
RECENT PUBLICATIONS

A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787. By Scott Douglas Gerber. New York, N.Y.: Oxford University Press. 2011. Pp. xxii, 413. \$95.00. Article III of the United States Constitution enacted one vision of judicial independence by granting judges life tenure and guarding against reductions in salary. While modern separation-of-powers scholarship starts with the assumption of an independent judiciary, that independence is a historical phenomenon that demands exegesis. In *A Distinct Judicial Power*, Professor Scott Douglas Gerber tells the story of how and why the American judiciary came to be independent. Beginning with a review of the intellectual history of judicial independence from Aristotle to John Adams, Gerber thoroughly chronicles the rise of proto-judicial independence in the original thirteen colonies' foundational texts and practices. Gerber persuasively describes the colonies as lurching toward judicial independence slowly and unevenly, yet steadily. The ultimate incarnation of judicial independence — Article III — both emerged out of this colonial history and, in turn, influenced later judicial independence developments in the states. Gerber concludes that judicial independence paved the way for judicial review and that this history remains relevant today as a counterweight to theories of popular constitutionalism and the protection of individual rights.

REHUMANIZING LAW: A THEORY OF LAW AND DEMOCRACY. By Randy D. Gordon. Toronto, Ont.: University of Toronto Press. 2011. Pp. xi, 286. \$60.00. For the last forty years, scholars of the law-and-literature movement have applied literary methods to legal texts to enrich legal practitioners' and students' understanding of judicial and legislative decisions. Continuing this project, *Rehumanizing Law* provides an incisive analysis of the relationship between law and narrative, a form that has traditionally been considered mainly within the purview of literary theory. In his exploration of this relationship, Professor Randy Gordon examines how literary, public, and personal narratives — including Upton Sinclair's *The Jungle* and Rachel Carson's *Silent Spring* — have directly influenced the passage of legislation and deconstructs how narratives can become legal rules in the form of judicial decisions. He then advocates methods of legal teaching and learning that recognize the many perspectives surrounding a given legal text and the dependency of these perspectives on historical context, as these assist in the evaluation of the validity of that text. Not only does *Rehumanizing Law* provide an insightful analysis of narrative both within and without the law, but the book, which is peppered with discussions and excerpts of famous cases, poems, novels, and plays, also often proves amusing, enriching, and entertaining.

INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA. By Joanna L. Grossman & Lawrence M. Friedman. Princeton, N.J.: Princeton University Press. 2011. Pp. ix, 443. \$35.00. The American family underwent enormous and tumultuous changes over the course of the twentieth century. Marriage lost its position as the sole legitimate context for sexual activity, women gained unprecedented economic and social freedom, and the movement for gay and lesbian rights made extraordinary gains by century's end. *Inside the Castle* elegantly charts the history of the legal system's reactions and adaptations to the social, economic, and political developments that brought about this fundamental reordering of American society. Ranging broadly over the field of family law, Professors Joanna Grossman and Lawrence Friedman cover the evolution of the law in areas such as marriage, divorce, inheritance, children's rights, and adoption, as well as the social movements behind those legal changes. Grossman and Friedman argue that although families have become vastly more diverse and individualistic since the early twentieth century, the institution of the family remains one of society's central pillars. *Inside the Castle* provides a highly readable overview of the growth and development of that institution over the last century.

THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION. By Paul Horwitz. New York, N.Y.: Oxford University Press. 2011. Pp. xxxiii, 316. \$65.00. In an increasingly secular age, the courts typically regard questions of religious truth as theological inquiries outside their proper jurisdiction. Yet in his new book, Professor Paul Horwitz suggests that this avoidance strategy does more to fuel ideological conflict among secular and religious Americans than to assuage it. Professor Horwitz argues that courts, lawmakers, and responsible citizens today should adopt a perspective of "constitutional agnosticism": an open-minded approach to religious disputes that seeks to empathize with fellow citizens' perspectives on religious truth, while conscientiously avoiding taking any conclusive stand on the issues. Crucially, constitutional agnosticism does not consistently side with either state or religious interests: the approach may favor greater religious accommodations under the Free Exercise Clause, for example, but reject state-approved religious symbolism such as the Pledge of Allegiance. Yet whatever the outcome, by reflecting and respecting the pluralistic values of a diverse democracy, constitutional agnosticism should make the Supreme Court's holdings more palatable to all parties involved. Drawing on a combination of legal, cultural, and literary scholarship — through, for instance, its derivation of "agnosticism" from the Romantic literary tradition — *The Agnostic Age* is an accessible and timely book for readers interested in the connections between pluralism, religion, and liberal democracy.

WHY THE LAW IS SO PERVERSE. By Leo Katz. Chicago, Ill.: The University of Chicago Press. 2011. Pp. xi, 239. \$35.00. In the eighteenth century, Marie-Jean de Condorcet proved a startling point: if voters in a given system prefer candidate Anita over candidate Bertrand and candidate Bertrand over candidate Carla, they may nonetheless prefer candidate Carla over candidate Anita. Years later, “social choice theorists” are still working through this and similar problems, seeking to understand the mechanics of how individual choices and values interact in the formation of collective choices. Building on these theorists’ insights, *Why the Law Is So Perverse* attempts to unravel several surprising features of law that seem impossible either to justify or to eliminate. In a style at once fast-paced, intricate, and clear, Professor Leo Katz exposes the underlying causes and possible explanations of four fundamental yet apparently impenetrable features of the legal landscape: the judicial and legislative refusal to allow certain win-win situations, failure to close loopholes that allow circumvention of the law and social mores, insistence on enforcing either-or outcomes in cases involving considerable grey area, and unwillingness to criminalize certain morally reprehensible conduct illegal. At the end of his analysis, Professor Katz reaches the intriguing conclusion that these outcomes are not only unavoidable but also logical if viewed through the lens of multi-criterial, multi-valued decisionmaking.

JUSTIFYING INTELLECTUAL PROPERTY. By Robert P. Merges. Cambridge, Mass.: Harvard University Press. 2011. Pp. xiv, 405. \$59.95. In our technology-dominated society, intellectual property has become an increasingly important and expansive area of law. Despite the fact that the “P” in “IP” stands for property, contemporary scholarship seeking to justify IP rights focuses on utilitarian considerations, not on the traditional justifications for property generally. In his timely new book, *Justifying Intellectual Property*, Professor Robert P. Merges seeks a deeper, more fundamental justification by looking to the foundational property scholarship of Kant, Locke, and Rawls. After establishing a normative underpinning for IP rights based on “foundational ideas about property rights and the basic organization of society” (p. 195), Merges turns to a description of four “midlevel principles” of IP law: nonremoval, proportionality, efficiency, and dignity, which “run through and tie together disparate doctrines and practices” while “provid[ing] a common policy vocabulary that bridges different foundational viewpoints” (p. 139). Based upon this conceptual framework, Merges justifies the existence of IP rights in light of several contemporary areas of debate in the field: corporate ownership, digital media, and pharmaceutical patents. *Justifying Intellectual Property* will certainly be an interesting read for those seeking something more than the usual law-and-economics approach to IP.

INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU. By John Tehranian. New York, N.Y.: Oxford University Press. 2011. Pp. xxx, 289. \$50.00. With the arrival of Web 2.0, the line between consumer and producer of copyrighted content has grown increasingly blurred. Professor John Tehranian explores this trend by considering the myriad roles in which individuals operate when interacting with copyrighted material: as infringers, transformers, consumers, creators, and reformers. The copyright regime is subject to a growing gulf between law and societal norms: in a society where an average individual could plausibly incur “\$4.544 billion in potential damages each year” (p. 4) without even engaging in the ubiquitous act of peer-to-peer file sharing, something must certainly be amiss. *Infringement Nation* includes a thorough and compelling analysis of the evolution of copyright law, including the surprising role of fair use doctrine “in the problematic expansion of the copyright monopoly” (p. 49). Tehranian presents an insightful critique of the copyright regime, including its underappreciation of non-transformative works and its hierarchy of protection that privileges sophisticated, repeat players. The book concludes with suggested reforms that might restore the copyright regime to its role as a stimulator of creativity. *Infringement Nation* offers unique insight into the perils of a future in which harsh sanctions and overbroad infringement claims continue to diverge from societal norms, and makes a convincing case for immediate reform of the copyright regime.

CRIME AND PUBLIC POLICY. Edited by James Q. Wilson and Joan Petersilia. New York, N.Y.: Oxford University Press. 2011. Pp. xi, 644. \$39.95. The rise of crime rates in the 1960s encouraged the use of crime data in examining the causes and consequences of criminal behavior and formulating public policy to respond to crime. *Crime and Public Policy* is an extension of previous works on crime released and edited by Professors James Q. Wilson and Joan Petersilia. The work brings together the perspectives of many scholars studying different aspects of the problem of crime. All agree that the crime rate in the United States has fallen in recent years, but the precise causes of this decline are a matter of dispute. Several chapters attempt to explain the biological and sociological bases for crime, including evolutionary developments, community and racial pressures, and family structures. Other chapters confront elements of the criminal justice system, from prosecution and rehabilitation to parole and prisons. Substantive criminal law is another focus of the work, with chapters on guns, drugs, and sex crimes. Reliable crime statistics give many of the authors a powerful tool to employ when explaining how public policy affects crime. Though the authors find no “silver bullet that will easily cut crime rates” (p. 4), *Crime and Public Policy* assembles an interesting and diverse selection of works that inform how society can approach the issue of crime.