

RECENT PUBLICATIONS

LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING. By Jeffrey Brand-Ballard. New York, N.Y.: Oxford University Press. 2010. Pp. ix, 354. \$65.00. Those both inside and outside the legal community often agree that judges have an obligation to reach legally correct results even when the law requires an outcome they consider to be morally objectionable. In his thought-provoking new book, Professor Jeffrey Brand-Ballard defies this conventional wisdom. He argues that judges sometimes have the moral right to disregard clear legal mandates, even in reasonably just systems, to avoid suboptimal results. Although he admits that “lawless judging,” if widespread, would destroy the rule of law, he asserts that the traditional conceptions of judicial duty and the rule of law constrain adjudication to an extent that cannot be easily justified. Rather than forcing judges and lawyers to distort the law in order to accommodate the morally just result, he favors permitting judges to choose transparently the legally incorrect outcome on occasion. Considering not only the legitimacy of the judicial role, but also the moral rights of the individuals who occupy that role, Professor Ballard draws on various ethical and legal theories ranging from natural law to legal formalism. His book persuasively challenges lawyers, legal scholars, and laymen to reconsider some of their most deeply held values. It will be of interest to anyone concerned with the ethics of judging.

MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA. Edited by Kamari Maxine Clarke and Mark Goodale. New York, N.Y.: Cambridge University Press. 2010. Pp. xii, 344. \$95.00. Since the late twentieth century, a new generation of scholars, political actors, and legal practitioners has taken up the torch of postwar idealism that accompanied the 1948 Universal Declaration of Human Rights by laboring on an ambitious project to pursue justice through robust international legal norms and institutions. In *Mirrors of Justice*, a group of scholars, mostly from the field of anthropology, uses a set of fascinating case studies to explore the complexities of the quest for justice in the contemporary world. From the traditional village courts of Papua New Guinea to the conference rooms of the World Bank (p. 178), the empirical accounts collectively emphasize the importance of political, cultural, and ideological context to the “vernacularization of transnational normativities” (p. 8). The case studies are grouped into categories that focus on three topics: the institutions of international law, the role of local legal actors, and the relationship between justice and the politics of collective memory. The editors synthesize the patterns that emerge from the empirical diversity and argue that, rather than seeking a single abstracted normative theory, it is best to focus on the multiplicity of justice in the world of the early twenty-first century (p. 23).

WAR, COMMERCE, AND INTERNATIONAL LAW. By James Thuo Gathii. New York, N.Y.: Oxford University Press, Inc. 2010. Pp. xxii, 277. \$65.00. Despite international law doctrine that emphasizes fairness in wars between states, pillaging, confiscation, destruction of private property, and violation of contract rights continue to characterize wars and conflicts in the twenty-first century. In *War, Commerce, and International Law*, Professor James Thuo Gathii frames the relationship between war and commerce throughout history and in the contemporary world in terms of relationships between more powerful and less powerful states. Through his use of relevant contemporary examples such as the resource war over “blood diamonds” and the commercialization of war through private military security companies like Blackwater, Professor Gathii explores the intersection of the public realm of diplomacy and war and the private realm of the global economy. In so doing, he convincingly demonstrates how the interpretation and application of ostensibly fair international law norms have nonetheless perpetuated the legacy of imperialism and colonial conquest in the modern world. This book will engage and edify legal scholars, historians, and any readers interested in the complex connections between war, commerce, and the rules of international law in the modern world.

THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW. By Michael J. Glennon. Washington, D.C. and Stanford, Cal.: Woodrow Wilson Center Press and Stanford University Press. 2010. Pp. xii, 253. \$40.00. Why do states obey some international legal rules and ignore others? In this compelling new book, Professor Michael Glennon argues that neither of the two conventional approaches to international law, naturalism or positivism, can explain the puzzle of state obligation. Professor Glennon instead advances a pragmatist approach that focuses on the particular pressures and incentives states face when confronting any given rule. This method relies on the rational choice model to offer a compelling explanation for states’ actions. It also suggests a helpful means for judging obligation: if states repeatedly and excessively violate a rule, it no longer binds them. In the book’s later chapters, Professor Glennon applies the pragmatist method to a series of security issues, such as the role of the United Nations and the crime of aggression. Although undoubtedly of great value to scholars, this concise and highly readable argument for a new understanding of international law may be even more important to the politicians and diplomats whose actions shape the international legal order.

PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP. By Eduardo Moisés Peñalver and Sonia K. Katyal. New Haven, Conn.: Yale University Press. 2010. Pp. x, 294. \$45.00. From the Greensboro lunch-counter sit-ins to the intellectual property activists at Downhill Battle, there has been a long tra-

dition in American history of violating property rights to “challenge the prerogatives of ownership in search of a more just social order” (p. 7). *Property Outlaws* focuses on this sort of “property disobedience,” as well as its impact on property doctrine, and the way that the law should respond to “property outlaws” in the areas of tangible and intellectual property. The book highlights some cases where property disobedience has positively influenced the direction of law. For example, organized resistance by squatters on public lands for sale in the mid-1800s “raised the political profile of conflicts over how to dispose of the massive quantities of public land . . . and ultimately led to the resolution of the conflict in their favor” (p. 63). Also, patent disobedience encouraged by the AIDS epidemic caused a “dramatic shift in favor of limiting intellectual property rights in pharmaceuticals” (p. 96) and led to a change in U.S. policy. The authors of *Property Outlaws* conclude that a relationship between “property disobedience” and legal innovation should be cultivated in order to preserve this method of legal reform.

CLIMATE CHANGE JUSTICE. By Eric A. Posner & David Weisbach. Princeton, N.J.: Princeton University Press. 2010. Pp. viii, 220. \$27.95. Climate change represents one of the gravest threats to global welfare today, and any solution will require international cooperation. In their new book, *Climate Change Justice*, Professors Eric Posner and David Weisbach make a forceful case for a global climate agreement and lay out the principles that any successful treaty will need to embody. They review moral philosophy, science, and economics to sketch the outlines of a principled, but feasible, climate change agreement. Such a treaty would set a globally optimal level of emissions, would distribute the costs of carbon cutbacks from nations that most benefit to those who least benefit, and would distribute any surplus to nations that have already voluntarily cut their carbon emissions. Acknowledging the obligations of rich nations to help poor nations, the authors challenge those who would “improperly tie valid concerns about redistribution to the problem of reducing the effects of climate change” (p. 73) because, in practice, nations cannot be expected to sign treaties against their self-interest. Instead, they argue, issues of redistribution and punishment should be addressed separately. Lucid and persuasive, *Climate Change Justice* is required reading for anyone interested in climate change and the international efforts to address it.

HEALTH AND SOCIAL JUSTICE. By Jennifer Prah Ruger. New York, N.Y.: Oxford University Press. 2010. Pp. xxxvii, 276. \$74.00. In this important book, Professor Jennifer Prah Ruger presents a model of universal health care that draws upon society’s collective morality for its implementation and continued legitimacy. Professor Ruger’s “health capability paradigm” (p. 41) builds upon Aristotle’s theory of “human flourishing” (p. 45) with supplementary insight from diverse fields such

as law, politics, and economics. Rigorously sourced and informative, this book should appeal to any citizen of the world concerned with the interplay between health and our greater humanity. Those readers with an interest in law will find Professor Ruger's cogent analysis of and respectful counterargument to Professor Eugene Volokh's idea of a "right to medical self-defense" (p. 124) particularly provocative. Equally fascinating is Professor Ruger's application of the theory of "incompletely theorized agreements," familiar to those interested in legal scholarship, to health care policy. Professor Ruger describes her model as a "radical alternative" (p. 236) to the failed models of the past, and readers would be wise to heed its wisdom.

THE DISENCHANTMENT OF SECULAR DISCOURSE. By Steven D. Smith. Cambridge, Mass.: Harvard University Press. 2010. Pp. 285. \$26.95. Centuries after the Enlightenment shone reason onto the discourse of a young American republic, prominent theorists continue to blame religious expressions in the public forum for the shallowness of today's public discourse. Enter Professor Steven D. Smith, who argues that overzealous secularism and the avoidance of religious values in social, political, and legal discourse are at fault for the superficiality of these conversations. *The Disenchantment of Secular Discourse* challenges the Rawlsian exclusion of normative principles from "enlightened" dialogue. Professor Smith posits that today's difficult moral issues remain neither resolved nor meaningfully explored by public debates that have excluded moral and religious arguments. Drawing on the conversations surrounding, for example, assisted suicide and the role of science in human atrocities, Professor Smith concludes that if society is "[u]nable to acknowledge its deeper, determining strata, our discourse is condemned to superficiality" (p. 211). He argues that we can avoid that fate only by bending the bars of the secular cage to let in the normative bases of our beliefs. This book puts generations of legal and political philosophers into an accessible dialogue, which Professor Smith artfully and persuasively relates to the most salient issues of our time.