At the Intersection of Criminal Law and Feminist Jurisprudence

- Mental Health Law's Leading Thinker
- Championing the Rebirth of Constitutional History
2  •  DEAN'S MESSAGE

5  •  ANNE M. COUGHLIN:
    AT THE INTERSECTION OF CRIMINAL LAW
    AND FEMINIST JURISPRUDENCE

17 •  JOHN T. MONAHAN:
    MENTAL HEALTH LAW'S "LEADING THINKER"

29 •  G. EDWARD WHITE:
    CHAMPIONING THE REBIRTH
    OF CONSTITUTIONAL HISTORY

42 •  FACULTY BIBLIOGRAPHIES
A Message from the Dean

Over the past 25 years, the University of Virginia School of Law has developed a vibrant intellectual community. This publication is devoted to the scholarship of that community. Published annually, the Virginia Journal includes both a survey of recent publications and in-depth profiles of selected faculty. Its purpose is not only to record the achievements of a remarkable faculty, but also to inform the continuing debate over the appropriate relationship between the scholarly and professional missions of American law schools.

We are proud and fortunate to claim as members of our faculty the three exceptionally talented legal scholars and teachers featured in the pages that follow. Anne Coughlin’s areas of expertise are criminal law and feminist jurisprudence, two seemingly disparate fields. Much of her scholarship has focused on the unintended consequences of feminist reform. John Monahan, widely recognized as the nation’s leading researcher on assessing the risk of violence, is the first non-lawyer psychologist ever to hold a full-time position in an American law school. G. Edward White is a legal historian whose scholarship has integrated constitutional and cultural history, resulting in a new and more sophisticated approach to the writing of constitutional history.

One of the consequences of having a faculty that is consistently ranked among the best in the nation is that we inevitably lose some talented colleagues to other institutions. Trends in legal education indicate that this is an era of “free agency” among law faculty nationwide. Law schools are much more aggressive in pursuing talent at other schools, and faculty are more willing to consider their offers. Virginia has not escaped this trend, and several exceedingly talented faculty members have departed in recent years. While we are saddened by these losses, we appreciate the many contributions of these colleagues and still consider them part of our extended academic community.

Meanwhile, we have welcomed a number of wonderful new scholars to the faculty. These additions include talented young teachers, such as Kim Forde-Mazrui, Kevin
Kordana, Daryl Levinson, James Ryan, Elizabeth Magill, Caleb Nelson, Jennifer Mnookin, Clarisa Long, and Chris Sanchirico, and nationally celebrated teachers and scholars, such as John Setear, Barry Cushman, and Vincent Blasi, whom we have been able to attract from other schools. Additionally, we have hired one senior and distinguished non-academic, Jonathan Cannon, formerly general counsel of the Environmental Protection Agency.

As we approach the new millennium, we remain committed to developing and nurturing a faculty that is exceptionally strong both individually and institutionally. The 65 members of the faculty who teach, research, and write at the University of Virginia School of Law represent diverse interests, perspectives, and areas of expertise, but are united in their commitment to providing future generations of lawyers a foundation in the law that combines the insights of theory with the hard discipline of experience, and that inspires in them the belief that being a good lawyer makes a difference, that ideas matter, and that great lawyers and great ideas about the law are mutually reinforcing.

Robert E. Scott

Dean
Lewis F. Powell Professor of Law
Arnold H. Leon Professor of Law
Anne M. Coughlin's areas of expertise are criminal law and feminist jurisprudence. At first glance, they seem an odd combination. Criminal law is a field dominated by men. Substantive criminal law punishes and deters wrongdoing committed overwhelmingly by men against men, and criminal procedure regulates traditionally male police officers as they try to identify and capture male offenders. Feminist jurisprudence, by contrast, is dominated by women. Feminist academics seek to expose the cultural mechanisms that have subordinated women's experiences, interests, and perspectives to those of men. Perhaps since so few criminals are female, feminist legal scholars have tended to confine their attention to a few cor-
Coughlin noticed, however, that the common law dropped this grudging approach to the defense of duress when it came to married women. If a wife committed a crime in the presence of her husband, the law presumed that he had coerced her misbehavior and attributed her crime to him. According to the judges who created this doctrine, women did not possess the same capacity for responsible conduct as men and it was therefore sensible to presume that a wife's conduct was controlled by her husband. Indeed, the judges not only thought it likely that a wife would submit to her husband's direction but even believed that she should do so. Since the wife was not a full-fledged moral agent, she should be encouraged to rely on the judgment of a man who had the ability to choose good over evil and who thus could be punished for making the wrong choice.

Of course, by the early 1990s, when Coughlin first encountered the doctrine of marital coercion, the law had changed. The idea that a woman was not criminally responsible for acts committed in her husband's presence was dismissed as a quaint relic from a Victorian past. Yet Coughlin also noticed the widespread support for a new excuse from criminal liability, an excuse that in practice applied only to women. The so-called “battered woman syndrome” was increasingly invoked to avoid criminal punishment for women who killed their abusive male partners. At a time when most feminists applauded this development, Coughlin saw there a disquieting remnant of the misogynist assumption that women lack the capacity for responsible self-governance. Everyone agrees that the responsible course of action would be to leave the abusive male long before resorting to homicide, but the battered woman syndrome posits that women are too dysfunctional to perceive or pursue that responsible option. In Coughlin's view, by suggesting that women suffer from psychological deficits that render them incapable of resisting pressures exerted by men, the battered woman syndrome defense explicitly locates women's subjugation, not within legal or cultural convention, but within women themselves. On that assumption, Coughlin reasoned, women would continue to be vul-
nerable to forms of state intervention and supervision from which autonomous and responsible men would be immune.

Coughlin developed these ideas in “Excusing Women,” 82 California Law Review 1 (1994). The article is groundbreaking and controversial but finely nuanced. Coughlin argued against special excuses that privilege masculine over feminine traits even as they extend protection to women. At the same time, she called for taking the sympathetic intuitions that support the battered woman syndrome defense into account in a revised theory of criminal responsibility, one that can accommodate women’s experience of domestic violence without judging them to be deviant and inferior, indeed, creatures more like animals than men.

Coughlin’s interest in the premises of crime definitions and excuse defenses also inspired “Sex and Guilt,” 84 Virginia Law Review 1 (1998), an article advancing a novel theory about the origins and functions of contemporary rape doctrine. The beginnings of this paper were serendipitous. Coughlin, who had just come to Virginia from Vanderbilt, was working on a criminal law casebook with colleagues Richard Bonnie, John Jeffries, and Peter Low. Since she had particular responsibility for the chapter on sexual assault, Coughlin thought it might be sensible to write an article on that subject as well, but she found that the literature on rape was voluminous and that the law of rape had already been ably and exhaustively criticized by feminists. Then a bungled LEXIS search (designed to uncover judicial rhetoric about the force element of rape) produced decisions by military courts in which soldiers were punished, to this day, for adultery. At first, the adultery cases seemed a distraction, just another reminder of outdated attitudes toward sexuality that civilian culture rejected long ago. But as Coughlin reflected, the adultery cases became deeply informative. To Coughlin, they suggested that rape doctrine can be properly understood only if it is repositioned as part of a legal system that punished not only forcible but also consensual nonmarital sex. Once we recall that rape law was inherited from a culture that also punished adultery and fornication, Coughlin concluded, traditional rape doctrine looks less like criteria for defining the man’s crime than like the elements of the woman’s excuse for engaging in nonmarital sex.

Keep in mind the standard feminist criticism of rape law. Traditional rape law required a woman to offer physical resistance to the man’s sexual advances; verbal resistance did not count. As feminist critics rightly insisted, this definition allowed men to annul women’s exercise of sexual autonomy by disregarding the answer “no.” Critics also condemned the traditional definition of force, which required proof that the man used or threatened serious physical violence and discounted other pressures, such as threats of economic or reputational injury. As critics noted, the law punishes those who use such threats to take money. Why should it refuse to punish men who use them to take sex? In a sense, critics saw rape as analogous to robbery and charged that the law’s refusal to treat the two the same reflected the lawmakers’ complicity in male domination of female sexuality.

In “Sex and Guilt,” Coughlin noted that although the foregoing critique may reflect contemporary assumptions, it ignores the moral and legal premises of the culture from which the rape prohibition emerged and therefore fails to account for the precise ways in which sexism shaped rape law. Coughlin invited readers to suspend their contemporary
understanding of consensual intercourse as lawful activity and to try to recapture the mind-set underlying laws against fornication and adultery. The question Coughlin asked was how the criminalization of consensual nonmarital sex influenced the law of rape.

Coughlin addressed this question by taking up the perspective of a judge committed to the criminalization of nonmarital intercourse. For such a judge, the task presented by a case of nonmarital intercourse was not to determine whether the incident was rape, for which the man alone would be punished, or ordinary intercourse, for which no one would be punished. Rather, the task was to decide whether the encounter was rape, for which the man was solely to blame, or fornication or adultery, for which both the man and the woman shared criminal responsibility. For such a judge, the woman who made a rape complaint was not in the same position as the person who reported a robbery, because giving away sex, unlike money, was itself a crime. From this perspective, the rape complainant seemed more like someone who implicated herself in the commission of a crime in charging another perpetrator.

From this perspective, the law of rape resolves itself with startling clarity. The traditional elements of rape law mimic the arguments we would expect a woman to make if she were defending herself against an accusation of fornication or adultery. Consider the duress defense. When we compare the defense of duress to the crime of rape, the connection between the woman's excuse and the man's crime is irresistible. The elements of the duress excuse are indistinguishable from the force and physical resistance elements of rape. Just as the duress defense requires threat of death or serious injury, the rape complainant was required to show that she had been subject to threats of exactly that sort. Likewise, physical resistance is a standard element of duress. Certainly, the malefactor who pleads duress will not be excused merely because she did not want to commit the crime or even that she manifested her reluctance by saying "no" to her criminal partner. Rather, courts tend to find the duress excuse credible only where the accused actively resisted the coercer and had no available strategies to avert the crime.

For Coughlin, this new way of looking at the traditional law of rape is not just an exercise in legal archaeology. She believes that it has the potential to support a thorough reform of rape doctrine. As a society, we now seem agreed that adultery and fornication should no longer be crimes. If that is so, there is no reason to continue a law of rape that requires women to prove that they have a valid legal excuse for engaging in consensual sexual activity. Coughlin therefore advocates the reform of rape statutes so that we no longer construe rape complaints as admissions of guilt for which women alone must be exonerated.

Coughlin's other articles include "Of White Slaves and Domestic Hostages," 1 Buffalo Criminal Law Review 109 (1997), and "Regulating the Self: Autobiographical Performances in Outsider Scholarship," 81 Virginia Law Review 1229 (1995). Both articles engage the attention of criminal law and feminist scholars. Her research agenda includes a work-in-progress on interrogation techniques in rape cases and another major project on the feminist movement to regulate pornography. In all these projects, Coughlin brings to bear the unique insights and perspectives of someone who is simultaneously committed to the unlikely fields of criminal law and feminist jurisprudence. The intersection of those interests is the foundation of her scholarly career and the direction of her future.
Bringing Cutting-Edge Developments in Criminal Law to the Classroom

It might have been serendipity. It might have been evidence of the way the tenure clock focuses the mind. Probably both luck and stress had a hand in it, but Anne Coughlin is sure that something special about her first year at the University of Virginia School of Law also made an important contribution to her favorite scholarly work to date, "Sex and Guilt," 84 Virginia Law Review 1 (1998) (excerpted here at page 11). Coughlin came to the Law School in the fall of 1995 as a visiting associate professor of law, and, during that year, she found the right mixture of people and professional values—a supportive administration, productive and energetic colleagues, and talented and receptive students—in which to flourish as a scholar and teacher.

Coughlin's visit to Virginia originated with Peter Low, John Jeffries, and Richard Bonnie, co-authors of a casebook in criminal law. In 1994, Jeffries contacted Coughlin and invited her to co-author a revised edition. "John had read my article in which I evaluate the battered woman syndrome defense ("Excusing Women," 82 California Law Review 1 (1994))," Coughlin recalled,
“and he phoned to ask me if I would write a new chapter on rape and revise the existing materials on justification and excuse defenses. When I agreed to join the casebook, John suggested that it would be helpful for me to visit at the Law School so that we could collaborate closely during the revision process.” As it turns out, Coughlin’s co-authors did not intend for feminist ideas to be limited to isolated passages on sexual assault and domestic violence. After arriving in Virginia, Coughlin learned that they wanted her to be what Jeffries called a “minister without a portfolio,” one who would review the entire book with an eye toward updating its traditional readings with fresh, critical perspectives. “At first, I thought the assignment was pretty intimidating,” Coughlin admitted, “and things got even scarier when my co-authors told me that they wanted the new rape chapter to be the first chapter in the book. I had never written even a footnote for a casebook before, so I just gulped and, then, somehow persuaded them that the sexual assault materials should come later, at a point after the students had a foundation in general criminal liability principles. I remember thinking, wow, these guys must be serious, they want to turn the book upside down.”

During her first semester at the Law School, Coughlin and her criminal law colleagues used a draft of the revised casebook in their courses. Coughlin found the experience very rewarding. “Of course, I have always known that our students are our colleagues in the sense that they will be members of our profession in three short years,” Coughlin said. “But, during my first year at Virginia, I saw how important the classroom experience can be in terms of developing and shaping our research agendas. The students appreciated our efforts to revise the casebook, to incorporate cutting-edge developments and critical perspectives, while still giving them a solid background in the traditional doctrine. I was working on the casebook chapter on rape and writing an article on rape, and, at the same time, I had the opportunity to get my students’ input on everything from specific course coverage to pedagogical strategies to feminist efforts to reform rape statutes.”

Just as Coughlin’s scholarship has flourished at the Law School, so has her teaching. During her year as a visitor, she won the Student Bar Association First-Year Council Teaching Award. “That award always will be most special to me,” Coughlin said. “With the award, the members of the class of 1998 were sending me a signal, they were telling me that they were rooting for me, that they wanted me to stay here permanently. At least that was my impression on the day I received the award, and students from that class later said to me, ‘We gave you that award so that you and the administration would know that we were adopting you.’” The Law School did adopt Coughlin. In the fall of 1996, she became a permanent member of the faculty, and, in 1997, she was named Class of 1941 Research Professor of Law. Since then, Coughlin has received more teaching accolades. In 1999, one of the classes she teaches, Criminal Investigation, was voted the most popular class in the Law School. In the spring of 1999, she won the prestigious All-University Teaching Award. The recommendations supporting Coughlin’s nomination were filled with praise for her teaching and her commitment to the students. As one student commented, “The Professor is brilliant, has great command of the subject and takes you on an intellectual ride that is incredible.” Steve Nickelsburg (Class of 1998, now clerking for Justice Anthony M. Kennedy) had this to say: “First-year law students spend much of their time drowning in information, wondering how any of it fits together. Breakthroughs come as an incredible relief. I had one of my first ‘Aha!’ moments in Professor Coughlin’s class, as she analyzed a judge’s written opinion by comparing it to three or four that we had studied in prior weeks. ‘So this is how you do it,’ I realized, and approached her class and my other first-year classes with newfound confidence.”
Sex and Guilt

by Anne M. Coughlin

The contemporary critique of the law of rape proceeds from the theoretical premise that the prohibition against rape exists to protect female sexual autonomy. This assertion about the proper purpose of rape law serves different strategies for different authors, depending on their political inclinations. From the perspective of liberal philosophy, the claim represents the primary normative judgment that lawmakers should employ when articulating a formal definition of rape and when applying that definition to particular circumstances. After scrutinizing rape doctrine in the light of late-twentieth-century liberal sexual mores, some authors have noticed that elements of the offense promote the sexual agency of men at the expense of that of women. Therefore, these commentators have suggested revising rape law in ways calculated to secure for women the authority to make sexual choices on an equal basis with men...
he critics' assertion that rape law is designed to protect female sexual autonomy carries with it a cluster of related assumptions about gender, heterosexuality, and the legal regulation of heterosexual intercourse. Speaking generally, the critics treat heterosexuality as a social sphere within which men and women should be free to pursue a range of erotic options. Although their conceptions of the state's role in securing sexual freedom differ in some crucial respects, the critics stipulate that, at a minimum, sexual freedom requires that people should be entitled to expect that the law will protect them from sexual contacts that they subjectively do not want and affirmatively reject or that they accept under conditions that would invalidate the exchange of other kinds of goods. The commentators imply that men enjoy sexual autonomy and that, at least when they are pursuing sexual connections with women, biological and cultural conditions coincide to support their autonomy and, indeed, their domination of female sexuality. . . . Women, on the other hand, possess physical and social traits that complement those of men – for example, where men are strong and assertive, women are weak and acquiescent – so they are ill-equipped to repel on their own the sexual depredations that men are disposed to undertake. Hence, in order to effectuate its goal of equal sexual autonomy, rape law intervenes in heterosexual relations to correct the existing imbalance in sexual power: By punishing rape, the law seeks to constrain the exercise of male sexual autonomy to the extent necessary to secure the sexual autonomy of women.

Viewed from this perspective, rape law in practice is thoroughly misogynistic. As the critics remark, the courts have interpreted the offense so narrowly that it prohibits only the most egregious violations of female sexual agency. By limiting rape to intercourse procured by physical violence, the courts tacitly validate many other coercive practices that would be criminal if, for example, men were trying to obtain money, rather than sex, from unwilling women. Worse still, the courts often represent such women as if they subjectively desired the sexual connection. The courts have achieved this inversion of female desire by holding that a
rape occurs only when the woman physically resists the man's violent sexual advances. Rape law thus instructs men that they are free to ignore a woman's verbal protests and even to construe such protests as expressing her agreement to participate. Through these and other distortions of women's experiences and perspectives, the law of rape promotes, rather than restricts, male control of female sexual expression.

By now, this account of rape law is a familiar one, and, if frequency of repetition is any indication, many members of the legal academy find it to be compelling. In this article, I will offer an alternative account of rape doctrine that the legal literature has not explored. . . . My account endeavors to be sensitive to the historical specificity of rape by examining some of the different ways of thinking about heterosexuality that may have shaped the prohibition, conditioned the experiences of rapists and their accusers, and influenced the community's response to rape allegations, in long (as well as recently) forgotten cases.

In particular, I argue that we cannot understand rape law unless we study the doctrine, not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside. When we recall that the contemporary definition of rape emerged from a system that outlawed these forms of consensual heterosexual intercourse, it seems clear that the official purposes of rape law . . . did not include the protection of sexual autonomy. Contrary to the assumptions of the modern rape critique, influential institutions within that former system decreed that sexuality was a force so dangerous that it could not safely be left to self-regulation, but rather should be closely confined, by law, within marital relationships. Far from being positively valued and protected, therefore, the exercise of sexual autonomy was something to be discouraged, even criminalized. Since legal institutions were assigned the task of enforcing both the rape laws and the fornication and adultery laws, it would not be surprising to discover that appellate judges and, presumably, other law enforcement officials found ways to enlist rape doctrine to detect and discipline sexual transgressions by women, as well as by men.

Therefore, I propose that we examine rape law by suspending our understanding that heterosexual intercourse ordinarily is lawful activity and by attempting instead to recapture the ways of thinking about heterosexuality underlying the fornication and adultery laws. In other words, what I suggest is an investigation of rape doctrine that proceeds from the premise that nonmarital heterosexual intercourse is—and should be—criminal misconduct for both women and men. When we consider the regulatory framework from which rape law emerged, this reversal of value is sensible, indeed, necessary, though it may seem absurd at first glance, especially to liberal readers. We inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside marriage—fornication and adultery—in which the man and the woman were accomplices. The existence of this prohibition on consensual nonmarital sex has a number of important implications. . . .

The . . . implications . . . to which the article is devoted . . . concern[] the influence that we would expect the fornication and adultery prohibitions to exert on the development of the substantive definition of rape. How would judges who believed that consensual nonmarital intercourse
We inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside marriage — fornication and adultery — in which the man and the woman were accomplices.

Was a crime define rape? This article will develop a contentious point: By unearthing our ancestors’ belief that all nonmarital intercourse should be criminalized, we may begin to appreciate, even as we reject, the courts’ inclination to approach rape complaints with deep suspicion. Since, under our ancestors’ system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime. A court would be receptive to such plea only if the woman could establish that, although she had participated in a sexual transgression, she had done so under circumstances that afforded her a defense to criminal liability. Significantly, careful examination of rape doctrine suggests that the elements of the rape offense (almost) are a mirror image of the defenses we would expect from women accused of fornication or adultery. Such traditional defensive strategies would include the claim that the woman had committed no actus reus, that she lacked the mens rea for fornication or adultery, or that she had submitted to the intercourse under duress. For example, just as courts allowed perpetrators of nonsexual crimes to interpose a duress defense, so we may assume that they would be willing to excuse those women suspected of fornication or adultery who could prove that their accomplices had forced them to offend under threat of death or grievous bodily harm. According to this account, the features of rape law to which the critics most strenuously object — namely, the peculiar definitions of the nonconsent and force elements of the crime — are better understood as criteria that excuse the woman for committing an illegal sexual infraction, than as ingredients of the man’s offense. Curiously, when we acknowledge, rather than ignore or minimize, the longstanding and explicit connection our culture has made between sexual intercourse and criminal guilt, we produce a description of rape law that incorporates a justification for thorough doctrinal reform. That is, if we now are prepared to agree that fornication and adultery no longer should be criminalized — whether because these offenses violate contemporary constitutional guarantees or contemporary moral and political judgments — then there appears to be no justification for adhering to a definition of rape that treats the rapist’s victim as a lawbreaker who must plead for an excuse from criminal responsibility.

Publications of Anne M. Coughlin

**BOOKS**


**ARTICLES**


Today John Monahan is recognized, even in the Supreme Court of the United States, as the nation’s “leading thinker” on assessing risk of violence. *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983). Two decades ago, when Monahan joined the Virginia Law School faculty, his appointment looked like more of a gamble. Although he had already established himself as a cutting-edge empirical researcher on issues of mental health law and the prediction of violence, Monahan had no legal training and no experience teaching law. His appointment as the first non-lawyer psychologist ever to hold a full-time position in an American law school required a leap of faith on both sides. In retrospect, the decision seems to have been inspired by luck or genius, for Monahan has not only flourished in the new environment but has become one of the real “stars” of the Virginia faculty.
Upon his arrival at the Law School, Monahan committed himself intellectually, as well as institutionally, to his new environment. He began a long and fruitful partnership with his new colleague, Laurens Walker, a specialist in the art and science of litigation. Monahan and Walker found a number of books suitable for teaching what is called “law and society.” (Under that rubric, social science scholars look at the ways in which social forces act on law and vice versa.) However, all of these books studied law from an “outside” perspective, analyzing law through the prism of behavioral science theory with little or no attention to the role of actors in the legal system. Monahan and Walker thought it would be intellectually more exciting—and practically more relevant to the education of future lawyers—to look at these questions from the “inside” perspective of the legal practitioner. Essentially, they wanted to ask what behavioral science could contribute to lawyers and litigation.

As there were no teaching materials adapted to that ambition, Monahan and Walker co-authored Social Science in Law (1985), a Foundation Press casebook now in its fourth edition. Like the very best of its kind, their casebook outlined an intellectual agenda. First, Social Science in Law explored the use of behavioral science in litigation to establish what they call “social facts.” These are essential factual questions that cannot be answered by reference to a discrete historical incident, questions such as whether consumers are confused between two trademarks or whether a sexually explicit film violates community standards for obscenity. Second, Social Science in Law analyzed the more general role of behavioral science as “social authority” for the appropriate content of the law. In the Monahan and Walker lexicon, “social authority” refers to the use of behavioral science to determine the content of legal doctrine, including such questions as the social consequences of segregation by race or gender. Finally, and most controversially, Monahan and Walker identified a growing use of behavioral science to provide what they called “social frameworks.” These are intellectual constructs used to understand and interpret specific facts by placing them in a broader context. A good example would be the attempt to determine whether a particular woman acted in fear of her life by interpreting her experience in light of general construct of the “battered woman syndrome.”

After completing their casebook, Monahan and Walker set out to explore its insights. They did so in an influential series of law review articles on how courts should use behavioral science research. First came “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law,” published in 134 University of Pennsylvania Law Review 477 (1986). That article outlined procedures to screen out poor studies and make exemplary research more apparent. When these procedures are followed, they argued, “fewer judicial opinions will rely upon social science material, but the material that is used will be of much higher quality.” Monahan and Walker followed this article with “Social Frameworks: A New Use of Social Science in Law,” 73 Virginia Law Review 559 (1987); “Social Facts: Scientific Methodology as Legal Precedent,” 76 California Law Review 877 (1988); and “Empirical Questions Without Empirical Answers,” 1991 Wisconsin Law Review 569. Although their collaboration was aimed chiefly at lawyers, Monahan and Walker also made their insights accessible to non-lawyers by contemporaneous publication of “Social Science in Law: A

More recently, Monahan and Walker have turned to the use of behavioral science procedures in mass tort litigation. Thousands—perhaps hundreds of thousands—of persons may claim to have been injured by exposure to such elements as asbestos or tobacco smoke. Determining liability and damages for such harms on a case-by-case basis is notoriously difficult and ruinously expensive. In “Sampling Damages,” 83 Iowa Law Review 545 (1998), and “Sampling Liability,” 85 Virginia Law Review 329 (1999), Monahan and Walker showed that behavior science sampling techniques similar to those routinely used in trademark or obscenity cases can be adapted to allow liability and damages to be determined accurately and efficiently, even in the largest mass tort cases.

This extraordinarily productive collaboration with Larry Walker did not mark the full extent of Monahan’s scholarly activities. In 1987, a call from Dean Richard Merrill rekindled Monahan’s earlier interest in mental health law and the prediction of violence. Merrill had a contact in the John D. and Catherine T. MacArthur Foundation, which was interested in funding a world-class program of empirical research in mental health law. A year of planning led to a successful proposal for the creation of the MacArthur Research Network on Mental Health and the Law, a program that Monahan has headed since its inception. The goal of the Network is to build the conceptual and empirical foundation for the nation’s next generation of mental health law. An article discussing the MacArthur Research Network in greater detail follows on page 20.

Monahan’s efforts to forge links between law and behavioral science have been widely acknowledged. In 1990, he received the American Psychological Association’s Distinguished Contribution to Research in Public Policy Award “for both fundamental and uniquely innovative research that has addressed key theoretical and policy ques-

itions in the psychology of law.” In 1996, he won the Isaac Ray Award of the American Psychiatric Association “for outstanding contributions to forensic psychiatry and psychiatric aspects of jurisprudence.” In 1997, he received an honorary doctorate in law from the City University of New York “in recognition of invaluable contributions to our understanding of violent behavior.” He has also been a John Simon Guggenheim Fellow, a Fellow at the Harvard and Stanford Law Schools and at the Center for Advanced Study in the Behavioral Sciences, and a Visiting Fellow of All Souls College, Oxford.

As the “leading thinker” on mental health and the prediction of violence, Monahan is often asked to serve as a consultant or expert witness in important cases, but scholarship remains his first love. He has published 13 books and more than 150 book chapters and articles. “I love everything about research,” he says, “having the original idea, planning out the study, conducting it, analyzing the results, writing it up. It’s still a thrill to find out something about law that no one knew before. I hope that thrill never ends.”
The MacArthur Network: Building an Empirical Foundation for the Next Generation of Mental Health Laws

Although it is a relatively new field, mental health law has undergone major changes in the past few decades, including landmark judicial decisions, dramatic legislative initiatives, and the publication of professional standards in both criminal and civil law. All of these developments have been predicated on plausible but untested assumptions about people with mental disorder, the service delivery system, and the law—and about how these elements affect one another.

In an effort to build an empirical foundation for the next generation of mental health laws—laws that would assure the rights and the safety of indi-
In recent years, society has come to realize that mental disorder does not necessarily lead to incompetence. Even when it does, the ability to make some decisions regarding one’s own treatment under civil law, or in the criminal process, may remain intact.

...
Research conducted over the past 25 years indicates that the validity of clinical risk assessments of violence is, at best, only modestly better than chance.

ly 1,000 people hospitalized for mental disorder. The patients were assessed in the hospital on over 100 factors theorized, but never demonstrated, to indicate risk of violence, and then the patients and their family members were interviewed about violence during the year after the patients’ discharge into the community. Police and hospital records were also gathered. The results of this landmark research, to be published early in 2000, indicate that it is indeed possible to specify the violence risk of the great majority of patients.

Finally, the Network squarely confronted one of the flashpoint issues in mental health law: coercing a person’s admission to a mental hospital. Debate about involuntary commitment contrasts a prospective patient’s legal rights to decision making autonomy with government’s position that impaired decision making does not warrant legal protection, especially when the decisions made might endanger the patient or others. In a series of studies, Network researchers found that a patient’s experience of being coerced bore only a loose relationship with his or her legal status. Many legally “involuntary” patients said they actually wanted to be in the hospital, and many legally “voluntary” patients experienced a great deal of coercion—albeit from their family and friends rather than from a judge. Further, a patient’s experience of coercion depended strongly on what the Network termed procedural justice, that is, on whether the patient had been given a chance to tell his or her “story” and had been treated with dignity and respect in the hospital and in court. Dozens of research projects throughout the world are now underway using the instruments to measure coercion that the Network developed.

The Research Network is now completing its final phase. Research on competence and on coercion was completed in 1999. The studies of violence risk are now being finalized. Five books and over 50 publications in behavioral science and legal journals have already appeared. The studies have provided new tools and criteria for assessing competence and risk of violence, and have broadened the understanding of the appropriate role of coercion in mental health services.

As for John Monahan, “The MacArthur project has been the most intellectually exciting thing I’ve ever done. To be able to do exactly the kind of research you think needs to be done . . . this was a once-in-a-lifetime opportunity.” Empirical research is not the kind of scholarship that law professors typically do. “Only in an intellectual environment as diverse and supportive as the Law School’s could a project like this have flourished,” Monahan added.

The Causes of Violence

by John Monahan

WHAT I CANNOT DO—what no one can honestly do—is offer a neat, simple story that explains why there is so much violent crime in America. Only people on the extremes of the political spectrum have that luxury and that conceit. The root cause of violence, says the right, is bad genes or bad morals. Not so, says the left; the root cause of violent crime is bad housing, bad schools, or dead-end jobs.

I am here to tell you that while doing something about the causes of violence surely requires a political ideology, the only way we have a prayer of finding out what those causes are in the first place is if we check our ideologies at the door and try to keep our minds open as wide, and for as long, as we can bear it . . . .
If research on violence were like stock on Wall Street, then where I would put my money right now is on psychology. By this I most emphatically do not mean mental disorder. The best epidemiological evidence indicates that major mental disorder accounts for at most three percent of the violence in American society. What I mean instead are the developmental processes that we all go through, most of us more or less successfully but some of us with great difficulty. I mean particularly the family—the filter through which most of the sociological factors, such as a parent’s being unemployed, and many of the biological factors, like poor nutrition, seem to have their effect on a child growing up . . . .

What do we know about families and children and violence?

• We know that while many aggressive children go on to be law-abiding adults, aggression at age eight significantly predicts violent convictions well into the 30s in every culture in which it has been studied.

• We know that while most children who have been physically abused by their parents go on to be perfectly normal adults, physical abuse doubles the risk that a boy will have convictions for violent crime as an adult.

• We know that failure of a child in school is one of the most enduring correlates of later violence. Four out of five violent offenders in prison never finished high school.

• We know that stability matters; the more changes of placement a foster child experiences while he or she is growing up, the more likely he or she will later be arrested for a violent crime.

• We know that a lack of parental supervision has been consistently related to delinquency, including violent delinquency. One study, for example, found that ten percent of non-delinquents were poorly supervised by their parents, one-third of one- and two-time delinquents were poorly supervised, and more than three-quarters of repeat offenders were poorly supervised. Another study found that for children growing up in very disadvantaged and violent neighborhoods, who look like they have everything going against them, the one factor that seems to protect against the child growing up to be violent is having a parent—overwhelmingly, a mother—who supervises her child very strictly and who nips misbehavior in the bud rather than waiting for the principal to call or the police officer to knock on the door.

• Finally, we know much about the relationship between illegal drugs and violence. But it is important to remember that the connection between one legal drug—alcohol—and violence is beyond dispute. About one-third of all violent offenders are alcoholic, and the earlier an adolescent starts to drink, the more likely he or she will be violent as an adult . . . .

None of this in any way negates the influence of social conditions in giving rise to violence. Poor people without adequate child care, for example, may have a much more difficult time monitoring their children’s behavior than affluent people with live-in help. Nor do they necessarily negate the possible influence of biological factors. Nutrition, to give another example, is something that parents literally put on the table for the child to eat. But it is through the family that these things have their effects and through the family that those effects might best be redirected.

We know some important things about violence. But we do not know nearly enough about how to prevent violence in the first place or how to stop it from happening once it begins. How can we learn more? . . .

We can learn more if we make a long-term national investment in research and development for a safer America. It takes resources to isolate the biological, sociological, and psychological factors that are associated with violence, to untangle the ball of wax we find them in, and to determine which are the causes of violence and which are its effects . . . . We need to put at the top of this research agenda a program of rigorously evaluated interventions to reduce violence. We will know that we have finally understood the causes of violence when we can take a group of children at high risk of becoming violent and ethically offer them opportunities and services to defy our predictions.

Publications of John T. Monahan

**BOOKS**

*Research in Community and Mental Health: Coercion in Mental Health Services* (JAI Press, 1999) (with J. Morisseyy).


*Children, Mental Health, and the Law* (Sage, 1984) (with others).


*Who is the Client? The Ethics of Psychological Intervention in the Criminal Justice System* (American Psychological Association, 1980).

*Prevention in Mental Health: Research, Policy and Practice* (Sage Publications, 1980) (with others).


**CHAPTERS IN BOOKS**


ARTICLES


*Wis. L. Rev.* 569 (with Laurens Walker).

"Judicial Use of Social Science Research," 15 *L. & Hum. 

"Violence in the Workplace," 32 *J. Occupational Med.* 1021 

"Social Facts: Scientific Methodology as Legal Precedent," 

"Social Science Research in Law: A New Paradigm," 43 

"Social Frameworks: A New Use of Social Science in Law," 


"Social Authority: Obtaining, Evaluating, and Establishing 
Laurens Walker).

"The Impact of State Mental Hospital 
Deinstitutionalization on United States Prison Populations, 
others).


"Psychiatric Evaluations of Police Referrals in a General 
Hospital Emergency Room," 8 *Int’l J. L. & Psychiatry* 39 
(1985) (with others).

"Vitek and Beyond: The Empirical Context of Prison to 
Hospital Transfers," 45 *L. & Contemp. Probs.* 125 (1983) 
(with others).

"The Case for Prediction in the Modified Desert Model of 


"Mentally Disordered Offenders: A National Survey of 
others).

"The Stone-Roth Model of Civil Commitment and the 

"Psychological and Psychiatric Aspects of Determinate 

"Trial by Data: Psychological Research as Legal Evidence,” 

"A Definite Maybe: Proof and Probability in Civil 
Wexler).

"Empirical Analyses of Civil Commitment: Critique and 

"John Stuart Mill on the Liberty of the Mentally Ill,” 132 

"Controlling ‘Dangerous’ People,” 423 *Annals Am. Acad. 

719 (1973) .
Championing the Rebirth of Constitutional History

"I believe that career choices are often fortuitous, especially if one has a number of interests and is resisting growing up," said Ted White. "I qualified on both counts." After graduating from Amherst in 1963, White entered a doctoral program in American studies at Yale, more or less because it seemed the thing to do. At the time, higher education was booming, many of his classmates were headed to graduate school, and he had enjoyed American studies in college. White soon found, however, that the Ph.D. program was not nearly as much fun. "I had to act like a professional headed for a career in liberal arts teaching, and that meant dressing up for class, not leaving athletic equipment lying about, and trying to pay attention as one's colleagues talked shop with their professors," he said.

Nevertheless, at graduate school White discovered that he liked academic research and writing. While many of his peers hated the exercise of writing a dissertation, White flourished in the task, and
did it so successfully that he could easily have found a place at a good school as an assistant professor of American studies or history. That he did not do so reflected his distaste for the hierarchal structure of graduate school, where students had to cultivate professors because professors got students jobs. White found himself uneasy about the prospect of joining a departmental faculty to perpetuate the hierarchal practices that he so disliked. Only 25 years old, he was reluctant to commit his future to an environment that he did not find completely comfortable.

White’s election to study law instead resulted in part from a chance encounter with a store that refused to take back goods he had found to be defective. White’s pleas were met by a clerk mindlessly repeating, “That’s our policy, sir.” “It occurred to me that my law school friends were developing weapons against such treatment,” White said, “I talked to one of them and repeated the arguments I had made to the clerk. My friend suggested that I was discovering the difference between legal and bureaucratic reasoning.” When White told his dissertation adviser that he was thinking of going to law school, the professor, who might properly have felt let down, instead encouraged him to do so. “It occurred to me later,” says White, “that he might not have wanted to be too closely associated with my entry into the history profession, but at the time his response clinched my decision.” In the fall of 1967, White matriculated at the Harvard Law School.

For the new first-year student, Harvard Law School proved to be a large, alienating environment. White, recently married, was a trained scholar determined to develop a professional identity. Most of his classmates lived in dorms and seemed “hysterical or not yet out of college.” Moreover, graduate school learning techniques and habits did not work well in law. “If I did not understand a legal issue in class,” White recalls, “I would go to the library and look up articles on the subject, trying to find an authoritative guide to that particular field of knowledge,” more or less as a graduate student would seek an obscure monograph or unpublished dissertation to nail down an unfamiliar point. Instead, White found elaborate arguments demonstrating the complexities of legal issues rather than providing settled answers. As White recalls, “These contributions just confused me. I never thought of seeking guidance or clarification from my professors, as they seemed unapproachable.”

In White’s second year, the experience improved. Yale University Press published his dissertation as a book,1 and some faculty took note. They invited him to join an informal legal history group newly created in an effort to foster a community of future legal historians. By his third year, White had decided to become a law professor specializing in American legal and constitutional history. The problem was that legal history, as then practiced, focused on the relation of private law to economic development. White wanted to write about public law and cultural development. He wanted to fuse legal analysis with American studies in an interdisciplinary approach to the history of law and ideas. At the time, no one was much interested in that kind of project, and White found the job market unresponsive. He spent a year as scholar in residence at the American Bar Foundation, and thereafter was hired as a law clerk by former Chief Justice Earl Warren.

During his year at the Supreme Court, White published “The Rise and Fall of Justice Holmes,” 39 University of Chicago Law Review 51 (1971). This article surveyed the changing historical images of Justice Holmes in American culture, thereby replicating for a major legal figure an approach that had already been used, for example, in a landmark study of Thomas Jefferson by Virginia's own Merrill Peterson.2 The success of this article convinced White that he could apply the interpretive techniques of intellectual and cultural history to the thought of certain legal figures—including influential judges and commentators—without unduly distorting or simplifying their contributions to the law. This terrain was then largely unexplored. With few exceptions, intellectual and cultural historians found legal materials intimidating, and legal historians focused chiefly on the evolution of doctrine rather than the history of ideas.

White joined the Virginia Law School faculty in 1972, immediately after clerking for Warren. He quickly launched

---


two intellectual campaigns. First, he set out to "historicize" twentieth-century jurisprudence, which had lost energy through constant reworking of such philosophical puzzles as the nature of law or the relation of law to morality, by thinking about successive American jurisprudential movements ("formalism," "sociological jurisprudence," "realism," "process theory," etc.) as episodes in intellectual and cultural history. This approach produced a series of articles\(^3\) that eventually became *Patterns of American Legal Thought*, published by Bobbs-Merrill in 1978 and winner of the American Bar Association Gavel Award the next year.

Second, White set out to rehabilitate American constitutional history. In the late 1960s, legal history focused on private law and its relation to underlying economic developments. This emphasis implicitly devalued constitutional history as unrigorous and old-fashioned. White thought that one way to reestablish the centrality of constitutional and public law in the field of legal history was to examine the lives of leading judges, with emphasis on the connections between the judge's jurisprudence and the intellectual and cultural setting of his work. This approach produced an ongoing stream of law review articles\(^4\) and an important book, *The American Judicial Tradition*, whose first edition was published by Oxford University Press in 1976. Additionally, White has published two acclaimed full-length judicial biographies, *Earl Warren: A Public Life* (Oxford, 1982) and *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford, 1993). Both books received the American Bar Association's Gavel Award. Additionally, the Holmes biography won the American Historical Association Littleton-Griswold Prize, the Scribes Award, and the Association of American Publishers Award in 1994.

Judicial biography, which enjoyed something of a renaissance in the 1980s and 1990s, was not the only force helping to revive constitutional history. Equally important were two contemporary intellectual movements, coming from opposite ends of the political spectrum but combining to support a revivification of the field.

The first was the use of intellectual history techniques pioneered by Thomas Kuhn and his enthusiasts\(^5\) and by structuralist scholars.\(^6\) These techniques emphasized the extent to which the intellectual contributions of various disciplines rest on shared, largely unexamined, and historically contingent starting premises. By the early 1980s, this approach surfaced in the then-burgeoning critical legal studies movement, as well as in White's *Tort Law in America: An Intellectual History* (Oxford, 1980). The domestication of "boundary theory"—the claim that scholarship ordinarily proceeds within implicit confines of "approved" inquiry and expression—freed the history of ideas from its idealist connotations and appealed to those who approached legal reasoning more skeptically.

An intersecting commitment to constitutional history

---


came from the opposite end of the political spectrum. “New right” scholars and theorists began to look to constitutional history as a source of universal and determinate cultural values. Specifically, they sought to invoke the “original intent of the Framers” as the touchstone of constitutional interpretation. As White noted, “Anyone with historical training would recognize the search for original intent as a complex, perhaps elusive enterprise.” That “original intent” was nevertheless taken as a guide to modern constitutional interpretation reflected a powerful need to restore determinacy and common grounding to constitutional law. Under the onslaught of structuralism, hermeneutics, deconstruction, and critical “unpacking,” constitutional texts seemed on the verge of disappearing as sources of authority. The search for original intent was one way of trying to reestablish the rule of law as a foundational concept in American culture.

The adaptation of the techniques of intellectual history to constitutional law and the renewed interest in original intent combined to energize American constitutional history. The first development gave constitutional historians a battery of techniques to recover the unarticulated starting assumptions of previous generations of judges and commentators. The second development ascribed to the process of recovering those assumptions a contemporary vitality and urgency. In the increasingly fragmented and abstract world of late twentieth-century constitutional jurisprudence, historical studies stood out as grounded, concrete exercises. As such, they engaged the ambition of a growing number of legal scholars.

White was not only an early proponent of the rebirth of constitutional history; he remains one of its most prolific and accomplished practitioners. In 1988, he published volume three of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, entitled The Marshall Court and Cultural Change, 1815-1835 (Macmillan, 1988), an award-winning work on the era of Chief Justice Marshall described in more detail on page 33. Next came Intervention and Detachment: Essays in Legal History and Jurisprudence, published by Oxford University Press in 1994. In this book, White used a series of topics in intellectual and constitutional history to illustrate the complicated relationship of historians and their sources to the current culture in which historians work. Two years later, White applied the techniques of a cultural historian to a sport he loves in Creating the National Pastime: Baseball Transforms Itself, 1903 - 1953 (Princeton, 1996). The stature of White’s work was recognized by the Association of American Law Schools with its Triennial Order of the Coif Award for distinguished legal scholarship in 1996, with his Holmes Devise History of the Marshall Court and his biography of Justice Holmes being singled out.

White’s latest book, entitled The Constitution and the New Deal: A Reassessment (Harvard, forthcoming 2000), demonstrates that contemporary understanding of the development of constitutional law in this century is “New Deal-centered.” By that phrase, White signals his belief that we have created an account of constitutional history in the twentieth century implicitly designed to legitimate the New Deal. In doing so, the conventional account of constitutional history has reinforced the dominant trends in American government from the 1940s through the 1970s, including a vastly expanded domestic governmental apparatus, a relatively limited role for the Supreme Court as a constitutional overseer of economic regulation, and a conception of judges as political actors whose countermajoritarian role in a democratic society is taken to create the central “difficulty” of contemporary American constitutional jurisprudence. White argues that the durability of this “New Deal-centered” narrative of early twentieth-century history reflects a tacit assumption that the world that gave birth to the New Deal is still largely intact at the close of the century. In addition to revising a number of historical stereotypes embedded in the conventional account of twentieth-century constitutional history, White questions the suitability of the New Deal as a model of governance in the century to come.

Ted White may be right in thinking that career choices are often fortuitous, but White’s own choices have been either extraordinarily far-sighted or outlandishly lucky. The marriage of cultural history and constitutional law has proved to be one of the most fruitful intellectual unions of the past three decades. In the 1970s, White positioned himself at the forefront of a scholarly movement that steadily grew in strength and influence. Today, White remains at the forefront, a scholar of amazing energy, broad reach, and a distinctive intellectual style, and the senior and most prominent of a new generation of constitutional historians.
G. Edward White's *The Marshall Court and Cultural Change, 1815-35* (Macmillan Publishing Co., 1988) is by any standard a triumphant achievement. It has been dubbed a "landmark in legal and constitutional history"\(^1\) and praised as a "brilliant interpretation of John Marshall, and of the Court over which he presided, masterfully\(^1\)

---

White's book was an unexpectedly successful product of what has aptly been called "one of the oddest, if not indeed most bizarre, projects in the history of the American Academy."³

When Justice Holmes died at the age of 93 on March 6, 1935, he left to the United States an unrestricted bequest of $263,000, a sum equivalent to more than $3 million in current dollars. Many years later, Justice Felix Frankfurter discovered the money, sitting idle in a U.S. Treasury account that did not even pay interest. Frankfurter conceived the idea of using Holmes's bequest to fund an authoritative history of the Supreme Court. Congress agreed and in 1955 created the Oliver Wendell Holmes Devise History, to be supervised by a Permanent Committee chaired ex officio by the Librarian of Congress. Paul Freund, professor of constitutional law at Harvard, became the series' general editor.

Frankfurter, Freund, and a small group of Harvard-based legal scholars made the initial selection of authors. Neither Frankfurter nor Freund were trained historians, but they were history buffs and of course well connected at elite law schools. They recruited former Frankfurter clerk Phil Neal of Chicago to write a volume covering the years of Chief Justice Melville Fuller (1888-1910). Another former Frankfurter clerk, Alexander Bickel, then an eminent constitutional scholar at Yale, was assigned the Chief Justiceships of Edward White (1910-1921) and William Howard Taft (1921-1930). Freund himself undertook to write a volume on the New Deal era of Chief Justice Charles Evans Hughes (1930-1941). Two (of three) volumes on the all-important Chief Justiceship of John Marshall were assigned to Gerald Gunther, then a professor at Columbia and later at Stanford.

All of these volumes encountered difficulties. In the mid-1970s, Phil Neal's volume was reassigned to Owen Fiss of Yale, who eventually published Triumphant Beginnings of the Modern State, 1888-1910. When Bickel died in 1974, he had not yet completed the first of his two volumes. They were reassigned to Benno C. Schmidt, Jr., of Columbia, who, after an additional seven years, published The Judiciary and Responsible Government, 1910-21 as Bickel's co-author. The second of Bickel's volumes was then given to Robert Cover of Yale, who died before completing the project.

That volume has since been reassigned to Robert Post of Berkeley. Paul Freund never completed anything. At his death in 1992, the Hughes Court volume was reassigned to Richard Friedman of Michigan.

Before Gerald Gunther relinquished authorship of his two volumes on the Marshall Court because of the pressure of other responsibilities, he was able to collect a mass of material and produce lengthy portions of a draft manuscript. When Ted White took over the project from him in 1983, he received Gunther’s research files and his manuscript drafts. Nevertheless, the finished product is uniquely White’s. As White wrote in the preface to his book The Marshall Court and Cultural Change, he profited from Gunther’s research, but added his own and adopted a different interpretive framework. He proceeded from the assumption that the Marshall Court’s decisions during the years 1815-1835 should be presented in an integrated, single-volume history, instead of the two separate volumes that Gunther had conceived. In order to preserve the original numbering, the book is listed as volumes III and IV of the series.

The most remarkable aspect of White’s achievement, however, is signaled by the title, The Marshall Court and Cultural Change. Earlier constitutional histories, especially those in the Oliver Wendell Holmes Devise series, were narrowly focused on the Supreme Court and legal doctrine. Law was presented in isolation from other historical approaches, as a “virtually autonomous” discipline “unrelated to the world outside.” This approach is not only dry and wooden; it also risks pervasive anachronism as the decisions and pronouncements of a vastly different era are interpreted as if they were rendered today. White’s great achievement was “to historicize the Marshall Court, to make us realize the important differences between its assumptions and those of his readers,” and in so doing to remind us “that, in one respect or another, all courts are courts of their time.” In short, White integrated constitutional and cultural history. The result has been termed a “new and vastly more sophisticated approach to the writing of constitutional history than has dominated the field until now.”

In truth, White’s is the first volume to fulfill the promise of the Holmes Devise.

---

4 Konefsky, 160 Virginia Law Quarterly at 162.
5 Levinson, 75 Virginia Law Review at 1432.
6 Konefsky, 160 Virginia Law Quarterly at 167.
7 Powell, 87 Michigan Law Review at 1535.
The Constitution and the New Deal: A Reassessment

by G. Edward White

The general argument of this book is that the conventional account of early twentieth-century American constitutional history is both inaccurate and deeply interesting. Its inaccuracies result from a set of anachronistic readings of the constitutional jurisprudence of the period, which have produced selective and monolithic interpretations of areas of constitutional law in the first three decades of the twentieth century. At one level, this study can be viewed as an effort to recover a more complicated world of early twentieth-century constitutional opinions and commentary than that portrayed in the conventional account.

This work is also an examination of the collective investment generations of commentators have made in the New Deal as a transforma-
tive constitutional event, an investment that can be shown to be connected to the deficiencies in the conventional account. Although, in a broad sense, most commentators who have contributed to the conventional account have seen themselves as "liberals," sympathetic to New Deal policies and hostile to constitutional opposition to those policies, the conventional account, with its interlocking parts, has been more than a particularistic spin on history. It has been a story so widely and broadly accepted as to amount to dogma, and its remarkable durability can be traced to the symbolic role of the New Deal as a formative period in twentieth-century American culture.

In my effort to get beyond the tendencies of the conventional narrative, and to provide a more authentic view of the state of early twentieth-century constitutional jurisprudence, I have attempted to detach myself from the starting premises of scholars who have taken the New Deal's provisional resolutions as universal reconfigurations, and the New Deal as a formative episode in modern governance. I have then attempted to determine what courts and commentators thought should be the governing rules and preferred analytical methods in the principal areas of early twentieth-century constitutional jurisprudence, and why they might have thought in that fashion. I have tried, so far as possible, to reconstruct how they—not subsequent generations—sought to make the Constitution fit with the world they were experiencing.

The result, for me, has been startling. A lost world of constitutional jurisprudence has emerged. The conventional account of early twentieth-century constitutional history has largely misread or lost sight of that world. Recovering that world not only helps complicate the narrative of constitutional change in twentieth-century America, it reveals a time in which the New Deal was far from an inspirational example, and in which none of the familiar characteristics of late twentieth-century constitutional jurisprudence had achieved the status of orthodoxy.

Publications of G. Edward White

BOOKS


Intervention and Detachment: Essays in Legal History and Jurisprudence (Oxford University Press, 1994).


Earl Warren: A Public Life (Oxford University Press, 1982).

Tort Law in America: An Intellectual History (Oxford University Press, 1980).

Patterns of American Legal Thought (Bobbs-Merrill, 1978).

CHAPTERS IN BOOKS


“Samuel Portland Chase and the Judicial Culture of the Supreme Court in the Civil War Era,” in The Supreme Court and the Civil War, ed. Jennifer M. Lowe (Supreme Court Historical Society, 1996).


ARTICLES


ARTICLES (CONTINUED)


"The Supreme Court’s Public and the Public’s Supreme Court," 52 Va. L. Rev. 370 (1976).


The University of Virginia School of Law
Selected Faculty Scholarship

1998

**BOOKS**


———, *Selected Statutes and International Agreements on Unfair Competition, Trademarks, Copyrights and Patents* (Foundation Press, 1998) (with Paul Goldstein and Harvey Perlman).


CHAPTERS IN BOOKS


**ARTICLES AND PAPERS**


John C. Harrison, “Jurisdiction, Congressional Power,


J. Hoult Verkerke, "Legal Regulation of Employment


George K. Yin, “Is Section 355(e) a Stalking-Horse for Mandatory Section 338?” 80 Tax Notes 865 (1998).

———, “Morris Trust, Sec. 355(e), and the Future Taxation of Corporate Acquisitions,” 80 Tax Notes 375 (1998).


Managing Editor: Linda A. Skove
Faculty Editor: John C. Jeffries, Jr.
Design: Lotta Helleberg
Printing: Schmitz Press
Photographs: Tom Cogill

We welcome your comments. Please send your letters to the managing editor at 580 Massie Road, Charlottesville, Virginia 22903-1789, or by e-mail at vajournal@law.virginia.edu.