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Latinos and American Law: Landmark Supreme Court Cases

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BOOK REVIEWS

IRA KATZNELSON. *When Affirmative Action was White: An Untold History of Racial Inequality.* New York: W. W. Norton, 2005. xv, 238 pp. $25.95 (cloth); $14.95 (paper).

Among myriad titles dealing with affirmative action, this book immediately stands out for its fresh approach to what can be a tedious debate. Chiefly, it is a reanalysis of the period prior to the first affirmative action policies, but it also contains historical justifications for affirmative action today and suggestions for reshaping policy.

To reconnect history and policy is laudable and very necessary, but this book is admirable for another reason. Katznelson writes optimistically, reminding us by using a historical perspective of the possibilities in the present. Many liberals, frustrated by the apathetic or hostile response of the majority of Americans to liberal policy, turn to backroom negotiations instead of noisy, street-based politics. Katznelson is confident that if the case is put correctly to the American people, they will listen.

The prose is generally clear and accessible for non-academic audiences. The story begins with Lyndon B. Johnson's famous Howard University speech in 1965, often cited as a justification for affirmative action because of its race metaphor that freedom for African Americans is not enough; they must have an open door and the ability to walk through it.

Why, asks Katznelson, was there the great disparity between blacks and whites that greeted Johnson? The next chapters show that social policy in the 1930s and 1940s was geared towards whites and often deliberately cut out blacks from its remit. A particularly useful argument is that southern congressmen secured exemptions from the 1935 National Labor Relations Act and the 1938 Fair Labor Standards Act for agricultural and domestic labor, which ensured that the vast majority of African Americans did not benefit from the government-sponsored minimum-wage legislation. Besides the New Deal legislation, blacks were effectively excluded from the benefits of the 1944 Servicemen's Readjustment Act, better known as the G.I. Bill of Rights. The last chapter calls for an expansion of affirmative action along the principles outlined by Justice Lewis Powell in 1978 and summed up by the term "strict scrutiny."

Katznelson's analysis is more suggestive than complete and might have gone further in-depth. There is the difficult question of the definition of affirmative action, something that crops up when Katznelson calls the social programs of the New Deal affirmative action for whites. He might have focused on use of the phrase "affirmative action" before World War II, when it usually implied government enforcement of fair treatment of union members. Progressive reformer William F. Willoughby, in an address to the American Association for Labor Legislation in 1914, used the phrase when he called for state action to ensure "equalizing of opportunities" for laborers.[1] The Wagner Act, the first time the phrase "affirmative action" appeared in legislation, called for "affirmative action" to reemploy union members laid off because they joined a union. Thus, the valid

1. William F. Willoughby, "The Philosophy of Labor Legislation: Presidential Address, American Association for Labor Legislation," *American Political Science Review* 8, no. 1 (February 1914): 20-21.

argument that affirmative action programs benefited organized labor—which, as he shows, did not include blacks—might have been strengthened.

The problem of definition crops up later, too. Is the expansive affirmative action Johnson pointed toward the same as the programs initiated by the Nixon administration or affirmative action today? Whereas Johnson saw affirmative action as a small part of a wider effort to integrate African Americans, for Nixon the Philadelphia Plan was, in the words of John Skrentny, a "safe, conservative move," especially when compared to the civil rights campaigns of the day, busing and housing desegregation.[2] Moreover, Nixon himself decided in 1970 to direct his civil rights efforts away from the ghettoes and toward creating a stable black middle class. The Democrats, understanding the limited nature of the type of affirmative action implemented by the Nixon administration, were willing in 1972 to outlaw affirmative action to secure crucial votes on giving "cease and desist" powers to the Equal Employment Opportunities Commission. They understood then that the affirmative action implemented by Nixon was part of the disassembly of the Great Society rather than an extension of it.

Today, affirmative action has become so institutionalized that the pros and antis differ less on the principle than on who should get it. Thus, in regard to *Gratz v. Bollinger* (2003), Edward Blum, legal director of the American Civil Rights Institute, which sponsored Gratz, said: "We're not out to kill these programs. What we're out to do is expand them to everyone."[3] Similarly, Dinesh D'Souza, Seymour Martin Lipset, and Richard D. Kahlenberg all argue that affirmative action should be "refocused" towards the real victims.[4] What started out as an impulse to integrate ostracized members of society has now descended into a contest for "special case" status. Is this Johnson's vision?

In sum, this book can be recommended as essential reading for anyone interested in affirmative action. I hope it succeeds in its project of redirecting the often ill-informed and cramped debate toward Johnson's ambitious vision of what needs to be and what can be accomplished.

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JEAN A. STUNTZ. *Hers, His, and Theirs: Community Property Law in Spain and Early Texas.* Lubbock: Texas Tech University Press, 2005. xvii, 217 pp. $35.00 (cloth).

"Laws of property ownership show how each society defines different levels of privileges, such as whether any particular class of people have the right to own property" (p. 2). Arguing that Texas adopted the Spanish system of community property law to protect family property from creditors, Jean A. Stuntz provides evi-

2. John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996), 194.

3. Greg Winter, "Colleges See Broader Attack on Their Aid to Minorities," *New York Times,* March 30, 2003, A16.

4. Dinesh D'Souza, cited in Francis J. Beckwith and Todd E. Jones, eds., introduction to part one of *Affirmative Action: Social Justice or Reverse Discrimination?* (Amherst, N.Y.: Prometheus Books, 1997), 29; Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W.W. Norton, 1996); Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (New York: BasicBooks, 1996).

dence for this thesis from case files involving women as plaintiffs and defendants in colonial and postcolonial *Texas. Hers, His, and Theirs* is a well-crafted comparative legal and social history of property rights in Spain, England, and early Texas. As such, students of comparative European legal systems as well as students of Latin American and U.S. legal systems will benefit from reading this book.

Composed of ten succinct chapters, the book is organized topically. It begins with a discussion of the historical development of law in Iberia, tracing its Roman and Visigothic roots into the era of compilation during the thirteenth century. The second chapter is devoted to a description of the thirteenth century *Siete Partidas,* the Seven Divisions of Law, a compilation that remained the main source for judicial decision making in the Spanish world well into the nineteenth century until new criminal, civil, and procedural law codes supplanted its primacy. That second chapter also brings into focus the legal capacity of women—their right to hold and divest property—and the place of community property in marriage. Continuing to draw on the laws and glosses of laws in the *Siete Partidas,* the third chapter focuses on family law. The fourth and fifth chapters, based on the historiography in English, address the transfer of Iberian law to the Americas in general and colonial Texas in particular. In the sixth chapter, Stuntz turns her attention to women's status in case law in colonial Texas. That case law fully illustrates the legal capacity of single, married, and widowed women and shows how women understood their individual and community property rights.

To explain the emergence of community property in both the Republic and the State of Texas, Stuntz in the seventh chapter discusses the roots of property rights in English history and law. Importantly, she points out how the fundamental social and economic roles of women and men in England differed from the roles of women and men in Castile during the foundational eras of common and civil law. The eighth chapter discusses the emergence of an interwoven Hispanic and English legal system in Texas after Mexican independence in 1821. The ninth chapter shows that the overlaying of Spanish and English law persisted in the legal system of the Texas republic between 1836 and 1845. The tenth chapter addresses the state legislative debates and judicial decisions that framed the concept of community property as a means of protecting family property from creditors. Stuntz reiterates that the Texas community property system, which protected the right of women to own property and be recognized as equal partners in marriage, had its roots in Spanish law. While evidence from the debates does not clearly point to those roots, the legislation and case evidence do serve to highlight the continuity of the Spanish system of community property.

Stuntz's thesis concerning the Spanish roots of certain civil, criminal, and procedural law concepts is not particularly novel. Joseph W. McKnight effectively explored those roots in two seminal articles that appeared in this journal in 1959 and in subsequent publications. Still, her decision to focus on the legal status of women in civil cases is a welcome addition to the literature. In that respect, this study complements Charles C. Cutter's work on criminal law in colonial New Mexico in *The Legal Culture of Northern New Spain, 1700-1800* (1995); unlike Cutter, Stuntz focuses on civil suits and civil procedure, thus expanding our appreciation of the Spanish legal system.

Even though Stuntz wrote this study for the novice student of comparative law and the informed general public, she might have dug a bit deeper than McKnight into colonial legal system reforms during the Age of Revolution and into the cases in repositories in Mexico. It is not clear from the text or her notes if she is aware of the legal system reforms mandated by the 9 October 1812 law.

That law required that all simple civil suits involving less than one hundred pesos be adjudicated by city council members and that all suits involving more than one hundred pesos had to be accompanied by a certification from those same officials that the plaintiff had first tried to reach a mediated settlement, or *conciliciación*. It is not clear if she explored the case files in the appellate court for the State of Coahuila and Texas, established in 1827. It is not clear if she is familiar with the literature on the history of law in Mexico. These criticisms aside, this volume will serve future students of comparative law.

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MICHAEL J. BAZYLER. *Holocaust Justice: The Battle for Restitution in America's Courts.* New York: New York University Press, 2003. xix, 410 pp. $40.00 (cloth); $22.00 (paper).

Holocaust Justice by Michael Bazyler is unquestionably the best overview written to date on the legal issues provoked by the litigations that over the last ten years have been attempted to win financial restitution for victims of the Holocaust and their surviving relatives. It is also an intriguing work of advocacy.

The Holocaust had a delayed financial and legal reckoning. It was not until 1996, a half century after Nuremburg, that the movement to exact financial restitution from the companies that benefited from the destruction of European Jewry began, with the launch in Brooklyn of a lawsuit calling for Swiss banks to disgorge the contents of victims' accounts, which had been allowed to remain dormant.

What followed was an epic series of legal and political negotiations. It culminated in settlements with the Swiss banks, German industrial companies that had used slave labor, European insurers that had failed to pay out on life policies written on the lives of victims, French banks that had collaborated with the Vichy regime, and Austrian banks that had collaborated with German occupiers, along with a raft of new historical truth commissions that reassessed the wartime role of governments across Europe. It also triggered a series of lawsuits by individuals over the possession of artworks that had been looted from Jewish families by the Nazis.

Following the crusade have come the books attempting to chronicle it and draw the lessons. Several have come from journalists who covered the cases (including this writer). Some participants have written their own versions.

Bazyler's book is a little different. It provides a good narrative of the compelling sequence of events and also provides explanations of the legal issues at a level comprehensible to the lay reader and yet useful to legal scholars. Bazyler was brought up the son of Holocaust survivors in Lodz, Poland. Although he followed the lawsuits for five years as an academic, he admits that he declined all invitations to take a role because "the subject was too close to home" (p. 311).

Bazyler has several key points that he wants to argue. The first is that the actions were justified and that the various European companies were let off lightly. This proposition is widely disputed in Europe, where many defendants still believe they paid "blackmail" money far out of proportion to the harm they had done. But Bazyler ends each chapter with a forensic indictment of the various companies' behavior.

A second central claim is that lawyers made the difference. This is more contentious. All these campaigns were much more than legal actions. They involved

foreign governments, American regulators, U.S. congressional leaders, threats of economic sanctions from the largest American pension funds, and aggressive and damaging public relations campaigns from Jewish advocacy groups. These efforts had already been in train for more than a year, and significant concessions had already been wrung from the Swiss banks, before the first lawsuit was even filed. And the presence of the lawyers was much resented by many of the campaigners who had already launched their own efforts to force compensation.

The main litigations were settled in different ways, and none ever saw the facts put to trial. The French banks case did see what Bazyler calls a "landmark decision," in which Judge Sterling Johnson, Jr., of the Eastern District of New York rejected a motion to dismiss and granted discovery, a ruling that prompted a settlement within a month (pp. 172, 188). It also demonstrated that U.S. law allows a lawsuit that is "1) brought for claims stemming from the Holocaust era, 2) taking place in Europe, 3) filed by foreigners as well as Americans and 4) for a violation of international law to be heard by a judge in the United States" (p. 189). In legal terms, although the numbers involved were very small compared to the other litigations, this was possibly the most important result of the Holocaust litigations.

The Swiss reached a settlement under the aegis of Judge Edward R. Korman, also of the Eastern District of New York, in 1998. The complicated settlement has been under the aegis of the U.S. court system ever since, with the many delays caused by appeals creating deep distress for the plaintiffs and dissension among them.

In the German case, where German politicians were deeply involved, negotiations led to the creation of a foundation, run by the German government. In return, the American lawyers had to agree to request that the cases be dropped. The result was a very swift payment to claimants, helped by the fact that all sides admitted that the justice in question was "rough," with fixed sums for anyone who could prove they had done slave labor.

The insurance litigation, on the other hand, was removed from the legal ambit after an ugly power struggle with American state insurance regulators, who held the ultimate power of being able to revoke insurers' right to do business in the United States. Lawyers were frozen out of the process, which was handed over to the International Commission on Holocaust-Era Insurance Claims (ICHEIC), which included Jewish representatives, American and European regulators, and the companies themselves.

The result was a bureaucratic nightmare, which according to Bazyler "has not even come close to fulfilling its mandate" (p. 167). He says that the class action process "yielded higher, speedier and more just results" (ibid.) and that the politicians "failed to realize that the aggressive lawyers with their heavy hammer of litigation were critical to getting the European defendants ... to settle" (p. 163).

His complaints against the ICHEIC are reasonable—the body was cordially hated by many survivors—but his conclusion, written in 2003, is contentious. As of the summer of 2006, ICHEIC processes had yielded offers of $213 million to 16,717 claimants. It received more than 90,000 claims. The Swiss banks litigation had yielded $462 million to 16,953 claimants. Neither route has been particularly swift—although both faced the extremely difficult task of historical detective work. Both processes are still ongoing, but Bazyler's extremely negative judgment on the route that excluded lawyers looks, with the benefit of another three years of hindsight, overdone. Conducting the whole process without help from attorneys might conceivably have led to a just outcome.

Such practical questions pale in comparison with an overriding issue: was it all worth it? Bazyler, who writes inspiringly about the litigations the Holocaust

lawsuits have prompted to right other historical wrongs, from the Armenian genocide to the internment of Japanese during World War II, is confident that it was. It is hard, after reading this book, not to share his enthusiasm.

Some prominent Jewish leaders worry that the principles established in the Holocaust lawsuits could lead to endless litigations of ancient historical wrongs. Abraham Foxman, leader of the Anti-Defamation League, has asked: "'Where does it end? World War I? The Indians? The slave trade? We'll be at this forever'" (quoted on p. 330). Bazyler, along with human rights activists and lawyers involved in such campaigns, confidently responds: "'And why not?'" (ibid.).

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DEBORA SHUGER. *Censorship and Cultural Sensibility: The Regulation of Language in Tudor-Stuart England.* Philadelphia: University of Pennsylvania Press, 2006. 346 pp. $59.95 (cloth).

In *Censorship and Cultural Sensibility,* Debora Shuger offers an interpretation of Tudor-Stuart laws pertaining to expression from the beginning of Elizabeth's reign in 1558 through 1641 and the beginning of the English Civil War. By analyzing hundreds of publications, Star Chamber decisions, royal prerogatives, and Parliamentary debates, Shuger explains a legal system based on more than a millennium of precedents, drawing from Roman and ecclesiastical law, and influenced by developments throughout Europe.

Shuger provides the reader with a look at a legal system that is difficult to imagine from a twenty-first-century perspective. This is true because almost all studies of the evolution of free expression, especially as its American incarnation developed from its English origins, depend primarily on what occurs during the Civil War and the periods of the Interregnum and later Stuarts—the period of time after Shuger's study. In fact, she begins her study by asking why people in England before the time of John Milton and the radical Levellers in the mid-1640s did not argue for free speech. Milton's *Areopagitica*, which was ignored by almost everyone when first published in 1644, has become part of the bedrock for understanding the development of freedom of speech and press in the United States. And it was one of the more popular tools for justifying free speech in colonial America, along with the writings of John Trenchard and Thomas Gordon as "Cato." Eighteenth-century American printers readily adopted the concepts and words of Milton. One need look no further than Benjamin Franklin's "Apology for Printers," written in 1731, which said, "when Truth and Error have fair Play, the former is always an overmatch for the latter." After John Peter Zenger's trial in 1735, *Areopagitica* was republished in its entirety as justification for the not-guilty verdict. Patriot polemicists quoted Milton, too, as justification for their calls to revolution.

Because we depend so much on the last half of the seventeenth century to explain the development of free speech in America, *Censorship and Cultural Sensibility* is all the more valuable. It enlarges the sphere of reasons for censorship and constraints upon free expression beyond ideological censorship—about which Milton complained—into a realm where language that was deemed hate speech or character assassination, heretical or immoral, or that questioned honor or invaded privacy could be censored and bring punishment upon the person who produced

the offending language.

According to Shuger, English language regulation of expression prior to the era of civil war was based principally in *iniuria*, Roman law that lumped various crimes including assault, battery, defamation, harassment, invasion of privacy, libel, and several others into a single category. Censorship and suppression in this environment were applied to threats to individual dignity and integrity. Consequently, Shuger says, there were instances when it made sense that truth only heightened the nature of libelous language. Because *iniuria* formed the basis for laws relating to expression, legal defenses against it were not framed in a context in which rights of free press or free speech allowed the offending language. However, as religious and political tensions arose under the early Stuarts, many Separatists began to place their arguments for the right to espouse ideological concepts that varied from church and state within a sphere that depended upon free expression as a catalyst. It is to this point in the development of free expression that Shuger's work brings us.

Because Shuger is providing a new way of understanding the development of censorship laws in England and subsequently America, she explains how *iniuria* and other laws for censorship evolved. As a result, her first chapters offer in-depth analyses of English precedents. Readers learn about the complicated web of censorship practices at the height of the Roman Empire and their application throughout Europe. Because of their influence on what developed in England, this information is important, but sometimes Shuger spends so much time with examples in this material that it obfuscates understanding in relation to sixteenth- and seventeenth-century England.

Censorship and Cultural Sensibility is strongest in the last three chapters, when Shuger moves to the application of legal and historical precedents within the context of Tudor-Stuart England. There she writes plainly and convincingly, leaving behind long passages of untranslated Latin and other scholarly interpretations to explain how the intricate laws related to censorship fit into an English mold. She applies contemporary American cases and situations that let readers see just how much the entire history of English libel law development has application within United States law, not solely that which developed in relation to ideological censorship. As a result, she makes it possible to understand how liberal interpretations of free speech and calls for strong individual protection can exist within the same legal framework.

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LAWRENCE M. FRIEDMAN. *Private Lives: Families, Individuals, and the Law.* Cambridge: Harvard University Press, 2004. 230 pp. $27.95.

Private Lives is a delightful and invaluable short work. In five solid, well-written, and fully documented chapters, Friedman highlights the main changes in American family law since the nineteenth century. Each chapter can stand on its own as a succinct but comprehensive discussion of a particular aspect of family law. There is an overview of family law in general, which is followed by two chapters on marriage and divorce, focusing on changes in marriage and divorce during and since the nineteenth century. They are in turn followed by a chapter on children, which includes a discussion of adoption, custody, and related issues. The

work concludes with a detailed and illuminating chapter on privacy and "the republic of choice" (p. 14).

Private Lives is more than a review of case and statutory law, however. Friedman contends that the law follows social reality rather than the reverse, and he demonstrates convincingly that where the law and social concerns are at odds, people will find ways around legal constraints. A good example of this process is the way divorces worked in New York state until fairly recently. The only ground for divorce was adultery. But married partners were not supposed to collude in seeking a divorce. Nevertheless, most evidence for divorce proceedings was the product of collusion, and there were photographers who specialized in the production of damning photographs.

Friedman's book is well grounded in case and statutory law and also in family history, social history, and contemporary popular culture. Furthermore it is not a dry or pedantic treatise but a lively and interesting work that can be read for both pleasure and profit. Thus his work functions as a needed corrective to much of the contemporary public discourse on families and the law in contemporary American society.

Friedman is equally at home describing the decline of common law marriage, the rise of divorce rates in twentieth-century America, and the rise of the contemporary practice of living together. He also shows the relationship between concerns about legitimacy and issues relating to adoption. Unlike many contemporary writings on adoption, he includes a discussion of both apprenticeship and the informal placing-out system of the New York Children's Aid Society in the late-nineteenth century. His survey of the history of adoption in twentieth-century American society is a model of clarity and conciseness. The early secrecy associated with closed adoption gave way to procedures whereby adopted children could identify and locate their birth parents and to the current practice of open adoption, in which birth parents and adoptive parents are acquainted with each other. The section on adoption is followed by a brief and cogent discussion of surrogate motherhood and the legal issues surrounding it. As for the prevalence of surrogate motherhood, Friedman admits that the exact number of surrogate mothers is probably unknown.

Friedman's straightforward and balanced discussion of the legal issues pertaining to abortion is clear and easy to follow. Friedman presents this discussion in the context of an extended chapter on privacy and choice. He is aware of the deep divide in American society over the question of abortion and steers a careful course between the extremes. He does not, however, discuss issues pertaining to the practice of abortion or of the violence against abortion providers.

Friedman's main argument is that family law has evolved in response to increasing individual freedom in American society. Or as he puts it, this is a "master trend" in American society—"the voyage of the family from status to contract, from rigidity to flexibility, from compulsion to choice. ... On issues of marriage, divorce, sexual preference, having children, not having children, family life or no family life, even questions of identity, the menu of choices has expanded" (p. 179).

Private Lives is lively, persuasive, and well-documented. Friedman discusses many familiar cases—e.g. *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), and the *Baby M Case* (1988)—and cites solid contemporary scholarly work on family history and social trends. This work is so readable it could be used as an undergraduate text and so solid it can serve as a desk reference for professionals.

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PETER BECKER and RICHARD F. WETZELL, eds. *Criminals and Their Scientists: The History of Criminology in International Perspective.* Washington: German Historical Institute; New York: Cambridge University Press, 2006. xiii, 492 pp. $85.00 (cloth).

Beyond the cryptic title and the misleading subtitle, *Criminals and Their Scientists: The History of Criminology in International Perspective* provides a smorgasbord of historical essays on various topics more or less related to criminology. Although they do not add up to "the history of criminology," they do make interesting reading, especially for American and British students of criminology who are more accustomed to sociological rather than medical or anthropological explanations for criminal deeds. The biological and anthropological emphases in Italian, German, French, and some other criminological traditions provide a distinct counterpoint to the Anglo-American preference for sociological criminology.

The introduction explains that "scientists" in the title is used loosely to mean anyone with an abiding interest in criminals. In the various essays in this book, it includes judges, lawyers, novelists, newspaper reporters, prison officials, and even criminals themselves, as well as academic criminologists. Michel Foucault's metaphor of "the archaeology of knowledge" provides a rationale for this digging into historical deposits for artifacts of more or less developed criminology. Scattered references to Foucault and occasional allusions from one essay to another attempt to confer on this book a unity it does not have. The poor index gives little help to a reader trying to make connections between essays. But the essays are better appreciated as separate pieces, some more satisfying than others.

A general appraisal of the essays provides a look into the book's contents. A few of the essays are stunted by vagueness, rhetoric, inadequate data, and non sequiturs, particularly Michael Berkowitz's essay "Unmasking Counterhistory: An Introductory Exploration of Criminality and the Jewish Question"; Becker's "The Criminologists' Gaze at the Underworld: Toward an Archaeology of Criminological Writing"; Nicole Hahn Rafter's "Criminological Anthropology: Its Reception in the United States and the Nature of Its Appeal"; and Martine Kaluszynski's "The International Congresses of Criminal Anthropology: Shaping the French and International Criminological Movement, 1886-1914."

But a few weak essays are outweighed by the well documented and carefully reasoned essays dealing with the historical core of criminology, most notably Mary S. Gibson's "Cesare Lombroso and Italian Criminology: Theory and Politics"; Mariacarla Gadebusch Bondio's "From the 'Atavistic' to the 'Inferior' Criminal Type: The Impact of the Lombrosian Theory of the Born Criminal on German Psychiatry"; Laurent Mucchielli's "Criminology, Hygienism, and Eugenics in France, 1870-1914: The Medical Debates on the Elimination of 'Incorrigible' Criminals"; Ricardo D. Salvatore's "Positivist Criminology and State Formation in Modern Argentina, 1890-1940"; Yoji Kakatani's "The Birth of Criminology in Modern Japan"; Wetzell's "Criminology in Weimar and Nazi Germany"; Oliver Liang's "The Biology of Morality: Criminal Biology in Bavaria, 1924-1933"; and Gabriel N. Finder's "Criminals and Their Analysts: Psychoanalytic Criminology in Weimar Germany and the First Austrian Republic."

Some essays are more at the periphery than at the center of criminology but are interesting, well researched, and carefully thought-out, such as Andrew Lees's "Moral Discourse and Reform in Urban Germany, 1880s-1914"; Stephen Garton's "Crime, Prisons, and Psychiatry: Reconsidering Problem Populations in Australia, 1890-1930"; and Geoffrey J. Giles's "Drinking and Crime in Modern Germany." Another seven essays fill out the book but are not especially remarkable one way

or the other.

Either Lombroso or a caricature of Lombroso shows up in most chapters of this book. A reader who has not already done so should read Lombroso before reading this book because Lombroso's work has been the compass for European criminologists, even for those wanting to travel in somewhat different directions. Lombroso's major work (the French edition, *Homme Criminel,* is usually considered the standard edition) underwent successive revisions and gradually evolved into the book entitled in English *Crime: Its Causes and Remedies* (trans. H.P. Horton, 1918). It is hard to say to what extent Lombroso's ever growing treatises on criminality were the result of new learning on his part, new thinking, more elaborate explanations to obviate misunderstandings, adaptations to benefit from criticisms, expansion of concepts like criminality, fuller development of minor points in earlier publications, or extensions or modifications in response to new developments. But he does not seem to have abandoned early ideas when adding to the work. Lombroso's theories were more nuanced than one might gather from some of the essays in this book. As noted in Bondio's essay, indignant reactions to Lombroso's deterministic ideas led to "a strange misunderstanding" of his work a century ago (p. 190). Much of the misunderstanding persists.

Although some essays in this book seem to assume that Lombroso was directly influenced by Charles Darwin and that he was the first to explain crime in terms of atavism, that was not the case. Darwin was by no means the first to formulate a theory of evolution, and Lombroso did not take anything directly from Darwin. As far as can be determined, he never read Darwin. Furthermore, it is incorrect to state, as Bondio does, that "[c]oncepts such as those of the 'born criminal' or 'atavism' ... were introduced by Cesare Lombroso..." (p. 183). Earlier Italian criminologists had expounded an atavistic basis for criminal behavior. It is somewhat misleading to say of Lombroso, as Gibson does, that "he developed two new categories of the born criminal: the morally insane and the epileptic" (p. 146). Lombroso emphasized similarities between born criminals and epileptics because it was already accepted that epileptic seizures were outbursts of atavism and this lent credence to the idea that some criminality could also be due to atavism. Readers familiar with Lombroso's work may be puzzled by other statements in various essays. For example, at least two authors, Gibson and Wetzell, claim that Lombroso reported that one-third of all criminals were born criminals, but they fail to provide a specific reference (pp. 145, 402, 408). The basis for this claim is elusive. It is a misrepresentation if they are referring to Lombroso's report that one-third of born criminals have numerous atavistic characteristics or to Lombroso's estimate that 35-40% of crime (not criminals) has some biological basis, particularly "the great strength of congenital impulsiveness [being] the principal cause" (see Horton's English translation, pp. 365, 376).

Some questionable items should not deter any reader with an interest in criminology. American and British readers may especially find their visions of criminology expanded by the essays in this book. As far as a history of thought is concerned, many of the essays provide striking examples of the interactions between cultures, politics, social movements, social roles, occupational perspectives, and ideas. Criminology is no abstract thing. The authors of these essays are mindful of the impact criminological ideas have had on the decisions of judges, the treatments of offenders, and crime prevention policies as draconian as eugenics programs. *Criminals and Their Scientists* is a good place to practice the archaeology of knowledge.

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JOHNATHAN O'NEILL. *Originalism in American Law and Politics: A Constitutional History.* Baltimore: Johns Hopkins University Press, 2005. x, 281 pp. $55.00 (cloth).

Johnathan O'Neill's *Originalism in American Law and Politics* is a work that is interesting and yet frustrating and troubling at the same time. "This book," he writes, "is the first historical examination of originalism as a defense of traditional understandings of legal interpretation, limited and consent-based government, and the rule of law" (p. 1). The purpose of that examination is to ask why originalism emerged as an important theory of constitutional interpretation after World War II. O'Neill argues that originalism had been the axiomatic, if implicit and untheorized, approach to constitutional interpretation from the founding to the early twentieth century, that it was driven underground by the "revolt against formalism" and the rise of legal realism, and that it reappeared in the primarily conservative reaction to the Warren Court's controversial decisions.

O'Neill is not a disinterested observer of the historical developments he explores. Behind his historical investigation lies the normative position, visible in his first chapter and in the range of constitutional theorists to whom he pays serious attention, that "the originalist approach [is] directly implied by a written constitution" (p. 5). Asserted more than argued, the substance of his claim is that a commitment to constitutionalism necessarily entails a commitment to originalism, with the implication that a rejection of originalism necessarily entails a rejection of constitutionalism. Following the work and normative commitments of Christopher Wolfe (and others) in his account of the rise of modern judicial review, O'Neill adopts Laura Kalman's term "legal liberalism" to represent "the common thrust of a number of complex, competing theories in which academics and judges sought to justify and elaborate modern judicial power and the landmark liberal decisions of the Warren and early Burger Courts" (p. 8). From his perspective, by contrast, "originalists rejected the legal liberal embrace of modern judicial power as a threat to the rule of law, the separation of powers, and federalism" (p. 9).

This normative commitment is fair enough, but what is frustrating, beyond the lack of a serious normative argument evidently not the purpose of a book that implies it, is that O'Neill seems not to have sorted out precisely what kind of history he wanted to write. His historical thesis is indeed interesting: "The end of the New Deal order combined with the renaissance of political conservatism and the Republican Party to encourage originalism by decreasing support for legal liberalism. Originalism was politically attractive as a jurisprudentially traditional approach that, at least in the post-1960s atmosphere, implied conservative policy results as opposed to the prior wave of liberal Supreme Court decisions" (ibid.). Again, he writes: "Waning support for liberal politics and Supreme Court decisions plus rejection of original intent by both the new defenders of judicial power and its older process-restraint critics combined to encourage reassertion of the originalist proposition as a way to limit the Court" (p. 94). And, once more, O'Neill writes: "American politics and constitutional thought were brought to a crossroads at the end of the 1960s in part by the fact of modern judicial power and the legal liberal defense of it and more generally by the fragmentation of the New Deal order and the rise of the new conservatism" (p. 110). What is frustrating is that, despite interesting claims of this sort, O'Neill presents an amalgam of the intellectual and political history of the development of American legal theory weighted heavily toward the work of a large number of legal theorists—e.g., James Bradley Thayer, Oliver Wendell Holmes, Herbert Wechsler, Alexander Bickel, Charles Fairman, William Crosskey, Raoul Berger, and Robert Bork, among many others—with only a

sketchy account of the political context seemingly promised in the statements of his historical thesis. Indeed, in stating that "commentators and judges who appealed to original intent were concerned that the legal liberal exercise of modern judicial power threatened the separation of powers, republican government, and the rule of law" or that "[m]any [Reagan] administration officials, as well as supporters in the electorate and Congress, regarded several Supreme Court decisions as politically distasteful, constitutionally mistaken affronts to limited, representative government," O'Neill gives the impression that all the political actors were motivated by considerations of abstract constitutional theory rather than substantive results (pp. 110, 133-34). We never really get the interesting interplay of intellectual and political history we are promised.

Beyond this frustrating character, the intellectual style of the book is troubling. O'Neill presents at best a bird's-eye view of an enormous legal literature, with some sixty pages of endnotes comprised of bibliographical references with almost no substantive comment. The troubling aspect of the book is that one begins to question whether O'Neill's summaries and paraphrases of a very large number of often detailed and complex argument—and particularly those of the "legal liberalism" and constitutional theorists he opposes—are fair and accurate readings of the texts from which he draws them. For example, in his chapter on the process-restraint tradition of legal theory, O'Neill writes, "With all values held to be individual and subjective, and original meaning too dismissed, process jurisprudence lacked a source of legal judgment capable of limiting judges" (p. 64). O'Neill's endnote for this sentence is simply this: "Compare Kahn, Legitimacy, 169-70," referring to Paul W. Kahn's 1993 work *Legitimacy and History: Self-Government in American Constitutional Theory* (p. 235n89). There is no way for the reader to assess O'Neill's claim without going to Kahn's book, which itself functions as a secondary source expressing a judgment on the meaning of the period under review by O'Neill. O'Neill's actual citations tend to be at most a sentence here or a mere phrase there, with the reader referred to the text at issue.

While supporters of originalism might welcome this book because of its normative assumptions and commitments, readers looking for a clear and coherent account of the interplay of political and intellectual history as well as readers looking for a convincing account of an important story of intellectual history alone, are likely to be disappointed.

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TERRY H. ANDERSON. *The Pursuit of Fairness: A History of Affirmative Action.* New York: Oxford University Press, 2004. xiv, 320 pp. $18.95 (paper).

In *The Pursuit of Fairness: A History of Affirmative Action,* Terry Anderson provides a carefully researched and highly detailed analysis of the development of affirmative action policy in the United States. Affirmative action is, of course, a term most Americans recognize. Unfortunately, most of us are not familiar with its origins or how programs bearing that label evolved during the past several decades. Anderson's book provides a useful place for interested people to learn the fascinating history of this controversial policy.

The strength and value of this book come from Anderson's careful attention to

detail. In a highly readable style, Anderson carefully describes the struggle for fairness and civil rights in the United States. His analysis contains insights that have been gleaned from many hours of research utilizing a vast array of original sources on the subject. He begins by reviewing the plight of African Americans in the late nineteenth and early twentieth centuries. The book contains examples of the violence, intimidation, and discrimination faced by African Americans during those decades and documents the slow development of a movement to counter injustice and promote fairness and equal opportunity. The work of black civil rights leader A. Philip Randolph is highlighted early, especially his call for a march on Washington in 1941. Although Randolph's march was postponed until 1963, his early effort resulted in a new federal government program to combat discrimination in public contracting and employment and led to the establishment of a new federal agency, the Fair Employment Practices Committee, to supervise that program.

Anderson details the struggle for equality in the years following World War II and documents the emergence of the civil rights movement of the 1950s and 1960s. The book reviews carefully the work of each administration, from Franklin Delano Roosevelt's forward, on matters of civil rights and affirmative action. Of special significance are President John F. Kennedy's executive order from 1961, which first used the term "affirmative action" in the context of equal employment opportunity policy; the struggle over passage of Title VII of the Civil Rights Act of 1964; President Lyndon B. Johnson's 1965 Executive Order 11246, mandating affirmative action in federal contracting and the federal civil service; and the creation of the Philadelphia Plan in 1967, which incorporated the first major use of preferential policies designed to benefit minorities and women. Each of these are milestones in the development of affirmative action policy, and Anderson provides a level of understanding and detail not often found in treatments of this topic.

In the third chapter, Anderson discusses developments in the 1970s, a period which he sees as the zenith of affirmative action. The work of the Nixon administration to promote the policy is reviewed thoroughly. The importance of the Supreme Court's 1971 decision in *Griggs v. Duke Power Company* is also considered. While the *Griggs* case did not directly address affirmative action, the Court's interpretation in that case of Title VII of the 1964 Civil Rights Act made it clear that one way to avoid litigation alleging discriminatory employment practices was to have an integrated workforce, and that, in turn, added significant impetus to affirmative action efforts. Anderson also reviews efforts by the Carter administration to promote affirmative action, and he documents the earliest Supreme Court jurisprudence to specifically address affirmative action preferences, beginning with the *Bakke* case in 1978.

During the decade of the 1980s, those opposed to affirmative action found a number of allies in the Reagan administration. Efforts to restrict enforcement policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs are reviewed systematically. During this period, the struggle was really over preferential forms of affirmative action, or "quotas," as many in the administration referred to those policies. Anderson notes, however, that Reagan never went so far as to issue an executive order prohibiting preferential programs and repealing Johnson's 1965 order, which had become the basis for those efforts.

In the later part of the book, Anderson discusses the controversy over a series of Supreme Court decisions in 1989 that were seen by many as restrictive of civil rights programs and affirmative action. He reviews the struggle in Congress over passage of new civil rights legislation and the politics associated with ultimate

passage of the Civil Rights Act of 1991. The resurgence of a backlash against the policy in the mid-1990s and the work of the Clinton administration to maintain affirmative action programs is also documented. Anderson notes the rise of diversity management in the mid-to-late 1990s and reviews the ways in which the language of diversity began to supplement, and to some extent replace, the language of affirmative action during that period. It may be too early, however, to claim that diversity has ushered in the demise of affirmative action. In the summer of 2003, as is widely known, the Supreme Court endorsed the narrow use of preferential affirmative action in state university admissions in the *Gratz* and *Grutter* cases from the University of Michigan. Anderson carefully reviews these cases and their implications for the future of affirmative action.

In sum, *The Pursuit of Fairness* rests on superb scholarship and provides a readable and balanced treatment of an important policy issue that has divided Americans for decades. This book should be read by students, academics, policy makers, and others in the general public who have an interest in the subject. It provides substantial insight into how we have arrived where we are today with respect to affirmative action. As we move forward to consider the future of this policy, it is imperative that we understand thoroughly where we have been in the distant and recent past. Terry Anderson does a marvelous job of telling that important story.

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TODD C. PEPPERS. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk.* Stanford: Stanford University Press, 2006. xvi, 310 pp. $55.00 (cloth); $21.95 (paper).

For the first hundred years of the Supreme Court's existence, the justices did their own work. There were no law clerks. When clerks began working at the high court, they were little more than students and secretaries gaining an advanced apprenticeship in the law—a far cry from the crucial staffers that engender increasing scrutiny today. During the past century, as institutional arrangements changed, clerks took on substantive responsibility. When Chief Justice Charles Evans Hughes stopped discussing each case petitioned to the Court in their face-to-face conferences, the other justices began relying on cert memos written by clerks. When Chief Justices Fred Vinson and Earl Warren began assigning majority opinions equally, as opposed to how fast the justices completed their assignments, justices were forced to delegate opinion-drafting to clerks. When the justices ended the practice of working at home and moved into their new building across from the Capitol, the clerk network developed to aid in negotiation across chambers. Each of these seemingly unrelated institutional changes transformed the institution of the law clerk. A growing literature exploring the clerk's role has developed, and Todd Peppers's *Courtiers of the Marble Palace* is an important and welcome addition.

Peppers draws on principal-agent theory, which posits that principals—justices—will employ agents—clerks—who will behave in ways consistent with the principal's wishes. The book relies on multiple data sources, including information provided by the Supreme Court, a mail survey of former clerks, personal interviews with clerks, others familiar with the institution, and even Justices John

Paul Stevens and Antonin Scalia, the personal papers of a number of justices, and secondary material such as judicial biographies and law review and periodical articles. Peppers's exhaustive use of these sources allows him to paint a rich and vivid portrait of clerkship as an institution.

After introductory and demographic chapters, the book proceeds through an historical examination of clerkship during three time periods: 1) the inception of clerks through the White Court (1882-1921); 2) the Taft through Vinson Courts (1921-1953); and 3) the Warren through Rehnquist Courts (1953-2004). Peppers details the clerk practices of each justice for each Court, and this is one of the book's two major contributions. This individual justice approach allows the reader to look up particular jurists and compare their use of clerks not only with their contemporaries but with other justices across time.

In chapter 2, Peppers provides a demographic portrait of clerks by discussing their gender, racial, academic, and perhaps most interestingly, ideological composition. The author was able to collect ideology measures of 491 clerks over the past sixty years. This is the book's second major contribution. While recognizing the limits of his survey data, Peppers does show remarkable ideological congruence between individual justices and clerks. Peppers's ideological findings are consistent with other studies and will provide an excellent resource for further study of the effects of partisanship on judicial decision making.

Chapter 3 details the beginning of clerkship at the end of the nineteenth century, with early clerks serving as "stenographers" gaining an advanced apprenticeship in the law while performing research and secretarial duties. While these early clerks reviewed and discussed cases with their justices—and even prepared opinions and memoranda on occasion—there is no evidence that early clerks had any influence over their justices' decision making. Peppers's focus on individual justices in this early period is laudable. Despite incomplete and often missing records, Peppers is able to sleuth out the practices of individual clerks and justices to detail what is, to my knowledge, the most comprehensive discussion of early clerks yet written.

The author then moves to the early twentieth century in chapter 4 and discusses how clerks transitioned from "stenographers" to "legal assistants" with more substantive duties. The institution grew as the number of clerks doubled from one to two per justice. Responsibilities increased to include the preparation of cert and bench memos as well as opinion editing and drafting. This chapter exemplifies one of the major strengths of the book as the author details clerk practices for each justice. Peppers concludes this section by explaining that "because most justices had delegated only limited duties, the possibility that law clerks would 'frolic' or 'defect' was improbable and the consequences of such defection minimal. Therefore, the justices did not put into place measures designed to monitor clerks and minimize the likelihood of defection" (pp. 143-44).

Chapter 5 begins with Earl Warren's appointment as chief justice and continues through the Burger and Rehnquist Courts. Peppers argues that the institutional rules governing clerks changed during this time as clerks transitioned from "legal assistants" to "law firm associates" involved in all aspects of chamber work akin to associate attorneys in small but prestigious law firms. The number of clerks doubled again, and they took on the primary responsibility for drafting nearly all of the opinions issued by their justices as well as reviewing cert petitions and drafting bench memos.

In the concluding chapter, the author returns to principle-agent theory in discussing the question of whether the clerks exert undue influence. He suggests that

"the necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court" (p. 206). Peppers argues that strict hiring practices, diligent monitoring of clerk duties, and the potential for harsh sanctions make it highly unlikely that clerks will be anything more than agents for their principals. Though many will undoubtedly disagree with Peppers's conclusions, the richness of his individual justice approach makes this study an essential one for those interested in the Supreme Court.

Ultimately, the question for those who study clerks is the extent to which they affect judicial decision-making and ultimately the law. For if this growing literature is able to demonstrate that clerks do have substantive impact—and despite Peppers's argument, much of what has been written suggests that they do—then it may be time to reform what has plainly become an institution that scarcely resembles its earlier incarnations.

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CARLOS R. SOLTERO. *Latinos and American Law: Landmark Supreme Court Cases.* Austin: University of Texas Press, 2006. x, 239 pp. $45.00 (cloth); $19.95 (paper).

In most courses on U.S. constitutional law, those on our legal history, and indeed the entirety of the modern law school curriculum, Latinos are near invisible, existing in the shadows and margins of the discussion. So Carlos Soltero's review of U.S. Supreme Court cases that intersect with the Latino experience is a refreshing and engaging reminder of the historically significant contribution that Latinos have offered to U.S. society and law.

There are several approaches that Soltero might have used to organize his overview. A thematic organization would have looked to the primary intersections of Latinos and law in the areas of immigration policy, discrimination and civil rights, and language barriers. Or to counter the sometimes essentialist views of the U.S. courts and society, Soltero might have structured discussion around the diverse ethnic groupings of Latinos, primarily Mexican Americans, Puerto Ricans, and Cuban Americans, with the majority of cases pertaining to Mexican Americans, by far the most populous Latino group in the U.S. historically and today. Alternatively, Soltero might have used geography to mark a journey through Latino legal interaction in the U.S.—a journey that might start in the Southwest but travel through Miami, Puerto Rico, the New South (with its emerging Latino immigrant workforce), and New York before returning to the U.S./Mexico borderlands. Another means of organization would have been outcome-based, placing decisions on a spectrum gauging their contribution to furthering the pursuit of dignity for Latinos. At one end are decisions such as *Plyler v. Doe* (1982), establishing a constitutional right to state-provided education for school-age undocumented immigrants, and *Hernandez v. Texas* (1954), recognizing racial bias against Mexican Americans in jury selection, a case that one scholar characterized as "a distressingly rare moment of Supreme Court acknowledgement of communitarian norms of white racism against Latino people."[1] At the opposite end are the likes of *San Antonio ISD v. Rodriguez* (1973), which condemned Latinos to school districts funded by property tax revenue systems that encourage and perpetuate de facto segregation, and Hernandez v. New York

(1991), which tolerated exclusion of bilingual Latinos from juries.

To my surprise, Soltero chose to organize his review chronologically in groupings reflecting the succession of Supreme Court justices, with an emphasis on the visionary Warren Court (1953-1969), the conservative tilt of the Burger Court (1969-1986), and the conservative renaissance of the Rehnquist court (1986-2005). (Since publication of this book, details of the Court's weekly conferences have emerged, including information that found Rehnquist disparagingly referring to the immigrant children in *Plyler* as "'wetbacks.'"[2]) But Soltero's organization serves well his purpose of not only examining the legal mechanics of each selected decision but also situating that decision historically in the always fascinating socio-political and legal climate of the time. He acknowledges he deliberately organized *Latinos and American Law* chronologically to make it "more historical than 'thematic'" (p. 198).

Yet several crucial themes do emerge. The most compelling for those U.S. court observers and historians who see our legal and social history through a black-and-white paradigm is the struggle for recognition of Latinos in that history. Several of the cases Soltero selects for examination confront the Court with disputes that call for expanding our conceptions of law and social policy to account for other diverse groups in the U.S.—most evidently in *Hernandez v. Texas* but also in *San Antonio ISD v. Rodriguez* and the redistricting case of *Johnson v. DeGrandy* (1994), where the Court encountered a white, black, and Cuban American South Florida.

A scholar of the Supreme Court might quibble over Soltero's selection of fourteen cases from the dozens of decisions that confront or influence interaction between Latinos and law, as a musical listener might lament the exclusion of favorites from a "Greatest Hits" compilation. And a scholar of Latino law or Latino history might question whether a focus limited to Supreme Court jurisprudence captures the full array of the Latino experience with the U.S. brand of justice, particularly given the many institutional impediments to access for Latinos in our legal system and the desirability of political and economic reform for Latinos rather than solutions relying solely on lawyers and appeals courts. But Soltero modestly seeks to "open a dialogue" (p. 6), and both historians and legal scholars can profit from his keen insight and vision of the broad landscape of Latino significance in U.S. history and law.

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STUART BANNER. *How the Indians Lost Their Land: Law and Power on the Frontier.* Cambridge: Belknap Press of the Harvard University Press, 2005. 344 pp. $29.95 (cloth); $18.95 (paper).

Stuart Banner proposes that the politico-legal history of the dispossession of indigenous peoples in North America must be framed in terms of "a spectrum

1. Juan Francisco Perea, "Mi Profundo Azul: Why Latinos Have a Right to Sing the Blues," in *"Colored Men" and "Hombres Aquí": Hernandez v. Texas and the Emergence of Mexican-American Lawyering*, ed. Michael A. Olivas (Houston: Arte Público Press, 2006), 110.

2. Quoted in Jim Newton, "The Brennan Memos: Brennan Dishes on His Colleagues," *Slate*, posted January 11, 2007, www.slate.com/id/2156940/fr/flyout.

bounded by poles of conquest and contract" (p. 4). Banner launches his argument from the very practical consideration of how he might best answer a question posed by one of his students: "whether the Indians sold their land or had it taken from them" (p. 1). Undoubtedly many scholars—whether in the fields of law, history, Native American studies, or anthropology—have been obliged to respond to similar questions from their students, many of whom (particularly those who are non-Native) may tend to view "the Indians" as a monolithic entity who uniformly experienced an inevitable, if not somehow justifiable, conquest in a long distant past. Indeed, the question "how did the Indians lose their land?"—phrased as such—remains a volatile and deceptive one precisely because both conquest and "the Indians" have been so compellingly mythologized and, concomitantly, obscured. Banner's study offers a superb demystification of conquest—particularly in chapters 4 and 5 as he traces late-eighteenth- and early-nineteenth-century manipulations and rejections of conquest as an ideology or political claim, and moves toward an exegesis of Chief Justice John Marshall's deployment of conquest in the 1823 *Johnson v. M'Intosh* decision (pp. 181-87).

Drawing from a rich documentary record, Banner's book is an incisive analysis of the legal debates and power struggles that generated major shifts in Indian land policy from the colonial period into the early twentieth century. While it is immensely important as a detailed history of policy formation and implementation, it is also, in its own measured way, a polemic. This is clear in chapter 1, "Native Proprietors," in which Banner discredits one of the most powerful assumptions regarding the European conquest of North America: the notion that European "discovery" conveyed ownership to the European sovereign (in this case, England) and that henceforth the Indians were never viewed or treated as land owners (or fee simple titleholders) by English colonists. This, Banner asserts immediately—and repeatedly throughout subsequent chapters—is false. He cites the views of numerous colonial officials to demonstrate that "the claim to property rights by conquest virtually died out among the English after the seventeenth century" (p. 18). Purchase, Banner argues, and acknowledgment of Indian land ownership, was the standard policy in the eighteenth century, prior to the Revolution—though he also documents the fraud and corruption that often characterized purchasing in practice, and he is likewise quick to note that those who defended the principle of Indian land ownership were generally in no sense friends of the Indians. Rather, they were protecting their purchases of Indian land—made through their own individual contracts with Indian proprietors—against the wishes of colonial governments that sought to tightly control or prevent such private purchases.

Banner goes on to investigate the "fairness" of colonial purchases (chap. 2); the implementation and implications of treaty-making (chap. 3); the claim of conquest and the subsequent re-acknowledgment of Indian ownership in the immediate postrevolutionary period (chap. 4); the redefinition of Indian title as a right of "occupancy" in the early nineteenth century (chap. 5); and the devastating hallmarks of nineteenth-century Indian policy—removal, the reservation system, and allotment (chaps. 6-8). Through much of the book, Banner is attuned to the experiences and responses of Native American peoples as they contended with imposed policies at particular historical moments. One of the most important among those moments was the "revolution in Indian land policy" that occurred immediately after independence, when a right of conquest was asserted to expropriate lands from native peoples who had allied with the British (p. 129). "We are now Masters," as General Philip Schuyler announced to the Six Nations in 1783 (quoted on p. 112). But as Banner shows, native peoples were not passive receptors of

such policies. Creek leaders, for instance, were appalled to learn that Georgia was to acquire a large portion of their hunting land, for they "did not believe that they had been conquered. ... Britain had signed a treaty ceding its claims in North America, but the Creeks had not, and for that reason the swaggering attitude of American officials must have seemed to the Creeks to rest on the faulty premise that Britain somehow had the authority to surrender the Creeks' land" (pp. 129-30). Banner (like Reginald Horsman before him in his classic 1967 study *Expansion and American Indian Policy, 1783-1812* [p. 44]) conveys the nature of Native Americans' response to this policy as summarized by Secretary of War Henry Knox: "'Indians have expressed the highest disgust ... at the principle of conquest'" (quoted on p. 130). But they were also disgusted with the new federal government's "apparently enlightened practice of purchasing," established in the 1790s as its claim of conquest proved untenable (p. 140). Many postwar purchases, Banner observes, "had in fact been accomplished through trickery or coercion" (ibid.), and thus George Washington was at the time informed of the Six Nations' assessment "'that *White Man* is ... but another name for *Liar*'" (Timothy Pickering, quoted at ibid.).

While there were significant changes in U.S. Indian policy during the nineteenth century, Banner argues that even removal and allotment were essentially continuations of a "very old story" (p. 284). As he explains it, a central theme of that story is that while established law continued to protect Indian title (despite its redefinition as "occupancy"), the tactics of land acquisition on "the frontier"—even when that "frontier" was a reservation boundary—remained difficult to control. Policy makers generally rejected the idea of outright conquest of Indian lands, he contends, but Native Americans were nonetheless dispossessed through practices that can be characterized as existing somewhere between the poles of contract and conquest. Thus, for Banner, even removal policy is not to be considered an act of conquest. He takes pains to show that among the defenders of such notorious policies were "well-meaning whites with the shared goal of protecting the Indians" (p. 209). Banner is right to emphasize the complexity and internal contradiction in debates over these policies, but his discussion avoids engagement with the argument that such policies were also genocidal, and he suggests that the motives of those he identifies as "humanitarians" (among whom were proponents of assimilation as well as segregation) could not be racist. Can the notion that "the Indians" constitute "a problem"—whether propounded by those who want to "help" them or those who seek their elimination—ever be construed as existing outside the racialized political and socio-economic hierarchy that had come to characterize U.S. society?

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E. KAY GIBSON. *Brutality on Trial: "Hellfire" Pedersen, "Fighting" Hansen, and the Seaman's Act of 1915.* Gainesville: University Press of Florida, 2006. xix, 225 pp. $34.95 (cloth).

This is a most unusual work of scholarship. Its subject, the incredible brutality inflicted on crew members aboard two U.S.-flag wooden sailing ships that carried lumber across the Pacific in the waning days of sail, is deeply disturbing and frequently revolting. Its author, Kay Gibson, found her subject over thirty years

ago while listening to stories told by her husband, maritime historian Dana Gibson, and his father. Over the years, the author, assisted by a great many specialists whose help is generously acknowledged, has pursued her subject with admirable thoroughness. The result is a narrative that incorporates a great deal of previously unavailable evidence.

Gibson's core evidence comes from legal records whose creation and preservation was mandated by laws passed in response to campaigns for seamen's rights led by maritime labor activists in the first two decades of the twentieth century. From these records, Gibson has reconstructed shockingly detailed accounts of brutality at sea. And as she makes clear, the laws that led to the creation of these records did precious little to prevent or punish the brutality she documents in such detail. This is a book about depraved individuals and the damage they did in circumstances where those upon whom they preyed had no recourse. Yes, there were subsequent trials in a few cases, and several of those charged were convicted and served time in prison, but the scales of justice remained heavily weighted against defenseless sailors.

The book vividly documents its appalling subject. The reader is also well served by the book's illustrations, appendices, glossary, notes, bibliography, and index. Gibson's diligence has turned up far more evidence than one might have supposed existed, and her evenhanded descriptions of conduct that veered from the lunatic to the sadistic reveal what it was like to be senselessly victimized in settings that offered no escape. Out-of-sight was out-of-mind for those on shore who enjoyed the benefits of civil society in the nineteenth century, but the relentless evidence Gibson has marshaled denies her readers that escape. Mix in frequent drunkenness, as these bucko mates and captains did, and you begin to understand why a century ago prohibition seemed such a compelling idea.

This is not an easy book to read. Seamen on ships that were out of communication with those who lived ashore could easily be brutalized, and the whims of those in command, like the vagaries of wind and weather, could make the life of the common sailor a living hell. But it is the author's narrative strategy, rather than the subject itself, that finally wears the reader down. Gibson repeatedly quotes from legal documents, most of which are transcripts of testimony. The reader is therefore obliged to wade through large blocks of quoted evidence, much of it essentially repetitive. The effect can be deadening. One longs for a confident and purposeful authorial voice, an awareness of the need to move the story forward and reveal to the reader where all this is taking us and why we should care. Perhaps Gibson would have found such a voice had she framed her story in a different way, perhaps by setting it in a larger historical context. As it is, her fixation on the evidential record of brutality, leaves the reader squirming.

As I plowed through these repeated descriptions of human misery, I was reminded that descriptions of evil can easily become banal, a point often made by those who have looked long and hard at the horrors of the twentieth century. Were Gibson a bolder and more ambitious author, her book might have transcended the wretched stories it tells and tells and tells again. And if in the end her account of brutality at the hands of depraved officers in the age of sail fails to satisfy as history, it certainly provides valuable and indisputable documentation of the subject she has examined in such searing detail. For this we must be thankful.

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TAMARA LOOS. *Subject Siam: Family, Law, and Colonial Modernity in Thailand.* Ithaca: Cornell University Press, 2006. x, 212 pp. $39.95 (cloth).

Tamara Loos ends her book by pointing out that both Muslim insurgency in the South and continuing debate about politicians' extramarital affairs share a common past and trajectory: "They both grew out of the Thai state's ambiguity about how to manage domestic priorities and cultural difference within the context of European transnational hegemony" (p. 188). The book is mainly concerned with the emergence of Siam's modern family law, but a substantial proportion is devoted to the creation of Islamic courts in the Muslim South and the way in which the state dealt with the issue of polygyny, the role of women under Thai conceptions of citizenship, and the regulation of officials' sexual conduct.

Studies in the legal history of Siam/Thailand are few and far between, and this book, in terms of the classic joke, "fills a much-needed gap in the literature," a gap whose "much-neededness" becomes apparent for several reasons, notable among which are the fact that it deals extensively with family law (a topic often totally missing from general accounts of legal history) and the fact that it deals extensively with the Muslim South and its system of Islamic courts. For these reasons alone, the book would already be close to indispensability. This reviewer would go much further and say that Tamara Loos has done for law what Thongchai Winichakul in his book *Siam Mapped: A History of the Geo-Body of a Nation* (1994) has done for spatial geography—that is, to shed a special light of understanding on the complex processes of modernity in Siam by looking closely at a particular sector of governmental activity where we find, intersecting, Western colonialism, Thai political culture and religion, and the attempt by the Thai state to dominate its peripheral areas. As Loos puts it, "law was the pivotal arena in which the leaders of Siam negotiated modernity to its subjects" (p. 3). In the case of Loos's book, we can add gender and sexuality as significant factors in the story. The parallels between the two books take us even further. In both cases, we find that a Thai state propelled into modernizing by copying the techniques (mapmaking, law reform) of the Western powers whose colonies bordered on Siam, utilized these techniques both as defense (to Western aggression) and as offense (assertion of power over non-Thai minorities). Notably, family law was used as a defense mechanism against colonialism (the unequal treaties embodying extraterritoriality were abrogated immediately; the reform of law was completed with the institution of a monogamous marriage system in 1935) and as a means of asserting colonial control over the Muslim South. Both books emphasize, in the spirit of subaltern studies, the perspective of powerless groups, while analyzing the nature of the Siamese state in its dealings with them. *Subject Siam* is concerned with actual human biology, not with the geo-body as an abstraction of nationalism as in *Siam Mapped;* and yet it gives us further insights into the nature of Siamese/Thai nationalism, insights that resonate acutely at the present time, when turbulence in the Muslim South focuses attention once more on Thai nationalism and its relation to religious difference, expressed in legal as well as in political (violently political) terms.

Loos in her earlier chapters sets out lucidly and interestingly the entire context of the creation and progress of its globalized (yes, even a century or more ago) situation; indeed these chapters could act as a text for a general course in Thai legal history. The most relevant part of this history is that in creating a separate system of Islamic courts in the Muslim South (Pattani, Yala and Narathiwat), the Siamese state under King Chulalongkorn was in fact copying the administrative techniques of the British in Malaya, where colonial domination was masked

by the major concession (but also by the manipulation) of religious courts. Later chapters examine the problems of polygyny and male and female sexuality through the legal lens of the evolving definition of "wife" (or should it be "wives"?) and King Vajiravudh's attempted Victorianization of Siam's sexual mores, which had much to do with the extra-royal expansion of the administrative elite in the early twentieth century.

It is of course implicit in both Siamese legal theory and in Loos's analysis that the entire nexus of family/gender/religion is presumptively and classically simply not amenable to legal modernization—at least not to the same extent as, say, administrative or commercial or property law. This nexus is thus an acute test for phenomena such as culture, colonialism, development, and modernity. What emerges from this book is a fascinating story, thoroughly researched, convincingly analyzed, and quite beautifully written. The book finishes where the next "much-needed gap" might well begin: the failure of the new family law of monogamy and registration to actually affect Siamese/Thai culture.

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PAUL M. PRUITT, JR., and DAVID I. DURHAM, eds., with TONY ALLAN FREYER and TIMOTHY W. DIXON. *Commonplace Books of Law: A Selection of Law-Related Notebooks from the Seventeenth Century to the Mid-Twentieth Century.* Occasional Publications of the Bounds Law Library 5. Tuscaloosa: Bounds Law Library, University of Alabama School of Law, 2005. ix, 134 pp. Free of charge (paper).

Over the past several years, the Bounds Law Library at the University of Alabama School of Law has issued a series of short books on legal history and bibliography highlighting items in its impressive collections. This volume, which reproduces extracts from seven notebooks spanning almost four centuries, is the latest of these productions. The volume itself is well-produced, as have been its predecessors. The editors offer a short introduction to the subject of legal commonplace books, which is both instructive and well-written. One might have wished for a slightly expanded account of the origins of legal commonplace books in the works of the Roman rhetorician Marcus Fabius Quintilian, whose writings were well known to eighteenth- and nineteenth-century Anglo-American lawyers, but this is a minor quibble.

The extracts from the seven volumes owned by the Bounds Law Library are each accompanied by an introduction and illustrative facsimiles. The facsimiles are particularly a welcome inclusion since they provide the reader with a feel for the actual book and its condition. The introductions provide comprehensive bibliographical descriptions of the texts as well as background notes on their authors.

The texts themselves consist of a notebook compiled by unknown students at the Inns of Court in the late seventeenth century, a ledger belonging to New York merchant and lawyer Alexander Dorcas dating to the postrevolutionary era, a notebook belonging to Litchfield Law School student George Josiah Sturges dating to 1826, a diary kept by the son-in-law of Alabama state circuit court judge Turner Reavis from January to December 1871, a printed lawyer's commonplace notebook started by Tuscumbia (Alabama) attorney James Thomas Kirk in 1891 and updated by him for more than twenty-five years, a three-ring binder of type-

written practice notes kept by Centerville (Alabama) lawyer Jerome T. Fuller from 1925 to 1935, and a three-ring binder of typewritten source notes compiled by U.S. Supreme Court Justice Hugo L. Black from 1938 to 1940.

One might question the editors' inclusion of a student notebook and a business ledger in a selection of commonplace books. Certainly, the inclusion of these texts expands the traditional notion of a commonplace book as it was understood by those who kept them, but this is an objection which only an historical bibliographer would take to heart. Further, the editors are fully aware of their expansive use of the term commonplace book and so note.

Every legal historian and historian of the book will profit from a close examination of this volume from the Bounds Law Library. The profession owes them sincere thanks for its production. We may hope that further volumes of like quality and utility will be forthcoming.

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JACK D. MARIETTA and G. S. ROWE. *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800.* Philadelphia: University of Pennsylvania Press, 2006. x, 353 pp. $59.95 (cloth).

Jack Marietta and G. S. Rowe have made a significant contribution to a robust literature on crime and punishment in early Pennsylvania. They have gathered and analyzed multiple data sources, and they have collected numerous cases and anecdotes to support their findings. The result is a highly textured portrait of the state's evolving criminal justice system from William Penn's proprietorship through the post-Revolution period.

The authors are particularly insightful when contrasting leaders' high expectations for building a liberal society founded on voluntary compliance and the high volume of crime, particularly violent crime, which troubled Pennsylvanians. For example, their analysis of rape juxtaposes official concern with this violent crime and its systematic underreporting. Marietta and Rowe consider why the meaning of rape was contested, why wives were vulnerable to husbands' sexual assaults, why women did not report rapes, why those who brought charges had difficulty pursuing them, how attorneys frustrated rape prosecutions, how female orgasm and impregnation were construed as consent, how purported victims were portrayed as extortionists, and how women's residence, social class, and race figured into rape trials. While the legal punishment for rape usually was draconian, few men were prosecuted, convicted, or punished for it, and those few were disproportionately black men convicted of raping white women.

The book's central theme is that Pennsylvania was founded as a liberal society that promised to liberate citizens from the conditions that promote crime but, nevertheless, "violence and crime abounded" (p. 1). Alas, high expectations borne of the "conceits of the Enlightenment and newborn liberalism" failed to explain ongoing criminal violence (p. 5). Let me raise three questions regarding this theme.

First, was early Pennsylvania a liberal society? It was friendlier to individual rights, market transactions, and limits on authority than other colonies and England. Also, its criminal justice system was less severe than elsewhere. However, its "liberal" government, laws, and tolerance for diversity were suspect. Initially, Pennsylvania was run by a proprietor and his elite and, after 1718, by

leaders bound to English precedents and directives. Its laws criminalized what officials considered immoral behavior, and its punishments, although varying, remained extremely harsh—including hangings, maimings, whippings, and humiliations. Marietta and Rowe emphasize that Pennsylvania was an open society; Quaker officials welcomed Germans, Scots-Irish, and others to their colony. However, this openness was truncated by segregated residential patterns, ethnic conflicts, and racial subordination, which suggest that not everyone was welcomed or tolerated.

Second, was liberalism conceived as conducive to a crime-free society or reduced crime rates? The authors claim, "Lockean liberals presumed that the impulses of human behavior were more often altruistic and constructive than selfish and destructive. Therefore, they anticipated more benefit than loss from freeing men and women from the historical constraints upon their behavior" (p. 264). My reading of Lockean liberalism differs. It assumes people are self-interested, find labor painful, and consent to a government that exercises police power—doing whatever it deems necessary to maintain order. For Locke, a defining feature of political society was that individuals transferred law enforcement responsibilities to the government. He assumed that crime would be a continuing problem.

Third, how do we explain the particular manifestations of crime in liberal society? Marietta and Rowe offer multiple explanations for Pennsylvania's high crime rates. Ongoing patriarchalism, immigrants with violent cultural baggage, large numbers of unattached young males, widespread alcoholism, racism, and slavery, marketplace aggression, land grabs from indigenous peoples, a gap between laws and juror prejudices, ungovernable frontiers, distrust between Whigs and Tories during the Revolution, institutional inefficiencies, failed reforms, and urban ills all contributed to Pennsylvania's "troubled experiment." Only a naïve liberal idealist could imagine that such a society would substantially reduce crime.

The book's most compelling subtheme is that liberty invites crime. Criminals take liberties by disobeying laws, and they forfeit liberties when incarcerated. The more they claim liberty, the more likely they will exercise it in illegal ways. It was no coincidence that Pennsylvania hosted the Continental Congress in the 1770s and then a vigorous penal reform movement in the 1780s. Benjamin Rush and fellow reformers were convinced that liberty produced licentiousness, which invited crime. Reformers' main concern was not to alter conditions conducive to crime (such as racism, poverty, and transience) but to reduce crime after the fact by imprisoning and rehabilitating criminals. America's ongoing commitment to penitentiaries and its mostly futile attempts at rehabilitation help explain why our liberal society disproportionately punishes "African Americans, the poor, transients, and the latest immigrants" by incarcerating them "at rates far exceeding those in nations we disrespect" (p. 272).

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MARTIN H. REDISH. *The Logic of Persecution: Free Expression and the McCarthy Era.* Stanford: Stanford University Press, 2005. xi, 300 pp. $55.00 (cloth); $21.95 (paper).

Having published extensively on the McCarthy Era myself, I am impressed with Martin Redish's take on First Amendment considerations of persecutions of

Communists in the 1940s and 1950s. He presents a balanced assessment of the crisis surrounding claims of internal subversion. Legitimate pursuit of espionage agents, witch hunts for so-called "fellow travelers," and the exposure of ex-Communists preceded Senator Joseph McCarthy's claim in 1950 that there were 205 subversives in the State Department. The House Un-American Activities Committee had been in operation since 1938. The Truman administration mandated loyalty oaths, a practice that was quickly adopted by the states. Under relentless questioning by Congressman Richard Nixon, Under Secretary of State Alger Hiss claimed never to have been a member of the Communist Party; he was soon convicted of perjury. Assistant Secretary of Treasury Harry Dexter White and an administrative assistant to the president, Lauchlin Currie, were outted on Truman's watch. His administration decided to go after Eugene Dennis and other leaders of the Communist Party under the infamous Smith Act. Even Hubert Humphrey proposed legislation making it a crime to be a member of the Communist Party. By the end of 1949, the Soviet Union had exploded an atomic bomb and taken over much of Eastern Europe, China had fallen to Communism, and the war in Korea was about to begin. This context of paranoia and instability made the rise of McCarthy possible.

Redish claims that documents released after the fall of the Soviet Union vindicate many claims by conservatives. The Communist Party of the United States "had, in fact, been run completely" by Moscow, had engaged in "espionage" at least as early as 1942, and had attempted to infiltrate trade unions, particularly in Hollywood, due to their propaganda value (pp. ix, 4). While too many innocents were tarred with the brush of the witch hunters, many real subversives were exposed.

From this revisionist position, Redish spins out a new theory of First Amendment analysis that is as nuanced as it is complex. Chapter 3 explores the "pathology" theory that traces pendulum swings from peacetime freedoms to wartime restrictions. Adding to those who have examined the swings during the Alien and Sedition, Civil War, Labor Union, Red Scare, and McCarthy periods, Redish focuses on the swing from *Dennis v. United States* (1951) to *Yates v. United States* (1957).

In Chapters 4 and 5, he explores the implied right of non-association that gives citizens the right to know who other people are. If we don't know who others are and to which organizations they belong, our attempts at non-association will be ill-informed. To enlighten his discussion, Redish uses the decision in *Boy Scouts of America v. Dale* (2000) as well as cases surrounding the National Association for the Advancement of Colored People (NAACP) and the State of Alabama, cases in which workers argued that they had a right not to reveal their membership in the NAACP to protect themselves from persecution and firing. Do we have the right to assemble in private and keep our views secret? That is the hook on which the Hollywood Ten placed their hats. Many have since argued that a Fifth Amendment hook would have served them better.

In Chapter 6, Redish also examines our educational system from the same balanced position. If we can protect our children from "value inculcation" by bigots, such as members of the Ku Klux Klan, can't we prevent them being taught by those with other ideological agendas, such as the advancement of a communist or fascist state? How does one separate a Communist who presents a threat to impressionable children from one who does not? How does one guarantee student access to all responsible positions on a question?

I do wish that Redish had consulted texts other than those written by scholars

at law schools or in history departments. There is spate of very good work by communication scholars in the *Free Speech Yearbook,* work that might have informed some of Redish's findings. That being said, Redish's use of the so-called McCarthy era as a laboratory for theory is supported by a careful review of case law. His proposals for revisions in policy are neither knee-jerk nor simple. They require an understanding of the philosophy of freedom of expression and the implied limits and extensions of the First Amendment.

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ERRATA

Volume 48 #1 of The American Journal of Legal History had the following misspellings. Page 39 in the BIO paragraph of the Carli N. Conklin article: Line 4 - University, Line 8 - University, Line 9 - Preston, Line 10 - Bentley, research.