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Twentieth Annual Frank M. Coffin Lecture on Law and Public Service

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TWENTIETH ANNUAL FRANK M. COFFIN LECTURE ON LAW AND PUBLIC SERVICE

EDITOR'S NOTE

The Twentieth Annual Frank M. Coffin Lecture on Law and Public Service was held on November 15, 2012. Jeffrey Lehman, the vice chancellor of NYU Shanghai and the chancellor and founding dean of the Peking University School of Transnational Law, delivered the lecture. Established in 1992, the lecture honors the late Judge Frank M. Coffin, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, an inspiration, mentor, and friend to the University of Maine School of Law.¹

¹ Past lectures from this series include: Joseph J. Rauh, Jr., *Nomination and Confirmation of Supreme Court Justices: Some Personal Observations*, 45 ME. L. REV. 7 (1993) (delivered posthumously by Mr. Rauh's widow, Olie Rauh, and their son, Michael Rauh, who were joined by Justice William Brennan); Arthur Schlesinger, Jr., *Multiculturalism and the Bill of Rights*, 46 ME. L. REV. 191 (1994); Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3 (1995); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996); Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 ME. L. REV. 1 (1997); Robert R. Reich, *What Happened to the American Social Compact?*, 50 ME. L. REV. 1 (1998); Warren B. Rudman, *The Law of Unintended Results: The Independent Counsel Law*, 51 ME. L. REV. 1 (1999); Justice Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 ME. L. REV. 301 (2000); Alan B. Morrison, *Must the Interests of the Client Always Come First?*, 53 ME. L. REV. 471 (2001); Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159 (2002); Cruz Reynoso, *The Lawyer as a Public Citizen*, 55 ME. L. REV. 335 (2003); Scot Harshbarger, *Strengthening Democracy: The Challenge of Public Interest Law*, 56 ME. L. REV. 211 (2004); Judge Judith S. Kaye, *Shaping State Courts for the New Century: What Chief Judges Can Do*, 61 ME. L. REV. 355 (2009); Stephen Oleskey, *Reflections on Forty Years of Private Practice and Sustained Pro Bono Advocacy*, 63 ME. L. REV. 513 (2011); and Jonathan Lash, *Community, Rights, and Climate: A Challenge to a Clever Species*, 64 ME. L. REV. 241 (2011).

WORLDLY PUBLIC SERVICE

*Jeffrey S. Lehman**

There can be no greater honor for me than to have been invited to deliver this 20th Annual Frank M. Coffin Lecture on Law and Public Service. The year 1981-82, when I served as one of the Judge's law clerks, transformed me and transformed my life. The past thirty years have been shaped profoundly by my year working for the Judge and living here in Portland.

After the Judge passed away, the University of Maine School of Law was kind enough to publish some remarks I had delivered to my students in China about the example the Judge had set for me—as a perfectionist, as a hard worker, as a lover of language, as a person who believed in the importance of all people, as a person who loved to have fun, and as a Renaissance man. He was all of those things and more. Those are qualities that often spring to my mind when I find myself seeking guidance and comfort in the question, “What would the Judge do?”

Until this evening, however, I have not had the opportunity to speak about what is perhaps the most powerful, far-reaching example that Judge Coffin set for me and for others. I am referring to his lifelong dedication to public service.

Everyone here is familiar with the contours of his professional career—in military service, as a law clerk, in private practice, and then a remarkable half-century in Congress, at the U.S. Agency for International Development, as ambassador to the Organization for Economic Co-operation and Development, and on the bench. This résumé of his career might well be described as a “public service *curriculum vitae*,” simply by virtue of the entities that Judge Coffin chose to work for. Fifty years in the employ of the United States government would, of course, justify us in calling his a “public service” career.

Yet the example of public service that Judge Coffin gave to us far transcended the identity of his employer. Rather, I would suggest, it expressed itself in the *approach* he took to carrying out the tasks that his various roles assigned him. As much as anyone I have ever known, Judge Coffin believed his highest professional responsibility was to serve the public.

In that respect, Judge Coffin was different from some others who have worked as employees of the federal government. In the world of academia, there has emerged an area of scholarship that is known as “public choice theory.” This form of scholarship attempts to analyze the behavior of public servants as if they were all purely self-interested actors who wanted only to maximize their individual power and influence and had no commitment to larger public values. Sad to say, I am sure we can all find examples of political behavior that fits this model. Yet Judge Coffin's vision of public service, and his approach to his work, made him a perfect counterexample—a case that proves that this kind of public choice analysis is, at best, incomplete.

Never once did I witness the Judge think about a case, or speak about a case, in self-interested, public choice terms (e.g., as a vehicle that might increase the likelihood of his appointment to the Supreme Court). And when the Judge spoke

* 20th Annual Frank M. Coffin Lecture on Law and Public Service, November 15, 2012.

with us about his career before he was appointed to the Court, it was as often as not to reminisce about a moment when he had acted *against* his own self-interest.

The form of the Judge's reminiscence was always self-deprecating. With a wry smile and a characteristic twinkle, he would say things along the lines of, "Tell me, don't you think I was a *fool* to tell the vice president of the United States that I disagreed with him on that point of public policy, when I knew that he would have power over my future career?"

In such cases, of course, the Judge was masterfully teaching us to draw the opposite conclusion. We immediately understood his implicit message. He was saying: "My responsibility was to serve the cause of good public policy, not to flatter the powerful. In the end, of course, things turned out well for me; but even if they hadn't, I at least knew that I was being true to my own sense of duty."

And so, with the Judge as my inspiration, I would like to spend some time this evening reflecting on the following question: If public service means more than simply having a government employer, or even a non-governmental organization employer, then what does it really mean? I will spend most of my time talking about the word "public" within the phrase "public service."

Who, exactly, are the members of the "public" that we are supposed to serve when we commit ourselves to public service? Who gets to decide who constitutes that "public"? I will suggest to you that "public" is not a word whose definition falls from the sky or is handed to us by some authority; rather, it is a word we have the power and duty to define for ourselves. And I will then suggest that today, in the modern world, we should elect to define the term broadly. I will suggest that we should be thinking of our "public" not in terms that are local, parochial, partisan, or even national, but rather in terms that embrace the entire world.

When I say that I am engaged in public service, what exactly do I mean? We can start from the proposition that the word "public" means "not private." "Private" service would include work that benefits only me, or some person I know and care about. It would also include work that I do for the purely private benefit of someone else who pays me to do so.

Public service goes further. It requires us to imagine a community that is larger than individuals, their relatives, and their closest friends. Putting to one side the question whether a "public" community must include total strangers, it surely must include people who fall outside the tight circle of "my family and my close friends."

Let's consider a specific example. The apartment I occupy in New York City is one for which I pay rent to a landlord. But not all New York apartments are like that. In fact, New York is filled with living communities that are defined as "co-ops." A co-op building is owned by a corporation, and the residents of the co-op are its shareholders. They live in their own apartment units, and they assess themselves fees to cover the costs of maintaining the infrastructure and the public spaces and of providing public services to the building.

Co-ops are governed by boards of directors. Board members generally serve without pay, and they are expected to exercise their authority in ways that serve the interests of *all* the building's tenants. They are not supposed to take actions that benefit themselves, their family, or their friends at the expense of other tenants.

So here's our question: Should we think of service on a co-op board as "public

service”)? Some people might find this label troubling, for two reasons. First, the community that is being served is quite small. And more significantly, it is quite clearly *not* a community that is in any way defined by reference to a spirit of altruism. This is a community of people with a shared interest in the quality of their own lives and the value of their own property.

Nonetheless, I would consider co-op board service to be a form of public service. The community is large enough to include—if not total strangers—at least *relative* strangers, people with whom one has no affective bonds. Service on the board calls for acts of *imagination* and *stewardship*. Directors are expected to imagine the lives and interests of those relative strangers. And they are expected to act in ways that help those relative strangers, even if that action is not the one they would have taken if they wanted to promote only their individual self-interests.

To put it slightly differently, I believe that co-op boards are engaged in an activity of service to *a* public, so that its members are required to make “public policy.” And in that role they should aspire to follow the example of Judge Coffin with the Vice President, placing their commitments to public policy ahead of their own private objectives.

In short, I would like to define the idea of “public service” very broadly, to encompass any activities that require us to imagine a community of people beyond family and friends, and to act on their behalf rather than our own.

When we reflect on this example of a co-op board, it becomes clear that this notion of a “public” that is beyond family and friends does not signify some random collection of people. It refers to a community in which we are *members*, a collection of people with whom we feel some *common interest*, some *identification*. And that leads us naturally to wonder, what is it that makes us feel identified with someone else in this way?

This question is especially important in the context of free and liberal societies like the United States. For hundreds of years, thoughtful writers about life in these societies have fretted about the risk that this kind of community might lead people to become isolated from one another. An individualistic commercial culture might lead people to turn inwards, to give up some essential elements of our humanity that are associated with our feelings of connection to other people.

Alexis de Tocqueville worried that if people spent all their time concerned only with their own affairs, they would develop a kind of “private selfishness which is the rust of society.”² He thought it was important for people to have the opportunity to develop the feelings of connection that link us to people beyond our family and closest friends. By engaging sympathetically with such people, we maintain a kind of moral health—for ourselves as individuals and for the community as a whole.

De Tocqueville admired nineteenth century America in part because he discovered within it a rich tapestry of voluntary associations. America was filled with people banding together into groups larger than family, in order to achieve a greater good. Many of those associations were churches, and churches undoubtedly played a salutary role in drawing people out of their family shells, into

2. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 305 (Henry Reeve, trans., D. Appleton & Co. 1899).

a broader world of service.

I would like to pause and note that a critical feature of the associations that de Tocqueville admired was their *voluntariness*. People were not forced to join them. They took an affirmative step to reach out and bond with others, to identify them as similar to themselves, to work with them to promote a common good. They chose affirmatively to bind themselves into a web of interdependence. The fact of free choice helped to reinforce the psychological benefits they experienced as joint participants in a particular kind of community life. It motivated them to give their very best efforts to the cause of public service.

At the beginning of the twenty-first century, it is reasonable to ask the following question: Has the uniquely American nineteenth century structure of voluntary associations, the one that de Tocqueville so admired, been eroded? Certainly the amount of time that the average American spends in devotion to a church is in rapid decline. Similarly, local organizations like the Rotary Club, or the Elks Club, seem to be having more and more difficulty attracting members.

This is surely due in part to the ever-increasing busy-ness that modern life seems to have brought us. The workweek grows relentlessly longer, and our time for anything unrelated to our employment becomes more and more scarce. Within families, every adult is today likely to work outside the home, which means the total time available for household production and engagement with children has declined dramatically. *A fortiori*, we have less of ourselves left to give to voluntary associations.

These shifts are accompanied by changes in the technology of entertainment that also disengage us from others. Prosperity and technological development have brought us ever-larger and ever-flatter television screens. Equipped with such toys, we think more and more of sporting events and movies as things to be watched from within the privacy of one's home. We share those activities with strangers a smaller and smaller percentage of the time.

I suspect that these shifts would have alarmed de Tocqueville. But modern life has brought us other changes that might perhaps be somewhat more ambiguous. How would de Tocqueville have felt, I wonder, about the new technologies of communication? How would he have felt about email, the internet, cell phones, text messaging, and social media?

On the one hand, these technologies make it much easier for us to be in nearly constant communication with people who are not members of our families or part of a small circle of our closest friends. Facebook enables us to have hundreds of so-called "friends." LinkedIn enables us to have equally impressive numbers of "connections." An ordinary person can reach out and touch thousands of people through tweets; a person named Kardashian can reach out and touch millions.

On the one hand, I believe de Tocqueville might have approved of the way that all these technologies can draw us outward from small cocoons into which we might otherwise withdraw. They *do* have the potential to serve as checks against isolation.

On the other hand, de Tocqueville might worry that these social media technologies carry the risk of transforming our social relationships from few-but-very-deep into many-but-very-shallow.

Consider the following rather typical exchange among today's youth:

“Hey. What’s up?”

“Not much. You?”

“Not much. Gotta go!”

It would seem that this form of exchange *does* in fact give its participants a certain sense of connection to one another. It *does* nurture a certain kind of mutual identification. The harder question—honestly, an open question in my mind—is whether it provides a *sufficient* connection to prevent the kind of “rust” that de Tocqueville warned against. Does this kind of exchange move its participants to be less selfish? Does it generate a sense of community, a sense of “public” that people could associate with a norm of service?

For now, let us adopt a hopeful stance. Let us assume that the human species is, in its essence, a smart species. Let us assume that, if our tweets are contrary to our interest in making meaningful connections with others, we will stop tweeting. Let us assume that, if our Facebook pages and LinkedIn communities bring us more stress than joy, we will shut them down.

With these assumptions in mind, it becomes possible for us to ask a slightly different question. If the modern world differs from the nineteenth century world in that we are less likely than we once were to define our “community” —the “public” we are drawn to serve—as our church or our immediate physical neighbors, then how exactly are we likely to define those terms today? Or, somewhat more pointedly, how *should* we try to define those terms for ourselves?

This is a fundamentally important question for our times. If we are to lead fully satisfying lives as individuals, and if, taken together, we are also to be a healthy society, then we have to find ways to define communities with which we engage in a spirit of service.

Let us start with the proposition that this question of what “community” might mean, this question of what “public” we wish to serve, should be thought of as a matter of *personal choice*.

Early in the twentieth century, the philosopher John Dewey wrote a number of essays about modern liberalism and modern democracy, and what those concepts entail. For Dewey, the best societies give individuals the freedom to make choices so that their lives might flourish. At the same time, Dewey wanted people to appreciate that their flourishing as a result of these choices *depends* upon the opportunities they are granted by living within a community. He wanted people to appreciate that those opportunities do not continue automatically. They continue only if people are committed to civic participation. They continue only if people are committed to defining the community as one whose structures and values will enable all its members to prosper.

In his book, *OUTLINES OF A CRITICAL THEORY OF ETHICS*, Dewey expressed these notions in the following words:

In the realization of individuality there is found also the needed realization of some community of persons of which the individual is a member; and, conversely, the agent who duly satisfies the community in which he shares, by that same conduct satisfies himself.³

3. JOHN DEWEY, *OUTLINES OF A CRITICAL THEORY OF ETHICS* 131 (1891).

In twenty-first century America, we enjoy the special freedom to chart our own paths. Whereas in feudal England people were chained to the land of their birth, we are given the privilege of choosing where we live, who we live with, and how we define ourselves politically and socially. And over the course of our lives, we are free to change our minds.

Yet that freedom carries with it responsibility. Each of us has the responsibility to make a choice about how we want to define our public, our community. And I believe we can make that choice more or less wisely.

In an essay entitled, *The Public and Its Problems*, John Dewey wrote about how we ought to define “the public” in an era of modern liberalism and modern democracy. He understood that each of us is likely to choose to belong concurrently to several different “communities”, communities that may overlap with one another. At the same time, he offered an overarching way of thinking about a concept of “the public” that stood apart from the choices people made about which set of “communities” to join.

Dewey suggested that, to define this “public,” we should focus on a key question: How do our activities affect other people? If I interact with another person, our interaction will obviously have an impact on both that person and me. But Dewey’s key observation was that sometimes those interactions will also have important indirect effects on *third parties*. Dewey said we should understand those third parties to be part of our “public.” He wrote: “The public consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for.”⁴

This quotation brings me to my central point this evening. I believe that we should follow Dewey’s guidance and think about whether and how *our* actions have indirect effects on *others*, and how *others’* actions have indirect effects on us. I believe it makes sense for us, as a general matter, to define our “public” as a soft circle that includes everyone whose actions affect us, even indirectly, as well as everyone who is affected by our actions. Today, to an extent unprecedented in human history, that means we should be defining our “public” in terms that span the entire world.

Permit me to take a few brief minutes to review the factors that caused, over the course of the past forty years, the set of truly revolutionary changes that we call “globalization.” Forty years ago, nations were hugely powerful actors; today, the power of nations has been profoundly undermined. This shift came about because of political, technological, and cultural changes, and it requires us to think in new ways about the answer to Dewey’s questions – whose actions affect us, and who is affected by our actions?

The political and economic changes over the past forty years have had to do primarily with free capital and free trade. After World War II and before 1971, the Bretton Woods agreements gave national governments a lot of flexibility to control capital and trade in order to manage their economies. National governments set the value of their own currencies. National governments managed capital flows in and out of their countries. The International Monetary Fund helped to bridge currency

4. John Dewey, *The Public and Its Problems*, in 2 THE COLLECTED WORKS OF JOHN DEWEY (Melvin L. Rogers, ed., 1984).

reserve imbalances.

During this time period nations also had a lot of policy tools available with respect to their economies. They could run deficits. They could print money and accept inflation. They could interfere with free trade—the General Agreement on Tariffs and Trade (GATT) was a weak instrument, with lots of areas that it left untouched. So tariffs were still a big part of the scene, as were export restrictions, import quotas, and subsidies.

Since 1971, however, the trend has been to reduce dramatically the power of national governments to regulate the movement of capital, goods, and services. The first step was the abandonment of the gold standard. In response to overwhelming market pressures, Richard Nixon announced that the dollar would no longer be convertible to gold at the rate of \$35 per ounce, and soon currencies were traded freely on markets for foreign exchange. During the 1970s and 1980s, developed countries lifted virtually all controls on capital. And during the 1990s, as part of the so-called “Washington consensus,” key institutions of international finance pressured developing countries to remove their capital controls as well.

Meanwhile, during that same forty-year period, in the world of tariffs and trade, the multinational system known as the GATT kept expanding. It came to include more and more countries. And whereas early rounds were primarily a mechanism through which the members would all agree to lower tariff rates at the same time, the Kennedy and Tokyo rounds began to prohibit countries from using so-called “non-tariff barriers” such as anti-dumping rules. Ultimately, the Uruguay round extended trade liberalization with regard to export subsidies, intellectual property, services, and foreign investment. Perhaps most importantly, that round also created a World Trade Organization with much greater power to enforce its decisions in the area of trade liberalization.

Moreover, at the same time that national governmental power was being dramatically reduced in deference to a philosophy of free movement of capital, technological and cultural changes were having an equally important impact. On the technology side, improvements such as containerization, and infrastructure investments such as transoceanic fiber optic cable, were reducing transportation and communication costs; e.g., food could travel longer distances without spoiling, etc. On the cultural side, English suddenly emerged as a truly global commercial language.

The result of these political, economic, technological, and cultural changes was the current phase of globalization: an absolutely astounding increase in the pace of movement of just about everything. Movement of capital, of goods, of services, of workers—of course. But much more than that: movement of diseases, of pollution, of ideas, of cultural fads—even of terrorists.

With all this new movement has come both interdependence and independence. We are vastly more dependent on people far away from us than ever before. And we are vastly more independent of the authority of our own governments than ever before. That powerful combination of personal interdependence and independence from our own nations is, at an abstract level, the defining impact of globalization on our lives.

Globalization has raised a set of very difficult challenges for us. It has made it more difficult for us to force commercial markets to be humane. In many countries

it has triggered domestic political pressures to shrink the size of government. It has meant that many of the risks to the global economy have become more highly correlated and dangerous. Accordingly, when a problem emerges like the financial crisis of 2007-2008, the entire world is much more vulnerable. Finally, globalization has made it ever more difficult to preserve distinct cultural identities in a world of labor migration.

And yet, as challenging as these consequences of globalization may be, I am an optimist. I believe that globalization has also brought humanity a set of new opportunities that are simply breathtaking. If I may, I would like to illuminate these new opportunities by reference to my own experiences during the past five years in China.

Please understand that I am not what one would ordinarily think of as a “China person.” Fifteen years ago I had never set foot in China, and I knew virtually nothing about the country. My impressions were vague, and, candidly, they were not very optimistic.

In 1998, however, the U.S. State Department asked me to participate in a project to support the development of the rule of law in China, and so I took my first trip there. And only nine years later, I agreed to move to China to help Peking University create a new law school that would teach American rule-of-law values to the young people who are China’s best hope for the future.

From 2008 until last summer, I lived and worked in South China, helping to launch the Peking University School of Transnational Law (STL). In their first year, STL students study the American common law—property, torts, contracts, and criminal law. They learn about trial by jury, and they learn about the presumption of innocence.

Bob Hirshon, a Mainer who once served as president of the American Bar Association, visits STL each year to teach about professional responsibility. At this very moment, another former president of the American Bar Association named Mike Greco is teaching about international human rights and the international criminal court. Next month Mark Rosenbaum, the legal director of the American Civil Liberties Union of Southern California, will be back to teach his enormously popular course on freedom of speech.

Why would such a school be created in China today? Because we are living in an era where ideas move, and where we are witnessing the emergence of a more unified transnational legal profession that is not rigidly divided according to national borders.

And just this past summer, I moved from the southern end of China up to Shanghai, to help launch New York University’s new degree-granting campus in that city. The first class of students at NYU Shanghai will begin their studies next year. Half the students will be Chinese, and the other half will come from the rest of the world.

I will be teaching all the NYU Shanghai students a required first-year course in intellectual history. We will be studying authors like de Tocqueville and Dewey, together with Confucius and Mencius. During the course of their education, all the NYU Shanghai students will also spend time studying outside China—in New York City or on another one of NYU’s fourteen campuses around the world.

My work in China has led me to see first-hand the kind of hope and possibility

that globalization holds out for humanity, alongside the challenges. The students and professors who participate in these educational adventures always come away with an appreciation for several powerful facts: First, cultural differences are tiny when compared with the overwhelming similarities that unite all humanity. Second, when students from different cultures are studying side by side, they all develop a deeper appreciation for their differences, a sense that these differences help to make life more interesting. And third, the most daunting challenges that we are facing in the twenty-first century—whether we are talking about climate change, or energy scarcity, or economic inequality, or disease—all transcend national borders. They are all challenges that we *must* solve together.

When we apply John Dewey's test today, there can be no doubt that what happens in China affects us, and vice versa. We are part of a worldwide "public." And it is clear to me that the University of Maine School of Law is analyzing legal education for worldly public service in exactly this way. Allow me to take note of just a few examples.

Under globalization, it is a fact that data networks no longer stop at national borders. Today the "cloud" surrounds the entire planet. We and our worldwide "public" need to think carefully about how to preserve notions of *privacy* in such an environment. The University of Maine School of Law is taking the lead in helping its students to engage these questions, so that they might be well prepared to provide service to a worldwide public. Similarly, we are all affected by problems of international migration, international slave trafficking, and international human rights. Again, Maine Law has chosen to initiate a Refugee and Human Rights Clinic. Third, our oceans are no longer simply boundaries that separate one nation from another. Rather, they need to be thought of as the connectors that link us to the rest of the world. Maine Law's Center for Oceans and Coastal Law is designed to encourage this manner of thinking.

When we all begin to think in this way about a worldwide "public," I believe that we will be well prepared to live out the highest ideals of worldwide public service. This kind of public service has the possibility of improving the lives of others. And just as importantly, it has the possibility of improving our own lives.

A commitment to worldwide public service connects us to others. It deepens our sentiments of sympathy and identification. It allows us to understand ourselves as full, participating members in the community of twenty-first century humanity. It ennobles us, in a way that I am confident would have made Frank M. Coffin very proud.