FALL 2020

UNIVERSITY *of* PENNSYLVANIA CAREY LAW SCHOOL

ADVANCES IN RESEARCH

Penn Law
UNIVERSITY *of* PENNSYLVANIA CAREY LAW SCHOOL

RESEARCH BY

The faculty at the University of Pennsylvania Carey Law School dedicate themselves to producing research and scholarship that illuminates the most pressing issues facing society today. From net neutrality and contract enforcement during the COVID-19 pandemic to criminal justice reform and judicial independence, and more, our professors discover and share pathbreaking insights that push the legal academy forward and reshape real-world policy.

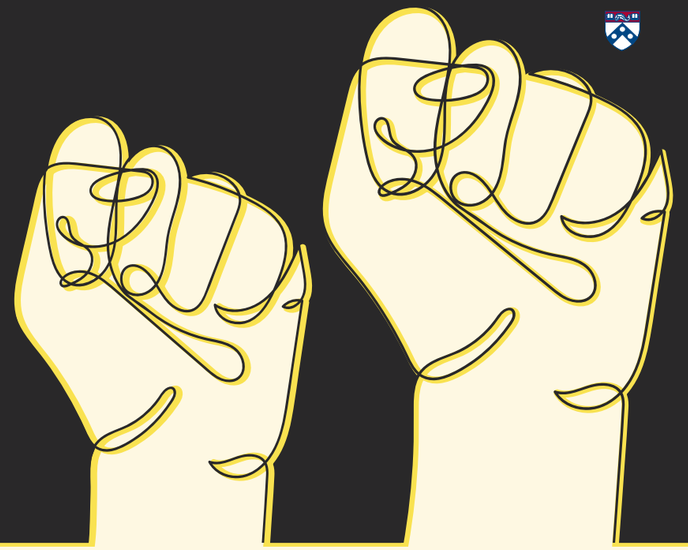
Our faculty members are interdisciplinary thinkers who bridge the gap between the law and myriad connected fields by collaborating extensively with scholars from institutions around the country and throughout the world. Their work exemplifies diverse methodologies and perspectives, revealing the wide range of modes of thought and areas of academic inquiry that thrive here at Penn Law.

In this issue of *Advances in Research,* we offer a snapshot of some of the most noteworthy research conducted by our faculty over the past year. The featured faculty members include both longstanding experts in their fields and promising scholars at the beginning of their careers. We hope you enjoy this edition.

Sincerely,

Ted Ruger
Dean and Bernard G. Segal Professor of Law

USING BLACK DOCUMENTARIES TO CONTEXTUALIZE INTENTIONAL TORT ACTIONS



"Contextual analysis that exposes and dissects the group conflicts underlying intentional tort actions might prevent such skewing of outcomes."

REGINA AUSTIN

ON RESEARCH BY

REGINA AUSTIN L'73

William A. Schnader Professor of Law

Understanding legal disputes in contemporary society requires an appreciation of the contexts in which such conflicts arise. In "A Dose of Color, a Dose of Reality: Contextualizing Intentional Tort Actions with Black Documentaries," published in the *Journal of Legal Education* and as part of the *Public Law and Legal Theory Research Paper Series*, William A. Schnader Professor of Law Regina Austin argues that black documentaries can be used to expose law students "to the contexts that have given rise to the doctrines that are the bread and butter of daily classroom experience."

Professor Austin, who is also the Director of the Penn Program on Documentaries & the Law, begins her pathbreaking paper by framing "the intentional torts' regime" as a "source of freedom and protection or oppression and control" for the "multiple, overlapping, variously fluid groups categorized by race, ethnicity, and nationality; sex, gender, and sexual orientation; socioeconomic class; age and abilities; religion; and geography." These groups are in constant competition for economic, cultural, and political resources, explains Austin, and the intentional torts doctrines – including assault, battery, false imprisonment, malicious prosecution, abuse of process, and others – "exacerbate, ameliorate, or resolve intergroup and intragroup clashes by clamping down on or leaving unconstrained private physical and emotional violence in ways that affect the distribution of resources."

Although intentional torts often involve "intergroup and intragroup clashes," Austin writes, courts generally do not delve into the type of contextual analysis that would expose how groups use "culture as a weapon." This type of analysis must begin from the starting point of rejecting "the assumption that market-based allocations of wealth are the product of 'invisible hands' or that assessments of 'personal responsibility' can be made without attending to the structural and systemic barriers that impede an individual's or a group's survival and mobility."

When there is a lack of such contextual analysis, there is a real danger of courts' reaching results that not only run afoul of reality but even incite violence. "Contextual analysis that exposes and dissects the group conflicts underlying intentional tort actions," writes Austin, "might prevent such skewing of outcomes."

Austin posits that documentary films can be "enormously helpful" in providing context for intentional tort disputes. She quotes James Baldwin in her assertion that they can demonstrate "what's happening on the other side of the wall" and "pierce 'the apathy and ignorance' that fuel conflict and violence between and within groups."

Austin uses *Klayman v. Obama* to illustrate how two contemporary documentaries – "I Am Not Your Negro" and "Whose Streets?" – may "provide a critical contextual analysis of an intentional tort case involving contemporary race relations." In 2016, Larry Klayman filed a class action lawsuit in the U.S. District Court for the Northern District of Texas against, among others, then-President Barack Obama, former Attorney General Eric Holder, the Reverend Al Sharpton, Minister Louis Farrakhan, George Soros, the three female co-founders of #BlackLivesMatter (BLM) and BLM itself. Klayman alleged intentional infliction of emotional distress, claiming that the defendants incited violence by convincing supporters "there is a civil war between black and law enforcement" – using, especially, the police shooting of Michael Brown in Ferguson, Missouri – and that BLM is "a violent and revolutionary criminal gang." Klayman claimed that these actions resulted in severe bodily injury and death to class members as well as the fear of such injury and death, causing severe emotional distress.

The district court dismissed the lawsuit but refused to sanction Klayman, finding that his claims were neither frivolous or brought in bad faith. As Austin writes: "Indeed, they likely reflect the views of many Americans about the nationwide black-led protests against police violence." Austin outlines the three key propositions on which "Klayman's outrage" rests: (1) law enforcement is not targeting blacks "in numbers that are inconsistent with the level of crimes blacks actually commit"; (2) BLM and similar protests provoke violence and property destruction and also put law enforcement at risk in a way that justifies aggressive responses by the authorities; and (3) such protestors "violently reject attempts at unity under the banner of 'All Lives Matter' and are criminals themselves."

First, Austin explores how Raoul Peck's "I Am Not Your Negro" speaks to "America's response to black suffering and black protest." Peck's documentary is based on an unpublished letter by James Baldwin about the deaths of his friends and prominent black civil rights leaders Medgar Evers, Malcolm X, and Martin Luther King, Jr. In his letter, Baldwin discusses the effect of black self-assertion on whites, Austin writes, which is to excite "terror and exaggeration of the threat posed by the resistance." This explains, according to Austin, "Klayman's resort to hyperbole and hysterics in dismissing blacks' representation of, and reactions to, their experience, their reality, of dehumanizing and deadly treatment at the hand of the police."

Next, Austin turns to "Whose Streets?," which was directed by Sabaah Folayan and Damon Davis, two young black filmmakers who were in Ferguson during protests after Michael Brown was shot by police. This 2017 documentary, writes Austin, addresses why whites "resort to fiction in the face of black suffering and organized protest" and provides a "direct response" to Klayman's criticisms of the BLM movement. The filmmakers focus on the experiences of the black community instead of on the looting and rioting featured in mainstream media. The documentary humanizes both Michael Brown and the protestors, writes Austin, while also contextualizing the Ferguson protests "in the larger social and economic context that contextual analysis demands and Klayman's complaint completely ignores."

Austin concludes that "Whose Streets?" effectively counters all three of the key propositions on which "Klayman's outrage" and legal complaint rest.

While contextual analysis won't resolve cultural clashes, concludes Austin, "contextualizing with documentaries has the potential to break down the walls between and within groups that apathy and ignorance erect and to reveal what is really at stake."

ON POWER & INDIAN COUNTRY

ON RESEARCH BY

MAGGIE BLACKHAWK

Assistant Professor of Law

When Assistant Professor of Law Maggie Blackhawk (Fond du Lac Band of Lake Superior Ojibwe) was asked to tell her story as a woman in the law for the special "Women & Law" special issue of the *Stanford Law Review*, she knew she would have to tell it "as a Native woman in the law." In her essay, "On Power & Indian Country," Blackhawk frames her pathbreaking scholarship in federal Indian law with her personal experiences before, during, and after attending Stanford Law School and into her teaching experiences at the University of Pennsylvania Carey Law School.

In the essay, she relays "a story of power, sovereignty, and legislatures" that "challenges many of our taken-for-granted assumptions about how our government and Constitution work: By contrast to slavery and Jim Crow segregation, intervention by the federal government into Indian Country only furthered the colonial project. Rights and equality continue to pose a threat to the foundations of Indian law." This formulation, writes Blackhawk, runs directly counter to the "simple story" that "rights are the protectors of justice, and federal courts are the protectors of rights."

Blackhawk begins by tracing her path to Stanford Law, which was paved by her work as a social science researcher at the University of California, Los Angeles. During her time at the Center on the Everyday Lives of Families (CELF), Blackhawk worked with a team of women attorneys led by Chai Feldblum, who Feldblum called "legislative lawyers" who "took their arguments to Congress" to advocate for better law. This work group not only taught Blackhawk "everything they knew about the lawmaking process," she writes, they also convinced her to apply to law school.

Once Blackhawk was admitted to Stanford Law, she turned to George Redman, a citizen of the Northern Arapaho Nation born and raised on the Wind River Reservation in Wyoming. Redman took Blackhawk to meet Berthenia Crocker, named law firm partner, in Lander, Wyoming, in his "pickup, dusty with reservation soil." When Crocker asked Blackhawk the type of law she planned to study, Blackhawk replied, "jurisdiction."

From this point, Blackhawk delves into the complex story of jurisdiction vis-à-vis federal Indian law in which "jurisdiction is synonymous with justice."

"Jurisdiction," writes Blackhawk, "is at the heart of sovereignty, and sovereignty is to Indian Country what air is to fire. Rather than the language of rights, it is the language of sovereignty that empowers Native people. . . . Sovereignty offers the ability to govern."

At this point in her fledgling legal career, Blackhawk envisioned Stanford Law as "offering courses on lawmaking, jurisdiction, power, and justice," but she soon learned the stark reality. "Lessons of justice were taught entirely in the language of rights," writes Blackhawk. "Any concern with jurisdiction or procedure often focused on the federal courts as protectors of justice through rights."

Blackhawk was further dismayed by not only the lack of "any mention of 'Indian Country,'" but also an experience in which she sat in the front row of her first-year "History of American Law" course and was "erased" by an unchallenged "offhand comment during a lecture [stating] that Native Nations and Native peoples no longer existed in any real form in the United States."

Blackhawk explores the way Native people often "combat the active erasure of Indian Country," which is to self-identify and "put our bodies and our reputations between the force of erasure and the furtherance of the American colonial project." Facing a Native person, then, writes Blackhawk, "is to face the reemergence of an erased history" and "to struggle with the difficult moral reality of being both a constitutional democracy and a colonial power that has ruled through conquest."


MAGGIE BLACKHAWK

"To tell my story as a woman in the law, I have to tell that story as a Native woman in the law… a story of power, sovereignty, and legislatures (that) challenges many of our taken-for granted assumptions about how our government and Constitution work…"

The response to Native self-identification, then, is often rejection, writes Blackhawk, manifested through "disbelief or a series of requests for evidence of 'authentic' Native status." Worse than this, however, is that "federal rights of non-Natives [have] trumped inherent tribal sovereignty."

Blackhawk writes that she also learned that "'equality posed as much of a threat to tribal sovereignty as did rights." She points to the 1978 U.S. Supreme Court decision in *Oliphant v. Suquamish Indian Tribe* to illustrate the Court's application of the "language of rights," colonialism, and erasure – while "leaning into equality" – to hold that the Suquamish Nation (even though it has a constitutional government with tribal courts and a criminal code) had no criminal jurisdiction over non-Indians, even those who had committed crimes within Indian Country.

Blackhawk notes that this "equality" had the goal of "integration," a concept with which Indian Country had already been acquainted through the era of allotment begun by the Dawes Act in 1887. "One justification for selling off Native land for pennies on the dollar," she writes, "was that the 'savages' might be better 'civilized' by integrating non-Native settlers with Native people." This attempt at integration, however, was "formally repudiated by the United States forty years later" – but not before it dismantled Native governments and other institutions in which Native people held power. Blackhawk posits that "integration" now lives in the "promise of diversity," but ironically, "diversity threatens every institution where Native people govern."

Blackhawk recounts that in her third year at Stanford Law, Janet Cooper Alexander introduced her to "power" and encouraged her to fight erasure and "bring the lessons of Indian Country to the academy by publishing academic articles."

The essay then fast-forwards to 2017 when Blackhawk learned how difficult this task would be, being labeled a "formalist" because of her position that "law matters." Expounding upon this premise, Blackhawk writes: "However imperfect, the recognition of inherent tribal sovereignty and the framework of United States law that fostered self-governance within Indian Country were born from the rigorous belief that law matters."

Although hiring committees openly questioned where Blackhawk could "fit in the pantheon of the legal academy" or achieve any recognition at all, she has found a home at Penn Law, where she has been teaching for three years.

In the final section of the essay, Blackhawk looks forward to the future of her academic career while recalling her recent experiences with constitutional law. The first was her appointment by the council of Fond du Lac Band to serve as a senior constitutional advisor to the president in the rethinking of its constitution. The second was when she was approached to teach first-year constitutional law at Penn Law and quickly found that her choices of casebooks invariably excluded Native Nations, Native people, and American colonialism.

"I was going to become complicit in that erasure simply because I lacked the materials to do otherwise," she writes. From this realization emerged Blackhawk's widely praised article, "Federal Indian Law as Paradigm Within Public Law," published in the *Harvard Law Review* in 2019.

Blackhawk concludes the essay by noting that the "complex story" of Indian country "might also offer an alternative vision of justice for all women – one that aims for power in addition rights and understands the value of building and preserving institutions where women govern."

Reconsidering Judicial Independence

ON RESEARCH BY

STEPHEN B. BURBANK
David Berger Professor for the Administration of Justice

"(A)s with judicial independence and judicial accountability, the quantum and quality, or mix, of 'law' and 'judicial politics' depends, or should depend, on what a particular polity wants from its courts."

How should we understand the relationship between judicial independence and judicial accountability? Professor Stephen Burbank has spent a significant portion of his extraordinary life in the law exploring the federal courts, federal court rulemaking, and the relationship between the federal judiciary and other institutions. In his recent article, *Reconsidering Judicial Independence: Forty-Five Years in the Trenches and the Tower*, Burbank reflects on what lessons we can learn from how the federal judiciary has weathered periods of stress and strain. His insights have grown from his first-hand experiences working with Congress and the courts and from his own interdisciplinary research.

Burbank has been a member of the Penn Law faculty for over forty years. This essay is an expanded and revised version of his keynote address at the *Stanford Law Review*'s 2019 symposium, "The Independence of the American Judicial System: Politics and Separation of Powers," and was published in the *University of Pennsylvania Law Review Online*.

Burbank begins the article with the first day of his clerkship for U.S. Supreme Court Chief Justice Warren Burger, when he was asked to review the Chief Justice's draft of *United States v. Nixon*. This decision would require President Nixon to comply with a subpoena for recorded conversations from the Oval Office and would precipitate his resignation. Experiencing the fallout from Watergate first-hand, Burbank was keenly aware both that the President would not be held to be above the law but also that, "there being no guarantee that the President would obey the Court's decision, whether he did so might depend on the public's support for judicial independence."

A few years later, Burbank served as the co-reporter for a set of rules to implement the Juridical Councils Reform and Judicial Conduct and Disability Act of 1980. His work on this project led him to believe that addressing the behavioral problems of federal judges was a polycentric problem requiring careful study and execution to avoid undermining the judiciary's role. Having become a "champion of judicial accountability as the judiciary's friend," Burbank used his experience developing these rules and subsequent work for the Judicial Conference to achieve an appointment to the newly created National Commission on Judicial Discipline and Removal. The Commission ultimately issued a set of recommendations designed to respond to problems of judicial misconduct and disability that would not, "in the name of efficiency or from failure to see the forest for the trees, unduly disrupt institutional compromises forged over two centuries."

Burbank brought these experiences to bear on his own scholarly engagement with judicial independence, which led him to read extensively in the literatures of other disciplines, particularly political science. He found that "discussions and debates about judicial independence had produced more heat than light and that scholars in different disciplines had been talking past one another." This led Burbank and New York University Law Professor Barry Friedman to convene an interdisciplinary conference of legal, economics, history, and political science scholars to discuss judicial independence. In his contribution to the book that followed the conference, Burbank demonstrated "that judicial independence is the other side of the coin from judicial accountability; that neither is an end in itself but rather a means to an end (or a variety of ends); that the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and that there is no one ideal mix of independence and accountability, but rather that the right mix depends on the goals of those responsible for institutional architecture with respect to a particular court or court system."

Understanding the complementary relationship between judicial independence and judicial accountability led to a series of important inquiries. For example, both independence and accountability must be understood in relation to other actors: from whom or what must the judiciary be independent? And to whom or what should the judiciary be accountable? Burbank concluded that judicial accountability should run to the public, including litigants, the legislature that funds judicial operations and creates the laws that the judiciary interprets and applies to disputes, and to the judiciary as an institution, in order to maintain integrity between the branches of government. "In each instance," Burbank explains, "proper regard for the other side of the coin — that is, for judicial independence — requires accountability not entail influence that is deemed to be undue."

Burbank's experience "in the trenches" leading the editorial committee for the American Judicature Society, responding to attacks on the courts and judges, helped to develop his scholarly perspective. One of these insights, Burbank writes, was that the relationship between judicial politics ("the pursuit of a judge's preferences on matters of policy relevant in litigation") and law need not and should not be the same for all judges or judicial systems. Nor is there a dichotomy between law and judicial politics; rather they are complementary. "[A]s with judicial independence and judicial accountability, the quantum and quality, or mix, of 'law' and 'judicial politics' depends, or should depend, on what a particular polity wants from its courts."

Burbank concludes with a review of his pathbreaking work with Berkeley Law Professor and political scientist Sean Farhang, which investigated the ways that Congress, federal court rulemakers, and the U.S. Supreme Court have responded to increases in private enforcement of rights through litigation over the past 50 years. Their book, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* (Cambridge University Press, 2017), demonstrated that a counterrevolution against private enforcement of rights granted by federal law has been led by an increasingly conservative Supreme Court. One reason for the Court's success stems from a lack of public awareness of decisions that rely on analysis of technical enforcement mechanisms rather than substantive rights. Burbank and Farhang's empirical work showed that Supreme Court's decisions on enforcement receive dramatically less press coverage than decisions on rights and that the relative lack of visibility of the former category of decisions limited public pushback even when the decisions substantially eroded the ability of plaintiffs to enforce their rights.

The lack of accountability fostered by this scant media coverage "has freed the justices to do indirectly what prudent management of the institution's perceived legitimacy would prevent them from doing directly." This situation also endangers democratic values. By undermining plaintiffs' ability to assert their rights under federal statutes, the Court may be "understood as seeking to enfeeble legislative policy with which it disagrees and doing so by means that avoid accountability."

Burbank concludes with a word of caution: "[I]n times of aspiring authoritarianism in the executive branch and serial subservience in the legislative branch, independent and accountable courts are the bulwark of our freedoms." Actions that undermine judicial accountability risk not only judicial independence, but the integrity of our democracy, he writes.

#BelieveWomen AND THE PRESUMPTION OF INNOCENCE

ON RESEARCH BY

KIMBERLY KESSLER FERZAN L'95

Earle Hepburn Professor of Law

"#BelieveWomen can be understood through a prism that uses the respect that is owed as both a moral claim about what we owe women and an epistemic claim that given what we owe them we are also justified in believing them."

KIMBERLY KESSLER FERZAN

In "#BelieveWomen and the Presumption of Innocence: Clarifying the Questions for Law and Life," Earle Hepburn Professor of Law Kimberly Kessler Ferzan explores these two concepts brought to the forefront of our collective consciousness through the Supreme Court confirmation hearing on the nomination of Brett Kavanaugh, during which Christine Blasey Ford accused him of sexually assaulting her when they were teens. Ferzan doesn't attempt to reconcile the positions but rather "to better explicate the claims that underlie both #BelieveWomen and the presumption of innocence in law and life, as well as to identify instances in which cross-pollination, between our everyday evaluations and the legal system, is contaminating our thinking."

Ferzan, who is also Co-Director of the Institute of Law & Philosophy, begins with the various ways that #BelieveWomen may be being used or understood. Some of these understandings are not truly about belief. They range from being political rallying cries to being calls to alter who gets the default benefit of the doubt. Others, however, are epistemic claims — they are claims about what the hearer should believe, and Ferzan spends considerable time unpacking this epistemic category.

Of the epistemic claims that Ferzan considers, she finds promise in the idea of "testimonial injustice" from philosopher Miranda Fricker, who has focused on the way that women's testimony has been devalued. Ferzan than devotes considerable attention to an interpretation she believes has "received less attention in the literature" and is deserving of added scrutiny – the one "that ties a cry for trust to a non-reductionist position with respect to the justification for believing testimony – that is, the idea that we have reason to believe someone, and are justified in doing so, just on her say-so."

Ferzan contends we "owe everyone the baseline of respect" described by philosopher Michael Lynch: "to treat them in some or all of the following ways: as a possible knower, as someone who can engage in the give and take of the game of giving and asking for reasons, and as someone who has the potential to make up their own minds." She maintains that we owe women – and each other – "basic epistemic respect." Giving women the respect that is owed, then further supports that we have reason to believe victims of sexual violence to the same extent that we take on board claims by others.

Overall, Ferzan posits, "#BelieveWomen can be understood through a prism that uses the respect that is owed as both a moral claim about what we owe women and an epistemic claim that given what we owe them we are also justified in believing them."

Ferzan then works through how these different interpretations will mesh with the legal system. Some interpretations have no role, whereas others, such as questioning how the burden of proof should be set, are ripe for legal argument. She addresses how Miranda Fricker's view, that individuals should be cognizant of the potential to discount women's testimony, could potentially be operationalized. But Ferzan notes that the law does not take anyone's word simply on their say-so, and so this understanding may not be easily accommodated within the law.

Ferzan turns to the presumption of innocence and compares the Supreme Court's extremely narrow interpretation of the concept with the European Court of Human Rights' much broader codification and notes that the issue is far from uncontroversial throughout the world. She reminds the reader that competing presumption constructions pertain to "*criminal proceedings* and the person bound by the presumption is *the state*." Ferzan endorses Larry Laudan's proposition that in law, the presumption "is simply the claim that a juror has no evidence."

In life, however, our questions are different, writes Ferzan, and we must ask what we owe each other and what is the default position in contested factual situations. She contends that invoking the presumption is intended "to invoke a deep, inalienable entitlement to someone's belief in our material innocence."Although the situation may occur outside of criminal proceedings, "the rhetorical presumption has to do with how we should treat each other," i.e., "Unless and until you become convinced by some (to be determined) standard that I have done something wrong, shouldn't you think the best (or at least not the worst) of me?"

Ferzan affirms that even though white men "have received the benefit of the doubt when claims of sexual assault have been made against them," that doesn't "mean that they are entitled to no weight or no consideration." Still, "the court of public opinion is quite different from a court of law," writes Ferzan, and judging someone from afar is far different from "expelling or incarcerating him."

Ferzan raises the issue of "how *heeding* (not ignoring) baseline probabilities may result in biased views." The struggle of how to confront statistical evidence, then, writes Ferzan, occurs alongside the struggle of "how to approach sexual assault allegations." Usually the discussion revolves around how women or people of color "are potentially wronged by the employment of statistical evidence," but here "we are at a crossroads as to whether white men will also be the recipients of negative statistical assumptions." While "some will (rightly) bemoan that it is only when the majority group is impacted that we have important normative discussions, the silver lining is that these important normative discussions can inhere to the benefit of everyone."

Ferzan ends with a warning to "be careful of the shadows we are casting" as we contemplate the various tools available, making sure not to seek "rhetoric that applies across the board" but rather focus on our "deepest commitments" and avoid "errors about what issues are and are not at stake." After all, she concludes: "Finding the right answer will be hard enough even when we are asking the right questions."

THE EXPANSIVE REACH OF PRETRIAL DETENTION

ON RESEARCH BY

PAUL HEATON

Senior Fellow and Academic Director, Quattrone Center for the Fair Administration of Justice

"(P)retrial detention has substantial downstream effects on both the operation of the criminal justice system and on defendants themselves, causally increasing the likelihood of a conviction, the severity of the sentence, and, in some jurisdictions, defendants' likelihood of future contact with the criminal justice system."

In "The Expansive Reach of Pretrial Detention," Paul Heaton examines multiple empirical studies to show the far-reaching effects of bail decisions. His work, which appears in the January 2020 issue of the *North Carolina Law Review*, demonstrates that "new evidence calls into question longstanding approaches to managing pretrial risk that provide limited due process protection and emphasize cash bail."

As Heaton explains, the decision of who to release pretrial requires an understanding of the impacts of specific bail requirements. For example, he writes, "for a given defendant, how would their risk on failure to appear ('FTA') or future criminal activity change if they were subjected to condition *A* (which might include preventative detention) versus condition *B* (which might include an alternative to detention, such as text message reminders of scheduled court appearances)?" Because of a paucity of good evidence on this question, Heaton argues, judges and magistrates traditionally "rely on a combination of personal experience (possibly including conscious or unconscious bias), heuristics, and local norms in formulating their bail decisions."

Heaton explains that good evidence has been hard to accumulate because "the bail system, when operating as intended, sorts defendants in a manner that limits the value of the outcome data it produces for demonstrating whether and how bail conditions matter." For example, looking at FTA outcomes of criminal defendants who have posted bonds with the help of commercial bonding agents provides little evidence about the effectiveness of this form of release, because commercial operations have an incentive to only accept clients with a low risk of non-appearance.

Fortunately, the evidence landscape is improving due to the emergence of several high-quality studies on this topic over the past few years. The new studies improve upon previous work in several ways. First, they use large administrative datasets, instead of generalizing from a few incidents. Second, Heaton writes, "they carefully consider the problem of differentiating correlation from causation, making use of natural experiments to measure the causal effects of detention and resolving the sorting problem described above." Finally, they not only consider the resolution of the case at hand but also a broad range of other outcomes, including future criminal activity, earnings, and unemployment.

"The takeaway from this new generation of studies," Heaton explains, "is that pretrial detention has substantial downstream effects on both the operation of the criminal justice system and on defendants themselves, causally increasing the likelihood of a conviction, the severity of the sentence, and, in some jurisdictions, defendants' likelihood of future contact with the criminal justice system." The results of these studies show the high cost of pretrial detention and should lead to reforms that provide that detention is limited to only situations when it is necessary and "identify alternatives to detention that can promote court appearance and public safety."

A study by Will Dobbie, Jacob Goldin, and Crystal S. Yang obtained nearly 400,000 administrative court records from Philadelphia and Miami-Dade counties. These records provide information about bail, nonappearance, case outcomes, and future offending, to which the researchers linked individual IRS tax data, including earnings and employment information. Heaton explains, "To obtain causal estimates, the researchers exploit the random assignment of bail magistrates to cases, empirically demonstrating that defendant and case characteristics are uncorrelated with judge assignment. But because judges vary in the leniency with which they apply bail guidelines, judge assignment influences the ultimate likelihood that individual defendants are detained pretrial." This allows "an opportunity to measure outcomes for otherwise similar pools of defendants who vary in their access to pretrial release." The authors, then, can measure the causal effect of pretrial detention.

The study shows that "pretrial detention reduces the likelihood of FTA by sixteen percentage points, but that this improvement in appearance rates comes with substantial ancillary consequences." Moreover, pretrial detention "increases defendants' likelihood of pleading guilty from 33% to 44% (a 32% increase), and the reductions in rearrest that accrue from incapacitating defendants pretrial are completely offset by increase in post-trial offending." Detention also reduces the likelihood of employment and of accessing social safety net programs.

The findings are in line with several other recent studies which included data from a variety of cities such as Philadelphia, Pittsburgh, and New York City. One group of scholars found that with cash bail, there is an increase in likelihood of conviction, an increase in future crime, longer sentences, and an increase in court fees. Heaton cites several studies that show the negative effects of the cash bail condition and writes: "The data also shows that a substantial fraction of the Black-White and Hispanic-White disparity in incarceration rates can be attributed to pretrial detention."

Another study found that "defendants arraigned on a day closer to the weekend are more likely to be released than those arraigned earlier in the week, despite being assigned identical bail amounts and appearing otherwise similar on observable characteristics." The differences could be because obtaining release requires someone to post bail, which can be harder on weekdays due to scheduling and liquidity constraints. This study showed that detention increased the likelihood of pleading guilty and more than doubled sentence length.

These recent studies show consistent evidence that pretrial policies have important consequences, including affecting the guilt/innocence determination, sentence length, and defendants' future of economic prospects. Heaton writes, "Detention can also increase future crime, meaning that the prospect of incapacitation in the near term must be balanced against future crime in assessing whether regimes that act to detain truly protect or instead actually harm public safety."

The findings have important implications for legal challenges to pretrial systems. Heaton writes that "because the decision to detain will, in effect, be a decision to convict for some defendants, the process of determining who gets detained requires the robust procedural protections that apply in other phases of the criminal process." The Sixth Amendment requires access to counsel where imprisonment is imposed and, because the outcome of a bail hearing can have the practical result of a jail sentence, "it seems pertinent that the Sixth Amendment right to counsel should extend to such hearings."

Another concern is lack of individualization in bail procedures. Many jurisdictions rely on bail schedules that set bail amounts based on charge severity and/or criminal history but do not account for ability to pay. This has the effect of determining guilt for some. Heaton writes, "It seems obvious that an adjudication process that convicts defendants because they belong to a broadly defined group – without an individualized inquiry into their circumstances – would raise serious due process concerns."

Critics have also attacked bail procedures on equal protection grounds. Several studies show that low-income individuals or minorities are disproportionally affected by pretrial detention. One study shows that compared to defendants assigned identical cash bail amounts, defendants from the poorest 10% of zip codes were detained more often than those from wealthiest 10% of zip codes. Another study demonstrated that "the adverse causal effects of being detained pretrial are similar for Blacks, Hispanics, and Whites, but Black felony defendants are fourteen percentage points (roughly 45%) more likely to be detained then White defendants, and Hispanic felony defendants are nine percentage points (roughly 30%) more likely to be detained than White defendants." The studies demonstrate that pretrial detention disproportionately impacts racial minorities and the poor, which means they bear the brunt of the consequences of detention.

Heaton writes, "Defenders of the status quo contend that the large volume of cases flowing through the criminal justice system necessitates shortcuts such as bail schedules, uncounseled hearings, or reliance on private bail enforcement; without such shortcuts, they argue, the pretrial process would become intolerably protracted or costly." However, recent research shows that this view is problematic. "Jettisoning constitutional protections in the pretrial context, we now know, raises… concerns because of the close connection between what happens in the bail hearing and the verdict that will ultimately be recorded."

Heaton concludes that "[w]hile ensuring court appearance is a legitimate policy objective, in light of these high costs, pretrial detention should only be a final resort used sparingly and only after less costly alternatives prove ineffective." The data show that pretrial detention comes at a considerable cost and thus alternative investments, such as referring defendants to social services and providing support to help defendants make it to court, may generate net savings.

THE SOCIAL COST OF CONTRACT

ON RESEARCH BY

DAVID A. HOFFMAN

Professor of Law

When private parties perform contracts, the public bears some of the costs. But what happens when society confronts unexpected contractual risks? During the COVID-19 pandemic, completing contracts —such as following through with weddings, conferences, and other large gatherings — will greatly increase the risk of rapidly spreading disease.

COVID-19 provides a good example of contracts that cause unexpected risks. In "The Cost of Social Contract," published in the University of Pennsylvania Carey Law School's *Journal of Business Law* and through Penn's Institute for Law & Economics, Professor David A. Hoffman and Cathy Hwang, a professor at the University of Virginia School of Law, believe "through judicial rescission, reinterpretation, and reformation, we anticipate that courts will recalibrate burden to acceptable levels."

Hoffman and Hwang note that "a close reading of past cases illustrates that when social hazards sharply increase after formation, courts have sometimes rejected, reformed, and reinterpreted contracts so that parties who breach to reduce external harms are not left holding the bag."

In their pathbreaking paper, Hoffman and Hwang make theoretical and practical contributions to the literature of contracts. Building on previous cases, they demonstrate how the public theoretically participates in private contracting, focusing particularly on the final gatekeeping function of courts, which usually enforce but can also reform contracts.

Practically, they write, in extraordinary times courts sometimes do not enforce contracts as written in an effort to protect public health. "Instead, courts turn to half-loaf and compromise solutions, including contract reformation and more equitable damage remedies. When deciding whether to perform contracts — or to hold counterparties to performance — parties should realize that previous courts can and have embraced compromise, rather than rote enforcement."

Hoffman and Hwang contend that contracts flourish when the externalities they create are acceptable to the public. The government monitors that acceptability through three main mechanisms: limits on the subject of contracts, regulatory intervention, and the contract-enforcement process in courts. If a contract survives the scrutiny of the first two types of gatekeeping, the third usually offers superficial review: courts almost always enforce contracts even when the contracts create third-party harms.

The public — through law, regulation, and contract interpretation — is very interested in keeping those externalities to an acceptable level. Hoffman and Hwang make the novel argument that when externalities to the public spike, the public can step in through courts.

The authors first offer examples of ways contracts externalize risk on the general public: A merger might create a monopoly, raising prices for consumers. A contract for the sale of prescription pain medication externalizes the social risks of addiction. "Because of these externalities, the general public has many reasons to intervene in private contracting — and it does, all the time," they write.

"When deciding whether to perform contracts — or to hold counterparties to performance — parties should realize that previous courts can and have embraced compromise, rather than rote enforcement."

The authors argue that "courts, standing in for the public, have a chance to reform contracts when the public's burden changes materially and unexpectedly. Courts can reform contracts by excusing performance, interpreting broad carve-outs, and changing contractual burdens to discourage performance."

They support this position by suggesting the existence of what they call "an anti-canon: a set of disfavored and odd cases that result from extraordinary facts. Although these anti-canon cases are bad guides for ordinary contract dispositions, they are still nominally good law. Together, they suggest how public health might matter to contract enforcement — and how we might expect courts, in the wake of the current pandemic, to interpret contracts that have the potential to endanger public health."

An example they point to is the 1918 case of *Hanford v. Connecticut Fair Association*. In September 1916, the Fair Association breached its contractual obligation to host a "baby show" where "babies were in some manner to be exhibited." That year, New York City saw its first cluster of poliomyelitis, a virus that mostly affected children, often paralyzing or killing them. The Fair, naturally, wished to walk away from the deal.

Walter Hanford, who was to have supplied the infants for the show, sued. Hanford claimed even if the association breached the contract to further the public's interest, it still owed him the contract price. In a passage with special resonance in 2020, the court disagreed. It would neither "require the performance, [n]or award damages for a breach, of a contract in which the public have so great an interest in the preservation of health . . . ."

There is no general public health exception to contract enforcement, but the court found one. In truth, as Hoffman and Hwang write, courts rarely discuss public health as an explicit factor in interpretation disputes. Still, information can be gleaned from the cases that do exist to help understand what might be coming.

Contract deposits will be a major point of contention in the coming months and years. Many contracts require parties to pre-pay nonrefundable deposits or to agree to pay liquidated damages if an event is canceled. Hoffman and Hwang ask if a court excuses contract performance due to public health risk, what happens to prepaid deposits? Are deposits refundable? Should they be?

The practical takeaway, they write, is this: "[P]arties to venue contracts, caterer contracts, and other contracts that involve non-refundable deposits should not behave as though those contracts are rock-solid. Rather, they should anticipate that there is a risk that a court will somehow reform, excuse or ignore nonrefundable deposits clauses, as they have in the past."

DAVID A. HOFFMAN

Judges will be applying rough justice, Hoffman and Hwang note, and suggest that parties seeking to enforce contracts that cause substantial public health harm might face skeptical receptions and that judges' appetite for ignoring contractual language is highly contingent.

IMPROVING POLICING THROUGH SENTINEL EVENT REVIEWS

ON RESEARCH BY

JOHN HOLLWAY

Associate Dean and Executive Director of the Quattrone Center for the Fair Administration of Justice

When something goes terribly wrong in the criminal justice system, what is the best way to respond to prevent something similar from happening in the future? Many organizations start by identifying who is to blame and seek to punish the wrongdoers through various courses of actions. Scholars call this focus on individual fault the "person-based approach," which assumes that organizational errors arise from an individual's faulty judgment or behavior. Studies suggest that this is the dominant approach used among police departments.

In the current atmosphere, police department error and overreach is under unprecedented scrutiny, catalyzed by widespread outrage over the deaths of unarmed Black civilians and police responses to resulting demonstrations and civil unrest. A recent paper by Professor John Hollway, co-authored by Duke Law School Professor Ben Grunwald and published in *Criminology & Public Policy*, describes a different approach for criminal justice systems to understand and respond to errors and create meaningful reform. Their work, "Applying Sentinel Event Reviews to Policing," reports on pathbreaking work conducted by the Quattrone Center, implementing the first ever use of Sentinel Event Review (SER) in an American police department.

A SER is a voluntary, multi-stakeholder, non-punitive review of an undesired outcome within an organization that damages the organization and its credibility. SER is a system-based, rather than person-based, approach to identifying the root or contributing causes of error and implementing systemic changes to prevent errors from recurring. SERs have been widely used in aviation and health care settings for decades and have proved highly effective.

A SER works from the assumption that systemic weaknesses — rather than individual misconduct — are at the root of many organizational errors. A SER root-cause analysis recognizes that fear of punishment and blame may interfere with problem-solving. The effort focuses not on punishing individuals at fault but instead on helping the organization focus on "a broad array of contributing factors that acted in concert to permit the error to occur." These contributing factors could include problems with communications, equipment failures, environmental conditions, management or supervision, organizational culture, or leadership.

As Hollway and Grunwald demonstrate, SER can be a powerful tool to improving policing. SER may help police departments envision and implement novel reforms that, over time, diminish their rate of error and negative outcomes. Moreover, by emphasizing organizational or systemic responsibility over individual blame, SER may also build institutional buy-in for reforms. And finally, "SERs may help improve public perceptions of the legitimacy of a participating criminal justice agency, not only by reducing its errors over time, but also by demonstrating to the public that the agency takes its errors seriously and is committed to learning from them."

Hollway is not only an expert on root cause analysis in criminal justice but also played a key role in the first ever SER of an American police department. In 2014, the Quattrone Center brought together members of the Philadelphia Police Department (PPD), the Philadelphia District Attorney's Office (DA's Office), and the 1st District Court of Common Pleas of Pennsylvania (the trial court in Philadelphia) to conduct a SER of the investigation and prosecution of a major homicide case that went astray, leading to the erroneous pretrial incarceration of four men.

Hollway and Grunwald's article focuses on the SER of a case known as the "Lex Street Massacre." In December 2000, four armed men shot and killed seven people and injured three others in a West Philadelphia rowhome. The case generated enormous urgency among the police and the media and fear within the wider community. A faulty identification from a survivor of the shooting coupled with one suspect's subsequent confession led to the PPD's arrest of four men in connection with the killings.

"SERs may help improve public perceptions of the legitimacy of a participating criminal justice agency, not only by reducing its errors over time, but also by demonstrating to the public that the agency takes its errors seriously and is committed to learning from them."

JOHN HOLLWAY

These defendants were held for a year and a half as the case slowly moved towards trial. When the trial did not begin on the appointed date, a local reporter began raising questions and soon published a story "revealing that the PPD was aware of another potential Lex Street perpetrator, creating some doubt about the defendants' guilt." The DA's Office dropped the charges against the defendants shortly thereafter, and four other men were arrested and charged with the homicides. Hollway and Grunwald explain that "[u]nbeknownst to all but a select few, these four had been under investigation by the Philadelphia Police since only weeks after the first group of defendants was arrested."

This sequence of events created several costly errors: "The police department and DA's Office invested substantial resources investigating and prosecuting innocent defendants. They subjected those innocent defendants and their families to the pains and stigma of eighteen months of incarceration. And all the while, the four true murderers were left on the streets, where they were free to — and did — commit crimes and harm other people." The ensuing civil litigation continued for several years. By 2014, however, all civil suits had been resolved and the case presented a unique opportunity: to test a multi-stakeholder review to identify potential reforms that might effectively prevent a devastating mistake—the faulty long-term detention of four people — from happening again.

To implement the SER, the PPD, the DA's Office, the court, and attorneys who had represented the first group of defendants agreed to work together in the review process. The participants chose Hollway to serve as the review moderator. In this role, the Quattrone Center provided administrative and project management support: training participants in the SER process, gathering and organizing documents, arranging interviews, and compiling a detailed timeline of events. To accommodate the confidentiality concerns and institutional mistrust present among the parties, the Quattrone Center also acted as a neutral moderator, collecting and holding documents in confidence and preparing a report that could be approved by each participating organization.

As a result of these painstaking efforts, the SER identified a number of contributing causes to the wrongful incarceration of the first group of Lex Street defendants and designed recommendations for reform to help avoid similar errors going forward. While some of these recommendations were reiterations of known best practices for policing, "several others were novel, non-obvious reforms that had not been proposed or implemented in the thirteen years since the Lex Street investigation." The group identified administrative and systemic changes that could be made by the PPD, District Attorney's Office, and within the courts to improve oversight, communications, and otherwise provide a check on inevitable human error.

As with any reform strategy, SERs bring strengths and weaknesses. For example, a SER may be ill-equipped to tackle problems that exceed "temporal or organizational delineation — *e.g.*, that police officers in a department are racist or have generally engaged in racial discrimination in the past." As Hollway and Grunwald's work demonstrates, however, police departments and other actors in the criminal justice system may have much to learn from other fields, such as medicine and aviation, about how to learn from their faults. Broader use of SER techniques among law enforcement agencies may lead to a better understanding of how to root out and remediate errors and create safer communities.

THE DORMANT COMMERCE CLAUSE IN INTERNATIONAL COMMERCE

ON RESEARCH BY

MICHAEL KNOLL

Theodore K. Warner Professor of Law & Professor of Real Estate Co-Director, Center for Tax Law and Policy

In a sweeping series of papers, Professors Michael Knoll and Ruth Mason provide a way forward for states to implement tax systems that avoid discriminatory double taxation of international income as required by the Commerce Clause. The authors also criticize some state courts for defying the U.S. Supreme Court's dormant Commerce Clause rulings.

Along with Mason, the Edwin S. Cohen Distinguished Professor of Law and Taxation at the University of Virginia School of Law, Knoll examines several Supreme Court and lower court cases on state tax regimes that are alleged to violate the dormant Commerce Clause. Knoll, who is also Co-Director of the Center for Tax Law and Policy, frequently writes about cross-border tax policy, particularly the connection between taxation and competitiveness, in the interstate, European Union, and international contexts.

In their three papers, the authors write about an area of law that has been seldom taken up by the Supreme Court: the application of the dormant Commerce Clause to international commerce.

Knoll and Mason note that the dormant Commerce Clause has "deep roots" extending back to the drafting of the Constitution and its ratification. For nearly 200 years, they write, "the Supreme Court has recognized the principle that the Commerce Clause… limits the ability of states to regulate cross-border commerce."

Further, they write that the Supreme Court has long made clear that the Constitution's prohibition against discriminatory taxes applies to both interstate and foreign commerce, with even more restrictions placed on foreign commerce.

In "The Dormant Foreign Clause After *Wynne*," 39 *Virginia Tax Review* 357 (2020), and two shorter Tax Notes publications – 99 *Tax Notes State* 377 and 845 (2020) – Knoll and Mason focus on *Steiner v. Utah*, 449 P.3d 189 (Utah 2019), *cert. denied*, 140 S. Ct. 1114 (2020). Robert Steiner of Utah was a shareholder of Alsco Inc., a large and successful family-owned linen and uniform rental business in the United States with subsidiaries in 13 other countries taxed as a pass-through entity. Steiner and his wife claimed foreign tax credits in those countries.

Although Utah permitted residents to claim a credit for income taxes paid to other U.S. states, it did not do so for taxes paid to foreign countries, prompting the Steiners to seek relief in the Utah courts as the Tax Injunction Act prevented the Steiners from filing in federal district court. In the Utah tax court, the Steiners prevailed, but in

"(*Steiner*) represents an example of the hostility of some lower courts to the dormant Commerce Clause, but more importantly, is the second example of a state supreme court refusing to apply the main lessons of *Wynne*… "

2019 the Utah Supreme Court reversed, making three overarching arguments: that the dormant foreign Commerce Clause applies to corporate, but not individual, foreign income taxes; that Utah's failure to credit foreign taxes did not violate the Commerce Clause because of an offsetting federal credit for foreign taxes; and that Congress passively approved Utah's tax system.

Knoll and Mason strongly criticize the Utah high court's decision for its failure to follow the Supreme Court's decision in *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015), where the Court addressed the same issue in the context of interstate commerce. In its 5-4 decision, the Court stated clearly that the Commerce Clause's nondiscrimination principle prevents protectionism, and it elevated a test it first described in 1983 as the central test for tax discrimination.

As explained by Knoll and Mason, the Wynnes were Maryland residents whose county taxed their worldwide income. They challenged the Maryland tax regime under the dormant Commerce Clause, arguing that Maryland's tax regime discouraged them earning income from other states in violation of the dormant Commerce Clause. While acknowledging that the dormant Commerce Clause neither forbids states from taxing their residents' worldwide income nor forbids all double taxation, the Court nevertheless held that the Maryland tax regime violated the dormant Commerce Clause because it was internally inconsistent.

Under Court doctrine, "internal consistency is preserved when the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear." If, however, interstate commerce is burdened more heavily than intrastate commerce, the tax is discriminatory and will be struck down unless the state can provide a compelling reason to justify the discrimination.

Knoll and Mason conclude that "the Utah court's reasoning is untenable after *Wynne*." They provide several reasons: (1) In *Wynne*, as in *Steiner*, the Supreme Court rejected the state's claim that the dormant Commerce Clause applies to corporations but not to individuals conducting business through tax transparent entities; (2) There is nothing in *Wynne* to support the notion that the internal consistency test, which the Utah tax regime clearly fails, applies only to interstate, but not foreign, commerce; (3) The Utah Supreme Court was wrong to assert that federal credits for foreign taxes were sufficient to resolve potential discrimination against international taxation by Utah; such credits are both economically and legally insufficient; and (4) Contrary to the Utah court's holding, Utah's tax regime and its avowed discrimination against foreign commerce is not cured by passive congressional approval. Under Court precedent, explicit rather than passive congressional approval is required to cure a discriminatory state practice.

Moreover, the authors argue that *Steiner v. Utah* should concern anyone interested in the federal system and the relationship between federal and state courts. *Steiner* "represents an example of the hostility of some lower courts to the dormant Commerce Clause, but more importantly, is the second example of a state supreme court refusing to apply the main lessons of *Wynne* – namely that state taxes that are internally inconsistent are unconstitutional unless justified or explicitly approved by Congress."

The authors surmise that other states' tax laws may contain the same constitutional infirmity as Utah's. Knoll and Mason offer several potential remedies for states that refuse to ignore the Court's precedents. These include exempting foreign income from state taxation; taxing residents' domestic and foreign income at the same rate and eliminating taxes on foreign residents' in-state income; providing tax credits for foreign income; and increasing the tax rate on residents' in-state income.

Knoll and Mason conclude by acknowledging that although some state courts will likely follow the Supreme Court, others will not, leading to more confusion, inconsistency, and doctrinal conflicts involving state taxation of foreign income.

BEYOND INTERMEDIATION:

A New (FinTech) Model for Securities Holding Infrastructures

ON RESEARCH BY

CHARLES W. MOONEY, JR.

Charles A. Heimbold, Jr. Professor of Law

"The linchpin of the (new platform system) would be an investor's exclusive and absolute control over directly held securities so as to permit dispositions (transfers) of securities by investors on the real-time, nonintermediated NPS platform."

Most publicly traded securities, and in particular those traded in the financial markets of most advanced economies, are held by investors through securities accounts maintained by intermediaries such as stockbrokers, banks, and central securities depositories (CSDs). For many investors, this is the only practical means of holding and dealing with securities. The infrastructures currently used in these markets make intermediated holding through intermediaries essential and foreclose the option of direct holding on the books of securities issuers.

Intermediated holding infrastructures impose a variety of risks and costs. But they persist as the only practical means for these investors to hold securities primarily because this is the way the systems currently work.

In "Beyond Intermediation: A New (FinTech) Model for Securities Holding Infrastructures," published in the Law School's *Journal of Business Law* and Penn's Institute for Law & Economics, Professor Charles W. Mooney, Jr. argues "that the mere existence of these holding systems, and the benefits enjoyed by their principal architects, do not reflect an appropriate public policy justification for maintaining and accepting the investor and systemic risks and costs (including costs of reducing and managing these risks) that they impose."

Mooney is a leading legal scholar in the fields of commercial law and bankruptcy law whose book, *Security Interests in Personal Property*, is a widely adopted text used in law schools around the country. He also served as U.S. Delegate at the diplomatic conferences for the Geneva Convention on Intermediated Securities.

Mooney proposes "a holding structure that would reduce intermediary risk and, along the way, would ameliorate several other problematic attributes of current intermediated securities holding infrastructures." He refers to this approach as the "new platform system" (NPS), which, he writes, is "a market infrastructure that would, post-settlement, eliminate or reduce these post-settlement risks and costs by allowing investors to connect directly with issuers instead of holding through accounts with intermediaries."

There is no doubt, Mooney writes, that intermediation plays a crucial role in the securities markets. As well, he writes, "the securities holding infrastructures are complex and arcane. This likely accounts, at least in part, for their persistence and resistance to regulatory reforms." In his paper, Mooney outlines the many risks and costs associated with intermediation, among them settlement-related risks, defaults and failure of the intermediary, custody chain risks, and impediments to the exercise of rights of security holders, such as claims against issuers. The infrastructure also impedes enforcement and compliance with regulations on anti-money laundering, sanctions against foreign governments, and anti-terrorist financing.

Mooney is not alone in advocating for disintermediation in the securities markets. He recognizes other scholars who are calling for it, while noting concerns and gaps in their proposals. To cite an example, one proposed adoption of a direct-holding system would have the effect of reducing intermediary risk, but the proposed structure does not offer a way to accommodate an investor's direct exercise of rights and powers vis-à-vis an issuer without the involvement of an intermediary. Mooney points out such a feature would be essential for a system that would provide the functional benefits of direct holding. This flaw, and others, leads Mooney to his new platform system, or NPS. While direct holding certainly is not a new concept, the NPS model does offer some fresh features.

As he writes, "It would connect a participating investor directly with an issuer on the issuer's register at the end of each settlement cycle — direct registration instead of intermediation. What is new, however, is the realistic prospect for meaningful (if not complete) disintermediation of securities holding without a major disruption of significant features of the current market infrastructures. What also is new is a feature of the NPS that would give a direct-holding investor the exclusive power at any time to transfer securities and exclusive control over securities that it holds in the NPS."

Mooney's proposal has the lightest of footprints. His goal, he says, "is not to propose and defend an optimal structure but to explore the simplest and least disruptive modifications of the financial market infrastructure necessary to achieve meaningful reduction of risks and costs through direct holding." After all, as he notes, "No single proposal could reasonably aspire to foretell the details of the infrastructure that might emerge."

His paper outlines the goals and features of the NPS direct holding system, including acquisition, disposition, financing, investor rights, cross-border issues, and market practices.

"The linchpin of the NPS would be an investor's exclusive and absolute control over directly held securities so as to permit dispositions (transfers) of securities by investors on the real-time, nonintermediated NPS platform," Mooney says. "This is a defining attribute that would distinguish the NPS from holding systems that feature transparency but nonetheless embrace intermediary control over securities."

Mooney's proposal does not emphasize technology. Instead, he views his proposal as a "request for proposal" (RFP) to the FinTech community to achieve the necessary results for an effective, safe, and efficient holding system.

He believes FinTech can provide remedies for the problems spawned by deep intermediation of securities holding and non-transparency while also preserving (or even enhancing) the flexibility and efficiency offered by current legacy infrastructures.

Mooney suggests his NPS is a proxy for a new system yet to emerge and believes his paper contributes toward a path forward. Ultimately, he says, "The actual attributes of a reformed infrastructure could result only from intensive deliberations among all stakeholders." To that end, Mooney's efforts extend beyond his scholarship. He has spearheaded and co-chairs a new Task Force of the American Bar Association Section of Business Law that is engaged in an extensive review and critique of the prevailing securities holding infrastructure.

NEUROHYPE AND THE LAW:

A CAUTIONARY TALE

ON RESEARCH BY

STEPHEN J. MORSE

Ferdinand Wakeman Hubbell Professor of Law

STEPHEN J. MORSE

Despite the predictions of many people – including an editorial statement published in *The Economist* in 2002 – neuroscience is unlikely to make significant contributions to legal policy and case adjudication. This is the premise of Ferdinand Wakeman Hubbell Professor of Law Stephen J. Morse's "Neurohype and the Law: A Cautionary Tale," published as part of the University of Pennsylvania Carey Law School's Public Law and Legal Theory Research Paper Series and in *Casting Light on the Dark Side of Brain Imaging* (Amir Raz & Robert Thibault eds., Elsevier 2019). Indeed, even though behavioral neuroscience has made major advances in recent years, Morse concludes that "the field has little to contribute to law at present."

Morse is Professor of Psychology and Law in Psychiatry at the University of Pennsylvania Perelman School of Medicine and the Associate Director of the Center for Neuroscience & Society.

In his paper, Morse calls the "irrational exuberance about the potential contribution of neuroscience" to the law "Brain Overclaim Syndrome," which he believes can be treated with "Cognitive Jurotherapy," defined as "learning the limitations of neuroscience and the conceptual relation between neuroscience and the law."

The origins of this "dire condition," writes Morse, are both "conceptual and empirical." Conceptually speaking, the two disciplines speak different languages with the law using "folk psychology," which Morse explains is "the psychology we all use to explain our own behavior and the behavior of others in terms of mental states like desires, beliefs, intentions, and reasons." Neuroscience, on the other hand, uses "the language of mechanism" and "[n]eurons, neural networks, and the brain's connectome do not have reasons. They have no aspirations no sense of past, present, and future."

Before addressing the relation of neuroscience and the law, Morse addresses "two 'radical' challenges to law that neuroscience poses but that have no legal purchase." The first of these concerns the belief of determinism, which if proven true as neuroscience allegedly does, makes assigning responsibility impossible. "[B]elieving that no one is ever responsible for anything would upend criminal law and much of human interaction as we know it," writes Morse.

The second – and more radical – challenge, according to Morse, is neuroscience's proof that "we are just a pack of neurons or that we are simply victims of neuronal circumstances." If true, it would

"Neuroimaging for general research is an infant science working on one of the hardest problems known to science, the relation of the brain to mental states such as intentions and to action."

remove the concept of agency, but, Morse concludes, "there is simply no reason at present to believe that our mental states play no causal role in explaining behavior."

Morse turns to the question of whether some neuroscience is legally relevant. Biological variables, writes Morse, cannot answer legal questions because the law's focus is on behavior (mental states and acts). If biology is to be used, "legal criterion must be established independently, and biological evidence must be translated into the law's folk-psychological criteria." Moreover, the data should be used only when the advocate can "explain precisely how the neurodata bear on the legal question in issue."

Empirically, neuroscience has not answered the question of how the brain enables the mind and action, and studies themselves present several issues – lack of reproducibility of the results, response biases and artifacts, questionable "ability to generalize from laboratory findings to real world behavior," the fact that college students are the usual subjects and are "hardly representative of the population generally or of, say, criminal offenders," and few replications of studies. Morse maintains that none of these scientific concerns are surprising as "[n[euroimaging for general research is an infant science working on one of the hardest problems known to science, the relation of the brain to mental states such as intentions and to action." While some of the challenges may be surmountable in the future, others, "such as the difficulties with inferences and the correlational nature of the research," writes Morse, will remain.

Along with an eminent neuroscientist, Morse reviewed all the behavioral neuroscience potentially relevant to criminal law adjudication and policy and he commissioned other comprehensive research on "brain reading" studies and neuroimaging research on addiction and criminal law and found "virtually no solid neuroscience findings" were yet relevant.

All of that said, Morse noted that researchers have conducted "a few legally-relevant, 'proof of concept' studies about using neural variables to predict criminal re-offending and to identify legally-relevant mental states." Another potential positive development are studies aimed at identifying potentially objective neural measures of subjective pain, which could inform compensation figures for pain and suffering damages.

Next, Morse turns to an observation that applies to any future use of neuroscience in the legal system because the "law's criteria are behavioral – actions and mental states." In the event that a "test or measurement of behavior is contradicted by actual behavioral evidence," writes Morse, "then we must believe the behavioral evidence because it is more direct and probative of the law's behavioral criteria." Because of this general principle, Morse notes, although "[w]e might think that neuroscience would be especially helpful in distinguishing the truth in 'gray area' cases in which the behavioral evidence is unclear… [b]ut unfortunately, the neuroscience helps us least when we need it the most, and if the behavior is clear, we don't need it at all."

ABOLITION CONSTITUTIONALISM

ON RESEARCH BY

DOROTHY E. ROBERTS

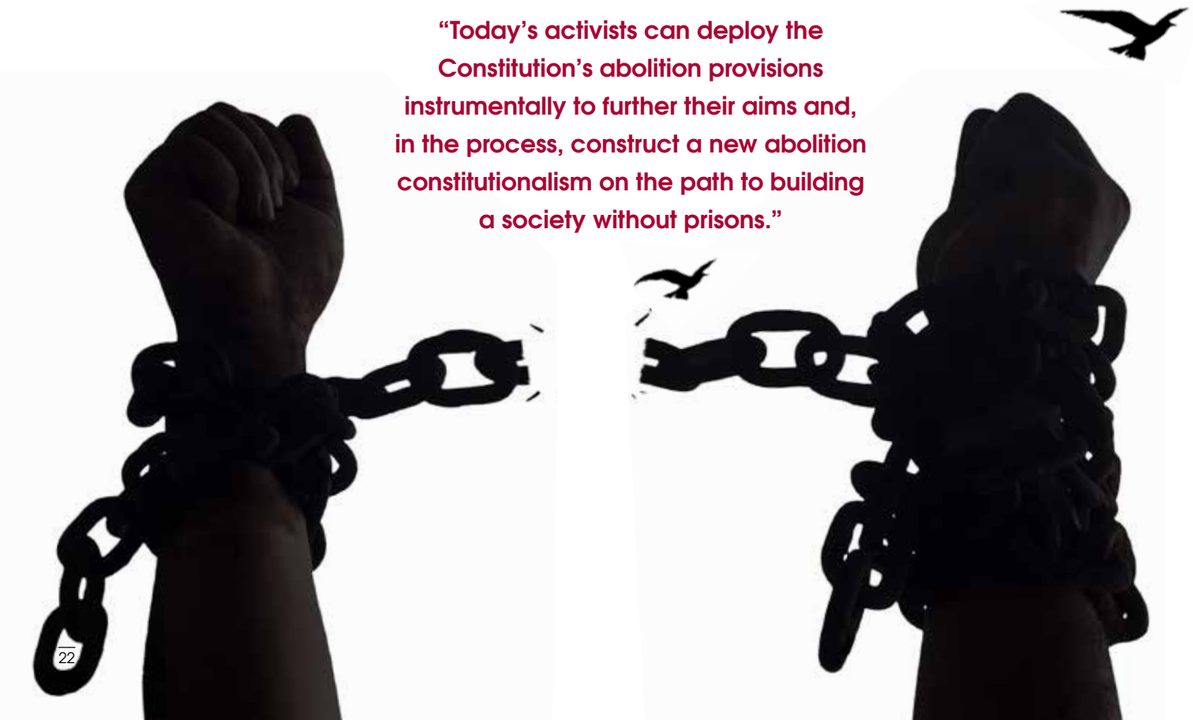
George A. Weiss University Professor of Law and Sociology and the Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights

Professor Dorothy E. Roberts wrote "Abolition Constitutionalism" as the Foreword to *Harvard Law Review*'s Supreme Court Issue on the 2018 term. In her pathbreaking piece, Roberts argues that prison abolitionists can "reinvigorate abolition constitutionalism" by using the Reconstruction Amendments – Thirteenth, Fourteenth, and Fifteenth – "to further their aims and, in the process, construct a new abolition constitutionalism on the path the building a society without prisons."

An internationally recognized expert in race, gender, and the law, Roberts also spoke at a standing-room-only forum at Harvard with Harvard Professor Elizabeth Hinton in conjunction with the publication of her Foreword. Roberts is the second black woman to pen the Foreword of the esteemed law journal, after Harvard Law Professor Lani Guinier, and the second Penn Law professor to do so, after Paul Mishkin in 1965. In April 2019, the Harvard Law Review published Roberts' "Digitizing the Carceral State," a review of Virginia Eubanks' *Automating Equality: How High Tech Tools Profile, Police, & Punish the Poor*.

In the Foreword, Roberts contends that there are two potential paths to examine prison abolitionist theory as it relates to the U.S. Constitution. The first is to use "prison abolition theory to evaluate the Constitution's provisions and the jurisprudence that has interpreted them in order to rebuke their failure to abolish slavery-like systems and install a democratic society." This avenue acknowledges "the futility of employing U.S. constitutional law" to deconstruct the carceral state. The other path, however, applies abolitionist history, including the "logic of the Reconstruction Amendments" to the current political climate, "to propose a constitutional paradigm that supports prison abolitionists' goals, strategies, and vision." Roberts finds validity in both approaches and maintains that "considering both is essential to developing a theoretically and pragmatically useful legal framework to advance prison abolition." She chose to pursue the second path because, like antislavery abolitionists, prison abolitionists can use the Constitution instrumentally while developing their own abolition constitutionalism.

"Today's activists can deploy the Constitution's abolition provisions instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons."



DOROTHY E. ROBERTS

Roberts begins the piece with a comprehensive summary of prison abolition theory, notably three foundational tenets: (1) "today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained"; (2) "the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racist capitalist regime"; and (3) "we can imagine and build a more human and democratic society that no longer relies on caging people to meet human needs and solve social problems."

She notes the "disconnect between social harm and carceral punishment" by citing its function as "state regulation of marginalized people" as well as "the immunity granted to state agents who commit social harms."

Prison abolitionists, she writes, "are both developing alternative, nonpunitive measures to deal with harm and creating new conditions to prevent harm from occurring in the first place, recognizing both as better approaches to ensuring safety and security than relying on police and prisons."

In the Part II, Roberts considers "whether the U.S. Constitution is an abolitionist document" by examining antislavery abolitionists' reading of the Constitution and Supreme Court jurisprudence "obstructing the Amendments' transformative potential." She pays special attention to *Flowers v. Mississippi*, the Court's "most recent decision interpreting the relationship between the Fourteenth Amendment and carceral punishment," analyzing the "Justices' rejection of an abolitionist approach in their ruling."

In 1997, Flowers, who is black, was charged with the murders of four employees – three white and one black – of the Tardy Furniture store in Winona, Mississippi. By the time his case reached the highest court, Curtis Flowers had been tried for capital murder six times by white prosecutor, Doug Evans, who had used peremptory challenges to strike 41 of 42 prospective black jurors. At the state supreme court level, the first two of Flower's convictions were overturned for prosecutorial misconduct while the third was reversed because of Batson violation. The next two trials ended with hung juries and the Mississippi Supreme Court upheld Flowers' conviction in the sixth trial.

Before the U.S. Supreme Court, then, was the question of whether Evans violated Flowers' Fourteenth Amendment rights by excluding a black woman from the jury in his sixth trial. Although the Court ruled in Flowers' favor, Roberts contends that Justice Brett Kavanaugh's opinion is "actually anti-abolitionist" in that it treats Flowers' case as "a system malfunction" instead of recognizing "the systematic use of all-white juries in preserving white-dominated carceral punishment."

Specifically, writes Roberts, "Missing from the Court's opinion is any discussion of the white supremacist logic behind keeping black people off juries, including the reason why West Virginia enacted the 1873 law at issue in *Strauder* allowing only white people to be jurors, and why prosecutors so routinely and relentlessly exclude black jurors from capital trials of black defendants." Justice Kavanaugh acknowledged that all-white juries are problematic, according to Roberts, but "characterized the problem as the harm that individual rogue prosecutors inflict on individual black citizens whom they wrongfully exclude from juries."

The last part of Roberts' Foreword links the first two sections by examining how prison abolitionists can use the abolitionist history of the Constitution "to help move forward to a radical future." This future, Roberts maintains, can take root in "a variety of forums," including courts, Congress, and state governments, and abolition constitutionalism can be applied to "many of the nonreformist reforms in which prison abolitionists and other activists are already engaged," such as stopping prison expansion, ending police stop-and-frisk practices, eliminating the money bail system, repealing harsh mandatory minimum sentences, giving amnesty to those believed to have killed in self-defense, and decriminalizing drug use and possession and other nonviolent conduct.

Roberts concludes with the concept of a "freedom constitutionalism" to guide and govern the radically different society abolitionists are creating, one that could "seek to abolish historical forms of oppression beyond slavery, including settler colonialism, patriarchy, heteronormativity, ableism, and capitalism, and strive to dismantle systems beyond police and prisons, including foster care, regulation of pregnancy, and poverty" – and even extend beyond U.S. borders as it addresses the issues of deportation and U.S. imperialism.

MITIGATIONS AND THE PROPORTIONALITY PRINCIPLE IN CRIMINAL LAW

ON RESEARCH BY

PAUL H. ROBINSON
Colin S. Diver Professor of Law

When the American Law Institute (ALI) amended its Model Penal Code in 2017 – the first amendment since the Code was created over 50 years ago – it represented a dramatic shift towards the principle of desert, which requires criminal punishments "proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." This shift has been well-received by those who favor traditional retributivist justice as well as crime-control utilitarians. In creating space for more-proportional determinations of punishment based on the blameworthiness of the offender, Professor Paul H. Robinson explains that the law can build "moral credibility with the community and thereby enable it to harness the powerful forces of social influence and the internalization of the law's norms." To achieve real proportionality in punishment, however, legal rules must reflect both deserved aggravations and deserved mitigations.

Robinson's article, "Mitigations: The Forgotten Side of the Proportionality Principle" was recently published in the *Harvard Journal on Legislation.* One of the world's leading scholars of criminal law, Robison has published and presented extensively on all aspects of criminal legal theory, sentencing, and criminal code reform. This latest work demonstrates how criminal law "must be as careful to provide appropriate mitigations as aggravations, and not as a matter of grace or forgiveness but as a matter of entitlement."

Robinson's previous work has established the nuance that ordinary people bring to determinations of blameworthiness and appropriate punishment — nuance that is often lacking in the law. In this work, Robinson provides a structure for identifying cases in which existing liability and punishment rules conflict with deserved mitigations, either because a defendant deserves mitigations that are not available from the law (perceived as an injustice) or because a defendant receives mitigation they do not deserve (perceived as a failure of justice). Robinson explains how these conflicts can be represented graphically at the intersection of the law and community perceptions. "Such a nuanced system ideally would include reform of a wide variety of current law doctrines and, especially in the absence of such specific reforms, adoption of a general mitigation provision that aims for blameworthiness proportionality in all cases," he writes.

To illustrate these mitigation conflict points, Robinson provides dozens of case studies that exemplify instances of injustice or failures of justice. These conflicts raise the risk that people will take it upon themselves to undermine the operation of criminal justice systems to bring about results that come closer to the community's sense of justice. In situations in which there is a perceived injustice, communities may turn to jury nullification or protest for executive clemency on behalf of a person thought to be unjustly convicted. In situations in which there is a perceived failure of justice, communities may see "shadow vigilantism," when people indirectly act to distort the work of the criminal justice system to impose a deserved punishment that the law would otherwise fail to provide.

Both kinds of conduct create systemic problems: they are undemocratic, arbitrary, and unpredictable. Robinson explains that by "undermining the criminal justice system's reputation for transparency and consistency, both nullification of liability and shadow-vigilante activity can provoke their own backlash by those offended by their inconsistency, leading to a downward spiral of declining reputation and declining deference, which then further undermine the system's reputation."

"Such a nuanced system ideally would include reform of a wide variety of current law doctrines and, especially in the absence of such specific reforms, adoption of a general mitigation provision that aims for blameworthiness proportionality in all cases."

PAUL H. ROBINSON

Robinson demonstrates that these points of conflict are not merely theoretical but are supported by empirical evidence of the judgments of ordinary people. Reporting the results of a survey of 131 subjects asked to evaluate the outcomes of several case summaries based on real criminal prosecutions, Robinson reports that respondents most commonly came to judgments about appropriate punishment and mitigation that conflict with legal rules in patterns that are consistent with the graphical framework previously described.

In light of these results, which are consistent with previous studies, Robinson argues that the law should, at a minimum, provide a general mitigation provision by statute. Traditional rules around provocation and mitigation for murder committed in the "heat of passion" are anachronistic and oversimplified, failing to account for the variety of cases in which mitigation should be available. For example, many offenders may commit crimes that are worthy of mitigation even if they were committed while the defendant was experiencing some other powerful emotion, such as grief or empathy. Robinson uses the example of Rodolfo Linares, whose infant child was left brain-dead after an accident. "[H]aunted by what he sees as the baby's coming lifetime of suffering and loneliness," Linares held off hospital staff at gunpoint as he removed the child from life support, cradled him until he died, and then turned himself over to hospital security. In such a case, Robinson explains, the defendant, "while acting improperly, does deserve some reduction in liability from that which would be appropriate in a case without the mitigating circumstances." Current law, however, provides no mitigation beyond the ad hoc discretion of individual judges at sentencing.

To appropriately address the many nuances of blameworthiness, Robinson prescribes a general mitigation provision that addresses three distinct inquiries: "(1) the *psychic state* inquiry: to what extent was the offender acting under the influence of mental or emotional disturbance or upset at the time of the offense?; (2) the *personal choice inquiry*: given the offender's circumstances and capacities, to what extent could we have expected the offender to avoid committing the offense?; and (3) the *normative inquiry*: to what extent would giving the offender a mitigation specially undermine community norms?"

Each of these inquiries contributes to create the nuance necessary to align an appropriate punishment to the blameworthiness of the defendant's conduct. The psychic state inquiry, which asks whether the defendant's mental or emotional at the time of the offense makes their conduct less blameworthy than it would have been otherwise, allows for more refinement than simply asking if the defendant was enraged or acting in the heat of passion. Moreover, Robinson points out, acts committed in a rage may be more or less blameworthy depending on whether the offender's actions are an understandable (if not condonable) response to their emotional state or if they are an overreaction. Thus, the law should consider not only the continuum of emotional states that may give rise to an offense, "but also a continuum of the understandability of the offender's reaction to the situation."

Finally, even if a defendant is legitimately overwhelmed with emotion and their response is an understandable reaction to their circumstances, the law should consider community norms and the risk of legitimizing abhorrent conduct. The focus of this third inquiry ought to focus narrowly on the justification for the mitigation, i.e., "*would the reason for giving the mitigation* undermine community norms?" In the Linares case, this would mean asking not whether mitigation would weaken the law against aggravated assault but rather whether granting mitigation for a father's empathy for his injured child would undermine community norms.

Robinson's article provides a proposed provision for implementing a general mitigation principle by statute. Among the several virtues of a codified rule, Robinson points out that it provides a universal rule delineating the contours of the doctrine, facilitating the work of courts. What the code should do, he explains, is focus the decision-maker "and provide a decisional structure that shows the interrelationship" between the relevant factors.

While it leaves much to the determination of juries, Robinson's work has repeatedly demonstrated that the task is within their capabilities. Adopting general mitigation provisions into our criminal codes can set blameworthiness proportionality "more consistently, accurately, democratically, and transparently" than we do today, he concludes.

HOW **CONSUMER PROTECTION LAW** CAN REIN IN **TWO-SIDED MARKETS**

ON RESEARCH BY

NATASHA SARIN

Assistant Professor of Law

How should the law address the potential for harm caused by card payment systems? In "What's in Your Wallet? (and What Should the Law Do About It?)," published in the March 2020 issue of *The University of Chicago Law Review*, Assistant Professor of Law Natasha Sarin explains how the U.S. Supreme Court's 2018 decision in *Ohio v. American Express* has complicated the antitrust analysis of two-sided markets, such as those used by credit card firms. In light of the AmEx decision, Sarin demonstrates how consumer protection law, rather than antitrust, may prove to be a more effective tool for rein in two-sided markets.

Sarin holds a secondary appointment in the Finance Department at the Wharton School, and her research focuses on the intersection of law and finance, most recently on financial regulation and consumer protection reforms.

While Sarin's article focuses on payments markets, specifically consumer credit cards, her insights may apply to other forms of two-sided markets, such as ride-sharing or online auctions. These are examples of "two-sided markets," which involve two separate types of users, each of which gains value from engaging with users of the other type. Sarin explains that these markets are centered on an intermediary, or platform, which sets both price levels and price structures to bring both types of users together.

For example, a credit card network intermediates between consumers and merchants. "A payment card can offer excellent rewards, but unless it is accepted by merchants, it is worthless to consumers," writes Sarin. "Similarly, a payment card can offer very low processing fees to merchants, but unless consumers user the card regularly, low-cost processing is of no value." The market has no value without both sets of users on board. But the specialized price structures that card networks use to bring consumers and merchants together "can make the traditional logic of economics — and antitrust — hard to apply."

In a traditional market, prices that are sustained at a higher level than the cost of providing a good or service indicate a market

"The antisteering provisions at the heart of AmEx are unfair both to consumers in the credit card market — who lose out on potential retail savings from using lower-interchange cards — and consumers outside of the credit card market, who subsidize the rewards that credit users receive."


NATASHA SARIN

failure. But in a two-sided market, an efficient price structure may balance users by allowing one side to be a "loss leader" and the other a "profit center." For example, a social media platform might be free for consumers (as loss leaders) but charge high prices for advertising (the profit center). Sarin explains that the "existence of a high price-cost margin on one side of the market is not dispositive on market failure, nor is the existence of below-market pricing dispositive on anticompetitive predation." These structures pose theoretical and practical challenges to cost-based regulation.

In the payments industry, card networks treat consumers as loss leaders, enticing them with rewards in exchange for using cards for purchases. Merchants pay fees to accept the cards; these fees have risen rapidly as credit card usage has become more prevalent and card networks have offered more luxurious rewards. Merchants argued this model allows card networks to collude to extract supracompetitive rents by effectively barring lower-cost competitors and forcing merchants to decide between paying high fees or losing business from customers accustomed to routinely paying by credit.

Sarin's empirical work with Professor Vladimir Mukharlyamov of Georgetown University's McDonough School of Business demonstrates that the payments industry is highly concentrated and that smaller merchants bear a significant disadvantage in bargaining with card networks. This lack of bargaining power "impedes small retailers' ability to offer low prices and attract market share, thus lessening competition in the retail market as well."

In the AmEx case, merchants challenged American Express's practice of charging high fees – higher than its competitors – to process transactions while prohibiting merchants from passing these costs along to consumers or alerting consumers to the differences in costs associated with accepting the cards. Several states and the federal government challenged this "anti-steering" ban on antitrust grounds. The Supreme Court held that the harm to merchants must be weighed against the benefit realized by consumers from using AmEx cards. "These rewards had to be weighed against the merchant harm," and since that balancing had not occurred in the initial case, the court had erred.

The AmEx decision and the complex balancing it requires have been criticized by antitrust scholars. "Regardless of the merits," Sarin explains, "it is clear that as long as the AmEx precedent governs, it will be more challenging for two-sided platforms to use antitrust to rein in card networks." In practical terms, merchants are incentivized to increase prices for all consumers to offset the heightened costs they incur from accepting high-fee card transactions. Consumers, shielded from this information, cannot factor in the cost of using credit when making purchasing decisions.

Even more perniciously, consumers who use less expensive payment methods, such as cash, checks, or debit cards, are effectively subsidizing the use of high-fee cards by other consumers. "This cross subsidization of credit users by their non-credit counterparts has devastating consequences," Sarin writes, leading to extremely regressive outcomes in which low-income households subsidize more affluent consumers premium rewards. But the harms experienced by consumers who do not use card payments exist outside the credit card market and thus cannot be captured by antitrust analysis.

Sarin's proposal is to look to consumer protection law, specifically the authority granted to the Consumer Financial Protection Bureau (CFPB) to prohibit "unfair, deceptive, or abusive acts or practices," or UDAAPs. Practices may be unfair, deceptive, and abusive, but each trait is analyzed according to its own standard. Sarin explains how the available arguments for each standard could push back against credit card firm practices that are beyond the reach of antitrust law. "The antisteering provisions at the heart of *AmEx* are unfair both to consumers in the credit card market — who lose out on potential retail savings from using lower-interchange cards — and consumers outside of the credit card market, who subsidize the rewards that credit users receive."

Even if the CFPB were to exercise this authority, Sarin writes, practical and legal constraints on how merchants can pass along processing fees to consumers remain. Several states have enacted laws that bar merchants from imposing surcharges on customers paying by credit card. And even if merchants were free to apply surcharges to customers using expensive cards, consumers may react negatively to differential pricing. Sarin presents new empirical work confirming that consumers are less likely to complete a shopping transaction if it will result in a 5% surcharge. "As such, merchants are correctly concerned that surcharging means losing customers, at least in a world where surcharging is not universal." Sarin concludes that if surcharging were to become normalized, however, consumers could be prompted to bear the true costs of using rewards cards or switch to less expensive options.

REGULATING 5G WITHIN A NET NEUTRALITY FRAMEWORK

ON RESEARCH BY

CHRISTOPHER S. YOO
John H. Chestnut Professor of Law, Communication, and Computer & Information Science

CHRISTOPHER S. YOO

By the end of 2010, mobile broadband connections surpassed fixed-line broadband connections in the United States and mobile has now emerged as the primary source of internet connectivity in most countries around the world. But as the business community prepares for the impending deployment of the next generation of wireless technology, commonly known as 5G, industry observers have raised the possibility that European network neutrality regulations may obstruct the implementation of 5G.

Issues surrounding the use of this emerging technology are discussed by Professor Christopher S. Yoo and Jesse Lambert L'21 in "5G and Net Neutrality," a chapter in the book *The Future of the Internet – Innovation, Integration and Sustainability*. Yoo is the Founding Director of the Center for Technology, Innovation and Competition at Penn and a member of the Federal Communications Commission's Broadband Deployment Advisory Committee (BDAC).

The authors note that, "Despite all of this hype, there is little understanding of what sets 5G apart as a technological matter and what the business case for its deployment will be." Furthermore, they write, a 2016 "5G Manifesto" released by a group of European telecommunications providers and equipment manufacturers warned "that that strict implementation of network neutrality might hinder networks' ability to experiment with the kind of flexible, elastic configuration of resources and other innovative specialised (sic) services, which in turn could dampen investment in 5G."

According to Yoo and Lambert, in addition to employing new technologies, 5G systems are expected to incorporate new business models that that are fundamentally different from the ways that prior networks were organized.

The primary focus of 3G and 4G wireless networks was to support broadband access by consumers but the data on consumer willingness to pay for 5G services are mixed. A 2018 survey by Ericsson ConsumerLabs found that 44 percent of users are willing to pay for 5G. Another survey jointly conducted by Qualcomm and Nokia in 2017 found that 50 percent of respondents indicated they were likely to be early 5G adapters. On the other hand, a 2017 study by Deloitte of German consumers found that 61 percent did not regard 5G as important. The study also found that willingness to pay for 5G was quite limited, with 58 percent unwilling to pay anything more for 5G.

This uncertainty about consumer demand for 5G has led many providers to focus their efforts on business-to-business connectivity. However, Yoo and Lambert return to the 5G Manifesto to point out, "some commentators and industry observers have raised the concern that the EU approach to network neutrality may impede the business models needed to deploy 5G."

In addition to hindering the business models to deploy 5G, EU network neutrality may also obstruct the innovation around 5G technologies. Yoo and Lambert write, "It is likely, however, that 5G will connect a significantly larger number of devices and that those devices will place demands on the network that are increasingly diverse. The idea that the increasing diversity of demand will require increasingly differential treatment rests in uneasy tension with the principle of equal treatment of traffic underlying network neutrality."

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The larger number of devices stems from the very nature of 5G. Unlike prior approaches, it enables device-to-device (D2D) and machine-to-machine (M2M) communications. D2D's approach to network management is different from traditional centralized architecture because it permits nearby devices to communicate directly with each other without having to connect through a base station. M2M differs from legacy architectures in that it envisions much larger numbers of connected devices, the need for very high link reliability and low latency, and the tendency to generate short blocks of highly sporadic data.

The question for the EU, then, was how to regulate 5G within a net neutrality framework. According to the Telecoms Single Market (TSM) Regulation enacted in 2015, all providers of internet access services are required to "treat all traffic equally…without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used."

The authors note the TSM Regulation recognizes exceptions for reasonable network management and for what are commonly known as specialised (sic) services, specifically stating the Regulation that the rules "shall not prevent providers of internet access services from implementing reasonable traffic management measures." It further specifies that to be reasonable, "such measures shall be transparent, non-discriminatory and proportionate" and "shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic."

The challenge was in defining reasonable traffic management measures. Yoo and Lambert write that the TSM Regulation calls upon the Body of European Regulators for Electronic Communication (BEREC) to issue nonbinding guidelines to help with the implementation of the regulation. BEREC's attempts to clarify the definitions of reasonable traffic management and specialized services left many key questions unanswered.

Despite the best efforts of the EU to regulate 5G in accordance with net neutrality, Yoo and Lambert conclude, "Unfortunately, the regulatory language and the nonbinding interpretive guidance provided by BEREC do not completely resolve which approaches to 5G will be permissible, if any. Ultimate resolution of these issues will have to await the deployment of 5G, enforcement decisions and actions by the national regulatory authorities, and any subsequent judicial challenges to the regulatory decisions. The hope is that enforcement authorities and courts will enforce these provisions with enough flexibility to give innovation the room to experiment that it needs in order to thrive."

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