
RECENT PUBLICATIONS

THE HARM IN HATE SPEECH. By Jeremy Waldron. Cambridge, Mass.: Harvard University Press. 2012. Pp. vi, 292. \$26.95. The United States stands alone among liberal democracies in its commitment to free speech — even when that speech is used to denigrate and demonize groups of people. In *The Harm in Hate Speech*, Professor Jeremy Waldron seeks to move the debate about the limits of free speech beyond knee-jerk sloganeering by advocating an alternative approach to hate speech and hate speech regulation. Decrying the ease with which nontargeted individuals proclaim their commitment to protecting even the most incendiary speech, Waldron argues that allowing hate speech has a deleterious effect on the fabric of a democratic society. In making this argument, Waldron acknowledges that speech intended to cause offense should be permitted, but draws a line at hate speech intended to undermine the dignity of individuals or groups, with dignity defined as “a person’s basic entitlement to be regarded as a member of society in good standing” (p. 105). Waldron engages with some of the prominent critics of hate speech legislation — particularly Anthony Lewis, Professor C. Edwin Baker, and Professor Ronald Dworkin — in this able effort to advance the conversation.

CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280. By Duane Champagne and Carole Goldberg. Durham, N.C.: Carolina Academic Press. 2012. Pp. xii, 231. \$30.00. The enactment of Public Law 280 in 1953 fundamentally restructured the relationship between many Native American tribes, the federal government, and state authorities by transferring criminal jurisdiction and policing authority over the affected tribal lands from the federal government to the states. Yet surprisingly little has been written about the effectiveness of Public Law 280 since its enactment. In this book, Professors Duane Champagne and Carole Goldberg first present a framework for evaluating the effectiveness of Public Law 280 from the perspective of both state and tribal stakeholders and then apply the framework to survey data collected from both groups. They find significant room for improvement. For example, their research suggests that state authorities exert monopolistic control over court and police services in many tribal communities and that the communities are largely dissatisfied with these services. The authors argue that increased cooperative governance will improve effectiveness and satisfaction for both groups, but also note that such reforms may be limited by a lack of funding. By providing a thorough look at the administration of criminal justice under Public Law 280, as well as practical recommendations for improvement, *Captured Justice* makes a welcome contribution to the study of criminal justice on Native lands.

COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE. By J. Harvie Wilkinson III. New York, N.Y.: Oxford University Press. 2012. Pp. xii, 161. \$21.95. Several constitutional theories have emerged purporting to unlock the meaning of the Constitution, which has allowed constitutional theory to take on a “cosmic” dimension. In *Cosmic Constitutional Theory*, Judge J. Harvie Wilkinson III helps bring constitutional law back down to earth. Judge Wilkinson argues that while there are merits to the prominent constitutional theories — living constitutionalism, originalism, political process theory, and pragmatism — each fails to provide a unified and fulfilling vision of the Constitution. Consequently, he writes, these theories have fundamentally undermined democratic institutions by being applied in an unchecked, ideological manner. For instance, while living constitutionalism has brought about advances in equality and commerce, it has also led judges to disregard the democratic will and overlook textual constraints, thus lending itself to judicial activism in the form of “paternalism” (p. 32). Similarly, while originalism has legitimized and in some sense circumscribed the judiciary’s role, it has also led judges to find certainty in ambiguity and subtly interject personal preferences into their decisionmaking, thus lending itself to judicial activism “cloaked as restraint” (p. 57). Instead of offering an alternative “cosmic” theory, Judge Wilkinson offers a refreshing take on the perils of theorizing and advocates a return to judicial restraint.

THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE. By Stuart P. Green. Cambridge, Mass.: Harvard University Press. 2012. Pp. xii, 382. \$45.00. Over one million bicycles are stolen in the United States every year. Yet despite the ubiquity of theft, there exists much debate over what counts as stealing and what can be stolen. Drawing on a plethora of real-world examples — from the internet user who accesses a store’s wireless network from his car, to the Florida man who falsely asserted that he had won the Medal of Honor, to Mark Zuckerberg’s alleged theft of his classmates’ social networking website idea — *Thirteen Ways to Steal a Bicycle* gives theft law a much-needed normative framework. After criticizing twentieth-century theft law reform for eliminating blameworthiness-based distinctions, Professor Stuart Green constructs a novel normative theory about when and how theft should be a considered a crime based on three basic elements: harmfulness, intent, and wrongdoing. Drawing on moral and political philosophy, legal history, law and economics, social psychology, and original empirical research, Green demonstrates how changes over the last half century have rendered theft law wholly incompatible with its moral foundations. *Thirteen Ways to Steal a Bicycle* offers conversation-sparking principles for reform that will aid politicians, jurists, and scholars alike.

IMPLICIT RACIAL BIAS ACROSS THE LAW. Edited by Justin D. Levinson and Robert J. Smith. New York, N.Y.: Cambridge University Press. 2012. Pp. xi, 270. \$99.00. Despite the decline of overt racism, systematic racial bias remains a subtle yet stubborn problem in American society. With this wide-ranging and nuanced collection of social science-based essays about the effects of implicit bias in the legal system, Professors Justin Levinson and Robert Smith seek to illuminate the cause of this intractable disparity. After providing a helpful overview of the relevant findings on racial priming and implicit association, the collection highlights the previously limited application of these findings to legal scholarship. Breaking with this trend, the contributors evaluate the presence of implicit bias across fourteen different areas of law, pushing the discussion beyond already “race-conscious” fields like capital punishment and education to address ostensibly race-neutral fields like corporations, intellectual property, and communications. These essays not only call attention to the underacknowledged role of implicit legal bias, but they also offer concrete solutions for its redress, recognizing that “[e]ngaging legal doctrine to expose the problem [represents only the] starting point to advance . . . a more egalitarian future” (p. 79). As such, the collection promises both to invigorate a social science-based approach to legal scholarship and to help reframe the law’s perspective on race.

EXPORTING THE MATRIX: THE CAMPAIGN TO REFORM MEDIA LAWS ABROAD. Edited by Richard N. Winfield. Durham, N.C.: Carolina Academic Press. 2012. Pp. xiv, 131. \$40.00. In 1937, Justice Cardozo observed that “[f]reedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom” (p. x). Seventy-five years later, much of the world’s population lives under regimes where the freedom of speech that Justice Cardozo envisioned remains unknown. In this collection of essays, media law experts offer rich accounts of their experiences promoting media law reforms internationally. Drawing on experiences from diverse geographical and professional backgrounds, the essayists — who include practitioners, legal academics, and a judge — all contribute thoughtful discussions of the challenges of exporting American-style media freedoms to countries with very different histories and sociopolitical conditions. The authors relate their experiences and also provide practical lessons about which approaches were and were not successful in their efforts to bolster media freedoms. They conclude with a brief discussion of the prospects for future reforms. By describing and analyzing varied experiences in the field, *Exporting the Matrix* promises to stimulate discussion among practitioners and laypeople alike.

AN INJURY LAW CONSTITUTION. By Marshall S. Shapo. New York, N.Y.: Oxford University Press. 2012. Pp. xxi, 284. \$85.00. From tragic plane crashes to instances of police brutality, injuries are often headline-grabbing events. In his new book, Professor Marshall S. Shapo argues that over time the body of law surrounding injuries has developed many of the features of a constitution. This “injury law constitution,” which comprises tort law, legislative compensation schemes, and various safety statutes, “governs the day-to-day interactions in which most of us engage” (p. 23). Much of Shapo’s book highlights the balancing act this constitution attempts to achieve: workers’ compensation statutes, for example, seek to reduce the imbalance of power between employer and employee, while battery law endeavors to balance one individual’s freedom of movement with another’s freedom from unwanted contact. From the outset, Shapo delves into the “reciprocal relationship” between rights recognized by American society and the injuries that result from violations of these rights (p. 84). Along the way, he explores the doctrines, mechanisms, and rationales underlying this constitution and the way in which it operates in different functional settings. By providing an engaging overview of the injury law constitution, Shapo illuminates a “living, breathing cauldron of controversy, in a state of constant flux that includes elements of culture, ideology, and politics” (p. 264).

LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE. Edited by Kevin Noble Maillard and Rose Cuison Villazor. New York, N.Y.: Cambridge University Press. 2012. Pp. xviii, 269. \$32.99. As the topic of same-sex marriage continues to command widespread attention throughout the United States in both the political and legal spheres, *Loving v. Virginia in a Post-Racial World* offers a timely and evocative exploration of the issues related to the Supreme Court’s unanimous decision finding state laws prohibiting interracial marriage unconstitutional. While it recognizes *Loving* as a milestone in the Supreme Court’s jurisprudence on race and marriage, this collection of essays challenges the legacy of the case by examining its actual impact on the intersections of race and intimate relationships in a society where interracial marriages remain a rarity. Weaving together essays containing both nuanced analysis and first-person experience, this anthology places *Loving* in its context. The essays explore the *Loving* case itself and its aftermath; the history of state regulation of interracial marriage; the lingering social challenges that face intermarriage; the impact of *Loving* on legal and political ideas of race; the impact of historical and contemporary federal laws, not just state miscegenation laws, on interracial couples; and *Loving*’s effect on present understandings of adult intimate relationships, both in the context of same-sex marriage and in challenging the traditional notion of marriage altogether.

LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY. By John Fabian Witt. New York, N.Y.: Free Press. 2012. Pp. viii, 498. \$32.00. Controversies over conduct in war have fostered debates in American discourse since the founding of the country. *Lincoln's Code* examines a number of these debates in the century after the country's founding. Vivid anecdotes tell the story of historical figures grappling with such difficult questions as whether prisoners could be executed in war, whether an action should be judged by domestic or international law, and how to differentiate between irregular combatants and uniformed soldiers. Professor John Fabian Witt explores the contours of these decisions through the lens of the conflict between the pursuit of just ends and the adoption of humane means. While acknowledging that the exact nature of the controversies has changed, Witt seeks to show that many of the difficult questions confronting American conduct in the post-9/11 context are similar to ones that Americans in war have dealt with for centuries — questions such as whether the use of torture is appropriate and how much power should be granted to the executive branch in times of conflict. By attempting to make sense of the history of laws of war in American conflicts, Witt encourages politicians and scholars alike to deliberate on the true nature of “just” wars.

THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS. By Robert M. Lichtman. Urbana, Ill.: University of Illinois Press. 2012. Pp. ix, 285. \$60.00. In the tumultuous decades of the Cold War and McCarthyism, the Supreme Court walked a precarious line between rubber-stamping government action against “subversives” and protecting civil liberties at the expense of public opinion. In this thorough and wide-ranging work, Robert M. Lichtman provides a comprehensive account of the Court's decisions on the “Communist cases” of the McCarthy era, reading the nuanced and often contradictory opinions in the context of the political landscape and individual characters underlying them. Making extensive use of the Justices' papers, Lichtman delves into the relationships and rivalries among the Court's famous personalities and insightfully examines the Supreme Court's inner workings, dissecting the dynamics motivating the Court's doctrinal shifts and highlighting the Court's vulnerability and concern for its own legitimacy. In its vivid portrayal of the Court's attempts to balance liberty and order under severe pressures, *The Supreme Court and McCarthy-Era Repression* tells the story of a Court in turmoil that still managed to lay the foundation for the protection of civil rights.

THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA. By George I. Lovell. Chicago, Ill.: University of Chicago Press. 2012. Pp. xvii, 259. \$27.50. Americans often speak in terms of civil rights and the Constitution when raising grievances with the government. Many scholars have criticized this rights-based approach, claiming that it limits citizens' ability to express their concerns and legitimates unjust outcomes. In *This Is Not Civil Rights*, Professor George Lovell uses a historical case study to challenge the conventional understanding of rights-based discourse. Focusing on the period between 1939 and 1941, Lovell examines a series of complaint letters from citizens to the Department of Justice's Civil Rights Section, known at the time as the Civil Liberties Unit. Although the letters covered everything from vehicle-licensing requirements for seasonal lettuce pickers to police brutality against African Americans, many writers framed their grievances in terms of civil rights and constitutional protections. After analyzing the letters and the Civil Rights Section's responses, Lovell concludes that the writers were able to use rights-based language without "losing sight of the fact that law did not live up to its expressed ideals and without succumbing to official law's claim to set some objective or universal standard for justice or legitimacy" (p. 178). This optimistic new view is sure to stimulate debate about the future role of rights-based discourse.

MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY. By Stephen J. Schulhofer. New York, N.Y.: Oxford University Press. 2012. Pp. xiii, 199. \$21.95. In an age of widely accepted casual searches, increased ease of police surveillance, and threats to national security, citizens may be exceptionally willing to accept a lax interpretation of the Fourth Amendment. *More Essential than Ever* reaffirms the importance of the Fourth Amendment in the twenty-first century through a look at the history of the amendment and its evolving case law, with an emphasis on its applicability in today's environment. Professor Stephen Schulhofer provides a nuanced and thorough view of complex contemporary issues, including broken-windows policing, advances in technology, and the War on Terror. In response to concerns about the need for increased police flexibility, Schulhofer tackles the common belief that liberty and security are a zero-sum game. Rather than viewing the Fourth Amendment as an impediment to police success, Schulhofer demonstrates the value of preserving a right to secrecy for the purpose of maintaining personal autonomy, a creative society, and a well-functioning democracy. This important book provides a thoughtful and engaging analysis of the profound questions that surround an eighteenth-century amendment and its application in a twenty-first-century world.

IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY. Edited by Austin Sarat et al. Stanford, Cal.: Stanford University Press. 2012. Pp. xi, 208. \$65.00. The relevance and strength of the law depend in part on its ability to adapt to new ethical and regulatory issues. This timely collection of works related to privacy in the twenty-first century offers many important insights into how the law can confront challenges to the public/private distinction and reconceptualize privacy. First, Professor Kathryn Abrams discusses the role of gender and sexuality advocacy in eroding the traditional public/private distinction, recent efforts to “re-enchant” this distinction, and the importance of developing new ways of “characterizing and integrating the public and the private” (p. 45). Second, Professor Ariela R. Dubler examines the distinction between “play” — a realm of unregulated behavior — and nonplay in two Supreme Court cases, arguing that the concept may reinvigorate “traditional cultural power dynamics” and contains the “dual promise of freedom and danger” (p. 80). Third, Professor Robin Feldman argues that the fluidity of contemporary public/private interactions “requires special attention to the protection of the individual,” and suggests creating an individual right to maintain “identity cohesion” (p. 86). Fourth, Professor Julie E. Cohen considers the normative value of regulating “technical” design decisions, like encoding decisions, in terms of citizenship and human flourishing, arguing that we need a new “sociotechnical configuration” and “reassertion of ‘public’ values” (p. 151). Finally, Professors Anthony Sebok and Lars Trägårdh compare the European model of public and private law to the U.S. model, predicting some convergence of these models in the future.

“PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS. By Jeremy Waldron. New Haven, Conn.: Yale University Press. 2012. Pp. xv, 288. \$65.00. References to international and foreign law by U.S. courts have provoked strong reactions in recent years, most notably in high-profile cases such as *Lawrence v. Texas* in 2003 and *Roper v. Simmons* in 2005. In his new book, Professor Jeremy Waldron explores the justifications for the use of international law in U.S. courts. Waldron first suggests that the United States, like all nations, is governed in part by *ius gentium* — laws of consensus common to all peoples. The United States, he argues, should look to this body of law to learn from the experiences of foreign courts and integrate its legal system with international norms. Such an approach, according to Waldron, is both practical and constitutional under *Erie Railroad Co. v. Tompkins*. Waldron’s elegant and richly detailed analysis is both a notable scholarly contribution to the study of the interaction between international and domestic law and a powerful rejoinder to those who believe international law has no place in the U.S. legal system.