2020

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Home Business Law Constitutional Law Criminal Law and Procedure Election Law
Foreign, Comparative, and International Law Intellectual Property Law Legal History
Environmental Law Legal Research, Writing, and Instruction Healthcare and Medical Law
Race, Gender, and Civil Rights Religion and Law Space Law Sports and Entertainment Law
Tax Law Regulations and Administrative Law Probate and Estates Zoning and Land Use Law

Updates

About This Guide

C|M|LAW supports faculty scholarship in many subject areas across the legal field. Faculty publications are available through EngagedScholarship, the institutional repository shared with Cleveland State University. This guide draws together scholarly articles and books by current faculty, published within the last five years, and arranged by topic. The abstract and link to the repository are provided for each listing.
### Recent C|M|Law Faculty Publication

Highlighting one of the most recent publications by current C|M|Law faculty.

**Milena Sterio**

- **The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide**  

**Abstract:**  
This Article first discusses and analyzes the Genocide Convention and its strict definition of genocide and the "intent" requirement. It then focuses on the evolution of this definition in light of the recent Karadžić case. This Article demonstrates that in modern-day conflicts, the finding of genocidal intent may be an impossible task for the prosecution and that the ICTY Trial Chamber’s method of inferring intent based on knowledge and other indirect factors may be the only way that prosecutors will be able to obtain future genocide convictions. This Article then discusses a possible re-drafting and re-conceptualizing of the genocide definition in light of modern-day conflicts and warfare.

### Business Law

**Michael J. Borden**

Professor Borden was an attorney with Leboeuf, Lamb, Greene & MacRae, L.L.P., in its New York and Paris offices from 1998 through 2001, when he
Charles M. Sagers entered the LL.M. program at New York University. He represented clients in a wide range of business transactions. To see more of his publications, click here.

**Areas of Concentration:**

Corporations, Contracts, Mergers & Acquisitions, Litigation

- Of Outside Monitors and Inside Monitors: The Role of Journalists in Caremark Litigation

  **Abstract:**
  In this article I argue for a change in Delaware corporate law that would allow for competitive forces to improve the quality of corporate compliance programs, thus reducing harm to society from corporate illegality and improving shareholder welfare. Specifically, courts should remove some obstacles that prevent plaintiffs in shareholder derivative actions from forcing defendant directors to demonstrate the efficacy of their compliance programs in cases where outside monitoring by journalists appears to have detected illegal corporate actions before those actions have been detected by the internal monitoring of the compliance department.
  Currently, the rigorous demand requirement and the deferential good faith standard in duty to monitor cases cause most Caremark claims to be dismissed at the demand phase, thus shielding defendant directors from revealing information about the performance of their compliance programs. The changes I suggest will force corporate defendants to reveal information that will allow courts to compare the monitoring performed by journalists with that done by compliance programs. Where the outside monitors are outperforming the inside monitors, directors may be responsible for failing to perform their duty to monitor, which requires them to establish systems to detect and report illegal behavior by employees. By implementing the modest changes I suggest, Delaware courts will, over time, have more information to help them assess whether their approach to the duty to monitor needs a more thorough overhaul.

  **Karin Mika**

  Professor Mika has been associated with the Cleveland-Marshall Legal Writing Program since 1988. She has also worked as an Adjunct Professor of English at Cuyahoga Community College and is a research consultant for various firms and businesses in the Cleveland area. Professor Mika is also active in both the Legal Writing Institute (LWI) and Association of Legal Writing Directors (ALWD). To see more of her publications, click here.

  **Areas of Concentration:**

  Legal Writing and Research, Native American Law, Employment Law, Learning Theories, and Health Care

  - Privacy in the Workplace: Are Collective Bargaining Agreements a Place to Start Formulating More Uniform Standards?

  **Abstract:**
  This paper discusses ambiguities related to laws in employee privacy and posits that this is problematic for both employers and employees. The article discusses how private employers have almost no restrictions when it comes to employee monitoring, especially when there is an announced (albeit vague) policy. The article then suggests that unions have at least some negotiating power in terms of setting standards for when an employee may be disciplined and thus, labor unions have at least a modicum of power in negotiating clear rules regarding employee monitoring. The paper further suggests that clear policies aren't a bad thing, and that if clear policies are adopted in collective bargaining agreements, those policies might find their way into the private sector.

  **Christopher L. Sagers**

  Professor Sagers is
Matthew W. Green

Professor Green was a law clerk for the Hon. Deborah K. Chasanow, U.S. District Court of the District of Maryland and for the Hon. Eric L. Clay, U.S. Court of Appeals for the Sixth Circuit. He was a litigation associate with Hogan & Hartson, L.L.P. and with Ober, Kaler, Grimes & Shiver where he focused on employment-related matters. To see more of his publications, click here.

**Areas of Concentration:**

Contracts, Employment Discrimination and Retaliation, Civil Liberties

- What's So Reasonable About Reasonableness?
  Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine
  University of Kansas Law Review, vol.62 no.3 (2014)

  **Abstract:**
  The article critiques recent application of the reasonable belief doctrine under Title VII of the Civil Rights Act of 1964. Title VII's anti-retaliation provision, in pertinent part, provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice [under Title VII]." Literally read, the provision requires that an employee oppose a practice Title VII actually makes unlawful. If the employee does so and is retaliated against, the statute affords the employee relief. While the U.S. courts of appeals have rejected this literal interpretation and have held that the opposition clause protects employees who complain about conduct reasonably believed to be unlawful discrimination, courts have failed to settle on a uniform standard for determining reasonableness. Most courts require that employees demonstrate the reasonableness of a belief about the illegality of alleged discrimination in light of existing substantive law. Case law is the objective evidence on which reasonableness is based, and

Professor Sagers is the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator. Before joining the faculty, Professor Sagers practiced law for four years in Washington, D.C., first at Arnold & Porter and then at Shea & Gardner. He is a member of the American Law Institute, a Senior Fellow of the American Antitrust Institute, and a leadership member of the ABA Antitrust Section. To see more of his publications, click here.

**Areas of Concentration:**

Administrative Law, Antitrust Law, Law and Economics, Corporations, Legislative & Regulatory Law, Agency & Partnership

- #LOLNothingMatters

  **Abstract:**
  Institutions matter in antitrust, at least as much as ideas. Most antitrust arguments, and especially the contretemps currently enjoying some attention in the popular press, imagine that antitrust problems are short- or medium-term matters, and that they can be corrected with local doctrinal steps. I suggest there is a deeper problem, a phenomenon more deeply inherent in the nature of competition itself. The problem will cyclically recur, so long as institutional brakes are unavailable to keep it at bay. Specifically, it seems that competitive markets are difficult to preserve without some prospective, no-fault rule to control concentration for its own sake. At least nominally, American antitrust has such a rule in its basic merger law, Clayton Act § 7, but the rest of it consists of retrospective, fault-based, law-enforcement rules that in their application are by nature somewhat piecemeal. A prospective concentration rule is needed because once markets become concentrated, situations are common in which neither disciplinary new entry nor retrospective conduct remedies can restore competition. The deeper problem inherent in competition policy, which demonstrates the significance of institutions as well as ideas, is that such a rule is also most difficult to enforce. That is so because markets in their ordinary operation are
criterion on which reasonableness is based, and employees are given no leeway for error about judicial interpretations of Title VII. The article argues that the courts have been correct to reject a literal interpretation of the opposition clause, but as a normative matter proposes a totality of the circumstances approach to assessing reasonableness. The article also sets forth factors that courts should generally take into account in the reasonableness calculus. The test articulated in the article is consistent with recent U.S. Supreme Court precedent interpreting Title VII, promises broader protection than the case-law approach and better effectuates the original purposes of the reasonable belief doctrine than current standards.

- Family, Cubicle Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes


Abstract:
This article joins the discussion of when employees should be protected against third-party retaliation under Title VII of the Civil Rights Act of 1964 and analogously worded statutes. In Thompson v. N. Am. Stainless, LP., 131 S.Ct. 863 (2011), the U.S. Supreme Court held that third-party retaliation was cognizable under Title VII, an issue that had divided the lower courts for decades. Prior to Thompson, lower courts that recognized the viability of such claims often imposed limits on the classes of relationships for which third-party retaliation was unlawful. For instance, courts often found such claims viable where after an employee complained about discrimination (engaged in "protected activity"), an employer punished that employee's spouse or other family member as a result. Where the relationship was deemed to be too attenuated (e.g., an amity or professional relationship) protection was uneven at best. This article argues against such a formalistic approach to third-party retaliation. The article argues that an employee should be protected against third-party retaliation whenever there is proof that the employer targeted him or her to get back at a coworker who engaged in protected activity regardless of the relationship between the coworkers — family, friend, cubicle mate or otherwise. It argues for protecting that coworker whenever that individual suffers an adverse action that would have sufficed for an actionable

because markets in their ordinary operation are confusing and contradictory to watch, and the hardest interventions for government to defend to a skeptical public are those that are prospective. Finally, however, it so happens that one institutional correction currently on the legislative agenda could conceivably do some good in correcting for this problem—a specific plank in congressional Democrats’ “Better Deal” platform.

- Brief of Antitrust Scholars as Amici Curiae in Support of Appellees, Supporting Affirmance

with Craig K. Wildfang, Ryan W. Marth, David Martinez
O'Bannon v. National Collegiate Athletic Association
Briefs and Court Filings (2015)

Abstract:
Amici urge affirmance for three principal reasons. First, we elaborate a point to dispel Appellant's suggestion that antitrust somehow does not belong here. Second, we show that ordinary rule of reason treatment was appropriate. Relying rather daringly on a case that it overwhelmingly lost, Appellant asks this Court to find within NCAA v. Board of Regents of Univ. of Okla., 468 U. S. 85 (1984), a rule that its "amateurism" or "eligibility" restraints are "valid...as a matter of law." NCAA Br. at 14, 22. Board of Regents did not say that, and even Appellant's own amici admit it. See Wilson Sonsini Br. at 5 & n. 2. Last, but most important, having shown that no special rule applies, we show ample grounds to affirm within the district court's opinion. Of fundamental importance is the court's finding that anticompetitive harm outweighed the minor benefits that Appellant could show.

- O'Bannon v. National Collegiate Athletic Association: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics

with Michael A. Carrier

Abstract:
In O'Bannon v. National Collegiate Athletic Ass'n, then-Chief Judge Claudia Wilken of the U.S. District Court for the Northern District of California issued a groundbreaking decision, potentially opening the floodgates for challenges to National Collegiate Athletic Association (NCAA) amateurism rules. The NCAA was finally put to a full evidentiary demonstration of its amateurism defense, and its proof was found
retribution claim had the employer taken the same action against the employee who engaged in protected activity. Thus, the proposal would bar employers from doing indirectly (to a third party) what they are prohibited from doing directly to the third-party’s associate who engaged in protected activity. The article cogently argues that this approach to analyzing third-party retaliation claims is consistent with Thompson, Title VII’s broadly worded anti-retaliation provision and the purposes that underlie it.

...
the court found that even products very plainly substitutable on any traditional "functional interchangeability" analysis are not in the same "relevant market" for purposes of rules governing horizontal mergers. We think the court's analysis was incorrect for a number of factual reasons, but stress that, much more importantly, a case like Lundbeck calls for return to traditionally broad, prophylactic rules.

- Antitrust: Examples & Explanations
  ISBN: 9781454833956

Abstract:
Publisher summary: This law text strives to make economic theory understandable to students without previous background in economics, and to relate economic theory to antitrust issues. Opening chapters introduce basics of economic theory in an intuitive way without mathematics, then take the economic basics a step further by introducing a set of economic generalizations that run throughout antitrust; the book also includes more in-depth economic material explained in a more traditional quantitative manner. Later chapters cover traditional areas of antitrust. This second edition takes into account changes in the field since 2011, especially three important Supreme Court decisions on antitrust cases.

- Testimony before the House Judiciary Committee,

Abstract:
Airline and business group representatives and antitrust analysts testified about the impact on competition and consumers of the proposed merger between American Airlines and U.S. Airways.

"I'm going to talk instead about what I also think is relatively simple, and that is the competitive effects. There isn't time for me really to address it fully, but I will say this. In the written statements that I read last night - - and I read them all -- the most remarkable statement was that, in this merger, among the thousands and
thousands of daily flights to cities all across the United States that are controlled by these two carriers, the only overlaps that matter in the whole combined network will be 12 overlaps, 12 flights.

We could delve into some complexities. I'd rather focus on what seems to me simple. We should ask ourselves, among those thousands and thousands of flights, are there really only 12 cities in which these two carriers provide competition with each other that will be lost through this merger? I don't think so.

For a brief introductory analysis to what are the more likely effects, you can look at the white paper produced by the American Antitrust Institute, which is attached to Mr. Mitchell's written statement.

The final thing I'll say -- and, unfortunately, I have a very brief remaining time to say it -- is that a dominating theme of all discussion of airline mergers since deregulation has been the economic difficulties of the carriers. The claim is we have to merge, we have to consolidate to strengthen ourselves so that we can perform.

Here are a few thoughts about that. First of all, the carriers really have never offered any very plausible explanation why merger. It has to be merger that's going to solve our economic problems. They can, and they often have suggested a lot of detailed arguments. But again, I think the response is a relatively simple one, and that is that, well, we've had a long time.

We've had 35 years with dozens of mergers, every single one of which has been sold on the claim that synergies, cost savings, et cetera, are going to make us competitive. It hasn't worked. The airlines have remained -- the latest airlines, at least, have remained mostly economically in dire straits throughout that whole time."
inaugural holder of the Charles R. Emrick, Jr.-Calfee Halter & Griswold Endowed Chair. During the Reagan administration, Professor Forte served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. He has authored a number of briefs before the United States Supreme Court, and has frequently testified before the United States Congress and consulted with the Department of State on human rights and international affairs issues. He has appeared and spoken frequently on radio and television, both nationally and internationally. To see more of his publications, click here.

Areas of Concentration:
Constitutional Law, the First Amendment, Islamic Law, Jurisprudence, Natural Law, International Law, International Human Rights, the Presidency, and Legal History

- Righting a Wrong: Woodrow Wilson, Warren G. Harding, and the Espionage Act Prosecutions

Abstract:
This is a story of excess and reparation. It is a chronicle of one President from the elite intellectual classes of the East, and another from a county seat in the heartland. Woodrow Wilson was the college president whose contribution to the art of government lay in the principle of expertise and efficiency. When he went to war, he turned the machinery of government into a comprehensive and highly effective instrument for victory. For Wilson, it followed that there could be little tolerance for those who impeded the success of American arms by their anti-war propaganda, draft resistance, or ideological dissent. Nor would there be any compromise with those who later opposed his plan for peace.

Warren G. Harding was a middling sort of person, simple in his virtues, mundane in his vices. Inadequately educated-as he always admitted-he nonetheless became a successful newspaper editor by four years (1991 to 1995) as the Legal Director for the American Civil Liberties Union of Ohio. He was also a trial lawyer at the national law firms of Smith & Schnacke (now Thompson, Hine & Flory) and Arter & Hadden (now Tucker, Ellis & West). To see more of his publications, click here.

Areas of Concentration:
Evidence, Civil Procedure, First Amendment Rights, Pretrial Practice

- The Regulation of Public Protest: Mass Demonstrations, Marches, and Parades
  Publication Date: 7-2017
  Publication Title: Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression

Abstract:
This book is a re-mastered, retooled version of the ABA publication Protecting Free Speech and Expression: The First Amendment and Land Use Law. It contains some theoretical discussion of First Amendment law as it pertains to land use issues (e.g. sign and billboard regulation, regulation of artwork and aesthetics, regulation of religious land uses, regulation of adult businesses, etc.). It also provides information that will be relevant to practitioners and includes some regulatory strategies and case studies. In order to strategically illustrate their points, the authors include cases as source material.

ISBN: 9781634259187

- Vernonia School District v. Acton
  ISBN: 1604265892

- Dog-Sniffing Searches
  ISBN: 1604265892
overcoming the shared monopoly of two established dailies. His persistence brought him political success in the rough world of Ohio Republican politics. Where Wilson thought efficiency the hallmark of a successful administration, Harding believed it to be harmony. While Wilson sought to confine those who opposed his war aims, and unseat those who rejected his peace aims, Harding did not think a man should be in jail for what he said. Where Wilson oversaw the segregation of the civil service, Harding confronted Jim Crow in the Deep South.

Between the two stood Eugene V. Debs, the Marxist Socialist who could gather nearly a million votes for President but looked forward to a revolution that would unseat the capitalists from their positions of power. There was nothing that Debs stood for that either Wilson or Harding could abide. But while Wilson wanted to keep Debs in prison, Harding wanted to shake his hand.

- Forgotten Cases: Worthen v. Thomas

Abstract:
According to received opinion, the case of the Home Bldg. & Loan Ass’n v. Blaisdell, decided in 1934, laid to rest any force the Contract Clause of the United States Constitution had to limit state legislation that affected existing contracts. But the Supreme Court's subsequent decisions belies that claim. In fact, a few months later, the Court unanimously decided Worthen v. Thomas, which reaffirmed the vitality of the Contract Clause. Over the next few years, in twenty cases, the Court limited the reach of Blaisdell and confirmed the limiting force of the Contract Clause on state legislation. Only after World War II did the Court abandon the Contract Clause by interpreting Blaisdell well beyond its original intention. The Court in the 1930s had devised a workable formula that could be still workable today.

- Limited Government
  American Governance
  Macmillan (2016)
  ISBN: 9780028662558

- Amicus brief in support of motion for reconsideration, in the case of Murray v. Chagrin Valley Publishing Co., Case no. 2015-0127, Supreme Court of Ohio

- Board of Education v. Earls
  ISBN: 1604265892

- Palmer Raids
  ISBN: 1604265892

- Saving the Press Clause from Ruin: The Customary Origins of a ‘Free Press’ as Interface to the Present and Future

Abstract:
Based on a close reading of original sources dating back to America’s early colonial period, this article offers a fresh look at the origins of the Press Clause. Then, applying those historical findings, the article critiques recent scholarship in the field and reassesses the Press Clause jurisprudence of the Supreme Court. Finally, the article describes the likely impact of its historical findings if ever employed by the Court in interpreting the Press Clause.

John T. Plecnik
Professor Plecnik worked for the Wall Street law firm of Thacher Proffitt & Wood LLP as an ERISA attorney. He then served as a law clerk to Judge David Gustafson of the United States Tax Court and as an Adjunct Professor of Law at Georgetown University Law Center, where he taught Tax Penalties & Tax Crimes. Professor Plecnik currently serves as Councilman-at-Large for the City of Willoughby Hills and Council Representative on the Willoughby Hills Income Tax Board of Review, which is tasked with approving local income tax regulations as well as hearing and deciding taxpayer appeals. To see more of his publications, click here.

Areas of Concentration:
Tax Law and Procedure, Penalties & Crimes, Wealth Transfer Tax, Estates & Trusts

Abstract:
Forte authored an Amicus brief in support of motion for reconsideration, in the case of Murray v. Chagrin Valley Publishing Co., Case no. 2015-0127, Supreme Court of Ohio, on issues dealing with free speech and libel. The brief was filed on July 20, 2015. In the brief, Forte writes, 'I have chosen to participate as an amicus curiae in support of the Motion for Reconsideration filed by Appellants Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company because as a career constitutional scholar, I believe that Appellants' case presents questions of keen interest to the bench and bar that merit this Court's attention. The interest that Appellants' appeal garnered from multiple amici curiae and from the press is no accident — the case indeed presents a notable package of First Amendment issues worthy of this Court's review.'

* End of Academic Freedom: The Coming Obliteration of the Core Purpose of the University (Forward)
End of Academic Freedom: The Coming Obliteration of the Core Purpose of the University
William Bowen, Michael Schwartz, Lisa Camp
Information Age Publishing (2014)
ISBN: 1623966590

* The Heritage Guide to the Constitution with Matthew Spalding, Forward by Edwin Meese III
Regnery Publishing (2014)
ISBN: 1621572684

Abstract:
"Everything you thought you knew about the Constitution and more-broken down, spelled out, and expounded upon. The Heritage Foundation presents its updated Guide to the Constitution, the preeminent and invaluable reference (with clause-by-clause analyses) for policymakers and students, alike. With laws deconstructed, addendums unveiled, this guide proves to be the most comprehensive authority on our country's framework"

* Brief of Political Scientists and Historians as Amici Curiae in Support of Respondent, National Labor Relations Board, Petitioner v. Noel Canning, No. 12-

* The New Flat Tax: A Modest Proposal For a Constitutionally Apportioned Wealth Tax
Hastings Constitutional Law Quarterly, vol.41 no.3 (2014)

Abstract:
This Article is the first to propose a solution that complies with the Apportionment Clause without imposing different rates in different states. This Article discusses the practical and administrative issues with implementing a wealth tax in the United States as well as the substantive fairness of such a tax relative to the income and consumption tax regimes. This article describes the Apportionment Clause, so-called direct taxes, and the constitutional issues with implementing a wealth tax. It also describes prior proposals to circumvent the Apportionment Clause for the sake of a wealth tax. It also outlines a modest proposal to pass the New Flat Tax—a wealth tax that complies with the dual strictures of horizontal equity and the constitutional rule of Apportionment.

* Officers Under the Appointments Clause

Abstract:
Much ink has been spilled, and many keyboards worn, debating the definition of "Officers of the United States" under the Appointments Clause of Article II, Section 2, Clause 2 of the Constitution. The distinction between Officers and employees is constitutionally and practically significant, because the former must be appointed by the President, with or without the advice and consent of the Senate, Courts of Law, or Heads of Departments. In contrast, employees may be hired by anyone in any manner.

Appointments Clause controversies are triggered when a government official who was hired as an employee is accused of unconstitutionally wielding the more "significant authority" of an Officer. If proved, the official's decisions are subject to collateral attack. In the seminal Tucker decisions, the Tax Court and D.C. Circuit held that IRS hearing officers are mere employees and the Supreme Court denied certiorari. This outcome, which upheld the status quo, was unremarkable. But the methodology of the Tucker
Abstract:
The Recess Appointments Clause does not permit the unilateral appointments to the NLRB made by the President in this case. Those appointments - made during a three-day "intra-session" break when the Senate was meeting pro forma - are unique in the history of the Republic. They are also the culmination of unnecessary and inappropriate Executive overreaching. This overreaching has undermined a valuable Senate prerogative in a manner unfathomable to the Founders and inconsistent with the design of the Constitution.

The primary purpose of this brief is to show that adhering to the original meaning of the Recess Appointments Clause has not and will not disrupt the orderly governance of the Nation. The constitutionally prescribed modes of appointment worked perfectly well for a very long time, and modern circumstances make it even easier to continue using the Constitution's procedures. Whether the clear text, structure, purpose, and history of the Constitution should give way to "practical" considerations of the modern administrative state therefore cannot even be considered an issue in this case.

Notwithstanding a few relatively minor deviations from the constitutional design, Presidents throughout the first 160 years of our Nation's history largely, and certainly without insurmountable difficulties, adhered to the textual and structural confines of the Appointments Clause and the Recess Appointments Clause with which it is closely related. Their ability to abide by the Constitution, even in sometimes very difficult situations, provides a ready model for exercising the Presidential-appointment power today.

Doron M. Kalir

Professor Kalir teaches in the Civil Litigation Clinic, where he supervises students on a wide array of decisions was a remarkable step forward in clarifying the Appointments Clause jurisprudence of the Supreme Court.

Under the Tucker decisions, an Officer holds a position that is (1) "established by Law," (2) "continuing," and (3) vested with "significant authority." In turn, "significant authority" consists of three "main criteria": (1) power over "significant" or important matters, (2) "discretion," and (3) "final" decision-making authority. This Article adds the observation that each of the three criteria is a necessary element of "significant authority" in all or most cases.

Lastly, this Article cautions against overzealous application of the Appointments Clause. Requiring the appointment of low-level bureaucrats dilutes the scrutiny paid to judges and attorney generals. Appointing everyone is tantamount to appointing no one.
civil matters. Before arriving in Cleveland, Professor Kalir practiced antitrust and other federal litigation law with several prominent New York firms.

He also clerked for the Hon. Justice M. Naor, currently the Chief Justice of the Israeli Supreme Court, and practiced law in Israel, where he argued successfully several cases before the Israeli Supreme Court. To see more of his publications, click here.

Areas of Concentration:

Civil Litigation, Appellate Practice, Trial Practice, Statutory Interpretation, Same-Sex Marriage, Jewish Law

- Brief for the National Association of Social Workers and the Ohio Chapter of the National Association of Social Workers as Amici Curie in Support of Petitioners, No. 13-933, United States Supreme Court (Mar. 6, 2014) with Civil Litigation Clinic students Amy Polomsky and Kate Southworth

Briefs and Court Filings (2014)

Abstract:
NASW's first argument is simple. To protect children from abuse - a major congressional and state legislative goal - this Court should apply qualified immunity to protect social workers from personal liability where a reasonable decision has been made to remove a child without a warrant.

NASW's second argument is equally cogent. DeShaney was decided 25 years ago. Since then, this Court's "continued silence" on the issue, Kovacic, 724 F.3d at 708 (Sutton, J., dissenting), has failed "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011). In light of the circuit split on this issue - compare Hatch v. Dep't for Children, 274 F.3d 12 (1st Cir. 2001) with Kovacic, 724 F.3d (6th Cir. 2013) - guidance from this Court is more necessary today than ever.
Criminal Law and Procedure

April A. Cherry

Prior to joining the Cleveland-Marshall faculty, Professor Cherry was an Assistant Professor of Law at Florida State University College of Law from 1992-1999. She also previously clerked for Chief Judge Judith Rogers of the District of Columbia Court of Appeals and was an associate with the Washington, D.C., law firm of Paul, Hastings, Janofsky & Walker. Professor Cherry's primary research focus is on reproductive rights and technologies. To see more of her publications, click here.

Areas of Concentration:
Property, Family Law, Estates and Trusts, Women and the Law, and Reproductive Rights

- Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses

Abstract:
The ways in which society responds to pregnant women whose behavior purportedly harms their fetuses can be explored from a variety of legal vantage points. This article argues that the criminal law model currently used is ineffective. The assignment of criminal liability to pregnant women is often rooted in fetal personhood and maternal deviance discourse. Criminal law solutions fail because they fail to take into account the fact that maternal behavior is often the result of a myriad of the social and economic conditions over which pregnant women have little or no control. The criminal law model, therefore, simply punishes women without any corresponding benefit to fetal health. And in effect, work to treat pregnant women in an instrumental way, as people whose primary purpose and responsibility is the health of others. This article argues that use of the public health model is superior in three ways. First, as a

Jonathan Witmer-Rich

Following law school Professor Witmer-Rich clerked for Judge M. Blane Michael on the Fourth Circuit Court of Appeals, and for Judge Joseph R. Goodwin on the U.S. District Court for the Southern District of West Virginia. He then worked as a litigation associate for three years at Jones Day in Cleveland. Professor Witmer-Rich also practiced at the Federal Public Defender's Office, where he represented defendants charged with a wide range of federal crimes. He also represented several detainees at the Guantanamo Bay detention facility in habeas corpus proceedings. To see more of his publications, click here.

Areas of Concentration:
Criminal Law and Procedure

- The Heat of Passion and Blameworthy Reasons to be Angry

Abstract:
This article seeks to resolve a longstanding conceptual puzzle plaguing the "heat of passion" doctrine--how courts should determine which features, beliefs, or characteristics of a defendant are properly relevant to assessing whether the defendant was sufficiently provoked, and which of those features should be disregarded. This article argues that provocation is not adequate if the reason the defendant became extremely angry is due to some blameworthy belief or attribute of the defendant. A belief is blameworthy if it contradicts the fundamental values of the political community. The blameworthiness principle distinguishes those aspects of the defendant that cannot form a basis to argue the defendant was reasonably provoked from those aspects that can properly form the basis of a provocation claim.
pragmatic matter, public health’s emphasis on harm prevention focuses attention on and proposes solutions to the problem of how to better ensure the health of women of child bearing age – especially those women who face social and economic barriers to good health. Second, public health’s pragmatic emphasis on harm reduction focuses attention on and proposes solutions to the problem of poor fetal and neonatal health. Finally, by its emphasis on social justice, the public health model encourages policy makers to focus on the dignity of women, including the absence of coercion and the availability of a sufficient number of meaningful options.

Part I introduces the "heat of passion" doctrine and briefly explains both the conceptual problem and this article’s solution. Part II more carefully examines the nature of the "heat of passion" doctrine, focusing in particular on the second component--whether the provocation was "reasonable" or "sufficient." Part III frames the problem--which characteristics of a defendant should be considered when assessing the reasonableness of provocation--by describing four example cases that elicit differing intuitions among many commentators. Part IV considers standards articulated by other commentators seeking to resolve this problem. Using the examples given in Part III, Part IV also explains why each of these standards fails to properly differentiate the cases. Part V then explains the correct standard--that the sufficiency of the provocation must be based on whether the defendant's reason for becoming extremely angry is itself blameworthy. Part V also explains how this standard correctly distinguishes among the examples given, and is grounded on the fundamental principle of culpability underlying criminal punishment. Part VI turns to several recurring types of provocation claims: claims by men who kill their intimate partners, and so-called "gay panic" and "trans panic" cases. Part VI also explains how these types of cases likewise involve the same conceptual issue at play in cases involving minority cultural or religious beliefs and how the "blameworthiness" principle provides the correct standard for differentiating the few valid provocation claims in these cases from the many invalid claims.

Patricia J. Falk

Patricia J. Falk clerked for United States Magistrate Arthur L. Burnett, Sr., upon her graduation from law school and was a Trial Attorney with the United States Department of Justice, Antitrust Division, from 1985 through 1991. She has tried numerous criminal and civil cases. To see more of her publications, click here.

Areas of Concentration:

Criminal Law, White Collar Crime, Evidence, Scientific Evidence, Social Science and Law, Family Law, Psychology of the Courtroom

- Husbands Who Drug and Rape Their Wives: The Injustice of the Martical Exemption in Ohio's Sexual Offenses

Abstract:
This article argues that Ohio's marital rape exemption fails to vindicate the sexual autonomy and physical integrity of all persons in the state to be free from non-consensual sexual conduct. This protection from unwanted, non-consensual sexual violation should be afforded to Ohioans regardless of the victim's marital relationship to the perpetrator. Furthermore, the state's sexual offense provisions are analyzed with

- Restoring Independence to the Grand Jury: A Victim Advocate for the Police Use of Force Cases

Abstract:
This Article proposes a grand jury victim advocate to represent the interests of the complainant before the grand jury in investigations into police use of excessive force. Currently, the prosecutor has near-exclusive access to the grand jury, and as a result, grand juries have become almost entirely dependent on prosecutors. Historically, however, grand juries exhibited much greater independence. In particular, grand juries have a long history in America of providing oversight over government officials, bringing criminal
sexual offense provisions are plagued with inconsistencies and illogical distinctions with respect to the marital immunity. Ohio’s partially abolished marital exemption cannot be justified under any coherent theory of justice, appears to survive merely due to inertia, and certainly does not serve the best interests of Ohio residents. The Ohio General Assembly should finish the legislative reform it started in 1975 and most recently revisited in 1986 by eliminating the marital exemption in its entirety from the state’s rape statute and other sexual offenses.

- “Because Ladies Lie:” Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio’s Sexual Offenses

Abstract:
In response to alarming statistics about the dearth of rape cases brought to successful fruition, feminist critiques of rape law, and changing attitudes about sexual autonomy, rape and sexual assault statutes in America have undergone enormous revision during the last few decades. The barriers to successful prosecution of rape cases—including the corroboration and resistance requirements—have been slowly eroding in modern statutory law. Despite rampant rape reform, these old-fashioned requirements have been remarkably persistent, and vestiges of them remain in twenty-first-century statutory enactments.

- A Curious Omission from Ohio’s Rape Statute: Sexual Assault When the Victim Consents to Medical or Dental Drugging
  University of Cincinnati Law Review, vol.82 no.4 (2014)

- Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud

This Article addresses the role of the prosecutor and the grand jury in police use of deadly force cases with a view toward American jurisdictions generally, but with a particular focus on Ohio law and recent events in Cleveland, most notably the grand jury proceeding following the shooting of twelve-year-old Tamir Rice on November 22, 2014.

- Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear

Abstract:
This Article aims to “unpack” the concept of affirmative consent by identifying common assertions about affirmative consent that are false or misleading and by separating issues that are commonly conflated. The goal here is not to advocate either for or against the notion of affirmative consent but to clarify the concept to show what is at stake (and what is not at stake) in these debates.

Part II of this Article sets forth definitions of affirmative consent, particularly noting the difference between policies that require unambiguous agreements and those that do not. Part III addresses the various misconceptions identified above. Section III.A discusses the “yes means yes” slogan. Section III.B notes that affirmative consent does not mean express verbal agreement. Section III.C explains that affirmative consent is different from unambiguous consent. Section III.D discusses the shift from “no means no” to “yes means yes,” noting that this change in the law has already occurred in most jurisdictions, regardless of whether the jurisdiction uses the term “affirmative consent.” Section III.E discusses the role of silence under affirmative consent policies analyzing a
under affirmative consent policies, analyzing a significant ambiguity on this point. Section III.F seeks to dispel the perception that in many sexual encounters, the parties fail to indicate their interest in sex.

- **Arbitrary Law Enforcement is Unreasonable: Whren's Failure to Hold Police Accountable for Traffic Enforcement Policies**
  
  
  Abstract:
  Whren v. United States is surely a leading contender for the most controversial and heavily criticized Supreme Court case that was decided in a short, unanimous opinion. The slip opinion is only thirteen pages long, and provoked no dissents or even concurring opinions. Critical reaction has been overwhelmingly negative. Criticism notwithstanding, the Court has not retreated from Whren, but continues to repeat its core holding.

  Part I frames the problem in Whren with a story. Part II sets forth the fundamental Fourth Amendment principle underlying this article—the prohibition against arbitrary search and seizure. Part III explains how arbitrariness applies to Whren, and to police enforcement policies. Part IV describes pretextual traffic stops as a form of entrapment. Part V addresses the Whren Court’s concern that the Fourth Amendment should not vary from place to place. Part VI notes that arbitrariness is distinct from discrimination, and acknowledges that ending arbitrariness would not necessarily end discriminatory law enforcement.

- **The Fatal Flaws of the ‘Sneak and Peek’ Statute and How to Fix it**
  
  
  Abstract:
  In the USA PATRIOT Act, Congress authorized delayed notice search warrants — warrants authorizing a “sneak and peek” search, in which investigators conduct covert searches, notifying the occupant weeks or months after the search. These warrants also sometimes authorize covert seizures — a “sneak and steal” search — in which investigators seize evidence, often staging the scene to look like a burglary.

  Covert searches invade the privacy of the home and should be used only in exceptional cases. The current
legal rules governing delayed notice search warrants are conceptually flawed. The statute uses a legal doctrine — “exigent circumstances” — that does not make logical sense when applied to covert searching of physical spaces because it permits investigators to manufacture a justification for a covert search in almost any case. Covert searches without sufficient justification run afoul of the Fourth Amendment’s “rule requiring notice” and are constitutionally unreasonable.

When confronted with a request for a covert search, courts should ask, “Why is it so important to do a covert search now, while the investigation is still ongoing, rather than a public search later, once police are ready to seize the evidence and arrest the suspects?” But the statute does not pose that question. Instead, the statute merely prompts courts to ask, “Assuming police conduct a search now but choose not to arrest anyone or seize the relevant evidence, will giving notice of the search likely lead to the destruction of evidence, escape of suspects, or otherwise seriously jeopardize the ongoing investigation?” Viewed this way, it is readily apparent that the answer will almost always be yes.

Stated differently, courts should be asking whether a proposed covert search is necessary — whether conducting a covert search is the only way to obtain evidence that cannot reasonably be obtained through conventional (and less invasive) investigative techniques.

This Article explains this conceptual error and addresses other flaws in the current statute. It then proposes new legislation that would fix the problems and properly regulate the invasive practice of covert searches and seizures.

- The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment “Rule Requiring Notice”
Pepperdine Law Review, vol.41 no.3 (2014)

Abstract:
This article documents the rapid rise of covert searching, through delayed notice search warrants, and argues that covert searching in its current form presumptively violates the Fourth Amendment’s “rule requiring notice.” Congress authorized these "sneak
and peek” warrants in the USA Patriot Act of 2001, and soon after added a reporting requirement to monitor this invasive search technique. Since 2001, the use of delayed notice search warrants has risen dramatically, from around 25 in 2002 to 5601 in 2012, suggesting that “sneak and peek” searches are becoming alarmingly common. In fact, it is not at all clear whether true “sneak and peek” searches are on the rise. The data are confounded with other types of searches and thus are failing to capture what Congress intended. This article proposes an amendment to the reporting requirement to fix this problem and allow adequate monitoring of “sneak and peek” searches. To date, most courts have concluded that delayed notice search warrants raise no Fourth Amendment concerns. This article argues to the contrary. As a matter of Fourth Amendment first principles, covert searches infringe on the privacy and sanctity of the home. Moreover, history shows that delayed notice warrants are a modern procedural innovation, and did not exist at common law in the years leading up to the drafting of the Fourth Amendment in 1791. Instead, covert searches presumptively violate the Fourth Amendment “rule requiring notice” -a principle deeply rooted in the history of search and seizure law, and meant to protect against many of the dangers created by covert, delayed notice searching.

Election Law

Foreign, Comparative, and International Law

April A. Cherry

Prior to joining the Cleveland-Marshall faculty, Professor Cherry was an Assistant Professor of Law at Florida State University College of Law from 1992-1999. She also previously clerked for Chief Judge Judith Rogers of the District of Columbia Court of Appeals and was an associate with the Washington, D.C., law firm of Paul, Hastings, Janofsky & Walker. Professor

Milena Sterio

Professor Sterio was an associate in the New York City firm of Cleary, Gottlieb, Steen & Hamilton and an Adjunct Law Professor at Cornell, where she taught in the International War Crimes Clinic. In her capacity as expert on maritime piracy law, she has participated in the meetings of the United
Cherry's primary research focus is on reproductive rights and technologies. To see more of her publications, click here.

**Areas of Concentration:**

Property, Family Law, Estates and Trusts, Women and the Law, and Reproductive Rights

- The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice
  

Abstract:
This article explores some of the ethical issues raised by the rise of a global reproductive tourism model that includes “the reproductive brothel,” a place where women are gathered together in confined areas and their reproductive capacities sold to men as commodities. After exploring the phenomenon of reproductive tourism as it has developed in India, and the ways in which economic globalization has shaped the practice, the article then considers two ethical responses to the development of the practice of global commercial surrogacy; the first of which focuses on the value of autonomy (both as choice and as dignity), and the second on the value of justice. The emphasis on autonomy is found in the response of traditional bioethics as well as in discussions of reproductive liberalism. The emphasis on justice is generally found in more radical feminist critiques of the practice, including those that focus on reproductive justice. After consideration and critique of these moral values, the article moves briefly to a consideration of the appropriate legal response. While neither regulation nor prohibition perfectly fit with the values of autonomy as choice, autonomy as dignity, or justice, the article nevertheless concludes that given the context in which commercial gestational surrogacy occurs, prohibition is the wiser course because regulation, under current conditions of globalization (including commodification and degradation), simply serves to reinforce gender, race, and class hierarchies; diminishing the authentic choices and dignity of the individual, as well as weakening access to reproductive justice, rather than enhancing it.

Nations Contact Group on Piracy off the Coast of Somalia, and has been a member of the Piracy Expert Group, an academic think tank functioning within the auspices of the Public International Law and Policy Group. Professor Sterio is one of six permanent editors of the prestigious IntLawGrrls blog. To see more of her publications, click here.

**Areas of Concentration:**


- Prosecuting Juvenile Piracy Suspects: The International Legal Framework
  
  Publication Date: 2018

  Publisher: Routledge

  ISBN: 9781138839335

Abstract:
Duncan Gaswaga, a former judge of the Seychelles Supreme Court who has presided over numerous piracy trials, asked the following question: "What is a judge to do when a bearded piracy suspect facing justice asserts that he is fourteen?" This book addresses this important question by focusing on the treatment of juvenile piracy suspects under international law within national prosecutorial regimes. Beginning with the modern-day Somali piracy model, and exploring the reasons for piracy organizers and financiers to have employed Somali youth as pirates, author Milena Sterio analyzes the relevant international legal framework applicable to the treatment of juvenile criminal suspects, such as international human rights law, international criminal law, including the statutes of several international and ad hoc tribunals, as well as legal issues related to the use of child soldiers, as a parallel to the use of child pirates.

- The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide
  

Abstract:
Michael H. Davis

Prior to beginning his law teaching career at the University of Tennessee, Professor Davis was in private practice in New York City. He has published in the areas of comparative law, jurisprudence, and intellectual property. He is a contributing editor of a French law journal, Revue Francaise de Droit Administratif, and is the American reporter to the Annuaire International de Justice Constitutionnelle. He is co-author of "Intellectual Property," published by West Publishing Company. To see more of his publications, click here.

Areas of Concentration:
Torts, Intellectual Property, Comparative Law, Entertainment Law

- The Many Texts of the Law
  with Dana Neacsu
  British Journal of American Legal Studies, vol.3 no.2 (2014)

Abstract:
This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, as well as for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources – some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources – are largely responsible for this situation.

- Excluding Patentability of Therapeutic Methods, including Methods of Using Pharmaceuticals, for the Treatment of Humans under Trade Related Aspects of Intellectual Property Rights Article 27(3)(A)

Abstract:
The Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), the General Agreement on Tariffs and Trade ("GATT"), and the

This Article first discusses and analyzes the Genocide Convention and its strict definition of genocide and the "intent" requirement. It then focuses on the evolution of this definition in light of the recent Karadžić case. This Article demonstrates that in modern-day conflicts, the finding of genocidal intent may be an impossible task for the prosecution and that the ICTY Trial Chamber’s method of inferring intent based on knowledge and other indirect factors may be the only way that prosecutors will be able to obtain future genocide convictions. This Article then discusses a possible re-drafting and re-conceptualizing of the genocide definition in light of modern-day conflicts and warfare.

- President Obama’s Legacy: The Iran Nuclear Agreement?
  Case Western Reserve Journal of International Law, vol.48 no.1 (2016)

Abstract:
Iran, the United States, and several world super-powers signed a historic nuclear agreement over the summer of 2015. The Agreement is a comprehensive plan of action, with an unprecedented level of minutia and detail regarding Iran’s commitment to curb its nuclear program in exchange for the lifting of United Nations-imposed sanctions against Iran. This Agreement, if it is successfully implemented, may represent President Obama’s most significant foreign policy achievement and may become the most important element of President Obama’s legacy.

This article examines the Iran Nuclear Agreement by focusing on the events that led to the imposition of sanctions against Iran and to the ultimate negotiation of this Agreement, the structure of the Agreement, and the most significant advantages and disadvantages of this somewhat risky deal. This Article concludes that the Iran Nuclear Agreement could become one of President Obama’s biggest foreign policy accomplishments in the Middle East.

- The Applicability of the Humanitarian Intervention ‘Exception’ to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS
World Trade Organization ("WTO") debacle has radically altered the traditional ability of nations to adopt whatever patent regime seems appropriate to them. Instead, TRIPS requires all member nations, even those which never thought it appropriate to grant such state monopolies, to afford patent protection to areas which had never been granted before-most dramatically in the area of health related innovations and, most expensively, pharmaceuticals. Until TRIPS, most -- or at least a number approaching half -- countries simply did not grant patents to pharmaceuticals based on the notion that nobody could claim the right to substances and methods essential for human life. TRIPS appears to require most nations in most circumstances to mimic the patent regimes of the most advanced countries that alone because they have the infrastructure to develop and sell drugs to the entire world -- find it profitable to grant monopolies over pharmaceutical products and methods (and to charge other nations -- notably undeveloped ones -- tribute for access to this aspect of health care).

Gwendolyn R. Majette

Professor Majette has taught at Johns Hopkins University, American University Washington College of Law, Howard University School of Law, and Howard University School of Medicine. Her work has been relied on by the United States Commission for Civil Rights, the Department of Health and Human Services, the World Health Organization, and is cited in one of the leading health law texts. Professor Majette has worked on health care issues on Capitol Hill. She has also consulted on health care matters for the United States Department of Health and Human Services. To see more of her publications, click here.

Areas of Concentration:


- Global Health Law Norms: A Coherent Framework to Understand PPACA's Approach to Eliminate Health Disparities and Address Implementation Challenges
  Law and Global Health
  Michael Freeman, Sarah Hawkes, Belinda Bennett,

Abstract:

The refugee crises in Iraq and Syria, which has been evolving over the past decade as a result of both ongoing conflict in these countries and the recent surge of Islamic State-led violence, has morphed into a true humanitarian catastrophe. Tens of thousands of refugees have been subjected to violence and have been dispersed and forced to live under dire conditions; such massive population flows have destabilized the entire region and have threatened the stability of neighboring countries. The United States and several other countries have been engaged in a military air strike campaign against the Islamic State, but the international community has otherwise not authorized a multilateral military action against the Islamic State in order to alleviate refugee and other humanitarian suffering. This Article will argue that in light of such a tremendous humanitarian crisis, reflected in the current refugee crisis, international law authorizes states to intervene through the paradigm of humanitarian intervention. This Article will argue that if international law embraces the concept of humanitarian intervention as an evolving norm of customary law, then this norm encompasses intervention in situations of a humanitarian refugee crisis, such as the one that has unfolded in Iraq and Syria.

- Self-Determination and Secession Under International Law: The New Framework

Abstract:

This Article argues toward the necessity to develop a new international law framework on secession. The development of such a normative framework is necessary in order to address various secessionist situations around the globe and to replace the resolution of secessionist struggles through politics of the Great Powers with true legal norms.

This Article first analyzes several examples of successful and failed secessions in recent history. Next it focuses on existing international law on the subject matter of secession and concludes that existing norms are insufficient and indefinite. Finally, it develops a new proposed framework on secession, which attempts to
Abstract:
This chapter examines how domestic and international legal mechanisms can be integrated to use as tools to reduce health care disparities that disproportionately affect people of color. In particular, Professor Majette’s chapter examines the multitude of diverse provisions within the Patient Protection and Affordable Care Act (PPACA) that have the potential to reduce health disparities, the barriers to implementing the PPACA (constitutional and political challenges), and the moral imperative to reduce health care disparities consistent with global health law norms.

Global Health Law Norms and the PPACA Framework to Eliminate Health Disparities

Abstract:
This Article analyzes how PPACA constitutes framework legislation that complies with global health law norms protecting a right to health in its approach to the reduction of health care disparities for racial and ethnic minorities in the United States. Part I identifies the global health laws that impose a duty on the United States to eliminate health disparities for people of color. Part II analyzes the legislative framework that PPACA creates to protect the right to health and eliminate health care disparities. Finally, Part III concludes with my recommendations on future efforts to reduce and eliminate health care disparities for people of color in the United States.

Brian Ray

Professor Ray was a litigation associate at Jones Day in Cleveland, Ohio. He also clerked for Judge Alan E. Norris, U.S. Circuit Court of Appeals for the Sixth Circuit and Justice Richard J. Goldstone, Constitutional Court of South Africa. He founded and directs the adequately reconcile the mother state’s right to the respect of its territorial integrity with the secessionist entity’s claim for independence.

The Covert use of Drones: How Secrecy Undermines Oversight and Accountability

Abstract:
Under the Obama Administration, the number of drone strikes has sharply increased, prompting criticism and concern. As one commentator has noted, “[u]nder Obama, drone strikes have become too frequent, too unilateral, and too much associated with the heavy-handed use of American power.” Many scholars have focused on the legal issues arising from the use of drones, analyzing their legality under applicable law of self-defense, as well as under international humanitarian law and international human rights law.

This Article will highlight another problematic aspect of the current American use of drones, which is secrecy. As will be argued below, because a large number of lethal strikes are conducted by covert C.I.A. operations, it is impossible to determine whether most strikes comply with relevant legal provisions of both domestic and international law. Section II will examine the so-called “problem of secrecy,” by describing the current C.I.A. unwillingness to release records and documents pertaining to targeted killings conducted through drone strikes, and by asking questions about the utility of such secrecy in a democratic society. Section III will then focus on all the relevant legal issues related to the use of drones, including the relevant domestic legal authority to conduct targeted killings, associated international law issues, as well as the definition of the battlefield and an examination of the legality of different types of strikes. This Article will conclude that while it is possible that drone strikes may be legal under relevant domestic and international law, this conclusion cannot be reached because of secrecy. Secrecy, as perpetuated through the C.I.A.’s refusal to publicly discuss the drone program and to provide relevant guidelines, policy, and legal rationales toward the use of drones, has disabled all of us from reaching appropriate legal, moral, and humanitarian judgment about the legality of drone strikes. This Article will argue that any use of lethal force by the United States, including the
Center for Cybersecurity and Privacy Protection. He is also editor of the Center-sponsored SSRN Cybersecurity, Data Privacy and eDiscovery eJournal. To see more of his publications, click here.

**Areas of Concentration:**

Civil Procedure, Comparative Constitutional Law, Conflict of Laws, International Law, Legislation and Regulation

- Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave
  Cambridge University Press (2016)
  ISBN: 9781107029453

  **Abstract:**
  With a new and comprehensive account of the South African Constitutional Court's social rights decisions, Brian Ray argues that the Court's procedural enforcement approach has had significant but underappreciated effects on law and policy and challenges the view that a stronger substantive standard of review is necessary to realize these rights. Drawing connections between the Court's widely acclaimed early decisions and the more recent second-wave cases, Ray explains that the Court has responded to the democratic legitimacy and institutional competence concerns that consistently constrain it by developing doctrines and remedial techniques that enable activists, civil society and local communities to press directly for rights-protective policies through structured, court-managed engagement processes. Engaging with Social Rights shows how those tools could be developed to make state institutions responsive to the needs of poor communities by giving those communities and their advocates consistent access to policy-making and planning processes.

- Evictions, Aspiration and Avoidance
  Constitutional Court Review, vol.5 (2014)

  **Abstract:**
  In December 2011 four of the Constitutional Court's five socio-economic rights cases turned on evictions. The Court decided three eviction-related cases in the 2012 term and two more in 2013. For a Court that averages fewer than 30 decisions per term 10 decisions in less than two and a half years is an extraordinary level of use of drones to conduct targeted killings, must be properly legally justified, and that such legal justifications should become a part of public discourse.

- Prosecuting maritime piracy: domestic solutions to international crimes
  with Michael P. Scharf and Michael A. Newton
  ISBN: 9781107081222

  **Abstract:**
  This book addresses maritime piracy by focusing on the unique and fascinating issues arising in the course of domestic piracy prosecutions, from the pursuit and apprehension of pirates to their trial and imprisonment. It examines novel matters not addressed in other published works, such as the challenges in preserving and presenting evidence in piracy trials, the rights of pirate defendants, and contending with alleged pirates who are juveniles. A more thorough understanding of modern piracy trials and the precedent they have established is critical to scholars, practitioners, and the broader community interested in counter-piracy efforts, as these prosecutions are likely to be the primary judicial mechanism to contend with pirate activity going forward.

- Humanitarian Intervention Post-Syria: Legitimate and Legal?

  **Abstract:**
  This article looks at the state of affairs under international law by focusing on the existing ban on the use of force and the established exceptions thereto as of December 2014. Topics discussed include the concept of humanitarian intervention, the civil crises in Syria, and international law for the legality of military intervention in Syria. It also examines Harold Koh's proposed normative framework for humanitarian intervention.

- The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC
  ILSA Journal of International and Comparative Law, vol19 no.2 (2013)

  **Abstract:**
than two and a half years is an extraordinary level of attention devoted to a single area of constitutional law.4 Does this sustained attention to eviction cases harbinger a significant development in the Court’s approach to the right to housing in FC s 26 and to socio-economic rights more generally? The cases provide some evidence of this possibility. One rough but important metric is the result and most of these decisions justifiably can be characterised as pro-poor.5 In several cases, the Court exercised a stronger institutional role that echoes its promising early interventions in Government of the Republic of South Africa v Grootboom, Treatment Action Campaign v Minister of Health (No 2) and Khosa and Others v Minister of Social Development and Others. 6 The Court also established important principles that could have far-reaching effects in future eviction cases and might apply outside that context. For these reasons, the newer cases mark a shift away from the deferential role the Court adopted previously in Mazibuko v City of Johannesburg. 7 In several other respects, however, these cases reflect the more conservative features of the Court’s general approach to adjudicating socio-economic rights and the persistence of the separation-of-powers and institutional-competence concerns that cabin the exercise of its powers.

This article explores the tension between these two aspects of this string of decisions. On the one hand the evidence of a stronger judicial role represents a long-standing and genuine commitment to find ways to make the socio-economic rights provisions do the very difficult work of addressing the deep inequalities that the new democratic order deliberately left in place. The pro-poor outcomes and several remarkable doctrinal advances in these decisions show a court working in creative ways to fashion a jurisprudence that aspires to fulfill that promise. In spite of the clear advances these cases make, the separation-of-powers and institutional-competence concerns that have frequently operated to limit the Court’s role in its socio-economic rights decisions continue to feature prominently. These concerns generally have pushed the Court to avoid interpreting these provisions in ways that set clear and wide-reaching precedents that might have potentially significant redistributive effects.

- Courts, Capacity and Engagement: Lessons from

Over the past two decades, various mechanisms of international and regional justice have developed. The proliferation of international courts, hybrid tribunals, domestic war crimes chambers, truth commissions, civil compensation commissions, and other tools of accountability has sparked an academic debate over the usefulness of any such mechanism for redressing past violations of international law. This Article briefly discusses some of the best-known mechanisms of international, national, and “hybrid” justice, and assesses their role in light of the creation and existence of the International Criminal Court (ICC), the only permanent tribunal in international criminal law. Does international justice have a place for ad hoc tribunals other than the ICC? With the relative successes of the ICC, will there be a need for additional ad hoc tribunals in the future? Or, will the ICC replace the need for any additional justice mechanisms and thus foreclose any future discussions over the establishment of ad hoc international, regional, or hybrid tribunals?

- Juvenile Pirates: “Lost Boys” or Violent Criminals?
  Case Western Reserve Journal of International Law, vol.46 no.1 (2013)

Abstract:

Piracy off the coast of Somalia has flourished over the past decade, and has both caused a global crisis in maritime shipping and destabilized regional security in East Africa. In addition, piracy attacks have spread more recently to the coast of West Africa, and in particular, the Gulf of Guinea. Thus, piracy is an ongoing global issue that should continue to occupy many maritime nations in the near future, and one that should command continuous scholarly attention.

This article examines the issue of juvenile piracy, with a specific focus on the treatment of juvenile piracy suspects by both the capturing as well as prosecuting nation. After describing the pirates’ modus operandi and their employment of juveniles, this article argues that states are obligated to treat juveniles with dignity and in a manner that is conducive to their rehabilitation. It further reviews several recent national prosecutions involving alleged juvenile pirates in order to ascertain how different nations have addressed age determinations and treatment of juveniles.
Hlophe v. City of Johannesburg
Economic and Social Rights Review, vol.14 no.3 (2013)

Abstract:
The case was one of the first applying the Constitutional Court’s holding in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another, (2) BCLR 150 (CC) (1 December 2011) (Blue Moonlight) that municipalities have an independent obligation to plan and budget for the emergency accommodation needs of people evicted from private property. The City also was the defendant in that case, and so its repeated failures to accommodate the occupants in Hlophe demonstrated a broader failure to implement the planning, budget and policy requirements that flowed from Blue Moonlight. Judge Satchwell recognised this and issued a complex order that attempts to grapple, at a systemic level, with the root causes of the City’s general inability to fulfil its obligations under section 26. In this short comment I’ll use the case and this innovative order to argue that the systemic approach it reflects is an appropriate expansion of a more intrusive procedural role for courts to enforce the social rights provisions. I’ll argue further that the meaningful engagement requirement that was first applied in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others, 2008 (5) BCLR 475 (CC) (19 February 2008) (Olivia Road) provides both a doctrinal framework and an institutional mechanism for that expansion. Courts applying engagement have thus far failed to fully exploit this procedural authority. Judge Satchwell’s order shows that courts can and should seek to identify the root causes of government’s failure to fulfil its obligations under section 26 and other rights. But she, too, missed the opportunity to take the next step by invoking the procedural authority that engagement creates to craft and manage a process that directly addresses the bureaucratic and administrative failures her questions aim to identify.

This article concludes that juvenile piracy suspects must be treated distinctly and recommends the following guidelines that arresting and prosecuting nations should follow to fulfill their international legal obligations: each suspect's age must be determined pursuant to medical and scientific procedures, any incarceration of juvenile suspects should occur in appropriate juvenile detention facilities, each juvenile's young age should play an important sentencing factor, and each juvenile's post-conviction incarceration should provide not only a correctional, but also an educational and rehabilitative opportunity.

ISBN: 0415668182

Abstract:
This book proposes a novel theory of self-determination; the Rule of the Great Powers. This book argues that traditional legal norms on self-determination have failed to explain and account for recent results of secessionist self-determination struggles. While secessionist groups like the East Timorese, the Kosovar Albanians and the South Sudanese have been successful in their quests for independent statehood, other similarly situated groups have been relegated to an at times violent existence within their mother states. Thus, Chechens still live without significant autonomy within Russia, and the South Ossetians and the Abkhaz have seen their conflicts frozen because of the peculiar geo-political equilibrium of power within the Caucasus region.

The Rule of the Great Powers, which asserts that only those self-determination seeking entities which enjoy the support of the majority of the most powerful states (the Great Powers) will ultimately have their rights to self-determination fulfilled. The Great Powers, potent military, economic and political powerhouses such as the United States, China, Russia, Japan, the United Kingdom, France, Germany, and Italy, often dictate self-determination outcomes through their influence in global affairs. Issues of self-determination in the modern world can no longer be effectively resolved through the application of traditional legal rules; rather, resort must
be had to novel theories, such as the Rule of the Great Powers.

This book will be of particular interest to academics and students of law, political science and international relations.

- The United States' use of Drones in the War on Terror: The (Il)Legality of Targeted Killings under International Law

Case Western Reserve Journal of International Law, vol.45 (2012)

Abstract:
After the terrorist attacks of September 11, 2001, the United States government began to use drones against al-Qaeda targets. According to several media reports, the United States developed two parallel drone programs: one operated by the military, and one operated in secrecy by the CIA. Under the Obama Administration, the latter program developed and the number of drone attacks in countries such as Pakistan and Yemen has steadily increased. Because the drone program is operated covertly by the CIA, it has been impossible to determine the precise contours of the program, its legal and normative framework, and whether its operators have been lawfully implementing the program. This article focuses on four distinct issues linked to the United States' use of drones: the definition of the battlefield and the applicability of the law of armed conflict; the identity of targetable individuals and their status as combatants or civilians under international law; the legality of targeted killings under international humanitarian law; and the location and status of drone operators. This article concludes that the Obama Administration, as well as any future administrations, should consider installing military-led drone operations, which would be subject to public scrutiny to ensure that the rule of law remains the guiding principle of the United States' use of force abroad.

Michael H. Davis

Prior to beginning his law teaching career at the University
of Tennessee, Professor Davis was in private practice in New York City. He has published in the areas of comparative law, jurisprudence, and intellectual property. He is a contributing editor of a French law journal, Revue Francaise de Droit Administratif, and is the American reporter to the Annuaire International de Justice Constitutionnelle. He is co-author of "Intellectual Property," published by West Publishing Company. To see more of his publications, click here.

**Areas of Concentration:**

Torts, Intellectual Property, Comparative Law, Entertainment Law

- Excluding Patentability of Therapeutic Methods, including Methods of Using Pharmaceuticals, for the Treatment of Humans under Trade Related Aspects of Intellectual Property Rights Article 27(3)(A)

**Abstract:**
The Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), the General Agreement on Tariffs and Trade ("GATT"), and the World Trade Organization ("WTO") debacle has radically altered the traditional ability of nations to adopt whatever patent regime seems appropriate to them. Instead, TRIPS requires all member nations, even those which never thought it appropriate to grant such state monopolies, to afford patent protection to areas which had never been granted before-most dramatically in the area of health related innovations and, most expensively, pharmaceuticals. Until TRIPS, most -- or at least a number approaching half -- countries simply did not grant patents to pharmaceuticals based on the notion that nobody could claim the right to substances and methods essential for human life. TRIPS appears to require most nations in most circumstances to mimic the patent regimes of the most advanced countries that alone because they have the infrastructure to develop and sell drugs to the entire world -- find it profitable to grant monopolies over pharmaceutical products and methods (and to charge other nations -- notably undeveloped ones -- tribute for access to this aspect of health care).

- Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell
Copyright in a Nutshell
with Arthur R. Miller
West Group (2012)
ISBN: 0314278340

Abstract:
Authors Michael Davis and famed Harvard professor Arthur Miller provide authoritative coverage on the foundations of patent protection, patentability, and the patenting process. Presents the fundamentals of trademarks and copyright laws. Text further addresses torts and property, antitrust and government regulation, concepts of federalism and state, and federal conflicts.

Legal History

Environmental Law

Lauren M. Collins

Lauren M. Collins joined Cleveland-Marshall College of Law in August 2013. Prior to that, she was director of the law library at North Carolina Central University School of Law and the Head of Reference Services at the J. Michael Goodson Law Library at Duke University. Professor Collins is active in the American Association of Law Libraries (AALL), having served on national committees and as an officer at the local and national levels. She has developed legal research lessons for the Center for Computer-Assisted Legal Instruction (CALI) on international legal research topics and cost effective legal research. To see more of her publications, click here.

Areas of Concentration:
Legal Research, Environmental Law

- Environmental Justice: A Legal Research Guide
  ISBN: 9780837738581

Heidi Gorovitz Robertson

Professor Robertson practiced environmental law at Pillsbury, Madison & Sutro (now Pillsbury Winthrop Shaw Pittman) in San Francisco and Washington, D.C. Professor Robertson has written about the development of the fields of environmental ethics and bioethics, and more recently, about public rights of access to privately owned lands for recreation. She has served as a Risk Analysis Fellow in CSU's Program of Excellence in Risk Analysis. In addition to her appointment to the law faculty, Professor Robertson is a member of the Environmental Studies faculty at the Maxine Goodman Levin College of Urban Affairs. She served as Associate Dean for Academic Enrichment from 2009-2014. To see more of her publications, click here.

Areas of Concentration:
Property, Environmental Law and Regulation, Environmental Ethics, International Environmental Law, Legal Issues Surrounding the BP/Deepwater Horizon Oil Spill

Abstract:
Heidi Gorovitz Robertson practiced environmental law at Pillsbury, Madison & Sutro (now Pillsbury Winthrop Shaw Pittman) in San Francisco and Washington, D.C. Professor Robertson has written about the development of the fields of environmental ethics and bioethics, and more recently, about public rights of access to privately owned lands for recreation. She has served as a Risk Analysis Fellow in CSU's Program of Excellence in Risk Analysis. In addition to her appointment to the law faculty, Professor Robertson is a member of the Environmental Studies faculty at the Maxine Goodman Levin College of Urban Affairs. She served as Associate Dean for Academic Enrichment from 2009-2014. To see more of her publications, click here.

Areas of Concentration:
Property, Environmental Law and Regulation, Environmental Ethics, International Environmental Law, Legal Issues Surrounding the BP/Deepwater Horizon Oil Spill

Abstract:
Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. There has not always been geographic equity in the protection of the environment and there are concerns that areas with few resources have been more exposed to environmental hazards.

This guide introduces users to resources containing information relevant to legal issues pertaining to the pursuit of environmental justice. It provides information on where to begin your research of environmental justice, including suggested internet sources, federal statutory law and legislative resources, executive branch materials, secondary materials, and much more. Advanced legal research opportunities present themselves for this topic based on relevant executive orders, legislative histories, statistics underlying laws on the subject matters, and routinely proposed regulations due to inclusive goals of the environmental justice movement.

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Abstract

This Article explores the nationally common problem of tension and conflict among state oil and gas statutes, constitutional home rule, and local control by considering intersections and tensions among the Ohio Constitution’s home rule authority, the Ohio oil and gas law’s preemption provision, and the many regulatory efforts of Ohio’s local governments. It explores the scope of the Ohio Constitution’s home rule authority, in part, by evaluating courts’ statements on the validity of several types of local ordinances, as they confront home rule and a legislative attempt at preemption. Types of local ordinances evaluated include those that prohibit or ban drilling, those that impose additional permitting fees, hearings or other requirements upon drillers, and those that pertain to more traditional exercises of zoning authority.

The Article also considers some similar local control efforts in the region—in particular, in New York and Pennsylvania—which have constitutional home rule provisions similar to Ohio’s, and where, like Ohio, the shale oil and gas industry is active. By considering the constitutions, legislation, and local control efforts of nearby states that are, like Ohio, within the Utica, Marcellus, and Barnett shale plays, this Article gauges the legal circumstances under which localities might regulate the actions of the shale oil and gas industry within their borders, and under what circumstances these efforts might succeed. Because this problem presents itself throughout the country, this Article looks briefly at similar circumstances in other regions, in particular, Colorado and Texas. These states have active shale oil and gas industries, legislatures vigorously working to preempt local control, and some engaged local communities hoping to exert some influence over oil and gas activities in their jurisdictions.

- Applying Some Lessons from the Gulf Oil Spill to
- When States’ Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and Its Many Masters
  William & Mary Environmental Law and Policy Review, vol. 41 no.1 (Fall 2016)
Hydraulic Fracturing

Abstract:
In this article, Robertson notes that Ohio is moving quickly towards hydraulic fracturing of horizontal wells and some argue it has insufficiently considered and managed that rush in light of the potentially disastrous, albeit unlikely, consequences of groundwater contamination, explosion at wells or drilling sites, depletion of freshwater supply as high volumes are used in fracturing, and disposal of contaminated flowback water. Similarly, although drilling for oil from deep water rigs was neither a new idea nor a new technology when the Macondo well blew out on April 20, 2010—killing 11 people, spewing tons of oil in the Gulf of Mexico, and sinking a $50 million drilling rig—most deep water wells that preceded it had not been drilled quite so deeply into the seafloor. Many of the technologies employed there were untested at such great depths, and regulation and enforcement had not kept pace with the advances in technology. This Article considers just a few of the lessons identified through government and other studies that followed the Deepwater Horizon oil spill. It considers how those lessons might be applied to Ohio’s regulation of hydraulic fracturing in the hope that Ohio can avoid some of the same mistakes that arguably paved the way for the blowout in the Gulf. In particular, this Article discusses three areas of potential concern: agency structure and responsibility, inadequacies in research or follow through, and emergency planning and preparedness for disaster.

Legal Research, Writing, and Instruction

Lauren M. Collins

Lauren M. Collins joined Cleveland-Marshall College of Law in August 2013. Prior to that, she was director of the law library at North Carolina Central University School of Law and the Head of Reference.
Services at the J. Michael Goodson Law Library at Duke University. Professor Collins is active in the American Association of Law Libraries (AALL), having served on national committees and as an officer at the local and national levels. She has developed legal research lessons for the Center for Computer-Assisted Legal Instruction (CALI) on international legal research topics and cost effective legal research. To see more of her publications, click here.

**Areas of Concentration:**

Legal Research, Environmental Law

- Legal Research Using Technological Tools: Librarians' View
  with Susan Silver and Whitney Curtis

Research Methods for Studying Legal Issues in Education
eds. Steve Permuth, Ralph D. Mawdsley, Susan Silver
Education Law Association (2015)
ISBN: 9781565341661

Abstract:
The technology revolution has impacted every aspect of our daily lives. It is hard to imagine a world without smartphones and the Internet. Where and how we access information has changed dramatically over the last decade. Gone are the days of traveling to the library check out books and read printed journal articles. No longer simply storehouses of print information, libraries but now serve as starting points for searching online information that can be accessed anywhere, any time and on any device. Library research that used to take hours or days can now be done in minutes. Online materials are often updated quickly, sometimes in hours rather than weeks or months, when researchers had to wait for updated print materials to be delivered. Utilizing websites and databases now prevails as the most common method of conducting legal research. The sheer number and variety of resources can sometimes make it difficult to determine where to start, how to choose among similar resources, and how to keep up-to-date on what is available. This chapter provides an overview of vast range of legal materials available in libraries and on the web, and offers guidance for efficiently and effectively conducting legal research.

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**Brian A. Glassman**

Professor Glassman, a full-time teacher in the Legal Writing Department since 1993, also serves as the Law School's Art Liaison and as a member of its Art Committee. Before joining the faculty, he operated a business providing legal research and writing services to other attorneys, and worked as a neighborhood staff attorney in the Legal Aid Society of Cleveland's Civil Division. He has presented at national legal writing conferences, and has authored materials appearing in The Journal of Legal Education, Clearinghouse Review, and Ohio Jurisprudence 3d. To see more of his publications, click here.

**Areas of Concentration:**

Legal Writing, Research and Advocacy, Art Law, Intellectual Property, Transactional Drafting

- In the Mind's Eye: Visual Lessons for Law Students
  Perspectives: Teaching Legal Research and Writing, vol.23 no.1 (2014)

Abstract:
This article shows how to use works of art to demonstrate essential components of effective legal writing. Part I discusses the learning theory underpinning the use of visual lessons. Part II describes the lessons themselves. Part III explains the benefits—both direct and indirect—that result from using visual lessons to teach law and summarizes student responses to the use of these lessons in first-year legal writing. The conclusion suggests ways in which this technique might be extended and adapted to teach not only legal writing but also other law school courses.

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**Karin Mika**

Professor Mika has been associated with the Cleveland-Marshall Legal...
- Environmental Justice: A Legal Research Guide  
  ISBN: 97808377738581

Abstract:  
Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. There has not always been geographic equity in the protection of the environment and there are concerns that areas with few resources have been more exposed to environmental hazards.

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Writing Program since 1988. She has also worked as an Adjunct Professor of English at Cuyahoga Community College and is a research consultant for various firms and businesses in the Cleveland area. Professor Mika is also active in both the Legal Writing Institute (LWI) and Association of Legal Writing Directors (ALWD). To see more of her publications, click here.

**Areas of Concentration:**

- Legal Writing and Research, Native American Law, Employment Law, Learning Theories, and Health Care

- Angst, Technology, and Innovation in the Classroom: Improving Focus for Students Growing Up in a Digital Age  

  Abstract:  
  Many professors in legal education have noticed increased angst in students, who fear that well-paying jobs are scarce. Often, that angst is manifested in the classroom. Some educators blame the phenomenon on the distractions of technology—but more specifically, the author finds that technology has brought all of our stressors to the fore, affecting concentration and the ability to absorb information. This article addresses the extent to which technology has changed the ways that people navigate the world within the span of only a few generations, and how the author continues to adjust her teaching techniques in her technology-oriented classroom in order to best accommodate these changes.

- Visual Clarity in Contract Drafting  
  Clarity, vol.70 no.52 (2013)

  Abstract:  
  The article describes how the clarity of a contract not only requires clear and easy-to-understand wording, but also clear organization. This can be achieved by grouping of the pertinent material within a contract, but also by way of visual devices, such as spacing, headings, indents, white space, and font. The article
Michael H. Davis

Prior to beginning his law teaching career at the University of Tennessee, Professor Davis was in private practice in New York City. He has published in the areas of comparative law, jurisprudence, and intellectual property. He is a contributing editor of a French law journal, Revue Francaise de Droit Administratif, and is the American reporter to the Annuaire International de Justice Constitutionnelle. He is co-author of "Intellectual Property," published by West Publishing Company. To see more of his publications, click here.

Areas of Concentration:
Torts, Intellectual Property, Comparative Law, Entertainment Law

- The Many Texts of the Law
  with Dana Neacsu
  British Journal of American Legal Studies, vol.3 no.2 (2014)

  Abstract:
  This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, as well as for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources — some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources — are largely responsible for this situation.

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Healthcare and Medical Law

April A. Cherry

Prior to joining the

Browne C. Lewis

Prior to joining the faculty

suggests that most people are too busy to thoroughly read written documents and thus attorneys are obligated to contribute to the ease of readability by the way in which a document is presented visually.

- A Third Semester of LRW: Why Teaching Transactional Skills and Problems is Now Essential to the Legal Writing Curriculum
  The Second Draft, vol.27 no.8 (2013)

  Abstract:
  The article advocates including drafting and transactional courses in Legal Writing programs to better prepare students for practice. The article also advocates teaching various upper level skills courses so that students learn "soft skills," such as dealing with clients and understanding their personal legal needs.

- Sight and Sound in the Legal Writing Classroom: Engaging Students Through Use of Contemporary Issues
  Perspectives: Teaching Legal Res. & Writing, vol.21 no.132 (2013)

  Abstract:
  Using the Fair Use Act as the basis of a research problem done in conjunction with YouTube music videos presents a variety of ways to demonstrate the range of situations in which the Fair Use Act might apply. Karin Mika discusses ways to force students to think in depth about various scenarios while comparing and contrasting them. As an example, when comparing two similar musical compositions using a Fair Use factor analysis, one need only concentrate on the notes and the various choruses in the songs. However, when combining a song with a video, the nature of the composition changes. The song itself may be similar to another song, but the message of the video in combination with the song itself might be vastly different than a second video in which the use of portions of a musical composition is being challenged.
Cleveland-Marshall faculty, Professor Cherry was an Assistant Professor of Law at Florida State University College of Law from 1992-1999. She also previously clerked for Chief Judge Judith Rogers of the District of Columbia Court of Appeals and was an associate with the Washington, D.C., law firm of Paul, Hastings, Janofsky & Walker. Professor Cherry’s primary research focus is on reproductive rights and technologies. To see more of her publications, click here.

**Areas of Concentration:**
- Property, Family Law, Estates and Trusts, Women and the Law, and Reproductive Rights

- **Shifting Our Focus from Retribution to Social Justice:**
  An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses
  *Journal of Law and Health, vol.28 no.1 (2015)*

  **Abstract:**
  The ways in which society responds to pregnant women whose behavior purportedly harms their fetuses can be explored from a variety of legal vantage points. This article argues that the criminal law model currently used is ineffective. The assignment of criminal liability to pregnant women is often rooted in fetal personhood and maternal deviance discourse. Criminal law solutions fail because they fail to take into account the fact that maternal behavior is often the result of a myriad of the social and economic conditions over which pregnant women have little or no control. The criminal law model, therefore, simply punishes women without any corresponding benefit to fetal health. And in effect, work to treat pregnant women in an instrumental way, as people whose primary purpose and responsibility is the health of others. This article argues that use of the public health model is superior in three ways. First, as a pragmatic matter, public health’s emphasis on harm prevention focuses attention on and proposes solutions to the problem of how to better ensure the health of women of child bearing age – especially those women who face social and economic barriers to good health.

at Cleveland-Marshall, Professor Lewis was an associate professor at the University of Detroit Mercy School of Law, a visiting professor at the University of Pittsburgh School of Law, a summer visiting professor at Seattle University School of Law and a legal writing instructor at Hamline University School of Law. Professor Lewis has also taught in the American Bar Association CLEO Summer Institute. She writes in the areas of bioethics, environmental, family and inheritance law. To see more of her publications, click here.

**Areas of Concentration:**
- Estates & Trusts, Property, Biomedical Ethics, Health Law

- **A Deliberate Departure: Making Physician-Assisted Suicide Comfortable for Vulnerable Patients**
  *Arkansas L. Rev., vol.70 no.1 (2017)*

  **Abstract:**
  This Article is divided into four parts. Part I discusses the history and evolution of the "right to die movement" in the United States. The current legal landscape in the United States is examined in Part II. In Part III, I analyze some of the relevant ethical concerns caused by the availability of physician-assisted suicide. My analysis primarily focuses on the Oregon statutes because it is the oldest physician-assisted suicide law in the United States and has served as a model for laws in the United States and abroad. For example, Lord Falconer’s Bill, which was defeated by the British Parliament, was modelled after Oregon’s Death with Dignity Act. Most of the misgivings about the legalization of physician-assisted suicide stem from the belief that persons who may be vulnerable because of their race, ethnicity, age, disability, and economic status will be adversely impacted. Relying on the "vulnerable patient" argument, opponents were able to prevent the passage of the British law. In addition, this sentiment was expressed by members of the New York Task Force on Life and the Law when they issued a 1994 report unanimously recommending that New York laws prohibiting assisted...
Second, public health’s pragmatic emphasis on harm reduction focuses attention on and proposes solutions to the problem of poor fetal and neonatal health. Finally, by its emphasis on social justice, the public health model encourages policy makers to focus on the dignity of women, including the absence of coercion and the availability of a sufficient number of meaningful options.

- The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice

Abstract:
This article explores some of the ethical issues raised by the rise of a global reproductive tourism model that includes “the reproductive brothel,” a place where women are gathered together in confined areas and their reproductive capacities sold to men as commodities. After exploring the phenomenon of reproductive tourism as it has developed in India, and the ways in which economic globalization has shaped the practice, the article then considers two ethical responses to the development of the practice of global commercial surrogacy; the first of which focuses on the value of autonomy (both as choice and as dignity), and the second on the value of justice. The emphasis on autonomy is found in the response of traditional bioethics as well as in discussions of reproductive liberalism. The emphasis on justice is generally found in more radical feminist critiques of the practice, including those that focus on reproductive justice. After consideration and critique of these moral values, the article moves briefly to a consideration of the appropriate legal response. While neither regulation nor prohibition perfectly fit with the values of autonomy as choice, autonomy as dignity, or justice, the article nevertheless concludes that given the context in which commercial gestational surrogacy occurs, prohibition is the wiser course because regulation, under current conditions of globalization (including commodification and degradation), simply serves to reinforce gender, race, and class hierarchies; diminishing the authentic choices and dignity of the individual, as well as weakening access to reproductive justice, rather than enhancing it.

- Suicide and Euthanasia not be modified. Part IV addresses the ethical issues surrounding Oregon’s 20-year statute, which largely remain unresolved.

- The Ethical and Legal Consequences of Posthumous Reproduction: Arrogance, Avarice and Anguish
  ISBN: 9781138021358
  Routledge, New York (2017)

Abstract:
Posthumous reproduction refers to the procedure that enables a child to be conceived using the gametes of a dead person. Advances in reproductive technology mean it is now possible to assist in creating a life after you die, and in recent years the number of women who have attempted to get pregnant using posthumous reproduction has increased. However, the law in many jurisdictions has not put regulations in place to deal with the ethical and legal consequences that arise as a result of posthumous reproduction.

- “You Belong To Me”: Unscrambling The Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs

Abstract:
This article is divided into four parts. Part I includes a discussion of just a few examples of when babies conceived as a result of surrogacy arrangements have been treated like personal property. Part II explains the process that makes human oocyte cryopreservation a viable option for young women and also explores the ways that human eggs may end up in the marketplace. Part III examines the options open to courts with regard to the extent of a woman’s property interest in her frozen eggs. Part IV contains an analysis of some of the property law causes of action that may be available to women in the event that frozen human eggs are classified as property.

- Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child

Abstract:
Professor Lewis argues that the courts should apply contract principles and not family law principles to resolve surrogacy disputes. Since children are unique,
Michael H. Davis

Prior to beginning his law teaching career at the University of Tennessee, Professor Davis was in private practice in New York City. He has published in the areas of comparative law, jurisprudence, and intellectual property. He is a contributing editor of a French law journal, Revue Francaise de Droit Administratif, and is the American reporter to the Annuaire International de Justice Constitutionnelle. He is co-author of "Intellectual Property," published by West Publishing Company. To see more of his publications, click here.

Areas of Concentration:
Torts, Intellectual Property, Comparative Law, Entertainment Law

- Excluding Patentability of Therapeutic Methods, including Methods of Using Pharmaceuticals, for the Treatment of Humans under Trade Related Aspects of Intellectual Property Rights Article 27(3)(A)

Abstract:
The Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), the General Agreement on Tariffs and Trade ("GATT"), and the World Trade Organization ("WTO") debacle has radically altered the traditional ability of nations to adopt whatever patent regime seems appropriate to them. Instead, TRIPS requires all member nations, even those which never thought it appropriate to grant such state monopolies, to afford patent protection to areas which had never been granted before-most dramatically in the area of health related innovations and, most expensively, pharmaceuticals. Until TRIPS, most--or at least a number approaching half--countries simply did not grant patents to pharmaceuticals based on the notion that nobody could claim the right to substances and methods essential for human life. TRIPS appears to require most nations in most circumstances to mimic the patent regimes of the most advanced countries that alone because they have the infrastructure to develop and sell drugs to the entire world--find it profitable to grant monopolies over pharmaceutical products and methods (and to charge other nations--notably

Professor Lewis argues, courts should presume that the contract should be specifically enforced. As a result, the intended mother should be adjudicated the legal mother. However, Professor Lewis further argues the the surrogate should be able to present evidence of changed circumstances to rebut the presumption of specific performance and permit the court to determine maternity based upon the best interests of the child.

- A Graceful Exit: Redefining Terminal to Expand the Availability of Physician-Facilitated Suicide

Abstract:
For almost ten years, Oregon stood alone as the state that permits terminally ill persons to choose the time and manner of their deaths. Finally, in 2009, Oregon received company when the state of Washington's physician facilitated suicide statute officially went into effect in March of that year. Supporters of the statutes hailed the enactments as a victory for persons seeking to die with dignity. Persons from groups like Compassion & Choices vowed to seek similar legislation in the remaining states. Representatives from the Washington State Medical Association, hospice groups and hospitals argued that the mandates of the statutes place physicians in an unnatural position. In particular, the Medical Association's spokesman stated that physicians take an oath to save lives, not to end them. The number of persons in the country who support physician-facilitated suicide has continued to grow. At the end of 2009, the Montana Supreme Court indicated that physician-facilitated suicide is not against the state's public policy. In this article, instead of joining the debate about the legalization of physician assisted suicide, I analyzed the law in Oregon and Washington. That analysis shows that the legislatures in those states attempted to regulate the process in order to protect the interests of terminally ill patients and physicians.

Gwendolyn R. Majette

Professor Majette has taught at Johns Hopkins University, American University Washington College of Law, Howard University School of Law, and Howard University School of Medicine. Her work has been relied on by the United States Commission for Civil Rights, the Department of Health and...
David F. Forte

Professor Forte is the inaugural holder of the Charles R. Emrick, Jr.-Calfee Halter & Griswold Endowed Chair. During the Reagan administration, Professor Forte served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. He has authored a number of briefs before the United States Supreme Court, and has frequently testified before the United States Congress and consulted with the Department of State on human rights and international affairs issues. He has appeared and spoken frequently on radio and television, both nationally and internationally. To see more of his publications, click here.

Areas of Concentration:

Constitutional Law, the First Amendment, Islamic Law, Jurisprudence, Natural Law, International Law, International Human Rights, the Presidency, and Legal History

- Life, Heartbeat, Birth: A Medical Basis for Reform

Abstract:
This Article does not revisit the moral, legal, and constitutional critiques of the Court’s position [in Roe v. Wade]. The voluminous commentaries on the flaws in the Court’s opinions speak for themselves. Rather, this Article seeks to ground an expansion of the protection available to the unborn on the implicit principles underlying current Supreme Court doctrine, refined and modified by recent medical research on nature of pregnancy and human pre-natal development. It will argue that the State’s compelling interest in the protection of what the Court has called “potential life” ripens at an earlier point in time than what the Court

Global Health Law Norms: A Coherent Framework to Understand PPACA’s Approach to Eliminate Health Disparities and Address Implementation Challenges
Law and Global Health
Michael Freeman, Sarah Hawkes, Belinda Bennett, eds.
Oxford University Press (2014)

Abstract:
This chapter examines how domestic and international legal mechanisms can be integrated to use as tools to reduce health care disparities that disproportionately affect people of color. In particular, Professor Majette’s chapter examines the multitude of diverse provisions within the Patient Protection and Affordable Care Act (PPCA) that have the potential to reduce health disparities, the barriers to implementing the PPACA (constitutional and political challenges), and the moral imperative to reduce health care disparities consistent with global health law norms.

Global Health Law Norms and the PPACA Framework to Eliminate Health Disparities

Abstract:
This Article analyzes how PPACA constitutes framework legislation that complies with global health law norms protecting a right to health in its approach to the reduction of health care disparities for racial and ethnic minorities in the United States. Part I identifies the global health laws that impose a duty on the United States to eliminate health disparities for people of color. Part II analyzes the legislative framework that PPACA creates to protect the right to health and eliminate health care disparities. Finally, Part III concludes with
Race, Gender, and Civil Rights

April A. Cherry

Prior to joining the Cleveland-Marshall faculty, Professor Cherry was an Assistant Professor of Law at Florida State University College of Law from 1992-1999. She also previously clerked for Chief Judge Judith Rogers of the District of Columbia Court of Appeals and was an associate with the Washington, D.C., law firm of Paul, Hastings, Janofsky & Walker. Professor Cherry’s primary research focus is on reproductive rights and technologies. To see more of her publications, click here.

Areas of Concentration:
Property, Family Law, Estates and Trusts, Women and the Law, and Reproductive Rights

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Abstract:
The ways in which society responds to pregnant women whose behavior purportedly harms their fetuses can be explored from a variety of legal vantage points. This article argues that the criminal law model currently used is ineffective. The assignment of criminal liability to pregnant women is often rooted in fetal personhood and maternal deviance discourse. Criminal law solutions fail because they fail to take into account the fact that maternal behavior is often the result of a myriad of the social and economic conditions over which pregnant women have little or no control. The criminal law model,

Milena Sterio

Professor Sterio was an associate in the New York City firm of Cleary, Gottlieb, Steen & Hamilton and an Adjunct Law Professor at Cornell, where she taught in the International War Crimes Clinic. In her capacity as expert on maritime piracy law, she has participated in the meetings of the United Nations Contact Group on Piracy off the Coast of Somalia, and has been a member of the Piracy Expert Group, an academic think tank functioning within the auspices of the Public International Law and Policy Group. Professor Sterio is one of six permanent editors of the prestigious IntLawGrrls blog. To see more of her publications, click here.

Areas of Concentration:

- The Covert use of Drones: How Secrecy Undermines Oversight and Accountability

Abstract:
Under the Obama Administration, the number of drone strikes has sharply increased, prompting criticism and concern. As one commentator has noted, “[u]nder Obama, drone strikes have become too frequent, too unilateral, and too much associated with the heavy-handed use of American power.” Many scholars have focused on the legal issues arising from the use of...
therefore, simply punishes women without any corresponding benefit to fetal health. And in effect, work to treat pregnant women in an instrumental way, as people whose primary purpose and responsibility is the health of others. This article argues that use of the public health model is superior in three ways. First, as a pragmatic matter, public health’s emphasis on harm prevention focuses attention on and proposes solutions to the problem of how to better ensure the health of women of child bearing age – especially those women who face social and economic barriers to good health. Second, public health’s pragmatic emphasis on harm reduction focuses attention on and proposes solutions to the problem of poor fetal and neonatal health. Finally, by its emphasis on social justice, the public health model encourages policy makers to focus on the dignity of women, including the absence of coercion and the availability of a sufficient number of meaningful options.

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Abstract:
This article explores some of the ethical issues raised by the rise of a global reproductive tourism model that includes “the reproductive brothel,” a place where women are gathered together in confined areas and their reproductive capacities sold to men as commodities. After exploring the phenomenon of reproductive tourism as it has developed in India, and the ways in which economic globalization has shaped the practice, the article then considers two ethical responses to the development of the practice of global commercial surrogacy; the first of which focuses on the value of autonomy (both as choice and as dignity), and the second on the value of justice. The emphasis on autonomy is found in the response of traditional bioethics as well as in discussions of reproductive liberalism. The emphasis on justice is generally found in more radical feminist critiques of the practice, including those that focus on reproductive justice. After consideration and critique of these moral values, the article moves briefly to a consideration of the appropriate legal response. While neither regulation nor prohibition perfectly fit with the values of autonomy as

This Article will highlight another problematic aspect of the current American use of drones, which is secrecy. As will be argued below, because a large number of lethal strikes are conducted by covert C.I.A. operations, it is impossible to determine whether most strikes comply with relevant legal provisions of both domestic and international law. Section II will examine the so-called “problem of secrecy,” by describing the current C.I.A. unwillingness to release records and documents pertaining to targeted killings conducted through drone strikes, and by asking questions about the utility of such secrecy in a democratic society. Section III will then focus on all the relevant legal issues related to the use of drones, including the relevant domestic legal authority to conduct targeted killings, associated international law issues, as well as the definition of the battlefield and an examination of the legality of different types of strikes. This Article will conclude that while it is possible that drone strikes may be legal under relevant domestic and international law, this conclusion cannot be reached because of secrecy. Secrecy, as perpetuated through the C.I.A.’s refusal to publicly discuss the drone program and to provide relevant guidelines, policy, and legal rationales toward the use of drones, has disabled all of us from reaching appropriate legal, moral, and humanitarian judgment about the legality of drone strikes. This Article will argue that any use of lethal force by the United States, including the use of drones to conduct targeted killings, must be properly legally justified, and that such legal justifications should become a part of public discourse.
prohibition perfectly fit with the values of autonomy as choice, autonomy as dignity, or justice, the article nevertheless concludes that given the context in which commercial gestational surrogacy occurs, prohibition is the wiser course because regulation, under current conditions of globalization (including commodification and degradation), simply serves to reinforce gender, race, and class hierarchies; diminishing the authentic choices and dignity of the individual, as well as weakening access to reproductive justice, rather than enhancing it.

Matthew W. Green

Professor Green was a law clerk for the Hon. Deborah K. Chasanow, U.S. District Court of the District of Maryland and for the Hon. Eric L. Clay, U.S. Court of Appeals for the Sixth Circuit. He was a litigation associate with Hogan & Hartson, L.L.P. and with Ober, Kaler, Grimes & Shiver where he focused on employment-related matters. To see more of his publications, click here.

Areas of Concentration:

Contracts, Employment Discrimination and Retaliation, Civil Liberties

- Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII

Abstract

This article is set forth in five parts. Part II is largely descriptive and focuses on two aspects of Obergefell: (1) the Court's clarification that adult, private, consensual, same-sex sexual intimacy is a fundamental right, protected by the U.S. Constitution's Fourteenth Amendment Due Process Clause and (2) the Court's
recognition that leading mental health and medical
groups consider sexual orientation to be immutable.
Part III examines how courts and the EEOC have
treated sexual orientation discrimination under Title VII
and contains a normative discussion which argues—
consistent with the position of other commentators,
some courts, and the EEOC—that sexual orientation
discrimination should be recognized as sex
discrimination for purposes of Title VII. Part IV explores
instances in which courts have permitted employers to
discriminate because of sex as a matter of judicial
interpretation of Title VII. One such instance involves
the "sex plus" theory. Part V argues that under this line
of sex plus authority, sexual orientation discrimination is
not only sex discrimination, but consistent with
Obergefell, it is the type of discrimination that Title VII
forbids.

- What's So Reasonable About Reasonableness?
  Rejecting a Case Law-Centered Approach to Title VII's
  Reasonable Belief Doctrine
  University of Kansas Law Review, vol.62 no.3 (2014)

Abstract:
The article critiques recent application of the reasonable
belief doctrine under Title VII of the Civil Rights Act of
1964. Title VII’s anti-retaliation provision, in pertinent
part, provides that “it shall be an unlawful employment
practice for an employer to discriminate against any of
his employees … because he has opposed any practice
made an unlawful employment practice [under Title
VII].” Literally read, the provision requires that an
employee oppose a practice Title VII actually makes
unlawful. If the employee does so and is retaliated
against, the statute affords the employee relief. While
the U.S. courts of appeals have rejected this literal
interpretation and have held that the opposition clause
protects employees who complain about conduct
reasonably believed to be unlawful discrimination,
courts have failed to settle on a uniform standard for
determining reasonableness. Most courts require that
employees demonstrate the reasonableness of a belief
about the illegality of alleged discrimination in light of
existing substantive law. Case law is the objective
criterion on which reasonableness is based, and
employees are given no leeway for error about judicial
interpretations of Title VII. The article argues that the
courts have been correct to reject a literal interpretation of the opposition clause, but as a normative matter proposes a totality of the circumstances approach to assessing reasonableness. The article also sets forth factors that courts should generally take into account in the reasonableness calculus. The test articulated in the article is consistent with recent U.S. Supreme Court precedent interpreting Title VII, promises broader protection than the case-law approach and better effectuates the original purposes of the reasonable belief doctrine than current standards.

- The Politicization of Judicial Elections and Its Effect on Judicial Independence
  with Susan J. Becker, Marsha K. Ternus, and Camilla B. Taylor
  Cleveland State Law Review, vol.60 no.2 (2012)

Abstract:
This article presents the proceedings of the Cleveland-Marshall College of Law Symposium, The Politicization of Judicial Elections and Its Effect on Judicial Independence and LGBT Rights, held October 21, 2011. The idea for the conference stemmed from the November 2010 Iowa judicial election, in which three justices were voted out of office as a result of joining a unanimous ruling, Varnum v. Brien, that struck down, on equal protection grounds, a state statute limiting marriage rights to heterosexual couples. The conference addresses whether the backlash that occurred in Iowa after the Varnum decision might undermine judicial independence in jurisdictions where judges are elected. Daniel Takoji, professor of law at the Ohio State University's Moritz College of Law, discusses, the role of money in judicial elections and more broadly its effect on judicial independence. Cleveland-Marshall College of Law Professor Susan Becker provides an overview of the struggle for LGBT rights, and discusses various factors that likely have influenced and will continue to influence judicial independence when addressing LGBT rights. Camilla Taylor, of Lambda Legal, who successfully litigated the Varnum decision through the Iowa courts, discusses her efforts in Iowa prior to litigating the Varnum case and whether the backlash that occurred after Varnum might affect Lambda's efforts to challenge laws affecting LGBT rights in other states where judges are elected. The Hon. Marsha K. Temus recounts her experience...
and offers her unique perspective on whether politicized judicial elections might undermine judicial independence.

- Family, Cubicle Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes

Abstract:
This article joins the discussion of when employees should be protected against third-party retaliation under Title VII of the Civil Rights Act of 1964 and analogously worded statutes. In Thompson v. N. Am. Stainless, LP., 131 S.Ct. 863 (2011), the U.S. Supreme Court held that third-party retaliation was cognizable under Title VII, an issue that had divided the lower courts for decades. Prior to Thompson, lower courts that recognized the viability of such claims often imposed limits on the classes of relationships for which third-party retaliation was unlawful. For instance, courts often found such claims viable where after an employee complained about discrimination (engaged in “protected activity”), an employer punished that employee’s spouse or other family member as a result. Where the relationship was deemed to be too attenuated (e.g., an amity or professional relationship) protection was uneven at best. This article argues against such a formalistic approach to third-party retaliation. The article argues that an employee should be protected against third-party retaliation whenever there is proof that the employer targeted him or her to get back at a coworker who engaged in protected activity regardless of the relationship between the coworkers — family, friend, cubicle mate or otherwise. It argues for protecting that coworker whenever that individual suffers an adverse action that would have sufficed for an actionable retaliation claim had the employer taken the same action against the employee who engaged in protected activity. Thus, the proposal would bar employers from doing indirectly (to a third party) what they are prohibited from doing directly to the third-party’s associate who engaged in protected activity. The article cogently argues that this approach to analyzing third-party retaliation claims is consistent with Thompson, Title VII’s broadly worded anti-retaliatory provision and the purposes that underlie it.
Mark J. Sundahl

Mark Sundahl is the Associate Dean for Administration and an Associate Professor of Law at Cleveland-Marshall College of Law. He is a leading expert on the law of outer space and focuses primarily on the business, legal, and policy issues arising from the recent increase in private space activity. He currently serves as a member of the Commercial Space Transportation Advisory Committee (COMSTAC) which advises the Federal Aviation Administration regarding new regulations governing private space activity. He is also a Member, and former Assistant Secretary, of the International Institute of Space Law and was a member of the UNIDROIT working group that was charged with drafting a new international treaty on the finance of satellites and other space assets - the Space Assets Protocol to the Convention on International Interests in Mobile Equipment. To see more of his publications, click here.

Areas of Concentration:
Space Law, International Law, Commercial Law, Corporate Law, Ancient Athenian Law

Mark J. Sundahl

- Legal Status of Spacecraft  
  Routledge Handbook of Space Law (2017)  
  ISBN: 9781138807716

Abstract: 
The Routledge Handbook of Space Law summarizes the existing state of knowledge on a comprehensive range of topics and aspires to set the future international research agenda by indicating gaps and inconsistencies in the existing law and highlighting emerging legal issues. Unlike other books on the subject, it addresses major international and national legal aspects of particular space activities and issues, rather than providing commentary on or explanations about a particular Space Law treaty or national regulation.

Drawing together contributions from leading academic scholars and practicing lawyers from around the world, the volume is divided into five key parts:

- Part I: General Principles of International Space Law
- Part II: International Law of Space Applications
- Part III: National Regulation of Space Activities
- Part IV: National Regulation of Navigational Satellite Systems
- Part V: Commercial Aspects of Space Law
- Regulating Non-Traditional Space Activities in the United States in the Wake of the Commercial Space Launch Competitiveness Act  

Abstract

With the rapid growth of space technology and the...
With the rapid growth of space technology and the development of new 'non-traditional' space ventures, there is concern that the United States will suffer from a 'regulatory gap' when these new space activities outstrip the existing regulatory framework. Such a gap might support a finding that the United States is not in compliance with Article VI of the Outer Space Treaty, which requires a state to 'authorize and continually supervise' the space activity of its nationals. Congress responded to this concern by enacting the Commercial Space Launch Competitiveness Act in 2015 (CSLCA), which took the first steps to fill the 'gap.' New bills are now under consideration that will take the next step in this legislative process to fill the 'gap' by giving the Federal Aviation Administration (FAA) authority to license non-traditional space missions. In the so-called section 108 Report, the White House recommended an approach based on the FAA's existing process of payload review. Sen. Jim Bridenstine proposed a similar approach in his American Space Renaissance Act (ASRA). Until the legislative process is complete, however, the FAA is leveraging its existing authority in order to regulate non-traditional activity, as has been seen in the agency's actions involving Bigelow Aerospace and, more recently, Moon Express.

- **Financing Space Ventures**
  

  **Abstract:**

  As private space activities expand on a number of fronts and the applications of space technology increase, the need for capital to fund these extremely expensive ventures will also grow. The international (and supranational) nature of space activities, coupled with the idiosyncratic features of transactions related to these activities, make the financing of space ventures a particularly complex and challenging area of law. Due to the nature of the new private actors in space, the finance structures used to fund their activity will likely depend increasingly on the reliability of the lender's security interest in the space asset that is being financed. As a result, the law of secured transactions will play an ever more critical role in the financing of space ventures.

  Chapter 16 explains the nature of finance transactions...
involving space assets and highlights the unique characteristics of these transactions. The existing landscape of secured transactions law is also described with particular attention paid to the current state of US law under Article 9 of the Uniform Commercial Code and to the challenges that exist under current law. This is followed by a description of the recently concluded UNIDROIT Space Assets Protocol to the Convention on International Interests in Mobile Equipment (the Cape Town Convention), along with a discussion of how this new international treaty intersects with the existing international law of outer space.

- The Cape Town Convention and the Law of Outer Space: Five Scenarios

Abstract:
The adoption of the Space Assets Protocol to the Cape Town Convention marked a new era in the evolution of the law of outer space by providing the first space treaty regarding private international law. This Protocol was not created in a legal vacuum, but was drafted against the background of the existing United Nations space treaties that were drafted in the 1960s and 1970s. Although the existing UN treaties address public international law and therefore cover subject matter that is quite distinct from the private law issues addressed by the Space Assets Protocol, there are still points at which the Protocol intersects with the existing treaties. This article explores these intersections, and even potential conflicts, between the Protocol and the existing treaties. Five hypothetical scenarios are presented to illustrate these intersections between the new and old laws and suggestions are made for how existing space law may either interfere with the operation of the Protocol or, in some cases, facilitate its operation.

- The Cape Town Convention: Its Application to Space Assets and Relation to the Law of Outer Space
  Martinus Nijhoff Publishers (2013)
  ISBN: 9004208919

Abstract:
The UNIDROIT Convention on International Interests in Mobile Equipment created a new international regime of secured finance applicable to aircraft and rolling stock
that facilitates the financing of this equipment by, among other things, enabling lenders to create a readily enforceable security interest in the equipment. The Space Assets Protocol extends the benefits of the convention to satellites and other space assets. This book explains the operation of the convention in a manner that is useful both to lawyers engaged in satellite finance as well as to academics who desire to obtain a more complete understanding of this treaty. The book also explores the relationship between the convention and the existing body of space law.

Sports and Entertainment Law

Christopher L. Sagers

Professor Sagers is the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator. Before joining the faculty, Professor Sagers practiced law for four years in Washington, D.C., first at Arnold & Porter and then at Shea & Gardner. He is a member of the American Law Institute, a Senior Fellow of the American Antitrust Institute, and a leadership member of the ABA Antitrust Section. To see more of his publications, click here.

Areas of Concentration:

Administrative Law, Antitrust Law, Law and Economics, Corporations, Legislative & Regulatory Law, Agency & Partnership

Christopher L. Sagers


Abstract:

Amici urge affirmance for three principal reasons. First, we elaborate a point to dispel Appellant's suggestion that antitrust somehow does not belong here. Second, we show that ordinary rule of reason treatment was appropriate. Relying rather daringly on a case that it overwhelmingly lost, Appellant asks this Court to find within NCAA v. Board of Regents of Univ. of Okla., 468 U. S. 85 (1984), a rule that its "amateurism" or "eligibility" restraints are "valid...as a matter of law." NCAA Br. at 14, 22. Board of Regents did not say that, and even Appellant's own amici admit it. See Wilson Sonsini Br. at 5 & n. 2. Last, but most important, having shown that no special rule applies, we show ample grounds to affirm within the district court's opinion. Of fundamental importance is the court's finding that anticompetitive harm outweighed the minor benefits that Appellant could show.

Abstract:
In O’Bannon v. National Collegiate Athletic Ass’n, then-Chief Judge Claudia Wilken of the U.S. District Court for the Northern District of California issued a groundbreaking decision, potentially opening the floodgates for challenges to National Collegiate Athletic Association (NCAA) amateurism rules. The NCAA was finally put to a full evidentiary demonstration of its amateurism defense, and its proof was found emphatically wanting. We agree with Professor Edelman that O’Bannon could bring about significant changes, but only if the Ninth Circuit affirms. We write mainly to address the NCAA’s vigorous pending appeal and the views of certain amici, and to explain our strong support for the result at trial. Reversal of Judge Wilken’s comprehensive and thoughtful decision would thwart needed changes just as colleges are beginning to embrace them and would be mistaken as a matter of law. O’Bannon is a correct, justifiable, garden-variety rule-of-reason opinion and should be affirmed by the Ninth Circuit.

Tax Law

Deborah A. Geier

Before joining the Cleveland-Marshall faculty in 1989, Professor Geier was an associate in the tax group with the law firm of Sullivan & Cromwell in New York. She is a member of the American Law Institute and has served both as a member of the Executive Committee and as Chair of the Tax Section of the Association of American Law Schools. She has also served as an Academic Adviser to the staff of the Joint Committee on Taxation (comprised of the members of the House Ways and Means Committee and Senate Finance Committee) in connection with a tax simplification study mandated by Congress and has testified before the Senate Finance Committee in connection with the tax consequences of home mortgage foreclosures. To see more of her...
Areas of Concentration:

Tax Law

- U.S. Federal Income Taxation of Individuals 2018
  Publication Date: 12-2017
  Publisher: CALI eLangdell Press

  Abstract:
  This is the fifth version of this textbook, updated through December 2017 for use beginning January 2018, incorporating the Tax Cuts and Jobs Act.

  This textbook is not intended to be an exhaustive treatise; rather, it is intended to be far more useful than that for beginning tax law students by equipping the novice not merely with unmoored detail but rather with a rich blueprint that illuminates the deeper structural framework on which that detail hangs (sometimes crookedly). Chapter 1 outlines the conceptual meaning of the term “income” for uniquely tax purposes (as opposed to financial accounting or trust law purposes, for example) and examines the Internal Revenue Code provisions that translate this larger conceptual construct into positive law. Chapter 2 explores various forms of consumption taxation because the modern Internal Revenue Code is best perceived as a hybrid income-consumption tax that also contains many provisions—for wise or unwise nontax policy reasons—that are inconsistent with both forms of taxation. Chapter 3 then provides students with the story of how we got to where we are today, important context about the distribution of the tax burden, the budget, and economic trends, as well as material on ethical debates, economic theories, and politics as they affect taxation.

  Armed with this larger blueprint, students are then in a much better position to see how the myriad pieces that follow throughout the remaining 19 chapters fit into this bigger picture, whether comfortably or uncomfortably. For example, they are in a better position to appreciate how applying the income tax rules for debt to a debt-financed investment afforded more favorable consumption tax treatment creates tax arbitrage problems. Congress and the courts then must combat...

Tax Law and Procedure, Penalties & Crimes, Wealth Transfer Tax, Estates & Trusts

- The New Flat Tax: A Modest Proposal For a Constitutionally Apportioned Wealth Tax
  Hastings Constitutional Law Quarterly, vol.41 no.3 (2014)

  Abstract:
  This Article is the first to propose a solution that complies with the Apportionment Clause without imposing different rates in different states. This Article discusses the practical and administrative issues with implementing a wealth tax in the United States as well as the substantive fairness of such a tax relative to the income and consumption tax regimes. This article describes the Apportionment Clause, so-called direct taxes, and the constitutional issues with implementing a wealth tax. It also describes prior proposals to circumvent the Apportionment Clause for the sake of a wealth tax. It also outlines a modest proposal to pass the New Flat Tax—a wealth tax that complies with the dual strictures of horizontal equity and the constitutional rule of Apportionment.

- Officers Under the Appointments Clause

  Abstract:
  Much ink has been spilled, and many keyboards worn, debating the definition of "Officers of the United States" under the Appointments Clause of Article II, Section 2, Clause 2 of the Constitution. The distinction between Officers and employees is constitutionally and practically significant, because the former must be appointed by the President, with or without the advice and consent of the Senate, Courts of Law, or Heads of Departments. In contrast, employees may be hired by anyone in any manner.

  Appointments Clause controversies are triggered when a government official who was hired as an employee is accused of unconstitutionally wielding the more "significant authority" of an Officer. If proved, the official's decisions are subject to collateral attack. In the seminal Tucker decisions, the Tax Court and D.C. Circuit held that IRS hearing officers are mere...
these tax shelter opportunities (sometimes ineffectively) with both statutory and common law weapons. Stated another way, students are in a better position to appreciate how the tax system can sometimes be used to generate (or combat) unfair and economically inefficient rent-seeking behavior.

- U.S. Federal Income Taxation of Individuals 2017
  CALI eLangdell Press (2017)

Abstract:
This is the fourth version of this textbook, updated through December 2016 for use beginning January 2017.

This textbook is not intended to be an exhaustive treatise; rather, it is intended to be far more useful than that for beginning tax law students by equipping the novice not merely with unmoored detail but rather with a rich blueprint that illuminates the deeper structural framework on which that detail hangs (sometimes crookedly). Chapter 1 outlines the conceptual meaning of the term “income” for uniquely tax purposes (as opposed to financial accounting or trust law purposes, for example) and examines the Internal Revenue Code provisions that translate this larger conceptual construct into positive law. Chapter 2 explores various forms of consumption taxation because the modern Internal Revenue Code is best perceived as a hybrid income-consumption tax that also contains many provisions—for wise or unwise nontax policy reasons—that are inconsistent with both forms of taxation. Chapter 3 then provides students with the story of how we got to where we are today, important context about the distribution of the tax burden, the budget, and economic trends, as well as material on ethical debates, economic theories, and politics as they affect taxation.

Armed with this larger blueprint, students are then in a much better position to see how the myriad pieces that follow throughout the remaining 19 chapters fit into this bigger picture, whether comfortably or uncomfortably. For example, they are in a better position to appreciate how applying the income tax rules for debt to a debt-financed investment afforded more favorable consumption tax treatment creates tax arbitrage problems. Congress and the courts then must combat these tax shelter opportunities (sometimes ineffectively) and the Supreme Court denied certiorari. This outcome, which upheld the status quo, was unremarkable. But the methodology of the Tucker decisions was a remarkable step forward in clarifying the Appointments Clause jurisprudence of the Supreme Court.

Under the Tucker decisions, an Officer holds a position that is (1) "established by Law," (2) "continuing," and (3) vested with "significant authority." In turn, "significant authority" consists of three "main criteria": (1) power over "significant" or important matters, (2) "discretion," and (3) "final" decision-making authority. This Article adds the observation that each of the three criteria is a necessary element of "significant authority" in all or most cases.

Lastly, this Article cautions against overzealous application of the Appointments Clause. Requiring the appointment of low-level bureaucrats dilutes the scrutiny paid to judges and attorney generals. Appointing everyone is tantamount to appointing no one.

- Reckless Means Reckless: Understanding the EITC Ban
  42 Tax Notes, vol.42 no.8 (2014)

Abstract:
This article argues that the legislative history of the EITC ban demonstrates that Congress intended to import to section 32(k) the well-established definition for reckless or intentional disregard from section 6662, which imposes the accuracy-related penalties.
with both statutory and common law weapons. Stated another way, students are in a better position to appreciate how the tax system can sometimes be used to generate (or combat) unfair and economically inefficient rent-seeking behavior.

- U.S. Federal Income Taxation of Individuals 2016
  CALI eLangdell Press (2016)

Abstract:
This is the third version of this textbook, updated through December 2015 for use beginning January 2016.

This textbook is not intended to be an exhaustive treatise; rather, it is intended to be far more useful than that for beginning tax law students by equipping the novice not merely with unmoored detail but rather with a rich blueprint that illuminates the deeper structural framework on which that detail hangs (sometimes crookedly). Chapter 1 outlines the conceptual meaning of the term “income” for uniquely tax purposes (as opposed to financial accounting or trust law purposes, for example) and examines the Internal Revenue Code provisions that translate this larger conceptual construct into positive law. Chapter 2 explores various forms of consumption taxation because the modern Internal Revenue Code is best perceived as a hybrid income-consumption tax that also contains many provisions— for wise or unwise nontax policy reasons—that are inconsistent with both forms of taxation. Chapter 3 then provides students with the story of how we got to where we are today, important context about the distribution of the tax burden, the budget, and economic trends, as well as material on ethical debates, economic theories, and politics as they affect taxation.

Armed with this larger blueprint, students are then in a much better position to see how the myriad pieces that follow throughout the remaining 19 chapters fit into this bigger picture, whether comfortably or uncomfortably. For example, they are in a better position to appreciate how applying the income tax rules for debt to a debt-financed investment afforded more favorable consumption tax treatment creates tax arbitrage problems. Congress and the courts then must combat these tax shelter opportunities (sometimes ineffectively)
with both statutory and common law weapons. Stated another way, students are in a better position to appreciate how the tax system can sometimes be used to generate (or combat) unfair and economically inefficient rent-seeking behavior.

- Business Interest Deduction and 100 Percent Expensing
  Tax Notes (2015)

Abstract:
Several recent tax reform proposals, including that of candidate Jeb Bush, recommend eliminating the interest deduction but allowing the cost of long-lived property to be deducted entirely in the purchase year (rather than depreciated over time). Professor Geier here criticizes the tendency of some commentators (particularly in the popular press) to assume that these proposals have separate justifications and are packaged together simply to make the elimination of interest deductions more palatable. She explains that the point of these reform proposals is not to tweak the income tax but to shift from an income tax base to a cash-flow consumption tax at the business level, where denial of interest deductions is necessary to prevent inefficient (and costly) rent-seeking behavior under 100 percent expensing.

- U.S. Federal Income Taxation of Individuals 2015
  CALI eLangdell Press (2015)

Abstract:
This is the second version of this textbook, updated through January 2015.

This textbook is not intended to be an exhaustive treatise; rather, it is intended to be far more useful than that for beginning tax law students by equipping the novice not merely with unmoored detail but rather with a rich blueprint that illuminates the deeper structural framework on which that detail hangs (sometimes crookedly). Chapter 1 outlines the conceptual meaning of the term “income” for uniquely tax purposes (as opposed to financial accounting or trust law purposes, for example) and examines the Internal Revenue Code provisions that translate this larger conceptual construct into positive law. Chapter 2 explores various forms of consumption taxation because the modern Internal Revenue Code facilitates such reforms in the business context.
Revenue Code is best perceived as a hybrid income-consumption tax that also contains many provisions—for wise or unwise nontax policy reasons—that are inconsistent with both forms of taxation. Chapter 3 then provides students with the story of how we got to where we are today, important context about the distribution of the tax burden, the budget, and economic trends, as well as material on ethical debates, economic theories, and politics as they affect taxation.

Armed with this larger blueprint, students are then in a much better position to see how the myriad pieces that follow throughout the remaining 19 chapters fit into this bigger picture, whether comfortably or uncomfortably. For example, they are in a better position to appreciate how applying the income tax rules for debt to a debt-financed investment afforded more favorable consumption tax treatment creates tax arbitrage problems. Congress and the courts then must combat these tax shelter opportunities (sometimes ineffectively) with both statutory and common law weapons. Stated another way, students are in a better position to appreciate how the tax system can sometimes be used to generate (or combat) unfair and economically inefficient rent-seeking behavior.

- U.S. Federal Income Taxation of Individuals
  CALI eLangdell Press (2014)

Abstract:
This textbook is not intended to be an exhaustive treatise; rather, it is intended to be far more useful than that for beginning tax law students by equipping the novice not merely with unmoored detail but rather with a rich blueprint that illuminates the deeper structural framework on which that detail hangs (sometimes crookedly). Chapter 1 outlines the conceptual meaning of the term "income" for uniquely tax purposes (as opposed to financial accounting or trust law purposes, for example) and examines the Internal Revenue Code provisions that translate this larger conceptual construct into positive law. Chapter 2 explores various forms of consumption taxation because the modern Internal Revenue Code is best perceived as a hybrid income-consumption tax that also contains many provisions—wise or unwise non tax policy reasons—that are inconsistent with both forms of taxation. Chapter 3 then provides students with the story of how we got to where
we are today, important context about the distribution of the tax burden, the budget, and economic trends, as well as material on ethical debates, economic theories, and politics as they affect taxations. In early January, the author will update the book, incorporating expiring provisions, inflation adjustments for the coming calendar year, new Treasury Regulations, etc.

- The Future of Corporate Tax Reform: A Debate with Omni Y. Marian, David S. Miller, Adam H. Rosenzweig
  ABA Section of Taxation News Quarterly, vol.33 no.1 (2013)

  Abstract:
  Professor Geier participated in a Lincoln-Douglas style debate, where the debaters were assigned different roles, so the opinions expressed were not necessarily their own. On the first point debated, Professor Geier was assigned to argue: The Affirmative: We Need to Tax Corporations at the Entity Level. Others argued the negative: The United States Should Repeal the Corporate Income Tax. On the second point debated, Professor Geier argued the negative, that Dividend Exemption Is NOT the Best Method of Corporate/Shareholder Integration, and is in fact the worst method. On the third point, Professor Geier argued in the affirmative, that the corporate tax rate should be lowered to below 35% in a revenue neutral way.

Regulations and Administrative Law

Probate and Estates
Browne C. Lewis

Prior to joining the faculty at Cleveland-Marshall, Professor Lewis was an associate professor at the University of Detroit Mercy School of Law, a visiting professor at the University of Pittsburgh School of Law, a summer visiting professor at Seattle University School of Law and a legal writing instructor at Hamline University School of Law. Professor Lewis has also taught in the American Bar Association CLEO Summer Institute. She writes in the areas of bioethics, environmental, family and inheritance law. To see more of her publications, click here.

Areas of Concentration:

Estates & Trusts, Property, Biomedical Ethics, Health Law

Zoning and Land Use Law

Browne C. Lewis

- Law of Wills
  CALI eLangdell Press (2016)

  Abstract:
  This casebook is designed to train law students to think and act like probate attorneys. It is meant to be used in conjunction with the author's book The Law of Trusts. This book's focus is problem-solving and legal application. It includes numerous problems so law students can learn to apply the law they learn from reading the cases. It also contains collaborative learning exercises to encourage students to engage in group problem-solving. The book is divided into three parts to reflect the main types of issues that students will encounter if they practice probate law; its organization mirrors the manner in which probate law is practiced in the real world.

- The Law of Trusts
  CALI eLangdell Press (2013)
Professor Weinstein holds a joint faculty appointment in the Maxine Goodman Levin College of Urban Affairs and also serves as Director of the Colleges’ JD/MPA and JD/MUPDD Dual Degree Programs and Law & Public Policy Program. He is a nationally recognized expert on planning law who writes and lectures extensively in this field. Professor Weinstein is a past-Chair of the Planning & Law Division of the American Planning Association (APA), is one of the twenty-eight planning law experts who serve as Reporters for APA’s monthly journal, Planning & Environmental Law, and previously served as Chair of the Sub-Committee on Land Use & the First Amendment in the American Bar Association’s Section of State & Local Government Law. To see more of his publications, click here.

Areas of Concentration:

Land Use Planning, Environmental Law, Alternate Dispute Resolution, Law and Public Policy, Administrative Law, and Torts

- Religious Land Use Regulation Under the Religious Land Use and Institutionalized Persons Act
  Publication Title: Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression
  Publication Date: 2017
  Abstract:
  This book is a re-mastered, retooled version of the ABA publication Protecting Free Speech and Expression: The First Amendment and Land Use Law. It contains some theoretical discussion of First Amendment law as it pertains to land use issues (e.g. sign and billboard regulation, regulation of artwork and aesthetics, regulation of religious land uses, regulation of adult businesses, etc.). It also provides information that will be relevant to practitioners and includes some regulatory strategies and case studies. In order to strategically illustrate their points, the authors include cases as source material.
  ISBN: 9781634259187

- Temporary Sign Regulations in a Post-Reed America with Wendy E. Moeller
  Zoning Practice (Feb. 2016)
  Abstract:
  This article provides detailed guidance to planners and local government officials on how to revise their regulations of temporary signs to comply with the new rules for sign regulations announced by the Supreme Court last June in Reed v. Town of Gilbert, AZ, 135 S.Ct. 2218 (2015).

- Federal Land Use Law & Litigation with Brian W. Blaesser
  Thomson Reuters (2014)
  ISBN: 9780314640437
  Abstract:
  This 2014 edition covers several important recent developments in this field. These include:
  The Supreme Court’s ruling in Brandt Revocable Trust
et al v. United States, which involved the general question of whether the federal government retains a reversionary interest in a railroad’s right-of-way granted under the General Railroad Right–of–Way Act of 1875. The issue had led to a split among the federal circuits. The Court concluded the right-of-way granted to the railroad under the 1875 Act was an easement. Thus, when a railroad abandoned the right-of-way, the underlying land became unburdened of the easement. The Brandt Revocable Trust decision has potential relevance to the Rails-to-Trails Act which authorizes the conversion of abandoned railroad rights-of-way into recreational trails as can be seen from Justice Sotomayor’s dissent which predicted that the decision will lead to lawsuits challenging the conversion of former railbeds to recreational trails.

The Court’s grant of cert in Reed v. Town of Gilbert, involving a church’s challenge to sign regulations in Gilbert, Arizona that the church claims disfavor its temporary directional signs based on their content. We note that the decision in Reed will likely resolve a split in the federal Circuit Courts of Appeal as to the correct view of what comprises content-based, as opposed to content-neutral, sign regulations.

The Court’s decision in Utility Air Regulatory Group v U.S. EPA to strike down EPA's efforts to regulate greenhouse gases (GHGs) emitted from stationary sources. The Court held that while its 2007 decision in Massachusetts v. EPA decision affirmed EPA's ability to regulate GHG emissions as “air pollutants,” the decision did not necessarily apply to the specific category of air pollutants regulated by the “Prevention of Significant Deterioration” (PDS) provisions under the Clean Air Act (CAA). The Court found that EPA's 2010 “Tailoring Rule” providing for a phased implementation of GHG permitting requirements based on source emission levels, was an impermissible interpretation of its authority under the CAA, because it would “bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.”

- The Supreme Court's 2012 Takings Case
Abstract:
In this article, the authors discuss the three takings cases before the U.S. Supreme Court this term and predict that in St. Johns River Water Management Dist. v. Koontz, 77 So. 3d 1220 (Fla. 2011), cert. granted, 133 S. Ct. 420 (2012), arguably the most important of the cases, the Court will reject the claim that the Nollan/Dolan exactions test should be extended to apply to proposed conditions on development in addition to conditions that have actually been imposed.

- The Ohio Supreme Court’s Perverse Stance on Development Impact Fees and What To Do About It

Abstract:
Ohio is among the twenty-two states that have no enabling legislation for development impact fees. But in a 2000 ruling, Homebuilders Association of Dayton and the Miami Valley v. City of Beavercreek, a divided Ohio Supreme Court ruled that municipalities could lawfully enact impact fees under their police and “home rule” powers, provided that the fees could pass constitutional muster under a “dual rational nexus test.” On May 31, 2012, however, the court ruled in Drees Company v. Hamilton Township, that a development impact fee enacted by an Ohio township with “limited home rule” powers was an unconstitutional tax. The court’s unanimous opinion in Hamilton Township was authored by Justice Paul Pfeiffer, who, twelve years before, had authored the main dissenting opinion in the Beavercreek case. This Article faults the court’s opinion invalidating the impact fees in Hamilton Township, arguing that the court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the Article demonstrates that the court failed even to acknowledge, let alone distinguish: (1) its earlier ruling upholding impact fees in Beavercreek; and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the court relied in part. The Article notes that the court’s ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because it makes impact fees most defensible in municipalities, in many of which there is little new development, and thus the need for impact fees is less, and effectively prohibits their use in rapidly developing
townships where they are needed most. The Article concludes that the time is long-past for the legislature to examine the policy debate on impact fees and make a decision about adopting enabling legislation for impact fees, and that the decision should be to join the majority of states that have enacted such legislation.

- Federal Land Use Law and Litigation
  with Brian W. Blaesser and Daniel R. Mandelker
  Thompson/West (2012)

Abstract:
Recent decisions by the U.S. Supreme Court, particularly its rulings on eminent domain and takings, require real estate and land use attorneys to have a thorough understanding of applicable federal law. Local governments must now take into account rights protected by the First, Fifth, and Fourteenth Amendments when considering regulation of private property. Federal Land Use Law and Litigation is the first in-depth work to analyze the complexities of this evolving practice area. This edition continues to highlight the pivotal federal constitutional and statutory limits affecting local land use and development controls.

- The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence

Abstract:
In the decade since the U.S. Supreme Court’s decision in Alameda Books v. City of Los Angeles, 535 U.S. 425 (2002), the adult entertainment industry has attacked the legal rationale local governments rely upon as the justification for their regulation of adult businesses: that such businesses are associated with so-called negative secondary effects. These attacks have taken a variety of forms, including: trying to subject the studies of secondary effects relied upon by local governments to the Daubert standard for admission of scientific evidence in federal litigation; producing studies that purport to show no association between adult businesses and negative secondary effects in a given jurisdiction; and claims that distinct business models and/or specific local conditions are not associated with the secondary effects demonstrated in the studies relied
on by many local governments. In this Article, we demonstrate that, contrary to the industry’s claims, methodologically appropriate studies confirm criminological theory’s prediction that adult businesses are associated with heightened incidences of crime regardless of jurisdiction, business model or location and thus, such studies should have legal and policy effects supporting regulation of adult businesses.

- The Effect of RLUIPA’s Land Use Provisions on Local Government

Abstract:
In the absence of perfect information about how RLUIPA has affected local governments, this article argues that the courts have adopted a pragmatic approach to maneuvering in the difficult terrain that RLUIPA occupies: combining appropriate judicial deference to a legislature that enacts a neutral law of general applicability with the heightened judicial scrutiny that becomes appropriate when that same law is applied to a specific zoning approval, a circumstance that frequently allows for subjectivity, and thus the potential for discrimination or arbitrariness against religious uses, in the approval process. I conclude that: (1) until proven otherwise, the costs RLUIPA undoubtedly imposes on local governments is the price to be paid for insuring against the discriminatory or arbitrary application of land use regulations and (2) RLUIPA does not seek to establish an unconstitutional preference for religious uses, but rather a proper accommodation of religious exercise in the land use context.