

## RECENT PUBLICATIONS

**FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY.** By Ely Aaronson. New York, N.Y.: Cambridge University Press. 2014. Pp. xii., 205. \$90.00. Tracing the development of modern hate crime legislation to laws preventing cruelty to slaves, Professor Ely Aaronson challenges narratives of racial progress in the United States. Aaronson skillfully weaves American literature, history, sociology, and law to contextualize the role of the state in preventing — and encouraging — racially motivated violence. The book explores the links between the American state's past and present approaches to racism, and innovatively argues that the criminalization of some forms of racial hatred can have a legitimizing effect on those social harms not addressed. Dismissing a continued “reliance on criminalization reform as a major strategy for tackling racial violence” as ineffective (p. 189), Aaronson advocates a renewed focus on broader structural reforms of unjust social conditions. By presenting a perspective from outside the American academy (Aaronson teaches at the University of Haifa, Israel), *From Slave Abuse to Hate Crime* will engage readers across the disciplines and encourage critical reflection as the nation continues to confront the racist past of its core institutions.

**MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY.** By Steven W. Bender. New York, N.Y.: New York University Press. 2015. Pp. ix, 241. \$35.00. For centuries, the United States has oppressed particular groups. *Mea Culpa* interrogates the collective sense of regret the United States expresses toward “regrettable” policies and practices, such as slavery and World War II-era internment (p. 8). Drawing on history and law, Professor Steven W. Bender uncovers a “compelling explanation” for such practices in “the perceived lesser humanity of the targets and victims” (p. 23). Bender then applies this lesson to the present day in analyzing the role of dehumanization in events such as the targeting of Muslims after 9/11, the ongoing degradation of African Americans through mass incarceration, and the mistreatment of undocumented immigrants. In his search for a potential solution, Bender questions “whether we can reshape those subhuman constructions to restore humanity” (p. 167). Bender concludes that “[c]ompassion and humanity . . . must come simultaneously from many directions and approaches” if we are to counter the pernicious effects of dehumanizing stereotypes and escape future regret (p. 172).

HAPPINESS AND THE LAW. By John Bronsteen, Christopher Buccafusco & Jonathan S. Masur. Chicago, Ill.: The University of Chicago Press. 2015. Pp. x, 289. \$40.00. For three decades, cost-benefit analysis, which translates all policy considerations into monetary terms based on the assumption that people are rational economic actors, has been the government's primary method for evaluating law and regulatory options. Continuing in the tradition of behavioral law and economics, Professors John Bronsteen, Christopher Buccafusco, and Jonathan Masur decry this model as insufficiently mindful of accurate understandings of human behavior. *Happiness & the Law* advocates for the application of the insights of hedonic psychology to the law. The authors first propose an alternative evaluative method to traditional cost-benefit analysis: "well-being analysis," which "measures how much a regulation raises or lowers people's enjoyment of life" (p. 33). After applying hedonic data to criminal punishment and the negotiation of tort settlements, the authors conclude with an extended defense of well-being analysis as a metric for policy choices. Bronsteen, Buccafusco, and Masur make a convincing case that hedonic psychology may hold the key to a more nuanced understanding of how the law can and should shape and be shaped by human behavior.

UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION. By Harold H. Bruff. Chicago, Ill.: The University of Chicago Press. 2015. Pp. 557. \$55.00. The U.S. Constitution, before amendments, contains 4543 words. It is unsurprising, then, that the text leaves many questions of governance wholly unanswered. And as a result, every U.S. president has performed his own constitutional analysis to determine the scope of executive powers and obligations while in office. In his fascinating new book, Professor Harold H. Bruff argues that presidential interpretations of executive power have shaped the law in profound and enduring ways. It is true that this exegetical process has led to the aggrandizement of executive power in many areas. Among other things, the Framers never would have imagined the modern approach to the Commander in Chief powers or to executive agencies. But Professor Bruff, through a painstaking and thorough analysis of the historical record, contends that presidential interpretation is appropriately constrained by Congress, by public opinion, and by judicial intervention. He concludes that presidents have played, and continue to play, a vital role in the contestation and development of the meaning of the Constitution.

DEMOCRACY DECLASSIFIED: THE SECRECY DILEMMA IN NATIONAL SECURITY. By Michael P. Colaresi. New York, N.Y.: Oxford University Press. 2014. Pp. xi, 379. \$29.95. Edward Snowden's and Chelsea Manning's recent leaks have reignited the long-running debate over the widespread classification of national security information. Our national security depends on some degree of secrecy, but democratic oversight thrives on transparency. Professor Michael P. Colaresi poses a fascinating iteration of this dilemma in his recent book: "How can the public be confident that foreign policy programs advocated by the executive will enhance security if that same leader also has the power to selectively reveal and hide relevant information?" (p. 1). Colaresi argues that the revelation that a democratic government is overly heavy-handed in national security secrecy may cause the public to doubt the efficacy of investments in the security apparatus. Keeping secrets, then, may make us less safe. His solution to the problem? Retrospective oversight. Colaresi conducts an empirical comparison of oversight institutions in democracies across the globe to support his argument that "[r]etrospective oversight turns out to be a force multiplier, allowing an executive to maneuver stealthily, with less public skepticism that the associated cost is not worth the benefit" (p. 19).

THE LEGACY OF RUTH BADER GINSBURG. Edited by Scott Dodson. New York, N.Y.: Cambridge University Press. 2015. Pp. xi, 314. \$29.99. Justice Ruth Bader Ginsburg has had a remarkable career over the past half-century as a lawyer, professor, appellate judge, and Associate Justice of the U.S. Supreme Court. In *The Legacy of Ruth Bader Ginsburg*, Professor Scott Dodson brings together prominent scholars from law, political science, and history to write about Justice Ginsburg's achievements in sixteen essays. Part I takes the reader through Justice Ginsburg's career in academia and at the American Civil Liberties Union, with one essay dedicated to her advocacy on behalf of Captain Susan Struck in *Struck v. Secretary of Defense* — a case not decided by the Court due to the Air Force's about-face — followed by a heartfelt postscript by Justice Ginsburg herself. The next two parts comment on some of Justice Ginsburg's key opinions, including those in *Wright v. Regan* and *United States v. Virginia*, and call attention to her work on the law of civil procedure, the interaction of legal systems, and federalism. The last part is dedicated to her confirmation journey and her time as an Associate Justice of the U.S. Supreme Court. *The Legacy of Ruth Bader Ginsburg* artfully chronicles Justice Ginsburg's prolific career and intersperses engaging personal perspectives.

REGULATING DESIRE: FROM THE VIRTUOUS MAIDEN TO THE PURITY PRINCESS. By J. Shoshanna Ehrlich. Albany, N.Y.: State University of New York Press. 2014. Pp. x, 213. \$80.00. The Supreme Court's decisions involving the abortion rights of minors are far from the first revisions of the law that were made in order to "protect, manage, and/or control the sexuality of young women" (p. 3). Through a series of five pieces, each covering a distinct historical period, Professor J. Shoshanna Ehrlich critically explores organized efforts to reshape the law with reference to the prevailing societal narratives of female sexuality. Ehrlich begins her inquiry in 1838, examining the American Female Moral Reform Society's campaign to criminalize seduction. Subsequent chapters focus on the late-nineteenth-century social purity movement's efforts to raise the age of consent; the Progressive Era concern about the working-class, immigrant "female sexual delinquent" (p. 62); the post-World War II fear of teenage pregnancy; and lastly, the still-ongoing clash over sexual education. Ehrlich's attempt to locate different legal reform movements within their historical context is rigorous, never reductive.

THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPA-RAZZI THREATEN A FREE PRESS. By Amy Gajda. Cambridge, Mass.: Harvard University Press. 2015. Pp. x, 302. \$35.00. Professor Amy Gajda brings her journalism background to bear in her book about modern journalism's race to the ethical bottom and its concomitant effects on First Amendment doctrine. Gajda describes the current journalistic landscape as home to both "far-from-mainstream publications" lacking "internal or external ethical restrictions" and "mainstream journalism that pushes the envelope in a seeming effort to compete" (p. 21). The pernicious result: the same First Amendment jurisprudence constructed to protect *The New York Times* when it published the Pentagon Papers is now being summoned to protect Gawker Media in its publication of Hulk Hogan's sex tape. Divorced from ethical constraints, yet pushing for ever-expanding First Amendment protections, the new breed of journalists risks engendering backlash from the courts. When that happens, Gajda fears, the titular First Amendment bubble will burst and journalism will suffer the consequences. The final chapter of the book is devoted to a clarion call to both journalists and the courts: "[T]he path to saving journalism from yet more draconian intervention to come is . . . to begin the process of drawing lines somewhere above the bottom" (p. 223).

PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW. Edited by Andrew S. Gold & Paul B. Miller. New York, N.Y.: Oxford University Press. 2014. Pp. xii, 436. \$135.00. Despite the importance of fiduciary law in diverse areas ranging from corporate management to doctor-patient relationships to governance of private institutions like churches and unions, legal theorists have devoted little attention to its philosophical underpinnings. Professors Andrew Gold and Paul Miller set out to fill this void with their ambitious collection of twenty essays from leading academics and jurists. Exploring the various aspects of fiduciary law, the first four essays delve into the multifaceted nature of fiduciary relationships, while the next set of essays consider the duty of loyalty, perhaps the most prominent component of fiduciary duties. The volume also presents various economic theories of fiduciary law, with works that offer contractarian, efficiency-based, and equity-driven accounts. Finally, several contributors contextualize fiduciary principles in both private and public law settings. In so doing, the essays comparatively analyze fiduciary duties in civil and common law jurisdictions and seek to identify those institutions that qualify as public fiduciaries. By offering such diverse — and often divergent — views on the philosophical foundations of fiduciary law, this collection contributes a rich body of scholarship to an underexplored field of legal theory.

REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR. By Ben Herzog. New York, N.Y.: New York University Press. 2015. Pp. xv, 187. \$49.00. American citizenship is both a legal status and a political ideal. In *Revoking Citizenship*, Professor Ben Herzog explores the sociological significance of American citizenship by looking at what it takes to lose it. In a country founded on “the idea that citizenship should be voluntary and contractual” (p. 4) — not to mention the idea that the citizenship contract comes with guaranteed rights and freedoms — the cases in which the government has unilaterally revoked that contract are telling. Herzog traces the history of expatriation from the Revolutionary War to the War on Terror, examining congressional legislation, international treaties, consular dilemmas, and Supreme Court rulings that defined who was no longer an American. From that empirical evidence, Herzog exposes the connection between citizenship and loyalty. Herzog identifies Americans’ historical — and, to some extent enduring — discomfort with the idea of dual citizenship. He also examines the undertones of punishment in high-profile expatriations like that of Yaser Esam Hamdi, an American citizen captured in Afghanistan in November 2001. Herzog’s study adds to the conversation on what it means to be — and stay — an American.

DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930–1970. By Anne M. Kornhauser. Philadelphia, Pa.: University of Pennsylvania Press. 2015. Pp. 323. \$59.95. In the traditional account, the New Deal era gave birth to a leviathan: a fully fledged administrative state with a powerful executive for a head and a large class of unelected officials as its body. *Debating the American State* explores the salient concerns held by a broad set of liberal thinkers — among them, the great philosopher John Rawls and a cast of German-refugee intellectuals who witnessed the destruction of democracy at the hands of a totalitarian government — all of whom worried that the administrative state’s continued existence rested on various tenuous justifications. Their attempts to reconcile the pragmatic value of the administrative state with the threats to legitimacy, individual autonomy, and popular sovereignty made immanent by its rise and expansion have since been supplanted by the less sympathetic and more politicized discourse about big government. Professor Anne Kornhauser’s skillful exploration brings to the fore a history of critical thinking that “cannot be reduced to programmatic, ideological, or partisan differences” (p. 222), and in doing so, sheds new light on age-old tensions between our democratic values and our need for efficient government.

THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION. By James S. Liebman et al. New York, N.Y.: Columbia University Press. 2014. Pp. xiii, 429. \$85.00. In 1989, Texas executed Carlos DeLuna, a poor Hispanic man with a child’s IQ, for the 1983 murder of a convenience store clerk. His conviction rested on eyewitness testimony about the nighttime killing that lacked forensic corroboration. At trial, DeLuna claimed that another Carlos — Carlos Hernandez — had killed Lopez, but the prosecution dismissed Hernandez as a “phantom” fabricated by DeLuna (p. 228). Fifteen years after DeLuna’s execution, Professor James Liebman and five Columbia Law students initiated what became one of the most comprehensive investigations ever into a capital criminal case. They discovered not only that the other Carlos existed, but also that it was very likely that the wrong Carlos had been executed for the crime. The results from their multiyear examination of the botched DeLuna case — preliminarily released in a technical 2012 law review article — are presented here in a more accessible and detailed narrative that serves as a stinging account of the structural reasons why capital cases can go so wrong. The book pairs with a website containing all of the primary sources uncovered by the authors.

THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES: CONFRONTING A NEW AGE OF THREAT. By Benjamin Wittes & Gabriella Blum. New York, N.Y.: Basic Books. 2015. Pp. 324. \$29.99. Advancements in science and technology have fundamentally redefined humans' interactions with the world around them; they have also enabled unprecedented threats to human security. *The Future of Violence* asks a novel question — what happens to the relationship between governments and their citizens when the former can no longer protect the latter? Law and security experts Benjamin Wittes and Professor Gabriella Blum discuss emerging threats to security from advances in cybertechnology, biotechnology, and robotics. Nations and terrorist groups no longer monopolize the power to inflict widespread pain; anybody can build drones, hack computers, or produce weapons with a 3D printer. The proliferation of power presents a problem for governments obliged to protect citizens. If governments cannot adequately provide protection, they lose their legitimacy. *The Future of Violence* offers a way forward. Governments, companies, and citizens must recalibrate the balance between liberty and security. Safeguarding liberty may require stronger international surveillance and regulation, as well as multinational cooperation to protect citizens in weaker states. Liberty and security, in short, are intertwined.

THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW. Edited by Eyal Zamir & Doron Teichman. New York, N.Y.: Oxford University Press. 2014. Pp. xiii, 824. \$160.00. Twentieth-century economic analysis of the law generally relied upon the assumptions that people act rationally and in their own self-interest. Over the last two decades, behavioral economics has challenged that assumption. *The Oxford Handbook of Behavioral Economics and the Law* seeks both to introduce and to contribute to this burgeoning field by bringing together chapters from thirty-three leading scholars covering a wide range of material. The book's initial chapters provide both an illuminating introduction to behavioral economics and detailed discussions of how it has already been applied to legal questions. The bulk of the book, however, is devoted to pieces that focus upon either particular behavioral phenomena — such as loss aversion, overoptimism, and prosocial behavior — or areas of the law — ranging from contract and insurance to plea bargaining and judicial decisionmaking. This range of subjects is matched with a variety of approaches, from literature surveys to applications of behavioral economics to legal analysis. This book provides not only a thorough introduction to the rapidly developing field of behavioral economics and law, but also an intriguing sample of the field's possibilities.