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THAT THOSE ALONE MAY BE
SERVANTS OF THE LAW WHO LABOR
WITH LEARNING, COURAGE, AND
DEVOTION TO PRESERVE LIBERTY
AND PROMOTE JUSTICE.

— *Leslie H. Buckler, Professor, UVA School of Law, 1931*

Inscribed on the face of Clay Hall

INTRODUCTION

THE FACULTY OF THE UNIVERSITY OF VIRGINIA School of Law is a remarkable intellectual community. That much is clear from reading the scholarly profiles of the thirty-three members of our faculty that have already graced the pages of this publication as well as the three we honor in this issue. But the whole really is larger than the sum of the parts. I have always believed that one of the reasons that so much excellent work is done here, by such a large and diverse group of scholars, is that scholarship is treated as a collective enterprise. It is entirely appropriate, therefore, that even as we select three scholars to profile in depth, we view the *Virginia Journal* as a record and celebration of the *faculty's* scholarly successes.

This year we profile three additional members of our faculty:

Darryl Brown's work is informed by a detailed understanding of the daily business of criminal prosecution and defense work. He uses that understanding to challenge views widely held among scholars of criminal law and procedure, such as the belief that criminalization is a one-way ratchet, with the scope of prohibited conduct and the severity of sanctions ever increasing. Darryl manages to blend theoretical sophistication with attention to ground-level doctrinal and practical realities of the criminal justice system. By doing so, he has accomplished the difficult task of shedding new light on fundamental questions of criminal justice.

Alex Johnson is a rare scholar equally at home in private law and critical race theory. Alex was one of a group of scholars that reinvigorated property law scholarship beginning in the 1980s, using then-novel tools from the law and economics literature. He then broadened his focus and made an immediate splash in critical race theory with his article "The New Voice of Color." The article argued for an experience-based rather than a status-based articulation of the distinctive contribution of scholars of color—a view that has received renewed attention because of its apparent embrace in a speech by Judge Sotomayor. Alex recently expanded into

contracts with a piece on duties to disclose, a topic with obvious connections to the law of real property.

Rich Schragger is one of the nation's leading young scholars of local government law whose work expands considerably the traditional boundaries of that field. Rich looks at issues that are conventionally analyzed as problems of state-federal relations, such as economic regulation or same-sex marriage, and shows that the relevant policy actors are often mayors and other local officials. He uses that observation to illuminate federal constitutional law and federalism—but federalism considered as a three-tier rather than a two-tier problem. Local, and not merely state, rules may be protectionist or interfere with the free movement of people and goods. Rich's work challenges us to think more deeply about the ways in which the division of political power affects the distribution of power between private capital and government.



PAUL G. MAHONEY

Dean



Exploring and Explaining How Criminal Law Really Works

AFTER A CLERKSHIP WITH CHIEF JUDGE DOLORES SLOVITER of the U.S. Court of Appeals for the Third Circuit and a brief practice in corporate litigation, Darryl Brown practiced as a criminal defense attorney and was lead counsel in more than thirty jury trials in Georgia before beginning his teaching career. That experience triggered his sustained academic interest in criminal justice issues, which he developed while teaching at Washington and Lee University School of Law for several years before joining the Law School faculty in 2007, after visiting in 2004–05. While he has taught a range of courses including torts, voting rights, and trial advocacy, most of his teaching in recent years has focused in criminal law, criminal adjudication, evidence, and white collar crime.

Criminal justice issues have also been the focus of his scholarship. It was the messy reality of practice in courtrooms and law offices in particular that led to an examination, in a range of work,

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on how juries and lawyers interact with, and give meaning to, criminal statutes and rules of procedure.

A pair of early articles sought to describe processes of criminal jury decision-making and their normative legitimacy in comparison with comparable decisions by other legal actors, especially judges. In "Plain Meaning, Practical Reason and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes," 96 *Mich. L. Rev.* 1199 (1998), Brown starts with the observation that juries in most jurisdictions are given instructions much like those he saw Georgia juries guided by: informed of the statutes under which defendants are charged and then tasked with determining disputed facts, they are told little more than to "apply the law" to the facts to reach a verdict. As judges and lawyers know, that is often easier said than done. A voluminous literature on statutory interpretation describes a complicated process, informed by a range of considerations and interpretive methods, that face *judges* when they must "apply the law." Yet juries receive little guidance in what this task might entail and are sometimes faulted when their verdicts seem to reflect something other than plain-meaning application.

Brown examined how juries go about reaching verdicts in ordinary criminal cases and whether their reasoning, and statutory application choices, accorded with familiar theories of judicial statutory interpretation. Utilizing videotape and transcripts from jury deliberations in real and mock trials, supplemented by empirical studies of jury decision making, Brown described how juries interpret statutes and found their substantive considerations, interpretive strategies, and occasional errors or biases to compare favorably with judicial interpretation. Juries are, for example, often pre-disposed to plain-meaning application of statutes, but they look as well to considerations such as a statute's purpose. Despite their solid instincts, the complexity of the task suggested to Brown that juries might be aided by instructions that offered more guidance on the basics of statutory construction.

In "Jury Nullification Within the Rule of Law," 81 *Minn. L. Rev.* 1149 (1997), Brown extended this understanding of juries' decisions on law

application to consider whether decisions typically described as nullification could nonetheless be lawful. If nullification is a decision to acquit despite finding facts that support a guilty verdict under the applicable statute, such verdicts are typically described as violating the rule of law. But understandings of the rule of law, how law is constituted, and what law consists of have evolved from earlier views that understood law in narrow positivist and formalist terms—that is, a view that law consists, in criminal cases, only of a written statute that can be applied determinately or mechanically. Even positivist scholars such as H.L.A. Hart understood law to require at times reference to observable social practices, and Hart’s great critic, Ronald Dworkin, insisted law requires as well reference to “principles of personal and political morality [that] explicit decisions presuppose by way of justification,” so that it is possible that statutes can be “internally compromised” and “unprincipled.” Even jurists inclined toward plain meaning approaches to statutory application, such as Justice Scalia, concede that at least judges must have good reasons for applying statutes’ seeming plain meaning and should look for “any clear indication that some permissible meaning other than the ordinary one applies.” Thus, when juries turn to the same considerations for rejecting the plain-meaning application of a statute, their verdicts, which look initially like lawless nullification, can be understood instead as falling within the rule of law on the same terms that judicial decisions do.

In subsequent scholarship, Brown has moved on to examine why criminal law is used to address some instances of wrongdoing while civil remedies are used to address others, even when the latter misconduct is covered by criminal statutes. In “Street Crime, Corporate Crime, and the Contingency of Criminal Liability,” 149 *U. Pa. L. Rev.* 1295 (2001), Brown observes that criminal liability is not explained by culpability—that is, not all culpable actors are prosecuted. Nor do the familiar grounds for prosecutorial discretion—state resources limits, first-offense status, or resulting harm—fully explain when we choose to prosecute. Moreover, there is wide variance in the use across the landscape of crime, from white-collar to “street” settings.

Brown argues that the way we actually employ criminal liability demonstrates the contingency of criminal law, and culpability itself, on civil alternatives and social costs. Whether criminal law is used, in other words, depends on available alternatives to criminal punishment, including civil, administrative, and non-legal remedies, and it also depends on assessments about the social costs and benefits of criminal punishment, including the effects of punishment on third parties. These contingencies both produce and help explain some otherwise puzzling class-based disparities in criminal punishment. As Brown explains, we use criminal liability for “street” wrongdoing much more than we do for white-collar wrongdoing not because the former is morally worse or causes more harm, but because we have fewer alternative remedies for addressing street-crime and because the ancillary costs of criminal punishment are often more visible and salient in white-collar settings.

In a follow-up article, “Third Party Interests in Criminal Law,” 80 *Tex. L. Rev.* 1383 (2002), Brown explored further how the law sometimes explicitly accommodates concerns for the collateral consequences of punishment on third parties, despite its formal concern only with offenders’ culpability and harm caused to victims. Third-party interests, for example, now appear in both prosecutorial charging guidelines and judicial sentencing decisions as rationales for leniency. Punishment may be moderated because offenders are sole caregivers to young children or critical employers in a community, and the effects of prosecution on such actors, who are closely tied to others, may affect decisions to charge in the first place.

Although we now accommodate third-party interests by moderating prosecution and punishment, Brown observes that we do so haphazardly and unevenly across the spectrum of criminal practice. Brown argues that third-party effects should be more routinely and consistently considered. While these practices conflict with the formal clarity of theories that supposedly organize criminal law—retributivism and deterrence-oriented utilitarianism—considering the impact of punishment on third parties is necessary in order to fully understand, and perhaps control, the impact

of criminal law. Widespread enforcement in some relatively fragile communities, for example, may undermine the communities' human capital and social viability—offenders with criminal records are less attractive as employees and marriage prospects, for example. Moreover, mitigating third-party interests is necessary at times to maintain the legitimacy of criminal law, even as conflicting commitments to distributive fairness, retributive justice, and crime prevention sometimes necessitate punishment. The practice of criminal justice downgrades retributivism and deterrence commitments at times in order to view criminal law more as a pragmatic, administrative process that accommodates multiple, conflicting policy interests.

In more recent work, Brown has sought to reexamine the debate about “overcriminalization” and its implications for American criminal justice. The dominant story of American political process and criminal law is one of democratic dysfunction. Criminal law is a distinctive issue for legislatures and democratic politics generally. Legislators respond to strong majoritarian preferences that make votes against crime creation—or votes to repeal antiquated crimes—politically implausible. Thus criminal law is a “one-way ratchet:” it expands but does not contract. On this account, America’s excessive criminal codes are products of structural failures in political process and democratic institutions.

In “Democracy and Decriminalization,” 86 *Tex. L. Rev.* 223 (2007), Brown told the overlooked story of American jurisdictions’ long and continuing history of legislative decriminalization. State legislatures have long records of repealing or narrowing criminal statutes. Even as criminal law has expanded greatly in some directions, it has contracted—dramatically so—in other spheres of activity. And democratic processes, especially legislatures, have been responsible for much of that contraction. Legislatures repealed most consensual sex crimes (before the Supreme Court’s decision in *Lawrence v. Texas*), alcohol prohibition, many gambling offenses, a range of old mercantilist market regulations, and many “morals” crimes that were once widespread but gradually lost public favor, such as crimes of obscene literature, interracial marriage, and contraception distribu-

tion. To this history, Brown added empirical evidence from a set of recent state legislative records that showed that contemporary legislatures decline to enact most bills proposing new or expanded criminal laws, including many that seem, on standard accounts, politically irresistible. The ratchet of crime legislation turns both ways, especially in state legislatures, and more than ninety percent of criminal law enforcement occurs at the state rather than the federal level. Moreover, while some examples of “overcriminalization” remain, data on charging, conviction, and sentencing practices suggest that what “overcriminalization” exists has little effect on criminal justice’s well recognized problems of excessive plea bargaining, racial disparities, and high incarceration rates. Most prosecutions and sentences are for familiar, non-controversial crimes (with some drug crimes being the arguable exception here), rather than for the sorts of offenses that would be widely recognized as “overcriminalization.”

Brown’s ongoing work continues to focus on what might be viewed as the political economy of criminal justice—the processes and institutions that shape criminal law’s substantive content but also its practice and its widespread effects. One work in progress looks at why the Supreme Court has never intruded on legislative decision-making and regulated substantive criminal law to anything near the degree it has chosen to regulate criminal procedure, and on how democratic processes, which work modestly well in revising criminal law, have worked so poorly in recent decades to keep incarceration rates in line with both American traditions and the standards of other advanced democracies.

In both past and current work, Brown has sought to bring new insights to old debates by questioning conventional wisdom and by looking beyond standard theories in an effort to understand how the institutions and institutional actors that shape criminal law actually function. His work, as a result, is fresh, provocative *and* grounded in reality, which is a rare combination in legal scholarship. ❧

EXCERPTS

Street Crime, Corporate Crime, and the Contingency of Criminal Liability

149 *U. Pa. L. Rev.* 1295 (2001)

THEORIES OF CULPABILITY AND PUNISHMENT IN CRIMINAL LAW seek to explain what conditions are necessary and sufficient for criminal punishment. Under a retributivist view, the defendant's fault or blameworthiness is not only necessary for punishment, but also functions as an affirmative, justifying reason to punish. Retributivism asserts a crucial role for criminal law's unique ability to express moral condemnation in addition to more concrete penalties, which civil sanctions often can inflict just as well. Retributivism implies that when the offender's conduct meets certain criteria, criminal punishment is not only justified but necessary; in fact, the state has a duty to pursue it. Deterrence, on the other hand, has no role for judgment of an offender's fault or culpability except to the extent that expressing such judgments furthers the deterrent effect of punishment. Deterrence theory, strictly conceived, does not look retrospectively at an offender's conduct for justification; its view is prospective, justifying a sanction as a means to reduce future wrongdoing.

Even when retributivism or deterrence offers affirmative, justifying reasons to punish offenders, however, in practice we seldom use criminal law to address such wrongdoing. Many considerations affect whether an offender will be charged and convicted beyond whether his conduct accords with the elements of a crime or defense. One aspect of this broader assessment is the jury judgment, which can assess an actor's particular circumstances to determine whether her actions are blameworthy or not. But this process of assessment also occurs at the initial stages of enforcement, when the police and prosecutors decide to arrest and charge, and it

is of even broader scope there. The assessment at that stage looks not only at the circumstances around the actor's conduct, but also takes account of a range of consequentialist concerns and practical considerations, such as management of limited resources. Further, such judgments are colored by social perspectives that help distinguish between otherwise similar instances of conduct. This broad range of criteria explains how the government answers the routine question that permeates criminal practice: when an offender has violated the law and a jury would convict her, on what grounds can the state decline to prosecute? Widespread declination is not fully explained by the common rationale of managing limited resources nor by the marginality of some criminal conduct, such as a first offense or causing minimal harm, because the state sometimes employs extensive civil remedies for serious wrongdoing covered by criminal statutes that is both intentional and imposes substantial harm.

To describe the actual working of criminal justice practice we need to uncover the criteria, beyond the legal elements, for imposing criminal culpability. Judgments of culpability are contingent not only upon the blameworthiness of an offender's acts, but also upon the perceived efficacy of criminal sanctions as a deterrent. Those assessments, in turn, depend on the alternatives to criminal law—public and private civil law, such as tort law or administrative regulation, as well as other social policy options, such as nonlegal crime prevention strategies like community youth programs and good corporate citizen campaigns. Further, use of criminal law hinges on the social costs of both crime and punishment. Finally, blameworthiness itself is not only weighed against these consequentialist concerns, but shaped by them.

Criminal law's expressive and retributive functions sometimes conflict because punitive approaches alienate offenders, reduce cooperation toward compliance, and may damage the legitimacy of law that is important for deterrence. Even when morally justified, retributivist sanctions can harm prevention efforts and reduce voluntary compliance. Faced with that irony, we sometimes decide to forgo prosecution of offenders for whom we have affirmative, justifying reasons to punish.

Retributivist and deterrent motives also conflict. Determinations of criminal culpability are contingent on the criminal law's civil alternatives and on its utilitarian costs and benefits. But this conflict is mediated inconsistently, so that criminal liability is distributed more unevenly among white-collar or corporate offenders than it is among street offenders. This is not because of hard distinctions in those realms—different sorts of offenders, crimes, and possible remedies—but because of how we have developed, or failed to develop, civil alternatives to criminal law in each sector and the ideological lens through which we make those alternatives appealing. Corporate and white-collar crime prosecution differs from street crime prosecution because of its different mix of retributive and deterrence concerns, which leads corporate crime policy to take greater advantage of our knowledge of how social norms interact with law, of the social costs that accompany punishment, and of the alternatives to criminal law. Criminal law is a comparatively minor tool for addressing white-collar wrongdoing. For street wrongdoing, in contrast, criminal law remains the dominant instrument. Our white-collar crime policy has a much better mix of regulatory strategies, civil remedies, and criminal sanctions than our street crime policy does. Our practice of punishment contributes to unproductive retributivism in street crime law. We could instead treat street crime more like white-collar crime by expanding nascent policies already tested on a local scale but that depart from the punitive trend that now characterizes street crime policy.

Criminal law has long traditions of both retributivist and consequentialist premises. Street crime law maintains a relatively stronger emphasis on moral culpability and expressive condemnation. Corporate crime policy, in contrast, takes place more in a deterrence mode. This distinction in organizing rationales has significant implications for criminal justice policy choices. It supports a division that keeps street crime policy oriented toward dysfunctional models that emphasize criminal sanctions, while corporate crime policy is oriented toward a regulatory model in which criminal law plays a significant but supporting role.

Consequentialist arguments have gained ground in criminal law, as they have in legal thought generally, in large part due to the rise of economic analysis. Dan Kahan has recently described how the opposed rhetorical modes of deterrence and expressive condemnation function politically in criminal law discourse. Deterrence serves to suppress the emotional and political content of criminal law's meaning, while expressive condemnation puts that content front and center, making it the object of heated political debate. Deterrence rhetoric cools passions—it sounds like rational policy talk. Expressive rhetoric heats passions—it is a tool in the battle over which political and moral values criminal law will serve.

The deterrence-expressiveness modulation occurs not only through time, as political disagreement grows or diminishes with regard to criminal law; it also occurs across the landscape of substantive criminal law. Criminal law's unique feature is its moral expressiveness and the traditional background of thinking about criminal law's expressive meaning is street crime. The dominant responses for wrongdoing on the street are the death penalty, the wide support for imprisonment evident in dramatically longer sentences, and the lower ages at which youthful offenders are punished as adults. While we use deterrence rhetoric sometimes in street crime discussions, an expressive and retributive moralism drives policymaking. Retributivism accords with the individualistic, autonomous view of street offenders, free of context that we described in contrast to corporate liability premises.

Corporate criminal law, in contrast, operates firmly in a deterrence mode. Corporate criminal law is part of an elaborate regulatory regime governing firms and commercial activity, and utilitarian thinking is the overwhelmingly dominant mode of analysis for administrative law. The deterrence framework has a couple of implications for corporate criminal law. First, deterrence talk cools passions about the political content of corporate criminal law. It thereby helps to take political contention and moral outrage about such crimes off the table of public debate because it chills moral evaluation of wrongdoing in commercial settings. This is not to say, of course, that it is a foolproof means for doing so, as the savings and loan scandal of a decade ago boiled over into a public debate carried out in expressive idioms.

Additionally, deterrence rhetoric implies that defendants are rational, reasonable actors who can be expected to respond sensibly to incentives. This is one reason why, for corporate wrongdoing, civil sanctions often seem appropriate substitutes for criminal sanctions. When all we are trying to do is deter bad conduct and foster socially desirable behavior, a civil fine can prompt a rational response from actors as well as a criminal one. Yet the rational actor implicit in the deterrence model adopts in a subtle way the social-being view of corporate actors noted above. If we are dealing with rational actors who we nonetheless recognize as vulnerable to social influence, then the incentives we set up for them should include factors present in their social setting. Thus, while the incentives we impose on street criminals are traditional punishments that also carry expressions of moral opprobrium, the options for corporate actors expand to include the much wider array of civil regulatory tools that not only punish, as civil fines do, but also change the offender's social environment to make offending less possible and less likely.

For instance, sanctions can take the form not only of traditional punishments like fines, but of voluntary pollution-reducing projects, reporting requirements, and other “enforced self-regulation” or “partial-industry intervention” mandates. These strategies change how offenders do the activity that led to crime in the first place, and they change the environment in which it is done by increasing supervision. That there is little objection to the lack of expressive power in such sanctions as pollution-reduction projects speaks to how thoroughly deterrence concerns trump retributive ones for white-collar wrongdoing.

When consequentialism dominates policies addressing wrongdoing and social harm, prevention and restitution goals take priority over judgments of culpability. Corporate regulation practice has responded to, and even led, scholarly literature critical of command-and-control punitiveness. Street crime regulation, with the exception of community policing strategies ... has been largely impervious to scholarly assessment or to reform strategies that have affected comparable areas of public policy. ❄

Democracy and Decriminalization

86 *Tex. L. Rev.* 223 (2007)

ONE OF THE GREAT AND INTRACTABLE WEAKNESSES OF AMERICAN democracy is its inability to create and maintain rational criminal law policy. The politics of crime are perennially perverse: the electorate demands that legislatures enact more crimes and tougher sentences, and no interest groups or countervailing political forces lobby against those preferences. The political process of criminal law legislation is, as several leading scholars have characterized it, a “one-way ratchet.” Criminal codes expand but don’t contract. The result is ever-expanding codes that have moved us “ever closer to a world in which the law on the books makes everyone a felon.” This state of affairs does more than expose ordinary people to criminal punishment for innocuous behavior. It expands the discretion of prosecutors to the point of lawlessness because, with broad codes, they can effectively pick and choose offenders as well as offenses. It aggravates disparities in punishment because the same conduct is covered by multiple statutes carrying different sentences. It makes the criminal law incomprehensible to ordinary citizens. All these things undermine criminal law’s legitimacy.

That, in a nutshell, is the consensus account of American criminal law politics and democratic process. And it is a formidable consensus: many leading American criminal law scholars have contributed to this account, and law reviews have hosted symposia dedicated to “overcriminalization” and the dysfunctional politics that perpetuate it. Few offer much hope for failures of democratic process that seem to be structural and irreparable. Legislative processes not only cannot cool the passions of the electorate in the service of rational social policy, they may exaggerate those passions.

A closer look at the contemporary practice as well as the history of American crime legislation, however, undermines this account of intractable democratic dysfunction. An overlooked story in the history

of American criminal law is the ongoing process of decriminalization. State legislatures, in fact, have long and continuing records of repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions. Even as criminal law has expanded greatly in some directions, it has contracted—dramatically so—in other spheres of activity. And democratic processes and institutions, especially legislatures, have been responsible for much of that contraction. The ratchet of crime legislation turns both ways. Moreover, evidence of state legislative records suggests that contemporary legislatures decline to enact most bills proposing new or expanded criminal laws, including many that seem, on standard accounts, politically irresistible.

Consensual sex was a topic of widespread criminalization in the Progressive era around the turn of the twentieth century. In that era every state that did not already criminalize sodomy passed legislation doing so. In many states, nonmarital, consensual sex and adultery were criminalized, sometimes at the felony level, as was some sexual conduct by married couples. But consensual sex has been an equally active topic for *decriminalization* since the early 1970s, largely by legislative repeal. Illinois repealed its sodomy law in 1962. Connecticut did so in 1967 (only two years after it unsuccessfully argued for the constitutionality of its criminal ban on contraception distribution in *Griswold v. Connecticut*). Between 1971 and 2001, legislatures in twenty-five states and the District of Columbia followed suit. (In another ten states, state supreme courts held that sodomy statutes violated state constitutions. In none of those states did legislatures succeed in amending state constitutions to allow sodomy prohibitions.) That widespread trend toward decriminalization left only fifteen jurisdictions with sodomy statutes on the books at the time *Lawrence v. Texas* declared such statutes unconstitutional. And that trend occurred despite the statutes' rare use against consensual sex (which might generate public disapproval) and despite their utility for prosecutors in sexual-assault cases that are difficult to prove under more appropriate rape or assault statutes.

Comparably, Congress, states, and localities in the late nineteenth and early twentieth centuries also widely criminalized expressive con-

duct, especially when sexually suggestive (including lewd dress and cross-dressing) but also when overtly political. At the height of World War I, Congress severely criminalized speech critical of the U.S. government with the Espionage Act of 1917 and the Sedition Act of 1918. The statutes made it a felony offense to, among other things, use “disloyal, profane, scurrilous, or abusive language” about the U.S. government, flag, or armed forces. Yet in the wake of the war’s end, Congress repealed most of the statutes’ provisions. Congress and federal officials also barred explicit or obscene publications. Film and book censorship, mostly focused on obscene and immoral content, was aggressively enforced in many jurisdictions in the 1920s and 1930s through criminal prosecutions as well as civil actions; targets famously included such novels as *Lady Chatterley’s Lover*, *An American Tragedy*, and *Candide*. Those activities were also decriminalized in the latter part of the twentieth century through a mix of legislative and judicial action. Contemporary examples of jurisdictions seeking to regulate obscene and explicit conduct or media—especially outside of child pornography—pale in comparison to such regulation seventy-five years ago, even though First Amendment doctrine provides some (much diminished) basis for such restrictions.

One finds the same pattern with respect to criminalization of contraception, which was prohibited or restricted by federal law and in a patchwork of states a century ago. (Merely advocating repeal of laws restricting contraception could result in criminal conviction for “breach of the peace.”) But by the time of *Griswold v. Connecticut*, most had been repealed; only Massachusetts restricted contraceptive use with anything like the severity of Connecticut’s criminal statute barring use and distribution of contraceptives even to married couples. A comparable story describes the history of criminal miscegenation statutes. Interracial marriage was criminalized in at least thirty states at the midpoint of the twentieth century. In the fifteen years before the Supreme Court declared such statutes unconstitutional in *Loving v. Virginia*, half of those states repealed their miscegenation bans, a trend the Court noted in support of its decision. (We will note this same pattern below with respect to restric-

tions on the use of capital punishment: state legislative reform led the way for constitutional interpretation restricting punishment.)

Decriminalization in these areas manifests a trend in public culture that legislatures (and courts) often reflect through law reform. We see the same pattern in gaming regulation, which is regulated by a mix of criminal and civil statutes. Nevada prohibited all gambling in 1909; it repealed that prohibition in 1931. Others followed to lesser degrees. In the 1930s twenty-one states legalized race tracks and betting on races. In the 1940s and '50s, most states decriminalized pari-mutuel betting and low-stakes charity gaming. By 1996, forty states allowed pari-mutuel betting, thirty-eight had state lotteries, and twenty-six had casinos. Note that gambling is the kind of activity that standard theories of legislative process would predict to be a likely candidate for decriminalization. Strong interest groups exist to lobby for legalized gambling, and states stand to gain revenue from gaming activity. Gambling is voluntary, consensual conduct, and government has other means to address the core criminal harms associated with gambling, such as control of gaming operations by organized crime groups.

National alcohol prohibition, instituted in 1919 with the passage of the Nineteenth Amendment and the Volstead Act (along with similar state statutes criminalizing alcohol distribution), was a sweeping criminalization that followed years of local moves to criminalize alcohol distribution. It was followed, of course, by a sweeping legislative decriminalization in 1933 with the passage of the Twenty-First Amendment. That repeal left alcohol regulation again as a state and local decision, and the trend since the 1930s has been a steady decline in criminalization, in most respects, of alcohol sales and use.

One component of post-Prohibition alcohol law is “blue laws” that restrict alcohol sales, often along with other retail activity, and that are often enforced with low-level criminal penalties. The trend here is similar and for similar reasons. Legislative action on laws governing Sunday alcohol and retail sales has been uniformly in one direction in recent years: deregulation and decriminalization. Here again we find powerful

interest groups—alcohol manufacturers, distributors, and retail stores—lobbying on the side of decriminalization.

For an example of crime abolition driven by popular sentiment, consider the very strong trend of decriminalizing certain weapons offenses. Over the last two decades, most states have abolished crimes of carrying concealed weapons, which often carried felony penalties for repeat offenses. Currently, only four states still criminalize carrying concealed firearms and other weapons. The reason for this trend is not hard to discern: the National Rifle Association (NRA) has led a concerted effort to convince every state legislature to change the carrying of concealed weapons from a crime to a statutory right. Other groups have opposed these reforms, and public opinion has been roughly split in many jurisdictions, yet the NRA's campaign has met with consistent success. Similar interest-group dynamics explain the decriminalization that occurred when Congress failed to reauthorize the federal assault-weapons ban in 2004.

The same interest groups also drive legislatures to (modestly) decriminalize other conduct through expansion of defenses. In 2005, Florida enacted a statute that eliminated any duty for one employing force in self-defense to retreat even from public places instead of using force when it is safe to do so. That change makes legal what was once a criminal use of force. This reform is less meaningful for present purposes but worth noting. It shows again how powerful interest groups sometimes lobby for decriminalization; the NRA pushed the Florida law and plans the same campaign in other states. It also demonstrates how criminal liability can contract even for violent crimes when the debate is framed in a politically appealing way.

On this latter point, consider how legislatures have explicitly decriminalized other core violent-crime conduct. Intrafamily assault and battery was the subject of decriminalization for a period in the mid-twentieth century. In 1962, New York modeled a trend of that period followed by many states when its legislature passed a statute allowing domestic-violence victims to bring civil actions in family court rather than filing criminal complaints (the act *required* criminal courts to transfer proceedings to

the family court) so that judicial responses to domestic violence would focus on reconciliation and treatment rather than criminal punishment. Through the 1960s and 1970s, courts used the statute to transfer the full range of violent conduct to a civil forum—burglary, weapons, harassment, and assault-with-intent-to-commit-incest charges were handled civilly. The pendulum has swung the other way more recently; today, we mostly treat domestic violence again as a criminal matter. But the history nonetheless reveals a pendulum rather than a one-way ratchet: criminal law ebbs and flows in response to public opinion and social movement pressure.

We find the same political change of strategy with regard to public drunkenness and related street-disorder conduct. In the 1960s and 1970s, there was a notable (but not nationwide) movement among states to decriminalize public drunkenness and treat intoxication as a public health problem. Strategies of order-maintenance policing in the 1990s swung the pendulum back toward prosecution of small-scale public-disorder conduct in many jurisdictions, but this policy oscillation is another example of legislatures' capacity to contract criminal law.

On top of such broad trends and oscillating policy approaches to social problems, a more modest approach to criminal code reform, driven by government staff rather than social movements or interest groups, contributes to ongoing decriminalization. In 2004, Virginia abolished clearly wrongful but rarely prosecuted theft and fraud offenses, such as conversion of military property, sale of goods of another with failure to pay over proceeds, and overvaluation of property for purposes of influencing lending institutions (as well as sillier offenses, such as the crime of jumping from railroad cars). In 2003, Alabama redefined some felony thefts as misdemeanors by raising the amount required to make a theft punishable as a felony; Colorado raised amounts for a range of theft and fraud offenses a few years earlier (changes that make a rough effort at adjusting crime definitions for inflation). Colorado also abolished most loitering offenses (preserving only a ban on loitering on school grounds), repealed crimes of circulating political material without identifying the sponsor, downgraded the status of a harassment-by-stalking offense, and

reduced penalties for some drug offenders. Years earlier, many states lowered the age of consent for sex, thereby abolishing the crime of statutory rape when it involved older teenagers.

Democratic institutions constrain criminal law in another way as well. They decline to enact criminal statutes as a means to address social problems and reduce disfavored conduct. More than scholars typically imply, this occurs by legislatures considering but failing to enact criminal law proposals. Consider what we learn from databases of all criminal law bills introduced in a dozen sessions, over several years, from legislatures in three states—Pennsylvania, Texas, and Utah—whose legislatures and criminal justice policies represent a cross section across several parameters. Using data from each state’s legislative information service, I compiled data sets of all criminal law bills both introduced and passed in twelve recent legislative sessions of these three legislatures (2003 and 2001 for all three states, and the most recent prior sessions available for each before 2001); from that I calculated passage rates of bills on criminal law topics. This allows a comparison of criminal-law-bill-passage rates with existing data on each legislature’s overall bill-passage rate. That comparison is one way to measure whether criminal law proposals enjoy unusual legislative success.

The results show that criminal law bills succeed roughly as often as—in fact, probably slightly *less often than*—legislative proposals on other topics. Criminal-law-bill-passage rates were *lower* than the overall bill-passage rates in eight of the twelve legislative sessions studied. In Texas, criminal law bills had lower enactment rates than those for all bills in all four sessions studied. In Utah, criminal law bills had lower passage rates in three of the five years studied. Only in Pennsylvania was the criminal-law-bill-passage rate higher than the overall rate more often than not; it was higher in two of the three years studied (2003 and 2001 but not in 1996). Some of the differences in either direction are negligible, but the overall impression is that criminal law legislation does not have unusual success rates in these three legislatures with distinct internal procedures and political cultures.

What explanations account for this overlooked story of American decriminalization and noncriminalization? One is, perhaps surprisingly, majoritarian and interest-group pressures on legislatures; interest groups and popular opinion often support and sometimes drive decriminalization. Legislatures in fact criminalize relatively little conduct that most people think should be completely unregulated. Another is the little-noticed influence of policy expertise and structural choices in legislative process, such as legislatively appointed law-reform commissions. The odds of success for reform proposals initiated by professional staff improve with special procedural mechanisms employed by legislatures—mechanisms that legislation scholars have examined in some detail with regard to Congress in a range of civil law and policy areas, but have noted less in state legislatures and have largely ignored with regard to criminal law. And finally, when legislatures leave outdated crimes on the books, other components of democratic governance compensate: politically accountable prosecutors rarely prosecute (and thus effectively nullify) many crimes the public cares little about—and that scholars complain about. ❧

BIBLIOGRAPHY

BROWN BIBLIOGRAPHY

BOOKS:

Adjudication of Criminal Justice: Cases and Problems(with R. Carlson and S. Crump) (Thomson/West, 2007).

ARTICLES:

- “Democracy and Decriminalization,” 86 *Tex. L. Rev.* 223 (2007).
- “The Warren Court, Criminal Procedure Reform, and Retributive Punishment,” 59 *Wash. & Lee L. Rev.* 1411 (Fall 2002).
- “Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law,” 21 *St. Louis U. Pub. L. Rev.* 25 (2002) (published with proceedings from ISISC conference 1999).
- “An Overview of the American Criminal Jury,” 21 *St. Louis U. Pub. L. Rev.* 99 (2002) (with Kimberly A. Mottley & David Abrami) (published with proceedings from ISISC conference 1999).
- “Third-Party Interests in Criminal Law,” 80 *Tex. L. Rev.* 1383 (2002).
- “Watching Legislatures for Apprendi’s Effects on Plea Bargaining,” 5 *Cal. Crim. L. Rev.* 1 (2002), available at www.boalt.org/CCLR/v5/v5brown.pdf.
- “What Virtue Ethics Can Do for Criminal Justice: A Reply to Huigens,” 37 *Wake Forest L. Rev.* 29 (2002).
- “Street Crime, Corporate Crime, and the Contingency of Criminal Liability,” 149 *U. Pa. L. Rev.* 1295 (2001).
- “Criminal Procedure Entitlements, Professionalism, and Lawyering Norms,” 61 *Ohio St. L.J.* 801 (2000).
- “Regulating Decision Effects of Legally Sufficient Jury Instructions,” 73 *S. Calif. L. Rev.* 1105 (2000).
- “Correspondence: Criminal Procedure, Justice, Ethics and Zeal,” 96 *Mich. L. Rev.* 2146 (1998).
- “Plain Meaning, Practical Reason and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes,” 96 *Mich. L. Rev.* 1199 (1998).
- “Jury Nullification within the Rule of Law,” 81 *Minn. L. Rev.* 1149 (1997).

- “Structure and Relation in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines,” 47 *Hastings L.J.* 1255 (1996); excerpt reprinted in Ronald L. Carlson, *Successful Techniques for Civil Trials* (2d ed. 1992; 1998 pocket part).
- “Class and Credibility: Insights from Empirical Sociology, Cognitive Psychology, and Trial Practice,” III *Class and Identity Readings* 499 (1995) (conference proceedings).
- “The Role of Race in Jury Impartiality and Venue Transfers,” 53 *Md. L. Rev.* 107 (1994).
- “Racism and Race Relations in the University,” 76 *Va. L. Rev.* 295 (1990) (student note).

BOOK REVIEWS:

- “Trial Practice as Legal Reasoning—and Legal Realism,” 24 *N.Y.U. Rev. L. & Soc. Change* 315 (1999) (reviewing *Trial Advocacy: Inferences, Arguments, Techniques*, by Moore, Bergman & Binder).
- “The Means and Ends of Representative Juries,” 1 *Va. J. Soc. Pol’y & L.* 445 (1994) (reviewing *Race and the Jury* by Fukurai, et al.).

WORKS IN PROGRESS

- “Yick Wo and the Constitutional Regulation of Criminal Law”
- “The Multifarious Politics of Capital Punishment: A Response to Smith”



Not Your Average Professor

TO HIS PROPERTY AND CONTRACTS STUDENTS, ALEX Johnson, the Pierre Brown and Thomas F. Bergin Research Professor at the Law School, might seem like just another law professor. He is anything but. Few could match his varied experiences, diverse interests, or impact on the Law School, the wider University community, and the legal academy in general.

Alex Johnson did not take the traditional path to academia. He grew up in Los Angeles at a turbulent time for race relations. As a teenager in 1965, he watched the Watts riots unfold from his front porch in South Central Los Angeles, and three years later was again reminded

of the salience of race with the reoccurrence of rioting following the assassination of Dr. Martin Luther King, Jr. Johnson attended public

The historical significance of Justice Marshall's appointment—as well as a baffling course in organic chemistry—convinced him that law was the career he ought to pursue.

schools that were essentially all black. One of his heroes was Thurgood Marshall, who was appointed to the Supreme Court while Professor Johnson was in junior high. Although Perry Mason was perhaps the most important influence in his decision to become a lawyer, the historical significance of Justice Marshall's appointment—as well as a baffling course in organic chemistry—convinced him that law was the career he ought to pursue.

Neither of Johnson's parents graduated from high school, but they encouraged him to excel in academics and sacrificed to ensure that he had every opportunity to succeed. As a result, he was fortunate to be offered several scholarships to some of our most prestigious universities and matriculated at Princeton University. A combination of home sickness and his parents' failing health necessitated a transfer to Claremont McKenna College (then, Claremont Men's College), from which he graduated magna cum laude in 1975. Following graduation, he turned down opportunities to leave Los Angeles to attend law school and enrolled at U.C.L.A. Law School.

While a student at U.C.L.A., a number of Johnson's professors strongly encouraged him to pursue a career in academia. Johnson would have none of it. He declined an invitation to join the Law Review, refused to interview for a judicial clerkship, and instead set his sights on becoming a partner in a large law firm, Latham & Watkins, in Los Angeles. He had noticed, while clerking at a large firm during the summer after his first year of law school, that there were very few attorneys of color in Los Angeles law firms in 1976, and he vowed to become one of the first black partners in Los Angeles.

Antitrust changed Johnson's mind. He had hoped to work in the real estate section, but his firm assigned him to a large and lengthy antitrust matter. Consequently, when he was offered a tenure track position at the University of Minnesota Law School in the fall of 1980, he accepted with the promise that he would be allowed to teach Property and Real Estate. He eventually made his way to the University of Virginia in 1984 and felt immediately at home.

Professor Johnson has been a major presence at the Law School and within the larger university ever since. He has paid particular attention to efforts to increase diversity among law students and faculty. As a result of his interest in student diversity, for example, Professor Johnson was appointed to the Admissions Committee of the Law School, where he worked closely with then Dean of Admissions Al Turnbull to guarantee that the Law School's classes were exceptionally talented and as diverse as possible.

While Johnson was actively involved in key committees at the Law School, he was simultaneously involved in several leadership positions at the University level. In addition to serving on several University-wide search committees, Johnson chaired the Athletic Department's Athletic Advisory Panel that counseled athletes about their prospects for a professional career and on the selection of an agent. In that capacity he befriended several of UVA's most notable athletes, including the Barber twins, Chris Slade, Charles Way, and Matt Schaub.

In 1995, Provost Peter Low appointed Johnson as Vice-Provost for Faculty Recruitment and Retention. Johnson was responsible for several initiatives and standing committees, but was most notably responsible for faculty hiring and the University's Promotion and Tenure practices and policies, chairing that committee. At the same time, Johnson expanded his reach beyond the University of Virginia by becoming active in several professional and academic organizations, most notably the Law School Admission Council (LSAC). The LSAC, which is owned by all of the ABA approved law schools, produces and administers the LSAT and, as a result, Johnson has become an expert on the efficacy of the test and an advocate for its continued use. Johnson was appointed to the Minority Affairs Committee in 1989, subsequently served on several of its standing committees, and was ultimately elected to Chair of its Board of Trustees, a position he held from 2001–2003. He also served on several standing committees of the Association of American Law Schools, chairing its Curriculum Committee and its standing committee on Bar Admission and Lawyer Performance.

In 2002, Johnson left the Law School to serve as the Dean of the University of Minnesota Law School. He returned to the Law School in 2007, and he is delighted to be back in the classroom regularly and to have the chance to return to his scholarship.

Johnson's scholarly interests are diverse and have evolved over time. He initially focused on importing contract principles into property and real estate law in an effort to bring a fresh perspective to supposedly moribund areas of law. In one of his early articles, Professor Johnson deployed relational contract theory, developed by his colleagues Charles Goetz and Robert Scott, and applied it to long-term commercial leases. Johnson concluded that courts were incorrectly eliminating the default rule that allowed lessors to withhold consent to an assignment of a long-term leasehold. He correctly argued that the elimination of this right would result in a windfall to the existing lessees (who would benefit from the sale of leaseholds), but ultimately result in the imposition of higher costs on new lessees who would be forced to bear the costs resulting from a regime in which lessors could not withhold consent to transfers.

While pursuing his interest in contract theory, property, and real estate law, Johnson also became intrigued by Critical Race Theory. This curiosity led Johnson to research and write in the area, and culminated in a major article, "The New Voice of Color," which was published in the *Yale Law Journal*. That article, which is excerpted below, was Johnson's second writing on the issue of whether scholars of color address or speak to certain issues with a different perspective or voice than their majoritarian colleagues. Although the academic debate has largely embraced this position, the issue was recently reignited when Judge Sonia Sotomayor was nominated by President Obama for appointment to the United States Supreme Court. In 2001 Judge Sotomayor, essentially embracing the tenets of Critical Race Theory and the articulation of the voice of color stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Johnson's prescient article explains what that voice is, why it is distinct for scholars and, in this case, judges of color, and how it is articulated.

Johnson has continued to pursue these quite disparate interests in contract theory, property, real estate, trusts, and critical race theory, as well as some others. Over the last decade, for example, Johnson has authored several articles in the Critical Race area, including his most recent: “The Re-emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race,” which is forthcoming in the *Iowa Law Review*. Johnson wrote the article to celebrate the twentieth anniversary of the emergence of Critical Race Theory, and in it he explores the possibility of destabilizing existing and hegemonic racial classifications as a way to eliminate societal discrimination. In addition, Johnson, ever the eclectic scholar, has written articles advocating the expanded use of *cy pres* in charitable trusts and also several articles focused on the legal and other issues impeding the flow of students of color into law school and the practicing bar.

Johnson’s most recent work, motivated in large part by his recent addition of Contract Law to his teaching portfolio, has focused anew on the imposition of contract principles to resolve issues and disputes in the property area. In his article, “An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine,” Johnson applies contract principles to explain why the caveat emptor doctrine has evolved to require the seller to disclose all defects with respect to sold property notwithstanding the doctrine’s original maxim providing a safe harbor to the seller who makes no disclosure. Modern contract doctrine has convincingly theorized when a party to a contract should be required to disclose information to the opposing contracting party. In brief, efficiency requires one party to disclose information to the other in three situations: 1) when that information is casually acquired—not the product of a deliberate investment, like obtaining an MBA; 2) the information redistributes wealth instead of creating it; and 3) the information is clearly more accessible at a lower cost to the party possessing it. Mapping contract theory onto the typical residential real estate transaction, Johnson argues that caveat emptor was originally correctly applied to real estate transactions because it developed at a time when

information regarding the quality of a dwelling was accessible equally to both parties. However, as dwellings became more complex, with HVAC, modern plumbing, etc., the information possessed by the selling homeowner regarding the quality of the dwelling sold is casually acquired, redistributive rather than wealth producing, and more accessible to the seller rather than the buyer. This development led to exceptions in the doctrine of caveat emptor that caused its total erosion in many states. Johnson's article not only explains this erosion but neatly analyzes why the caveat emptor doctrine is making a return in the form he characterizes as "caveat emptor light."

In his forthcoming *Pepperdine Law Review* article, "Preventing a Return Engagement: Destroying the Negotiability of the Mortgagor's Note via the Unconscionability Doctrine," Johnson again deploys contract theory to argue that the holder in due course doctrine, which protects assignees/transferees of mortgage notes from personal defenses, is a key factor in the predatory and subprime lending that helped create the perfect circumstances for the recent real estate collapse. Johnson focuses on the development and increasing use of "exotic financing devices" (adjustable rate mortgages, graduated payment mortgages, shared and negative amortization mortgages, to name a few), the parties to the residential mortgage transaction, and the subsequent transfer of the mortgage on the secondary market through the securitization of mortgages to identify the differing incentives of the parties that creates the perfect opportunity for predatory lending and mortgagor default. For example, the originator of the mortgage obtains fees by initiating the mortgage. Because the mortgage is securitized and transferred on the secondary market, banks and other originators have no incentive to insure that the mortgagor has the ability to perform the mortgage when it adjusts after it is transferred. On the other hand, purchasers on the secondary market are purchasing a negotiable instrument secured by a mortgage and are protected against most mortgagor claims via the provisions of the Uniform Commercial Code. These purchasers are holders in due course under the Code and are immune from any claims by the maker that the originator lied or engaged

in fraud (so-called personal defenses). As a result, purchasers of these mortgages have no incentive to insure that the originators acted appropriately in dealing with the mortgagor. In addition, the purchaser of the note, relying on ratings of the security, makes no effort to verify the value of the underlying security. The mortgagor, who is an unwitting party to a predatory loan, has no recourse against the holder of the note and will remain liable on a predatory loan, resulting ultimately in a foreclosed mortgage. Johnson theorizes that eliminating the holder in due course doctrine and applying the UCC sections on unconscionability will appropriately align the parties' incentives and prevent a return of what he characterizes as the current "mortgage miasma."

Consequently, Johnson's scholarship has come full circle. His second major published article, "Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases," focused on the intersection of contract and real estate law to argue for the continued enforceability of clauses restricting the transferability of long-term leases by commercial tenants. Although there have been many scholarly detours along the way, Johnson's latest article again explores the intersection of contract and real property law and explains why he so eagerly began teaching Contracts for the first time in the fall of 2008. His teaching interests are now totally aligned with his scholarly interests and Johnson predicts that there will be many more articles that explore the intersection of property and contract law. Johnson eventually hopes to develop a theory detailing when unique (and some would say archaic) property rules should correctly depart from larger contract principles and doctrines.

Although Johnson's students might not realize how varied his legal career has been, they undoubtedly recognize his energy and passion for the law and his wide-ranging intellectual curiosity. They, like his colleagues at the Law School, will be the beneficiaries of the latest chapter of Johnson's storied career, as he returns his seemingly limitless energy, passion, and commitment to teaching and scholarship. ❄

EXCERPTS

The New Voice of Color

100 *Yale L.J.* 2007 (1991)

BRIEFLY, PROPONENTS OF THE EXISTENCE AND VALUE OF THE voice of color allege that scholars of color speak to all issues with a distinctive voice, especially to certain race-related ones, because scholars of color have shared the molding experiences created by racism that caused the voice of color to emerge. Randall Kennedy of the Harvard Law School is engaged in a debate with other scholars over the existence and worth of the voice of color. Kennedy rejects the existence of the voice and its monolithic character, basing his position on a lack of objective proof that a distinctive voice exists. He questions whether the voice of color contains anything unique to distinguish it from other “voices.” Stephen Carter of the Yale Law School likewise questions the existence and worth of voice, although he equivocates more than Kennedy.

In a similar vein, Kennedy refutes Richard Delgado’s claim that the academic contributions “of minority scholars [are] frequently either unrecognized or underappreciated by white scholars blinded by limitations of their own racially defined experience or prejudiced by imperatives of their own racial interests.” Kennedy challenges this claim by asserting that, “Delgado fails to shoulder the essential burden of championing on substantive grounds specific works [by scholars of color] that deserve more recognition than they have been given.” More importantly, Kennedy questions whether the otherwise excluded articles are *worthy* of citation when judged by the objective, meritocratic standard employed by his colleagues and accepted by him.

More charitably, Carter believes there may be a more benign explanation for the general lack of scholarship: there may be a “lack of literature”

from scholars of color to be cited since there are so few scholars of color in academia, and our entry into the profession is historically recent. However, Carter's hypothesis does not stop there. He goes on to suggest that articles authored by scholars of color are not as heavily cited as their majoritarian peers because "our work must be, on the whole, not as good as the work of white scholars." Carter buttresses his hypothesis with the following statement: [B]ecause racial preferences in faculty hiring are intended to hire the best potential scholars of color rather than simply the best potential scholars, they might produce a group of scholars who will produce work of lower median quality than the work produced by those hired simply because they are the best potential scholars.

What I find intriguing about Kennedy's and Carter's contentions is their representation in the current debate over Critical Race Theory and the existence and value of voice. Simply put, Kennedy and Carter represent the voice of color that I call Hierarchical and Majoritarian—two terms which at first glance present an odd, if not impossible, coupling. Their views are majoritarian in the sense that the standard they articulate and use to measure, judge, and evaluate has been developed by this country's dominant culture—white males—with little or no input from persons of color, irrespective of class affiliation. Moreover, in this Article I use "majoritarian" in a very limited sense to refer to the racial and gender make-up of the majority of members of the professoriate, a body within which the voice debate is now raging. Consequently, in this context, being labeled a "majoritarian" or adopting majoritarian values has nothing to do with general societal values or norms.

Narrowing my focus to an analysis of the professoriate explains this coupling of "majoritarian" and "hierarchical." The terms are complementary for my purpose: constituting a label for what is the consensus of an insular group (the legal academy) who embrace a hierarchical standard—which may have a discriminatory impact on minority members of that insular group—and accept the majoritarian paradigm, based upon that standard, to establish what is "best." By "hierarchical standard" I mean that its proponents maintain that there is a neutral, objective, evaluative

standard by which the “best” scholarship can be ascertained, ranked, differentiated from other works, and rewarded.

Most importantly, implicit in the notion of a Hierarchical Majoritarian standard is the perception or belief that all have an equal shot at satisfying that standard as long as no *substantive* hurdles are employed to either assist or impede one class or type of individual. It is a belief that there is but one standard by which to make judgments on what is valuable and best.

I have elsewhere defined my conception of the voice of color as one encompassing the author’s intent, reader perception and acceptance of the author’s intent, and reader belief that the author’s status as a scholar of color imbues the author with some unique perspective. My conception of the voice of color is therefore contextual; not all scholars of color possess it or use it all of the time. When scholars of color speak, they are not a priori speaking in the voice of color. The scholar of color must draw on her experiences and general insight gained *as* a person of color before the voice of color is articulated. In other words, the *voice* of color is not synonymous with one’s status within the academy as a scholar of color, although I have argued elsewhere that only scholars of color may speak in the voice of color. Kennedy and Carter correctly reject the position that the voice of color exists whenever a scholar of color speaks.

However, Kennedy, and to a lesser degree Carter, appear to be hostile to the conception of the voice of color because of its potentially stigmatizing effect on the interpretation of scholarship contributed by scholars of color. At base, perhaps what concerns Kennedy is the development of evaluative scholarly norms that have the potential for creating “segregated” scholarship. In other words, if it is indeed impossible to apply the concept of voice of color selectively to the work of some scholars of color, then it is possible that the scholarship of *all* scholars of color will be evaluated by a different—though not necessarily lesser—evaluative standard. This scenario could lead to the unfortunate development, either actual or perceived, of “separate-but-[un]equal” scholarship: scholarship authored by scholars of color would be judged by an as yet undefined standard;

scholarship produced by majority scholars would be judged by the Hierarchical Majoritarian standard.

I firmly believe that Carter in “The Best Black” and Kennedy in his article, “Racial Critiques of Legal Academia,” speak in the voice of color. And, despite the fact that the substance of what they say is that scholars of color should embrace the Hierarchical Majoritarian standard and excel pursuant to those norms, they ultimately address the same issue raised by those I have characterized as speakers of the “Monistic dialect of the voice of color”: developing the best strategy to improve the plight of people of color and to achieve racial equality in our society. Kennedy and Carter, drawing upon *their* experience as scholars of color, have apparently determined that the best strategy to achieve progress in the legal academy is via an “integrationist,” mainstream approach that embraces the so-called “neutral” evaluative norms of the dominant cultural group.

The Carter/Kennedy approach presupposes the existence of an objective “truth,” which requires that a scholar be computer-like in assessing the value of other scholars’ work. The standard used by Kennedy is based on universalism—that “truth claims ... are to be subjected to *preestablished impersonal* criteria.” Yet this standard, like others, is not based on certainty and objective truths. Such a standard must by definition be premised on a form of “consensus” among scholars that claims to be independent of “truth” notions about what is good and what is better. Consequently, Kennedy’s meritocratic paradigm is premised on a value-objective truth—that in this context is inapplicable and inappropriate, and, since people are made of flesh and not silicon, it is a standard impossible to realize.

The voice of color, on many levels, challenges this concept of consensus. Scholars of color do not speak in a monolithic voice because they have not all had the same experiences. Focusing on the author’s nonacademic, real world context, a scholar of color speaks in the voice of color when she makes a claim to a perspective that is not shared by her majoritarian peers because her experiences as a scholar of color are different. Put another way, “[t]he author of color is making a claim to

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a perspective that is not shared,” and is therefore necessarily different, because the crucial value-forming experiences that have defined the perspective are not universally shared by scholars of color. I contend that scholars of color writing in the voice of color not only belong to a community of legal academics, for which they write and speak in a manner interpretable by that community without reference to the identity of the author/scholar, but also belong to different communities based on their race and background. Further, membership of scholars of color in these unique communities provides them with insight and knowledge-insight and knowledge a majority scholar/reader may be able to grasp only after accepting an interpretive strategy that requires the reader to recognize the identity of the writer. ❧

An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine

45 *U. San Diego L. Rev.* 79 (2008)

SEVERAL LEADING LAW SCHOLARS HAVE ATTEMPTED TO EXPLAIN why certain legal rules require a party to disclose information to the other contracting parties, often competing parties, in certain transactions. Most notably, Dean Anthony Kronman, in his article, “Mistake, Disclosure, Information, and the Law of Contracts,” presents an economic theory explaining why unilateral mistake is allowed as a defense to preclude contract formation in some cases, but not others. As part of his argument, Dean Kronman discusses when a party has a duty to disclose information to the other contracting party when the other contracting party does not ostensibly possess that information. The obverse of the rule mandating disclosure is also discussed—when a party is privileged to remain silent even though the party possesses relevant information (a material fact) that the other contracting party would prefer to know. Dean Kronman concludes that there is no duty to disclose relevant information that is a product of deliberate investment, but that one has a duty to disclose relevant information that is “casually acquired.”

Similarly, Professors Cooter and Ulen in their economic treatise, *Law and Economics*, put forth a theory to determine when the disclosure of a material fact is required from the knower to the knowee. They attempt to draw a distinction between those facts which they determine are productive (wealth producing or enhancing), which are not required to be disclosed between contracting parties, and those facts which are merely *redistributive*, which the knower is required to disclose to the knowee. Lastly, in a fascinating book addressing the legal issues and rights that flow from, and are related to, the phenomenon of “secrecy,” Professor Scheppele theorizes that one party to a contract is privileged to keep a

secret premised on the relative cost of each party's access to the material fact or relevant information. Briefly, Professor Scheppele's disclosure theory mandates disclosure of secret information if the marginal cost of that information is much less for one party to the contract than for the other party to the contract.

Although most of these theories have been articulated to explain why disclosure is or is not required in certain contracting situations having to do with the sale of personalty, it is clear that these theories, if correct, must also apply to contracting situations involving the sale of realty. That is, when the vendor and vendee enter into the contract for the purchase and sale of real property, they execute a contract that allocates their respective rights and liabilities. A critical issue at the time of contract formation has to do with what, if any, facts the vendor-seller (knower) must disclose to the vendee-buyer (knowee) regarding the condition of the premises being sold. Enter the doctrine of *caveat emptor*, which at common law, in its purest form, provides a safe harbor to the vendor-seller not to disclose *any* information to the vendee-buyer. *Caveat emptor*, then, is a huge exemption to any doctrine requiring the disclosure of information from the knower to the knowee.

This Article examines the economic theories that model rules requiring the disclosure of information between contracting parties in light of the development and evolution of the doctrine of *caveat emptor*. If correct, these theories predicting when information must be disclosed must account for the common law usurpation of disclosure requirements in the purchase and sale of realty. In other words, if the economic analysis is correct, these theories must explain why no disclosure of information is required with respect to the sale of realty at common law. The alternative explanation is that the *caveat emptor* doctrine should not be applied with respect to the sale of realty—that its use has been erroneous for centuries. Hence if the theories are accurate, some disclosure is or should be required with respect to the sale of realty. Conversely, if the economic theory mandates disclosure of certain information even with respect to the sale of realty, perhaps the common law doctrine of

caveat emptor is ill-suited to address issues that arise from modern-day real estate transactions.

Mapping these economic theories on the doctrine of caveat emptor is, however, not without problems. The doctrine has not remained static over time. Indeed, although it is fair to say that the common law doctrine is fairly easy to articulate and apply, the doctrine itself, as applied by the courts, has become riddled with exceptions and has been made null and void by certain legislative enactments. Thus, a case can be made that the rationale for the use of caveat emptor with respect to the sale of realty may have been appropriate at the time the doctrine was developed. However, changes in the nature of the property being sold may have resulted, over time, in the need for information to be disclosed consistent with the theories discussed above. This requirement of disclosure of information from seller to buyer in the residential real estate transaction, expressed as exceptions to the caveat emptor doctrine, may demonstrate the efficacy of the economic theories put forth to explain disclosure rules. However, in one final twist, these theories must also explain why the doctrine of caveat emptor, in a modified form that I characterize as “caveat emptor light,” is now emerging as a result of court opinions and legislative enactments.

In other words, applying these economic theories to the doctrine may have power to explicate what is currently a puzzle: Why has the common law doctrine of caveat emptor been obliterated through exceptions causing yet another version of caveat emptor—caveat emptor light—to emerge as a result? Factor in the changing nature of the real estate being sold (agrarian land to complex residential dwellings) and the stage is set for a historical analysis of a doctrine that has transformed itself to adapt to current transactional norms. Consequently, following a brief primer on the three economic theories which attempt to explain when disclosure is or should be required among contracting parties which would tend to eliminate or disprove the need for caveat emptor in any real estate transaction, this Article begins with a historical exegesis of the doctrine of caveat emptor.

As a result, this Article examines the evolution of the caveat emptor doctrine from its common law origins to its current status in American

law. In so doing, this historical analysis tests several economic theories and attempts to analyze the same in light of the doctrine's evolution. By using economic theory regarding when material facts should be disclosed, I hope to demonstrate that the original formulation of caveat emptor at common law was the correct and efficient rule for the parties at that time. Conversely, I demonstrate that the exceptions which have become associated with the caveat emptor rule—which have riddled the rule—represent attempts by the courts to align disclosure requirements to parties to a transaction which bears little resemblance to the vendor-vendee transaction that originated at common law in agrarian England.

What I hope to demonstrate is that caveat emptor in its pristine common law form is deemed inapposite for the modern residential real estate transaction, yet perfectly suited for the real estate transactions that took place as the doctrine was originally developed and applied. It is the change in the very nature of the real estate transaction that caused the doctrine of caveat emptor to become inapposite for real estate transactions. However, the mandatory disclosure of all information from seller, or knower, to buyer, or knowee, as mandated by courts and laws focusing on the status of the parties, is also incongruent and inapposite with the economic theories requiring the disclosure of information. This is so because these new laws require inefficient disclosure of information by mandating the disclosure of all information, including that which is the product of deliberate investment and, relatedly, information that is equally available to both parties. As a result, and efficiently, caveat emptor light is emerging, which I will document is consistent with the economic theories requiring disclosure of information and correctly establishes the correct duty for disclosure of information from the knower, or vendor-seller, to the knowee, or vendee-buyer.

The evolution of caveat emptor also serves to validate Professor Rose's theory in her article, "Crystals and Mud in Property Law," which is addressed in the fourth and final part of this Article. Pro-

fessor Rose, analyzing the evolution of common law through judicial opinions, hypothesizes that, broadly speaking, judicial opinions often have the effect of taking what she terms a “crystal” rule—a rule that is easy to interpret and apply because its contours are certain, like caveat emptor—and ultimately transforming it into a “mud” rule—the antithesis of a crystal rule or a rule that is difficult to interpret and apply because of the rule’s complexity or the fact-related nature of the rule which requires precise application of certain facts to a rule to produce a predictable outcome. In effect, I argue that the courts have done to the caveat emptor rule exactly what Professor Rose hypothesized. The courts have taken a simple and easy-to-apply rule and have muddied it to the extent that treatises and articles are now written regarding its applicability. The evolution of caveat emptor light represents an attempt to transform what is now a mud rule into a new crystal rule. This process by which the crystal rule becomes the mud rule and is in the throes of becoming crystal again is caused by courts’ attempts to align the parties’ duties to disclose information in the residential real estate transaction consistent with their acquisition of information about the residences being sold.



Caveat emptor, then, represents the epitome of a rule that evolves from crystal to mud and thence to crystal. First, crystal rules are extended—overused—to situations that are inapposite leading to inefficient and unjust outcomes. Caveat emptor, in its pristine common law form, applied to a very simple structure in which all defects were essentially immediately visible. Furthermore, the seller, by residing in the dwelling, gained no particular unique knowledge of the premises as a result. Hence, the parties to the common law transaction possessed equal bargaining power and equal knowledge with respect to the quality of the building. Subsequently, as a result of the increasing complexity of the dwelling, these positions changed, although the doctrine did not. Sellers became more knowledgeable about defects in the premises that were not easily discov-

erable by the buyer. As a result, when the buyer found himself fleeced, now in the role of the mope, to use Professor Rose's terminology, courts were more willing to muddy the crystal rule to provide exceptions in order to grant the buyer relief from her necessitous circumstances.

Second, although the contract is not relational, the requirement that information not be conveyed, as allowed by caveat emptor, is once again inapposite in a situation where the seller acquires information in a relational context and is privileged not to convey same in the context of the contingent contract entered into with the buyer. That inequality of bargaining power-relational knowledge in a contingent contract setting leads to scoundrels fleecing, sometimes inadvertently, sometimes not, the foolish (mope) buyers who fail to adequately protect themselves by undertaking an adequate inspection and the acquisition of the necessary information regarding the quality of the premises. Just as predicted by Professor Rose, courts in these settings were moved to make post hoc readjustments that led to the erosion of the doctrine and resulted in the imposition of a mud rule.

But in addition to the three factors that Professor Rose has identified to explicate why crystals turn to mud and thence crystals, an examination of caveat emptor reveals two heretofore additional reasons why these rules change and become muddied. Professor Rose's theory is incomplete in one respect because she does not take into account how the property or resource that is the subject of the crystal rule might also evolve to become inapposite to the crystal rule. In other words, these are not static rules or doctrines affecting static and unchanging properties. Quite the contrary, as technology evolves and changes, ill-fitting rules must also evolve and change to address those changes.

In other words just like the law is not static, neither is the object or subject of the rule being analyzed. What works initially for a crystal rule may not work for something that is called the same thing but has technologically evolved far beyond its original form or design. It should be self-evident that the caveat emptor doctrine worked as a default rule at common law due to the simplicity of the dwelling it was designed to

regulate or govern. As the dwelling became more complex, morphing into something that is nothing like the agrarian dwelling to which the original rule applied, the courts were unable to declare the old rule obsolete and develop a new rule given how common law rules evolve via court decisions instead of legislative fiat and declaration. As the property evolved slowly and inexorably to its current form, the doctrine of caveat emptor also evolved to take into account the different characteristics of the property regulated.

This evolution of the property being regulated represents a different challenge than, say, the creation of a new property right like the Internet. The development of a new form of property also creates the recognition and awareness that there is a void in the existing regulatory structure to govern the new entity. Scholars and judges jump into the fray to fill the void created when the new property is created. With respect to existing and evolving property, no void exists. Instead judges and legislators must modify the crystal rules, making them mud, in order to regulate the newly evolved species of property. The insight that is missing from Professor Rose's theory regarding how mud rules become crystal is the lack of analysis and recognition of the evolution of the property that is being regulated by the rules. That evolution of the property should also force an evolution in the norms, mores, et cetera, and in the rules governing the property rights.

The second insight gained by an analysis of caveat emptor and its evolution into caveat emptor light is the fact that crystal rules are more likely to be used for what I designate "objective" determinations, and mud rules are more likely to be used for "subjective" determinations where multiple variants play into the equation concerning how resources or rights should be allocated. Put another way, as determinations become more subjective with more variables being considered by the courts, the muddier the rules become. An analysis of the three fact situations described by Professor Rose in her article as prototypical crystal rules involves objective determinations. Thus the fact that the seller has no duty to disclose (caveat emptor); the mortgagor did not make the payment on law date (the

equity of redemption); and the losing party was not the first to record (the operation of recording acts) entails a determination made by the trier of fact that is bipolar—yes or no—not maybe or partially, but definitive and dispositive. Crystal rules, thus, work best when the fact to be decided is either up-down or yes-no with no subtle gradations to be made.

Think of it this way: the common law sale of a house was a crystal transaction—objective and verifiable—something akin to a contingent one-shot transaction in which the parties were not repeat players. In fact, many have alleged that the residential real estate transaction is the epitome of a contingent contract that should lead to the use of crystal rules. However, I contend that today's transaction is more subjective and akin to a relational contract. In order to determine the enforceability of the transaction, the court must determine what this seller knows and what is important to this buyer. It is individualized and subjectivized to an extent that was not relevant at common law. Hence, importantly, even though the parties in a real estate contract represent prototypical contingent contracting parties, the nature of the information sought is in fact relational. Underlying the theory of relational versus contingent contracts is the notion that in contingent contracts the parties are dealing at arm's length and each can take the maximum steps to protect their respective positions. That is not true in the sale of the residence and has caused the further erosion of the doctrine of *caveat emptor*.

Consequently, adding these two elements to Professor Rose's theory makes its explanatory power more robust. I would expect to see crystal rules become mud rules not only when: (1) crystal rules are extended to non-obvious situations; (2) when parties are in a relational contract; and (3) when courts are called to make an *ex post* adjudication that will involve the forfeiture of a significant asset; but also (4) in situations where the variable being decided is subjectivized; and (5) the asset or variable about which the decision is made is itself evolving into a significantly different asset due to technological advances. When all five of these variables are aligned, crystal rules will inevitably become mud rules and lead to the development of crystal rules to replace the muddied rules. ❄

JOHNSON BIBLIOGRAPHY

BOOKS

- Understanding Modern Real Estate* (Lexis/Nexis, 2d ed. 2007)
- Understanding Modern Real Estate* (Hornbook) (Lexis Publishing, 2001)
- A Technical Guide to Academic Assistance Programs*, Lead Editor (Law School Admission Council, 2000)

ARTICLES

- “An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine,” 45 *U. San Diego L. Rev.* 79 (2008)
- “The Destruction of the Holistic Approach to Admissions: The Pernicious Effect of Rankings,” 81 *Ind. L. Rev.* 309 (2006)
- “Having a Faculty Everyone Wants . . .” 36 *Toledo L. Rev.* 95 (2004)
- “Why I am Not a Lawyer: A Contextual Reply,” 8 *Nexus L.J.* 13 (2003) (Chapman University Law School)
- “The Impact of Diversity on Scholarship: Challenging Traditional Canons,” in *Perspectives on Diversity Issues* (AALS, 1998)
- “Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine,” 21 *U. Hawaii L. Rev.* 353 (1999) (Symposium Issue)
- “The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective,” 95 *Mich. L. Rev.* 1005 (1997)
- “Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law,” 84 *Cal. L. Rev.* 887 (1996)
- “How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods,” 143 *U. Pa. L. Rev.* 1595 (1995)
- “Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship,” 79 *Iowa L. Rev.* 803 (1994)
- “Bid Whist, Tonk, and *United States v. Fordice*: Why Integrationism Fails African-Americans Again,” 81 *Cal. L. Rev.* 1401 (1993)
- “Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy,” 79 *Va. L. Rev.* 959 (1993)

BIBLIOGRAPHY

- “Scholarly Paradigms: A New Tradition Based on Context and Color,” 16 *Vt. L. Rev.* 913 (1992)
- “Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties,” 1992 *U. Ill. L. Rev.* 1043
- “Think Like a Lawyer, Work Like a Machine: The Dissonance between Law School and Law Practice,” 64 *S. Cal. L. Rev.* 1231 (1991)
- “The New Voice of Color,” 100 *Yale L.J.* 2007 (1991)
- “Adding Another Piece to the Financing Puzzle: The Role of Real Property Secured Debt,” 24 *Loy. L.A. L. Rev.* 335 (1991)
- “Racial Critiques of Legal Academia: A Reply in Favor of Context,” 43 *Stan. L. Rev.* 137 (1990)
- “Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to *Cy Pres* and America’s Cup Litigation, (with Ross D. Taylor) 74 *Iowa L. Rev.* 545 (1989)
- “The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts,” 22 *Conn. L. Rev.* 61 (1989)
- “An Appeal for the ‘Liberal’ Use of Law and Economics: The Liberals Fight Back,” (reviewing Blinder, *Hard Heads, Soft Hearts*). 67 *Tex. L. Rev.* 659 (1989)
- “Modern Real Estate: A Constitutional Approach,” in *Blessings of Liberty: The Constitution and the Practice of Law* 175 (ALI-ABA Committee on Continuing Professional Education, 1988)
- “Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases,” 74 *Va. L. Rev.* 751 (1988)
- “The Legality of Testing Student-Athletes for Drugs and the Unique Issue of Consent” (with James F. Ritter), 66 *Or. L. Rev.* 895 (1987)

WORKS IN PROGRESS

- “The Reemergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race,” (forthcoming, 95 *Iowa L. Rev.* 2009)
- “Preventing a Return Engagement: Destroying the Negotiability of the Mortgagor’s Note via the Unconscionability Doctrine,” (forthcoming, 36 *Pepperdine L. Rev.* 2009)

“Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer.” (in progress)



Examining Cities, Constitutions, and the Connections Between Them

RICHARD SCHRAGGER'S WORK RANGES WIDELY—FROM the nuts and bolts of municipal government to constitutional and political theory, from mayors to Supreme Court justices. That is what you might expect from someone who is interested in cities, constitutions, and their intersection. Schragger's work is sometimes described as local government law, but that is too confining a category. He is really interested in how political communities are created and sustained. That has led him to write about the role of local, decentralized institutions in a federal democracy and the relationship between governments at different scales. His work uses geography, sociology, economics, political science, history, and legal theory to explore the concept of self-government.

“... we miss hugely important insights if we act like local institutions are at best unimportant or at worst threatening.”

How did he get here? Schragger would blame it on his father and grandfather, both lawyers who worked in and with state and local

governments in Trenton, New Jersey. He would also have to credit the constitutional theory courses he took as an undergraduate, and the local government law class he took at Harvard Law School. And finally, he would point to his interest in race and poverty, which has led him to ask why America has so often failed to build livable, just, integrated cities.

His first full-length article, “The Limits of Localism,” 100 *Mich. L. Rev.* 371 (2001), addresses a number of these themes through an exploration of *Chicago v. Morales*, a Supreme Court case that struck down a city ordinance that banned loitering by gang members in certain inner-city Chicago neighborhoods. *Morales* engendered a continuing debate in criminal law scholarship about the devolution of constitutional law to the neighborhood level, with some scholars arguing that local communities should be able to depart from constitutional norms under certain circumstances.

Schragger’s article identifies three accounts of community that provide the most common theoretical grounds for local autonomy. Then, using the insights of legal geography, the article critiques each account. Law is often “boundary creating,” Schragger contends, borrowing from Robert Cover—it marks us in legal, social, and literal space as insiders or outsiders, members or nonmembers, citizens or noncitizens. While boundaries create citizens (or aspire to do so), they must also, by definition, create noncitizens. They are therefore invariably destructive of the ideal of a wider community. Schragger concludes that if we want to defend particular policies, we cannot do so by invoking some non-controversial notion of “community” or “autonomy” but must do so based on the merits of the policies themselves, that is, on substantive grounds. In the case of *Morales*, the invocation of “community” hid the true costs of the anti-loitering ordinance on outsiders.

In “The Role of the Local in the Doctrine and Discourse of Religious Liberty,” 117 *Harv. L. Rev.* 1810 (2004), Schragger makes a substantive claim that points in a different direction—this time, it is in the context of church-state relations, and he argues in favor of local authority. The conventional wisdom is that local political institutions are often hostile

to religious minorities and therefore particularly in need of central oversight—judicial or otherwise. Schragger argues just the opposite.

He claims that local government—and more generally the decentralization of power—is a robust structural component of religious liberty. He concludes that the chief threat to religious liberty is the exercise of centralized power generally, either to benefit religion as a class or to burden it. Schragger’s central point is that the scale of government matters when considering the substantive goals of the religion clauses. Once one pays attention to scale, it becomes clear that our fear of local government is as misplaced as our trust in centralized oversight.

Schragger’s work emphasizes the role of local institutions in a system often presumed to have only two levels—state and federal. In this way, his scholarship is an antidote to public law’s fixation with federalism. That cities, towns, counties, and school districts are central to our lives is obvious, but the myth of a two-tiered federalism still dominates constitutional law and scholarship. In “Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government,” 50 *Buffalo L. Rev.* 393 (2002), Schragger shows how this constitutional blindness is built into judicial doctrine and how distrust of local institutions is built into our constitutional culture. Schragger claims that this distrust is unwarranted and in tension with our professed commitment to self-rule. “I’m not a romantic about local government—it is often beset by serious political pathologies,” says Schragger. “But we miss hugely important insights if we act like local institutions are at best unimportant or at worst threatening.”

The relative power of local institutions is the subject of two other articles, one on same-sex marriage and the other on the power of mayors in a federal system. In “Cities as Constitutional Actors: The Case of Same-Sex Marriage,” 21 *Va. J.L. & Pol.* 147 (2005), Schragger considers San Francisco’s recognition of gay marriage and offers a reading of Supreme Court precedent that provides room for local governments to resist state-level commands under certain circumstances. Specifically, Schragger argues that a form of constitutional localism is currently embedded in the

Court's jurisprudence and that it can be read to protect local autonomy when cities seek to enforce certain kinds of equal treatment guarantees. This "decentralized equal protection" would provide San Francisco some constitutional traction in challenging California's preemption of the city's same-sex marriages.

In "Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System," 115 *Yale L.J.* 2542 (2006), Schragger explores the relationship between the federal structure and local executive power. Schragger asks why big city mayors in the United States are relatively weak institutional actors and suggests that constitutional federalism is partly to blame. Under America's distinctive form of federalism, cities are granted a great deal of autonomy but given little capacity to address their most intractable problems.

Each of these articles ask: What are the legal and institutional capacities of local governments in a federal system? What should those capacities be? And what does (and should) the Constitution say about it? Schragger thinks this is where the action is. "Constitutional scholars have written pages and pages about 'what is truly local and what is truly national,' (to quote Justice Rehnquist from *United States v. Morrison*), but cities and other 'truly local' institutions are often invisible to mainstream public law scholarship and to our students. That is a mistake. Local government is where government policies are felt most directly, and where racial, economic, and social policy meets the road."

Schragger recognizes that the invocation of localism has often served to entrench and mask inequality. But he argues that decentralization can also have a powerful egalitarian and democratic valence. In "The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940," 90 *Iowa L. Rev.* 1011 (2005), Schragger explores this aspect of localism in the economic sphere. He tells the history of the popular opposition to chain stores in the United States in the 1920s and 1930s, and places this opposition in the context of the shift from Lochnerian jurisprudence to the New Deal. During that period, chain store opponents, including Justice Louis Brandeis, argued that the

chains were undermining the small, independent retailer and destroying America's small towns. They argued that the concentration of economic capital in large corporate entities threatened democratic citizenship. These localist and decentralist arguments were taken seriously by state legislatures, many of which adopted anti-chain store tax laws, and by Congress, which adopted amendments to the federal antitrust laws. The Supreme Court considered a number of chain store tax cases during the late 1920s and 1930s, one of which—*Liggett v. Lee*—resulted in one of Brandeis's most famous dissents.

In “The Anti-Chain Store Movement . . .”, Schragger uncovers an alternative history of progressive political and economic localism. He observes that Brandeis's defense of the small retailer was the outgrowth of a political philosophy that emphasized both political decentralization and economic deconcentration. For Brandeis and other decentralist intellectuals of the time, the “curse of bigness” was the concentration of wealth in big corporations and the concentration of power in big government. The New Dealers made peace with both, however, and by the 1940s localist arguments became the province of states-righters and segregationists. Although this meant that Brandeis's alternative was marginalized, Schragger believes that a form of progressive decentralization is still possible.

His most recent scholarship explores this possibility, focusing on the twin themes of political and economic decentralization. In “Cities, Economic Development, and the Free Trade Constitution,” 94 *Va. L. Rev.* 1091 (2008), Schragger argues that we have misunderstood the nature of the American common market and the constitutional rules that govern that market. While constitutional doctrine focuses on inter-state trade in defining the parameters of the national free market, the bulk of internal U.S. trade takes place between cities and in and between metropolitan areas. By looking at the free trade constitution from the perspective of the city, Schragger forces us to radically rethink the constitutional doctrines that are relevant to preserving the common market. For example, local land use ordinances, which the Supreme Court rarely reviews for their protectionist effects, are central instruments in the cross-border control of

persons, goods, and capital. Once local governments are brought to the fore, a whole set of doctrinal inconsistencies and contradictions emerge, as well as a new understanding of the actual contours of the “free trade” constitution. That constitution looks nothing like the one that we are accustomed to seeing—the one in which states are the sole focus of attention.

A forthcoming article continues with this theme. “Mobile Capital, Economic Regulation, and the Democratic City,” 123 *Harv. L. Rev.*—(forthcoming 2009), considers the appropriate scale for economic regulation. Despite the conventional wisdom that sub-national governments cannot effectively control or redistribute capital, Schragger observes that cities have increasingly sought to do both. His article describes these efforts, which include putting conditions on the entry of development dollars through contract, excluding capital through anti-chain and anti-big box store laws, and redistributing from capital to labor through local minimum wage laws and other labor-friendly legislation. This new “regulatory localism” is noteworthy because it challenges the proposition that industrial policy, redistribution, and other responses to global economic restructuring must be addressed at the national level. It also challenges the proposition that local economic development policies must necessarily be biased in favor of corporate capital.

Schragger’s article makes us rethink a whole set of assumptions about which levels of government are equipped to handle large-scale shifts in the economy. And it further advances a claim that would have been familiar to Brandeis and the decentralist intellectuals of the Progressive Era. Schragger argues that the division of authority between cities, states, and the federal government is best understood as a reaction to the political pathologies that arise from the government-business relationship. Legal scholars who write about the division of authority among levels of government often miss this central insight. When lawyers debate the vertical distribution of powers, they often do not see that distribution as a proxy for regulating the relationship between private capital and public power. Schragger argues, however, that the question of how power is allocated among levels of government is secondary to the question of how

government power is allocated vis-à-vis capital—in particular, vis-à-vis large-scale, mobile capital.

The relationship between public and private power, between democracy and capital, looms large for Schragger. He argues that we cannot understand our constitutional culture without understanding how the market economy shapes political institutions and vice versa. An effort along these lines is Schragger's most recent article, entitled "Rethinking the Theory and Practice of Local Economic Development," 77 *Chi. L. Rev.*—(forthcoming 2010). There, Schragger argues that scholars' policy prescriptions have to be based in a realistic account of how city economies form, grow, prosper, and decline. Much of the economic theory that informs local government law scholarship is too simplistic, he contends, because it assumes a competitive model of economic development. Schragger urges scholars to think harder about how cities work and what institutional arrangements might make them work better in a market economy in which private enterprise is the main driver of prosperity.

Thinking hard about the role of local institutions in our constitutional and economic order has been Schragger's scholarly preoccupation. "We can learn so much simply by shifting scales," Schragger observes. "Legal doctrine has to be made with attention to its actual operation on the ground, in the places that we live, in the communities that we build." Schragger has staked out a scholarly agenda that takes localism seriously and that challenges the conventional wisdom about the limitations and possibilities of local self-government. "In the 1960s and 1970s there was a real scholarly effort—in law schools and out—to think about how we construct and think about cities, the people who live in them, and their welfare. Those issues are again on the table. Young local government law scholars are generating new ideas in the field. And we are seeing more nuanced accounts of how democracy and economy operate across local, state, and national scales." For a scholar of cities and constitutions, especially one with Schragger's vision and energy, it is an exciting time. ❧

EXCERPTS

The Role of the Local in the Doctrine and Discourse of Religious Liberty

117 *Harv. L. Rev.* 1810 (2004)

THE ANTIMAJORITARIAN CHARACTER OF THE RELIGION CLAUSES is their most salient feature. America's extraordinary religious pluralism, scholars often argue, is the direct result of a system of religious freedom that at the very least prevents majorities from imposing norms of religious exercise on minorities. What has been somewhat surprising is scholars' and courts' inattention to the location and institutional character of these majorities. At the Founding, the Religion Clauses limited the power of the federal government to enact a national religion—"Congress shall make no law," reads the First Amendment. Until the advent of the Supreme Court's modern Religion Clause jurisprudence, with the application of the First Amendment to the states in the 1940s, states were free to regulate religion and religious exercise, limited only by their own constitutional provisions. Since incorporation, however, much of Religion Clause doctrine has been preoccupied with neither federal nor state governments, but rather with local ones: city councils that adopt Sunday closing laws or sponsor religious displays in front of city hall; school boards that provide busing or equipment to students in religious schools, that restrict access by religious groups to school property, or that permit a prayer at a graduation ceremony; zoning boards that deny a church's permit to expand or that allow churches an exemption from applicable local land-use ordinances.

In short, modern Religion Clause jurisprudence has been to a significant degree a product of religious conflicts within smaller polities—a jurisprudence (putting it more prosaically) of municipal regulation.

Because the post-incorporation Court has never made a distinction among levels of government—local, state, or federal—when considering Establishment or Free Exercise Clause challenges, constitutional theorists have rarely treated this locational fact as significant. This Article seeks to remedy that oversight. In exploring the implications of a constitutional commitment to religious freedom in a nation of towns, it argues that the predominantly local character of Religion Clause disputes should have theoretical and doctrinal significance. It seeks to conceptualize the role of the local in the doctrine and discourse of religious liberty.

The fact that much of Religion Clause doctrine has been forged in conflicts that directly implicate the traditional powers of local government is not surprising. Individuals and communities of individuals tend to wrestle with the relationship between church and state at close quarters. In one case, a small Texas town wants to come together and pray at community civic events, like a football game. In another case, a city seeks to display a religious symbol in front of the town hall. These efforts concern, at least for the combatants, the moral virtue—even the salvation—of a particular community. At stake is the soul of a specific place. Witness the Florida town that declared by mayoral proclamation that Satan was banned from the city limits. Like mayors placing the Ten Commandments at the doorsteps of city hall, the town leaders placed markers containing the declaration at the entry points to the city. These and other attempts at creating communities of virtue are not ambitious; they stop at the city limits. Participants assert a modest agenda, to do “what [is] best for [our] town.”

In the past, such ambitions often partook of territorial claims. And though religion no longer “runs with the land” as it did when explorers would claim aboriginal lands for crown and church (thus subsuming the inhabitants under both), we have not been able to banish territoriality entirely. As historian Martin Marty has observed, the religious history of the United States must be understood in the context of place and space—as the negotiation and competition between the state and religion (and among religions) for territory, both in the sense of defensible geo-

graphic boundaries and defensible social and cultural room to maneuver. Implicit in this observation is that the American experiment in pluralism is only truly tested under conditions of urbanity. The frontier permitted escape from intolerance, a space for religious exercise that would otherwise be anathema to one's neighbors. The Mormons made free exercise by migrating to a place where no one else was (though ultimately it failed to protect them). In contrast, the ghetto provides sanctuary when there is no open expanse available for migration. It also seriously circumscribes liberty by physically defining the limits of toleration.

The modern principle of religious tolerance rejects the frontier and the ghetto. That is to say that American-style religious pluralism is not based on grants of territorial autonomy to religious groups, but is instead premised on accommodating religious belief and exercise right here in our midst. It is this "in our midst" quality of religious liberty that has troubled the Court in its attempts to reconcile the competing values of assimilation and autonomy, inclusion and exit, neutrality and separatism. The difficulty is that "in our midst" also means "in our backyard." The Religion Clauses are cosmopolitan but, as James Wilson declares, "people are by nature locals."

What is the role of the local in the doctrine and discourse of religious liberty? The usual parochialism story is that local political institutions are often hostile to religious minorities and therefore particularly in need of central oversight—judicial or otherwise. This Article questions this conventional wisdom. It argues that local government—and more generally the decentralization of power—is a robust structural component of religious liberty. First, the dispersal of political authority prevents the amassing of power to benefit or burden religion in any one institution, thus guarding against governmental overreaching. Second, the dispersal of political authority gives local governments the ability to serve as counterweights to private religious power, thus preventing religious overreaching.

The first claim is based on the Madisonian view that religious faction is a particularly virulent form of faction. Disestablishment has often

been understood as the primary mechanism for ensuring that no one religious faction can gain undue power in the whole. Underappreciated by most scholars and theorists, however, is the protective role played by the dispersal of political authority. Political decentralization ensures that the national councils do not have a monopoly on the power to regulate religion. And the fragmentation of government authority encourages the formation of religious groups, a necessary precondition for the robust competition among sects that prevents any one sect from gaining political dominance in the whole. The chief threat to religious liberty, I contend, is the exercise of centralized power generally, either to benefit religion as a class or to burden it. The Court's Religion Clause jurisprudence should therefore be more skeptical of federal and state regulations that touch on religion than of similar local regulations.

The second claim—that the dispersal of authority gives local governments the ability to serve as counterweights to private religious power—suggests a role for the local that is currently at odds with an individual-rights-based approach to religious liberty. Instead of treating government as monolithic and religious rights as invariant—to be defined in the first instance by the judiciary—the decentralization approach views local governments as valuable sites of civic association with a role in articulating local constitutional norms. Indeed, by paying close attention to where most conflicts over religious liberty take place, we can excavate the nature of the relationship between city and church, community and faith, civic commitments and religious ones. The interplay of religious and civil authority and the accommodation of each occurs locally, among neighbors, in communities. Judicial or legislative actions that bypass local institutions have the effect of undermining an important institutional location for the articulation of public norms and values. This devaluation of the local is dangerous because it enhances private power to the detriment of public power; it degrades the local community as a civic counterweight to religious power. On this argument, local governments are appropriate sites—not the only sites, certainly, but central and overlooked sites—for the negotiation of church-state relations. ❧

Mobile Capital, Local Economic Regulation, and the Democratic City

123 *Harv. L. Rev.*—(forthcoming 2009)

ECONOMIC LOCALIZATION IS BEING DRIVEN BY A DECENTRALIZED labor movement, urban anti-poverty organizations, opportunities in municipal law, political alliances with progressive city mayors, a localist economic ideology, and the urban resurgence. These efforts are emphatically post-industrial; in this atmosphere it may be possible for cities to regulate in ways that nations and states cannot—to leverage place-dependent value and constrain or redistribute capital. This nascent localization of economic policy coincides with the rise of the region as an important economic unit and the relative decline of the nation-state as a central regulator of economic life. Even if there was the political will to generate a new relationship between capital and democracy, it is far from clear that the nation can or is in a better position than cities to deliver. Indeed, a progressive economic localism is one possible answer to the dislocations that accompany globalization.

In light of these phenomena, we need to reframe our approach to city power. The conventional approach to the allocation of powers between the federal, state, and local governments involves assessing those governments' relative competences and the political effects of particular allocations. These debates occur, however, with little consideration of the allocation of power as between government and capital. Debates about decentralization make little sense without reference to the private-side exercise of economic power as well as the public-side exercise of regulatory power. The relevant question is: How is the city's power exercised vis-à-vis capital—in particular, vis-à-vis large-scale, mobile capital? That question should inform how we conceive of local power and how we think about local economic policy.

We should start by complicating our understanding of the relative

vulnerabilities of city and capital. The disciplining view of capital mobility is skeptical of the exercise of local power—it assumes that government power will often be deployed to exploit unless there are some constraints. Liberty, on this account, is the exercise of rights against—and the operation of markets free from—direct government intervention or interference. One implication of this view is that where exit does not provide sufficient discipline, legal limits on city power are appropriate to prevent exploitation of property owners, corruption, and other political process flaws of local urban democracy. Courts and legislatures should step in to prevent local oppression of the vulnerable; local authority is thus appropriately limited.

When one turns away from the dominant conception of rights and markets, however, a different idea of vulnerability emerges. A competing political tradition tells us that governments are also vulnerable to markets, though this vulnerability tends to be less visible. Indeed, the vulnerability of the city to mobile capital is often interpreted as the reverse—the vulnerability of capital to local government.

Kelo [v. New London] is a nice example: mobile capital dictates the terms of New London’s economic strategy, but the salient and legally-cognizable act was the government’s invasion of the homeowners’ property rights. The liberal economic order has the necessary tools to prevent the public sphere from invading a protected private sphere—the language of rights does most of this work. But we have more trouble understanding when the private sphere is invading the sphere of the public—that is, we have more trouble preventing the distortion of public decision-making for private ends. Explicit corruption or capture of public processes can be guarded against, but the form of corruption that worries those concerned with capital’s political power—the narrowing of the public sphere, the loss of political and economic independence, government policy driven by unaccountable and unelected economic actors—is more difficult to articulate. The sense that government has lost the power to control the chief determinants of citizens’ well-being—sometimes described in terms of “democracy deficits”—drives local economic reform efforts like the minimum wage ...

Our difficulty in articulating this concern reflects the pervasiveness of the negative conception of rights as trumps to be asserted against government invasions. That difficulty also stems from the fact that we have come to discount the notion of the common good itself; the “public” no longer exists, but is an amalgam of private interests. Indeed, our current theories of democratic process—dominated as they are by public choice—tend to undermine the idea of an identifiable democratic public at all. The democratic public either does not exist or has no interests that can be invaded by private-side rights-bearers.

But this one-sidedness masks the central problem, which is that the political pathologies of local government are, in significant part, a function of local government’s relationship to capital. Indeed, both concerns—the public invasion of rights and the private corruption of the public good—have and continue to be dominant problems in the city-business relationship. Recall that the original 19th century limitations on city power were a means of restraining giveaways to mobile capital; the counter-movement to limit state authority was motivated by similar concerns that business-dominated interests were corrupting good municipal government. Limiting municipal power to intervene in the private marketplace by enforcing a rigid public/private distinction and adjusting the city’s powers vis-à-vis higher level governments have been the two primary ways of dealing with the pathologies of the city-business relationship. These conceptual narratives continue to dominate the current law of local government.

Those efforts are quite imperfect, however. More importantly, they appear unable to effectively cabin the politics of capital attraction, retention, and exploitation. That is because the relationship between the legal regulation of the city and mobile capital is not a linear one. The city develops in tandem with private investment, commercial activity, and capital formation—city power cannot be disentangled from the power of private economic activity. Mobile capital operates through the instruments of local government; the rules that bind the latter might well be for the purpose of binding the former. Reformers legitimately worry that

public power will be used as an instrument for private gain, but private gain is the city's lifeblood.

The notion of city power is thus more complicated than it appears. Cataloguing the powers or limitations of municipal government does not tell us very much. Rather, one needs to ask how lodging authority to make certain kinds of decisions at a particular level of government—federal, state, or local—affects the city-business relationship. Indeed, the city power debate—to the extent it only looks at the legal powers of cities vis-à-vis other levels of government—is somewhat beside the point. Local “autonomy” is not an available option: first, because the city and private investment are inextricably linked; and second, because different allocations of legal authority as between the city, state, and federal governments will have different (and not always predictable) consequences for the city's vulnerability to private-side control and manipulation. ❧

SCHRAGGER BIBLIOGRAPHY

PUBLICATIONS

- “The Last Progressive: Justice Breyer, Heller, and ‘Judicial Judgement’” 59
Syracuse L. Rev. 283 (2008) (Symposium: District of Columbia v. Heller)
- “Cities, Economic Development, and the Free Trade Constitution,” 94 *Va. L. Rev.* 1091 (2008)
- “San Antonio v. Rodríguez and the Legal Geography of School Finance Reform” in Goluboff and Gilles, eds., *Civil Rights Stories* (2007)
- “Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System,” 115 *Yale L.J.* 2542 (2006)
- “Cities As Constitutional Actors: The Case of Same-Sex Marriage,” 21 *Va. J.L. & Pol.* 147 (2005) (Symposium: Democracy in Action? The Law and Politics of Local Governance).
- “The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940,” 90 *Iowa L. Rev.* 1011 (2005)
- “The Role of the Local in the Doctrine and Discourse of Religious Liberty,” 117 *Harv. L. Rev.* 1810 (2004)
- “Consuming Government” (reviewing William Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001)), 101 *Mich. L. Rev.* 1824 (2003), excerpted in Frug, Ford & Barron, *Local Government Law* (4th ed. 2006) at 491
- “Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government,” 50 *Buffalo L. Rev.* 393 (2002)
- “The Limits of Localism,” 100 *Mich. L. Rev.* 371 (2001)
- Note, “The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend,” 109 *Harv. L. Rev.* 1747 (1996)

OTHER PUBLICATIONS

- “The Progressive City” in “Why the Local Still Matters: Federalism, Localism, and Public Interest Advocacy,” Papers from the Eleventh Annual Liman Public Interest Program Colloquium (2009)

“Congress Behaving Badly” (with Dahlia Lithwick), *Washington Post*, Oct. 8, 2006

“Cooler Heads: The Difference Between the President’s Lawyers and the Military’s,” *Slate*, Sept. 20, 2006

City Powers Project: Denver, Colorado (2005) (commissioned as a report to the Boston Foundation)

“Rock and Roe: Alito’s Unequivocal Abortion Decisions,” *Slate*, Nov. 1, 2005.

“Commentary: The Real World/Why Judicial Philosophies Matter” (with R. Goluboff), *Slate*, Sept. 7, 2005

“At Risk: Roe, Rights and Religion,” *Los Angeles Times*, July 21, 2005. Articles

WORKS IN PROGRESS

“Rethinking the Theory and Practice of Local Economic Development,” *Chicago L. Rev.* (forthcoming 2010)

“Mobile Capital, Local Economic Regulation, and the Democratic City,” 123 *Harv. L. Rev.* (forthcoming 2009)



2008 Faculty Scholarship

ABRAHAM, KENNETH S.

The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 (Harvard University Press, 2008).

“A Tribute to Glen O. Robinson,” 94 *Va. L. Rev.* 1292 (2008).

BAGLEY, MARGO A.

“The Need for Speed (and Grace): Issues in a First-Inventor-to-File World,” 23 *Berkeley Tech. L.J.* 1035 (2008).

BALNAVE, RICHARD D.

Virginia Family Law: A Systematic Approach (Virginia CLE Publications, 3d ed. 2008).

BARZUN, CHARLES L.

“Chicago v. Sturges, 222 U.S. 313 (1913),” in 1 *Encyclopedia of the Supreme Court of the United States* 293 (David S. Tanenhaus, ed., Macmillan Reference USA, 2008).

“Rules of Weight,” 83 *Notre Dame L. Rev.* 1957 (2008).

BARZUZA, MICHAL

“Delaware’s Compensation,” 94 *Va. L. Rev.* 521 (2008).

BEVIER, LILLIAN

“What Is the ‘Free Press’?” (panelist), 11 *Chap. L. Rev.* 243 (2008).

BONNIE, RICHARD J.

“The Impact of Modern Neuroscience on Treatment of Parolees: Ethical Considerations in Using Pharmacology to Prevent Addiction Relapse” (with Donna T. Chen and Charles P. O’Brien), *Cerebrum*, Nov./Dec. 2008.

“Legal Authority to Preserve Organs in Cases of Uncontrolled Cardiac Death: Preserving Family Choice” (with Stephanie Wright and Kelly K. Dineen), 36 *J.L. Med. & Ethics* 741 (2008).

BROWN, DARRYL K.

“Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining,” 57 *DePaul L. Rev.* 365 (2008).

“The Multifarious Politics of Capital Punishment: A Response to Smith,” 94 *Va. L. Rev. In Brief* 57 (2008).

“*Yick Wo* and the Constitutional Regulation of Criminal Law,” 2008 *U. Ill. L. Rev.* 1405.

BROWN-NAGIN, TOMIKO

“*Missouri v. Jenkins*: Why District Courts and Local Politics Matter,” in *Civil Rights Stories* 243 (Myriam E. Gilles & Risa L. Goluboff, eds., Foundation Press, 2008).

“‘One of These Things Does Not Belong’: Intellectual Property and Collective Action Across Boundaries,” 117 *Yale L.J. Pocket Part* 280 (2008).

CANNON, JONATHAN Z.

“A Bargain for Clean Water,” 17 *N.Y.U. Envtl. L.J.* 608 (2008).

“The Environmental Other: Finding and Losing Ourselves in Nature,” in *What Should I Read Next?* 104 (Jessica R. Feldman & Robert Stilling, eds., University of Virginia Press, 2008).

“Over the Life of a Site,” *Envtl. F.*, Sept./Oct. 2008, at 27.

“Sustainable Watersheds,” 107 *Mich. L. Rev. First Impressions* 74 (2008).

CHOI, ALBERT H.

“Completing Contracts in the Shadow of Costly Verification” (with George Triantis), 37 *J. Legal Stud.* 503 (2008).

“Optimal Agency Contracts: the Effect of Vicarious Liability and Judicial Error” (with Juan Carlos Bisso), 28 *Int’l Rev. L. & Econ.* 166 (2008).

CUSHMAN, BARRY

“The Great Depression and the New Deal,” in 3 *Cambridge History of Law in America* 268 (Michael Grossberg & Christopher Tomlins, eds., Cambridge University Press, 2008).

“The Structure of Classical Public Law,” 75 *U. Chi. L. Rev.* 1917 (2008) (reviewing Duncan Kennedy, *The Rise and Fall of Classical Legal Thought*).

DOOLEY, MICHAEL P.

“Rethinking Appraisal,” *Del. Law.*, Spring 2008, at 28.

DUDLEY, EARL C., JR.

“Prosecuting Lawyers and Co-Opting Grand Juries: the Rise and Fall of an Embracery Prosecution” (with Alan Silber), *Champion*, May/June 2008, at 8.

EMERY, KIMBERLY C.

“Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart” (with Robert E. Emery), 43 *Wake Forest L. Rev.* 365 (2008).

FORD, DOUG

Underground America: Narratives of Undocumented Lives (with others) (McSweeney’s, 2008).

GARRETT, BRANDON L.

“Claiming Innocence,” 92 *Minn. L. Rev.* 1629 (2008).

“Corporate Confessions,” 30 *Cardozo L. Rev.* 917 (2008).

“Judging Innocence,” 108 *Colum. L. Rev.* 55 (2008).

GEIS, GEORGE S.

“Automating Contract Law,” 83 *N.Y.U. L. Rev.* 450 (2008).

“Economics as Context for Contract Law,” 75 *U. Chi. L. Rev.* 569 (2008) (reviewing Victor Goldberg, *Framing Contract Law: An Economic Perspective*).

GOLUBOFF, RISA L.

“*Brown v. Board of Education* and the Lost Promise of Civil Rights,” in *Civil Rights Stories* 25 (Myriam E. Gilles & Risa L. Goluboff, eds., Foundation Press, 2008).

Civil Rights Stories (editor with Myriam E. Gilles) (Foundation Press, 2008).

“Ongoing Struggle: The Deeper History of the Civil Rights Movement,” in *What Should I Read Next?* 43 (Jessica R. Feldman & Robert Stilling, eds., University of Virginia Press, 2008).

“Peonage,” in 4 *Encyclopedia of the Supreme Court of the United States* 32 (David S. Tanenhaus, ed., Macmillan Reference USA, 2008).

HAFEMEISTER, THOMAS L.

“Mens Rea and Actus Reus” (with Kamela K. Nelan), in 2 *Encyclopedia of Psychology and Law* 487 (Brian L. Cutler, ed., Sage Publications, 2008).

HARMON, RACHEL A.

“When Is Police Violence Justified?,” 102 *Nw. U. L. Rev.* 1119 (2008)

HARRISON, JOHN

“The Constitution of Economic Liberty,” 45 *San Diego L. Rev.* 709 (2008).

“Ex Parte *Young*,” 60 *Stan. L. Rev.* 989 (2008).

“New Property, Entrenchment, and the Fiscal Constitution,” in *Fiscal Challenges: An Interdisciplinary Approach to Budget Policy* 401 (Elizabeth Garrett et al., eds., Cambridge University Press, 2008).
 “On the Hypotheses That Lie at the Foundations of Originalism,” 31 *Harv. J.L. & Pub. Pol’y* 473 (2008).

HEYTENS, TOBY J.

“Doctrine Formulation and Distrust,” 83 *Notre Dame L. Rev.* 2045 (2008).

HYNES, RICHARD M.

“Broke but Not Bankrupt: Consumer Debt Collection in State Courts,” 60 *Fla. L. Rev.* 1 (2008).

JEFFRIES, JOHN C., JR.

Federal Courts and the Law of Federal-State Relations (with Peter W. Low) (Foundation Press, 6th ed. 2008).

“A Tribute to Earl C. Dudley, Jr.,” 94 *Va. L. Rev.* 1281 (2008).

“A Tribute to Glen O. Robinson,” 94 *Va. L. Rev.* 1289 (2008).

JOHNSON, ALEX M., JR.

“An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine,” 45 *San Diego L. Rev.* 79 (2008).

KITCH, EDMUND W.

“In Memoriam: David P. Currie (1936 -2007),” 75 *U. Chi. L. Rev.* 13 (2008).

KORDANA, KEVIN A.

“The Rawlsian View of Private Ordering” (with David H. Blankfein Tabachnick), 25 *Soc. Phil. & Pol’y* 288 (2008).

KRAUS, JODY S.

“From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory,” 94 *Va. L. Rev.* 157 (2008).

LESLIE, DOUGLAS L.

Labor Law in a Nutshell (Thomson/West, 5th ed. 2008).

LOW, PETER W.

Federal Courts and the Law of Federal-State Relations (with John C. Jeffries, Jr.) (Foundation Press, 6th ed. 2008).

MAGILL, M. ELIZABETH

“Temporary Accidents?,” 106 *Mich. L. Rev.* 1021 (2008) (reviewing Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*).

MAHONEY, JULIA D.

“Doctors, Lawyers, and the Classics: Reading for Ethical Values” (with Marcia Day Childress), in *What Should I Read Next?* 140 (Jessica R. Feldman & Robert Stilling, eds., University of Virginia Press, 2008).
“Land Preservation and Institutional Design,” 23 *J. Envtl. L. & Litig.* 433 (2008).

MAHONEY, PAUL G.

“Hall v. Geiger-Jones Co., 242 U.S. 539 (1917),” in 2 *Encyclopedia of the Supreme Court of the United States* 382 (David S. Tanenhaus, ed., Macmillan Reference USA, 2008).

MARTIN, DAVID A.

Immigration and Citizenship: Process and Policy (with Thomas Alexander Aleinikoff, Hiroshi Motomura, and Maryellen Fullerton) (Thomson/West, 6th ed. 2008).

The Immigration Debate (Miller Center of Public Affairs, University of Virginia, 2008).

MEADOR, DANIEL J.

“Griffin Bell at the Intersection of Law and Politics: The Department of Justice, 1977-1979,” 24 *J. L. & Pol.* 529 (2008).

MITCHELL, GREGORY

“Calibrating Prejudice in Milliseconds” (with Philip E. Tetlock), 71 *Soc. Psychol. Q.* 12 (2008).

“The Challenge of Debiasing Personnel Decisions: Avoiding Both Under- and Over-Correction” (with Philip E. Tetlock and Terry L. Murray), 1 *Indus. & Org. Psychol.* 439 (2008).

“Contextual Evidence of Gender Discrimination: The Ascendance of ‘Social Frameworks’ ” (with John Monahan and Laurens Walker), 94 *Va. L. Rev.* 1715 (2008).

“Law and Proximity” (with Adam J. Hirsch), 2008 *U. Ill. L. Rev.* 557.

MONAHAN, JOHN

“Alternative Pathways to Violence in Persons with Schizophrenia: The Role of Childhood Antisocial Behavior Problems” (with others), 32 *Law & Hum. Behav.* 228 (2008).

“Classification of Violence Risk (COVR),” in 1 *Encyclopedia of Psychology and Law* 92 (Brian L. Cutler, ed., Sage Publications, 2008).

“Computer-Assisted Violence Risk Assessment among People with Mental Disorder,” in *Psychology and Law: Bridging the Gap* 211 (David Canter & Rita Zukauskien, eds., Ashgate, 2008).

“Contextual Evidence of Gender Discrimination: The Ascendance of ‘Social Frameworks’ ” (with Laurens Walker and Gregory Mitchell), 94 *Va. L. Rev.* 1715 (2008).

“MacArthur Violence Risk Assessment Study,” in 2 *Encyclopedia of Psychology and Law* 467 (Brian L. Cutler, ed., Sage Publications, 2008).

FACULTY SCHOLARSHIP

“Mandated Community Treatment: Applying Leverage to Achieve Adherence,” 36 *J. Am. Acad. Psychiatry & L.* 282 (2008).

MOORE, JOHN NORTON

“UNCLOS Key to Increasing Navigational Freedom,” 12 *Tex. Rev. L. & Pol.* 459 (2008).

NACHBAR, THOMAS B.

Communications Regulation (with Glen O. Robinson) (Thomson/West, 2008).

“The Public Network,” 17 *CommLaw Conspectus* 67 (2008).

Rule of Law Handbook: a Practitioner’s Guide for Judge Advocates (editor with Katherine Gorove) (Judge Advocate General’s Legal Center and School, U.S. Army, Center for Law and Military Operations, 2008).

NELSON, CALEB

“Judicial Review of Legislative Purpose,” 83 *N.Y.U. L. Rev.* 1784 (2008).

O’CONNELL, JEFFREY

“The Cost and Other Advantages of an Early Offers Reform for Personal Injury Claims Against Business, Including for Product Liability” (with Patricia Born), 2008 *Colum. Bus. L. Rev.* 423.

Friendships Across Ages: Johnson and Boswell; Holmes and Laski (with Thomas E. O’Connell) (Lexington Books, 2008).

“The Last Cost Savings and Other Advantages of an Early Offer “Crimtorts” Approach to Medical Malpractice Claims,” 17 *Widener L.J.* 835 (2008).

A Recipe for Balanced Tort Reform: Early Offers with Swift Settlements (with Christopher J. Robinette) (Carolina Academic Press, 2008).

OLIAR, DOTAN

“There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy” (with Christopher Sprigman), 94 *Va. L. Rev.* 1787 (2008).

O’NEIL, ROBERT M.

Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University (Harvard University Press, 2008).

“Academic Speech in the Post-*Garcetti* Environment,” 7 *First Amend. L. Rev.* 1 (2008).

“The Story of *Keyishian v. Board of Regents*: Loyalty Oaths, Academic Freedom and Free Speech in the University Community,” in *Education Law Stories* 285 (Michael A. Olivas & Ronna Greff Schneider, eds., Foundation Press, 2008).

ORTIZ, DANIEL

“The Difference Two Justices Make: *FEC v. Wisconsin Right to Life, Inc. II* and the Destabilization of Campaign Finance Regulation,” 1 *Alb. Gov. L. Rev.* 141 (2008).

“Discerning Constitutional Meaning,” in *What Should I Read Next?* 35 (Jessica R. Feldman & Robert Stilling, eds., University Press of Virginia, 2008).

ROBINSON, GLEN O.

Communications Regulation (with Thomas B. Nachbar) (Thomson/West, 2008).

“Designing Competition Policy for Telecommunications” (with Dennis L. Weisman), 7 *Rev. Network Econ.* 509 (2008).

ROBINSON, MILDRED WIGFALL

“Transfer Tax Reform after EGTRRA-2001: Reconstruction or Further Deconstruction?,” 28 *Va. Tax Rev.* 391 (2008).

RUTHERGLEN, GEORGE

- “Civil Rights in Private Schools: The Surprising Story of *Runyon v. McCrary*,” in *Civil Rights Stories* 111 (Myriam E. Gilles & Risa L. Goluboff, eds., Foundation Press, 2008).
- “Public Employee Speech in Remedial Perspective,” 24 *J.L. & Pol.* 129 (2008).
- “State Action, Private Action, and the Thirteenth Amendment,” 94 *Va. L. Rev.* 1367 (2008).
- “A Tribute to Earl C. Dudley, Jr.,” 94 *Va. L. Rev.* 1283 (2008).

RYAN, JAMES E.

- “Charter Schools and Public Education,” 4 *Stan. J.C.R. & C.L.* 393 (2008).
- “Standards, Testing, and School Finance Litigation,” 86 *Tex. L. Rev.* 1223 (2008).

SCHAUER, FREDERICK

- “Abandoning the Guidance Function: *Morse v. Frederick*,” 2007 *Sup. Ct. Rev.* 205 (2008).
- “Authority and Authorities,” 94 *Va. L. Rev.* 1931 (2008).
- “A Critical Guide to Vehicles in the Park,” 83 *N.Y.U. L. Rev.* 1109 (2008).
- Di Ogni Erba un Fascio: Generalizzazioni, Profili, Stereotipi nel Mondo della Giustizia* (Il Mulino, 2008).
- “Hohfeld’s First Amendment,” 76 *Geo. Wash. L. Rev.* 914 (2008).
- “Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) about Analogy,” 3 *Persp. on Psychol. Sci.* 454 (2008).

SCHRAGGER, RICHARD C.

- “Cities, Economic Development, and the Free Trade Constitution,” 94 *Va. L. Rev.* 1091 (2008).
- “The Last Progressive: Justice Breyer, *Heller*, and ‘Judicial Judgment,’” 59 *Syracuse L. Rev.* 283 (2008).
- “*San Antonio v. Rodriguez* and the Legal Geography of School Finance Reform,” in *Civil Rights Stories* 85 (Myriam E. Gilles & Risa L. Goluboff, eds., Foundation Press, 2008).

SCHWARTZMAN, MICAH

“Judicial Sincerity,” 94 *Va. L. Rev.* 987 (2008).

SIEGAL, GIL

“Adjudicating Severe Birth Injury Claims in Florida and Virginia:
The Experience of a Landmark Experiment in Personal Injury
Compensation” (with Michelle M. Mello and David M. Studdert), 34
Am. J.L. & Med. 493 (2008).

SINCLAIR, KENT

Sinclair on Federal Civil Practice (Practising Law Institute, 5th ed. 2008).
Virginia Civil Procedure (with Leigh B. Middleditch, Jr.) (LexisNexis, 5th
ed. 2008).

SPELLMAN, BARBARA A.

“The Benefits of Knowing What You Know (and What You Don’t): How
Calibration Affects Credibility” (with Elizabeth R. Tenney and Robert
J. MacCoun), 44 *J. Experimental Soc. Psychol.* 1368 (2008).

SPRIGMAN, CHRISTOPHER

“There’s No Free Laugh (Anymore): the Emergence of Intellectual
Property Norms and the Transformation of Stand-Up Comedy” (with
Dotan Oliar), 94 *Va. L. Rev.* 1787 (2008).

STEPHAN, PAUL B.

“What Story Got Wrong: Federalism, Localist Opportunism and
International Law,” 73 *Mo. L. Rev.* 1041 (2008).

WALKER, LAURENS

“Contextual Evidence of Gender Discrimination: the Ascendancy of
‘Social Frameworks’ ” (with John Monahan and Gregory Mitchell), 94
Va. L. Rev. 1715 (2008).

FACULTY SCHOLARSHIP

WALT, STEVEN D.

“Uniformity and Diversity in Payment Systems” (with Clayton P. Gillette),
83 Chi.-Kent L. Rev. 499 (2008).

WHITE, G. EDWARD

“A Conversation among Legal Biographers” (with others), *Focus on Law
Studies*, Spring 2008, at 1.

“The Suspension Clause: English Text, Imperial Contexts, and American
Implications” (with Paul D. Halliday), *94 Va. L. Rev.* 575 (2008).

YALE, ETHAN

“Taxing Cap-and-Trade Environmental Regulation,” *37 J. Legal Stud.*
535 (2008).

YIN, GEORGE K.

“Reforming the Taxation of Foreign Direct Investment by U.S.
Taxpayers,” *118 Tax Notes* 173 (2008).

“Simplifying Assumptions: How Might the Politics of Consumption
Tax Reform Affect (Impair) the End Product?: Discussion,” in
Fundamental Tax Reform: Issues, Choices, and Implications 133
(John W. Diamond & George R. Zodrow, EDS., MIT PRESS, 2008).

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