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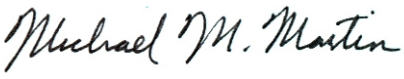
FOREWORD

Dear Colleagues:

In this inaugural Faculty Spotlight Journal, we highlight some of the scholarly work of our most recently tenured faculty. Their scholarship places them at the apex of their respective fields: law and education, immigration and labor law, law and race, criminal theory, and empirical studies in criminal law. The academic contributions in these pages represent just a small selection of the formidable body of work of each of these professors. I hope this sample encourages you to become better acquainted with their research.

Scholarship at Fordham Law does not happen in a vacuum. Our professors collaborate with each other and discuss their ideas and projects with their peers and, just as importantly, with their students. When professors are able to share their ideas openly and freely, the resulting scholarship exhibits an energy and weight that can only come from a communal exchange of ideas.

At Fordham Law, we foster this sense of community among our students and professors alike. Our students, benefitting from the abiding commitment to open academic discourse, become the legal leaders of tomorrow. And our professors become the scholars whose compelling, original work distinguishes them as leaders of legal academia.



Michael M. Martin
Interim Dean and University Distinguished Professor in Law

INTRODUCTION

The following pages feature the scholarship of five recently tenured Fordham Law faculty members. The work of each of these scholars is both timely and trenchant. As emerging leaders of their respective fields, they are indelibly shaping the landscape of contemporary legal scholarship. These scholars carry on the best of the Fordham tradition of an unwavering commitment to scholarly excellence.

Jennifer Gordon's groundbreaking scholarship is uniquely shaping the debate around immigration and labor policy in this country. Her highly praised proposal for "Transnational Labor Citizenship" is a powerful rethinking of the relationship between immigration and labor standards. Her work adeptly moves between history, economic theory, and policy and reflects her longstanding commitment to facilitating the free movement of people across borders while preventing the erosion of working conditions within host countries.

Youngjae Lee is a brilliant theorist whose scholarship wrestles with fundamental questions concerning the system of condemnation and blame found in criminal law. In approaching these questions, Lee has focused on the type of problems that arise when evaluations of criminal culpability must make direct references to the moral significance of the state. Lee's work carefully and incisively explores the various justifications for the existence and scope of state power in light of the appropriate level of condemnation for certain offenses.

Robin A. Lenhardt is a rising star among second-generation critical race theorists. Characteristic of her approach to questions of racial equality, her article on racial stigma offers a disciplined and systematic analysis of racial harm in constitutional jurisprudence. Her commitment to creating a thicker conception of equality also extends to the idea of equal citizenship. There, she advances the idea of "belonging" as a way to understand the ways in which racial and gender exclusion from marriage are deeply and conceptually linked.

John Pfaff has emerged as one of the leading scholars in empirical legal studies. His early work deftly examined significant empirical questions in the wake of the Supreme Court's *Blakely v. Washington* opinion declaring mandatory sentencing guidelines unconstitutional. Committed to improving the use of empirical work in legal scholarship, his scholarship on criminal sentencing and incarceration has highlighted the methodological shortcomings of much of the existing empirical work in the field while developing new models to elucidate the factors that have contributed to the striking surge in U.S prison rates.

Aaron Saiger's original and sophisticated scholarship is revitalizing the field of education law and policy. A proponent of more nuanced strategies for dealing with aspects of local politics and policy that make educational reform difficult, Saiger posits that our understanding the "black box" of education—the processes that turn inputs like money and teachers into desired educational outcomes—is very imperfect. He argues that legislatures, courts, and policymakers must eschew both false optimism about technology and the presumption that the black box is unknowable. They should focus on establishing rules and institutional incentives that encourage experimentation towards productive educational technologies.

Associate Dean for Academic Affairs
Albert A. Walsh '54 Chair in Real Estate, Land Use and Property Law

Jennifer Gordon

Working Hard and Working Right

Immigration law scholars have long grappled with finding the right policies for an era characterized by increasing mobility across national boundaries. Many countries—including the United States—have responded by attempting to reinforce their borders, and yet migrants continue to arrive outside the legal regime. The presence of large numbers of "illegal" workers in destination country labor markets has raised vexing questions about the relationship between immigration policy and domestic labor regulation.

Few people are as well situated to address these questions as **Professor Jennifer Gordon**. A Harvard Law graduate, Professor Gordon joined Fordham in 2003 after many years working to improve wages and employment conditions for immigrant workers. During that time, she founded the nonprofit Workplace Project on Long Island, for which she was awarded a MacArthur "Genius" Fellowship. Her book, *Suburban Sweatshops: The Fight for Immigrant Rights* (Belknap/Harvard University Press), powerfully captures her efforts as an advocate and organizer on behalf of immigrant workers.

Since coming to Fordham, Professor Gordon has established herself as one of the nation's leading thinkers in immigration and labor law. Professor Gordon is exceptionally adept at cutting to the heart of the most difficult puzzles that lie at the intersection of immigration and labor policy. She advocates for a commitment to an immigration policy that approaches global movement as a product of the interaction between migrant origin and destination nations (rather than as an appropriate subject for unilateral regulation), and that above all seeks to reinforce a baseline level of workers' rights for both immigrant workers and the native-born. To do so, she has urged a fundamental rethinking of the relationship between immigration and labor standards.

Her proposal to create a "Transnational Labor Citizenship," for example, has twice been praised by the *New York Times* as offering a way out of a major policy conundrum.* Every nation that receives labor migrants worries that they will undermine wages and working conditions for the workers in that country. Yet the way that destination countries like the United States structure their immigration policies makes it very difficult for migrant workers to access their rights. And so, migrant workers become an ever cheaper and more appealing source of labor. In her work, Gordon reconceptualizes the relationship between governments, civil society institutions, and private actors as way out of this dilemma. Her proposal offers a way to facilitate the free movement of people while preventing the erosion of working conditions in host countries.

What distinguishes Professor Gordon's work is the sharpness and creativity with which she moves between history, economic theory, and policy. As her recent work suggests, in addition to proposing provocative resolutions of current policy conundrums, she will continue to locate and interrogate emerging approaches to regulating human mobility in a context of global inequality.

* Lawrence Downes, "Worker Solidarity Doesn't Have to Stop at the Rio Grande," Editorial Observer, Opinion Page, September 30, 2007; Editorial, "A Shift on Immigration," Opinion Page, May 2, 2009.

Excerpts

People Are Not Bananas: How Immigration Differs from Trade

Forthcoming, 104 Northwestern University Law Review, Vol. 3 (2010)

If economists' models predict that free trade, foreign investment, and immigration will behave so similarly in terms of maximizing global wealth, what accounts for the weak global regulation of immigration as opposed to the highly developed global mechanisms regulating trade and investment? The simplest of responses points to realpolitik: trade and investment are arenas where most nations are aggressively seeking new relationships on favorable terms, while immigration is an area where developed countries display considerable ambivalence in the face of developing nations' great interest.[1] But this answer begs the fundamental question: if immigration offers even greater efficiency gains than trade, why are developed nations so reluctant to permit greater openness, and to pursue that goal in coordination with developing countries? In Part I, I noted and rejected an explanation rooted in classical economics: that the difference is accounted for by the fact that trade and migration are substitutes for each other.[2] In this Part, I argue instead that labor mobility is fundamentally different from the mobility of goods or capital in several ways, each of which contributes either to wealthier nations' reluctance to permit greater global movement of workers, or to their distaste for multilateral structures governing labor migration, or both.

Before beginning, however, a reiteration of the parallels between kinds of factor mobility is in order. In the classical economic lineup, trade and migration appear to produce a similar set of winners and losers. In the trade setting, if a U.S.-based commercial baker imports flour from abroad, the foreign firm selling the flour benefits from higher prices than it could command in its domestic market. The U.S. baker benefits from cheaper flour. Consumers benefit from the lower prices of the crackers the baker produces. The losers are U.S. based flour-producers, whose prices fall as a result of competition with foreign producers, and their workers, who lose jobs (although as consumers, they also benefit to a very small degree from cheaper crackers). In the immigration context, if a U.S.-based tomato canning firm uses immigrant workers on its production line in the United States, the immigrant benefits from higher wages than she could earn at home. The U.S. firm benefits from cheaper labor. Consumers benefit from the lower prices of the canned tomatoes. And the losers are the group of workers in the United States who compete with migrants for jobs; their wages fall because of the increased labor supply (although they, too, benefit a tiny bit from the decreased cost of the product).

Furthermore (and not surprisingly, given the similarities just noted), many of the charges levied against the importation of goods and the importation of labor echo each other. Trade is critiqued for displacing workers from jobs in the importing country, and for replacing traditional products and practices with

[1] This essay gives short shrift to the complex, ambivalent, and varied perspectives of *developing* countries on migration, not by any means because they lack importance, but because they do not shed much light on the question that occupies this essay, ie, why developed nations have responded in such disparate ways to the movement of goods and people across borders.

[2] There are two variations of this argument: the outsourcing claim (trade will render immigration unnecessary because the jobs will move to where the workers are) and the wage equalization claim (trade will render immigration unnecessary because it will raise wages and increase employment opportunities in less-developed countries). The first has proven untrue because large numbers of jobs in developed countries are locally rooted. The second effect has failed to materialize in a number of cases, as the wave of migration unleashed by NAFTA illustrates.

foreign ones, threatening national cultures.[3] Immigration, too, is criticized for its displacement effects on native workers, and for the social and cultural shifts that it engenders.[4] As Timothy Hatton has noted, "Across a broad range of countries attitudes are on balance against both imports and immigration, and the same types of people are against imports as are against immigration."[5]

And yet, the domestic politics of most developed countries have eventually yielded to the opening of trade despite these distributional and cultural concerns, while continuing to pose an obstacle to the liberalization of labor migration on the same grounds. In the international arena, this split translates into the two contrasts I have noted. Developed countries emphatically support increased trade abroad, while advocating and adopting restrictions on immigration. And developed countries pursue negotiations over trade in bilateral, regional, and multilateral settings, while preferring unilateralism or limited forms of bilateralism to govern migration. With the exception of the European Union, regionalism is reserved for a few accords on high-skilled labor migration; multilateralism is unknown.

I explain these divergences as follows. First, labor migration involves human beings, who behave differently than goods. This behavioral difference elicits a different sort of reaction to their arrival, which in turn shapes a different set of domestic political forces and incentives. Second, developed nations perceive immigration as having a lower payoff than trade, in part because trade is largely a reciprocal process, while labor migration is mostly a one-way street. Both factors reduce the (perceived) economic gains from immigration and make immigration a more difficult political issue in developed countries. Finally, while wealthy nations cannot achieve free trade and protections for mobile capital without the cooperation of less-developed countries, they can in almost all cases fill their needs for labor migrants through unilateral action. Cooperation is only attractive when it brings destination countries more than they could achieve on their own.

[3] For a critique of free trade's cultural effects, see Maude Barlow, *The Global Monoculture*, EARTH ISLAND J., Autumn 2001, at 32. For a critique of free trade's impact on workers, see Byron Dorgan and Sherrod Brown, Op-Ed., *How Free Trade Hurts*, WASH. POST, Dec. 23, 2006, at A21.

[4] For an attack on immigration for its impact on culture, see SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004); for a critique of immigration for its economic impact, see George J. Borjas, *Globalization and Immigration*, *in* GLOBALIZATION: WHAT'S NEW 77, 84, 86–90 (Michael Weinstein ed., 2005); and for an attack that mixes both elements, see MARK KRIKORIAN, THE NEW CASE AGAINST IMMIGRATION: BOTH LEGAL AND ILLEGAL (2008).

[5] Greenaway and Nelson argue that in the United States, trade policy (seen as national and economic) is set via "group politics" while immigration policy (seen as local and social) is set via "democratic politics." Id. at 359 (citing D. Greenaway & D. Nelson, *The Distinct Political Economies of Trade and Migration Policy Through the Window of Endogenous Policy Podels*, in LABOR MOBILITY AND THE WORLD ECONOMY 25 (Foders & Langhammer eds., 2006)).

Transnational Labor Citizenship

80 Southern California Law Review 503 (2007)

I. Introduction

Over one million new immigrants arrive in the United States each year.[1] This spring, Americans saw several times that number pour into the streets, protesting proposed changes in U.S. immigration and guest work policies.[2] As the signs they carried indicated, most migrants come to work, and it is in the workplace that the impact of large numbers of newcomers is most keenly felt. For those who see both the free movement of people and the preservation of decent working conditions as essential to social justice, this presents a seemingly unresolvable dilemma. In a situation of massive inequality among countries, to prevent people from moving in search of work is to curtail their chance to build a decent life for themselves and their families. But from the perspective of workers in the country that receives them, the more immigrants, the more competition, and the worse work becomes.

As an advocate for immigrant workers for over twenty years, I have often spoken from the heart of that dilemma.[3] This Article proposes a way out. In it, I develop the idea of "transnational labor citizenship," a new approach to structuring cross-border labor migration that draws on, but goes beyond, current theories of transnational political citizenship. Transnational labor citizenship reconceptualizes the relationship among the governments of immigrant sending and receiving countries, civil society labor institutions, such as unions and worker centers, and private actors. Inspired by recent efforts to organize workers as they move across borders, transnational labor citizenship would link permission to enter the United States in search of work to membership in cross-border worker organizations, rather than to the current requirement of a job offer from an employer. It would facilitate the enforcement of baseline labor rights and allow migrants to carry benefits and services with them as they move. Its goal, heretofore elusive, is to facilitate the free movement of people while preventing the erosion of working conditions in the countries that receive them.

Labor organizations are central to this proposal. Historically, unions have been restrictionist in their approach to immigration, but today most unions in the United States welcome immigrants already present in the industries they organize, including the undocumented.[4] While this Article applauds this pro-immigrant position, it argues that to move forward on the immigration question from a social justice perspective, and to succeed in their goal of improving working conditions, unions must refashion themselves so they can accommodate an ongoing influx of new migrants. Simultaneously, the United States must reconfigure its approach to labor migration so that it sees workers' organizations as allies in the process.

This Article offers the new concept of "labor citizenship" as a lens for understanding the challenges unions face in taking the leap to an open attitude toward the future flow of migrants. By labor citizenship

[1] JEFFREY S. PASSEL & ROBERTO SURO, RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004, at i–ii (2005), available at http://pewhispanic.org/reports/report.php?Report ID=53.
[2] Luis Andres Henao, After the Amnesty: 20 Years Later, CHRISTIAN SCI. MONITOR, Nov. 13, 2006, at A3.
[3] See, e.g., JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Jennifer Gordon, Immigrants Fight the Power—Worker Centers Are One Path to Labor Organizing and Political Participation, NATION, Jan. 3, 2000, at 16.
[4] I use the term "undocumented" to refer to noncitizens with no legal immigration status because it avoids the pejorative inherent in phrases like "illegal immigrant" or "illegal alien." The word also highlights a fairly recent emphasis on documentation at the intersection of U.S. labor and immigration law. It was not until 1986, with the passage of the Immigration Reform and Control Act and its employer sanctions provisions, that all job seekers in the United States were required to present "documents" proving their authorization to work before being hired.

I mean the ways in which workers' organizations create membership regimes, set and enforce rules for those who belong, and approach their goal of improving wages and working conditions. Labor citizenship also encompasses the normative expectation of solidarity among workers and active participation by them in the democratic governance of their own institutions.

Strikingly, aspects of labor citizenship implemented by unions in the United States parallel the conventional national citizenship framework. Like countries, which apportion privileges based on national citizenship, unions offer a special set of benefits to their members alone.[5] At a minimum, union boundaries separate those eligible to claim the higher wages guaranteed by union contracts from those beyond the contract's scope. In some organizing models, particularly in the building trades, there have been times when labor citizenship is treated as a limited commodity, denied to some workers in order to increase the share of those within the circle. This model echoes the way that nation-states circumscribe those who will be admitted to citizenship to facilitate the amassing and distribution of limited resources. As nations do, unions assert that this line drawing is normatively important, in addition to its instrumental value. From the union perspective, bounded citizenship aids in the development of democracy and solidarity within the union, and enhances the capacity of union members to realize full and equal citizenship outside the workplace as well. From the perspective of the nation-state, it is often said to be a precondition for the creation of community and the flourishing of democracy.

In the past decade, much has been written about the ways that political participation, once seen as a single-state phenomenon, has transformed into a transnational experience under pressure from massive migration around the globe.[6] Transnational scholarship describes immigrant remittances as the driving force behind many of these changes but is curiously silent on the conditions of the work that produces

[5] In this Article, I use the word "members" when referring to workers who are represented by a union. This should be qualified. First, in states that have passed so-called "Right to Work" legislation, workers are released from the obligation to join or pay dues to the union that represents them. For a typical "Right to Work" Law, see IDAHO CODE ANN. §§ 44-2003 (2003). In such states—currently numbering twenty-three—employees in a unionized workplace who do not wish to offer the union their financial support do not have to do so, although under the doctrinal duty of fair representation the union must always represent the interests of all workers in the bargaining unit. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944); U.S. Dep't of Labor, State Right-to-Work Laws and Constitutional Amendments in Effect as of January 1, 2007 with Year of Passage, http://www.dol.gov/esa/programs/whd/state/righttowork.htm (last visited Jan. 27, 2007). Furthermore, after the passage of the Taft-Hartley Act, although unions in non-"Right to Work" states can negotiate "agency shop" or "union shop" contracts that require that all workers in the bargaining unit pay dues, it is illegal to require workers to formally affiliate as members with the unions that represent them. See, e.g., Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers Local 444, 311 N.L.R.B. 1031, 1041 (1993) (invalidating a clause in a collective bargaining agreement requiring all employees to become "members of the Union in good standing" because such a clause "fails to apprise employees of the lawful limits of their obligation" to the union and "would lead an employee unversed in labor law to believe that employees were obliged to join the Union and satisfy all of the requirements for membership as a condition of employment"). Thus, even in a "union shop" there may be workers represented by the union who are not technically members.

[6] The literature on transnational citizenship is vast. Foundational works include TOWARDS A TRANSNATIONAL PERSPECTIVE ON MIGRATION: RACE, CLASS, ETHNICITY, AND NATIONALISM RECONSIDERED (Nina Glick-Schiller et al. eds., 1992) and YASEMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994). Linda Bosniak's article, Citizenship Denationalized, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000), offers an empirical and theoretical exploration of whether citizenship is an inherently national project, or whether it can and should be expanded across national borders. Roger Waldinger, David Fitzgerald, and Jonathan Fox, among others, have recently offered critiques of the argument that transnational citizenship represents a meaningful shift in the citizenship paradigm. See Jonathan Fox, Unpacking "Transnational Citizenship," 8 ANN. REV. POL. SCI. 171 (2005); Roger Waldinger & David Fitzgerald, Transnationalism in Question, 109 AM. J. SOC. 1177 (2004). A recent volume of the N.Y.U. Law Review explores this phenomenon in detail including Anupam Chander's useful taxonomy of the emerging institutions of transnational economic and political citizenship. Anupam Chander, Homeward Bound, 81 N.Y.U. L. REV. 60 (2006).

remittance income.[7] Such scholars have also been reluctant to take the leap from description of transnational activities to normative exploration of how the transnational framework might be reshaped so that it serves the ends of a more just labor and immigration system.[8] In exploring the potential for transnational labor citizenship, this Article takes on both tasks.

The same forces shifting the practice and structure of citizenship on the national level are also bearing down on unions. Yet the transnationalization of political citizenship emerging on the national level does not yet have a clear parallel in labor citizenship. I argue that unions' legitimate concerns about the effect of an oversupply of workers on working conditions has hampered their ability to reshape labor citizenship to respond effectively to ongoing immigration. To be sure, as of the late 1990s unions in the United States became much more open to organizing new immigrants, including the undocumented. And, in the context of the global movement of capital, a number of unions have initiated cross-border efforts to support workers and unions in other countries.[9] But the core model of labor citizenship has remained reliant on efforts to curtail the number of workers entering the labor market. In bringing undocumented immigrants into the fold of labor citizenship, most unions did not forgo the idea of boundaries. They merely extended their borders to include a new group. The idea that the future flow of migrants remain outside the reach of labor citizenship—and that union borders must be defended against them, or they will undermine the viability of that citizenship—remains essential to the vision of much of the labor movement today. And yet, new migrants continue to arrive.

It is the central contention of this Article that the hard-bordered model of labor citizenship is untenable in the face of an increasingly global market for labor. Instead, I ask how we might productively reconceive of the relationship between labor citizenship and nation-state citizenship in a context of ongoing labor migration. Could a different form of labor citizenship better achieve the norms that the concept embodies? What approach to labor organization makes sense in a globally interconnected world, if the goal is to

[7] There are a few exceptions, including the work of David Fitzgerald and Lynn Stephen, who have explored the links between labor unions and transnational political behavior. See David Fitzgerald, Beyond "Transnationalism": Mexican Hometown Politics at an American Labour Union, 27 ETHNIC & RACIAL STUD. 228 (2004); Lynn Stephen, Mixtec Farmworkers in Oregon: Linking Labor and Ethnicity Through Farmworker Unions and Hometown Associations, in INDIGENOUS MEXICAN MIGRANTS IN THE UNITED STATES 179 (Jonathan Fox & Gaspar Rivera-Salgado eds., 2004).

[8] It is also important to challenge the idea that the shift from nationalism or transnationalism has been linear, universal, or complete. Borders are still tremendously important sites for the exercise of real and symbolic national power, as the 2006 congressional mandate for the construction of a 700-mile wall along the southern U.S. border illustrates. Secure Fence Act of 2006, H.R. 6061, 109th Cong. § 3 (2006). Within the United States, the state's capacity to exclude and deport immigrants increased over the course of the 1990s and 2000s. Changing laws drastically increased the facility with which legal permanent residents convicted of crimes could be stripped of their green cards, and ramped up surveillance and enforcement against those whose religion, ethnicity, or nationality placed them within the state's rubric of "suspected terrorists." See generally Muneer Ahmad, Homeland Insecurities: Racial Violence the Day After September 11, 20 SOC. TEXT 72 (2002); Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575 (2002); E-mail from Sameer M. Ashar, Assistant Professor, City University of New York School of Law, to author (Aug. 2, 2006) (on file with author) ("[T]he post-9/11 reinforcement of national borders and immigration enforcement and the 1996 targeting of LPR's with criminal convictions seem to suggest a tiered system in which some populations are allowed to transnationalize, while others are targeted and put outside of our national borders."). In these ways, transnationalism is best understood as a phenomenon that is permitted for "desirable aliens" by some receiving country governments, but forbidden by them to a large swath of would-be migrants (some of whom nonetheless migrate or remain illegally, and create transnational forms of participation from the bottom up).

[9] For a historical overview of labor's cross-border efforts, see BEVERLY J. SILVER, FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870 (2003). Examples of concrete campaigns are set out in Terry Davis, Cross-border Organizing Comes Home: UE & FAT in Mexico & Milwaukee, 23 LAB. RES. REV. 23 (1995); Andrew Herod, Organizing Globally, Organizing Locally: Union Spatial Strategy in a Global Economy, in GLOBAL UNIONS? THEORY AND STRATEGIES OF ORGANIZED LABOUR IN THE GLOBAL POLITICAL ECONOMY 83 (Jeffrey Harrod & Robert O'Brien eds., 2002); Kenneth Zinn, Labor Solidarity in the New World Order: The UMWA Program in Columbia, 23 LAB. RES. REV. 35 (1995).

create good work—at a bare minimum, work that can support a family, does not endanger the worker's health, and provides adequate time off for other pursuits—in this country no matter who the worker is?[10]

In response, I call for a thought experiment in the transnationalization of labor citizenship. I propose an opening up of the fortress of labor and of the nation-state to accommodate a constant flow of new migrants through a model that would tie immigration status to membership in organizations of transnational workers rather than to a particular employer. These memberships would entitle migrants to services, benefits, and rights that cross borders just as the workers do. In exchange for the authorization to work that they would receive as members, migrant workers would commit to the core value of labor citizenship: solidarity with other workers in the United States, expressed as a commitment to refuse to work under conditions that violate the law or labor agreements.

The premise behind this proposal is that in the face of enormous inequality between countries, immigration controls will not stop the movement of workers from the South to the North. But recognizing that migrants will continue to arrive in the United States regardless of our policy does not require abdicating wages and working conditions to employers who would set them as low as the market permits. Advocates have long stated that the government must actively enforce basic workplace standards in immigrant-heavy workplaces to set a floor for all workers. Such a step is necessary but insufficient. The state does not have the political will, the staffing, or the mechanisms to enforce those laws consistently, and even if it did, the minimums are set too low to assure workers a decent standard of living. To engage the state more fully in enforcement, and to go beyond inadequate existing levels of protection, workers themselves must organize. Transnational labor citizenship would shift the enforcement of a floor on working conditions from the arena of immigration policy in employer hands, where it currently lies, to the arena of labor solidarity in worker hands, where it belongs. In this way, I argue, we can create structures that respond at once to the desires of migrants for jobs and to the aspirations of labor citizenship to preserve decent working conditions in this country.

[10] Despite the transnational focus of my proposal, the central concern of this Article remains addressing conditions of work within the United States.

Bibliography

Book

SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (Belknap/Harvard University Press, 2005)

Law Reviews

People Are Not Bananas: How Immigration Differs from Trade, 104 NORTHWESTERN UNIVERSITY LAW REVIEW (forthcoming 2010)

Rethinking Work and Citizenship (with R.A. Lenhardt), 55 UCLA LAW REVIEW 1161 (2008)

The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change, 95 CALIFORNIA LAW REVIEW 2133 (2007)

Transnational Labor Citizenship, 80 SOUTHERN CALIFORNIA LAW REVIEW 503 (2007); excerpts reprinted in LABOR LAW IN THE CONTEMPORARY WORKPLACE (Kenneth Dau-Schmidt, et. al., 2009); GLOBAL ISSUES, LOCAL ARGUMENTS (June Johnson, ed., 2009)

Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives (with R.A. Lenhardt), 75 FORDHAM LAW REVIEW 2493 (2007), excerpts reprinted in IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (6th ed.) (Alexander Aleinikoff, David Martin, Hiroshi Motomura, and Maryellen Fullerton, 2008)

Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today, 8 UNIVERSITY OF PENNSYLVANIA JOURNAL OF LABOR & EMPLOYMENT LAW 1 (2005)

We Make the Road by Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change, 30 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 407 (1995); excerpts reprinted in SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES AND LAW (Martha Mahoney, John Calmore, and Stephanie Wildman eds. 2003)

Book Chapters

The Impact of a New Law on a Movement: The Case of the UFW and the California Agricultural Labor Relations Act, in CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat and Stuart Scheingold, eds, Stanford University Press, 2006)

Let Them Vote, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (Owen Fiss, et. al., eds., Beacon Press, 1999)

Policy Papers

Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers Rights (University of California-Berkeley Law School, Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity Policy Paper, January 2009)

Conflict and Solidarity Between African American and Latino Immigrant Workers (with R.A. Lenhardt) (University of California-Berkeley Law School, Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity Policy Paper, November 2007)

Other Articles

Workers Without Borders (Op-ed), NEW YORK TIMES (March 9, 2009)

American Sweatshops, BOSTON REVIEW (Summer 2005)

Organizing Low-Wage Immigrants, WORKINGUSA vol. 5 no. 1 (2001)

Immigrants Fight the Power, THE NATION (January 3, 2000)

Youngjae Lee

Leading Theory

During his five years at Fordham Law School, **Professor Youngjae Lee** has developed a large and impressive body of work in criminal law theory. A Swarthmore College graduate with high honors in philosophy and economics, a Fulbright Scholar, and a magna cum laude graduate of Harvard Law School with experience as an attorney for the U.S. Department of Justice, Professor Lee brings to his work an array of insights stemming and developing from his academic and practice backgrounds.

Lee's theoretical work is closely tied to the criminal justice system's condemnatory dimension. Lee has argued that, if the condemnation expressed by state punishment is to be persuasive, the state must speak with a credible voice, and in order to be credible the state's statements about wrongness of criminal acts must reflect correct positions on questions of moral rights and wrongs. In other words, the state must operate the institution of punishment and calibrate its scale of punishment so that the punishments it imposes express the appropriate level of condemnation, given the seriousness of the offenses in question. His article "The Constitutional Right Against Excessive Punishment" accordingly argues that the Cruel and Unusual Punishments Clause of the Eighth Amendment should be read to prohibit the government from imposing punishments that exceed the correct level of condemnation.

In his more recent work, Lee has focused on special problems that arise when proper evaluations of the culpability of offenders must make direct references to the moral significance of the state. In the case of core crimes, such as murder and rape, the task of thinking about what makes them wrongful, why it is that those who commit such offenses deserve to be punished, and how serious they are as crimes, seems manageable. Such core crimes can easily be imagined as pre-legal wrongs; murder, for instance, is wrong whether legal institutions exist or not. It is not as straightforward to evaluate crimes committed against the state, as understanding what makes offenses against the state wrongful necessitates an exploration of the justification of the existence and the scope of the power of the state and its various institutions.

Two recent articles by Lee reflect on such themes. In "Recidivism as Omission," for instance, Lee tackles the widespread intuition that repeat offenders are more blameworthy than first time offenders. Lee argues that we cannot understand the moral significance of reoffending until we come to grips with the way in which the nature of the relationship between an offender and the state changes at the moment of his or her conviction and punishment. In "The Defense of Necessity and Powers of the Government," Lee weighs in on the torture debate and argues that it is a mistake to infer, from the existence of a potential necessity defense for the crime of torture in the so-called "ticking bomb" scenarios, a governmental power to engage in acts of torture in such situations. The necessity defense calls for an evaluation of a private individual acting in a situation of emergency in a way that takes into account the special status of the state as an exclusive wielder of instruments of violence, and such considerations do not apply in the same way when evaluating the state's responses to emergency.

Excerpts

Recidivism as Omission: A Relational Account

87 Texas Law Review 571 (2009)

Are repeat offenders more culpable than first-time offenders? In the United States, the most important determinant of punishment for a crime, other than the seriousness of the crime itself, is criminal history. It is commonly, and casually, assumed that repeat offenders deserve more punishment than first-time offenders. However, desert theorists have been generally critical of sentencing enhancements based on the offender's criminal history. While the belief that repeat offenders are deserving of greater punishment is widespread, there is no satisfactory retributivist defense of that prevailing view, prompting one leading scholar on the topic to note that "a plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness."[1]

One of the conceptual difficulties of the recidivist premium is that if we focus on the moment of offending, the offense does not look, at least at first, any different no matter who commits it—whether it was a repeat offender or a first-time offender. The first step out of this conundrum is to see that criminal offenses—like many acts that we undertake in life—do not happen in isolation. A series of events and circumstances can combine to produce a moment ripe for a crime to take place. This in turn means that well before individuals end up committing crimes, they can steer their lives in different directions in order to minimize the risk of finding themselves in a position in which committing a criminal offense becomes a compelling—or at least appealing—option.

One way to think about this is to divide up an individual's life into different selves, as in the self at t_0, the self at t_1, at t_2, t_3, t_4, and so on. What a past self does at t_0 can powerfully shape the choices that the future self faces at, say, t_4. To use a mundane example, a person on a diet might decide at t_0 to travel out of the way to avoid passing next to a fast-food joint at t_1. A person who has a tendency to overspend at grocery stores might eat at t_0 to avoid grocery shopping at t_1 on an empty stomach. Obviously, how one finds oneself in situations that tempt or induce one to commit a crime is a far more complicated matter. But a person who thinks that she has a tendency to give in to peer pressure to commit criminal acts may stay away from those who are likely to encourage her to engage in criminal activities. If a person understands that having no source of income may lead him down the path of a life of a criminal, he could try to find a job to support himself and his family. If a person's drug addiction leads her to look for quick bucks through burglary, then perhaps combating the drug addiction could lead to a life away from crime. If a person is tempted to molest children whenever he is around children, he can organize his life in a way that minimizes his contact with children. The point is that for every crime that a self commits at t_x, we can find other "guilty" selves at t_{x-n} preceding the self at t_x who committed the crime. Loosely speaking, we might even say that one's past self, through a series of missteps, can aid and abet a self in committing a crime by increasing the risk that the future self would commit that crime.

So what does this have to do with the recidivist premium? I am suggesting that the recidivist premium is not about what an offender does or reveals at the moment a crime is committed; rather, the recidivist premium is additional punishment directed at the previous selves who *enabled* the later self to commit a crime. The recidivist premium does not punish disobedience or bad character; rather, it punishes an ex-offender's omission—the omission being his failure to take steps to prevent himself from committing another crime.

[1] Julian V. Roberts, *Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium*, 48 BRIT. J. CRIMINOLOGY 468, 469 (2008).

One may object, is it not the case that we demand that all persons—not just offenders—organize their lives so that they steer clear of criminality? Why is it not the case that when first-time offenders are being punished, they are being punished not only for committing the crimes with which they are charged, but also for their failures to live life in a way that would have allowed them to steer clear of criminality?

The answer is that there is a difference between a first-time offender and a repeat offender because a repeat offender has gone through the process of conviction and punishment and a first-time offender has not. When a person is convicted and punished for a crime, one thing we can say with confidence is that the relationship between that person and the state has changed in a way that makes that person different from others who have not had that kind of encounter with the state. It is *this* change in relationship that changes the normative positions of persons with regard to the state.

The idea that obligations arise from relationships is a familiar concept in law. The most straightforward relationship that can give rise to obligations in law is one created by a promise, but bases for obligations need not always be voluntary. For instance, family is often given as a paradigmatic example of an association that gives rise to obligations despite the fact that it is not—or at least not fully—voluntary. Even though phrases like "paying debt to one's society" imply that once individuals have been punished, they start with a clean slate, the idea that punishment puts people back to where they were before flies in the face of our everyday experiences. One's life cannot be thought of as simply one event after another, one encounter after another, each of which is discrete and disconnected from the others. "After all we have been through," a phrase that typically precedes a normative statement, is not an idle phrase; it is a way of emphasizing the different normative expectations that arise as a result of what "we have been through." What we expect of one another is shaped by what we have been through, and different relationships people enter into (voluntarily or involuntarily) can inject new, morally significant elements into their lives.

What kinds of morally significant duties or obligations exist as a result of the existence of a relationship depend on the nature of the relationship itself. The nature of the offender–state relationship is as follows. The institution of punishment has a communicative, expressive dimension. When the state punishes, it condemns what the offender has done as blameworthy and it communicates to the offender that what he has done is wrong. Implicit in that message, of course, is that the offender is being punished for what he has done, and after his punishment is complete, he shall not offend again.

Now, if the process of conviction and punishment communicates the message that what the offenders have done is wrong and they should not do it again, the process also should prompt a period of reflection on the part of offenders to determine how they ended up committing the prohibited act. This kind of self-diagnosis, aided by the institution of punishment, should identify what has gone wrong in an offender's life. People may end up committing crimes for different kinds of reasons, and those reasons differ for different types of offenses. Such diagnoses should lead to appropriate prescriptions for each offender, and each offender should follow those prescriptions while and after serving a sentence. A repeat offense by someone who has gone through this process of reflection, diagnosis, and prescription justifies the inference that, for whatever reason, the prescription was not followed, and the offender failed to prevent herself from reoffending by failing to organize her life in a way that steers clear of criminality.

Some may object that none of this is unique to repeat offenders. Those without criminal histories have the ability to know themselves and to understand the kinds of factors that lead people into situations in which they end up committing a crime. First-time offenders may have taken each step leading to their crimes knowing exactly what they were doing and understanding that each step was leading them closer to the commission of a crime. Also, as mentioned above, those who are convicted of a crime for the first time are not necessarily those who have committed only one crime in their lives. Some may already

have an impressive criminal background without ever having been caught. If my argument holds, and that those who are convicted of crimes know themselves well enough to know what kinds of things l ead them down the path of the criminal, then that argument should apply to those first-time offenders who have good understandings of such factors as well. And if that is the case, then my argument ceases to become an argument in favor of singling out an offender's criminal history as a significant aggravating factor.

However, this objection misses the point that the crucial difference between first-time offenders and repeat offenders is that the repeat offender *has gone through a process with the state that has created a relationship with the state, and the point of that relationship was to ensure that whatever led the offender to the status of being a convict should be avoided in the future*. It is *that history* of having had *that relationship* that first-time offenders lack. And once a person enters into a thick relationship with the state through the process of conviction and punishment, it is appropriate for the state to attribute blame to how a person has increased the risks of criminal wrongdoing over time.

The account advanced here opens up a new line of inquiry that, in my view, should always be part of the recidivist-premium calculus—the idea of assigning to the state at least partial blame for an offender's recidivism. As I have been stressing, the engine that drives the recidivist premium is the relationship between the state and the offender, the point of which is to acknowledge that what the offender has done is wrong. And implicit in that relationship is a commitment on the part of the offender to organize his life in a way that steers clear of criminality so that he does not re-offend. Like most relationships, this is a relationship that places obligations on all parties involved. In the same way that the relationship between an offender and the state allows the state to take a closer look at how an offender carries out his life, the state also has a heightened responsibility towards the offender—namely, to help him get back to a life of normalcy or at least to not interfere with an offender's effort to become a law-abiding citizen. In other words, if the recidivist premium is imposed for one's failure to set his life straight postconviction, if what justifies the recidivist premium is the relationship between the individual and the state, and if the moral logic of the relationship necessitates the parties' commitment that the offender should organize his life in order to prevent another offense, then it seems to follow that the state has a role to play in helping the offender live a life away from crime as well.

The Defense of Necessity and Powers of the Government

3 Criminal Law and Philosophy 133 (2009)

If one of the lessons of the ubiquitous and highly problematic "ticking bomb" scenario is that torture may be justified under certain narrowly specified situations, why would we not want it made available as a weapon in the government's anti-terrorist activities? The question that this Essay addresses is related but narrower: if one starts from the proposition that the ticking bomb scenario demonstrates that a government official facing prosecution for torture may have available the necessity defense, what implications, if any, should the government be able to draw from the existence of the defense as it formulates its torture policy? We have two well-known government documents that address this question.

First, in a much discussed opinion from 1999, the Supreme Court of Israel considered the question whether the General Security Service could legally engage in interrogation tactics that involved "physical means," such as shaking, sleep deprivation, excessive tightening of handcuffs, and forcing subjects into uncomfortable positions. The Israeli Supreme Court handed down a pair of decisions that seem paradoxical. The Court decided that if a GSS investigator is facing criminal prosecution, the necessity defense

would be available to him if all the requirements of the necessity defense are met. The Court also held, however, that generalizations about when the necessity defense may be available for the crime of torture may not be used as a way of authorizing government officials to torture in such situations.

Second, in the notorious "Torture Memo," the Office of Legal Counsel of the U.S. Department of Justice addressed the questions as to the definition of "torture" under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and what kinds of defenses would be available should a governmental official be found to have violated the convention, which is implemented in the United States as federal criminal provisions. The Bush administration relied on this memorandum when it devised interrogation practices used by the C.I.A. The Memo stated, among other things, that even if an interrogation method turns out to meet the definition of torture, the defense of necessity might be available to a government official facing prosecution for torture. Implicit in the Memo is the proposition that if one could raise a successful necessity defense in certain situations for the crime of torture, the government may design a program of interrogation in such a way that every governmental official facing a potential prosecution would have the necessity defense available to him or her.

The Israeli Supreme Court's decision that the necessity defense cannot serve as a general basis to "infer authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of 'necessity'" relied on an argument about the general nature of the necessity defense. The Court stated that the defense "is an ad hoc endeavor, in reaction to a event" and "a result of an improvisation given the unpredictable character events." The Court concluded, "Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power."

The logic of this argument is not crystal clear. There are emergencies that are unforeseeable and the necessity defense may be well-suited for such situations, but there also are emergencies that are foreseeable and there are even emergencies that we can predict would recur over long periods of time. Every example of necessity given in textbook formulations deals with situations that can recur over time, such as "property may be destroyed to prevent the spread of fire," "[a] speed limit may be violated in pursuing a suspected criminal," "an ambulance may pass a traffic light," and so on. It is unclear what is wrong or incoherent about devising general formulations that identify situations in which the necessity defense would be available.

The truth of the matter lies elsewhere. We must start by asking what the necessity defense *does*. A typical way of thinking about criminal law defenses is to assume that the essence of the defenses mirrors moral principles. According to this view, contours of justification defenses should track morally permissible instances of violations of prohibitions. If this view were taken seriously, then it does seem odd to recognize the necessity defense for certain instances of torture on one hand yet deny that the government may engage in torture in similar situations. If moral and legal justifications coincide, then it follows that whatever is allowed by a (legal) justification defense is morally permissible, and the government may guide its own conduct by considering what conduct would constitute successful defenses since by doing so it would avoid engaging in immoral conduct.

The problem with this view is that the necessity defense is not available "if the issue of competing values has been previously foreclosed by a deliberate legislative choice, as when some provision of the law deals explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the claimed justification otherwise appears."[1] That is, the defense does not contemplate principles of morality trumping legislative judgments in certain situations; it contemplates in fact the principle of legislative supremacy. Even if the optimal outcome in a given situation is to violate a given prohibition,

[1] Model Penal Code and Commentaries § 3.02 cmt. 2 at 13.

if the legislature has chosen to mandate the suboptimal outcome in that situation, then the violation is not justified. The legislative will takes priority over dictates of morality when they conflict, and the necessity defense should be understood as a way of supplementing legislation, as opposed to a general all-purpose policy of not punishing individuals who do the right thing all things considered.

That the necessity defense is concerned not only with permitting illegal behavior when it is morally permissible but also with spelling out the terms of the relationship between citizens and the state can also be seen in the "imminence" or "emergency" requirement of the necessity defense. That is, it is not enough that a violation of the law resulted in a lesser evil than the evil avoided through the violation (and that it was not precluded by the legislature). The violation also must have been the only legal option that the actor had available to address the choice of evils he was facing. The point of the imminence requirement, then, is to allow violations of law only when the government is unavailable to prevent the harm that the actor seeks to avoid. The government is authorized to make decisions that harm individuals' interests for the common good, and private individuals are prohibited from doing so, and the necessity defense allows private individuals to do the balance of evils calculation themselves and act on them in ways that hurt others' interests only when the government is effectively out of the picture due to the imminence of harm. Of course, this does not mean that anything goes once the government is not available; there is still the requirement of choosing the lesser evil. The point, rather, is that when an individual may engage in this kind of balance of evils reasoning to guide his conduct in contemplating violating a law, as opposed to legal reasoning only, is severely constrained by the requirements of the necessity defense.

Why does the necessity defense have this particular structure? Once a law has prohibited a conduct, it demands compliance even if a citizen may have many good reasons not to comply in certain situations, and the law does that by "occupying" the field and replacing various reasons to engage or not engage in a conduct with the prohibition. The necessity defense lifts the prohibition, and the reasons for and against performing the act come roaring back in, and the law places strict limitations on when that prohibition is lifted, by requiring that the danger be "imminent" and that legally sanctioned ways of dealing with that danger be unavailable due to the emergency nature of the situation. In other words, at least to the extent that the necessity defense restricts the ways in which private citizens may use force that harms another's interest, the limited scope of the necessity defense is one of many tools that help sustain the state's monopoly on legitimate violence.

So, is there anything wrong with an argument that starts from the premise that the necessity defense may be available against prosecution for torture to the conclusion that the government can determine when torture is or is not allowed at least partly on the basis of the availability of the necessity defense? If the necessity defense is about allocating power between individuals and the state and is a way of sustaining the state monopoly on violence, then the argument in question amounts to a sleight of hand. The necessity defense is an exception to the general rule that only the state may act in certain ways; it creates a space in which citizens are empowered to act as if the state has disappeared from the scene, and it is improper for the state to refer to the existence of that space to expand the scope of its own power. The necessity defense effects a division of power, with the state reserving itself the power to harm individuals' interests as a general matter but letting individuals have such powers in situations of emergency. The necessity defense, in other words, exists to empower individuals where individuals are supposed to be powerless; it cannot be used to confer powers on the state as well.

One might object to this conclusion. If it is indeed the case, the objection might go, that an individual is empowered to act as if he is a government official in situations of emergency, does it not follow then that a government official is also able to act in the way that a private individual is allowed to act in such situations? That is, how can one start with the presumption of state monopoly on violence and argue that the state monopoly is sometimes shared with private individuals and conclude that a state cannot do what a

private individual is allowed to do? If a private individual can do something only when he is allowed to act as if he is a state actor, then a *fortiori*, a government official can do it in the same situation. Therefore, the argument would conclude, it is entirely appropriate for a government body to examine what is allowed under the necessity defense and seek guidance as to what it is allowed to do. After all, the government's power is greater than what is allowed to private individuals under the necessity defense, and the greater (state's monopoly on violence) must necessarily include the lesser (individual's use of violence).

The problem with this argument is its conflation of the *domain* of governmental power with *authorized* uses of governmental power. The state monopoly on violence is a statement about the domain of governmental power in relation to its citizens. The monopoly prohibits everyone other than the state to use violence, but that of course does not mean that *any* use of violence by the state is legitimate. For instance, only the state may punish, but the power of the state to punish is strictly regulated as to whom, when, how, and how much it may punish. Neither does the state monopoly on violence mean that a private individual's authorized use of violence necessarily has a governmental counterpart every time. All that the necessity defense does is to lift the prohibition on private uses of violence thereby creating a domain in which individuals are empowered to use violence, temporarily weakening the monopoly, but such a lifting of prohibition does not create a corresponding power for the state.

The confusion of *domain* and *authorized* uses of governmental power can easily arise in discussions of the necessity defense because the common examples used to illustrate the nature of the necessity defense involve situations in which the prohibited yet justified conduct by the individual is something that public officials are permitted to engage in as routine parts of their job (such as running a red light). The discussions encourage the perception that what an individual is doing is the job that a government official normally does or that an individual is doing what a government official or the legislature would allow him to do if they were around to give permission during situations of emergency (say, permission to run a red light). But that perception is wrong. What is allowed to happen during the suspension of the state monopoly on violence has no implications for how the state is allowed to act within its own domain. What the state is allowed or not allowed to do is determined by a whole another set of power-conferring rules, such as the Constitution, legislations, and regulations. This is why it is improper for the state to proceed from the proposition that the necessity defense allows individuals to act in certain ways in situations of emergency to the conclusion that government officials are therefore allowed to act in the same way.

Bibliography

Articles and Essays

Deontology, Political Morality, and the State, 8 OHIO STATE JOURNAL OF CRIMINAL LAW (forthcoming 2011) (invited contribution for Symposium on Criminal Law and Political Theory)

The Purposes of Punishment Test, 23 FEDERAL SENTENCING REPORTER 58 (2010) (invited comment on *Graham v. Florida*)

Repeat Offenders and the Question of Desert, in THE ROLE OF PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 49 (Julian V. Roberts & Andrew von Hirsch eds., 2010)

Recidivism as Omission: A Relational Account, 87 TEXAS LAW REVIEW 571 (2009)

The Defense of Necessity and Powers of the Government, 3 CRIMINAL LAW AND PHILOSOPHY 133 (2009) (peer-reviewed)

Desert and the Eighth Amendment, 11 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 101 (2009) (invited contribution)

International Consensus as Persuasive Authority in the Eighth Amendment, 156 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 63 (2007)

Judicial Regulation of Excessive Punishments through the Eighth Amendment, 18 FEDERAL SENTENCING REPORTER 234 (2006) (invited contribution)

The Constitutional Right Against Excessive Punishment, 91 VIRGINIA LAW REVIEW 677 (2005)

Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective, 53 AMERICAN JOURNAL OF COMPARATIVE LAW 403 (2005) (peer-reviewed)

Comments and Book Reviews

Desert, Deontology, and Vengeance, 42 ARIZONA STATE LAW JOURNAL (forthcoming 2011) (comment on Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*) (invited contribution)

Keeping Desert Honest, in CRIMINAL LAW CONVERSATIONS 49 (Paul Robinson, et al. eds., 2009)

Punishment as Reluctant Moralism, 1 CRIMINAL LAW & PHILOSOPHY 227 (2007) (review of Andrew von Hirsch & Andrew Ashworth, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005) (invited contribution)

Valuing Autonomy, 75 FORDHAM LAW REVIEW 2973 (2007) (Symposium on Minimalism and Perfectionism in Constitutional Theory)

Robin A. Lenhardt

Rethinking Race and Equality

The persistence of racial inequality in the United States has long been a concern of legal scholars. Critical race scholars, in particular, have interrogated the role of legal norms in perpetuating racial inequalities across a variety of social contexts and have proposed alternative jurisprudential frameworks for addressing these inequalities. In a fairly crowded field of impressive scholars, **Professor Robin A. Lenhardt** has emerged as a rising star among second-generation critical race theorists.

Her groundbreaking article, "Understanding the Mark: Race, Stigma and Equality in Context," provides a disciplined and systematic analysis of racial harm as a basis for moving courts beyond their highly formalistic approach to questions of racial equality. Canvassing social science literature and the history of equal protection jurisprudence, Professor Lenhardt proposes that courts consider the stigmatic impact of laws and policies in determining their constitutionality. This multidisciplinary approach to stigmatic racial harm is characteristic of her body of scholarship dedicated to creating a thicker, more comprehensive conception of equality to effectively address the harms of racism.

The lens through which Professor Lenhardt examines questions of racial equality grows, in part, out of her professional experience. She joined the Fordham Law faculty in 2004 after spending two years at Wilmer, Cutler & Pickering, where her work included serving as part of the litigation team defending the University of Michigan in *Gratz v. Bollinger* and *Grutter v. Bollinger*, two affirmative action cases decided by the Supreme Court in 2003. She has also worked as an attorney advisor at the U.S. Department of Justice's Office of Legal Counsel, a Skadden Fellow at the Lawyers' Committee for Civil Rights, and a law clerk to Justice Stephen G. Breyer of the Supreme Court. While studying for her LL.M. at Georgetown Law Center, she served as a Future Law Professor Fellow. Her teaching career began as a Visiting Professor at the University of Chicago. She received her J.D. from Harvard and her A.B. from Brown.

Professor Lenhardt's identification of racial stigmatization as a form of inequality provides an important foundation for her later work identifying exclusion from one's community as an element of racial stigmatization. She advances, for example, the idea of "belonging" as a way to understand the citizenship dimensions of marriage vis-à-vis exclusion on the basis of race and sexual orientation. In a recent article, she analyzes the relevance of *Perez v. California*, a landmark antimiscegenation case decided in 1948 by the California Supreme Court, to constitutional questions regarding same-sex marriage. Lenhardt locates in Justice Roger Traynor's opinion an articulation of the citizenship dimension of marriage: the ability to choose your marital partner. This citizenship dimension of marriage, she argues, opens up a space where questions of racial and gender exclusion from marriage are deeply and conceptually linked. This powerful rethinking of marriage, citizenship, and belonging offers a more substantive idea of equality for courts to embrace in approaching contemporary questions of marriage equality.

Excerpts

Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage

96 California Law Review 839 (2008)

Sixty-five years ago, two California factory workers, Sylvester Davis and Andrea Pérez, committed an act that would transform the terrain of race and ethnicity in the United States. They fell in love. Determined to share the rest of their lives together, Sylvester, an African American just returning from service abroad in World War II, and Andrea, the daughter of Mexican immigrants, went to the Los Angeles county clerk several years later to obtain a marriage license. The county clerk, however, refused to grant them one. Sylvester and Andrea had run afoul of California's antimiscegenation law.

On its face, this antimiscegenation law, which had been in effect from California's entry into the union in 1850, did not appear to apply to Sylvester and Andrea. It declared that "marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes" would be deemed illegal and void. Individuals of Mexican descent were nowhere mentioned in the statute. But, in California, Mexican Americans had long been regarded as white for purposes of marriage. Andrea was a mestizo who, by all accounts, did not appear phenotypically white and who, given the racial politics of California at the time, likely received none of the social privileges associated with whiteness. Ironically, though, she was deemed to fall among those whose blood had to be protected from contamination by non-Whites.

Devout Catholics interested in marrying in their neighborhood church, Sylvester and Andrea refused to resort to the strategies employed by other couples ensnared in the bramble bush of California's race regulations. They were unwilling to cohabitate, misrepresent their racial identity, or even to seek a marriage license in a sister-state without an antimiscegenation law, as many others did. They sought legal marriage on the same terms available to all Californians. And so, with the help of a civil rights attorney named Dan Marshall, they resolved to challenge California's antimiscegenation law.

This decision was significant, but not monumental in and of itself. Litigants had made various challenges to the application of antimiscegenation laws over the years. Relatively few, however, had sought to challenge the entire antimiscegenation apparatus. Andrea and Sylvester undertook this challenge and won.

On October 1, 1948, the California Supreme Court issued an opinion holding the state's antimiscegenation law unconstitutional under the Fourteenth Amendment of the U.S. Constitution. Its ground-breaking decision, which marked the first time since Reconstruction that any antimiscegenation statute had been invalidated, led to significant changes in the lives of interracial couples in California. But outside California, other state courts rarely relied on or even cited it. Indeed, for years, a footnote mention in the Supreme Court's *Loving v. Virginia* decision was Perez's greatest claim to fame.

But for the efforts of advocates in recent litigation to secure civil marriage rights for same-sex couples, Perez would have been consigned to legal obscurity. Advocates for same-sex marriage have been "loving" Perez. In cases such as In re Marriage Cases, in which the California Supreme Court recently held that "the failure to designate the official [domestic partnership] relationship of same-sex couples as marriage violates the California Constitution," advocates have treated Perez as a landmark case that sheds light on the core meaning of marriage, perhaps even more so than Loving itself. Opponents of full marriage rights for members of the LGBT community frequently attack this deployment of Perez and other similar cases, insisting that it distorts precedents that, at bottom, concern issues of race alone. In this article, I argue that this assertion could not be more wrong.

Far from distorting the meaning of Loving and other cases, the use of Perez in recent litigation helps to focus attention on the problems inherent in identity-based marriage restrictions in a way that Loving failed to do. Loving identifies marriage as one of the "basic civil rights of man," but focuses principally on the white supremacist subtext of the antimiscegenation laws. Perez, in contrast, both engages issues of race and its social construction through such law, and develops a more fulsome account of the marriage rights with which interracial marriage bans interfered. It makes clear that the fundamental right to marry involves the freedom to marry not just anyone, but the "person of [one's] choice." In this sense, Perez, with its emphasis on choice and self-expression, goes beyond the more limited articulation of marriage rights that appears in the Supreme Court's decision in Loving.

In addition, advocates' utilization of Perez in recent cases helps to highlight the often overlooked fact that antimiscegenation laws served to shape societal norms regarding gender, as well as race. To be sure, interracial marriage bans worked to define the borders of racial identity and race. By now, the mechanisms employed by states in defining who, for example, was "white" or "black" for the purposes of antimiscegenation statutes are legend. But it is also true that, for those laws, race and gender were inextricably tied. Historians have for some time focused on the race and gender dimensions of antimiscegenation laws. Legal scholars have also begun to consider in important ways the intersecting identities regulated by such provisions. The strategic embrace of Perez in the marriage cases underscores this connection and, in doing so, promises to advance understanding about antimiscegenation laws, as well as restrictions on marriage for gay and lesbian couples.

Finally, by unearthing Perez and injecting it into both legal and public conversations about modern marriage, advocates have provided us with a path out of the "analogy debate" so often a part of discussions about the rights of gay men and lesbians to marry. Perez gives us an opportunity to interrogate not just the similarities or differences in the experiences of groups that have historically had limitations placed on their right to marry, but also the fundamental nature of the right to marry and the substantive effects of state marriage regulations. I argue that, by restricting intimate choice, identity-based restrictions on civil marriage improperly limit self-definition efforts, cabin expressions of human identity and intimacy, and have a negative impact on the ability of those affected to "belong" as full members of the citizenry or broader community in which they reside.

Understanding the Mark: Race, Stigma, and Inequality in Context

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[This article makes] the case for understanding racial stigma and the negative meanings and effects associated with it as the principal source of racial injury and disadvantage in the United States. We know now what social scientists say about how [racial stigma] operates and the nature of the harms it imposes, especially those related to citizenship and the exclusion of African Americans and other minorities from the conversations, interactions, and relationships necessary for meaningful democratic engagement. This Part tries to develop an understanding of how courts have historically addressed the issue of racial stigma. More specifically, it looks at the U.S. Supreme Court and its treatment of the problem of racial stigma over time.

For many people, the Supreme Court's history with issues of racial stigma starts in 1954 with its celebrated decision in Brown or, perhaps, with its affirmative action cases, which have debated the stigmatic effects of race-conscious programs designed to remedy past discrimination or enhance diversity for decades. But, as Justice Taney's discussion in Dred Scott and his stigma-based conclusion that Blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution" suggests, the Supreme Court was forced to contemplate the legal consequences of racial stigmatization

long before Brown and the affirmative action cases arose. Indeed, a close look at Supreme Court cases in this area makes clear that a concern about the effects of racial stigma runs throughout the Court's modern cases. In the years since the Fourteenth Amendment was enacted, the Court has plainly concluded that the harms imposed by racial stigma lie at the core of the problems of inequality the Fourteenth Amendment was designed to address.

This understanding about the significance of racial stigma in the constitutional scheme did not, of course, emerge immediately. In the decades just after the Fourteenth Amendment's enactment, the Court's position on the seriousness of the threat that racial stigma posed to equality varied significantly. *Strauder v. West Virginia* provides an example of an instance in which the Court recognized the citizenship harms associated with racial stigma. In that case, the Court was asked to assess the constitutionality of a West Virginia statute excluding Blacks from jury service. Taking the view that the Fourteenth Amendment encompassed an affirmative right to be free from racial stigma and "unfriendly legislation . . . implying inferiority in civil society," the Court held that the statute, among other things, impermissibly stigmatized those excluded from jury service on the grounds of race.

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and . . . an impediment to securing [equal protection] to individuals of the race.

Plessy v. Ferguson, in contrast, found the Court unsympathetic to claims of racial stigmatization. Indeed, the Court seemed to say that racial stigmatization, to some extent, was a "just and necessary" aspect of black life. Perhaps because social, rather than political, rights—such as voting or jury service—were at issue, the Court's view was that "a statute which implies merely a legal distinction between the white and colored races" raised no real citizenship concerns. For Justice Brown, who authored the Court's opinion, citizenship referred to formal or political citizenship alone, not the broader notions of citizenship discussed in Part I. If African Americans experienced exclusion from railway cars as a "badge . . . of inferiority" prohibiting them from full citizenship, he asserted, "it is not by reason of anything found in the act," but because "the colored race . . . put[s] that construction" on it.

It would take more than fifty years for the Court to clarify its position on racial stigma's significance as a constitutional concept or principle. The Court accomplished this with its 1954 decision in Brown, which overturned Plessy. By invalidating segregated public schools as unconstitutional, the Court seemed to embrace fully the notion that racial stigma—whether it impairs social or political rights—constitutes one of the harms the Fourteenth Amendment was intended to address. Taking a page from Strauder, the Court recognized racial stigma as a problem linked directly to citizenship and the guarantee of equal protection, arguing that education provides "the very foundation of good citizenship" and that its denial on racial grounds would marginalize African-American children in the larger society. "In these days," the Court asserted, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

In addition to focusing on issues of citizenship, the Brown Court concerned itself with the psychological aspect of the harms imposed by racial stigma. The National Association for the Advancement of Colored People (NAACP) legal team that brought the consolidated cases in Brown introduced extensive social science evidence at trial and in their briefs before the Court on the racially stigmatizing and psychological effects of forced segregation, including submissiveness, diminished personal drive, and overall "feelings of inferiority." Professor Kenneth Clark's doll test, which sought to measure the psychological impact of racial stigma by recording childrens' responses to black and white dolls, was the centerpiece of this evidence. Clark reported that the African-American children tested expressed preferences for white dolls;

moreover, they most often ascribed negative attributes to the black dolls, leading Clark to conclude that the children had internalized, to their detriment, the negative identity norms so important to maintaining Jim Crow segregation.

On the strength of this and other research, the Court held that the stigmatizing effects of segregation also had an impermissible psychological impact. This portion of the Court's opinion was drafted in particularly strong terms. "To separate [black children] from others of similar age and qualifications solely because of their race," Chief Justice Warren wrote for the Court, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court's view was that the injuries flowing from racial stigma were permanent, largely because the segregation was state-sanctioned.

The Brown Court's focus on issues relating to racial stigma arguably helped put an end to the kind of uncertainty about the constitutional significance of racial stigma that existed in the wake of Strauder and Plessy. Today, the Court's equal protection cases are replete with cautionary references to the racially stigmatizing effects of discriminatory policies. And the idea that the Constitution reflects anti-stigma notions has been widely accepted. Ironically, though, a precise understanding of racial stigma and the harms it imposes has remained elusive. The Court—despite its reliance on social science evidence in Brown—has yet to bring its understanding of racial stigma in sync with what social science research currently says about how racial stigma operates. In fact, it has yet to define racial stigma with any specificity at all.

The definition of racial stigma employed at any given time seems to change by case and individual justice. In education cases following Brown, we see racial stigma being defined as a citizenship-like harm, a matter of psychological harm, or both. But the definition employed often shifts when the Court considers cases in other areas. Consider, for example, the Court's decision in *City of Richmond v. J.A. Croson Co.*, which addressed the constitutionality of a 1983 Richmond program designed to increase the number of racial minorities in the construction industry by requiring prime contractors awarded municipal contracts to subcontract at least 30 percent of the dollar amount of any contract to one or more minority business enterprises (MBEs).

Justice O'Connor, writing for the plurality, concluded that the strict scrutiny standard Justice Powell had applied eleven years earlier in articulating the judgment in *Regents of the University of California v. Bakke* should apply, rather than the more lenient intermediate standard that had been applied to a federal MBE program in *Fullilove v. Klutznick.* In explaining the need for such an exacting standard, Justice O'Connor invoked racial stigma: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

The use to which Justice O'Connor put the term "stigmatic harm," however, differs from what we have seen in the other cases discussed thus far. The utilization of the term "racial inferiority" in conjunction with a statement Justice Powell made in the admissions context—where implementation of affirmative action has, as the narrative in Part II suggests, raised old questions about the intellectual capabilities of minorities—suggests that it refers here to some intellectual infirmity or lack of overall ability, not the citizenship-based notion of stigma so prominent in Strauder or the psychological harm featured in Brown. At the same time, the notion that stigmatic harm could be imposed by a mere classification, as opposed to, say, one expressly designed to disadvantage, suggests that yet another conception of stigma was in play: the notion of racial otherness, the idea that being recognized as racially different by government—whether or not one belongs to a racial group with a history of discriminatory treatment—is its own type of stigma.
Shaw v. Reno conceptualized racial stigma in yet another way. That case involved a North Carolina redis-

tricting plan drawn to include two majority-minority voting districts. Marking a dramatic turn from its earlier voting rights precedents, the Court held that white voters could assert an equal protection claim challenging the two oddly misshapen districts as unconstitutional and impermissibly drawn for the sole purpose of electing African Americans to Congress, even though they asserted no claim of vote dilution or interference with their ability to vote. To reach this conclusion, the Court drew on the concept of racial stigma, in terms similar to those employed in Croson: "Classifications of citizens solely on the basis of race . . . 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.'"

When it lamented that North Carolina's two districts—because they were drawn to enhance minority voting strength—sent the message that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates[,]" the Court seemed poised to draw on a citizenship, psychological, or inferiority-based notion of stigmatic harm. But the danger of what it called "political apartheid" was only a piece of what motivated the Court. In the end, it was not the concern that white voters would be stigmatized as racially similar to Blacks, but the idea that they might suffer stigma as a result of not being recognized as racially distinct from them—a kind of courtesy stigma—that seemed most to concern the majority. Essentially, the Court cast racial stigma as a "reputational" type of harm, which helps explain Justice O'Connor's assertion that the redistricting plan risked telling "elected officials that they represent a particular racial group rather than their constituency as a whole."

For all the definitions of racial stigma—inferiority or citizenship, psychological, or reputational-based—that it has employed, the Court often fails to recognize racially stigmatic harm when it is present. Board of *Education v. Dowell*, a case involving a challenge to the dissolution of an Oklahoma desegregation decree, provides one illustration of this problem. *Palmer v. Thompson*, which involved Jackson, Mississippi's decision to close its swimming pools rather than integrate and open them to Blacks, as it had done with other public facilities, offers another. In Palmer, the majority declined even to consider seriously the possibility that the closings might send a negative expressive message about Jackson's African-American residents. It rejected out of hand claims that the closings stigmatized African-American residents as unfit for membership in the larger community and concluded that Jackson's actions did not deny equal protection.

A number of factors account for this failure to recognize racial stigma and for the definitional variations discussed earlier. To begin, the Court has a very narrow understanding of both the sources of racial stigma and the harms it imposes. Part I of this Article primarily located racial stigma as a problem of social meaning and norms, one that affects our unconscious, cognitive processes and responses to race and imposes harms ranging from racial microaggressions to persistent racial disadvantage in areas such as employment, education, and health care, among other things. In contrast, the Court repeatedly casts racial stigma as a problem of intentional discrimination alone. Along with the deprivation of concrete benefits such as employment opportunities or access to schools, racial stigma is seen by the Court as one of the harms of intentional discrimination, not one of its causes. By intentional discrimination, however, the Court does not necessarily mean overtly discriminatory acts of the sort discussed in Part II.

Under the Court's cases, the mere consideration of race as a factor in government decisionmaking can, in certain circumstances, result in racial stigma. *Shaw v. Reno,* a case in which the plaintiffs alleged no deprivation of any right whatsoever, is perhaps the strongest evidence of this. Racial stigma, for the Court, has become a sort of reputational harm, one that can arise by the mere acknowledgement (or failure to acknowledge) of racial difference. This superficial understanding comports with the very narrow, formalistic interpretation of the Equal Protection Clause and the notion of equality the Court has adopted in its race cases in the last two or three decades, but it is, as we have seen, very much out of sync with

current sociological views on the problem of racial stigma and the very substantive citizenship effects—social, economic, and political—that it can have on stigmatized individuals.

Additionally, the Court has no consistent, structured mechanism for analyzing cases involving a risk of racial stigmatization. Indeed, although the Court has often regarded racial stigma as a problem of constitutional dimensions, it is difficult to predict when or how the Court will deem it necessary even to mention the potentially stigmatizing effects of a challenged policy or action. This, admittedly, is not so much a direct conflict with social science as it is a consequence of ignoring some of its core teachings about how racial stigma operates. As I indicated earlier, the social science insight that racial stigma is very much mediated by context and the historical realities of race in the United States provides a clue as to how to approach the task of assessing the risk of racially stigmatic harm. One must, at a minimum, be focused on the historical context out of which an allegedly stigmatizing program or policy stems, if racial stigma is ever to be effectively addressed.

The Court, however, has not demonstrated that it can reliably be expected to engage in such contextualizations. We can, of course, point to some instances in which the Court has tried to place its decisions within a broader context that would allow for interpretation of stigmatic meaning. In Brown, for example, the Court's conclusions were based, in part, on its broad interpretations of the Fourteenth Amendment's purposes and an understanding of the important role that education had come to play in the development of future citizens. An expansive view of context also made it possible to interpret stigmatic meaning in Strauder.

There, the Court looked to examples of discriminatory laws in effect at the time, as Justice Taney did in Plessy, but also endeavored to understand the overall context in which the Fourteenth Amendment was adopted. "The true spirit and meaning of the [civil rights] amendments," Justice Strong, the author of the majority opinion in Strauder, admonished, "cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish."

But the deliberate consideration of context seems to have been jettisoned in later cases. Consider *Shaw v. Reno*, where, in recognizing a voting rights claim for the white plaintiffs, the Court imputed a history of discrimination and deprivation to Whites without any hesitation, much less evidence of actual harm, despite the fact that evidence of harm in the voting rights context pertained primarily to African Americans. One can also look to cases such as Palmer or Dowell, where decisions about the actuality or risk of stigmatization were essentially made in a vacuum, without any inquiry into past and future contexts.

In far too many cases, the analysis employed by the Court has been ahistorical and willfully ignorant of relevant contexts, and, thus, necessarily incomplete. Essentially, the Court has no principled way for evaluating a potentially stigmatizing program or, for that matter, for deciding between two options that each run a risk of stigma. Were it not for the seriousness of the harms that racial stigma imposes, the Court's narrow approach and refusal to take into account social science in this area arguably would not be cause for concern, much less the subject of an Article. But we know from Part II that refusing to attend to the problem of racial stigma has real consequences—individual and collective—for the people it affects.

In failing to adopt a consistent approach to racial stigma, the Court, in a very real sense, becomes complicit in its perpetuation. If the Court is to fulfill its mandate in Fourteenth Amendment cases, it must develop a strategy to address the full range of racially stigmatic harms—those that arise from intentionally discriminatory acts as well as those that are imposed unconsciously or as a result of cognitive processes of which individuals are not necessarily aware. What is required, in sum, is a more comprehensive approach to identifying and remedying racial stigma than has heretofore been suggested in the Court's cases or in legal scholarship.

Bibliography

Law Review Articles

Proposition 8, Race, and the Meaning of Marriage (work-in-progress)

Racial Vagueness (work-in-progress)

Race Audits, 62 HASTINGS LAW JOURNAL _____ (2011)

Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage, 96 CALIFORNIA LAW REVIEW 839 (2008)

Rethinking Work and Citizenship (with J.Gordon), 55 UCLA LAW REVIEW 1161 (2008)

Understanding the Mark: Race, Stigma, and Equality in Context, 79 NEW YORK UNIVERSITY LAW REVIEW 803 (2004)

Law Review Symposium Contributions and Shorter Works

Forty Years of Loving (with E. Cooper, S. Foster, and S. Katyal), 76 FORDHAM LAW REVIEW 2669 (2008)

Citizenship Talk: Bridging the Boundaries Between Immigration and Race Perspectives (with J. Gordon), 75 FORDHAM LAW REVIEW 2493 (2007)

Grave Building: A Tribute to Charles J. Ogletree. Jr. and His Evolving Legacy, 22 HARVARD BLACKLETTER LAW JOURNAL 154 (2006)

Book Chapters

Perez v. Sharp and the Limits of Loving in LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE (Kevin Maillard & Rose Cuison Villazor, eds., 2010)

The Story of Perez v. Sharp: Forgotten Lesson on Race, Law, and Marriage in RACE LAW STORIES, (Devon W. Carbado & Rachel F. Moran, eds., 2008)

Rethinking Inequality: Race and Stigma in the Classroom (forthcoming chapter in ECONOMIC JUSTICE, Emma Coleman Jordan and Charles Ogletree, eds.)

The Racial Subject in Legal Theory (with S. Foster) in THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, et al., eds., 2008)

Policy Papers

Conflict and Solidarity Between African American and Latino Immigrant Workers (with J. Gordon) (University of California-Berkeley Law School, Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity Policy Paper, November 2007)

John Pfaff

The Future of Empirical Legal Scholarship

Legal scholarship has undergone a tremendous methodological transformation over the last decade. The growth of computing power and wide availability of sophisticated statistical software have emboldened many legal scholars to undertake rigorous empirical research. Even as they approach legal disputes and policy questions with careful data collection and thorough statistical analysis, scholars are increasingly faced with questions about the ability of empirical methodology to answer important normative legal questions.

Professor John Pfaff is at the forefront of this revolution in legal scholarship and, paradoxically, one of its strongest critics. With a law degree and Ph.D. in economics from the University of Chicago, Pfaff is well situated to examine the interplay of legal theory and social science research.

Pfaff's scholarship poses and meticulously examines empirical questions at the heart of the robust legal and policy debates concerning criminal sentencing and incarceration. His work on incarceration has focused on explaining how the U.S. prison population has quintupled since the 1970s, both by exposing the systematic methodological shortcomings of earlier empirical work and by developing new models to elucidate these issues. Committed to improving the way that empirical evidence is used in these debates, Pfaff has focused on identifying and distinguishing methodologically sound statistical studies and finding ways to mitigate problems arising from the legal system's reliance on "dueling experts." For his work on the latter topic, Professor Pfaff earned a two-year grant from the John Templeton Foundation and the University of Chicago's Arete Initiative for the study of wisdom.

Pfaff's early work examined whether voluntary sentencing guidelines could yield sentencing outcomes as consistent as those brought about by mandatory guidelines, a question of significant importance after the Supreme Court's *Blakely v. Washington* opinion declared mandatory guidelines unconstitutional. Pfaff demonstrated that voluntary guidelines, while perhaps not as effective, can serve as viable alternatives. Pfaff then turned his attention to the broader question of empirically evaluating factors (including sentencing guidelines) that contributed to the striking surge in U.S. incarceration rates over the past three decades. He found that many empirical models devised to determine the cause of the prison population explosion were methodologically flawed.

In his own empirical studies, Pfaff has demonstrated that the rise in prison populations came, primarily, through admissions to prisons—i.e., *the willingness to incarcerate increasingly minor offenders in the first place*—and not from length of time served. He is now interested in devising better measures of the forces that shaped admissions during the prison boom.

His concerns with methodological problems in criminology have led Pfaff to examine ways to improve how the social sciences, in general, produce empirical knowledge. He posits that stunning advances in computer technology over the past several decades have enabled a dramatic increase in the volume, but not always the quality, of empirical work. Pfaff argues that the social sciences, like the fields of medicine and epidemiology, must develop rigorous quality assessment tools for evaluating empirical research. Pfaff's scholarly activity centers on developing tools to address the specific needs of social scientists. Pfaff argues that such tools could significantly improve how empirical conclusions are made in the law.

Excerpts

A Plea for More Aggregation: The Looming Threat to Empirical Legal Scholarship*

Work in Progress

The empirical social sciences, including empirical legal scholarship (ELS), stand at a critical threshold. A technological revolution over the past three decades has led to a tremendous boom in the production and use of empirical work, thanks to staggering advances in computing power and storage. But this boom has also exposed deep problems in the traditional methods empiricists use to produce knowledge; though perhaps always present, these problems are now unavoidable thanks to the surging volume of empirical analysis. As a result, in some empirical disciplines—particularly medicine and epidemiology—the technological revolution has inspired a parallel philosophical revolution, namely the Evidence Based Policy (EBP) movement. At one level, EBP appears to focus simply on developing more rigorous techniques for synthesizing knowledge from a growing (and often contradictory) body of studies. But at a deeper level it reflects a new, and substantially superior, philosophy of science for the biological and social sciences.

Unfortunately, while taking full advantage of the technological revolution, the social sciences have almost completely overlooked the need for the philosophical revolution: the concerns raised by EBP's proponents are often unheard, and the solutions they have proposed generally ignored. This is dangerous, particularly for the law. The growth in empirical analysis has increased the volume of contradictory claims. Some of the disagreement is surely due to just the general noisiness of statistical results, but by lowering the costs of producing empirical work, the technological revolution has made it easier for partisans to cynically produce skewed studies and for unskilled analysts to naively produce erroneous results.[1] At times, a corollary of Newton's Third Law appears to hold: for every empirical claim there is an opposite (though by no means necessarily equal) claim. And current practices in the social sciences, shaped by a misguided philosophy of science, are poorly equipped to sort through the disagreeing voices.

The dangers that such a cacophony pose for litigation and regulation, and policymaking more generally, are clear. In recent years the law has embraced empirical analysis, with more scholars undertaking rigorous empirical projects, more non-empiricists wrestling with the implications of empirical findings, and more legal disputes invoking empirical evidence. But without some means of differentiating the good studies from the bad, and of obtaining a holistic understanding of what the good results imply, empirical disciplines—both within and outside the law—will be incapable of providing meaningful guidance. And should this happen, legal actors will be forced to rely less on a rigorous understanding of how the world works and more on mere guesswork or, even worse, self-satisfying assumptions.[2]

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[1] Michaels (2008) and Taverne (2007) provide good examples of manipulation by industry and environmental groups, respectively. McGarity and Wagner (2008) also provide an overview of such efforts to "bend" science.

[2] An extensive literature laments the legal preference for assumption over fact: see, for example, Meares & Harcourt (2000) and Faigman (1991, 1989).

In this paper, I explore the changes that the social sciences and empirical legal scholarship need to adopt to effectively channel the current flood of empirical work. My core assertion is that these fields need to shift primary attention away from individual studies and toward the rigorous "systematic reviews" that EBP has developed to synthesize entire literatures examining particular phenomena. That is not to say we should stop producing new studies—after all, without new work, what is there to synthesize? But the rigorous review must not be something done sporadically and infrequently, and that is viewed as "unoriginal" research. Instead, it must become both the central product of legal empiricists[3] and the primary source relied on by those making empirical claims.

The argument here is not just one of degree—I am not simply proposing that systematic reviews be used more often.[4] The focus on individual studies, or on string cites of results, is indicative of a much deeper problem. The empirical social sciences do not think carefully about matters of epistemology, and as a result they produce knowledge poorly. No new statistical technique nor methodological improvement will really enable empirical disciplines such as ELS to produce genuinely useful results until these fields fundamentally reform how they generate knowledge.

I develop three points in this paper. The first is that unless the social sciences address their epistemological shortcomings, they will not be able to properly handle the boom in empirical work driven by the technological revolution. Empirical social scientists are trained to think along (roughly) Popperian lines: the purported goal of every empirical study is to refute a null hypothesis. But this is not in fact what empiricists do (see, for example, Redman 1991), which leads to a serious conceptual problem, namely encouraging analysts to focus on individual studies rather than the literature as a whole. A single-study approach is valid in a Popperian world, since the discovery of one black swan refutes the hypothesis that all swans are white. But in practice social scientists try to measure effect sizes, since meaningful policy analysis requires us to know what fraction of swans are black. This, however, is estimation, not refutation—induction, not deduction. And induction requires a holistic perspective.

Fortunately, the systematic review provides a powerful way of synthesizing a wide array of empirical results that directly addresses these concerns. The second goal of this paper, then, is to examine how to design such reviews in the social sciences. The current form of review essay that the empirical social sciences use—what I call the "authoritative review"[5]—is poorly suited to the task of producing knowledge. Almost all authoritative reviews, whether qualitative (narrative) or quantitative (meta-analytic), rely on informal, non-rigorous methods for collecting relevant studies, assessing the quality of their claims, and synthesizing their findings. ELS and the social sciences must embrace the more rigorous evidence based systematic reviews that have been revolutionizing fields like medicine and epidemiology. These employ well-designed protocols to gather an entire literature, evaluate the quality of the relevant studies, and extract a conclusion from them (see, e.g., Guzelian et al. 2005, Moher et al. 1995, and Petticrew and Roberts 2006). As a result, they are substantially more transparent, comprehensive, and objective than authoritative reviews, and thus they are significantly more reliable.

[3] Unfortunately, philosophers and social scientists often use the same words for different concepts. As one of the latter, I use the social science definitions here. Thus "empiricist" refers to someone engaged in data analysis, in contrast to a theorist; I do not use the word to refer to those who follow, say, logical empiricism. Also, I use "positive" here to refer to "is" statements, in contrast to normative "ought" statements; again, I am not referring to concepts such as positivist schools of thought in the philosophy of science.

[4] After all, meta-analyses are forms of systematic reviews, and these are used from time to time in the social sciences.

[5] So-called because its reliability rests heavily (and problematically) on the analyst's assertion of authority.

At least in theory. Designing such reviews in practice, however, raises a host of pragmatic challenges. What, for example, constitutes a "high quality" study? And how do we accurately assess and measure that quality? Defining quality and a means of measuring it will be particularly challenging for the social sciences, such as ELS, that rely mainly on non-experimental, observational data. But these are essential questions, not just for the design of systematic reviews, but for the production of empirical knowledge in general. So besides laying out the theoretical benefits of systematic reviews, I also begin to explore here how to address the concrete problems of review construction.

I also emphasize the perhaps counterintuitive, but fundamentally important, point that failure to resolve these issues should not be feared as a bad thing but *embraced as a good*. Disagreement about what constitutes, or how to measure, high quality research reflects a meaningful epistemic limitation, one that must be acknowledged and confronted. If we cannot agree on what is high quality or how to evaluate it, how can we put our faith in any one study, much less be confident that we have determined the implications of an entire literature? And without such confidence, how can we expect empirical analysis to shape public policy in predictable and beneficial ways? We must be cognizant of, and honest about, the limits to the empirical claims that we make. In many ways, the philosophical revolution may act as an important brake on the technological revolution. Where technological change may lead us to think that we can solve almost any problem by throwing enough data and computing power at it, the philosophical revolution encourages us to acknowledge our epistemic limitations.

The third issue I briefly explore in this paper moves away from the social sciences and considers the effect systematic reviews will have on the use of empirical evidence in legal settings. Courtrooms are often arenas for dueling partisan experts squaring off before baffled judges or jurors. Reforms to improve how courts use scientific evidence have been proposed for nearly three hundred years, but all have by and large failed (Cheng 2007, Galan 2004). Once we take a close look at how empirical disciplines traditionally produce knowledge via authoritative reviews, a surprising reason for the failure emerges. The problem is not (as is often stated) the *differences* between legal and scientific epistemologies, but the *similarities*. Knowledge production via authoritative reviews parallels strikingly such production by dueling partisan experts. Like partisan experts trying to win over a legal jury, competing scientific authorities debate each other in an effort to sway a jury of their disciplinary peers. The epistemological shift that has fueled the development of quality guidelines and systematic reviews thus provides a fundamentally different way to generate empirical knowledge and thereby creates an opportunity for meaningful reform.

This paper proceeds as follows. Part 1 briefly discusses the technological revolution of the past thirty years and then examines the epistemic shortcomings of current empirical scholarship in the law and the social sciences and the alternative offered by evidence based policy. Part 2 lays out the argument for replacing the current authoritative review with the systematic review developed by proponents of EBP. It begins by sketching the deficiencies in authoritative reviews, and it then explains the basic design of, and need for, systematic reviews. Part 3 addresses some of the substantive developmental challenges these reviews face, particularly how to define and measure quality. And Part 4 concludes with a short overview of how the development of systematic reviews opens the door to meaningfully reforming how complex scientific evidence is used in legal settings.

Before continuing, I would like to point out that most of my sources here come from medicine and epidemiology. This is not accidental: the social sciences, including ELS, have simply not begun to address this issue yet in any way. I touch on some of the reasons why this may be the case below. But in the end, these provide only explanations, not excuses. It is essential for the social sciences to start confronting this issue itself.

References

Cheng, Edward K. 2007. "Same Old, Same Old: Science Evidence Past and Present." *Michigan Law Review* 104: 1387–1402.

Faigman, David L. 1991. " 'Normative Constitutional Fact-finding': Exploring the Empirical Component of Constitutional Interpretation." *University of Pennsylvania Law Review* 139: 541–614.

----------. 1989. "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy." *Emory Law Journal* 38: 1005–1096.

Galan, Tal. 2004. *Laws of Men and Laws of Nature.* Cambridge: Harvard University Press.

Guzelian, Philip S., Michael S. Victoroff, N. Christine Halmes, Robert C. James, and Christopher P. Guzelian. 2005. "Evidence-Based Toxicology: A Comprehensive Framework for Causation." *Human & Experimental Toxicology* 24: 161–201.

McGarity, Thomas O., and Wendy E. Wager. 2008. *Bending Science: How Special Interests Corrupt Public Health Research.* Cambridge: Harvard University Press.

Meares, Tracey L., and Bernard E. Harcourt. 2000. "Forward: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure." *Journal of Criminal Law & Criminology* 90: 733–798.

Michaels, David. 2008. Doubt is Their Product: *How Industry's Assault on Science Threatens Your Health.* Oxford: Oxford University Press.

Moher, David, Alejandro R. Jadad, Graham Nichol, Marie Penman, Peter Tugwell, and Sharon Walsh. 1995. "Assessing the Quality of Randomized Controlled Trials: An Annotated Bibliography of Scales and Checklists." *Controlled Clinical Trials* 16: 62–73.

Petticrew, Mark and Helen Roberts. 2006. *Systematic Reviews in the Social Sciences.* Malden: Blackwell Publishing.

Redman, Deborah A. 1993. *Economics and the Philosophy of Science.* Oxford: Oxford University Press.

Taverne, Dick. 2007. *The March of Unreason: Science, Democracy, and the New Fundamentalism.* Oxford: Oxford University Press.

The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices

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The scope of incarceration in the United States is hard to underestimate. Approximately 1.6 million people are currently in prison, an incarceration rate of approximately 700 per 100,000, or nearly 1 out of every 130 Americans (and about 1 out of every 20 black men).[1] The United States possesses only 5% of the world's population, but it houses one third of its prisoners (Walmsley 2007), and cash-strapped states are spending nearly $40 billion per year to incarcerate them. This is a new development: the U.S. incarceration rate was a steady 100 per 100,000 people for nearly 50 years, from 1920 (when the statistics are first gathered) through 1970, at which time there were only 300,000 people in prison. The subsequent quintupling of prison populations is an event unseen here or abroad.

Yet equally remarkable is how little we actually understand about causes of this buildup. Researchers have posited a wide array of insightful theories, and in some cases they have mustered anecdotal or historical evidence in corroboration. But there is scant rigorous empirical evidence, and what work has been done has primarily taken the total stock of prisoners as the dependent variable. As I argue in Pfaff (2008), this stock variable is shaped by a host of concurrent and lagged factors that cannot be easily modeled,[2] and it is ultimately unclear if these efforts have produced any well-identified estimates.

The flow variables of admissions and releases are substantially more conducive to empirical analysis. A few empirical studies have looked at admissions,[3] but none has rigorously examined releases. This paper starts to fill this gap, as part of a broader empirical project examining trends in American prison populations over the past thirty years. Despite the claims and anecdotes—in media and academic writings alike—about the severity of contemporary sentencing policy, we have at best only a weak understanding of what patterns in time served actually look like. This paper provides a rich descriptive account of time served in prison, demonstrates that prison growth has been driven primarily by changes in admission policy rather than release policy, and examines how inmate characteristics such as race, ethnicity, sex, age, and conviction offense influence time served.

To date, investigators have made only rough forays into release policy, looking at releases through crude approximations of time served such as dividing the number of prisoners admitted in a given year by that year's total prison population (see, e.g., Blumstein & Beck 1999).[4] Taking advantage of the National Corrections Reporting Program (NCRP), a highly detailed—and underused—dataset, I can map (to the day) how the time served by individual inmates changes over a ten- to twenty-year period in a sample of eleven states. As a result, I am able to paint a much more detailed and nuanced picture of the time spent in prison and its effect on overall prison growth.

[1] The recent report by the Pew Center on the States' Public Safety Performance Project (2008) puts the incarceration rate at 1 out of every 100 adults. The rate is 1 out of 130 Americans of all ages.
[2] The prison population in 1995 is a function of criminological, economic, political, and demographic conditions in 1995, 1994, 1993, and so on into the past. The models done so far, however, essentially regress, say, unemployment in 1995 on the stock of prisoners in 1995, and it is thus unclear what the coefficient really means.
[3] See Stucky et al. (2005), Nicholson-Crotty (2004), Listokin (2003), Sorensen & Stemen (2002), Marvell & Moody (1997, 1996), Jacobs & Helms (1996) and Marvell (1995). All but Listokin (2003), however, suffer from substantial identification problems (Pfaff 2008).
[4] Thus if 10,000 people were admitted in 1990 and the total prison population were 100,000, this formula returns an average sentence length of 10 years. This would be an accurate estimate were the prison population in equilibrium, but during periods of change it is inaccurate.

The results stand in stark contrast to conventional wisdom, which often argues that prison growth has been driven by increasingly punitive, "tough-on-crime" legislatures passing harsher and harsher sentencing laws—such as mandatory minimums, truth-in-sentencing laws, two- and three-strike laws, and parole abolitions—even as crime rates entered their long decline in the 1990s. Media accounts of sentencing focus heavily on shockingly long sentences for relatively minor crimes. Academics have similarly focused on longer sentences: Blumstein and Beck (1999), for example, argue that 57.7% of the growth in prison population between 1980 and 1996 was due to longer sentences.

The results from the NCRP tell a much different story. In many states, the median time served has declined over much of the 1990s; so too has the 75th percentile of time served, and even the 90th in some cases. As I demonstrate below, it is undoubtedly clear that the United States has become more punitive over the past thirty years, but rarely with respect to sentence length *actually served*. It is our willingness to incarcerate in the first place, not to keep people in prison once admitted, that appears to have been the fundamental engine of prison growth since the late 1980s and early 1990s.[5]

It is important, however, not to overstate this point. First, the rise in admissions has been driven at least in part by the incarceration of increasingly minor offenders, who likely serve shorter sentences; after all, prison populations grew during the longest recorded crime drop in American history. Comparing time served by those admitted in 1988 to that served by those admitted in 1998 is thus challenging, since the two groups are not identical—a greater fraction of those admitted in 1998 would be serving short(er) sentences even if sentencing policy had grown more severe. Controlling for this shift in the distribution of offenders yields less dramatic results, but ones that still suggest time served has frequently remained relatively constant or even declined.

Second, other countervailing trends may mask the effect of increasingly punitive practices. Some states, for example, parole prisoners quickly but violate them back aggressively—the median prisoner in California serves only about 180 days, but California violates nearly 30% of its parolees back to prison in any given year (accounting for approximately 43% of all parolees violated back in the United States).[6] If a large number of inmates return to prison at least once, is the median time 180 days or 360 days? Also, capacity may limit time served, so were admission rates to decline, total population may decline more slowly—with more capacity available, states may force prisoners to serve longer fractions of their (longer) sentences.

And third, aggregate state-level quantiles may mask important differences in time served across various types of prisoners. To explore this issue more carefully, I develop offender-level survival models to examine the effects of race, ethnicity, sex, age, and (broadly-defined) offense type on time actually served. My aggregate results appear to overstate time served by non-violent and by elderly inmates, and they understate time served by the young and by the Hispanic. No other trait—including race—appears to significantly influence time served.[7]

[5] Because of limitations in the data, I cannot compare the relative importance of admissions to that of time served prior to the late 1980s. [Data from the Bureau of Justice Statistics, however, suggest] that increasing time served may have played a more important role in prison growth from the 1970s through the mid-1980s.
[6] This is an approximation—180 days comes from the 2002 NCRP data, while the parole data come from the 2006 BJS survey of parole practices (Glaze & Bonczar 2007).
[7] Though employment status or, say, education could affect time served as well, the five traits list here are the only five consistently reported in the NCRP. Particularly disappointing is the NCRP's failure to provide data on prior convictions: though officially included in the data, the entry is blank for every inmate in every state in every year.

The results in this paper shed new, and important, light on US penal policy. First, they indicate that our attention to sentencing[8] matters is at least partially misplaced. While institutions such as Families Against Mandatory Minimums and the Kennedy Commission (2004) challenge sentencing regimes such as mandatory minimums, most of the growth in prison population has come through admissions, an area that receives substantially less attention; and the one facet of admissions that receives perhaps the most attention—the incarceration of low-level drug offenders—is relatively unimportant.[9] Tough-on-crime activists likewise focus on passing increasingly draconian sentences that appear to have little effect on actual outcomes. Reformers on both sides are thus looking in the wrong place.

Second, these results suggest that despite its great size the US prison population need not be particularly stable. Rising admissions drive the current growth in prisons, and admission rates—unlike release rates—can change immediately.[10] Again, though, it is important not to overstate this point. A small cadre of very-long serving inmates could exert a disproportionate effect on both the size and rate of change of the prison population. As a result, a one-year admissions freeze in, say, California, where the 75th percentile time to release is one year, need not result in the prison population falling by 75%.[11]

[8] To be clear, I use "sentencing" to refer to choices about how long to incarcerate someone already heading to prison, not the decision whether to incarcerate in the first place; that falls under "admissions." The line, however, is not always clear—admission can be thought of as raising time served from zero to something greater than zero.

[9] While the number of drug offenders in prison, and their share of the total prison population, has risen over the years, their importance peaked at about 20% of the nation's total population. The incarceration of low-level violent and property offenders thus appears to be much more important.

[10] Changes in sentencing policy generally operate with a lag. Reducing the sentence for burglary from ten years to six years will have no effect for six years (ignoring parole), while changing the admissions rate for burglary reduces the prison population instantly.

[11] Consider the following example. A state admits 100 prisoners per year: 25 serve three-year terms, 25 serve one-year terms, and 50 serve six-month sentences. The median time served is six months, and the 75th-percentile one year, as in California. In equilibrium, the prison population at any given point is 125. If the state imposed a one-year ban on admissions, total population would immediately drop to 50, a 60% decline (despite 75% of all prisoners being released within one year). The longer the right tail, the smaller the effect of the one-year freeze: if the 25 long-timers served four years, the one-year freeze would result in a 43% drop from 175 to 100; if they served ten years, a 25% drop from 300 to 225. (Conversely, if they served two years, the drop would be the full 75%.) I examine this issue more fully in Pfaff (2010), and I find that these long-serving inmates do not impose too strong a barrier to real reform.

References

Blumstein, Alfred, and Allen J. Beck. 1999. "Population Growth in the US Prisons, 1980-1996." In *Prisons*, edited by Michael Tonry and Joan Petersilia. Chicago: University of Chicago Press.

Glaze, Lauren E., and Thomas P. Bonczar. 2007. *Probation and Parole in the United States, 2006*. Washington, D.C.: Bureau of Justice Statistics.

Jacobs, David, and Ronald E. Helms. 1996. "Toward a Political Model of Incarceration: A Time-Series Examination of Multiple Explanations for Prison Admission Rates." *American Journal of Sociology* 102: 323–357.

The Justice Kennedy Commission. 2004. *Report to the ABA House of Delegates*. Washington, D.C.: American Bar Association.

Listokin, Yair. 2003. "Does More Crime Mean More Prisoners? An Instrumental Variables Approach." *Journal of Law and Economics* 46: 181-206.

Marvell, Thomas B. 1995. "Sentencing Guidelines and Prison Population Growth." *Journal of Criminal Law & Criminology* 85: 696–709.

Marvell, Thomas B., and Carlisle E. Moody. 1997. "Age-Structure Trends and Prison Populations." *Journal of Criminal Justice* 25: 115–124.

----------. 1996. "Abolishing Parole: The Long-Term Impacts on Prisons and Crime." *Criminology* 34: 107–128.

Nicholson-Crotty, Sean. 2004. "The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time." *Crime & Delinquency* 50: 395–411.

Pew Center on the States. 2008. *One in 100: Behind Bars in America* 2008. Washington, D.C.: The Pew Charitable Trusts.

Pfaff, John F. 2010. "The Durability of Prison Populations." *University of Chicago Legal Forum* 2010 (forthcoming).

----------. 2008. "The Empirics of Prison Growth: A Critical Review and Path Forward." *Journal of Criminal Law and Criminology* 98: 101–179.

Sorensen, Jon, and Don Stemen. 2002. "The Effect of State Sentencing Policies on Incarceration Rates." *Crime & Delinquency* 48: 456–475.

Stucky, Thomas D., Karen Heimer, and Joseph B. Lang. 2005. "Partisan Politics, Electoral Competition and Imprisonment: An Analysis of States Over Time." *Criminology* 43: 211–248.

Walmsley, Roy. 2007. *World Prison Population List (Seventh Edition)*. London: King's College London International Centre for Prison Studies.

Bibliography

Book Chapters

Gary Becker, in PIONEERS OF LAW AND ECONOMICS, (Joshua Wright & Lloyd Cohen, eds.) (2009)

Published and Forthcoming Papers

The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program, AMERICAN LAW AND ECONOMICS REVIEW (forthcoming 2010)

The Durability of Prison Populations, 2010 UNIVERSITY OF CHICAGO LEGAL FORUM 73 (2010)

The Future of Appellate Sentencing Review: Booker in the States, 93 MARQUETTE LAW REVIEW 683 (2009)

The Empirics of Prison Growth: A Critical Review and Path Forward, 98 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 547 (2008)

The Vitality of Voluntary Guidelines in the Wake of Blakely v Washington: *An Empirical Assessment*, 19 FEDERAL SENTENCING REPORTER 202 (2007)

The Continued Vitality of Structured Sentencing Following Blakely: *The Effectiveness of Voluntary Guidelines*, 54 UCLA LAW REVIEW 235 (2006)

Other Publications

Reform School: Five Myths About Prison Growth Dispelled, SLATE, February 19, 2009

It's the Media, Not Juveniles, Who Are Delinquent: A Panic About Names, HUFFINGTON POST, February 3, 2009

Working Papers and Works in Progress

Model Uncertainty and the Effect of Incarceration on Crime: A Bayesian Analysis (with Jeffrey A. Fagan and Ethan Cohen-Cole)

A Plea for More Aggregation: The Looming Threat to Empirical Legal Scholarship

Adversarial Law and Actuarial Science: Incorporating Systematic Sources of Knowledge Into the U.S. Legal System

Aaron Saiger

Education and the Law

Ever since *Brown v. Board Of Education*, American lawyers have known that the law and policies affecting how and where our children are educated is a critical subject for the United States. Yet education law has become immeasurably more complex over the past fifty years; from vouchers to school choice to No Child Left Behind, the legal and policy issues on education have exploded in scope and importance.

Fordham's **Professor Aaron Saiger** is among the country's most original and sophisticated scholars of education law. A former law clerk to Justice Ruth Bader Ginsburg, Editor of the *Columbia Law Review*, and Ph.D. in Public Affairs from the Woodrow Wilson School at Princeton University, Saiger conducts research that operates at the highest level in both law and political science. As the following excerpts illustrate, Saiger has made the case that we need both *greater realism* about the severity of the challenges we face in equalizing educational outcomes, and *more nuanced strategies* for dealing with the facets of local politics that hamper educational reform. Among Professor Saiger's most important contributions to the field of education law is the insight—developed in several articles—that we must move beyond the conflict between local control and central control of education by recognizing the definition of localities *is itself a matter of policy choice*. In education, as in voting rights, for example, Saiger argues that our political system has the capacity to address problems by reassessing political boundaries that have merely been assumed.

Professor Saiger's work takes as its starting point the difficulty of making changes in educational outcomes through legal reform, particularly given that the primary determinants of educational achievement resist direct government control. Because the big drivers of educational achievement are the income, educational background, and zip code of a child's parents, there are real limits on the extent to which legal reforms can produce greater educational equity. In Professor Saiger's view, the law that regulates schools is elastic and malleable in some ways but also is independently committed to values of inertia and consistency. Schools are entrenched government bureaucracies and also potential sites of innovation.

Until recently, the dominant approach to legal educational reform had been to insist upon financial arrangements that mitigate the problems created by local control. Many states' supreme courts demanded equalization of funding: wealthy school districts cannot spend per child as much as they would like so long as poor districts spend very little. This solution and others like it, Saiger tells us, have not reliably generated better outcomes for poor children. This is because they rest upon unproven and unwarranted assumptions about the technology of education—the processes that turn inputs like money and teachers into desired outcomes. At the same time, educational technology is no "black box"; schools and society are capable of better understanding, and improving, educational practice. Saiger therefore wants to insure that legal and institutional efforts to promote equity or effectiveness encourage the key actors in the educational system to experiment and vigorously to seek more efficacious educational technologies. In his mind, to proceed either as if we understand the relationships between educational inputs and outputs, or as if such relationships are a "black box" irreducibly resistant to our understanding, is to insist that we leave schools, too many of which are failing in their missions, largely free to resist accountability and change.

Excerpts

Local Government without Tiebout

41 Urban Lawyer 93 (2009)

By purchasing or renting a home, one also purchases or rents a basket of local public goods. What is in that basket, along with its associated tax burden, can matter to a prospective resident at least as much as acreage or the size of the master bedroom. And a defining feature of American local government is that the content of the local public goods basket varies dramatically from place to place.

This substantial and ubiquitous interjurisdictional variation in the availability of local public goods elicits widely divergent normative assessments, often in literatures that routinely talk past one another. Literatures on local and regional government, environmental justice, school finance and other public goods frequently regard interlocal variation as insidious because it correlates with wealth. The very poor, such arguments run, know too well that they will be stressed at least as much by the pathologies of a destitute neighborhood—high crime, bad schools, dirty air, and inferior public services—as by the low quality of their own, individual housing. The wealthy correspondingly can expect their expensive homes to be surrounded by similar homes on similarly large lots, with access to top-notch public schools and other public amenities. To require the poor to purchase public goods along with private housing (and other necessities) ensures that they will get little of either. But access to public goods, such arguments continue, should not depend upon private means.

Other literatures, primarily economic but also in political theory, celebrate variation in the provision of local public goods. They understand it as an inevitable consequence of allowing residents to choose among localities and simultaneously empowering those localities to determine what public goods they will offer their residents, and to levy taxes accordingly—two policies with considerable appeal. Empowered local polities facilitate individual political participation, which can be distressingly attenuated with respect to more distant state and national authorities. They permit people to band together in order to pursue diverse ways of life and diverse preferences. They facilitate experiment.

Perhaps most important, residential mobility across empowered localities promotes efficiency in the production and allocation of local public goods. Charles Tiebout argued, a half-century ago, that mobile residents permitted to sort themselves among various localities, each offering different bundles of local public goods and associated taxation, will select the package that they prefer most. Localities' concomitant adaptation to residents' preferences tethers the production of public goods to people's desires and willingness to pay. These efficiency advantages can be had only where local governments make their own decisions about taxing and spending.

This Article makes two arguments. [First, it] identifies the problems that critics associate with variation in local public goods as challenges to Tiebout sorting, not to robust local autonomy. Because efficiency assumes a budget constraint—goods are efficiently allocated if they go to those most willing to pay for them—efficiency in the distribution of public goods helps the rich more than the poor. When, as they often do, preferences for public goods themselves correlate with wealth, allocative efficiency further encourages the rich to withdraw into enclaves that exclude the poor, and to focus on providing public goods only for themselves. Such a system sacrifices equity, democratic values and even productive efficiency.

But these are objections to sorting, not to the empowerment of local governments. Autonomy has valuable features, independent of sorting, that do not promote inequality. Therefore, the appropriate response to the correlation between wealth and the quality of public goods is not to supplant local government, as has been suggested, with state or regional government, with markets or with hybrid institutions. Rather, it is to maintain local government while seeking to undermine sorting. Critics should seek, in short, local autonomy without Tiebout.

[Second, the Article] argues that election law offers a well-developed paradigm that can advance this objective. Both constituting local jurisdictions for the purpose of electoral representation—voting districts—and constituting local jurisdictions for the purpose of providing local public goods—local governments—require the aggregation of persons on a geographical basis so that they can conduct local politics. But doctrine diverges enormously with respect to how such aggregation is accomplished. The fixed boundaries of local governments facilitate a Tieboutian ratchet of increasing wealth in the most successful jurisdictions and a concomitant spiral of poverty in the unsuccessful. The boundaries of electoral districts, by contrast, are drawn and redrawn subject to principles of equity and fairness: one-person-one-vote, along with secondary prohibitions on some forms of dilution of minority groups' voting power. Such principles are imposed from outside the local politics that districts are created to actualize.

Even the few who have discerned the parallels between electoral districts and local governments have not recognized that the central institution that might effectively protect localism while undermining sorting is *periodic redistricting*. Just as electoral districts are periodically redrawn in the face of population changes to ensure continued adherence to one-person-one-vote and other subsidiary rules, so local government boundaries could be periodically redrawn to dilute concentrations of wealth or poverty that otherwise accrete in particular jurisdictions. But just as electoral districts once redrawn proceed on the principle of local plurality rule, so too would redrawn local governments continue autonomously to tax and spend. However, because local boundaries would react to the development of enclaves of wealth or poverty, existing residents would be substantially less able to choose, permanently, the characteristics of their neighbors. Voice would be strengthened and exit weakened.

[The Article also] considers two objections to the claim that a system of local governments based upon periodic redistricting preserves the advantages of local autonomy while avoiding the costs of Tiebout sorting. It considers first whether periodic redistricting would vitiate the normative desirability of local autonomy, by attenuating citizens' connections with their localities or by drastically constraining the ability of like-minded groups collectively to constitute new jurisdictions more to their liking. It then analyzes whether, by making interjurisdictional exit more difficult, redistricting would encourage citizens to seek substitutes for public goods in private markets and in that way reduce public support for public expenditures. Such reductions could hurt the poor as much or more than Tiebout sorting.

While these problems will certainly arise, the nature of redistricting will cabin their magnitude. Ultimately, redistricting local government would not reduce citizens' interest in and support for their localities as much as it would create new incentives for citizens additionally to concern themselves with the quality and quantity of goods provided regionally—because parts of that region could be part of their locality in the future. Redistricting is thus a proposal for a new "new regionalism," which would build a regional politics not through the creation of governmental or extra-governmental institutions, but by broadening the private incentives of individual voters.

School Choice and States' Duty to Support "Public" Schools

48 Boston College Law Review 909 (2007)

I. THE BASELINE MARKET FOR SCHOOLING

Schooling is compulsory in all fifty states. In 1925, in *Pierce v. Society of Sisters*, the U.S. Supreme Court acknowledged this to be a genuine restraint upon freedom and consumer sovereignty, but justified it nevertheless in light of the strong state interest in an educated populace. But *Pierce* also established that, notwithstanding compulsory education, parents have the liberty to remove their children from state-sponsored "public" schools and educate them instead in private institutions: "The fundamental theory of liberty … excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

By forbidding the prohibition of private schooling, *Pierce* requires states to tolerate a market for private schooling. But schooling is not a typical consumer good; both demand and supply in the industry are highly regulated by government. On the demand side, that schooling is compulsory means that parents cannot substitute goods that they might prefer for education. On the supply side, education is subsidized, with government ensuring that every student can attend some school without charge. Prices, entry, and exit from the market therefore cannot and do not work in standard ways.

By "relax[ing] constraints on students' mobility among schools," charters, vouchers, and similar initiatives introduce additional competition into the educational quasi-market. Vouchers—state subsidies that parents may direct to private schools in which they enroll their children—reconfigure the school type market by reducing the barrier that cost presents to parents who would otherwise prefer private to public education. In addition, the various forms of public education, and the facilitation of choice among them, have proliferated. For example, often in an effort to promote both racial integration and school quality, many states and districts supplement traditional, state-managed public schools (that all children from a given area attend) with magnet schools. Quality concerns also motivate districts to enter into contracts with private educational management organizations ("EMOs"), which provide not just administrative services but general management to struggling public schools.

The most dramatic market-based reform in the public school sector is the charter school. Chartering permits groups of educational entrepreneurs from both within and without an existing public system to constitute a public school not subject to the full panoply of rules and procedures imposed by the school district in which it is located; the extent of regulatory relief varies by state. Charter schools receive state money for each student who chooses to enroll, money that otherwise would go to those students' traditionally assigned public schools. The charter school sector is growing explosively.

II. CHOICE UNDER THE EDUCATION CLAUSES

Given this perspective on what "school choice" programs do, what limits should the education clauses be seen as placing upon them? … Every state constitution has a clause that discusses primary and secondary education. … [These] clauses, although they vary in scope and in specific language, generally deploy subsets of a constellation of key terms: education should be "thorough," "public," "common," "free," "general," "uniform," "efficient."

These requirements constrain the organization of school systems in two ways. First, school finance cases in many states have held that terms in the education clauses like "thorough," "equal," and "efficient" impose the substantive duty upon states to ensure that all children are educated adequately and/or equally. … At

the same time, the clauses speak directly to the organization of educational institutions. Requirements that state-supported schooling be "free," "uniform," "common," and "public" can be read to require some organizational approaches and arguably to preclude others. Even if it were to be established that school choice promoted educational adequacy and equity, state support for charter or voucher programs might still be foreclosed by requirements that such support be limited to "common," "public," "free," and/or "uniform" schools. Moreover, requirements that schooling be "thorough" or "efficient" have an independent institutional dimension. Whether "efficient" is read as a mandate for productive efficiency, in the sense of minimizing cost-per-output and avoiding waste, or allocative efficiency, in the sense of seizing potential Pareto improvements and minimizing deadweight loss, the term on its face has more to say about how schooling is structured than about the nature of the product that it generates.

Until recently, whether choice is directly precluded by institutional language received relatively little judicial attention. In 2006, however, in *Ohio* ex rel. *Ohio Congress of Parents & Teachers v. State Board of Education*, the Ohio Supreme Court rejected the argument that the state's charter school legislation was facially inconsistent with the Ohio education clause's requirement of "a thorough and efficient system of common schools throughout the state." The court emphasized that community schools (as charters are called in Ohio) incorporate "flexibility," "choice," "customiz[ation]," and "experimen[t]" to help "ensur[e] that all children receive an adequate education that complies with the Thorough and Efficient Clause." The court held that rational judgment, coupled with charters' ultimate susceptibility to public control, to be sufficient to meet the constitutional requirements of commonness, thoroughness, and efficiency.

The Florida Supreme Court, in the 2006 case *Bush v. Holmes*, took the opposite approach in invalidating the state's Opportunity Scholarship Program ("OSP"), which provided school vouchers, redeemable at private, tuition-charging schools as well as public schools, to students previously enrolled in public schools that the state had categorized as "failing." The Florida court reasoned that because vouchers "diver[t]" funds from free public schools to private schools, they undermine "the system of 'high quality"' schools that the state constitution requires. Furthermore, said the court, the constitution requires state support of schools both "free" and "public," quality aside; private schools receiving vouchers are neither. Because the OSP funds schools subject to less extensive regulation than the public schools, the court found that it violates the requirement that the public school "system be 'uniform."' Finally, the Florida court concluded—over a vigorous dissent—that the Florida constitution specifies a single "manner" by which the state may discharge its duty to educate school-age children, that being a "uniform, high quality system of free public education." Choice is not allowed even if it meets the state's educational goals: the constitution, says the court, "does not authorize additional equivalent alternatives."

Although *Holmes* invalidated a voucher program, its reasoning clearly extends beyond vouchers to charter schools. If OSP's "diversion" of funds from public schools to private ones unconstitutionally undermines public schools, charter schools' similar diversion is unconstitutional as well. And if a voucher program violates the "uniformity" provision because voucher schools are subject to regulations less intrusive and onerous than traditional schools, charter schools, whose sine qua non is regulatory relief, violate it similarly.

III. RECONCILING CHOICE AND THE CLAUSES

[S]chool choice should be viewed as consistent with education clauses if they meet two criteria. First, choice programs must be reasonably expected to result in education of adequate quality. Second, the choice programs must provide, so long as not inconsistent with the first criterion, parents with a genuine and independent choice among educational providers.

The first half of the proposed test—a reasonable connection to improving educational quality—is intended to be one that can easily be met by most choice and privatization proposals. Well-developed theoretical

arguments support the view that choice and privatization have the potential to improve educational quality, although empirical demonstrations of such benefits are contested and far from robust.

In contrast, the second part of the test—that choice, if provided, be genuine and independent—does limit the design of choice. It borrows from the U.S. Supreme Court's 2002 holding in *Zelman v. Simmons-Harris* that, under the Federal Establishment Clause, private individuals may direct state-provided voucher funds to religious and secular schools, so long as their choice to do so is "genuine and independent." The test proposed here similarly requires that choice programs multiply, rather than frustrate, the ability of parents to exercise choice in the educational marketplace.

Why incorporate *Zelman's* holding into the analysis of the education clauses? Although it is obviously desirable from the point of view of those who might establish school choice programs that two separate constitutional mandates could be satisfied by the application of a single rule, this is scarcely a sufficient reason to import the rule of *Zelman* into the education-rights area. The Establishment Clause and education clauses guarantee different rights, different kinds of rights, and appear in different varieties of constitutions.

Nevertheless, I argue, *Zelman* offers an approach to the market for schooling that usefully informs education rights as well as Establishment analysis. This is because the Court in *Zelman* understood the Cleveland voucher program as an effort by the State of Ohio to catalyze a pluralist market for schooling, rather than as an effort to subsidize individuals' static preferences for religious education.

The extent of this departure has not been widely recognized. *Zelman* is generally categorized as an "aid" or "funding" case, along with such other Supreme Court cases as *Mitchell v. Helms, Agostini v. Felton, Zobrest v. Catalina Foothills School District, Witters v. Wisconsin Department of Services for the Blind,* and *Mueller v. Allen*, because it involves government spending in aid of religious schools. … Indeed, the phrase "genuine and independent choice" is not a new coinage but taken directly from *Mitchell* and *Agostini*.

In the earlier K–12 aid cases, however, government subsidies were conceptualized as efforts to cushion the pain associated with a decision to pay tuition to private schools when public schooling could be had for free. Theoretically, there can be no doubt that a tax credit like that upheld in *Mueller*, or tuition savings like that generated by the in-kind aid upheld in *Mitchell* and *Agostini*, will, by changing the effective price of religious relative to public schools, result in some marginal parent-consumer changing her preference between the two. Nevertheless, until *Zelman*, the marginal case is absent from the Court's opinions. Indeed, the Court repeatedly dismisses the possibility that preferences might respond to changes in effective prices. Rather, the cases focus on the inframarginal consumers, those already choosing religious school. Pre-*Zelman* choice matters only because private citizens make choices freely, uncoerced by government; the question is whether government, accepting the legitimacy of their choices, may help alleviate the costs private citizens have chosen to bear. Therefore, the Rehnquist Court's aid cases are full of talk about choice, but until *Zelman* no talk about markets.

The raison d'être of a voucher program, by contrast, is to catalyze choices different than those parents were previously making. Indeed, the possibility that vouchers might simply subsidize parents already using private schools, leading to no change in enrollment patterns, is often viewed as a flaw of such programs. The innovation of *Zelman*, therefore, was to recast the Court's "genuine and independent choice" rule, developed to permit government subsidies because they would not influence private choices, to apply to programs in which the state sought, specifically and explicitly, to influence those choices. But that influence was to be of a particular kind: the state would extend the range of choice by creating markets, including markets that embraced religious sellers, to replace government monopoly.

Although this move is not implied by *Mueller, Agostini,* or *Zobrest*, it is a justifiable innovation. It rests on an understanding of markets as a device for aggregating and fulfilling private preferences that differs fundamentally from democratic decision making. In the latter, the aggregation of private preferences is the "public" will, and the clearest command of the Establishment Clause is that government may not, in obedience to such public will, advance religion. The point of *Zelman* is that a government that creates a market that includes religious institutions is doing something else: it is facilitating private choices, in the aggregate, without imposing its own will or establishing its own preferences. *Zelman* legitimates this kind of pluralist, public support for religious preference—one that not only supports all choices once made, but also actively seeks to make such choices more available to more people—because with markets, government can avoid putting its thumb on the scale regarding the content of individual choices.

Although the scope of choice programs is often thought to vary inversely with their publicness, the converse seems more accurate. It is true that robust choice decreases enrollment in traditional "public" schools, diverts funds that otherwise would have flowed to those schools, and mitigates the direct influence of "public" regulation. But these observations, although sound, reflect a statist critique of choice. Once the decision is made to permit pluralist choice, the norms of access, fairness, quality promotion, and a disconnect between opportunities and ability to pay can and ought to govern the design of choice programs. "Genuine and independent choice" offers a promising operationalization of those norms that is both institutionalist and instrumentalist. When options under a choice program are varied and arise in response to market demand, there is public input into their design—to be sure, input mediated through a market instead of through political and bureaucratic institutions, but public nonetheless. When the number of options is not artificially constrained, more people have access to schools of choice and those schools are in that sense more public. The same is true when no point of view is a *priori* preferred in designing school options. And when profound underfunding of choice schools is barred as anticompetitive, the schools are more "free." Moreover, because robust choice is Pareto superior to nonrobust choice with respect to parents, it, in an important sense, contributes to the requirement that schools be "efficient."

At the same time, "genuine and independent" choice as I define it does not set the constitutional bar so high that choice programs become unrealistic or unworkable. The test permits states to cap their expenses at acceptable levels. It allows market choice to be limited. It preserves both the right to have "free" schools and the right to pay for schools. And perhaps most important, it creates diverse schools to serve a diverse population of learners—an approach which, although the antithesis of uniformity in the institutional-design sense, promotes equality of educational opportunity in a world where all children are different.

Programs based upon "genuine and independent" choice also offer a different compromise than traditional statist schools with respect to states' *Pierce* obligation to tolerate an educational market and to localism. [S]tates have long circumscribed markets for schooling by offering parents only the option either to send their children, without charge, to a public school in the district in which they live, or to pay to educate them privately. This is one approach to regulating the educational marketplace; it is most emphatically not a policy that disappears the market or renders it nugatory. The recognition that markets, even imperfect ones, can enhance the scope of private choice and simultaneously fulfill public values suggests that this single, grudging, and biased variety of market regulation—grudging in its limitation of options and biased in its preference for those who can afford private education, those who live in districts with good schools, and those whose preferences regarding schooling are similar to their neighbors'—is not the only policy that might be characterized as making a school system "free," "public," "uniform," or "common." Statist dimensions of publicness like democratic deliberation and state provision, along with within-school diversity may suffer under choice; but replacing district-based, stratified, and low-quality educational monopolies with market institutions is in other ways more responsive to the public will, more free, and more uniform than the dichotomous … choice today imposed upon rich and poor alike.

Bibliography

Publications

The School District Boundary Problem, 42 THE URBAN LAWYER _____ (forthcoming summer 2010)

Local Government without Tiebout, 41 THE URBAN LAWYER 93 (2009)

School Choice and States' Duty to Support "Public" Schools, 48 BOSTON COLLEGE LAW REVIEW 909 (2007)

The Role of Empirical Research in Informing Debates about the Constitutionality of School Choice, 1 JOURNAL OF SCHOOL CHOICE *123* (2006)

The Last Wave: The Rise of the Contingent School District, 84 NORTH CAROLINA LAW REVIEW 857 (2006)

Legislating Accountability: Standards, Sanctions, and School District Reform, 46 WILLIAM & MARY LAW REVIEW 1655 (2005)

Constitutional Partnership and the States, 73 FORDHAM LAW REVIEW 1439 (2005)

Taking Over: Federalism, Deterrence, and the Search for Educational Accountability. Doctoral dissertation, Princeton University (2004)

The Edward Byrne Memorial Systems Improvement and Drug Control Block Grant Program: An Evaluation (with Terence Dunworth and Peter Haynes). Washington, D.C.: United States Department of Justice, 1997

The Federal Role in Crime Control (with J. Dilulio, Jr. and S. Smith), in CRIME (James Q. Wilson and Joan Petersilia, eds., ICS Press, 1995)

Drug Policies and Problems: The Promise and Pitfalls of Cross-National Comparison (with Robert MacCoun, et al.), in PSYCHOACTIVE DRUGS AND HARM REDUCTION: FROM FAITH TO SCIENCE (N. Heather, et al. eds., Whurr Publications, 1993)

Drug Legalization: The Importance of Asking the Right Question (with M. Kleiman), 18 HOFSTRA LAW REVIEW 527 (1990)

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