

When is wartime?

Why does it matter?

Mary L. Dudziak says traditional assumptions do not match contemporary experience.



ALSO INSIDE

- **Timothy Holbrook** on Patent Law
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—Jonathan Nash, professor of law

INTERNATIONAL, COMPARATIVE, AND FOREIGN RELATIONS LAW

- 2 A Time for War?
Mary L. Dudziak
- 6 Exploring the Legal Orient
Teemu Ruskola
- 9 Recent Scholarship
*Robert B. Abdieh, Abdullahi Ahmed An-Na`im, Laurie Blank,
Johan D. van der Vyver, John Witte Jr., Barbara Bennett Woodhouse*

PUBLIC LAW

- 10 Patent Law: Playing to the Audience
Timothy R. Holbrook
- 13 The Economics of Civil Procedure
Jonathan Nash
- 16 Recent Scholarship
*Richard D. Freer, Rafael Pardo, Robert Schapiro, Charles A. Shanor,
Liza Vertinsky, Alexander Volokh*

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A Time for War?



Dudziak challenges traditional paradigms of law and war, by unpacking the assumptions about time that underpin current thinking about war and its impact on the law.

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As a scholar, one of Mary L. Dudziak's key goals is to bring new work on war in political science, history, anthropology, cultural studies, and other fields to bear more directly on the study of law and war—one of her primary areas of study.

In the academic literature broadly, a paradigm shift is underway in the way we think about war, Dudziak says. The traditional view among American legal scholars and policymakers is that war is an exceptional experience. War comes and goes. Its impact on the nation is episodic. From this perspective, a wartime balance is struck between liberty and security, which is then recalibrated in peacetime. Much legal scholarship continues to operate within this paradigm. But current experience is that war isn't confined in time and space, as scholars in a number of different fields have recognized. New, critical work thus argues that war is an ever-present feature, even if most Americans are isolated from its direct effects.

Dudziak's new book, *War·Time: An Idea, Its History, Its Consequences*, contributes to this reexamination, questioning the traditional paradigm by unpacking assumptions about time ("wartime") that underpin our current thinking about war. Yet the book came about as she embarked on writing a different one. While working on a new account of the impact of war on American law and politics, at the renowned Institute for Advanced Study, in Princeton, N.J., Dudziak became puzzled by the way contemporary scholarship on war's impact used the concept of "wartime." The concept of war as bounded in time seemed ill-suited to the experience of recent years—a war on terror framed in a way that suggests no endpoint.

Excerpts: “War·Time: An Idea, Its History, Its Consequences”

Just as Americans changed their clocks during World War II [adopting year-long daylight saving time as an energy-saving measure], we adjust ourselves to a different order of time during war. Wartime is not merely a regulation of the clock; it is the calibration of an era. Once we enter it we expect the rules to change. Some burdens are more tolerable because we think of war as important and exceptional, and also because, by definition, wartime comes to an end.

World War II Daylight Saving Time did not succeed completely in bringing uniformity to the nation's mix of time practices, but one moment brought the country together. December 7, 1941, the day the Japanese attacked Pearl Harbor, was seen almost immediately as dividing time into different eras. It created a before and an after, just as the Civil War divided nineteenth-century American history, and the twentieth century is thought to be segmented into periods of wartime and peacetime, with World War I and World War II as the essential time markers.... Yet the onset of war is not seen as a discrete event, but as the beginning of a particular era that has temporal boundaries on both sides, so that entering a “wartime” is necessarily entering a temporary condition. Built into the concept of wartime is the assumption of an inevitable endpoint.

The opposite of wartime is of course peacetime, and history is thought to consist in the movement from one kind of time to another. Much depends on what time it is: the relationship between citizen and state, the scope of rights, the extent of government power. A central metaphor is the pendulum—swinging from strong protection of rights and weaker government power during peacetime to weaker protection of rights and stronger government power during wartime. Moving from one kind of time to the next is thought to swing the pendulum in a new direction.

Dividing time into wartime and peacetime offers a convenient way to periodize history, but more is at stake in our constructions of wartime. Law is thought to vary depending on what time one is in. Despite Cicero's *inter arma silent leges*, law is not completely silent during wartime, but it is generally assumed to be different, with courts affording less protection to civil liberties and giving more deference to executive power. The controversy tends to focus on the questions of whether the balance between rights and security in a particular war context was the right one, and whether departures from peacetime rules are useful or regrettable.

Wartime is assumed to be temporary, but now we find ourselves in an era when American political leaders announce an end to hostilities—“mission accomplished”—but war continues. War's tendency

to defy time boundaries has a longer history, as we will see in later chapters. But how is it that time boundaries have become a feature of the way we think about war? The ideas that wartime and peacetime are distinct eras seem as natural and inevitable as did Standard Time to World War II-era American farmers. How might American history look if we understood wartime and peacetime as cultural features, as self-made categories, as constructs?

“Time feels like an essential and defining feature of human life,” the historian Lynn Hunt explains, but we rarely stop to think about it. “Like everyone else,” she writes, “historians assume that time exists, yet despite its obvious importance to historical writing—what is history but the account of how things change over time?—writers of history do not often inquire into the meaning of time itself.”...

Ideas about time are rooted in culture, but as the sociologist Emile Durkheim suggested in *The Elementary Forms of Religious Life* (1912), we have trouble examining this. “We cannot conceive of time,” he wrote, “except on condition of distinguishing its different moments.” If we “try to represent what the notion of time would be without the processes by which we divide it, measure it or express it with objective signs, a time which is not a succession of years, months, weeks, days and hours! This is something nearly unthinkable.” But Durkheim was curious about how these categories came into existence. “What is the origin of the differentiation?” he asked. Where do we get the categories that time is divided into? Durkheim helps us to see that minutes and hours are not features of the natural world. They come from social life, he argues, from the ideas we share that help make our world understandable....

Ideas about time are sometimes tied to the experience of modernity. Building on the work of the influential British historian E. P. Thompson, historians have examined the way that clock time brought time-discipline to labor, aiding development of the factory system. Developments in science, technology, business, and global affairs have affected the role of time....

Once time was viewed as uniform and governed by the clock, it helped create what the historian Benedict Anderson called an “imagined community,” as clock time helped knit together a common sense of national identity...The nation is conceived as “a solid community moving steadily down (or up) history.”...

Just as clock time is based on a set of ideas produced not by clocks, but by the people who use them, wartime is also a set of ideas derived from social life, not from anything inevitable about war itself. *(continued on following page)*

The Idea of Wartime

Wartime is important to American law and politics, but, as with other ways of categorizing time, we don't tend to inquire about it. We treat it as if it were a distinct feature of our world, as if warfare brought with it a particular temporality. The impact of this way of categorizing time on our thinking tends to go unexamined.

War structures time, as does the clock. Stephen Kern argues that World War I displaced a multiplicity of "private times," and imposed "homogenous time," through an "imposing coordination of all activity according to a single public time." In the context of war's public time, individual differences remained.... [but] very different personal experiences with time played out under a common umbrella: the trajectory of war from beginning to end.

When the outbreak of war is a dramatic attack, the way Pearl Harbor was experienced, it brings the nation together, so that a widely dispersed population feels that they have experienced the same thing at the same time, bringing about Anderson's consciousness of simultaneity. Because the attack is on the nation, and it is the nation that mounts a response, this moment of simultaneity also helps bind the people to the state, the source of their defense....

Once war has begun, time is thought to proceed on a different plane. There are two important consequences of this shift: first, we have entered a time that calls for extraordinary action, and second, we share a belief that this moment will end decisively, so that this shift is temporary. Because of this, built into the idea of wartime is a conception of the future.... In wartime thinking, the future is a place beyond war, a time when exceptional measures can be put to rest, and regular life resumed. The future is, in essence, the return to a time that war had suspended.

An era is sometimes presented as simply a compendium of time.... An era of wartime, in contrast, is more than a passive time marker. It can determine history. During the French Revolution, for example,... Bertrand Barere, a leading member of the Committee of Public Safety, and viewed as a driving force behind the Reign of Terror, "excused his actions as the product of his time." According to Hunt, Barere claimed that he did not shape his revolutionary epoch. Instead he "only did what I had to do, obey it." Barere's time, he argued, "sovereignly commanded so many peoples and kings, so many geniuses, so many talents, wills and even events that this submission to the era and this obedience to the spirit of the century cannot be imputed to crime or fault." In American wartime thinking, there is also a powerful sense of determinism. Actions that would normally transgress a rule of law are seen as compelled by the era, as if commanded by time. And, as did Barere, individuals defend themselves by arguing that their actions were compelled or justified by the times....

Wartime is ... a central category in domestic American law and politics. Scholars as well as policymakers tend to see wartime as a historical actor, having force in history, enhancing the power of the government and sometimes compromising rights....

But war is only exceptional during the twentieth century if we ignore the numerous American "small wars" carried on in Haiti, the Philippines, and elsewhere.... The idea of discrete wartimes continues to do important work for civil liberties scholars well into a century during which the dividing lines between war and peace became so much more difficult to see.

—from *War·Time: An Idea, Its History, Its Consequences* (Oxford University Press, 2012)

To get to the bottom of this puzzle, she wrote an essay, "Law, War, and the History of Time," which explored "wartime" using literature on the history and anthropology of time. As she gave workshops and lectures on the essay, ultimately published in the *California Law Review* (2010), colleagues encouraged her to expand it into a short book, arguing that the ideas ought to be disseminated to a broader audience.

War·Time, published by Oxford University Press this year, analyzes contemporary thought about the concept of wartime and the role it plays in law and politics. In essence, the idea of wartime assumes that war is succeeded by peace, making it an inherently temporary phenomenon. Legal scholars thus assume that wartime is exceptional, and peacetime the norm—and that the impact of

war on American law is consequently episodic and isolated to distinct wartimes. Dudziak challenges this way of thinking by integrating the many small wars as well and by illustrating how even an iconic war such as World War II was not bound by fixed start and end dates, as the Roosevelt Administration engaged in war-related efforts long before Pearl Harbor. More significantly, she says, the Cold War, on its own terms, does not fit the wartime/peacetime model, but is used as if it were a separate and exceptional wartime by civil liberties scholars concerned about Cold War red-baiting. Meanwhile, constitutional scholars pay inadequate attention to the Cold War's most enduring impact on our constitutional structure—not its episodic impact of war on rights, but the continuous expansion of the national

security state. The phenomenon of ongoing war may be especially important in our own era, though, given a war against terrorism that appears to have no boundaries in space or time.

Dudziak's next book will be the larger work from which *War·Time* distracted her. It is an account of the impact of war on American law and politics that explores war and militarization across time, rather than within the discrete wartimes that structure most American histories. Under contract with Oxford University Press,

As creator and director of Emory's innovative Project on War and Security in Law, Culture and Society, Dudziak seeks to bring new work from numerous disciplines to bear on the study of law and war.

the working title is *How War Made America: A Twentieth Century History*. She is working also on the intersection between legal and diplomatic history and has been invited to contribute a chapter on that relationship to the third edition of *Explaining the History of American Foreign Relations*, edited by Michael J. Hogan, Thomas G. Paterson, and Frank Costigliola.

As creator and director of Emory's newly-formed and innovative Project on War and Security in Law, Culture and Society, she seeks to bring new work from numerous disciplines to bear on the study of law and war. "If we are in the midst of a paradigm shift, Emory can be a great place where fields converge to illuminate the way a new understanding of war and conflict affects law and policy," says Dudziak. "There are strengths across the campus in the study of war, conflict, and human rights while the law school is home to the Center for International and Comparative Law, and the International Humanitarian Law Clinic."

Though many U.S. law schools have developed programs focused on legal issues related to war and national security, Dudziak emphasizes that serious study of the nature of war and security is also underway in many other disciplines. Although inter-disciplinarity is a central feature of American legal scholarship, most programs on law and national security focus intently on law and policy, and do not see interdisciplinary inquiry among their central objectives. This deprives legal study of

war and security of broader critical inquiry that is essential to a full understanding of this area.

The Project on War and Security in Law, Culture and Society, says Dudziak, will give the study of law and war a broader canvas on which to paint, through a deeply interdisciplinary workshop series and related courses, and scholarly programs that will get underway this fall.

SELECTED PUBLICATIONS

Books

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Cold War Civil Rights: Race and the Image of American Democracy (Princeton University Press, 2nd ed., 2011)

Exporting American Dreams: Thurgood Marshall's African Journey (Princeton University Press, paperback revised ed., 2011) (Oxford University Press, 1st ed., 2008)

Book Chapters

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"The Case of 'Death for a Dollar-Ninety-Five': Miscarriages of Justice and Constructions of American Identity," in *Making Sense of Miscarriages of Justice* (New York University Press, 2009) (Charles Ogletree and Austin Sarat eds.)

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Law and Social Context in Civil Rights History, 72 *University of Chicago Law Review* 429 (2005)

Exploring the Legal Orient



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Inter-University Program for Chinese Language Studies,
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Teemu Ruskola's interest in Chinese law might be traced to his childhood in Finland, when he was told that if he were to dig a hole in the earth and keep digging, he would come out on the opposite side of the earth—in China. Eventually, he learned that children in the Western Hemisphere are told the same thing. Evidently, China's location "on the other side of the world" is a matter of the geopolitics of knowledge, not of geographic space, he says.

Ruskola's research seeks to understand how, and why, China functions as the West's civilizational "Other," as well as the role law plays in the political and cultural encounter between East and West. His work on what he calls Legal Orientalism—the longstanding cultural association of China with lawlessness and "Oriental despotism"—seeks to bracket the question whether, or how, Chinese law exists in fact, in order to emphasize why it is that it can't exist even in theory.

In his book *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, forthcoming 2013), Ruskola explores the history of globally circulating narratives about what is law, and who has it. Since the end of the Cold War, China has become a global symbol of disregard for human rights, while the United States has positioned itself as the world's chief exporter of the Rule of Law. How did lawlessness become an axiom about *Chineseness*—rather than a fact to be verified empirically—and how did the United States assume the mantle of law's universal appeal?

In Chinese studies, Ruskola says, the United States is cast conveniently as a "special friend" of China, which defended it against depredations by Great Britain and other European imperial

Ruskola's research seeks to understand how and why China functions as the West's civilizational "Other," and especially the role that law plays in the political and cultural encounter between East and West.

Excerpt: "Legal Orientalism: China, the United States, and Modern Law"

Standard accounts of the origin of modern international law trace its birth to the Treaty of Westphalia in 1648 and the end of the post-Reformation religious civil wars in Europe. Thereafter, each sovereign was to determine the religion of his state, all states were to enjoy formal equality under the law of nations. Collectively, these accounts provide a history of the emergence of the liberal norm of sovereign equality among nation-states.

Yet the picture changes significantly when it is reframed geographically, beyond Europe, and temporally, to an earlier date. Consider Carl Schmitt's invitation to view the Discovery of the New World in 1492 as the origin of modern international law. From this perspective, the narrative is no longer one of increasing inclusion and equality *within* Europe. Rather, it becomes a story of the violent exclusion of others *outside* of Europe, first on the basis of religious, then cultural, difference. Viewing the history of international law from this earlier date, then, how did the New World fit into what was still by and large the public law of the "Christian republic" of Europe? It is important to recall that Columbus ended up in America while looking for a route to India. America hence began its European career as Asia. Columbus believed until his dying day that the New World he had found was in fact Asia. Thus, America originated as the "West Indies" in European historical consciousness, in contrast to the East Indies in the "real" Asia.

Originally both the East and West Indies were regarded as lying beyond the pale of civilization, or as John Locke put it epigrammatically, "in the beginning, all the world was America." Yet with the American Revolution the United States indeed rose to assume, in its own words, "among the powers of the Earth, the separate and equal station to which the Laws of Nature and Nature's God" entitled it. Although the new nation emerged from what had once been the West Indies, the United States now claimed to exceed, and supersede, that categorization. It confidently asserted its political parity with Europe, and ultimately even its superiority. With the Revolution, Americans came to believe that theirs was the real West: the New World embodied the universal values of Europe even better than Europe did. With the rise of the New World, the Old World in turn became precisely what the designation suggests—old and anachronistic. Whatever may have remained of the Indies in the New World was expelled geographically outside of North America proper, where it still languishes, mostly in the islands of the Caribbean. And insofar as some actual "Indians" still remained physically within the borders of the United States, they were not considered

citizens of the new polity but became ultimately "domestic dependent nations," in the memorable words of Chief Justice Marshall.

As far as Europe was concerned, in 1776 the law of nations was still limited in its application to the Family of Nations, or European international society consisting of "civilized" states. Nevertheless, despite some early hesitation, the admission of the United States into this European political family was fairly uncontroversial. Given the colonists' indisputable genealogical connection to the Old World, the young nation was soon recognized as civilized and hence fully sovereign.

But although the American Revolution reconstituted America's legal relationship to Europe on the novel basis of sovereign equality, it remained an open question how the young nation would organize its political relations with the rest of the world. Even after the American Revolution, Europeans deemed themselves fully authorized by the law of nations to continue their project of colonizing the extra-European world. With a high degree of self-consciousness, the young United States rejected that European understanding of sovereignty and the "will to empire" that it implied. It was self-evident to patriotic early Americans that they ought not to establish territorial colonies on the European overseas model (but rather on their own continental one, which was not seen as imperialism at all).

Nineteenth-century international law, however, did not divide the world solely into civilized states that were fully sovereign and savages whose lands were either mere *terra nullius* that was only there waiting to be "discovered" or else could be won through colonial conquest. In certain circumstances, less-than-civilized peoples might indeed possess a degree of sovereignty, yet they could not impose their laws on "civilized" men even when they entered their territory. This exemption from local law became established as the right of extraterritorial jurisdiction.

The secular international law of the nineteenth century justified the practice of extraterritorial jurisdiction in Asia and elsewhere on explicitly civilizational grounds. However, it is important to recognize its religious origins in the much earlier system of the so-called Capitulations, which once mediated Europe's relations with the Ottoman Empire. In the pre-Westphalian era when religion provided the predominant framework for European inter-state relations, the privileges of the law of the European *Respublica Christiana* could not be extended to infidels and, concomitantly, Christians sojourning in the Ottoman Empire could not be subjected to
(continued on following page)

Muslim law but adjudicated their disputes under their own law. The arrangement began as a favor granted by Turks to Europeans. Yet as the Ottoman Empire became increasingly weak relative to Europe, the Capitulations ultimately solidified into a resented imperial imposition. By the nineteenth century, they were a well-established, nonterritorial form of imperialism.

As the newborn United States began looking outside its borders and turned its gaze across the South Seas, how was it to constitute its relationship to Asia? Having (ostensibly) rejected outright territorial colonialism, would it decline to follow the

European practice of extraterritorial jurisdiction in Asia as well? The matter was far less urgent than the relations with Europe, for example (the clarification of which required a revolution), or the relations with Africa (which were troubled because of slavery). Unsurprisingly, it was also decided much less self-consciously. China figured only minimally in the early American diplomatic consciousness, and from the beginning, U.S.-China relations were inextricably intertwined with questions of trade.

—From *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, forthcoming 2013)

powers—part of a larger narrative of American exceptionalism. Looking at U.S. actions in China through the lens of Legal Orientalism, by contrast, helps Ruskola see the emergence of a distinctive American ideology of empire in the mid-nineteenth century—based not on the traditional model of territorial colonialism, but on a kind of legal, or jurisdictional, imperialism. This history of U.S. extraterritorial empire remains almost unknown. One of the reasons, Ruskola says, is the way in which it straddles both geographic and disciplinary boundaries. In addition to being a story about Chinese history and American history, it is a story about international law, comparative law, and U.S. constitutional law, for example. Despite this pervasiveness, the United States' extraterritorial empire is easy to miss, as it does not come into full view from the vantage point of any one of these fields of study alone. Precisely because it is a historical monstrosity of sorts, conventional disciplinary approaches render it almost invisible.

From a longer historical perspective, *Legal Orientalism* examines how a European tradition of philosophical prejudices about Chinese law developed into a distinctively American ideology of empire, influential to this day. The first Sino-United States treaty in 1844 authorized the extraterritorial application of American law in a putatively lawless China. A kind of legal imperialism, this practice long predated the United States' territorial colonialism following the Spanish-American War in 1898—and found its fullest expression in the bewildering jurisprudence of a U.S. District Court for the “District of China.”

Among its contemporary implications, Legal Orientalism lives on in the enduring damage wrought on the U.S. Constitution by late nineteenth-century anti-Chinese immigration laws,

and in the self-Orientalizing reforms of Chinese law today. In the politics of trade and human rights, Legal Orientalism continues to shape modern subjectivities, institutions, and geopolitics in powerful and unacknowledged ways. Indeed, in today's world, ideas of human rights and the Rule of Law have become the global standard for constituting free individual subjects as well as free and democratic states.

Ultimately, Ruskola would like to have a more informed scholarly debate about the legal, political, and geopolitical status of China, historically as well as today. China matters, he says, and people do care about it—especially as its economic might grows—yet so much of the public and even academic discourse about China is misinformed at best, and ignorant at worst. To this day, when he tells people he studies Chinese law, they frequently insist there is no such thing.

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Books

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Schlesinger's Comparative Law (Foundation Press, 7th ed., 2009) (with Ugo Mattei & Antonio Gidi)

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Book Chapters

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Articles

Raping Like a State, 57 *UCLA Law Review* 1477 (2010)

Recent Scholarship



Ahdieh

Robert B. Ahdieh

Vice Dean, Professor of Law and Director, Center on Federalism and Intersystemic Governance

Book Chapters

Varieties of Corporate Law-Making: Competition, Preemption, and Federalism, in *Research Handbook on the Economics of Corporate Law* 373 (2012) (Claire A. Hill and Brett H. McDonnell eds.)

Articles

Imperfect Alternatives: Networks, Salience, and Institutional Design in Financial Crisis, 79 *University of Cincinnati Law Review* 527 (2010)

Crisis and Coordination: Regulatory Design in Financial Crisis, 104 *American Society of International Law Proceedings* 286 (2010)



An-Na'im

Abdullahi Ahmed An-Na'im

Charles Howard Candler Professor of Law

Books

What is an American Muslim? (Oxford University Press, forthcoming 2013)

Muslims and Global Justice (University of Pennsylvania Press, 2011)

Book Chapters

Transcending Imperialism: Human Values and Global Citizenship, in *The Tanner Lectures on Human Values* (University of Utah Press, 2012)



Blank

Laurie Blank

Director, International Humanitarian Law Clinic

Books

International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War (Aspen, forthcoming 2013) (with G. Noone)

Articles

After "Top Gun": How Drone Strikes Impact the Law of War, 33 *University of Pennsylvania Journal of International Law* (forthcoming 2012)

A Square Peg in a Round Hole: Stretching Law of War Detention Too Far, 64 *Rutgers Law Review* (2011)



van der Vyver

Johan D. van der Vyver

I.T. Cohen Professor of International Law and Human Rights

Articles

Children's Rights, Family Values and Federal Constraints, 15 *Journal of Markets and Morality* 79 (2012)

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Time Is of the Essence: The In-Depth Analysis Chart in Proceedings Before the International Criminal Court, 48 *Criminal Law Bulletin* (2012)

John Witte Jr.

Jonas Robitscher Professor of Law, Alonzo L. McDonald Distinguished Professor and Director, Center for the Study of Law and Religion

Books

No Establishment of Religion: America's Original Contribution to Religious Liberty (Oxford University Press, 2012) (with T. Jeremy Gunn)

Religion and Human Rights: An Introduction (Oxford University Press, 2011) (with M. Christian Green)

Religion and the American Constitutional Experiment (Westview Press, 3rd ed., 2011)

Barbara Bennett Woodhouse

L.Q.C. Lamar Professor of Law

Book Chapters

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Witte



Woodhouse

Patent Law: Playing to the Audience



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As part of his broader research agenda of exploring how patents and patent law act as a system of communication, Timothy Holbrook's recent scholarship is focused on the exact audience of patent law—a question not given much consideration in either the design of patent law or the study of it.

Given widespread concern that patents fail in providing adequate public notice of their scope, Holbrook and Professor Mark Janis, Indiana University School of Law, explored how well the public notice function of patents actually works. Their research revealed that, amidst all of the discussion in the scholarly literature and the courts of “public notice,” no one had really defined the relevant “public.”

For some doctrines, a “person having ordinary skill in the art” (PHOSITA) is used to frame the relevant legal question—such as what a term in a patent means. At other times, courts instead use a “reasonable competitor” or other standard. These proxies, Holbrook believes, have been poorly defined for the most part, and nearly all have fallen by the wayside, with the exception of the PHOSITA, in recent years. The courts have not afforded the PHOSITA much flesh, meanwhile, and often apply it to contexts in which a technological perspective seems ill-suited.

In *Patent Law's Audience*, 97 *Minnesota Law Review* (forthcoming 2012), Holbrook and Janis offer a novel theoretical framework to address the audience issue in patent law. They suggest, in essence, a steadily shifting tradeoff between the complexity of a rule and the proximity of the relevant audience to the law. This rubric can be applied generally, but has particular salience in patent law. Courts often focus solely on reducing legal complexity to enhance notice, but Holbrook believes that a consideration of proximity offers an alternative, underappreciated means for courts to more finely tune patent doctrine. By constructing appropriate heuristics that bridge the gap

Timothy Holbrook's recent scholarship is focused on defining the precise audience of patent law—a question not given much consideration in either the design of patent law or its study.

Excerpt: "Patent Law's Audience"

Who does read patent law?... In truth, we think it would be only a mild exaggeration to assert that no one actually reads the patent law in its raw state. Really, who would?... [I]t is at best a fond Jeffersonian conceit to suggest that modern research scientists pass their days poring through the prodigious output of the U.S. Court of Appeals for the Federal Circuit—or that they have a clear notion of who or what the court even is. Moreover, the obvious retort—that modern patent professionals read the patent law and retransmit the text to their clients—raises additional questions, and assumes (incorrectly, we think) that patent professionals actually do get their patent law predominantly from source materials, rather than from intermediaries.

The fact is that patent law is probably much more remote from its putative end users than patent law rhetoric conventionally admits. Two types of problems result. First, remoteness complicates patent law's ex ante incentives story. In the traditional version of the story, patent law incents inventors' actual decisions about whether to work on inventions, or inventors' decisions to disclose them, and patent rulemaking is an exercise in intricately sculpting those incentives to create a perfect fit with the overriding normative and constitutional goal of promoting progress in the useful arts. But that account assumes that the law's incentives actually are communicated, in some form, to inventors. If modern patent law is all but incomprehensible to inventors, then who does receive patent law's messages about incentives? How are those messages rebroadcast to inventors? How certain are we that the subtleties of patent law's putative incentive effects are not lost in translation?

Second, patent law's remoteness presents serious challenges for the design of the patent system's institutions and rules. It creates great pressure on the system to develop intermediaries that can function to refine the formal patent law so that its audience can receive a comprehensible essence. It creates pressure to perfect those intermediaries so as to minimize the chance that they will introduce translation errors. And it suggests that in elaborating patent law rules, Congress, the courts, and the United States Patent and Trademark Office (USPTO) need a better understanding of the composition of the intended audience, and need to understand how and when to invoke the intermediaries that may connect rule to audience.

We identify and define two considerations that guide this design exercise, proximity and complexity, and offer a simple matrix to illustrate the proximity/complexity tradeoff in the design of rules...

Formal law sometimes communicates directly with those bound by it. Consider, for example, a speed

limit sign displayed on a public road. The rule of law is communicated directly to the relevant audience, car drivers. The legal text is literally spelled out for the ultimate audience and presented in such a manner that no specialized expertise is required in order to discover the text. We could characterize such a rule by saying that there is little distance between the speaker (the state) and the audience (the drivers).

Such direct communication of the law to the relevant audience does not always occur. Often, parties bound by formal legal rules have never read the texts, may not know where to find them or how to read them if they could find them, and see little need to do so in any event. In such instances, other mechanisms forge an indirect connection between formal law and its audience.... For example, although most may not understand the subtle differences between murder and homicide, everyone knows that taking the life of another is a crime, absent some justification such as self-defense. The failure to read the statute that defines murder does not reduce the effectiveness of the law....

Alternatively, formal law may be communicated to its ultimate audience by way of intermediaries. Intermediaries may be individuals, institutions, or legal constructs.... In some areas—such as patent law—the technical precepts of the law may not be rooted in background norms ... Thus, for designing the patent law system, it is critical to develop intermediaries and situate them in such a way as to facilitate efficient dissemination of the formal rules or ... elaborate legal constructs to help translate the law. To capture the notion of a degree of separation between the entity promulgating a formal legal rule and the audience targeted by that rule, it may be useful to speak of a rule's proximity to its audience....

As even the most casual student of the law well knows, some legal rules are easier to decode than others.... Here, we note that the ease of decoding should also be a function of the rule's inherent complexity.... A highly complex rule, as we define it, is difficult to decode, but this presents little concern if the relevant audience is small and expert. It presents greater concern as the audience becomes large and more diverse in its abilities and familiarity with the legal regime at issue....

Our central proposal here is simple: in the design of legal rules, there is a tradeoff between proximity and complexity. Rulemaking exercises that ignore this tradeoff are not likely to produce rules that operate as intended.... Our central focus here is on rules ... that purport to convey highly complex content to a distant audience. Those rules are candidates for redesign. They need either to be restructured (*continued on following page*)

to reduce their complexity ... or keyed to take advantage of intermediaries or to invoke other sorts of heuristics to increase the effective proximity....

Patent scope doctrines are generally complex, but yet they purport to speak to the general public. As our framework predicts, such doctrines are problematic; they do not respect the proximity/complexity tradeoff.... [L]ongstanding rules of patentability that bar inventors from patent protection based on their own prior disclosures

or sales activities—the so-called statutory bars to patentability... suffer from a similar tradeoff problem: they purport to convey subtle incentives (high complexity) directly to inventors (unfavorable or low proximity). A reassessment of these rules is in order, especially in view of the passage of new patent legislation....

—from *Patent Law's Audience*, 97 *Minnesota Law Review* (forthcoming 2012) (with Mark D. Janis)

between the courts and the appropriate audience, public notice can be enhanced.

Holbrook hopes his research will lead the courts to think more diligently about public notice by more accurately considering the actual public. Some patent doctrines are badly developed, he says, if their target audience really is the inventive community. Instead, the courts have seemed to target lawyers as their audience, without considering that technologists are unlikely to understand the resulting dynamic. As scholars consider whether the incentives of patent law work effectively, Holbrook hopes they will draw upon the framework he and Janis have proposed to inform their own analysis.

Holbrook sees this recent work as particularly important, given the “sea change” in patent law in the last few years—with the Supreme Court and the U.S. Court of Appeals for the Federal Circuit having changed the law dramatically.

Most notable was the dramatic transformation instigated by Congress with the passage of the America Invents Act in 2011. Instead of awarding patents to the first person to create the relevant innovation, the patent generally will now be awarded to the first person to file a patent application. In addition to creating its host of new procedures for the U.S. Patent and Trademark Office, thus, the AIA alters what had been the most distinguishing aspect of U.S. patent law: the “first to invent” system. As a result of the AIA, the patent will now go to the first inventor to file an application at the Patent and Trademark Office, bringing U.S. law more in line with most legal systems abroad.

Yet the AIA, Holbrook says, continues to diverge significantly from other countries’ patent law regimes—and is rife with ambiguity, to boot. Complicating matters further is that patents under the old system remain in effect until at least 2033, meaning that the U.S. will effectively have two patent systems for the next two decades.

Engaging another critical line of inquiry, other recent papers by Holbrook—Territoriality

and Tangibility after *Transocean*, 61 *Emory Law Journal* (forthcoming 2012); Should Foreign Patent Law Matter?, 34 *Campbell Law Review* (forthcoming 2012) (symposium); and Extraterritoriality in U.S. Patent Law, 49 *William and Mary Law Review* 2119 (2008)—explore the possibility of a conflicts-based approach to issues of extraterritoriality in the enforcement of U.S. patents. Extending Holbrook’s influence yet further into the design of U.S. patent policy, this work was the basis of a recent presentation to the director of the U.S. Patent and Trademark Office, and will be the subject of a joint Emory-Patent and Trademark Office workshop later this year.

SELECTED PUBLICATIONS

Book

Patent Litigation and Strategy (Thomson-West, 4th ed., forthcoming 2012) (with Judge Kimberly A. Moore of the U.S. Court of Appeals for the Federal Circuit and John F. Murphy)

Articles

Patent Law's Audience, 97 *Minnesota Law Review* (forthcoming 2012) (with Mark D. Janis)

Territoriality and Tangibility after *Transocean*, 61 *Emory Law Journal* (forthcoming 2012)

Should Foreign Patent Law Matter?, 34 *Campbell Law Review* (forthcoming 2012) (symposium contribution)

Patents, Presumptions, and Public Notice, 86 *Indiana Law Journal* 779 (2011)

Equivalency and Patent Law's Possession Paradox, 23 *Harvard Journal of Law & Technology* 1 (2009)

Extraterritoriality in U.S. Patent Law, 49 *William and Mary Law Review* 2119 (2008)

The Expressive Impact of Patents, 84 *Washington University Law Review* 573 (2006)

Possession in Patent Law, 59 *SMU Law Review* 123 (2006)

When Patents Threaten Science, 314 *Science* 1695 (December 1, 2006) (with Jordan Paradise, Lori Andrews, and Danielle Bochneak)

The Economics of Civil Procedure



Jonathan Nash

Professor of Law

BA, Columbia College, 1988

JD, New York University Law School, 1992

LLM, Harvard Law School, 1999

Scholarly interests: federal courts, civil procedure, judges and judging, property law, environmental law

In his scholarly pursuits, Jonathan Nash goes behind the scenes, to explore questions essential to the effective and efficient operation of the judicial system. In particular, his scholarship considers what a law and economics approach can offer to the design of procedural devices and judicial systems—two areas where that approach has not commonly been applied.

Nash's research focuses on trans-jurisdictional devices and on the proper role of standing doctrine. Trans-jurisdictional devices enable legal questions that arise within the judicial system of one sovereign to be resolved, at least in part, by the courts of a different sovereign. The mechanism of certification, for example, empowers federal courts—and even administrative agencies—to certify questions of state law that arise in federal litigation to a relevant state high court, for definitive resolution. Analogously, abstention doctrines allow federal courts, in select circumstances, to abstain from proceeding further with a federal case in order to allow state courts to hear litigation raising relevant state law issues. The Supreme Court reviews issues of federal law arising in state courts, under its certiorari review authority. For the most part, legal commentators—among them his colleagues Robert Ahdieh, William Buzbee, and Robert Schapiro—have expressed enthusiasm about trans-jurisdictional procedural devices; they endorse their increased use and expansion of their scope.

In recent articles in the *Vanderbilt Law Review* and *Virginia Law Review*, as well as earlier work, Nash takes a different tack. He critically examines the value of trans-jurisdictional procedural devices, elucidating their costs and benefits from an economic vantage. Nash argues that courts and commentators tend to overstate the benefits of trans-jurisdictional procedural devices and, even more commonly, to understate

Nash argues that courts and commentators tend to overstate the benefits of trans-jurisdictional procedural devices and, even more commonly, to understate their costs.

Excerpt: “Standing’s Expected Value”

Suppose that Jones has an investment. It is worth \$10. Suppose that the government takes action that renders the investment worthless. Has Jones suffered an “injury in fact”? The answer is clear. Jones has lost an asset, and if the government takes that asset, it has injured Jones.

Now suppose that Jones has another investment. It is far more likely than not that the investment will turn out to be worthless. But there is a small chance—1 in 10,000—that the investment will be worth \$1 million. Suppose that the government takes action that renders the investment certainly worthless. Has Jones suffered an “injury in fact”? Under existing doctrine, the answer is fairly clear. Jones has lost an asset, the expected value of which is \$100, and if the government takes that investment, it has injured Jones.

Now suppose that Smith faces a mortality risk of 1 in 100,000. Smith wants the Environmental Protection Agency to eliminate that risk, as he believes that it is legally required to do so. The EPA refuses to act. Has Smith suffered an “injury in fact”? Under existing doctrine, the answer is not entirely clear; confusion over whether the injury should be seen as procedural or substantive muddles the issue. But under figures the government itself has used, the expected value of the mortality risk of 1 in 100,000 is \$60.

Whether a plaintiff can establish that he or she has suffered an injury in fact is critical to whether the plaintiff can pursue his or her legal action in federal court. Traditional understanding has it that Article III requires that, in order for there to be standing, a plaintiff must demonstrate (i) “injury in fact”, (ii) a causal link between that injury and the conduct complained of, and (iii) redressability. It is apparent that “injury in fact” is a necessary antecedent to standing analysis; without injury, there is nothing with which a causal link can connect and there is nothing to redress.

My principal claim is simple: Standing doctrine has been constructed in a way that is oblivious to the simple idea of expected value. If people have suffered a loss with a positive expected value, they have suffered an “injury in fact.” It is unhelpful to say, as courts often have done, that an injury is “speculative” or “conjectural” when it has a positive expected value. A 1 in 10,000 chance of losing \$100,000 is the equivalent of a \$10 loss (assuming risk neutrality), and a \$10 loss is an injury. A small risk of death is an injury in the sense that rational people would pay to eliminate it. Indeed, the federal government’s own practice treats small risks of deaths as injuries calling for a regulatory response.

These points cast grave doubt on many of the Court’s decisions in which it has denied standing on the ground that the relevant injury is too “speculative”

or has not been shown to be “likely” to be redressed by a decree in the plaintiff’s favor. Speculative risks have a positive value; to suffer them is to suffer an injury in fact. If a victory by the plaintiff would give the plaintiff an asset with a positive expected value, then the plaintiff’s injury would be redressed by a decree in his favor.

Indeed, notwithstanding the Court’s ambivalence towards it, the notion of expected value-based standing is consistent with the essence of existing standing doctrine: Extant doctrine implicitly embraces expected value by allowing standing in settings where the harm is far from certain, and indeed merely probabilistic. For example, standing in declaratory judgment actions necessarily assumes that the subject of the declaration sought will probably come to pass. And standing in cases raising overbreadth challenges—in which a speaker challenges a government speech restriction on the basis that it might chill the protected speech of parties not before the court—presumes both that the government likely would prosecute actions of others that come near the margin of a statute, *and* that others likely would, as a result, not engage in those actions in the first place.

What, then, might explain the pattern in the rest of existing standing law, which has had such difficulty in understanding a simple point about expected value? I suggest four possibilities. The first possibility is that courts are simply confused. They have not understood that a small risk of a significant harm is equivalent in value to a certain loss of a harm of a specified magnitude. The second possibility is that in refusing to hear cases in which plaintiffs complain about a loss of positive expected value, courts are relying on common law conceptions of injury—conceptions that poorly fit modern regulatory law. The third possibility, related to the second, is that some of the key cases are not about injury in fact at all. They are grounded instead in the (unarticulated) judgment that no relevant source of law should be taken to grant the plaintiff a cause of action. The fourth possibility is that some of the relevant decisions are based on judicial concerns over the generalized nature of the harm. In some cases, millions of people face a loss with a positive expected value. In such cases, there should be no problem with injury in fact; millions of people have been injured (in fact). If a problem exists, it is that widely generalized harms should not be judicially cognizable, at least when Congress has not explicitly said that they should be—not that Article III bars suits where the occurrence of injury is less than certain.

In my view, there is no reason to say that Congress lacks the power to channel into federal court cases in which harm in the future is probabilistic.

Nor does the injury-in-fact test bar courts from hearing such cases. If the plaintiff has lost a small chance to gain a large amount, the loss is equal to an amount that would unquestionably be a basis for standing. To be sure, the prudential barrier on generalized harms might apply in some such cases.

But there is no reason to hold, as some courts have, that Article III poses an obstacle to standing for probabilistic harms, so long as the expected value test is met.

—from Standing's Expected Value, *Michigan Law Review* (forthcoming 2013)

their costs. The smooth application of trans-jurisdictional procedural devices in most cases, for example, requires that the relevant federal and state law issues can easily be disentangled. In reality, however, this disaggregation is fraught with difficulty—and often controversial. This need not require throwing the baby out with the bathwater. Some trans-jurisdictional procedural devices may be useful, but Nash cautions us to take pause in our head-long rush to apply them.

Nash's research has likewise brought a law and economics approach to bear on standing, a gatekeeping tool that permits only certain cases to reach the federal courts. In "Standing and the Precautionary Principle," published in the *Columbia Law Review*, he explains how standing doctrine fails to integrate modern economic understandings of events whose occurrence is less than certain. Existing doctrine is hesitant to allow federal courts to hear cases based on injuries that may never occur. Nash, by contrast, argues for standing, based on the principle of precaution. Developed in the context of environmental law—and especially international environmental regulation—the precautionary principle calls for precaution in the face of uncertainty. A framework of precaution-based standing would thus allow cases into federal court where the injury is uncertain, so long as the injury, were it to occur, would be catastrophic. The expected value of such an injury, Nash argues, should be sufficient to meet the requirements for standing. He emphasizes that such an acknowledgement of standing does not necessitate the grant of relief. It simply allows the case through the courthouse doors. Finally, he offers a creative justification for such precaution-based standing: By comparison with the courts, the political branches of government are perhaps especially unlikely to take up the possibility of relief for high-cost, low-probability harms.

In a forthcoming piece in the *Michigan Law Review*, Nash continues to explore standing doctrine's failure to integrate economic understandings of expected value. While courts are quite willing to find standing where an injury is

certain to occur, but of very low value, they are reluctant to find standing where the injury is not certain to occur but of large value—even where the expected value of the latter injury is the same as, or even greater than, the low-value certain injury. This seems paradoxical, however, given that standing doctrine already embraces, if only implicitly, expected value-based standing in certain instances. Especially given the latter, Nash argues, cases involving injuries with identical expected values should be treated consistently.

Nash's future work on procedural design will continue to focus on standing, exploring whether existing standing doctrine is in fact well-suited to contribute to the sharpness of our adversarial litigation system, as is commonly claimed by both judges and academic commentators alike.

Nash's study of courts and procedure thus adds not only to the analysis of academics in law, economics, and political science, but also to the policies and decisions of legislators and judges who design procedural devices and judicial systems.

SELECTED PUBLICATIONS

Book Chapters

Legal Defeasibility in Context and the Emergence of Substantial Indefeasibility, in *Essays on Legal Defeasibility* (Oxford University Press, forthcoming 2013) (Jordi Ferrer & Giovanni B. Ratti eds.)

Articles

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Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals, *53 William and Mary Law Review* 919 (2012) (with Rafael I. Pardo)

Prosecuting Federal Crimes in State Courts, *97 Virginia Law Review* 243 (2011) (with Michael G. Collins)

The Institutional Dynamics of Transition Relief, *85 New York University Law Review* 391 (2010) (with Jonathan S. Masur)

Recent Scholarship



Freer

Richard D. Freer

Robert Howell Hall Professor of Law

Books*Civil Procedure* (Wolters Kluwer, 3rd ed., 2012)

Business Structures (West, 3rd ed., 2010) (with David G. Epstein, Michael J. Roberts, and George B. Shepherd)

ArticlesThe Continuing Gloom about Federal Judicial Rulemaking, 107 *Northwestern University Law Review* (forthcoming 2012)Personal Jurisdiction in the Twenty-First Century: Justice Brennan's Ironic Legacy, 63 *South Carolina Law Review* 551 (2012)

Pardo

Rafael Pardo

Robert T. Thompson Professor of Law

ArticlesThe Structural Exceptionalism of Bankruptcy Administration, 60 *UCLA Law Review* (forthcoming 2012) (with Kathryn A. Watts)Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals, 53 *William and Mary Law Review* 919 (2012) (with Jonathan R. Nash)Reconceptualizing Present-Value Analysis in Consumer Bankruptcy, 68 *Washington and Lee Law Review* 113 (2011)The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, 83 *American Bankruptcy Law Journal* 179 (2009) (with Michelle R. Lacey)

Schapiro



Shanor



Vertinsky

Robert Schapiro

Dean and Asa Griggs Candler Professor of Law

Books*Polyphonic Federalism: Toward the Protection of Fundamental Rights* (University of Chicago Press, 2009)**Book Chapters**The Varieties of Federalisms, in *Navigating Climate Change Policy in a Federal System* (Arizona University Press, 2011) (Edella Schlager, Kirsten Engel and Sally Rider eds.)

Volokh

ArticlesJudicial Federalism and the Challenges of State Constitutional Contestation, 115 *Penn State Law Review* 983 (2011)Monophonic Preemption, 102 *Northwestern University Law Review* 811 (2008)**Charles A. Shanor**

Professor of Law

Books*American Constitutional Law: Structure and Reconstruction Cases, Notes and Problems*, 5th ed. (West, forthcoming 2012)*Military Law in a Nutshell* (West, 3rd ed., forthcoming 2012) (with L. Lynn Hogue)*National Security and Counterterrorism Law in a Nutshell* (West, 1st ed., forthcoming 2013) (with L. Lynn Hogue)**Articles**Terrorism, Historical Analogies, and Modern Choices, 24 *Emory International Law Review* 589 (2010)**Liza Vertinsky**

Associate Professor of Law

ArticlesUniversities as Innovation Managers, *Utah Law Review* (forthcoming 2012)Comparing Alternative Institutional Paths to Reform, 61 *Alabama Law Review* 501 (2010)Reconsidering Patent Licensing in the Aftermath of *MedImmune*, 45 *Houston Law Review* 1609 (2009)**Alexander "Sasha" Volokh**

Associate Professor of Law

ArticlesPrivatization and the Elusive Employee-Contractor Distinction, 46 *UC Davis Law Review* (forthcoming 2013)Prison Vouchers, 160 *University of Pennsylvania Law Review* 779 (2012)The Constitutional Possibilities of Prison Vouchers, 72 *Ohio State Law Journal* 983 (2011)Do Faith-Based Prisons Work?, 63 *Alabama Law Review* 43 (2011)

Selected Faculty Authors

Mary L. Dudziak

Asa Griggs Candler Professor of Law (designate)

War-Time: An Idea, Its History, Its Consequences
Oxford University Press, 2012



The concept of “wartime” implies that U.S. military engagement is limited to discrete times. But it is not, says Dudziak, a legal historian whose latest book explores this contradiction, and its implications.

In *The Nation*, Peter Maass says, “Mary Dudziak’s new book, *War-Time: An Idea, Its History, Its Consequences*, is a crucial

document. Her smooth foray into legal and political history reveals that in not just the past decade but the past century, wartime has become a more or less permanent feature of the American experience, though we fail to realize it ... Dudziak assembles an intellectual Rubik’s Cube, playing with ideas of time, law, killing and politics, and arranging them into a pattern that all but eliminates the distinctions we long assumed to have existed between war and peace.”

David F. Partlett

Asa Griggs Candler Professor of Law

Torts: Cases and Materials

with Victor E. Schwartz and Kathryn Kelly
Foundation Press, 12th ed., 2010



Drawing on both chestnuts and the very best contemporary cases, the latest edition of the nation’s leading torts casebook maintains its longstanding quality, while offering expanded accounts of legislative inroads into tort law and the increasing globalization of the law.

First authored in 1954 by the most influential torts scholar of the 20th century, William Prosser, the book was hailed for its effective synthesis of what had previously been a jumbled body of tort law. With John Wade’s addition as co-author, students were given a more solid doctrinal introduction, with ample room to explore the depths of tort law—a balance that ensured the book’s continued standing.

Even amidst great social transformations and the pressing and probing of tort theorists, it is a testament to the strength of the authors’ vision that their work has maintained its preeminence.

Michael Perry

Robert W. Woodruff Professor of Law

The Political Morality of Liberal Democracy
Cambridge University Press, 2010



In this volume, Perry’s overarching aim is to elaborate and defend a particular understanding of the moral convictions and commitments that should govern decisions in a liberal democracy—about what laws to enact or maintain on the books, what policies to pursue, and the like. Perry addresses the main questions that have engaged

him throughout his career: questions concerning the grounding, content, implications for moral controversy, and judicial enforcement of the political morality of liberal democracy.

“Although broader in scope than I first conceived it,” says Perry, “this remains a book about ... the proper, and properly limited, role of religious faith in the politics and law of a liberal democracy.”

John Witte Jr.

Jonas Robitscher Professor of Law

Alonzo L. McDonald Distinguished Professor
Director, Center for the Study of Law and Religion

Religion and Human Rights: An Introduction
with M. Christian Green

Oxford University Press, 2011



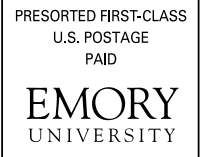
With contributions by a score of leading experts, *Religion and Human Rights* provides authoritative and accessible assessments of the contributions of Judaism, Christianity, Islam, Hinduism, Confucianism, Buddhism, and Indigenous religions to the development of the ideas and institutions of human rights. It is

the most comprehensive survey to date of religion and human rights. It devotes attention to emerging “third generation” human rights, including those pertaining to environmental sustainability and conflict transformation, and addresses cutting-edge issues of group rights, self-determination of religious communities, economic, social, and cultural rights, and the relationship between religion, culture, and ethnicity.



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FEATURED SCHOLAR

Legal scholars tend to see wartime as exceptional, and peacetime as the norm—and view the impact of war on American law as consequently episodic, and isolated to distinct wartimes. **Mary L. Dudziak** challenges this conventional thinking.