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Heights of Justice (Introduction and Front Matter)

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HEIGHTS OF JUSTICE

DISCOURSE
FROM
BOSTON COLLEGE LAW SCHOOL

EDITED BY
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Thanks to all my colleagues at Boston College Law School for their overwhelming support of this project. I appreciate their trusting me to reproduce, selectively, portions of their considerable contributions to legal scholarship. Whether or not I succeeded in vindicating that trust by faithfully rendering their work in my selections, I encourage readers inspired by the scholarship appearing in this anthology to consult the original contributions.

An asterisk footnote accompanying each selection provides citations to the original printed version and to a subsequent Internet version of each article. Complete versions of many papers by professors of Boston College Law School are available from the Boston College Legal Research Series on the Legal Scholarship Network: <http://www.ssrn.com/link/boston-college-public-law.html>.

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INTRODUCTION

Heights of Justice explores political, social, economic and procedural attributes of justice, as applied law. Themes combine theory and practice to articulate moral and ethical values that facilitate a rational application of law. This application seeks to foster legal arrangements imbued by values associated with the Jesuit tradition, including the dignity of persons, advancing the common good and compassion for the underprivileged. Actions in the name of justice exhibit commitment to serving others; legal scholarship in this vein is dedicated to providing intellectual and professional sustenance necessary to achieve these objectives.

For lawyers, pursuit of these objectives begins in law school. Legal education ideally entails dialogue and intellectual discovery. Dialogue includes making connections between seemingly different classifications, such as theory and practice, or clinical training and feminist jurisprudence. Such iteration, along with parallel exchanges using interdisciplinary and comparative inquiry, often produces surprisingly powerful insights. One example is how seeming dichotomies sometimes turn out not only to be false, but to reflect a mutually-complementing spiral. Engaging discussion of this kind among teachers and students broadens pedagogical range, rendering law not merely a system of rules but a pathway to justice. When such conversations continue into reflective legal practice, inventive conceptions of justice emerge that deepen the meaning and value of lawyering.

In justice's political dimension, institutional legitimacy is a cornerstone. An example is the relationship between governmental branches, especially between the judiciary and legislatures. Finding harmony in this relationship, whether through inquiry into the nature of equity or when addressing such charged topics as bioethics, lends a

sense of justice to these institutional dynamics. Similar inquiries illuminate the relationship between central and local authorities in a federal republic. One virtue of federalism is that it enables central authority to promote democratic legitimacy by policing or pressuring local authorities. Contemporary lawmaking is complex, incorporating executive branch agencies (such as the Food and Drug Administration and the Securities and Exchange Commission), private actors (such as the American Dental Association and the Financial Accounting Standards Board) and international organizations (such as the World Bank). Suitable institutional arrangements to ensure political justice are essential to incorporate such participants.

Institutional legitimacy depends, further still, on the content of resulting social and economic policies. This need creates an intersection of law and society requiring attention to principles of both democratic order and equality. At the center of this intersection are matters of wealth distribution, influenced by tax policy, and socio-political factors such as family structures and trade unions. In an information age, how information is shared is central to organizational legitimacy, of both government and large enterprises such as public companies. Equality plays a complex role in this democratic process, influencing such important issues as immigration and deportation policy and health care delivery. Questions of equality must deal with the role of difference, apparent in such settings as treatment of girls versus boys in juvenile justice systems and in trans-racial adoptions (white parents adopting black babies).

Convention helps to promote institutional legitimacy and the values of democracy and equality. Convention's virtue, however, depends upon its endless critique. For example, accepted models of decision-making or international trade law must be tested, sometimes refashioned, and only then do they remain legitimate. Slavery, a convention,

withered only under critique. Associated methods of discourse promote justice. This occurs independent of the intellectual tradition used for study, such as pragmatism, liberalism, utilitarianism, or Aristotlean virtue ethics, to name a few major approaches. When applied to lawmakers, discourse pitting convention against critique advances justice too, whether assessing the drafting of commercial codes or writing judicial opinions resolving copyright disputes.

In adjudication, justice entails supervision, starting with the appeal and involving judicial review of official conduct, such as prosecutors in grand jury proceedings. Judges also must police themselves and their courtrooms; they frequently must reconcile legal mandates with moral values when these collide, or oversee expert witnesses when assessing probity of proffered evidence. Courts' infirmities in adjudication invite pursuing alternative paths to justice, such as mediation. Blazing such passages may require doctrinal adjustment, the pursuit of which promotes justice. Bolder paths to justice include pre-dispute contracting, a recent innovation in international tax law. This shows capacity of contemporary institutions to respond justly to needs of an endlessly changing world.

While justice may be a vague concept, it is powerful and pervasive. Its infinite complexity inclines scholars to recognized categories of justice. Roughly, leading examples are political justice, distributive justice, corrective justice, and procedural justice (fairness in administration). These rough categories are contested, overlapping, and often essentially tools of convenience. While these conceptions have some utility, practical justice would suffer from attempting to classify its manifestations into such pigeon holes. Instead, *Heights of Justice* is organized to reflect the preceding illustrations.

This arrangement generates considerable coherence in the topics featured. This collection of scholarship is unusual because it is all generated by members of a single law faculty, Boston College Law School. Each contributor pursues an individual scholarly arc. Each develops an individualized body of knowledge that gels, when viewed in total. This volume captures a different coherence, one across colleagues of a school. This unusual feature means both (1) the collection presents an organic whole, readable in the sequence presented and (2) it will enrich readers who prefer to skip around, and these readers likely will wish to study further works of particular scholars. In preparing this introduction and in selecting excerpts for inclusion, I serve as a reader, interpreter and narrator of the works. Commentary and content thus filter through a different lens than the original materials, making me, not each author, responsible for any omissions of nuance or subtlety.

I. Legal Education and Practice

Contributions collected in the book's opening section reflect upon the meaning of legal education, teaching, writing and thinking about justice. The first series of works addresses dialogue in legal education, the second builds on these foundations to explore roles in the legal academy, and the third extends these insights into the practice of law.

A. *Dialogue*. Conventional wisdom denominates law school's principal task as teaching students to "think like lawyers." Gregory Kalscheur demonstrates how restricting such a conception is and pushes, instead, for law schools to celebrate the fundamental human drive to ask questions and to follow our curiosity wherever it takes us. Professor Kalscheur elucidates the thought of Bernard Lonergan and James Boyd White to enhance understanding of meaning and value in conceiving law as a social and cultural activity. Envisioning law school as a process called "re-horizoning," he

emphasizes how traditions of the Society of Jesus enable law schools within a Jesuit university, such as Boston College, to provide unique ways to establish cultures of authentic conversation.

In a classic work that Professor Kalscheur draws upon, Mark Spiegel first provides working definitions of theory and practice and then explains how division into these categories does not reflect a natural order but a choice. By discussing development of the case method and the legal realist challenge to it, he shows how traditional approaches to legal education can be seen either as theoretical or as practical. Professor Spiegel explains that these labels are thus contingent products of our age, explores why we persist in this labeling and what difference this makes for legal education and its capacity for enrichment.

Provisionally adopting Professor Spiegel's working definitions of theory and practice so dissected, Phyllis Goldfarb deepens the theme using two movements in law's academy: clinical education (seen as practical) and feminist jurisprudence (seen as theoretical). She identifies underlying methodological kinship to illustrate how problematic the theory-practice label remains. By studying the ethical impulse that sparks both clinical education and feminism, Professor Goldfarb discerns a theory-practice spiral, growing through mutual affinities. This discovery opens a new ethical vision to reinvent the nature of moral theory as anchored in the concrete reality of specific people in our lives, not one orbiting around the abstract "generalized others" of traditional philosophy.

Dialogue in legal education is the animating theme of Hugh Ault's ensuing essay, which explores comparative law as a directive force in reshaping legal education. A world-renowned comparative tax scholar, Professor Ault recounts his pioneering

development of a comparative law course at Boston College Law School decades ago. The essay is contextualized in the broad framework of change in legal education during the last decades of the twentieth century. That is when law professors became increasingly inventive, law became increasingly interdisciplinary, and critical theory from legal history, philosophy, economics and other fields enriched the tapestry of legal rules and their operation to generate deeper insights into legal systems.

B. *Roles*. The second series of pieces in this section builds upon these transformative enterprises to explore varying conceptions of roles in legal education. Noting the sociological foundations of the concept of role, Filippa Anzalone reflects on learning theory, showing how teachers are more effective when self-aware. The piece is a phenomenology of discovery about learning theory, a report of applied knowledge aimed at excellence in pedagogy and a study of how contemporary reflective practice and criticism continue to transform legal education and the professor's role in it.

The contribution featuring Alexis Anderson explores challenges facing various participants in law school externship programs, centering on ethical issues of confidentiality. The piece uses cases to illuminate the roles of students and supervisors in the field and on the faculty. It provides protocols to teach students skills and professional habits necessary to provide competent client representation.

Jane Kent Gianfriddo, President of the Legal Writing Institute, presents a theory of written analytical feedback on student writing for law practice. She envisions legal writing teachers playing the dual role of legal educator plus reader in law practice. Professor Gianfriddo illustrates how her theory works, using a specific legal problem showing student communication and teacher feedback, along with commentary on why the feedback succeeds pedagogically.

Judith Tracy extends Professor Gianfriddo's framework to demonstrate how using samples in the classroom enhance analytical development. Balancing the roles of legal educators engaging students to pursue justice while training them as professionals, she explores teaching methods producing imminent engagement. These emphasize the specific roles of audience and writer, not monolithic off-the-rack exercises.

C. Lawyering. Legal education does not stop at law school, but demands continued nurturing. In the practice of law, a theme of roles continues. But as Daniel Coquillette explains, it is impossible for lawyers in practice to separate professional ethics from personal morality. Yet these sometimes conflict. Emphasizing how professional identity as lawyers is the center of the lawyer's personal morality, Dean Coquillette's meditation focuses on our ultimate motivation for obeying rules in all roles. He critically examines three theories of professional behavior—goal-based, rights-based, and duty-based—to guide lawyers into justice's humanistic roots, away from instrumentalism.

Recognizing the impossibility of drawing sharp lines between the lawyer and one's self, Judith McMorrow considers latitude lawyers have in committing acts of civil disobedience. Such conduct may be proper under certain circumstances for non-lawyers, yet remain improper for lawyers. Professor McMorrow develops a theory and prescribes a norm of special caution for lawyers. Its premise is the correlation between the rule of law and positive law, meaning that lawyers bear special obligations to act in accordance with law to promote democratic legitimacy. This limits lawyerly civil disobedience, guided by the standard of special caution.

The question of roles likewise contributes to defining the nature of lawyering. Paul Tremblay works through competing conceptions of poverty lawyering, dubbed

“rebellious” lawyering and “regnant” lawyering. Regnant lawyering is the conventional approach, emphasizing client autonomy and calling for the lawyer to advance the client’s interests here and now. Rebellious lawyering takes a broader and longer view, conceiving of the lawyer’s role as driving a “justice-based allocation of resources away from clients’ short-term needs in favor of a community’s long-term needs.” Professor Tremblay develops a theory of justice aimed at refashioning legal ethics into this model of lawyering.

Building on themes of critical self-reflection, Carwina Weng examines scholarship on multicultural lawyering to discover a focus on learning about culturally-different clients. The literature wrongly overlooks the human inclination towards unconscious cultural blindness and discrimination against those who are different. To address this oversight, she calls for a new conception of multicultural lawyering, one demanding self-analysis of one’s culture and its influences. Professor Weng contributes a framework for learning cultural self-awareness, using cognitive and social psychology to lend completeness to cross-cultural lawyering.

II. Institutions and Legitimacy

The delivery and administration of justice depends upon existence of legal institutions. In a democracy, these require components that provide balance and fairness to systemic efficacy and legitimacy. Traditional notions of separation of powers and federalism support these structures in the United States. Increasingly administrative agencies and private actors, both within the United States and globally, play critical though inchoate roles. Scholars explore advanced attributes of these legal power structures in this section.

A. *Separation of Powers.* The relationship between the judicial and legislative branches of government in generating law and justice is a central theme of United States jurisprudence. The first pair of contributions in this section considers aspects of this relationship. Both reflect how it is the role of legislatures to express political will and of courts to mediate it.

Zygmunt Plater examines the role of equitable discretion in the modern statutory context. He starts with an unsettling proposition: courts, even courts in equity, lack discretion to permit violations of statutes to continue despite broad mandates to “balance the equities.” Resolving this separation of powers puzzle involves dissecting equitable powers into three distinct balancing exercises: a threshold balance, a balance on the question of contending conducts, and a balance in tailoring equitable remedies. Equity defers to legislation in the second but retains discretion as to the first and third. So the thrice-balanced method facilitates equity in the age of statutes, mediating the roles of courts and legislatures.

Charles Baron explores, more directly, the relative desirability of law being made by courts or legislatures, using the law regarding the “right to die” to illustrate. Common law responded, in the absence of legislation, to technological advances in prolonging human life. Legislators sidestepped difficult questions while case law incrementally evolved responsive legal principles. The interaction exhibits law’s magisterial dialectic process. Neither branch is institutionally subservient to the other. The interaction between them promotes public confidence that results yield more just law.

B. *Federalism.* Public confidence is a component of democratic legitimacy; it is a critical function of federalism. Likewise a central theme of United States jurisprudence, the second pair of contributions in this section considers aspects of the federal-state

relationship. Both reflect federalism's flexibility enabling it to promote public confidence and democratic legitimacy.

George Brown explores federal prosecutions of state and local officials for political corruption. These actions pose difficult issues of how federalism relates to state autonomy and local sovereignty. He examines *Sabri v. United States*, which endorses such actions without appreciating the significant constitutional issues they pose, and links it to the widely-publicized campaign finance reform case (*McConnell*). Questioning conventional rationales such as justifiable protection of federal funds, Professor Brown explains that endorsing these federal actions promotes anti-corruption imperatives grounded in principles making Congress "the guardian of the democratic process."

Renee Jones explains federalism on similar grounds of public confidence in lawmaking. She focuses on federalism in corporate law, implicated by the Sarbanes-Oxley Act of 2002 that suggests a "creeping federalization of corporate law." She explains that a realistic federal threat to state jurisdiction is critical to development of legitimate corporate law among states. Professor Jones uses Sarbanes-Oxley to ground one prong of her theory of dynamic federalism. This is a relationship between state and federal regulation that enables each to reinforce the other's efficacy. In this context, enabled by the federal preemptive threat, federal legislation induces state courts to jurisprudential shifts congruent with democratic principles garnering popular support.

C. Contemporary Lawmaking. The federal preemptive threat inherent in federalism, and the separation of powers concept, play defining roles in the broader stage of law production found in the administrative state. Each piece in this part grapples with this complex, radial, production of law in contemporary society, including the role of private actors.

Mary Ann Chirba-Martin examines public safety when private associations establish standards—endorsed by federal agencies—that may not be in the public interest. The illustration is dental amalgam fillings, which the American Dental Association (ADA) champions as safe while the Food and Drug Administration (FDA) essentially defers. Judicial capacity to provide a forum to resolve contending interests is limited. So only state legislatures can produce law necessary to assure appropriate safety and dissemination of information—and they are constrained by the threat of federal preemption in doing so.

Federal administrative agencies increasingly leverage their regulatory function by adopting private standards as public law. This phenomenon, well illustrated by how the Securities and Exchange Commission adopts private accounting standards for public companies, poses issues of both public access to materials and legitimacy of the process. In my contribution to this volume, I offer an analytical framework to promote the legitimacy of this process and, for the federal government, nominate the Director of the Federal Register to implement its objectives.

In emerging areas of international practice in which law as yet plays little formal role, innovative and creative approaches are essential to establish legitimacy and promote justice. David Wirth explores the example of how private organizations from the United States and abroad, together with donor country governments, have reoriented both the procedures for developing and the content of third world development agendas financed by the World Bank. He fashions a partnership advocacy model to guide those efforts, with particular attention to assuring democratic accountability to the poor in developing countries who are the ostensible, but rarely the actual, beneficiaries of donor lending

operations. Professor Wirth then defines a principled role for American lawyers in such partnerships.

III. Law and Society

Law must respond to the needs of societies it governs to achieve justice. Two series of papers in this section illustrate how. The first, presented as democracy, seeks systemic solutions in contexts of taxation, mediating institutions, the workforce and public access to governmental information. The second series, denominated as equality, addresses specific instances that focus on immigrants, girls, patients and infants.

A. Democracy. Democracy and wealth are inextricably bound, each facilitating and simultaneously threatening the other. James Repetti demonstrates how wealth concentration impairs economic growth, due to reduced opportunities, and frustrates democratic processes. Particularly when wealth concentration arises from inheritance, tax policy should be used to offset these adverse effects, with proceeds from such transfers allocated to fund education that nurtures human capital.

A sub-theme of tax policy aimed at nurturing human capital is the idea of the middle class, a classification embracing a more general middle. Thomas Kohler laments a systemic tendency to overlook this vast “middle,” comprised of families, religious congregations, service and fraternal groups, grassroots political clubs, and unions—all of which mediate relations between individuals and institutions. Mediating bodies—“little platoons” of society as Edmund Burke called them—inculcate habits central to self-rule at individual and social levels. This is why Tocqueville stressed associations as mediating groups with potential to act as “schools for democracy.”

Extending this concern about the overlooked middle, Kent Greenfield considers federal law concerning candor. It protects against fraud in capital markets by theorizing

that accurate information facilitates optimal capital allocation. A similar rationale, perhaps even stronger, justifies equivalent protection against fraud in labor markets, but neither federal nor state law provides it. Professor Greenfield explains why common law and state regulation are inadequate, requiring a federal statutory approach.

Information is central to capital and labor markets and increasingly to all citizens in a democracy. The venerable doctrine called the public's right to know underscores this theme when addressing information held by government. Mary-Rose Papandrea demonstrates judicial reluctance to promote this right when the executive branch asserts secrecy on grounds of national security. Yet the public's right to know, grounded both in the First Amendment and the Freedom of Information Act, is essential to political justice, particularly amid national crisis when government activities are directed at non-citizens.

B. Equality. Non-citizens are part of numerous groups often put in law's shadows, denied access to justice even though equality demands it. In the case of non-citizens, a critical moment of justice arises in deportation proceedings. Daniel Kanstroom explains how deportation is often an automatic consequence of criminal conviction, yet constitutional protections provided in criminal proceedings do not apply in deportation proceedings. To maintain constitutional legitimacy, Professor Kanstroom says, the Constitution's criminal law protections should be incorporated into the deportation system. One model for doing so appears in the juvenile justice system.

The juvenile justice system's goal is individualized rehabilitative justice, yet juveniles sometimes likewise are denied justice through blindness to notions of equality of treatment. Effects can be particularly pernicious for girls. Francine Sherman documents the disparities girls face in the juvenile justice system and explains legal remedies to provide redress. While differences between male and female offenders have

undermined equal rights challenges in the adult arena, differences among individuals are acknowledged in juvenile courts, and dispositions can be driven by those individual needs.

If equality means addressing gender-specific needs of girls in the juvenile justice system, broader conceptions of equality play an overlooked role in politically-driven proposals for a “patients’ bill of rights.” While assigning due process rights to patients of privately-funded health plans, Dean Hashimoto explains that the proposals never appreciated how Medicaid-managed care systems often do not provide equal treatment for the poor or other minorities. Any patients’ bill of rights should safeguard such patients by extending protections to such managed care programs based on a principle of equality, Professor Hashimoto says.

Principles of equality are complex. From whose viewpoint should equality be assessed? Ruth-Arlene Howe confronts such questions in one of her classic articles on the trans-racial adoption debate—chiefly the adoption by white couples of black children. Her thesis is that the increase in such adoptions reflects less an interest in the equality of all persons participating in the process than it does an elevation of the interests of white adults above the needs of black children. Professor Howe urges a shift from seduction by the rhetoric about trans-racial adoption to crystallizing culturally-sensitive approaches to meeting needs of black children in foster care.

IV. Convention and Critique

Conventional wisdom is often long on convention and short on wisdom. Papers in this section critique and expose such limitations. In legal discourse, this facilitates evolving legal conventions towards more just formulations, whether the topic is decision-making, international trade, slavery, relationships or lawmaking.

A. *Aspirations.* Pragmatism, a hearty philosophy for centuries, occasionally comes under rebuke for lacking rational principles to resolve difficult questions. Catharine Wells defends pragmatic analysis of legal decision-making. She presents two models of normative decision-making that purport to distinguish between types of decision-making but shows how these describe interdependent parts of any decision-making process. Professor Wells concludes that pragmatic decision-making should be appreciated as elucidating contextual elements of all forms of deliberation, not as rejecting rationally structured decision-making procedures.

Confronting the concept and meaning of justice head-on is an ambitious project. Taking the leap, Frank Garcia explores various theories of justice in the tradition of liberalism, including communitarian, libertarian, and fairness-based accounts. From this analysis, Professor Garcia articulates a Rawlsian framework of justice that he expands to evaluate contemporary international trade law. His compelling conclusion, contrary to convention, is that traditional liberal justifications of the international order justify asking wealthier states to adopt redistributive policies in international trade law.

Effects of injustice persist long after corrections are made. This is among the major lessons in our legacy of slavery. Deep wounds heal slowly, and wounds of the soul may never heal. Anthony Farley critically reviews the realities of slavery to conclude that “the black is the apogee of the commodity,” a trait sustaining inherited injustices marked by the trauma of “white-over-black.” Despite energetic search for empowerment and reparations by community leaders, such as the Black Panthers, this morally bankrupt legacy makes a mockery of accepted aspirational notions, such as the rule of law, designed to win struggles against injustice. Achieving justice is even more perplexing than many conventional theorists may think.

B. *Affiliations*. Legal classifications are often pivotal in conceptions of justice and applications of law. How should relationships be treated, according to arms'-length norms of the market place or the relational strictures of fiduciary obligation? A trio of pieces provides perspective on the law and nature of affiliations.

Scott FitzGibbon consciously sets out to develop a theory of affiliations, specifying its architecture and articulating associated ethical obligations. This exercise entails engaging with the distinction between contract and fiduciary law. Applying virtue ethics, this account refutes utilitarian theories that deny any difference between contract and fiduciary duty. Accounting for the ethics, psychology and anthropology of affiliations, Professor FitzGibbon provides a basis for sustaining attributes that distinguish the worlds of contract and trust.

Law has struggled for centuries to classify the nature of marriage, as rooted in status or in contract. By reviewing evolving legal doctrines and social dimensions of three features of modern matrimonial arrangements—ante-nuptials, cohabitations, and property settlements—Sanford Katz concludes that marriage is a special model of contract, partaking of components of consensual free exchange along with social constraints directed through state agents. The result is a law of marriage in flux, blending private and public law, individual and communal values, local and national concerns.

The complexion of marriage as straddling the zones of private individual autonomy and public policy becomes more acute in amorous consensual relationships between teachers and students. Elisabeth Keller explores the jurisprudential terrain anchored in freedoms of association and privacy but constrained by societal norms.

C. *Lawmakers*. Justice is a performance as well as a structural process, meaning lawmakers are central figures. They write laws, both in legislation and judicial opinions.

Studying these actors in action are two pairs of pieces, one on statutory commercial law and the other on judge-made copyright law. Bismark reportedly quipped that those who like laws (or sausages) should not witness how they are made; those who like justice insist upon seeing.

The Uniform Commercial Code is among the most ambitious and successful modern legislative initiatives, covering a broad range of commercial transactions in its dozen different articles. Among the most famous of these statutes is Article 2, on sales, brainchild of Karl Llewellyn, a prolific and provocative law professor in his day. A peculiar feature of Llewellyn's work in Article 2 is a distinction between merchants and non-merchants. Ingrid Hillinger demonstrates, contrary to common belief, that the merchant rules did not codify trade customs but codified Llewellyn's conceptions of rational commercial rules. Reconceived as statements of policy not reality, they invite asking how law shapes practice and why the merchant rules should not apply to non-merchants.

Ontological issues appear in legislative drafting exercises of all kinds, including statutory updates of the UCC in light of technological change. James Rogers cites changes in securities trading during the latter twentieth century, when electronic means of recording proliferated. Commercial law reformers rewrote the law in putatively media-neutral terms, updating the law suitable for paper transactions to expressly cover paperless transactions. Professor Rogers explores the limits of this strategy, speculating that changes in the medium ineluctably change the content, meaning a shift from print to digits bears ontological effects obscured by such legislative updating.

Two copyright law scholars examine judicial approaches to the subject. The judge's job is to assess and, despite objective principles, this is an art. The reality of the

judicial art is most pronounced when most reliant upon judgment, which is the field of copyright law that entails making aesthetic judgments. Alfred Yen develops this exquisite insight by exploring major movements from aesthetic theory and showing how they correspond to the analytic premises of judicial opinions in copyright disputes. Accordingly, the aesthetic nature of legal reasoning requires explicit consciousness of aesthetics in judging.

Judges in copyright disputes often face arguments that the venerable fair use doctrine permits a copycat to use a work without payment or constraint. The multi-factor judicial inquiry leaves out, surprisingly, the length of time since a work's first publication. Joseph Liu examines this omission, showing how time is as important a factor in fair use analysis as traditional factors. Incorporating time facilitates dynamic judicial accounting for policy stakes, such as authorial incentives and public access, while also injecting public-regarding values into copyright jurisprudence.

V. Courts and Beyond

Adjudication is the high-water mark of justice. Assuring its integrity is central. Mechanisms include the appeal and other structural arrangements designed to promote integrity; judicial inspection reinforces these structures. Enduring limitations of adjudication yield to searches for superior pathways to justice.

A. Supervision. Inherent in the American system of justice is the possibility of appeal, a quintessentially supervisory conception enabling superior courts to review lower court judgments. Mary Sarah Bilder uses cultural history to explain that appeals are a foundational feature of American jurisprudence. They are not merely legal procedures, rooted in common law, as convention has it, but a transatlantic characteristic of Western European legal culture. Professor Bilder defines an American "culture of appeal" as a

central attribute of justice rooted in legal, religious, political, and literary ideas dating to the 1630s.

If the appeal is an emblem of equitable justice, then appellate review of official actors is critical to justice. As Robert Bloom explains, the concept of judicial integrity is a hallmark of our Constitutional order, and sanctions judicial exercise of supervisory powers that, in turn, promote the integrity of persons acting under official license. He laments, however, that a series of Supreme Court pronouncements mistakenly retreats from the doctrine of judicial integrity, diminished in part by reduced exercise of such supervisory powers.

Specific judicial supervision is essential to police practices of prosecutors exercising executive branch powers. A common example occurs when prosecutors seeking a grand jury indictment possess but do not disclose exculpatory evidence during the proceeding. Michael Cassidy demonstrates how historical appreciation of the grand jury's role, combined with the supervisory powers of federal courts, mandates judicial review. Short of this, state legislative and judicial action can supervise prosecutorial discretion in grand jury proceedings by mandating disclosure of exculpatory evidence in specified cases.

B. Examination. Structures contribute partial promotion of justice in adjudication; courts also must exercise examination, of legislators, themselves, and participants in litigation.

Courts exercise considerable discretion when imposing sentences on criminal defendants, although various legislative schemes often exert limitations on this discretion. Difficult issues arise as to what due process safeguards are relevant to sentencing, as distinguished from substantive elements of a crime. Frank Herrmann explores the

landscape, encouraging applying full due process safeguards to all types of sentencing schemes. Critical in such exercises is how judicial supervision of sentencing laws can be achieved without provoking legislative efforts to negate this power through artful drafting of criminal statutes.

A slight but lethal swing in the penal pendulum occurring towards the end of the twentieth century brought death as a penalty back to the forefront of social thought. This penalty poses profound moral issues for Catholic judges sitting in capital cases. John Garvey provides a framework to reconcile legal requirements with religious conviction by inquiring into theories of cooperation in morally impermissible behavior. His model establishes that Catholic judges cannot enforce the death penalty, either by sentence or upon jury recommendation, but face more difficult balancing when reviewing lower court orders or petitions for *habeas corpus*.

Adjudication requires establishing evidentiary grounds for conclusions, whether by judges or juries. Among difficult contexts is evidence provided by expert witnesses, designed to educate fact finders in arcane areas. Social scientific evidence poses greatest complexities. Mark Brodin measures this form of proof against specific reliability standards and general requirements for admitting expert testimony. He finds that much of this testimony should be excluded. It does not assist juries, can distort the accuracy of the fact-finding process and imperil a proceeding's fairness.

C. Circumvention. Judicial dispute resolution may be recognizable as a common means of adjudication, but alternatives proliferate. Obstructing these pathways are doctrinal entanglements or administrative obstacles, which two scholars in concluding pieces show can be removed.

Ray Madoff reflects upon mediation's appeal, observing its varying success in fields ranging from divorce (where it has worked well) to wills (where it has not). She theorizes mediation's relative success in divorce law is due to doctrinal revolutions such as the no-fault principle and its relative failure in wills settings as owing to the unseen hand of doctrine, a wills law that encourages opting for judicial disputation. To increase successful mediation for wills dispute resolution, doctrinal changes are necessary.

Innovations for dispute resolution increasingly take one step back in the process to prevent disputes from arising. This occurs in international tax law when parties agree with governments in advance on the tax treatment of complex cross-border transactions. Diane Ring puts this fascinating "advance pricing agreement" procedure under the lens of administrative theory, to test the theory, including examining its lessons for academic accounts of the administrative state. She finds in this inquiry a certain justice in this innovation enabled by the administrative state, an exercise in cooperation that epitomizes emerging models of collaborative governance.

Coda

Justice is law's deep bed, whether the topography is called distributive, corrective, political or procedural justice, or located on the more textured terrain of social, economic, or racial justice. Normative moral theories and behavioral practices interact with law in complex ways. Ethical lawyers grapple with value and meaning in all aspects of their spiritual, intellectual, moral, and professional lives, whether in formal legal education or practicing law. Contributions to this anthology animate how these theories and practices ascend to the heights of justice.

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