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Expanding Inmates’ Access to Appeals

Rethinking Copyright and the Creative Process

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University of Pennsylvania Law School

ADVANCES IN RESEARCH

Penn Law
At Penn Law, our faculty seek and discover insights into the most significant issues of our day, complex legal problems ranging from criminal justice reform to tax policy and trade, and to the burgeoning and relatively unexplored field of virtual currencies.

Advances in Research highlights a sampling of the recent scholarship produced by Penn Law’s professors. Our faculty members are transformative thinkers, who broaden and deepen their research and expertise by collaborating extensively with each other, with scholars from across the University of Pennsylvania, and with those at other institutions. The articles in this volume exemplify the diverse methodologies and perspectives that put Penn Law at the forefront of academic and policy debates. I hope you enjoy learning more about the insights and innovation generated by our faculty.

Sincerely,

Ted Ruger
Dean and Bernard G. Segal Professor of Law

In this issue of the magazine, we offer a concise, but detailed, look into some of the research conducted by our faculty over the past year. Here you will see how our interdisciplinary scholars are developing new insights into the law and connected fields, with the goal of advancing legal knowledge that may be shared with the scholarly community, with the profession, and with policy makers and other influencers. The faculty members featured here include scholars at the beginning of promising careers as well as preeminent experts in their respective fields. We hope you enjoy this edition.

Sincerely,

Tess Wilkinson-Ryan L’05
Professor of Law and Psychology; Deputy Dean for Academic Affairs
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The American administrative state, comprised of agencies like the Environmental Protection Agency, the Food and Drug Administration, and the Department of Veterans Affairs, has long been under siege. From the highest levels of government — including the White House — to scholars, commentators increasingly question the legality of its position outside the traditionally-understood three branches of government: executive, legislative, and judicial.

In an article in the Yale Law Journal, “Petitioning and the Making of the Administrative State,” University of Pennsylvania Law School professor Maggie McKinley uncovers the previously unexplored origins of the modern administrative state in the history of Congressional petitioning from the Founding through the mid-twentieth century. McKinley’s work offers scholars, policymakers, and the courts an opportunity to rethink the position of the administrative state within our constitutional framework.

Administrative agencies are a defining feature of the modern United States government, engaging in regulation and enforcement that affects countless facets of American life. The history of petitioning “reveals an administrative state that was established, at least in part, to protect individual rights and to maintain equal liberty by affording individuals and minorities a mechanism for meaningful participation in the making of law,” McKinley writes. As such, it “offers a counternarrative to the libertarian vision of the administrative state as a rights-invading, and even unconstitutional, construction.”
While some scholars have tangentially addressed petitioning within institutional histories of early American administration, McKinley "excavates the petition process comprehensively for the first time and documents how petitioning shaped the modern administrative state." Although the most commonly understood function of Congress has been to draft and vote on widely applicable legislation, from the late eighteenth century onward, individuals and minority groups could also petition their representatives directly for resolution of their specific concerns.

McKinley explains how the process was grounded in the text of the Constitution, where the First Amendment guarantees the right "to petition the government for a redress of grievances." As such, she argues, the history of the petition process as a forerunner of the administrative state may offer some comfort to textualist and originalist thinkers who are uncomfortable with the position and powers of the administrative state within modern government.

"[T]he Founding generation and the Founding Era Congress envisioned petitioning as an integral aspect of lawmaking and interpreted the vested powers to encompass petitioning. From the very first days of the young Congress, individuals submitted petitions in the form of formal documents, like complaints, and Congress institutionalized procedures to respond," McKinley writes. The “petition process was public; petitions were read on the floor and each step in the petition process was made part of the formal record. Denial of a petition was not a ‘legislative act’ that required bicameralism and presentment, and could be completed by the decision of a single committee,” she explains.

Meanwhile, “[g]ranting a petition could result in general legislation, passed through the traditional legislative process,” or “it could equally result in a private bill or even the decision of an agency, board, or commission.”

Drawing on archival materials from the First Congress and from a database of more than 500,000 petitions submitted from the Founding until 1950, McKinley illuminates the way that petitioning offered individuals and minorities a voice in government. The process “provided an underappreciated avenue for political participation distinct from the vote,” as the “unenfranchised — women, Native Americans, and non-enslaved African-Americans — were afforded process on par with franchised petitioners.” Among early American petitioners were African-American freedmen in Philadelphia, who in 1799 sought regulation of an illegally operating slave trade, and war veterans who sought to receive pensions.

Processing petitions comprised a significant portion of Congressional business, particularly in the eighteenth and nineteenth centuries. In managing that process, McKinley explains, “Congress constructed by statute boards and commissions that were not clearly within one single branch of government, and it made law not in isolation, but in consultation with individuals and minorities affected by those laws.”

Thus, as time passed, Congress’s role in resolving petitions was gradually “siphoned off” from the legislative body itself and moved into various administrative institutions that covered a wide range of subject areas, among them “public lands, Indian affairs, military affairs, public infrastructure, regulation and incorporation of the territories, post offices and roads, labor, education, agriculture, immigration, and election administration.”

The development of the Court of Claims to adjudicate federal claims, the Bureau of Pensions to regulate the public benefits system, and the Interstate Commerce Commission to play an executive role in managing interstate commerce provide salient examples of the outgrowth of the administrative state from the petitioning process.

“Petitioning complicates the simplistic notion of legislative power described by the tripartite model of separation of power,” McKinley argues. Rather, the Constitution itself contemplated entrusting the legislative branch of the government with the role of processing petitions, which “more often than not … involved an amalgam of legislating, adjudicating, and enforcing.” Thus, McKinley writes, “[l]ocating and identifying the origins of the administrative state in the petition process can begin to situate, on firmer historical and constitutional footing, the administrative state within our constitutional framework.”

McKinley, an Assistant Professor of Law whose scholarship examines the structural representation and empowerment of minorities using empirical, theoretical, and historical methods, argues that tracing the history of the petitioning process and its significance as part of the participatory state — those mechanisms apart from the majoritarian vote that facilitate input into government — contributes to the development of “a deeper and more refined understanding of our lawmaker institutions.” Moreover, uncovering that history advances the “long overdue” “conversation about the representation and participation of individuals and minorities within the lawmaking process.”
Rather than seeing Chevron as directing courts to retreat from deciding the relevant legal questions, the Interstitial Steps reveal what those relevant questions are, and they show the work that judges must undertake in cases involving agency interpretations of statutes.”
In its 1984 ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a framework under which the courts defer to administrative agencies’ reasonable interpretations of unclear or ambiguous statutes. The *Chevron* decision has become one of the most central of all decisions in administrative law. Today, it is also one of the most controversial.

Some critics of *Chevron* deference — among them, new Supreme Court Justice Neil Gorsuch — view the doctrine as an abdication of the judiciary’s responsibility to make an independent determination of a statute’s meaning. Still others object to what they view as the Supreme Court’s inconsistent application of the *Chevron* doctrine.

Contributing the Foreword to this year’s administrative law issue of the *George Washington Law Review*, University of Pennsylvania Law School professor Cary Coglianese argues that *Chevron*’s critics misunderstand the doctrine.

Coglianese is the Edward B. Shils Professor of Law and Professor of Political Science, as well as the Director of the Penn Program on Regulation and the founder of *The Regulatory Review*. He specializes in administrative law and the study of regulatory processes, with an emphasis on the empirical evaluation of alternative regulatory strategies and the role of public participation, negotiation, and business-government relations in policy making.

He shows in his article, entitled “*Chevron’s Interstitial Steps*,” how the conventional view of *Chevron’s* simple two-step framework — (1) Is a statute clear?, (2) If not, is the agency’s interpretation of the statute reasonable? — ignores an important series of steps that exist between steps 1 and 2. Coglianese explains that when these “interstitial steps” are taken into account, the objections to *Chevron* start to ring hollow.

His analysis shows that the doctrine both makes much more sense and is more defensible than previously acknowledged. “When *Chevron* is properly conceived..., the logic behind *Chevron* deference fares better as both a doctrinal and normative matter,” he writes.

In his article, Coglianese gives close scrutiny to the structure and reasoning of the Court’s opinion in *Chevron*, as well as those in subsequent key cases, including *King v. Burwell*, the case in which the Court upheld the legality of the Affordable Care Act. He shows that the Court has made clear that judges must evaluate a series of questions between Step 1 and Step 2 to determine whether Congress has delegated gap-filling authority to the agency. These questions include whether the ambiguous statute presents extraordinary circumstances that make it implausible that Congress would have wanted an agency to determine the meaning of the provision.

“Rather than seeing *Chevron* as directing courts to retreat from deciding the relevant legal questions, the Interstitial Steps reveal what those relevant questions are, and they show the work that judges must undertake in cases involving agency interpretations of statutes,” he writes in the Foreword.

“A mere finding of statutory ambiguity does not ineluctably justify deference to an agency’s reasonable interpretation,” he notes. “The Interstitial Steps provide the legal framework for determining when deference is justified: only when Congress has explicitly or implicitly delegated interpretive authority to the agency.”

In addition, Coglianese argues that when *Chevron*’s interstitial steps are made evident, the Supreme Court’s application of the doctrine becomes more consistent than critics acknowledge.

Coglianese assesses the *Chevron* framework with interstitial steps against several alternative frameworks proposed by other legal scholars: namely, one that interposes a “Step 0” before Steps 1 and 2, as well as another one which collapses Steps 1 and 2 into a single step. He argues against both alternatives, explaining why a so-called Step 0 is misplaced and why efforts to collapse *Chevron*’s multiple steps ultimately fail.

“If the Court and the Congress — and the scholarly community — more openly recognized these Interstitial Steps, critics would be less quick to treat *Chevron* as a doctrine in need of retirement,” he suggests. “Recognizing these steps mitigates the concern that *Chevron* automatically substitutes agency interpretation for judicial judgment whenever a statute governing that agency is ambiguous.”

“Given the controversy surrounding the *Chevron* doctrine’s future, at the very least the doctrine and its rationale should be better understood,” he concludes.

Professor Coglianese’s article can be downloaded from his SSRN research page.
University of Pennsylvania Law School professor Stephen J. Morse has contributed a chapter to a comprehensive report, titled Reforming Criminal Justice. Morse’s chapter, “Mental Disorder and Criminal Justice,” examines the wide-reaching interactions between mental health and the criminal justice system. In addition, Penn Law professor Paul H. Robinson and former faculty member Stephanos Bibas (now a judge on the U.S. Court of Appeals for the Third Circuit) served as consultants for the report.
Morse is the Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry, as well as the Associate Director of the Center for Neuroscience & Society at the University of Pennsylvania. In addition to being a lawyer, he is a board-certified forensic psychologist.

Morse's contribution is one chapter of a four-volume report, edited by Professor Erik Luna of Arizona State University, targeted to policymakers, practitioners, and all others interested in criminal justice reform. The report consists of 47 chapters written by leading criminal justice scholars. It is being widely distributed.

“The goal is to help provide a basic understanding of these topics in the criminal justice system so that someone, after finishing a relatively short and reader-friendly chapter, will appreciate the issues in terms of the law, policy, and scholarship on a given topic, and have before them some recommendations for possible reforms,” said Luna, who is the Amelia D. Lewis Professor of Constitutional & Criminal Law at Arizona State’s Sandra Day O’Connor College of Law.

While most of the chapters in the report deal with specific issues in the criminal justice system, Morse's chapter engages systemically with criminal justice and mental health.

“I took the criminal justice system from first encounters with the police to last encounters — including competence to be executed — and looked at every mental health issue that exists in the criminal justice system,” said Morse.

Throughout his overview of mental health and criminal justice, Morse makes a large number of specific recommendations. He notes that a disproportionate number of people in prisons and jails suffer from serious mental disorders, and the treatment provided for them is utterly insufficient.

“Providing inadequate treatment is not only a humanitarian failure,” he said, “it’s also a practical failure.”

In addition, Morse recommends that non-physician health care providers in jails and prisons, particularly psychologists, psychiatric social workers, and psychiatric nurses, should be permitted to prescribe psychotropic medication and medication for substance use disorders, if they have received adequate training in prescribing those types of medication.

Morse acknowledges that this is a controversial recommendation — typically only those with a medical degree can prescribe medications — but he notes that a small number of states have already allowed psychologists with specialized training the ability to prescribe the needed medications. He argues that the lack of psychiatrists makes the recommendation necessary. He also recommends that substance abuse treatment generally should be more widely available.

Other recommendations in the chapter include providing all defendants who raise a mental health issue with an independent, genuine defense mental health expert to assist with their claims, and videotaping all forensic evaluations interviews.

Morse also recommends establishing a new verdict: “Guilty, but partially responsible,” that would be available to defendants charged with any crime. In appropriate cases, the new verdict would permit defendants to raise at trial claims that they suffered from substantially diminished responsibility as a result of mental abnormality. If they succeed, a legislatively-mandated reduction in sentence would follow. Sentencing discretion is insufficient, Morse argues, to respond fairly and even-handedly to substantial diminished responsibility cases.

As to the role of this report in the current political landscape, Professor Luna noted that there is a desire for criminal justice reform that spans the traditional divisions of American politics. “People may come to the table with different underlying rationales,” he said, “and yet they all seem to agree that the American criminal justice system is in need of change.”

“Any fair-minded, principled person wants a fair criminal justice system,” said Morse. “We can argue about what are the fairest rules and what are the fairest procedures, but so much of what we do now is clearly broken, by anybody’s standards.” He hopes that the unprecedented report will have a positive impact on reform efforts.
Caught at the intersection of the prison and foster care systems, incarcerated black mothers confront stereotypes and punitive political impulses that render it all but impossible for them to retain legal relationships to their children, argues University of Pennsylvania Law School professor Dorothy Roberts. In a new volume, *Reassembling Motherhood: Procreation and Care in a Globalized World*, published by Columbia University Press, Roberts has authored a chapter analyzing how prisons and the foster care system not only operate as mutually reinforcing funnels to one another, but also combine “to penalize the most marginalized women in our society while blaming them for their own disadvantaged position.”

“According to the U.S. Department of Justice, in 2004, 11 percent of mothers incarcerated in state prisons reported that their children were in the care of a foster home, agency, or institution,” writes Roberts. In the chapter, “Marginalized Mothers and Intersecting Systems of Surveillance: Prisons and Foster Care,” Roberts explains that African Americans have long been overrepresented in prisons and foster care alike. “In the 1990s, although about 12 percent of the U.S. population was African American, about one-third of the children in foster care were black, and most had been removed from black mothers who were their primary caretakers,” she writes. “Likewise, about one-third of women in prison are black and most are the primary caretakers of their children.”

Child welfare interventions into families, such as removing children from their parents and placing them into foster care, are “typically viewed as necessary to protect maltreated children from parental harm,” Roberts writes. “But the need for this intervention is usually linked to poverty, racial injustice, and the state’s approach to caregiving,” which addresses families’ poverty not by providing social services and financial support, but instead by removing children from the home. Indeed, “[s]ince the 1970s, the number of children receiving child welfare services in their homes has declined dramatically, while the foster care population has skyrocketed.”

Further, Roberts explains, the government’s decision of whether to place a child in foster care is susceptible to racial stereotyping: For example, a study of Michigan’s child welfare system by the Center for the Study of Social Policy discovered that social workers expressed negative views of black families, mothers, and children. Statements by key policy makers and service providers reflected the belief that “African American children are better off away from their families and communities.” Those views yield real-world consequences, as a peer-reviewed study published in the Child Welfare journal concluded that “it takes more risk of maltreatment for caseworkers to place a white child in foster care than it does to remove a black child” from their home.

The dismantling of the welfare social safety net that worsened the effects poverty in African American neighborhoods and families “coincided with the passage of the Adoption and Safe Families Act of 1997 (Public Law 105-89).” The act, which “emphasized adoption as the solution to the rising foster care population,… places foster children on a fast track to adoption,” Roberts explains, mandating that state agencies begin proceedings to terminate parental rights “if a child spends fifteen out of any twenty-two months in foster care. The swift federal timetable is often grounds for severing incarcerated mothers’ ties to their children.”
Adoption legislation is not the only barrier standing between incarcerated mothers and reunification with their children. In most states, babies born to incarcerated mothers "are automatically placed in foster care immediately after delivery." Incarcerated mothers must also contend with a diminished ability to see or communicate with their children, whether due to exorbitant prison telephone use prices or caregivers' failure to bring children to visit. Distance and travel costs play a significant role, as "[a] 1995 study reported that the average female inmate in federal prison was 160 miles farther from her family than the average male inmate."

The resulting limited or nonexistent contact with children places these mothers at higher risk of losing their parental rights, Roberts notes, because "[c]hild welfare agencies may construe a parent's failure to visit and communicate with his or her child as abandonment and grounds for [termination]."

Even once released from prison, black mothers continue to contend with significant obstacles to reunification, often resulting from the same lack of social welfare support that may have led to the children's removal from their homes in the first place. "A host of state and federal laws impose draconian obstacles to women's successful reentry into their struggling communities by denying drug offenders public benefits, housing, education, and job opportunities," Roberts writes. "With no job, public assistance, or stable housing, a mother released from prison will find it extremely difficult to meet the child welfare agency's requirements for reunification with her children and risks termination of her parental rights... This is, for many women, the ultimate punishment that the state can inflict."

Roberts is the George A. Weiss University Professor of Law and Sociology and the Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights at Penn Law. Her scholarship focuses on the intersection of race and gender in contemporary issues in health, social justice, and bioethics, particularly as they impact the lives of women, children, and African-Americans. The twentieth anniversary edition of her path breaking book Killing the Black Body: Race, Reproduction, and the Meaning of Liberty, on state regulation of black women's childbearing, was published in 2017.

Analyzing the combined impact of the prison and foster care systems demonstrates that they "work together to punish black mothers in particular ways, thereby preserving U.S. race, gender, and class inequality in a neoliberal age," Roberts argues. Such analysis reveals the "need for cross-movement strategies that can address multiple forms of systemic injustice to contest the over-policing of women of color and expose how it props up an unjust social order."
EXPANDING
INMATES’ ACCESS TO APPEALS

ON RESEARCH BY
CATHERINE STRUVE
Professor of Law

Over the 50-year history of the Federal Rules of Appellate Procedure, the number of federal appeals by self-represented, incarcerated litigants has risen dramatically, and few academics have examined the procedural rules that impact inmate appeals in federal court. But new research by University of Pennsylvania Law School professor Catherine Struve examines how the procedure for inmate appeals has evolved over the past half century and how the use of technology could change those procedures in the future.

Her article, “The Federal Rules of Inmate Appeals,” appeared in the spring issue of the Arizona State Law Journal. Struve teaches and researches in the fields of civil procedure and federal courts. She served from 2006 to 2015 as Reporter to the Judicial Conference Advisory Committee on Appellate Rules, and she was appointed in fall 2017 to serve as Associate Reporter to the Judicial Conference Committee on Rules of Practice and Procedure. She stresses, however, that the views expressed in her article are solely her own and do not necessarily reflect the views of others in the rulemaking process.

The original Appellate Rules created in the 1960s were intended to promote access to appellate justice for poor and incarcerated litigants, writes Struve. They were created at a time when the Supreme Court, the executive branch, and Congress were all in the midst of efforts to improve treatment of poor defendants in the criminal justice system.

During the early years of the original Appellate Rules, procedural developments — on issues such as filing deadlines for incarcerated litigants — were made through a combination of court decisions and the federal rulemaking process, she explains. The Supreme Court in Fallen v. United States held that Floyd Charles Fallen had timely filed his notice of appeal when he had delivered it to the prison authorities within the deadline for his direct criminal appeal — even though the notice did not reach the court until after that deadline.

The case Houston v. Lack extended Fallen’s holding beyond criminal appeals to civil appeals, Struve adds, and the decision in Houston spurred new rulemaking which codified the prison mailbox rule for notices of appeal and for filings in the courts of appeals.

“[I]t is impossible to tell whether the rule changes would have resulted without such a nudge from the Court,” Struve writes. “But the rulemakers, in turn, provided distinctive value by incorporating information gathered from stakeholders in a deliberative, iterative process.”

But after the decisions and rulemaking that expanded access, Struve notes, the swelling federal docket led to case-management practices, a number of which significantly affect pro se inmate appeals. In such appeals, Struve notes, oral argument is less likely, the issuance of a published opinion is less likely, and staff attorneys are more likely to be involved in assisting the decisional process.
pro se litigants, who frequently lack access to computers. Existing initiatives that allow electronic filing by prisoners in state correctional institutions are governed by local court provisions and the practices of the relevant institutions. Inmates typically provide the filing to the prison staff, who scan the document and email it to the court. But a new pilot program with the federal Bureau of Prisons will provide pro se prisoners access to a digital kiosk, which accepts typed or hand-written documents, to file documents in civil cases in participating district and appellate courts.

“[T]he e-filing programs might provide better assurance that notice of court orders will timely reach inmate litigants—but better still would be a system that allows inmates themselves to view electronic versions of the docket in their case,” argues Struve. “Whether or not one agrees with the substantive judgments that Congress has made concerning inmate claims, all participants in the system should be able to agree on the basic value of access to appellate justice.”

During the mid-1990s, Congress passed two landmark bills, the Prison Litigation Reform Act (PLRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), which were designed to, and did, impose barriers to inmate appeals.

AEDPA tightened what it termed the “certificate of appealability” requirement and extended that requirement to federal prisoners; federal and state prisoners alike must now seek permission to appeal by making “a substantial showing of the denial of a constitutional right.” The PLRA requires inmates who seek to appeal in forma pauperis (i.e., as poor persons) to make periodic payments from their prison accounts; directs the courts of appeals to proactively screen such appeals for lack of merit; and bars prisoners who have incurred three “strikes” (roughly, dismissals for frivolity or failure to state a claim) from proceeding in forma pauperis unless the prisoner faces “imminent danger of serious physical injury.”

The most significant new driver of change in procedure for inmate appeals in the future, Struve argues, may be the availability of technology in prisons. Struve compares the ways in which current and proposed Rules handle appeals by represented litigants, who generally file electronically, and by pro se litigants, who frequently lack access to computers.

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“Whether or not one agrees with the substantive judgments that Congress has made concerning inmate claims, all participants in the system should be able to agree on the basic value of access to appellate justice,” Struve concludes. “An inmate should not lose the right to appellate review merely because he or she lacks the options available to a non-incarcerated litigant for timely filing of a notice of appeal.”
A groundbreaking new study by researchers at RAND and the University of Pennsylvania Law School finds that by adopting an innovative holistic approach to defending poor clients in criminal cases, jurisdictions can significantly reduce incarceration and save taxpayer dollars, without harming public safety.

The study, “The Effects of Holistic Defense on Criminal Justice Outcomes,” to be published in the Harvard Law Review, examined over half a million cases in the Bronx over a 10-year period involving poor criminal defendants who received court-appointed lawyers. The study was authored by James Anderson and Mary Buenaventura of RAND, and Paul Heaton, Academic Director of the Quattrone Center for the Fair Administration of Justice at Penn Law.

Heaton and his co-authors compared holistic representation — wherein an interdisciplinary team that includes a lawyer working alongside other advocates such as a social worker, housing advocate, investigator, etc. addresses the wider needs of the client enmeshed in the criminal justice system — to the more traditional public defense model focused around criminal attorneys and criminal case advocacy. They found that the holistic approach reduced the likelihood of a prison sentence by 16 percent, and actual prison sentence length by 24 percent.
These impacts translated to big savings for taxpayers. Over the decade covered by the study, holistic representation of clients prevented more than one million days of incarceration, saving New York taxpayers an estimated $165 million. And despite an appreciably higher release rate, in a follow-up spanning up to ten years after case resolution, defendants who received holistic defense services were shown to commit no more crime than those incarcerated for longer periods.

“Communities across the country are grappling with ways to address the problem of mass incarceration while preserving public safety.” said Heaton. “This study demonstrates that strengthening indigent defense deserves a prominent place in those conversations.”

The study by Heaton and co-authors is the first large-scale empirical evaluation of the impact of holistic representation on criminal justice outcomes. Holistic defense emerged in the 1990s and has many supporters and critics; yet until now there had been limited scientific evidence about how the model performs in real-world practice.

The authors studied two institutional providers of indigent defense in the Bronx, a New York City borough with an estimated 1.4 million residents as of 2017. The two legal aid organizations, the Bronx Defenders and the Legal Aid Society of New York, exist side-by-side within the same court system. The Bronx Defenders have been operating under a holistic defense model since their office’s inception in 1997, while Legal Aid has historically followed a more traditional model. Clients are allocated to the two defender associations through a rotating shift assignment system that created a natural experiment for the researchers, enabling them to rigorously capture the effects of the holistic defense approach.

An analysis of over half a million cases revealed that holistic defense did not affect conviction rates, but did appreciably increase the use of non-incarceration sentencing alternatives. Impacts were particularly large in drug and larceny cases, where holistic representation reduced custodial sentences by 63 percent and 72 percent, respectively. In the latter years of the study, as the Legal Aid Society also embraced a more interdisciplinary approach, outcomes across the two organizations converged.

“No one doubts that we’d get better results by addressing circumstances such as homelessness, addiction, or mental illness that draw people into the criminal justice system, rather than simply locking people up. The hard question is how, as a practical matter, to accomplish that,” said Heaton. “The Bronx Defenders have developed a model that enables attorneys to better understand the unique challenges faced by each client and bring that into the adjudication process, and the research shows it is having a significant impact.”

Holistic defense has been adopted in numerous other communities, and the Bronx Defenders maintain a Center for Holistic Defense that assists other jurisdictions in implementing the model. However, how best to replicate the model to generate comparable impacts in other communities remains an important unresolved question. Holistic defense also carries the potential to improve outcomes not addressed in the study such as economic well-being, housing and family stability, and health, and the authors call for further research into these topics.

The study was funded by the National Institute of Justice, a research arm of the U.S. Department of Justice, and was conducted under the auspices of Penn Law’s Quattrone Center for the Fair Administration of Justice and RAND’s Justice Policy Program. The Quattrone Center is a nonpartisan national research and policy hub producing and disseminating research designed to prevent errors in the criminal justice system.
THE EFFECT OF THE TRUMP TAX CUT PLAN ON GLOBAL TARIFF FIGHT

ON RESEARCH BY
CHRIS WILLIAM SANCHIRICO
Samuel A. Blank Professor of Law, Business, and Public Policy; Co-Director, Center for Tax Law and Policy

CHRIS WILLIAM SANCHIRICO
The Trump administration's imposition of tariffs against China's exports of aluminum, steel, and other goods has garnered headlines worldwide, but the new U.S. tax code contains a provision that lowers the corporate tax rate significantly for American businesses earning certain kinds of income abroad and has implications for U.S. trade policy — yet few other than tax experts are aware of it.

This may change as the issue enters the policy spotlight, writes Chris Sanchirico, a professor of law and co-director of the Center for Tax Law and Policy at the University of Pennsylvania Law School, in a new paper, “The New U.S. Tax Preference for ‘Foreign-Derived Intangible Income.’” A new provision in the Tax Cuts and Jobs Act of 2017 lowers the corporate tax rate from 21 percent to just over 13 percent on “foreign-derived intangible income” (FDII), income derived from exports and attributable to intangible business assets, such as intellectual property (IP), patents, copyrights, and trademarks.

Because the provision is newly adopted and somewhat novel in form, Sanchirico writes, there has been little discussion of it to date, with some exceptions. For example, in December 2017 the finance ministers of Germany, France, the UK, Italy, and Spain sent a joint letter to the U.S. Treasury Secretary expressing concern over the GOP’s proposed FDII provision — which was shortly thereafter adopted — warning that it constituted both an export subsidy in violation of international trade agreements such as the WTO, and a preferential tax regime for income derived from intangible assets in violation of international tax agreements, specifically a lesser-known OECD agreement regulating preferential tax regimes for IP income.

Since the European letter, the FDII issue has been “eclipsed by an eruption of measures and threats signaling the U.S.’s newly proactive — some might say aggressive — approach to trade policy,” notes Sanchirico, such as the tariffs the Trump administration has imposed on imports from China.

“The question arises,” the study author writes, “whether the shift of international attention away from FDII is simply due to the urgency of more recent events or rather reflects the fact that FDII is ultimately less significant.”

Moreover, the author finds that the provision is not as clearly in violation of international agreements as some may indicate. With respect to trade agreements, specifically a portion of the WTO Agreements known as the Agreement on Subsidies and Countervailing Measures, Sanchirico writes that “although it seems clear that FDII is ‘export-contingent,’ it is not as obvious that it is a ‘subsidy,’” under this agreement. The touchstone for “subsidy” is forgone tax revenue. And in light of the U.S.’s shift to a “territorial” tax regime under the same new law, whereby the U.S. relinquished taxing foreign subsidiary income, it is not clear that FDII ought to be regarded as a revenue loser.

With respect to the claim that FDII violates international tax agreements — in particular, those reached within the OECD’s Base Erosion and Profit Shifting Project (known as BEPS) — though it “seems clear that FDII does not fit within the specific parameters of allowable preferential tax regimes for ‘IP assets,’ it is not as clear why large portions of it could not be repackaged as a preferential regime for non IP-assets,” Sanchirico points out in the paper.

Moreover, Sanchirico notes, “the practical significance of any violations that might be found” with respect to agreements on either trade or tax “is increasingly uncertain.”

Finally, the paper attempts to shift discussion toward whether the provision makes sense purely as a matter of national policy, “more precisely, U.S. policy without regard to any inherent or strategic value that there might be in following international agreements.”

Here, Sanchirico argues in this analysis FDII is more problematic. “To be sure: this is not because export subsidies or intangibles subsidies are always a bad idea” — as loss-leaders or retaliation against trade restrictions. “Rather it is because the setting in which the provision is imposed is quite different from — in some respects almost the opposite of — the kinds of situations in which such subsidies might be warranted.”

In sum, Sanchirico writes, while FDII is likely not a violation of international trade or tax agreements, it may be hard to justify as a national tax policy position. “IP-intensive U.S. multinationals like the FAANGs (Facebook, Amazon, Apple, Google/Alphabet) are already quite large, and, according to some trading partners, their economies of scale are already crowding out potential foreign competitors.” In fact, the scale economies created or reinforced by FDII may serve to crowd out competitors in U.S. domestic markets, as well.

Thus, FDII enshrines “a system of subsidizing export-oriented IP-intensive business activity that is difficult to justify even with recourse to strategic or dynamic considerations.”
In a new article, University of Pennsylvania Law School professor David A. Skeel upends one of the key notions in bankruptcy law, arguing that equal treatment of creditors should not be a legal mandate. The notion that similarly situated creditors should be treated equally is widely understood to be a foundational principle of bankruptcy law but, Skeel argues, in practice the creditor equality norm is consistently undermined.

Rather than trying to resuscitate it, in an article published in a recent issue of the University of Pennsylvania Law Review, Skeel urges judges, lawyers, and scholars to abandon the equality principle and turn their attention instead to the concerns that actually underpin modern bankruptcy law: avoiding self-dealing by debtors, and increasing the efficiency of the bankruptcy process by encouraging transparency about differential treatment of creditors.

“In bankruptcy, the equality norm has become a costly distraction. Bankruptcy judges, professionals, and scholars would do well to foreswear the language of equality, and direct their attention to the principles that still matter.”
His article, “The Empty Idea of ‘Equality of Creditors,’” begins by examining the history of American bankruptcy laws, including their English predecessors, to determine how the equality norm arose. “Bankruptcy advocates envisioned that the assets of an insolvent debtor would be turned over to a trustee… The trustee or assignee would then sell the assets and distribute the proceeds to the debtor’s creditors,” writes Skeel. “In return for fully cooperating, the debtor would no longer be responsible for his pre-bankruptcy obligations; they would be discharged. The equality of creditors norm emerged as an increasingly important feature of this story.”

Thus, in the nineteenth century, bankruptcy laws penalized debtors who sought to give “preference” to certain creditors by making payments to them shortly before filing for bankruptcy, thereby leaving fewer assets to be divided among those remaining. Under the 1841, 1867, and 1898 Bankruptcy Acts, creditors who received preference payments could be forced to return them, “and a debtor that had made a preferential payment could be denied access to bankruptcy.”

While the early Bankruptcy Acts confined the principle of equality of creditors to “individual and small business bankruptcy cases,” in the 1930s Congress brought large-scale corporate reorganization within the ambit of federal statutory bankruptcy law. As a result, the scope of the equality principle expanded. Indeed, the current Bankruptcy Code, enacted in 1978, reflects the norm “in the preference provision, in the general rule that unsecured creditors are entitled to a pro rata share of the debtor’s assets, and in the prohibition on unfair discrimination” among creditors in corporate reorganizations.

However, Skeel writes, “[i]t turns out that current bankruptcy law provides numerous devices for privileging one creditor or group of creditors over another.” Skeel describes five of the most important methods. First, the prohibition on preference payments may be easily evaded by carefully timing the payment and the subsequent filing for bankruptcy, as the “preference period” in the statute lasts for 90 days prior to filing. Thus, a preference payment made 91 days before filing is rendered “immune from attack by the trustee.” The bankruptcy statute also provides “safe harbors” for what would otherwise be considered preference payments, among them protection for payments “made in the ordinary course of business.”

Debtors may also rely on the “executory contract” rule to favor a particular creditor when there exists “an unpaid obligation under an ongoing contract between the parties.” The debtor company can either reject or assume such a contract in bankruptcy, with assumption requiring full payment of any obligations; thus, Skeel explains, “[b]y assuming Creditor A’s contract, while rejecting Creditor B’s… [the company] can thus arrange favorable treatment for Creditor A.”

A debtor may also arrange to pay a favored creditor in full by designating them as a “critical vendor,” arguing that it “desperately needs Creditor A’s services and fears that Creditor A will stop providing them” unless paid. Once “a limited exception to the equality of creditors norm,” use of the critical vendor loophole “is now commonplace in large cases.”

Asset sales and reorganization plans also provide opportunities to treat creditors unequally. Debtors may agree to sell their assets to a buyer that would assume the debtor’s obligations to a particular creditor and pay them in full. Within a reorganization plan, a debtor might arrange a “gifting” transaction, wherein a “senior creditor agrees to cede part of its recovery to a lower priority class of claims or interests.”

Using its broad discretion to structure reorganization, Skeel explains, a debtor may also simply put creditors into separate classes, “and can propose to give Creditor A’s class a bigger payout than Creditor B’s.” Despite the abundant workarounds, Skeel suggests that simple statutory revisions and more stringent enforcement of existing rules could easily restore the equality of creditors norm.

However, he argues, “[i]n bankruptcy, equality is not everything it’s imagined to be.” Rather, the notion of equality among creditors is merely an indirect method of addressing other, more salient concerns. “In each of the contexts where it figures most prominently, the real normative issues are preventing self-dealing or secret liens, or addressing other concerns, not equality,” he writes.

Self-dealing might involve a business owner who is “tempted to repay loans from family members, or repay themselves, shortly before their business fails.” When a debtor can quietly favor a particular creditor by exploiting loopholes to the equality norm, Skeel writes, it effectively creates an implicit or “secret lien whose contours are not known when the debtor or other plan proponent proposes a reorganization plan.” Such conduct undermines the fairness and efficiency of the bankruptcy process.

However, Skeel argues, these concerns could be addressed by rules targeted directly at the problematic conduct rather than through the overly broad stroke of the equality norm. Such rules would permit unequal treatment of creditors in those cases where it does not pose a problem.

Skeel is the S. Samuel Arsht Professor of Corporate Law, and focuses his scholarship on bankruptcy, corporate law, financial regulation, and other topics. “In bankruptcy, the equality norm has become a costly distraction,” he writes. “Bankruptcy judges, professionals, and scholars would do well to foresee the language of equality, and direct their attention to the principles that still matter.”
With the advent of automated financial products, consumers can get quotes for a mortgage, find a health insurance plan, or get help planning their financial future. But with these tasks now able to be conducted by computer programs, new research co-authored by University of Pennsylvania Law School professor Tom Baker investigates how regulators should handle these new technologies.

The article, “Regulating Robo Advice Across the Financial Services Industry,” was co-authored by Baker and Benedict G. C. Dellaert of Erasumus University Rotterdam and was published in a recent issue of the *Iowa Law Review*.

Baker is the William Maul Measey Professor of Law and Health Sciences and a preeminent scholar in insurance law. His scholarship explores insurance, risk, and responsibility using methods and perspectives drawn from economics, sociology, psychology, and history. One of his most recent projects was serving as Reporter for the American Law Institute’s Restatement of the Law Liability Insurance, an effort to definitively define the field.

With the growth of automated financial advice services, also known as “robo advisors,” consumers have new tools for choosing investments, banking products, and insurance policies. These robo advisors have the potential to provide higher quality, more transparent financial advice at a lower cost than human financial advisors, Baker and Dellaert explain.

They also note that the emergence of these programs doesn’t eliminate a role for people in the financial industry. “People design, model, program, implement, and market these automated advisors,” they write, “and many automated advisors operate behind the scenes, assisting people who interact with clients and customers.”

Throughout their essay, the authors use the example of the “well-designed robo advisor” to examine the benefits and detriments of automated financial services. “This is not because we believe that robo advisors necessarily will be well designed,” they write. “Indeed, we believe the contrary.”

“While robo advisors have the potential to outperform humans in matching customers to mass market financial products, they are not inherently immune from the misalignment of incentives that has historically affected financial product intermediaries,” they state. “A robo advisor can be designed to ignore those incentives, but many consumer financial product intermediaries that develop or purchase robo advisors are subject to those incentives. It would be naïve to simply assume that intermediaries will always choose the algorithms and choice architecture that are best for consumers, rather than those best for the intermediaries.”

In addition, robo advisors pose new risks — they “may entrench historical unfairness and promote a financial services monoculture with new kinds of unfairness and a greater vulnerability to catastrophic failure than the less coordinated actions of humans working without automated advice.”

These programs present new challenges for regulators, Baker and Dellaert write, and an open discussion between legal and financial scholars, as well as experts in other relevant disciplines, is necessary to protect the integrity of financial markets.

The traditional goals of regulation are competence, honesty, and suitability, the authors explain. A well-designed robo advisor should meet those goals as well as a human advisor — though they are careful to emphasize “well-designed” — but regulators will need to quickly develop the expertise to assess just what “well-designed” means.
“The smart thing for regulators to do is to start developing the necessary capacities now, when the stakes are lower, and when consumers are still sufficiently uncertain about robo advisors that some firms may actually welcome the legitimization that could accompany independent certification of the quality of robo advice,” they write.

Baker and Dellaert propose a regulatory “trajectory” rather than a regulatory agenda. First, regulators must gather information to assess the capacities that their agencies must develop through a systemic, interdisciplinary assessment, then they must develop those capacities.

As of now, they note, there is no formal inter-agency coordination in the United States on financial technology, and that coordination is even less developed on the global stage.

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In a new article, corporate governance expert and University of Pennsylvania Law School professor Jill Fisch calls for increased judicial scrutiny of board-adopted corporate governance bylaws in light of the imbalance of power between shareholders and boards of directors. Corporate boards of directors wield considerable power to adopt bylaws that limit shareholders’ rights. In recent years, courts deciding corporate law cases have deferred to such bylaws, likening them to binding contract provisions that directors and shareholders negotiated and signed.

In “Governance by Contract: The Implications for Corporate Bylaws,” published in the *California Law Review*, Fisch challenges this contractual approach, arguing that the shareholders’ unequal ability to challenge objectionable board-adopted bylaws belies the analogy. Fisch is the Saul A. Fox Distinguished Professor of Business Law and Co-Director of Penn Law’s Institute for Law and Economics, and her scholarship focuses on the intersection of business and law.

Corporate governance bylaws can have a profound effect on shareholders’ ability to influence the direction of a corporation. Board-adopted bylaws can constrain where shareholders may sue corporate directors and officers, dictate the methods for nominating competing director candidates, or fundamentally alter the method for counting shareholder votes in elections. The contractual approach has been instrumental in supporting courts’ decisions to defer to board-adopted corporate governance bylaws on the basis of arguments about autonomy, contractual freedom, and the efficiency of allowing corporate rules to be “freely modified by firm participants rather than imposing one-size-fits-all mandatory regulations.”

Focusing on the case law in Delaware, where the majority of U.S. companies are incorporated, Fisch details how the contractual theory achieved widespread acceptance in the wake of two landmark decisions from the Delaware Chancery Court and Supreme Court, respectively: *Boilermakers Local 154 Ret. Fund v. Chevron Corp.* in 2013, and *ATP Tour, Inc. v. Deutscher Tennis Bund* in 2014.

In Boilermakers, then-Vice Chancellor Strine wrote that “the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders” within the framework of Delaware’s statutory corporate laws. *ATP* extended that reasoning in its assessment of a “board-adopted bylaw that required a losing plaintiff-shareholder to pay the corporation’s litigation expenses.” The court upheld the bylaw “not merely based

“(S)hareholders are limited in their ability to constrain board actions with which they disagree… (T)he corporation is not truly a contract, and shareholders, due to existing legal and practical obstacles, cannot protect themselves effectively.”
on a contract analogy,” Fisch explains, “but rather specifically treated
the bylaw in question as a contract term.”

The contractual approach relies upon two factors that were
articulated in Boilermakers. The first is the theory that shareholders
“implicitly consent to be bound by board-adopted bylaws when they
buy stock in a corporation with a charter that confers that power
on the board.” The second, Fisch writes, is the shareholders’ “right
to challenge board-adopted bylaws,” including by adopting and
amending bylaws themselves.

The article focuses on the second factor, with Fisch arguing that
“for a variety of reasons shareholder power to amend the bylaws is
more limited than the Boilermakers decision suggests.” Accordingly,
she writes, “shareholders are limited in their ability to constrain board
actions with which they disagree.”

Fisch details some of the major limitations, both legal and
practical, on shareholders’ ability to challenge board-adopted bylaws.
On the legal side, Fisch notes that shareholders’ power to adopt bylaws
is “not co-extensive with that of the board of directors,” because the
Delaware General Corporation Law (DGCL) “provides the board,
but not the shareholders, with broad management powers over the
affairs of the corporation.” As a result, Delaware courts have decided
that shareholders may not adopt any bylaws that would allow them to
“make substantive business decisions for the Company.”

The DGCL also limits shareholders’ authority through its
“provisions expressly authorizing shareholders to vote on bylaws
that address particular issues.” These subject-specific grants of power
“reinforce the idea that shareholder authority over corporate affairs
is limited and that all residual authority is vested in the board of
directors,” Fisch writes.

Finally, she notes, “[s]till though shareholders have the power to
adopt and amend the bylaws, so does the board of directors. As a
result, even if the shareholders adopt a bylaw, their action may be
overturned by the board.”

While shareholders may be able to respond to objectionable
board-adopted bylaws by withholding support for or even removing
the directors who adopt them, Fisch argues that these methods “are
not enough to close the existing gap between board and shareholder
power.”

Shareholders also contend with practical, non-statutory
limitations on their influence. Among them, Fisch cites the collective
action problem, which is heightened by supermajority voting
requirements at many companies. Such requirements “raise the
threshold required to amend or repeal a board-adopted bylaw.”

An additional challenge arises from the fact that “many
shareholders hold their stock through institutional intermediaries
such as pension funds and mutual funds, in which the power to vote
rests in the hands of the institutional agent” who may have different
voting preferences than a retail investor. Fisch also points to the
gatekeeping role of the Securities and Exchange Commission as an
impediment, as the agency can grant companies permission to exclude
shareholder-proposed bylaw amendments from proxy statements.

Because shareholders’ “power to act through the adoption,
amendment, and repeal of bylaws is, for a variety of reasons, less
expansive than board power,” Fisch writes, “the level of judicial
deerence reflected in Boilermakers and ATP — deference that is
based on the contractual theory — may be inappropriate.”

Accordingly, she argues, rather than granting additional powers
to shareholders by statute — which would bring business-related risks
— courts “could instead rethink the existing level of deference given
to board-adopted governance provisions and subject those provisions
to greater judicial scrutiny.”

To that end, Fisch draws from existing Delaware case law to
propose a two-part test that courts could use to conduct “intermediate-
level review” of board-adopted corporate governance bylaws. “First,
the directors must show that they had reasonable grounds for
believing that a danger to corporate policy and effectiveness exist[s],”
she writes. “Second, the board’s response must be ’reasonable in
relation to the threat posed.’”

The test “would allow courts to play a meaningful role in
preventing boards from adopting bylaws that excessively interfere
with shareholder rights,” Fisch argues. “The need for courts to
exercise such scrutiny responds to the reality that the corporation
is not truly a contract, and shareholders, due to existing legal and
practical obstacles, cannot protect themselves effectively.”
CRYPTOCURRENCY
INVESTORS FACE UNSEEN RISKS IN INITIAL COIN OFFERINGS

ON RESEARCH BY*
DAVID HOFFMAN
Professor of Law

Researchers at the University of Pennsylvania, led by Penn Law professor David Hoffman, have conducted the first detailed analysis of “Initial Coin Offerings” (ICOs) of virtual currencies, known as cryptocurrencies, revealing the estimated $25-billion-dollar industry’s protections against self-dealing may leave investors exposed to risks they don’t anticipate from issuers. The study, “Coin Operated Capitalism,” is forthcoming in the 
Columbia Law Review.

Initial Coin Offerings are an example of financial innovation, placing them in kinship with venture capital contracting, asset securitization, and initial public offerings (IPOs). Unlike an IPO, however, an ICO does not typically involve the sale of equity or shares in a corporation. Instead, ICO participants are buying an asset from ventures or firms that are selling digital currency, namely a coin or “token,” which is actually a string of computer code of which there is a restricted supply, that enables its holder to use, or govern, a network that the ventures’ promoters plan to develop using funds raised through the sale.

“Our main finding is, in a financial ecosystem built around the proposition that regulation is unnecessary because code is the final guarantee of performance, often ICOs are not embedding the governance promises they make — which protect investors against exploitation — in software code,” said Hoffman, a contracts law expert. “We also show that at least some popular ICOs have retained the power to modify their currency’s rights, but have failed to disclose that ability to investors in plain language.”

The research team includes Shaanan Cohney (a Penn PhD student in computer science), Jeremy Sklaroff (a recent graduate of Penn’s Carey JD/MBA program), and David Wishnick (a fellow at Penn Law’s interdisciplinary Center for Technology, Innovation and Competition). Together, the study authors surveyed the 50 ICOs that raised the most capital in 2017, and analyzed the relationship between the contractual promises made by ICO promoters in their offering documents and the actual functionality of the cryptocurrencies they deliver.

The study authors first collected online contracts, a range of “soft law” documents made available digitally by the projects to investors and which, collectively, helped to raise $2 billion alone for these projects.
Next, the authors then audited the software code associated with each of the projects to determine if the code matched, or failed to match, firms’ contractual promises. That is, because cryptocurrencies are entirely digital and accessible through a global network of computers, the authors examined the automated “if-this-then-that” code for each ICO governing how their cryptoassets function, along with the associated network-based ledger systems known as “blockchains” that track and authenticate a currency’s transactions.

“The automated mechanisms found in code — known as ‘smart contracts’ — are not the only way entrepreneurs can deliver on their promises,” Wishnick noted. “But, according to proponents, they are what make ICOs innovative.”

The study revealed that for those ICOs surveyed, the ICO code and ICO contracts often do not match. Of the 50 ICOs from 2017, only about 20 percent had code which matched their promises 100 percent of the time, while nearly 60 percent made at least one governance promise that was missing from the code, and 20 percent had two or more mismatches.

“Surprisingly, in a community known for espousing a technolibertarian belief in the power of ‘trustless trust’ built with carefully designed code, a significant fraction of issuers retained centralized control through previously undisclosed code permitting modification of the entities’ governing structures,” the authors write.

Hoffman and his team examined the ICOs surveyed based on three qualities that economic theory suggests should be salient to investors. First, they looked at whether ICO promoters made any promises (with those assurances encoded into the currency and blockchain) to restrict the supply of their cryptoassets, as a limited supply of a virtual currency is assumed to drive up its value. Second, they examined if ICO promoters pledged to restrict or prevent insider self-dealing. And third, they examined if ICO promoters retained the power to modify the smart-contract code governing the tokens they sold, and if so, whether these firms disclosed to investors that they had allocated themselves that power.

“My co-authors and I found some of these tokens have code which is not disclosed in the soft law promises, which permits the firms to modify the rights the tokens give you at the will of the originator of the currency,” Hoffman said. That does not mean ventures are going to exploit investors or commit fraud, but it does give firms that power to change the rights investors have bought at the firms’ will.

The authors recommend regulators and scholars spend more time looking at the buy-side of the ICO market, and learn more about the actual drivers of demand in this burgeoning space. “Are buyers relatively unsophisticated individual investors? Hoffman queried. “Or, is this an illicit market driven by money launderers or tax evaders - or is ICO demand driven by legitimately smart money? How this market should be regulated, or not, depends on how scholars and regulators answer these questions.”
In a probing new article, University of Pennsylvania Law School professor Christopher Yoo uses an interdisciplinary approach to fundamentally reexamine modern copyright law, proposing a new theory that accounts for the significance of the creative process and suggests pathways for legal reform. In doing so, Yoo offers a corrective to the traditional “personhood theory,” which prioritizes the rights of original authors and creators by essentially treating their finished work as an extension of their persons.

The article, “Copyright and Personhood Revisited: Kant, Hegel, and the Role of Play,” forthcoming in the University of Illinois Law Review, develops Yoo’s revised personhood theory, which “regard[s] creative works as more than mere repositories of personality,” and explores “how the process of creation itself can promote self-actualization.”

The traditional personhood theory of copyright “posits that authors have such deep connections with their creations that respect for their sense of self requires giving them a degree of ongoing control over those works,” writes Yoo. The theory carries significant limitations, he argues, among them that it “values creative works only as static artifacts” and fails to recognize the role of the creative process in fostering an artist’s personality. As a result, original authors or creators of things like books, music, and works of art retain such significant control over their intellectual property that derivative use by subsequent artists is stifled.

Because “the conventional wisdom adopts a view that focuses exclusively on initial authors without taking the interests of follow-on authors into account,” he explains, existing copyright law permits too few works into the public domain and is insufficiently protective of rights to develop and disseminate derivative works. A revised personhood theory that recognizes how the creative process can both “develop personality and require[] access to preexisting works” addresses those shortcomings.

The article looks first at the philosophical underpinnings of the traditional personhood theory of copyright law. Perhaps surprisingly in our information age, “[a]ccording to the conventional wisdom, personhood-based theories of copyright are founded on the philosophical writings of [Immanuel] Kant and [George Wilhelm Friedrich] Hegel,” Yoo writes. However, he argues, traditional personhood theory is based upon flawed and incomplete understandings of their work. Yoo uncovers and analyzes little-read writings of both philosophers that expressly set forth their opposition...
to the unauthorized copying of books, but which also suggest limits on the protection of non-literary creative works.

While in his time, eighteenth-century philosopher Kant adamantly opposed the unauthorized copying of books, Yoo notes, he concluded that owners of non-literary works, such as sculptures and paintings, should be free to copy and sell them at will. “Absent some claim that sculptures and paintings contain less of their creators’ personalities than do literary works, it becomes impossible to reconcile Kant’s rationale for opposing unauthorized copying with the traditional vision of personhood-based justifications for copyright,” writes Yoo. Thus, “it is hard for his work to serve as the foundation of the conventional understanding of personhood-based theories of copyright that would protect creative works because they embody their creators’ personality.”

Turning to Hegel, Yoo finds that although property — including intellectual property — “plays a central role in defining a person, … it does so not by establishing a special bond between a person and an external object.” Rather, the significance of the institution of property is that it helps to “define and organize relationships between the owner and other people.” Thus, “Hegelian property theory … does not provide a firm foundation for the traditional personhood-based conception of copyright law.”

Yoo goes on to highlight the work of thinkers like Kant and Friedrich Schiller, who provided the foundation for “modern theories of how creativity can develop personality.” He explores how “the German tradition values play for its ability to allow each person to develop her own sense of self rather than for its ability to promote other more consequentialist values,” and describes how modern psychologists like Abraham Maslow and Carl Rogers have built upon those ideas to develop a “more active vision of creativity.” Their work suggests that they “view creativity as an innate attribute of fully self-actualized individuals [who] pursue creativity as an end unto itself,” Yoo concludes. “The focus is neither on the consequences of the art nor on the tangible output, but rather on how the process of creation itself develops the sense of self.”

Creativity also has a “cumulative nature,” and Yoo’s revised personhood theory incorporates that concept. As he notes, “[c]ourts and scholars have long recognized how creative works typically borrow from and extend the existing corpus of works.” As examples, he cites remix culture and fan fiction communities as emblematic of the ways creative people borrow from, recreate, and build upon existing creative works.

“To the extent that creative works are adaptations from the extant corpus of creative works, personhood theories arguably support structuring copyright law to give individuals sufficient access to prior works to achieve self-actualization,” he argues. “Moreover, to the extent that such works must be read by others or be shared with a community in order to be meaningful,” Yoo’s revised personhood theory also supports providing follow-on authors with at least limited rights to disseminate their work.

While the revised personhood theory yields useful insights, it also has some limitations. In particular, Yoo acknowledges that the theory suggests that the rights of follow-on authors to access preexisting works and disseminate their own derivative works should “be limited to noncommercial and educational uses.” The logic of his theory also indicates that “rights of access and dissemination should be limited to the amount necessary for follow-on authors to develop their personalities.”

Nevertheless, the revised personhood theory “accords better with the [traditional] theory’s purported philosophical roots,” writes Yoo. By adopting a conception of personhood “that takes into account a broader range of ways that creativity can foster personal development,” he writes, the revised theory “takes the interests of follow-on authors seriously by embracing how creativity often builds on the corpus of prior works.” The theory also points the way toward reform by offering “an affirmative theory of why copyright law should provide access to existing works” through a more robust public domain and suggesting expanded rights of dissemination for derivative works in light of “[t]he importance of readers and the need for authorship within a community[.]”

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His revised personhood theory represents a first step toward reconceptualizing the field of copyright law, and invites future scholars to refine, extend, and criticize the new ideas it raises. As such, Yoo writes, this article will likely “be the first rather than the last word in a long debate” about the direction and future of copyright.
Elevating the importance of property owners’ interest in privacy, University of Pennsylvania Law School professor Gideon Parchomovsky and University of San Diego law professor Abraham Bell propose a new theory of property law in an article forthcoming in the *University of Pennsylvania Law Review*. A privacy-oriented theory of property, they argue, “has the potential to transform long-standing debates and disagreements about the appropriate scope of property owners’ right to exclude and right to use, as well as to their remedial options.”

One of the most important benefits of property ownership is that it offers owners a private sphere where their actions and choices are not subject to public or governmental scrutiny. Despite this key feature of the institution of private property, argue Bell and Parchomovsky, the prevailing theories underlying property law devote little attention to the notion of privacy. Their article, “The Privacy Interest in Property,” makes explicit the strong connection between privacy and property rights and aims to “reinstate privacy as a decisive factor in determining the appropriate scope of property protection.”

Because the protection of property rights was an important safeguard against intrusions of the privacy interests by both the government and by private actors,” Parchomovsky and Bell write, there once “existed a clear nexus between property and privacy” in the law. Over time, however, “privacy law separated from property law and became a distinct legal field.” As a result, “[t]he privacy interest is invoked in reference to such disparate topics as criminal procedure, contraception and medical information technology[.]”

“Now that privacy law has emerged out of property law, theories of property law seem no longer to reflect the centrality of privacy,” they argue. Rather, opposing camps of property theorists focus either on utilitarian concerns or on progressive theories of property law that prioritize social welfare. Utilitarianists contend that the concept of private property is valuable because it “promotes efficient use and management of resources,” while progressive property theorists tend to “argue that property protection should be focused not solely on the interests or personality of owners, but rather on broad societal goals including those of non-owners that are sometimes at odds with owners.”

Bell and Parchomovsky’s alternative theory recognizes the importance of owners’ interest in privacy. In developing this theory, they note that the connection between privacy and property is already “evident in a variety of existing doctrines in property law.” In particular, in the case of owners’ right to exclude others from their property, the “exclusion powers are often implicitly correlated with their expectations of privacy.” For example, “[o]wners of commercial properties who invite the public to frequent their establishments virtually relinquish their right to exclude,” thanks to non-discrimination laws that curtail their ability to bar people based on
characteristics like race and religion. “By contrast, in the context of the home, where owners’ privacy interests are paramount, the right to exclude is at its strongest.”

The authors next seek to draw lessons from Fourth Amendment case law, which governs searches and seizures of private property by government actors. Fourth Amendment jurisprudence is particularly salient to a “privacy-oriented view of property law” because it “was traditionally oriented around property, and it has struggled for decades to develop a stable model for incorporating privacy concerns,” they write.

Indeed, while the Fourth Amendment was originally understood to protect tangible, material private property, the Supreme Court’s landmark 1967 decision in *Katz v. United States* “changed the emphasis of constitutional search and seizure law from the physical invasion of spaces or seizure of things to interferences with individual expectations of privacy.” In *Katz*, the Court held that eavesdropping on conversations that took place in a public telephone booth constituted an unreasonable “seizure” under the Fourth Amendment due to the suspect’s “reasonable expectation” of privacy when he entered the space.

However, a later case, *United States v. Jones*, saw the court reassert “the importance of the asset-based approach to the Fourth Amendment.” In *Jones*, the Court found that police attaching a GPS tracker to a suspect’s car violated the Fourth Amendment not because of any expectation of privacy, but because the government physically “intruded upon the defendant’s property in a manner that would be considered trespass.”

The conflict between the *Katz* and *Jones* approaches remains unresolved, Bell and Parchomovsky explain, and “the privacy-based jurisprudence of the Fourth Amendment has been strongly criticized.” Commentators have described the *Katz* “reasonable expectation of privacy” doctrine as logically incoherent, excessively malleable, or unstable due to its highly situation-specific nature.

Parchomovsky and Bell “view the difficulty of developing a coherent model for protecting privacy interests in Fourth Amendment jurisprudence as an important cautionary tale[.]” While privacy interests plainly “lie at the core of search and seizure law,” they write, “courts and theorists have struggled to develop a definition of privacy expectations that can successfully anchor Fourth Amendment doctrine [and] stand completely independent of traditional understandings of property.”

Several other areas of law have also struggled to address privacy concerns, among them civil rights and public accommodation statutes, the laws regulating investigative reporting and trespass, those concerning beach access and other public easements, and land use regulations. Parchomovsky and Bell analyze how each of these areas have tried and sometimes failed to account for privacy interests, albeit indirectly, through the recognition of private property rights.

The authors conclude by examining how a more expressly privacy-oriented theory of property might impact existing legal doctrines. For example, they suggest that “an encroachment that exposes areas of land where plaintiffs have privacy interests should naturally be treated more harshly than one where no such privacy interests are implicated.” Discussing trespass liability and associated damages, they argue that “the degree to which privacy interests are compromised by a trespass, even if not directly compensable, should play a role in the decision to award punitive damages and the scope of such damages.”

Parchomovsky and Bell also advocate reconceiving owners’ right to exclude others from their property. Incorporating a privacy interest, they contend, would mean that the right to exclude is not absolute, but instead would vary and include exceptions where owners of spaces like restaurants or stores lacked any strong privacy interest. They note that their theory is capable of compromise with the progressive property movement, as their conception of property is “open to the possibility of expanding the access and use privileges of the public as long as doing so does not interfere with the owners’ privacy expectations.”

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In making the case for privacy as an important value underlying property law, Bell and Parchomovsky provide valuable insights poised to guide property law toward sensible reforms.
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