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Foundations and Government, Marion R. Fremont-Smith

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BOOK REVIEWS

FOUNDATIONS AND GOVERNMENT. By Marion R. Fremont-Smith. New York: Russell Sage Foundation. 1965. Pp. 564. \$8.50.

Criticism of charities, like criticism of motherhood or of religion, usually is very unpopular. Everyone knows that the best single sign of goodness in a man is charity. Does not the Bible say, "And now abideth faith, hope, charity, these three; but the greatest of these is charity."¹ Thus, criticism of charity is generally viewed with suspicion and resentment. Most resentful of all is the one accused of hypocritical pretended charity for selfish purposes. After all, it is his money to give or not give. It is a rare wrongdoer who does not justify his deeds in his own mind.

Even so, there has been a growing chorus of criticism, in recent years, of American charity and charities. Chief among the targets of criticism have been the philanthropic foundations, not even excepting the most revered names among them. They have been accused of various faults, but, worst of all, some have been accused of hypocritical self-seeking under the mantle of charity, of use of the charitable form for private gain, and for evasion of the law.² They have been accused by private citizens³ and by congressional committees.⁴

Yet, in all this uproar, nobody has been quite sure of what this thing called a "foundation" or "charitable trust" really is, what is its form and organization, and what law governs it. At least there has been no single, organized study (book) on that, though there have been many piecemeal studies of parts of the picture.⁵ Indeed, there was not one modern study of the law of non-profit organizations in this country until 1956,⁶ though there had been earlier books on parts of the subject in this country and in England. This fact is

¹ 1 *Corinthians* 13:13 (King James).

² CHAIRMAN OF HOUSE SELECT COMM. ON SMALL BUSINESS, 87TH CONG., 2D SESS., TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY 1 (Comm. Print 1962) [hereinafter cited as 1962 COMMITTEE REPORT].

³ OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS 439-63 (2d ed. 1965); Oleck, *Foundations Used as Business Devices*, 9 CLEV.-MAR. L. REV. 339 (1960); Comment, *Charitable Trusts and Inducements To Violate the Law*, 20 WASH. & LEE L. REV. 85 (1963).

⁴ 1962 COMMITTEE REPORT; Reece, *Tax-Exempt Foundations*, H.R. REP. NO. 2681, 83d Cong., 2d Sess. (1954).

⁵ See the bibliography in OLECK, *op. cit. supra* note 3, at 387-88 nn.52-55 & 66.

⁶ OLECK, NON-PROFIT CORPORATIONS & ASSOCIATIONS (1st ed. 1956).

startling, considering how many non-profit organizations there are and how important they are to our society.⁷ As far back as 1830, the wonderful Baron de Tocqueville commented on the characteristic American tendency to form and join voluntary non-profit associations.⁸

Now we also have a modern study (book) on foundations — the subject of this review — *Foundations and Government*, by Marion R. Fremont-Smith. It is well written and will be valuable for the understanding and treatment of foundations.

The Russell Sage Foundation of New York City underwrote the project for producing and publishing this book as part of that foundation's continuing program of studies in philanthropy. There is a mild irony in having a study of the controversial subject of foundations underwritten by a foundation. But no better proof of the fundamental value and rightness of the foundation device could be imagined than such a forthright project.

Necessarily, this work, like any full-scale study of any type of non-profit organization, cuts across various fields of law — trusts, corporations, taxation, decedents' estates, property, contracts, agency, administrative law, and more. This complexity probably has been the reason why so few legal writers have been bold enough to attempt the subject.

Mrs. Fremont-Smith's analysis is broken down into eleven chapters — a somewhat too broad system, perhaps. A more detailed breakdown might have been better. Starting with an historical summary, she moves to the question of what is a charitable disposition. Then she treats foundations, first as trusts and then as corporations. The Internal Revenue Code merits and receives a chapter. State supervisory agencies, the attorney general's role, typical state supervisory programs, and the 1954 Uniform Supervision of Trustees for Charitable Purposes Act, are discussed in sequence. Agencies for federal supervision receive detailed treatment, and a chapter is devoted to comparison with the English law of foundations. Finally, there is a concluding chapter on future prospects and recommendations.

A large and valuable appendix is included, beginning with a state-by-state table of basic legal requirements for charitable trusts

⁷ See OLECK, *op. cit. supra* note 3, at 360-61; THE WORLD ALMANAC AND BOOK OF FACTS, 1964, at 535-39, 546-61, 622.

⁸ 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (Knopf 1945).

and corporations. Like almost all tables, this affords a quick bird's-eye view of a few major points and a quick view of comparative approaches but is oversimplified for other purposes. A second part of the appendix sets forth typical statutory rules and regulations from several states. The appendix concludes with reporting forms and a list of cases cited. The list of cases is disappointingly small but is well selected. Inasmuch as the book does not pretend to be encyclopedic, these cases suffice as starting points for more detailed studies. The index is adequate but inconsistent in referring to some sources (*e.g.*, legal articles) cited in the text but not to others similarly cited.

Critics of foundations invariably attack the abuse of foundation forms and privileges, not the forms and rarely the privileges themselves. Nobody, not even the critics, is against charity. The chief accusations in recent years have been that some, perhaps many, founders are much more interested in tax evasion and in perpetuation of personal and family benefits than in charity. Foundations are said to be a common device for evasion of corporation law and for unfair competition in business. They are said to be dangerous and perpetual concentrations of wealth, offensive to the general policy of a democracy that wealth and power should not be hereditary.⁹ Indeed, it is even suggested that there be a twenty-five-year maximum duration of legal life for most foundations.¹⁰

As this is written, another criticism comes to mind, only half in jest. The foundations are discouraging competitive individual enterprise. Mrs. Fremont-Smith's book was underwritten and produced by a tax-exempt foundation and sells for approximately the cost of production. This reviewer's book on a similar subject,¹¹ produced by a business publisher, was underwritten by its author and produced by its publisher as a taxable business-risk venture, for which the author will receive modest compensation only if and when there is successful sale. Its price is far more than twice the price of the foundation-supported volume. It is no answer to say that foundations aid production of books that otherwise would not be written, because many foundation-supported books would be written without such support, and free enterprise should not be dependent on the favor of a patron.

⁹ OLECK, *op. cit. supra* note 3, at 441, 444-46; 1962 COMMITTEE REPORT 1.

¹⁰ OLECK, *op. cit. supra* note 3, at 457-58.

¹¹ OLECK, *NON-PROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS* (2d ed. 1965).

Mrs. Fremont-Smith seems to accept the *Foundation Directory's* and Treasury Department's figure of 15,000 as the number of foundations worthy of the name, in 1964.¹² But these exclude foundations with assets below \$100,000 which did not make grants of \$10,000 or more in the year of record, which supposedly number 9,000.¹³ She makes no comment on the fact that 88 percent of the foundations listed in the *Directory* were set up after 1940, though she mentions it.¹⁴ Surely, so remarkable an outburst of generosity merits analysis and comment.

If Congressman Patman's figure of 45,124 tax-exempt foundations in 1960 is an exaggeration, as it refers to tax Form 990-A reports of other types of exempt organizations,¹⁵ then few indeed of America's hundreds of thousands of such organizations are filing reports. And the biggest danger today, as this reviewer often has stated, is the use of the foundation device as a holding company for family and one-man controlled business associations, a tax free business instrument bluntly called a "conduit" foundation.¹⁶ Mrs. Fremont-Smith seems undisturbed by the 1964 *Treasury Report* which found that over two thirds of the listed 15,000 foundations were subject to "50 percent or more" of "donor-related influence."¹⁷ What goes on in the unknown numbers of smaller, family or one-man foundations is not hard to guess. Her mildly derogatory comments on the Patman Reports include apparently supporting citations that actually praise much in the reports.¹⁸

She mentions, but apparently is not disturbed about, the lack of adequate attorney general or other supervision or of statutory control, though she cites the English Brougham Commission and Board of Charity Commissioners as examples of what inferentially ought to be done.¹⁹

Perhaps the most illuminating sentence in the book is this one: "The motive of the donor of a charitable trust is not usually a factor which the courts will consider in determining the validity of a

¹² FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT* 45 (1965).

¹³ *FOUNDATION DIRECTORY* 10 (2d ed. 1964):

¹⁴ FREMONT-SMITH, *op. cit. supra* note 12, at 46-47.

¹⁵ 1962 COMMITTEE REPORT at v.

¹⁶ FREMONT-SMITH, *op. cit. supra* note 12, at 46.

¹⁷ *Id.* at 47, citing STAFF OF SENATE COMM. ON FINANCE, 89TH CONG., 1ST SESS., *TREASURY DEPARTMENT REPORT ON PRIVATE FOUNDATIONS* 82-84 (Comm. Print 1965).

¹⁸ FREMONT-SMITH, *op. cit. supra* note 12, at 371-73, citing Krasnowiecki & Brodsky, *Comment on the Patman Report*, 112 U. PA. L. REV. 190, 192 (1963).

¹⁹ FREMONT-SMITH, *op. cit. supra* note 12, at 49-50.

charitable purpose.”²⁰ She does say, however, and on the same page, that if the result is such that private profit will inure to the donor, it is not charitable, particularly in questions of Internal Revenue.²¹

Somewhat surprisingly, Mrs. Fremont-Smith barely mentions the celebrated case of *In re Estate of Scholler*,²² and then only as an added footnote to a minor aspect of the law involved.²³ That case is perhaps the classic example of the worst features of the American law of foundations, with the court smiling benignly on what amounts to the use of the foundation form as a holding company device. The court said that the word “charity” is the magic word, and if any improper practice is involved, that will be left to the attorney general for correction. We know how likely is attorney-general action in such cases.

Perhaps she is right, however, in remaining cool and objective. Her statements do speak for themselves, and the book is intended to provide data, not editorials. This reviewer’s tendency to become righteously indignant does not seem to have accomplished many great reforms.

The paucity of state and other requirements of reports speaks for itself.²⁴ So does the timidity of court supervision.²⁵ Such illustrations as Ohio’s one assistant to supervise 1,777 *registered* trusts, speak for themselves.²⁶ Only after the uproar of the Patman Committee did the Treasury Department set about making a registry of tax-exempt organizations, which in 1965 was not yet ready for full automated use.²⁷ To this day the failure of many foundations even to file tax information reports is well known and generally unpunished.²⁸

Mrs. Fremont-Smith seems to favor the idea of separate State Boards of Charity, as recommended by Karst, to supervise foundations and other charities.²⁹ But even this seems to be a half-meas-

²⁰ *Id.* at 59.

²¹ *Ibid.*

²² 403 Pa. 97, 169 A.2d 554 (1961). The author of this book review was counsel to the attorneys for the heirs in the challenge of the deed of trust in this case.

²³ FREMONT-SMITH, *op. cit. supra* note 12, at 86 n.8.

²⁴ See *id.* at 123.

²⁵ See *id.* at 196-97.

²⁶ See *id.* at 287.

²⁷ *Id.* at 406.

²⁸ INT. REV. CODE OF 1954, § 7203 provides a maximum penalty of one year imprisonment and a ten thousand dollar fine for willful failure to file.

²⁹ FREMONT-SMITH, *op. cit. supra* note 12, at 406-07, citing Karst, *The Efficiency*

sure. This reviewer has urged, and in 1955 drafted a model statute for, a supervisory agency for *all* non-profit organizations in every state.³⁰ Nothing less is likely to suffice to reasonably control abuse of non-profit status and privileges. The new English system of supervision by Commissioners is the best example of such control-supervision.

But she is clearly correct when she concludes that foundations must not be allowed to "become vehicles of special privilege or position. Only as long as government fulfills this function will the public refrain from demands for greater control which may ultimately destroy the ability of foundations to make their unique contributions to society."³¹

HOWARD L. OLECK*

RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES. Reporters: Adrian S. Fisher, Covey T. Oliver, Cecil J. Olmstead, I. N. P. Stokes, Joseph M. Sweeney. Revisers: Noyes Leech, Robert E. Stein. St. Paul: American Law Institute. 1965. Pp. xxvi, 633. \$17.50.

The highest — and yet the riskiest — task of legal scholarship is to pull from the cases, the statutes, and what the French call the *doctrine*,¹ those general rules which govern the broadest spans of our behavior.² A familiar example of this in the common law tradition is the development of the rule for every equity case³ that "he who seeks equity must do equity."⁴

To this task the American Law Institute, its reporters, and its editors for the *Restatement* dedicated ten fruitful years.⁵ The result is a book that may properly be called indispensable for anyone connected with matters international. Among restatements, it stands out as one of the most readable. As a proposed draft and in its present form, it has been found useful as a teaching tool,⁶ and its heuristic value in provoking thought among jurists in and out of the State Department has already begun to bear fruit.⁷

Extensive reporting has made the Reporters' Notes a gold mine of recent material without attempting to supplant the comprehensive-

of the Charitable Dollar: An Unfulfilled State Responsibility, 73 HARV. L. REV. 433, 476-83 (1960).

³⁰ OLECK, *op. cit. supra* note 11, at 575-92.

³¹ FREMONT-SMITH, *op. cit. supra* note 12, at 460.

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ness of the Hackworth and Whiteman *Digests of International Law*. Many of these Notes are most desirable for ready comparison with the *Restatement's* "black letter" rules; many of them are virtually unavailable in an ordinary law collection. For example, the Reporters' Notes on jurisdiction include in full all the key articles of the Convention on the Territorial Sea and the Contiguous Zone.⁸ Again, in the Notes on immunities from jurisdiction, not only is the Vienna Convention on Diplomatic Relations set forth where it applies⁹ but the fact of its ratification by the Senate in September of 1965, to remain undeposited until we have adopted implementing legislation, is also reported.¹⁰ Equally desirable but even less common-

¹ The civil law states have a code of rules to apply to fact situations; comments on these rules and on the cases applying them help to spell out their content and are called *doctrine* (pronounced "doc-treen"). The RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT], with its sections, official comments, and Reporters' Notes, performs the function of both a Code and its *doctrine*.

² This type of work may be seen in present projects of the International Law Commission and the *ad hoc* General Assembly committee to formulate general principles of international law; the Duke World Rule of Law Center projects on "General Principles," "Sovereignty Under Law," "Independent Adjudication," and "Limitations on Self-Defense" cited in LARSON, *THE INTERNATIONAL RULE OF LAW* 26-30 (1961); and the Cornell University project on "General Principles of Law and the Law of Contracts." See generally Corbett, *The Search for General Principles of Law*, 47 VA. L. REV. 811 (1961); Hazard, *The General Principles of Law*, 52 AM. J. INT'L L. 91 (1958); Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations*, 10 U.C.L.A.L. REV. 1041 (1963); Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 15 AM. J. INT'L L. 734 (1957).

³ Professor Ralph A. Newman points out that the early history of the English Court of Chancery shows there is no compelling reason why the plaintiff seeking money damages in a "law" case should not also be subject to this principle. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 30-45 (1961).

⁴ An analogy in international law is the requirement under the Geneva Conventions that, in order to be entitled to certain benefits, insurgents must belong to a group which displays civilized conduct toward captives. Where there is no showing that the individual captured had any connection with the inhumane conduct of other insurgents, however, is not the equity principle, "he who asks fair treatment must himself mete out fair treatment," better than the present "guilt-by-association" rule?

⁵ *Restatement* work began with Ford Foundation aid in 1955. The use of advisory committees from the United States and Europe continued a trend toward multinational participation in international law research which, it is hoped, will be expanded to include Africa, Asia, and Latin America in future restatements.

⁶ In draft form, it was used by Professor Albert H. Garretson in a summer course on Foreign Relations Law at the New York University Law Center, by Professor Stanley D. Metzger at the Georgetown University Law Center, and by this reviewer in an International Law seminar at Western Reserve University School of Law.

⁷ See, e.g., *A Symposium on the Restatement of the Law (Second), Foreign Relations Law of the United States*, 41 N.Y.U.L. REV. 1 (1966).

⁸ RESTATEMENT § 14, Reporters' Note; § 15, Reporters' Note 3.

⁹ *Id.* § 73, Reporters' Note 2; § 74, Reporters' Note 1; § 75, Reporters' Note; § 76, Reporters' Note; § 78, Reporters' Note 2; § 79, Reporters' Note 1.

¹⁰ *Id.* Introductory Note, at 228. In addition, key articles of the Vienna Convention

ly available materials include such gems as Arthur Dean's statement of our "abstention doctrine," under which states not yet involved in a fully fished area of the ocean should be required to abstain from fishing there,¹¹ and Herman Phleger's assertion that an American investor whose property is expropriated is only entitled to be compensated in local currency, regardless of its utility to him.¹²

The *Restatement* does not try to span all of international law. It aims to codify only those general principles which can be deduced from known rules and practices in four areas: (1) jurisdiction, (2) recognition, (3) international agreements, and (4) responsibility of states for injuries to aliens. The rules on hostilities, on American immigration laws, and on acquiring territory were expressly excluded.

Every "codification" of this sort invites new evaluations of the process of "codification" itself. This is an especially healthy venture for those schooled in the common law tradition with its assumed superiority for case-by-case determinations. Indeed, Mr. Justice Holmes felt that the great merit of the common law is that it decides the case first and only determines the principle afterwards:

A well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step. These are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant. . . . When, then, it is said to be one of the advantages of a code that principles are clearly enunciated and not left to be extricated from cases, either the definiteness of well-settled law is underrated, or it is intended . . . to develop by legislation doctrines of which the germs may be found in isolated decisions.¹³

on Consular Relations of April 22, 1963, not yet in force as of September 1, 1965 but already a significant source of diplomatic law, are set forth in *id.* § 81, Reporters' Note.

¹¹ *Id.* § 36, Reporters' Note 1. Recent fishing for the first time by a large Soviet fleet in the ocean perch spawning grounds on Stonewall Bank some thirty miles off Newport, Oregon, displays both the urgent need for some international regulatory machinery in this area and the timeliness of many of the Reporters' Notes. See Bamberger, *Soviet Stresses Fishing*, N.Y. Times, April 12, 1966, p. 3, col. 2. See generally BURKE, OCEAN SCIENCES, TECHNOLOGY AND THE FUTURE INTERNATIONAL LAW OF THE SEA 63-85 (1966); McDUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 923-1007 (1962).

¹² RESTATEMENT § 190, Reporters' Note.

¹³ HOLMES, BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 63-64 (Shriver ed. 1936). While Holmes deprecated the value of developing new doctrines from isolated cases, he welcomed the new Code of Procedure adopted in New York in 1870 precisely because the existing common law forms of action were not based on any comprehensive survey of rights and duties yielding practical classifications. *Id.* at 58. Can it be gainsaid that there are signs we have reached an analogous point in international law?

Codification at its best, as in the overwhelming majority of the *Restatement's* sections, serves several aims helpful to lawyers. Among others, it makes prevailing doctrines readily available in a single source. A treatise attempts this.¹⁴ Usually, however, it lacks any requirement that it embrace all the problems in the areas covered. A restatement, on the other hand, requires its scholars to (1) cover, by generalizations spelled out in comments and illustrations, every problem in specified areas; (2) show consistent treatment for problems which logically ought to be resolved consistently; and (3) provide a consistent solution even where one may not yet have been reached in *ad hoc* practices. It is precisely because of these requirements of comprehensive reach and consistent approach that a restatement may attain a higher level of legal craftsmanship than a treatise need reach.

The "Bases of Jurisdiction" chapter is an example of how the *Restatement* meets the first requirement. Here, the American Law Institute has had to set forth all the bases it believes an international tribunal would recognize. For instance, the many ways in which a nation's laws can be applied to acts carried out abroad on the basis of nationality or of some effect at home are spelled out.¹⁵ On the other hand, the ability to reach acts by an alien abroad which have no effect at home but which harm one's own citizens — sometimes called "passive personality" or "protective" jurisdiction where it has been incorporated in penal codes — has been intentionally rejected.¹⁶

In this reviewer's opinion, however, it was as unnecessary to so broadly reject all assertions of jurisdiction based merely on the nationality of the victim as it would be to press for jurisdiction over every case in which one's citizen has been injured by acts unredressed or unpunished when they occurred abroad. In the nineteenth century, our State Department took an official position against Mexico's application of this kind of statute to an American who had libeled a Mexican in a Texas newspaper.¹⁷ It is just as foreseeable, nevertheless, that we may someday be called upon to support or oppose actions taken when it is more just to uphold a jurisdictional claim

¹⁴ Several excellent English-language treatises have been produced, *e.g.*, OPPENHEIM, *INTERNATIONAL LAW* (8th ed. 1955) (two volumes), which is now being revised under Professor R. Y. Jennings at Cambridge University; O'CONNELL, *INTERNATIONAL LAW* (1965) (two volumes); BRIGGS, *LAW OF NATIONS* (2d ed. 1952).

¹⁵ *RESTATEMENT* §§ 18, 30.

¹⁶ *Id.* § 30(2) & comment *e.*

¹⁷ See Letters on *Cutting's Case*, in 1887 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 757.

based merely on the nationality of the victim. Suppose, for instance, under conditions of extreme persecution of Indian minorities by South Africans, India applied its similar jurisdiction to try the persecutors when found in India. In such a case, that country might ask for and receive our support rather than our rejection of its protective jurisdiction so used.

An example of how the *Restatement* meets the second requirement can be seen in the notable contribution it made by consistently distinguishing between *jurisdiction to prescribe* a rule and *jurisdiction to enforce* it. The layman, for instance, thinks of diplomatic immunity as some mysterious way in which diplomats are "outside the rules." The *Restatement* makes it easier to understand how the diplomat is subject to the same rules as everyone else, although non-court means must normally be used to hold him to them.¹⁸

An example of how the third requirement — that the *Restatement* provide a consistent solution even where practice is still ambiguous — is fulfilled lies in the excellent chapter on "Resolution and Avoidance of Conflicts of Jurisdiction." Here again, the Institute has made a notable contribution with its rule that the existence of inconsistent requirements (say, where one state deliberately permits a merchant to refuse to deal with those who fail to keep monopolistic prices, while another state firmly prohibits it) is not an excuse for insulation from regulation but is rather a reason to take other factors into account to see whether a nation ought to insist on its own requirements.¹⁹

It would have been good to have seen the Institute take a bolder stand in the areas of individual rights and duties under international law than it has. The present hiatus, for example, in which stateless persons are left unprotected under an international law which is a bit too conceptualized around "citizenship" to embrace them, is retained.²⁰ The Reporters' Notes mention rules in proposed conventions which would require that (1) stateless persons be treated no worse than other aliens, and that (2) the state in which the stateless person habitually resides be able to protect him by espousing his claims under international law.²¹ The Note comment on this sec-

¹⁸ *But see* RESTATEMENT § 64, illustration 2, which makes it clear that in the case of a murder by an ambassador, he has immunity from trial only while he retains his ambassadorial status and can be tried for the offense if he returns or remains under some different status.

¹⁹ *Id.* §§ 39-40.

²⁰ *Id.* § 175.

²¹ *Id.* § 175, Reporters' Note 2.

ond rule illustrates the dilemma which would arise when faced by the requirements of being all-embracing and consistent if there were not also a third requirement, namely, that of supplying a consistent solution, if logically demanded, even where practice has not yet come up with an unequivocal one:

Such a rule has the merits of justice and feasibility, but it is believed that international law has not yet progressed to the point where it may properly be included in a Restatement of the Law.²²

Nevertheless, the care that went into the *Restatement*, its informative abundance of material not normally available, and its success in abstracting those general principles that govern our foreign relations law, shine through. The highest, and riskiest, task stands well fulfilled.

DANIEL WILKES*

²² *Ibid.*

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