the labor movement along with the dominance of the Republican Party in the South.

On the other hand, the merger of the AFL and CIO, as Dave has pointed out, put the labor movement and its leadership in a supportive role the movement for civil rights. The AFL-CIO leadership's support of civil rights has also encouraged conservative political forces to drive a wedge between the white membership of labor unions from their leadership. We still see that phenomenon reverberating today. I don't know how many organizing campaigns I've been involved with where management's appeal is to isolate the white worker from the expressed leadership positions of the AFL-CIO. I point this out to demonstrate that the legacy of the merger is still unfolding in terms of American political life and social life.

How about on the structure of labor organizations themselves? The merger of the AFL-CIO reinforced the centralization of union structures. The CIO was a mass industrial-wide social movement. Local craft unions were, in



many ways, like the old Democratic Party in Chicago, a system of baronies based upon territories and ethnicity. The barons had, and still have, a lot of authority, although their constituencies are less defined and predictable. The nature of the construction industry in which the crafts are employed is not as centralized as compared to the CIO and industrial union movement. However, the merger of the AFL-CIO was a thrust towards greater centralization of authority and leadership within the labor movement.

The merger was also in response to an increase role of the federal government in the internal operations of labor organizations. We can consider the centralization of labor movement not only in terms of its impact upon labor; but upon the political process of our society. It has been my strongly held view that labor and labor organizations are the only significant, viable, democratically based institution in American life in which there is significant participation by the constituency served by the organization. It's not ideal but it's the only one we have that's significant. I don't view the political parties in this country as being fundamentally organizations that involve a great deal of mass participation in the electoral process. Therefore, the centralization of labor organizations that was reinforced by the merger raises interesting kinds of questions which are significant both in terms of labor organizations, as such and in the broader American society. The period of Arthur Goldberg as a labor lawyer was a time of social movement and he was a movement lawyer. He became involved as part of a social movement. That participation evolved into a professional specialty.

A social movement generally has leaders and rank and file. I started thinking about the concept of the rank and file. What does it mean to be a rank and file? It means that they are the base upon which an organization moves. The term has a kind of military quality to it. A leader goes to the rank and file to support a program. A leader speaks for the rank and file, etc. There is a difference between a social movement based upon the rank and file and democratic organizations which arise from the grass roots and whose leaders are representatives of the grass roots. I think the test for labor and part of the legacy of Arthur Goldberg is whether labor unions, now highly centralized within the American society, can move significantly from organizations based upon a mass constituency of the rank and file to organizations which grow and are continually nourished by active involvement and direction from the grass roots. I don't know. But, the spirit of democracy is and must be part of our core part of our legacy.

Thank you.

*Voice:* I missed the first half hour of the seminar but no speaker so far has mentioned or referred to the role of the

National Lawyers Guild. That fine organization which was the nexus between the law practice and the labor movement and other movements of that kind. Is there some reason why no one has mentioned it?

*Gil Cornfield:* If you read Dave's book, my recollection is he mentions it. He mentions it particularly in the context of the late 30's, as I recall, in connection with the Newspaper Guild. By the time people like myself come on the scene, the Lawyers Guild had been the target of McCarthyism and had already been heavily red-baited if you want to call it that. Subsequently, in years gone by, the Guild has had a renaissance. But I think the significance of the Guild in our meeting today relates to the pre-war in which the Guild was an important factor as a vehicle for movement lawyers to become involved with the embryonic mass labor movement.

*Voice:* Will we ever in our lifetime see another Arthur Goldberg?

*Gil Cornfield:* The way I see it is, there's a point in history in which someone like Goldberg connects with a large scale social movement and brings to that social movement intellectual and professional skills. One gets that kind of merger from time to time without a mass social movement; but I don't see that occurring. There are going to be bright people, there's going to be idealistic people, etc., but not that kind of connection. So the more fundamental question I think is, is society going to have another social movement of the order of the industrial union movement that came from the depression.

...If Arthur Goldberg had come on the scene when I did, as a bright, capable, I don't think he would have become the Arthur Goldberg of history because there wouldn't have been a social movement that he would have connected with as the industrial union movement. For example, Thurgood Marshall is a respected African-American lawyer. But his association with the Civil Rights Movement created his place in history.

*Voice:* You raised a couple of points that I need some clarification on just to understand. One was relative to the separation. Apparently, there are efforts by management for whatever reason to separate, you said, the whites from the union leadership.

*Gil Cornfield:* Oh yes, that goes on still.

*Voice:* Can you elaborate a little bit on that?

*Gil Cornfield:* I think it was Dave that mentioned about the AFL-CIO and its relationship to the Civil Rights Movement and period of civil rights legislation and the organization's strong support for that. That's true. And so you had George Meany advocating it as the AFL. Even the AFL-CIO spokesperson for the crafts, Gerogine, was a strong advocate of the legislative agenda. There were political forces, and I believe there are still political

forces in society, that use those positions articulated by the AFL-CIO as ways of attempting to divide the white worker (usually male) from identification with the labor movement on the basis that the labor movement stands for these kinds of things but they're not to your interest. Now it's not always said openly but there are strong sub-textual messages that are made.

*Voice:* My second point was, I guess you had characterized the democratic majority or in terms of the aspect of the democratic organization that was always there, you said was the labor movement. I agree with your characterization to the extent that they at least typically and conventionally supported the Democratic Party. I think maybe that's to the exclusion of, particularly the Civil Rights community that was out there. For instance, the African-American clergy in America has been since Blacks turned democrat conventionally a significant part and a constant supporter of democratic office particularly relative to the Kennedy election and some of the forces that in America have come to bear relative to Kennedy even being elected with support of the African American and the black clergy. So I didn't want to exclude that.

*Gil Cornfield:* Oh no, don't get me wrong I wasn't saying that labor movement represented the only significant element of the Democratic Party. I was only dealing with the labor movement's relationship to the Democratic Party.

*Voice:* I don't know, this is probably opening a can of worms but it seems to me that you haven't mentioned the Right to Work Clause.

*Gil Cornfield:* There are a thousand things I could have mentioned. As far as I am aware once Taft-Hartley was passed, including the Right to Work legislation, labor has been totally unsuccessful in changing any of those amendments. There were efforts, but politically, labor has been impotent to do it. But that ties in the right to work legislation with the Russ Belt, the movement of the industry to the South. During my early years, our early years in representing the Steelworkers in this area in the 60's into the 70's, an awful lot of my time was spent dealing with issues of plant removals, with whether the workers could follow work to the South, negotiating over the effects of job loss, etc. There were wildcat strikes over the removals. That really characterized much of our experience in the 60's and 70's in terms of industry in our area.

I think by the way of hindsight, it would be my view that in the debate that may have taken place between Goldberg and Brussell on the question of the merger or not, Goldberg was probably more accurate. That is that the bringing in the CIO as a social movement into a fundamentally craft organization had a positive impact upon organized labor as our institution within the

changing social and economic character of our society.

*Professor Gerald Berendt:* The next portion of our program is devoted to Justice Arthur Goldberg's services as an Associate Justice on the United States Supreme Court and we're delighted to have with us a gentleman who was introduced earlier in the program during the reminiscence part of the program and that is Peter Edelman, Professor of Law at Georgetown Law School. And we have already pointed out to you that among his many credentials he was clerk to Justice Goldberg from 1962 to 1963. It's my pleasure to introduce Peter Edelman.

*Professor Peter Edelman:* Thank you Jerry. I didn't have a chance to say earlier in our informal format how delighted I am to be here and how delighted I am that you're having this conference. I think it's so important and I think Justice Goldberg has not been remembered enough in a formal way. So many of us have such warm personal memories so it's very special for me to be here.

I'm not going to talk about labor law. There are others here who are much more expert at that and you're going to hear about that from them. I would like to talk a little bit more broadly about Justice Goldberg's work on the Supreme Court. There is a definite connection to everything that you've heard in terms of his creativity and the way in which he would always find a way to see things in a slightly different way. The time on the Supreme Court was similar. He made a remarkable contribution in the three short years that he served. It is important to remember that the fall of 1962 was when the real Warren Court began. Even though we think of the Warren Court going back to *Brown v. Board of Education* and the Chief Justice's appointment by President Eisenhower, that was the first time there was a reliable five vote majority on the liberal side. There was *Brown*, there was *Baker v. Carr*, and there were other important decisions, but the more consistent stream of progressive decisions began when Justice Goldberg replaced Justice Frankfurter and then continued when Justice Fortas replaced Justice Goldberg.

There is some irony in this. Robert Kennedy once told me that he and President Kennedy had expected Byron White to be the liberal and that Arthur Goldberg would be the more conservative. White was their New Frontier pal. Goldberg, while also their close colleague, had stood up to the trade unions during his time as Secretary of Labor and had created an impression that he might continue to go somewhat against the grain on the Court.

He quickly proved to be an innovative force and leader on the Court. He was immediately an activist. I saw that coming on as a law clerk that first Term. He was an activist inside the Court working very effectively to stitch together majorities and find common ground in complex cases. He had an intuitive quality of genius at being able to see how a glimmer in one colleague's view

could be added to a hint in another's position to bring them together. Of course that came from all those years in the labor movement and all that negotiation experience, so that the advertised talent for bringing parties together was entirely truthful.

His jurisprudence was what I call creative plain meaning. He was not a textual deviate, he believed in text, he wanted to ground himself in the Constitution but he was definitely creative. And I want to give you just four or five examples depending on how much time we have.

The opinion of which he was probably the proudest was not a majority opinion. It was his concurrence in *Griswold v. Connecticut* in 1965. There is a handful of opinions that he was very proud of but that was certainly one of them. There was a Connecticut law that prohibited the use of any drug, medicinal article, or instrument for the purpose of preventing conception. The case laid the groundwork for *Roe v. Wade*, which of course remains controversial politically, but not just politically. It's also doctrinally controversial as was *Griswold*. The question that we still debate and that is still asked of nominees for the Supreme Court in hearings in the Senate is, is there a notion of privacy embedded in the Constitution and if so where does it come from? Justice Goldberg invoked the little cited 9th Amendment in his concurrence, which says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

I'll say more about his thinking in a minute, but I want to set out a little context to set the stage for discussing how his creative plain meaning approach operated here. The larger issue for Goldberg and for the other liberals on the Court, Black and Douglas, Warren and Brennan, was how to prevent governmental overreaching into the lives of individual people without reviving the idea of substantive due process that the Court had espoused in *Lochner v. New York* in 1905. The newly emergent Roosevelt Court thought that they had killed off *Lochner* and the liberals wanted it to stay dead.

*Lochner* said that the state of New York could not regulate the hours that bakers could bake, said that it interfered with the liberty of bakery owners and employees to bargain with one another over terms and conditions of work. Where is that right found in the Constitution? The Supreme Court in 1905 said it was found in the 14th Amendment which talks about a prohibition on the States from depriving any person of life, liberty, or property without due process of law, a concept of economic due process. The Court used that for over 30 years to strike down numerous state efforts to regulate working conditions, create minimum wages, and protect consumers, and at the same time engaged in a narrow

reading of Congress' power to regulate interstate commerce to strike down numerous efforts by Congress to engage in similar economic regulation. So it left for that period, for the first almost 40 years of the 20th century, a no man's land where no government could reach and the market could operate unimpeded. Social Darwinism.

When FDR finally captured the Court during his second term the new majority was determined to end this situation. They effectively overruled *Lochner* and the parallel commerce clause cases and established the broad power of both the states and Congress to engage in economic regulation. The Court really didn't want to open up that door again. If you look at the cases you see *Williamson v. Lee Optical of Oklahoma* in 1955 where Oklahoma wouldn't allow opticians to even duplicate existing lenses without a prescription from an ophthalmologist or an optometrist. The Court upheld the regulation. It's clearly political. The Court wouldn't touch it. There was a case called *Ferguson v. Skrupa* in 1963, about a Kansas law that would not allow people to do debt adjusting unless they were lawyers. You can see how that law got passed. The Court said, "If you don't like it, don't come to us, go to the legislature."

The Court was going a long way to stay away from re-opening economic due process. There is a case right now that is going to raise the issue again, which is about hair braiding in Ohio. African American women who do hair braiding are required to take a totally irrelevant cosmetology course, 1500 hours, or they can't open a store to do hair braiding. Common sense says there's something wrong with that law. But, there continues to be such a reaction to *Lochner* – and rightly so—that the Court doesn't want to open it up again.

There was another piece of *Lochner* that was more relevant to the *Griswold* case itself, that actually had never been explicitly overruled. *Meyer v. Nebraska*, a seven to two decision in 1923, involved a state law prohibiting the teaching of modern languages other than English in grammar schools. It had been enacted as part of one of the periodic waves of nativism that we have in this country. There was an eloquent opinion by Justice McReynolds. He talked about the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his conscience and generally to enjoy those privileges long recognized that common law as essential to the orderly pursuit of happiness by free men." Holmes dissented, because of his opposition to economic due process. Brandeis went along with the majority; the dissenters were Holmes and Sutherland.

Two years later there was a case called *Pierce v. Society of the*

*Sisters of the Holy Names of Jesus and Mary* where Oregon had prohibited sending children to private school. The Court struck that down. *Lochner*, substantive due process.

The *Griswold* Court could have seized on those two cases. The cases had never been overruled, but they didn't because they were worried about reviving *Lochner* in the economics sphere, that somebody would use their reasoning in *Griswold* to do that.

Douglas wrote the opinion for the majority. He cited *Meyer* and *Pierce*; but he interpreted them as First Amendment freedom of association cases. He wrote a rather ridiculous opinion that talked about "penumbras formed by emanations from those guarantees that give them life and substance" to create the zones of privacy. He mentions the First, Third, Fourth, Fifth, and the Ninth Amendments as each having something to do with privacy. Implicitly none is dispositive, so Justice Goldberg was uncomfortable with Justice Douglas' formulation. He was also uncomfortable with using *Meyer* and *Pierce*, although he did cite them to buttress his formulation. The issue for Justice Goldberg was finding the text to support his view that the Connecticut statute was unconstitutional, but that would not open the door to reawakening the economic side of *Lochner*. He found it in the Ninth Amendment.

His own reasoning is not without twists and turns because he didn't want to open the door to the wholesale use or misuse of the open ended rather indeterminate language of the Ninth Amendment. So he used the Ninth Amendment to buttress his reading of the word liberty in the Fifth and the Fourteenth, and he also joined the Court's opinion. But then he said that, "the concept of liberty embraces the right of marital privacy even though that right is not mentioned explicitly in the Constitution." And he said the case law supports that, but also that "the language and history of the Ninth Amendment . . . reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement" which exist alongside those rights specifically mentioned in the first eight Constitutional Amendments.

The following sentence is the heart of the opinion: "Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children had been born to them." This is common sense. He is saying there must be something, and he is a little reluctant to call it substantive due process, that limits government from doing these absolutely outrageous things and he finds it in the Ninth Amendment. He said personal rights are "retained by the people" and "that the right of privacy and the marital relation is fundamental and basic, a personal right retained by the people within the meaning of the Ninth

Amendment.”

This is very interesting, kind of thin ice to be honest, but he's juggling a number of important dilemmas. This issue is, how do we limit the government from interfering in things that are so basic; we know what's wrong but we don't have a handle. It's an important problem in constitutional law.

We don't know what would have happened if he had stayed on the Court. He had Chief justice Warren and Brennan with him in the opinion, they concurred, there were three of them that joined together in this. Would they have gotten two others as time passed? Was it even a good idea? I personally believe that a modern largely non-economic substantive due process can work, that it's justified and that it doesn't unduly raise the specter of reincarnation of *Lochner*. But Justice Goldberg's effort in *Griswold* was very important.

Another case that he was very proud of was *Escobedo* which he wrote in 1964, a five to four case, decided just a year after the historic right to counsel case of *Gideon v. Wainwright*. The question was about the right to counsel earlier in the process, when before a trial it attaches. The decision laid the groundwork for the Miranda Rule which the court adopted two years later. But the difference is interesting. Justice Goldberg saw this as a right to counsel issue, and if the implications of that had been followed out to their logical conclusion, it very likely would have had far reaching effects. Miranda says you have to be warned, that you have a right to counsel but that you can waive it and that it's based on the Fifth Amendment. It was very controversial for quite a period of time but over the years the police and prosecutors have figured out that it's really not a big impediment to successful prosecution. The actual requirement of counsel—all of these things can be manipulated, of course—but the actual requirement of counsel with a presumably higher threshold for the validity of the waiver could have worked out quite differently. Justice Goldberg was very conscious of that and very proud of his formulation. Again, he didn't stay and so we don't know what would have happened if he had and had continued to push for it.

The opinion is an impressive piece of scholarship. He said, “It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation the authorities had secured a formal indictment.” That shouldn't matter. He said the petitioner “had, for all practical purposes, already been charged with murder.” Exalting form over substance, that's a phrase he liked a lot.

He cited English judges' use of functional rather than a formal text. He contrasted the Soviet Criminal Code which does not permit a lawyer to be present during interrogation, and referred to the proceedings of the 20th Congress of the Communist



Party exposing false confessions obtained during Stalin's rule in the 30's. And he quoted the venerable Professor Wigmore, well known in these precincts, who said any system where prosecution trusts habitually to compulsory self-disclosure "must itself suffer morally thereby."

His dissent from the denial of certiorari in a case called *Rudolph v. Alabama* in the fall of 1963 elaborated a contemporary theory of cruel and unusual punishment and helped significantly in paving the way toward the Court's capital punishment work a few years later. The question in the case was the death penalty imposed on a rapist who hadn't taken or endangered human life. He was joined by Justice Douglas and Justice Brennan. It was a very short opinion. He just asked three questions. One is in light of the trend both in this country and throughout the world about punishing rape by death, does the imposition of the death penalty by those states that retain it for rape violate evolving standards of decency that mark the progress of our maturing society? Just a question, but a penetrating and very important question. Two, is the taking of human life to protect a value other than human life consistent with the Constitutional proscription against punishments which by their excessive severity are greatly disproportioned to the events as charged? And three, can the permissible aims of punishment, e.g., deterrence, isolation, and rehabilitation, be achieved as effectively by punishing rape less severely than by death, e.g., by life imprisonment? If so does the imposition of the death penalty for rape constitute unnecessary cruelty? I just read you the entire opinion. He was very proud of this. A tremendous effort went into thinking it through, getting it just right, and boiling it down. It was very important to the subsequent evolution of these issues in the Court.

Another case that the Justice often mentioned with pride was decided the year I clerked. It was his opinion for the Court in *Watson v. City of Memphis*. This was a case, otherwise routine by 1963, about the desegregation of the parks and recreation facilities in Memphis. What was important about it is that Justice Goldberg got the idea, and I remember this personally, that he wanted to convince the brethren to take a strong stand that we had to have desegregation right away, that the time for all deliberate speed had passed. He obtained a nine to nothing majority, which was his personal contribution here, as I recall. He said that it had been nine years since *Brown*, and eight years since the first case on public recreation facilities. Then came the key language, since parks and recreation are a little less complicated to desegregate than schools. He said on behalf of a unanimous Court that, "given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with all deliberate speed

would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed significant." That is of course dictum, not necessary to the decision in the case, but he talked his colleagues into saying that. It was especially important to send the message around the country in 1963 that the Court unanimously was getting impatient with the pace of school desegregation.

You see in the span of these cases all the great issues of the day. Every one of the issues that I've mentioned is of great significance in our country. He wrote a concurrence in the Bible reading case, *School Dist. of Abington Tp., Pa. V. Schempp*, which was also decided during my clerkship year. He was joined in the opinion by Justice Harlan. His basic point was how complicated it is to make the Establishment Clause and the Free Exercise Clause both work, and to have them work together. He said, "Judgment in each case is a delicate one." He pointed out that Bible reading in school is a clear case. The state is utilizing its facilities to engage in unmistakably religious exercises. But then he added that, "the First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." If that sounds like too many words, he gave examples, saying military chaplains are fine, and teaching about religion in school is fine.

I had many conversations with him over the years where he was quite impatient with people who litigated about what he regarded as small questions of the establishment of religion. I, of course, don't know how he would have voted, but in the later years when the Court has become more likely to say that something is not sectarian or not an establishment of religion but really a permissible accommodation, they have been going in the direction he advocated. You may know the *Witters* case about a blind man who wanted to have the state pay for his education in a religiously oriented institution. I think Justice Goldberg would have approved of that, and of the move that we've had in recent years to being more flexible in our view of all of this. He said, "Untutored devotion to the concept of neutrality" can lead to "a passive or even active hostility to the religious. A vast portion of our people believe in and worship God and many of our legal, political and personal values derived historically from religious teachings." This was literally iconoclastic, and another case that he felt strongly about.

I could go on and on. It was a wonderful record of accomplishment, an amazing accumulation in just three years. He played an influential role on so many great issues of the day. It is

sad, as I said earlier, that he resigned from the Court.

There is one other case that I want to mention. It was the second opinion that he wrote. It was a case called *Foman v. Davis*. A woman had sued because she thought she had a deal with her father that if she took care of her mother, the father's first wife, she would inherit intestate and she would be compensated in that way. Then the second wife overreached and the father left all the money to the second wife, and the daughter sued. It must have been a diversity case. I won't take you through the details, but essentially she was thrown out of court on a technicality. She tried to appeal but she must not have had a very good lawyer. He got the appeal wrong procedurally. There were two appeals. One was thrown out as premature, and the second was thrown out as appealing only from some post-judgment motions that she had made. The Court of Appeals held that she had never properly appealed the merits of the case.

Justice Goldberg picked that out of the pile. I remember that so well. He had just been on the Court for only about a month. He said, "This is terrible, we've got to do something about this." You know the Supreme Court is supposed to be deciding cases like *Brown v. Board of Education* and cases like the ones that I've talked about today. He said, "We really have to see that Ms. Foman gets her day in court." He convinced the brethren and it came out almost unanimous. He wrote that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."

It was vintage Goldberg. It is so indicative of the fundamental point about Arthur Goldberg as a Supreme Court Justice. If there is a fault line between the jurisprudence of technical proficiency and the jurisprudence of getting to the right result, Arthur Goldberg was surely in the latter group, and *Foman v. Davis* illustrates it so well.

He was an excellent lawyer and he was a diligent scholar. When he developed a new theory or a new application of old principles he did so with intellectual rigor. I've tried to illustrate that. His three years on the Court were enormously productive. Maybe because of the obscuring effect of the fact that he resigned and went to the UN, I don't think that they're sufficiently examined and appreciated. So I'm glad to have had a chance to do that a little with you today. Thanks so much for the chance to be here.

*Professor Gerald Berendt:* Our second speaker on this part of the program about Justice Goldberg's service on the Supreme Court is also an old friend of mine and that's Wesley Wildman of the University of Chicago. In addition to teaching labor law and industrial relations for many years at the University of Chicago, Professor Wildman practices law representing management clients

and I understand he's one heck of a negotiator from the people on the other side of the table who talk to me about him. He has practiced with a number of noted Chicago area law firms, Robbins, Schwartz & Lifton; Vedder, Price, Kaufman & Kammholz; and most recently with Franczek Sullivan, P.C. Mr. Wildman has also held several numbers or several important government posts. One was an appointment by Governor Jim Thompson to the original, the first Illinois Educational Labor Relations Board, Wes joined the board in 1984 in the original appointments.

He's published a number of scholarly articles on labor relations law and has taught more successful arbitrators, mediators and labor lawyers and negotiators than he would care to admit. It's my pleasure to introduce Wes Wildman.

*Wesley Wildman:* Thank you very much Jerry. This is the only instance today where the introduction will turn out to be longer than the presentation. In a very real sense Justice Goldberg didn't leave much of a legacy in labor cases from his three years on the Supreme Court and I am gratified to see the Judge and the historian nodding approval here. I came to this task at Jerry's request. I had my wife go to Nexus and pull down every case in the world that said Goldberg and labor and there were maybe 30, 35 of them and I dutifully plowed through them all. The first thing that impressed, amazed me historically was that the cases, the classic labor cases that we still teach, that issued from the court during Goldberg's three years on the court. .

Now one of the questions I would have asked, do we have any of the clerks still here? We didn't get a chance to ask Peter this, was, "How did Goldberg relate to and use his clerks?" But more specifically can we assume that with his vast knowledge of industrial relations and collective bargaining that despite the fact (unless I missed a case) that he ever wrote a majority opinion in a labor case, did he have an enormous impact in caucuses on these cases. We don't know. He frequently recused on labor cases but not necessarily in the landmark decisions.

What did I get reading the dissents? And there were a few of them. And the concurrences? I made an attempt to get Stebenne's book and read it before I appeared here today. I finally came up with one after Jerry told me that I get a free copy for appearing today.

But it's interesting that the image presented here today by these very moving reminiscences and everything else that we've heard from David and others fits what you see when you read the relatively sparse output of Justice Goldberg in these labor cases and the occasional dissent and concurrences. Patience. Gentility. Collegiality. Pushing one notion above all others and I quote the actualities of industrial relations, all right? He once said in one of these concurrences to his Supreme Court Brethren, "We're crafting

basic rules of national labor policy and we've got to do it carefully and with a keen eye on what really goes on at the bargaining table." And that is the role that played in all of these concurrences and the occasional dissent in these labor cases. Making some refinements at the margin with regard to some of the rather too sweeping pronouncements made by the majority, etc., but always, again I say with patience, gentility, collegiality of a sort we don't see much of today.

I didn't know what I would find with regard to bias given Goldberg's background. I can say no way was there ever demonstrated in any of his decisions a reflexively pro-union stance. In *Brown*, for instance, Goldberg defended a lock out in no uncertain terms and the operation of the firm, the locked out firm, with temporary replacements to counter whipsawing in a multi employer bargaining unit. You always had the feeling whenever he spoke on a labor case that here was someone who knew exactly what was going on and he brooked no nonsense. In *American Shipbuilding*, Goldberg defends the defensive lockout and even hints at the possible legitimate broadening of the doctrine. At the same time, *American Shipbuilding* refused to go along with the sweeping rule of the majority. Just a word on this, the Supreme Court had never said up until 1965 that if a union could strike virtually any time they wanted to to put economic pressure on an employer that it would be legitimate for an employer to go ahead and lock out to put economic pressure on the union. That's exactly, what the Supreme Court said in *American Ship Building* in 1965. To paraphrase, the Court almost said to the National Labor Relations Board, where did you ever get the idea that the employers right to lock out isn't just exactly the counterpart of the unions right to strike? Goldberg in his concurrence in that opinion said, no question but that a defensive lock out is justifiable in this case but you don't have to go beyond established doctrine about defensive lockouts. You don't have to make this sweeping finding he said to his brethren, that the lock out is in every meaningful sense a counterpart to the strikes. What shines through in all of these decisions where he did speak, is a concern for a careful nurturing of an industrial relations system for which he obviously held near reverence. This is completely in keeping what I found with everything else of a personal nature that we have heard today about Justice Goldberg.

And then, of course, the case of the century. In terms of underlying policy considerations if not the practicalities of labor relations, I think it would be tough for any of the labor lawyers here today to say that *Pennington* had a big impact on the nature and practice of collective bargaining in the United States subsequent to 1965. But for intellectuals and professors and all the rest who want to play with national policy considerations,

there's no question that *Pennington* is the case of the century.

And I'll take just a minute to tell a non-labor lawyers here what *Pennington* was all about. United Mine Worker sat down with the big producers and said give us this, give us that, more money, make the hospitalization plan better, etc. Big producers said, this is the early 60's now, we can't. The Union asked, why not? The big producers said, because the United Mine Workers no longer represent all the people who mine coal in the United States and the small producers, the strip mines and the burgeoning non-union folks are eating us alive. The Union responded, don't worry about it, we'll go out and we'll organize them, we'll strike them, we'll picket them, we'll make them pay industry standards that we're not asking you to yield on. Amazingly enough, the Supreme Court of the United States said was a violation of the Sherman Anti-trust Act. For once in a decision on the Supreme Court that I read, (rightly so in my estimation) Goldberg went berserk. He wrote his longest single decision in dissent (depending on what version, how many words on a page you're reading it's anywhere from 30 to 50 or 55 pages long) in which he says in effect, and I'm paraphrasing, to the majority never quite losing his cool and getting nasty, what the hell do you think labor unions are for if not to take wages out of competition. What do you think the ultimate goal of a labor union is except to organize an entire relative labor or product market and get a uniform rate which is higher than the one that pertained before? That's the essence of his dissent. You are just, he said to his majority brethren, dead wrong. Of course he elaborated his decision.

I will finish by taking a look at Justice Goldberg's incredibly famous and important dissent in *Pennington* from three points of view. First, the law and the decision. Second, jurisprudential posture, and third, can we get any kind of a clue into this man's underlying economic, social and political philosophy with regard to aggregates in a society, unions, and the use of union power. What kind of presumptions does he work from?

Let's take first the question of the law and the decision. I've already told you there's no question in my mind that he was absolutely right that the Supreme Court was absolutely wrong. Let me just read you two of the sentences. One states, "That is the majority of the court that uniform wage agreements may be made with multi employer units. But an agreement cannot be made to affect employers outside the formal bargaining unit." And here comes the classic Goldberg approach in labor cases in his three years on the Supreme Court except it's a little more bluntly stated, not a lot of the gentle nudging that he did in the other cases. "I don't believe", he said, "that the court understands the effect of it's ruling in terms of the practical realities of the automobile, steel, rubber, ship building and numerous other industries which

follow the policy of pattern collective bargaining.” Pretty heavy condemnation of the Supreme Court. He’s saying you don’t know what the hell goes on in this country at bargaining tables. And he was absolutely right.

What about so called jurisprudential posture? How did he handle this case? What were his arguments? In this case, he didn’t say anything about the Ninth Amendment, at least up to a point. Peter mentioned the famous *Lochner* case and the non-attorneys among you glaze over at this point in the afternoon—but it was damned important. A question of whether the Supreme Court should substitute its judgment for the judgment of the states in essentially economic legislation. And Holmes dissented in *Lochner*. The *Lochner* majority said to the State of New York, that it was interfering with the right of bakers to work 16 hours a day if they wanted to. The German immigrant bakers worked almost around the clock in shops owned by folks who had come over before they did. They would bake and then they would go to bed for a while and then they’d get up and they’d deliver the baked goods. And they were up against the traditional entrepreneurial bakeshops where you just worked a shift. Holmes said the Supreme Court had no right to substitute its judgment on bakers’ maximum hours for the judgment of the legislature of New York. And his famous dissent was short, it’s just a half a page. I’ll read just a sentence or two. “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I don’t conceive that to be my duty”, said Holmes, “because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.” This has become the classic anti-*Lochner* position that Peter was making reference to earlier. “Some of these laws embody convictions or prejudices which judges are likely to share, some may not but a constitution is not intended to embody a particular economic theory whether of paternalism and the organic relation of the citizen to the state.” So Holmes said I’m going to keep my hands off this stuff.

Justice Goldberg, in his dissent in *Pennington*, said, “My conclusion that unions and employers are exempt from the operations of the anti-trust laws for activities involving subjects of mandatory bargaining is based solely on congressional statutes which I believe clearly grant such an exemption and not on any views past or present as to the economic desirability of such an exemption. Whether it is wise or sound public policy for this exemption of unions from the anti-trust laws to continue to exist in its present form or at all, or whether the exemption gives too much power to labor organizations, it is solely for congress to

determine.” Very, very Holmesy, no question, almost a paraphrase of Holmes’ descent in the *Lochner* case.

In Peter’s outline to you the ways in which, at least in a handful of cases the Ninth Amendment was used by Goldberg to get back a bit when he wanted to, to *Lochner*. It is the key dilemma in constitutional law today. But that’s what he said in this famous dissent in *Pennington*. So, what does that mean? We’re not going to get any kind of a clue here as to the underlying economic assumptions and predispositions of Justice Goldberg. He was keeping his hands off questions of judgment. It’s up to Congress to make those judgments. Well, not quite. Holmes, case after case, in dissent would say what he said in *Lochner*, it’s none of our business, let the labor union do what it wants to do unless it’s being violent and nasty.

But in taking these positions Holmes would sometimes unburden himself just to let everybody know that he might—although he was being agnostic—that he knew what was going on in the world. For instance in a Massachusetts case, *Plant v Woods*, in 1900, Holmes in his dissent, said leave the labor union alone. “This is not the place for extended economic discussion,” Holmes once said, “although the law may not always reach ultimate economic conceptions I think it well to add that I cherish”, this is his famous cherish no illusions paragraph, “no illusions as to the meaning an effective strikes. Although I think the strike a lawful instrument in the universal struggle of life, I think it’s pure fantasy to suppose that there is a body of capital that which labor is a whole, secure as a larger share by that means. The annual product subject to an infinite deduction for the luxuries of the few is directed the consumption by the multitude and is consumed by the multitude always. Organization and strikes may get a larger share for the members of an organization, but if they do they get it at the expense of the less organized and less powerful portion of the laboring mass, they do not create something out of nothing.”

So Holmes, despite his consistently anti-*Lochner* posture through his entire career on the bench would every once in a while feel it necessary to disclose some of what he knew about the economics and organizations and collective bargaining. Despite the paragraph that I read you where Goldberg said it was up to Congress to make those judgments, do we find Goldberg similarly unburdening himself in giving us any clues at all to underlying economic and social and political philosophy? We do and in a rather dramatic fashion. You know the Clayton Act says, “The labor of a human being is not a commodity or an article of commerce.” That sentence is cited six times in this one dissenting opinion. And in addition to that he was fond of coming back again and again to a quote from Justice Brandeis, “What public policy in



regard to the industrial struggle demands is not for judges to determine", etc.. So you begin to get a flavor of an economic philosophy here which is incidentally a little different than what you pick up from Holmes in *Plant v Wood*, although Holmes contradicted himself in other cases with regard to the desirability of strikes and what labor unions can accomplish.

I think the dissent is a classic and will go down in history as absolutely right, there's no question about it. With regard to this underlying economic and political and social philosophy, the most charitable view would perhaps be styled as an incomplete view of a considerably more complex world than Justice Goldberg was willing to acknowledge. Here the other shoe drops in just two paragraphs in this dissent. We get hints from the constant invocation that labor is not a commodity but here it is. "The very purpose and effect of a labor union is to limit the power of an employer to use competition among working men to drive down wage rates and enforce substandard conditions of employment." His language. And again on the same page of the decision. "It is clear that Congress did not intend that competition among manufacturers should be carried on not on the basis of their relative efficiency or ability to produce what the consumer demands but on their ability to operate at substandard wage rates." The only inference I can draw from these two statements (and they're the only two statements of their kind in the *Pennington* dissent) is that by in large for Goldberg, any wage rate not set by a union engaged in collective bargaining is likely to be substandard. As I said, I think that the most charitable view of this is that the world is a bit more complex. After all in 1931 we had Davis Bacon to go back to and look at the legislative history. Incidentally, Davis Bacon is cited with approval in the *Pennington* dissent. He realized it was sort of a shameful piece of legislation, at least in terms of the motivation. Representative Bacon was upset at the fact that a southern contractor was bringing black labor up to North to compete against him in the building of hospitals and other public institutions in that state, and a southern senator and the legislative history apologizes for bringing up bootleg, colored labor to compete in the North. You have got to assume that Justice Goldberg was aware of this kind of thing. In 1965, we had Greg Lewis' famous study on unionism and relative wage rates, consensus among labor economist all the way from Harvard to Chicago to the west coast that labor unions raise the wage rates of their members, but they do it through the operation of the labor monopoly. He must have been aware of these kinds of things. By 1965, there were minimum wage studies which notwithstanding show consistently that some people are thrown out of work and they demonstrated many a classical model to be maldistributionist and GNP is lower. So there's no hint of

that here and I think the opinion would have been stronger if Justice Goldberg had at least acknowledged in passing that there is a hell of a problem in a society which says you're going to the slammer if you violate the Sherman Anti Trust Act but we encourage labor monopoly. Not saying it's an unjustifiable policy position for a society to take but it does create tensions and it's those tensions that gave rise to the majority opinion in *Pennington*. The important thing here is that Goldberg got the law right and he got the actualities right. And how often do we get that these days. Thanks a lot for listening.

*Dean Gilbert Johnston:* The final speaker of the program today is the Chair of the day. Jerry Berendt has been a member of this faculty for 24 years. He came to us from Washington where he served as counsel to a member of the National Labor Relations Board. He's held a number of very important governmental appointments in Illinois. And you know about it, he's a noted author on collective bargaining and recently in contracts. I want to personally say a few words as Chair of school's centennial planning committee and I want to thank Jerry for taking the time and applying his talents to plan and execute this superb program today. I did not know Arthur Goldberg but I would expect that he would have approved of this gathering today and would also appreciate this very warm celebration of his life that Jerry has created for us today. Thank you Jerry.

*Professor Gerald Berendt:* As we're running short on time I wanted to take the opportunity to acknowledge the presence today of two of the Goldberg relatives, Trudy and Charlotte Lenoff.

I met Arthur Goldberg once at a John Marshall Commencement in 1986 or 1987. Goldberg was in the process at the time of answering the obligato question, "Why did you leave the Supreme Court and how did Lyndon Johnson convince you to do this?" And I waited patiently until he had answered. He answered with great dignity and great patience, again, to a question he must have answered a million times. And when he was finished Len Shrager introduced me and we shook hands. He didn't make eye contact and I was a little concerned about that and I said, "Shrager introduced me as a labor law professor and, well I'm not going to boar you with any of these questions about Lyndon Johnson and the Supreme Court and the UN, I'm going to ask you about your relationship with Roger Blough and the Steelworkers dispute." And he turned and made eye contact with me. And he said, "You know nobody asks me about that any more, and I'm glad you did." He spent the next fifteen minutes talking to me about it. I told that story to David Stebenne and David told me that when he asked Arthur questions in the interviews that he had with him about the Steelworkers situation and Roger Blough that he became animated at that point also. And he and I linked

up at that point.

Arthur Goldberg first met John Kennedy in 1948 when Kennedy was a member of the House of Representatives. Goldberg remembered later that Kennedy looked like a high school graduate at the time he met him. They came to know each other much better over time as Kennedy served on House and Senate Labor Committees from 1947 till 1960. Following the McClellan Committee hearings, Goldberg worked closely with Kennedy in 1958 and 1959 on Kennedy's ill-fated version of the Labor Management Reporting and Disclosure Act which was designed to amend Taft-Hartley and implement reforms in internal union governance. Later when he ran for President, Kennedy enlisted Goldberg's assistance in his efforts to obtain the Democratic nomination. After consulting Adlai Stevenson who assured him he would not enter the primaries, Goldberg surprised Stevenson and labor leaders by declaring his support for Kennedy over Hubert Humphrey who had a better record on behalf of workers' issues and New Deal programs. Goldberg reasoned that Kennedy had the best chance to win against the likely Republican nominee, Vice President Richard Nixon, and that Kennedy offered the best chance of progress against social, class and racial oppression.

Labor leaders were angry with Kennedy over his role in labor reform legislation, and the AFL-CIO considered publicly announcing its opposition to his candidacy. However, after Goldberg appeared at an AFL-CIO Executive Council meeting, a motion to oppose Kennedy's candidacy failed. After the Wisconsin and West Virginia primaries, Humphrey dropped out of the race, leaving Lyndon Johnson whose only hope was for a brokered convention. Since Johnson was anathema to the labor movement, most of the labor movement lined up behind Kennedy with the exception of the building trades. Although Adlai Stevenson mounted a last minute "draft Stevenson" effort, Kennedy prevailed and won the Democratic nomination at the Los Angeles Convention. Kennedy biographers report that Goldberg participated in the discussions over whom Kennedy should choose for his running mate. Goldberg preferred Humphrey, but Kennedy chose Johnson to complete the ticket. In the November 1960 election, Goldberg's work cultivating the labor support paid off, particularly in the tight Illinois race, and Johnson's place on the ticket helped Kennedy carry Texas and hold enough of the Southern states to prevail.

With the election over Goldberg anticipated appointment within the Kennedy cabinet. Due to his strong personal commitment to civil rights and his dream of an appointment to the Supreme Court, Goldberg's preference was either Attorney General or the number two position in the Justice Department. But Kennedy had other plans for Justice and decided to tap

Arthur for Secretary of Labor. In a gesture of deference, Kennedy asked AFL-CIO head George Meany to send him a list of candidates for Secretary of Labor, expecting Goldberg's name to be on it. But Goldberg had picked up enemies in the labor movement, particularly among the building trades leaders and those who wanted a more traditional AFL person. Goldberg was understandably disturbed by Labor's initial failure to support his appointment, but the President-elect smoothed over matters with Meany. Goldberg's appointment sailed through the Senate. Following the confirmation hearing, he received unanimous votes in both the Senate Committee and the Senate itself, although reportedly one Southern Senator had prearranged stomach cramps and left the chamber before the Senate vote was taken.

Goldberg had solicited the President-elect's promise that he could choose his most important aides without patronage pressure from the Kennedy political operation. He kept many of his predecessor James Mitchell's senior professional staff. For the important Under Secretary's position, he chose our distinguished guest, Northwestern Law Professor Willard Wirtz, who had served on the Wage Stabilization Board in World War II and was already a noted arbitrator. To enforce the anti-corruption provisions of Landrum-Griffin, Goldberg chose former NLRB member James J. Reynolds, a self-described "liberal industrialist." Thus, the top three positions at Labor mimicked a tripartite panel, with Goldberg from Labor, Reynolds from management and Wirtz the neutral or public representative. Goldberg also sent an important message with other high level appointments: George Weaver, a black who had worked for IUE, was named assistant secretary for international affairs. Esther Peterson, a women, was appointed head of the Women's Bureau. And Jerry Holleman, from the AFL's traditional wing, was named to the third position in the Department's chain of command. Later, Goldberg successfully moved to have Peterson's position elevated to assistant secretary status, emphasizing the importance of women's issues and making Peterson the highest-ranking woman in the Kennedy administration.

Goldberg quickly assumed a prominent role in Kennedy's cabinet. He opposed an incomes policy by economists Walter Heller and John Kenneth Galbraith on the ground that it was too close to being a wage and price control, a policy which would have been unacceptable to business and labor. Instead, Goldberg suggested the administration implement a wage and price *guidelines* policy really based on *jawboning* or persuasion and voluntaristic methods rather than a heavy-handed policy enforced by the government.

Goldberg believed that jawboning would be successful in preventing inflationary price and wage increases if strikes could

be minimized, and he and his Labor Department staff employed mediation to an unprecedented degree. In the first days of his tenure as Secretary of Labor, Goldberg successfully mediated a New York City tug and ferry boat workers' strike at the personal request of Governor Nelson Rockefeller. And shortly afterwards he successfully mediated a wildcat strike by commercial airline pilots. He also urged Kennedy to intervene in a maritime strike by 80,000 longshoremen, convincing the President to invoke Taft-Hartley's national emergency disputes provisions. After the strike was enjoined, the parties accepted the Taft-Hartley Board's recommended settlement. Thus, early on, Goldberg demonstrated a willingness to use the influence and power of his office to help end strikes and to settle disputes. And the nation was rewarded for this effort. Doctor Stebenne reports that during the first half of 1961, the nation lost the fewest working hours to strikes since World War II.

It is worth reflecting at this point on the willingness of Kennedy and Goldberg to act in these disputes. Goldberg's belief that government could and should act in private labor disputes with public ramifications is in stark contrast to our comparatively hands-off approach of the last two decades. Influenced by his life experiences, the depression, World War II, the Korean conflict, the Cold War and the 50's recessions. Goldberg held the firm belief that Government should take an active role in pursuing the public good. He is most often remembered as a pragmatist rather than an idealist, and it is true that he was a master at figuring out how to get from here to there, whether in labor negotiations or political matters. Nevertheless, what struck me the most about my readings in preparation for this program was the firm anchoring of Goldberg's world view in a set of ideals acquired early in the New Deal. He favored the improvement of the lives of the working class, the elimination of class, racial and gender barriers in society, and he was a confirmed civil libertarian. Although he spend his career as a labor attorney fighting for higher wages and benefits and improved working conditions for workers, he was conscious of long-term, broader considerations, such as business competitiveness and national security. He was the sincerest type of patriot. He did not believe that his country was without fault, but he believed that our form of government was the best. For me, the remarkable thing about him, and perhaps the most admirable thing as well, was his ability to translate his ideals into action.

I was a teenager when Kennedy was elected in 1960, but I remember the spirit of the campaign and the early months of his administration. Perhaps the basic policies of the Eisenhower administration, particularly in the labor area, differed very little from those pursued by Kennedy and Goldberg. But the message was not one of stasis. The key phrase of the day was, "Let us move

ahead with vigor." And Goldberg took that rhetoric seriously in the operation of the Labor Department. It is no longer fashionable to believe in so active a government in pursuit of national interests. Today, successful politicians seem to build their platforms on statements of what they are against, and by advocating that government is the enemy. Goldberg understood that government exists to serve the people, and he brought to the Labor job the intelligence, experience and practical skills to do good.

Where are such men and women today? We used to attract them to government because our popular culture celebrated public service as the highest calling, justifying the sacrifices such exceptional individuals made when they came to serve. Today, our public servants are more reviled than they are respected. When I was a kid, there were no more respected people in the community than police, fire fighters and teachers. I remember my parents commenting on the loss of income a friend of the family suffered when he moved from a lucrative law practice to the bench. Then, public servants were honored. Not today. In 1961 or 1963, high school students could tell you who the Secretary of Labor was. Not today. (She is Alexis Herman). Even I have trouble remembering who has been Secretary of Labor since Ray Marshall. In recent years, we have lost the sense that government can act in the public interest to improve our lives and those of people around the world. And I believe the loss of that optimism in government's role has caused the concomitant decline in interest in public service. Until we recover the belief that government exists to serve, and that it can and should serve the public interest, we shall attract the leaders, politicians and public servants we deserve.

Goldberg was not merely satisfied with reacting to labor disputes as they arose. He believed in positive programs and active attention dealing with broader questions. When the Kennedy administration assumed office, wages were under control, but the economy was contracting and unemployment was rising. The administration sought renewed economic growth, reductions in unemployment and an increase in workers' real income. Kennedy was unwilling to accept all of Goldberg's ideas, which included public-works programs, because he feared they would create a budget deficit. Nor was he willing to accept Goldberg's suggestion of an increase in taxes for the upper middle class and rich. Kennedy eventually agreed to pursue a more modest anti-recession package that included an increase in the minimum wage and a temporary extension of unemployment benefits. Although the package passed the House, it was initially defeated in the Senate by an odd coalition of Southern conservatives and Northern liberals who thought the bill too weak. Calling on his Labor connections, Goldberg put pressure on the

liberals, and the administration forced new votes which led to passage of a scaled down version of the anti-recession program.

Goldberg pressed Kennedy to take the initiative on the issue of racial discrimination, but Kennedy was reluctant for political reasons. Goldberg was forced to accept less than he had hoped for, in the form of the creation of the President's Committee on Equal Employment Opportunity with Vice President Johnson as its chair. That committee produced one major program, Plans for Progress, which was designed to induce government contractors to take voluntary steps to reduce discrimination in employment. Goldberg was frustrated with the modest achievements of the PCEEO, but political considerations prevented him from taking more aggressive initiatives. Instead, he focused on leading by example, by recruiting and promoting minority employees at the Department of Labor. Other Goldberg initiatives designed to break down discrimination barrier for blacks and Latinos were thwarted.

Goldberg also supported measures designed to help women in the workplace, including an equal pay law. But he was concerned that an Equal Rights Amendment would ultimately operate to the disadvantage of working women by weakening protective legislation won during the New Deal and dividing the working classes. Goldberg and his deputy, Esther Peterson, convinced Kennedy to pass an executive order creating the President's Commission on the Status of Women, which pushed for equal pay legislation. With Goldberg's support Peterson shepherded versions of the equal pay bill through both houses of Congress only to see it killed in the conference committee. Goldberg had to settle for an executive order banning sex discrimination in employment in the executive branch.

Goldberg also took the initiative in the area of industrial relations. In the 1950's the post war social contract between management and labor began to break down as managers in the leading industries, including steel, sought to recover unilateral control of wages, hours and conditions of employment. To deal with the problems associated the so-called managerial revolt, Goldberg urged the creation of a National Council of Labor Management Advisers to devise wage and price policy. Kennedy authorized the creation of the President's Advisory Committee on Labor-Management Policy, which lacked the power of implementation possessed by groups in statist systems in Western Europe. The Advisory Committee was made up of prominent business leaders (such as Henry Ford II and Thomas Watson of IBM), union officials (such as George Meany and Walter Reuther) and public members (such as George Taylor, Arthur Burns and Clark Kerr).

The Committee addressed a wide range of workplace issues,

including the impact of automation, collective bargaining and strikes, foreign competition and wage and price guidelines. Although the Committee did not include the most recalcitrant of the business leaders, particularly Roger Blough of U.S. Steel, the subcommittees addressing the various issues bogged down over both substantive and procedural matters, such as whether to issue consensus reports or include dissents. Most of the solutions considered early in the deliberations were substantially diluted by the time reports were drafted, and Goldberg had to reconsider his dream of emulating the Swedish corporatist system for controlling inflation and addressing workplace issues. Instead, he embraced a piece-meal approach using fact-finding, mediation and the voluntary wage and price guidelines the Council of Economic Advisers announced in January 1962. He would concentrate on jawboning parties to labor contracts in leading industries in order to establish patterns that would be followed by other companies in the various sectors, such as steel.

Bargaining in the steel industry presented the first major test for Goldberg's jawboning strategy. Goldberg hoped that negotiations between Kaiser Steel and the United Steelworkers would provide the opportunity to establish the jawboning/pattern bargaining system, and for a while it did. Kaiser and the USA, which was represented by Marvin Miller in the bargaining, were willing to work through the committee system with public members providing fact-finding and mediation. But US Steel's ability to set prices in the industry loomed like a giant shadow over the Kaiser negotiations.

US Steel and its controversial CEO, Roger Blough, resisted the tripartite structure, which would include public members on joint committees. Early negotiating sessions alternated between rancor and accommodation over issues involving crew size, incentive pay and full employment guarantees. If the meantime, bargaining at Kaiser took a turn for the worst when Kaiser expressed its willingness to take a strike rather than accept a formula for sharing profits with workers and guaranteed employment for those displaced by technology. Goldberg, who had watched from a distance for eight months, acted. Employing jawboning, he urged the steel managers to change their position. Goldberg convinced Kennedy to write the steel company executives requesting that they not raise prices, as was rumored. The steel executives were unhappy with the President's letter, but acceded for the moment because they were concerned over the implied threat of public intervention. Goldberg also convinced Union President Dave McDonald, his former client, to agree to wage and benefit increases well within productivity guidelines. After some initial stalling, serious bargaining took place in January 1962. Goldberg who was pushing for a quick settlement, arranged a



meeting between Kennedy, himself, McDonald and Blough at the White House. Kennedy urged McDonald to accept a new contract within the CEA guidelines. McDonald blustered a bit, but eventually agreed. Blough, however, refused to go along with Kennedy's call to hold the line on prices, and the meeting broke up without agreement. Goldberg then worked on management to restrain itself without making an explicit commitment not to raise prices in return for union concessions on wages and benefits. He hinted the alternative was more direct government intervention. Fearing an industry shutdown would prompt government intervention on the side of labor, management began to show greater flexibility.

Goldberg then convinced the Steelworkers to accept a truce on a wide range of issues and a modest compensation increase of 2.2%. Kaiser's CEO, Conrad Cooper, and US Steel's Blough stopped making public statements about their right to raise prices unilaterally, and on March 31, 1962, the parties announced a new two-year contract.

It appeared that the administration's economic policy and jawboning had worked. But the tacit commitment of US Steel not to raise prices was the Achilles' heel of the deal. Ten days after the agreement was announced, Blough visited the White House and told the President U.S. Steel was distributing a press release announcing a 3.5% price increase. Kennedy called Goldberg to the Oval Office where Goldberg and Blough engaged in a tense exchange. Goldberg told Blough he considered Blough's conduct dishonest. After Blough left, Kennedy grew angry and took action to force Blough to back down. The President delegated Treasury Secretary Douglas Dillon to tell the financial community it would fight the increase, and prevailed on Senator Estes Kefauver to make a public statement that his Senate subcommittee would investigate whether the steel companies violated anti-trust laws by collusive pricing. In frustration, Goldberg offered to resign and take responsibility for the crisis, but Kennedy put him off. Next, Kennedy opened a televised press conference with a statement blasting Blough and the other steel executives who had fallen in behind the US Steel price increase. He accused the steel companies of acting in defiance of the public interest. Braced by the President's performance, Goldberg withdrew his offer to resign and joined in the pressure on the steel managers. Goldberg leaked his offer to resign, an announcement that frightened the business community, which feared a return to the acrimonious relations, encountered during the Truman administration. Bethlehem Steel was the first company to cave in, and Blough was forced to give in, rescinding its price increase.

The experts are divided on their assessment of the Kennedy administration's jawboning policy and its handling of the Steel

negotiations. Some point out the victory was short-lived since the steel companies simply raised prices gradually in increments over the following months. Perhaps the outcome establishes there is no middle ground between a government-controlled wage and price system and totally unrestrained capitalism, that jawboning and voluntary restraints cannot work. I, for one, do not believe that any shortcomings in the implementation of the Goldberg policies emanated from the peculiar circumstances of the time, including the personalities involved. In sum, our leaders should not shy away from devising and implementing policies designed to serve the public interest. We learn from our mistakes, which should not deter us from trying again. As an active neutral in the public sector, I have observed that many of the techniques refined by Goldberg, Wirtz and others thirty to forty years ago work quite well. Arthur Goldberg didn't run away from challenges; he met them with enthusiasm, intelligence and great skill. Our leaders today would serve us well if they emulated him. Thank you.

