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Dean's Desk: New Faculty Continue Legacy of Legal Scholarship

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Dean's Desk: New faculty continue legacy of legal scholarship

Austen Parrish May 4, 2016



DEAN'S DESK

Austen Parrish
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Maurer School of Law

Great law schools, like the IU Maurer School of Law, are home to top-flight faculty. As teachers, our faculty earn acclaim from both students and alumni for the classroom experience they have created. Our “students first” perspective ensures that new members of the faculty come to Bloomington with a deep commitment to student success, both inside and outside the classroom.

Part of what informs our faculty and enables them to be exceptional educators and mentors, however, are the significant contributions they make through their world-class research. Readers of a certain age will remember such faculty standouts as Val Nolan Jr., whose outstanding classroom teaching and authorship of a hornbook on land use controls are matched only by his dozens of scholarly articles on ornithology, a subject in which he was completely

self-taught. Harry Pratter brought his scholarship and expertise in the Uniform Commercial Code to the classroom where, like all great teachers, he taught about life. Pat Baude fueled lively classroom discussions with his research and writing in criminal law, federal jurisdiction and civil rights. And Doug Boshkoff, whom we lost only last November, was one of the country’s leading bankruptcy scholars, bringing his vast knowledge of that subject and of contract law itself to more than one-third of the practicing lawyers in Indiana.

Inspired and challenged by this awesome legacy, we’ve been fortunate to recruit some of the most promising rising stars in legal education today, all of whom are classroom standouts as well. I can’t describe them all, but thought I’d highlight four examples of our newly hired rising stars: Gina-Gail Fletcher, a Cornell Law graduate who studies business organizations; Pamela Foohey, a Harvard Law alumna with expertise in nonprofit bankruptcy law; Tim Lovelace, who holds both a law degree and Ph.D. from Virginia and studies civil rights history; and Victor Quintanilla, a Georgetown Law alum who writes about judicial decision-making through the lens of social psychology. Below are some examples of the timely legal issues they are addressing in their recent work.

How is the price of oil determined, and by whom? Many believe that market forces dictate the price of commodities such as oil, gas and gold, but instead, these prices are determined through financial benchmarks: metrics that reflect limited slivers of the markets.

In her new article, Gina-Gail Fletcher describes how these benchmarks have also been at the epicenter of numerous, multiyear market manipulation scandals in recent years. Oil traders, for example, deliberately execute trades to artificially drive benchmarks lower, which allows the trader to capitalize on the manipulated benchmark. In responding to these benchmark-manipulation scandals, regulators have relied on the existing anti-manipulation framework, which is based solely on ex-post prosecution of

wrongdoers. As such, the current framework treats benchmark manipulation as just another form of market manipulation. But as more benchmark manipulation schemes come to light, the effectiveness of traditional approaches for curbing benchmark manipulation becomes dubious.

Gina-Gail's article provides the first in-depth analysis of the differences between benchmark manipulation and other forms of market manipulation. Her analysis demonstrates that benchmark manipulation cannot be adequately addressed through ex-post enforcement actions alone. In failing to recognize how benchmark manipulation differs from traditional manipulation, regulators miss a prime opportunity to oversee a key facet of the financial markets and thereby safeguard market integrity. By focusing on the unique attributes of benchmarks that make them susceptible to manipulation, her article puts forward a comprehensive, prescriptive regulatory framework aimed at detecting and minimizing benchmark manipulation, rather than merely punishing these practices after the fact.

What does a church do when it's about to go bust? Bank lending officers will tell you that they don't like to lend money to churches because it's too hard to foreclose on them. Pamela Foohey tells us, however, that about 90 religious organizations seek shelter under Chapter 11 every year.

Drawing on research with 45 church leaders and their bankruptcy lawyers, Pamela wrote in a recent article in the Ohio State Law Journal that these leaders did not initially think of their congregation's financial problems as legal problems. Instead, they struggled to solve the problems themselves through self-help and negotiation with creditors. Most often it was the threat of foreclosure that brought the law to leaders' attention. At that point, they turned to their social networks for help in understanding their legal options, including bankruptcy, as well as for help in reconciling their view that filing for bankruptcy must be avoided with the reality that Chapter 11 was their last remaining option for saving their congregations. Pamela's research has been featured in CBS News MoneyWatch and on the front page of the Huffington Post. She has also been invited to join the Consumer Bankruptcy Project as a co-investigator. The CBP has been the leading empirical study of consumer bankruptcy for the past 35 years.

How did an African-American journalist's reporting on the Cuban revolution influence global human rights? In 1962, William Worthy, a reporter for the Baltimore Afro-American and a member of the Fair Play for Cuba committee, was convicted in federal District Court for returning to the United States without a passport. The conviction arose from his secret travel to Cuba — in defiance of Department of State regulations — to study racial politics on the island. The first U.S. citizen indicted for violating the travel ban to Cuba, Worthy charged that he was being selectively prosecuted because of his radical journalism.

Using archival records only recently made available to researchers, Tim Lovelace shows that although the State Department had the names of more than 200 U.S. citizens who had defied the travel ban to Cuba, they chose only to prosecute Worthy. He framed his argument around the Fifth Amendment and Article 13(2) of the Universal Declaration of Human Rights, and the 5th Circuit eventually overturned his conviction, declaring that “inherent in the concept of citizenship . . . [is] a right to return.”

Tim also demonstrates that Worthy's efforts to domesticate human rights in the U.S. had global ramifications. The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities relied on Worthy's prosecution in Jim Crow-era Miami in its landmark “Study of Discrimination in Respect of the Right of Anyone to Leave Any Country, Including His Own, and to Return to His Country.” Tim returns to Bloomington this fall after completing a prestigious one-year fellowship at Princeton University's Program in Law and Public Affairs.

How should the scope of the same-actor doctrine be adjusted to account for legislative history and psychological science? Under this employment-law doctrine, when a supervisor first behaves in a way that benefits an employee and then subsequently takes adverse action against that employee, many federal courts conclude that the supervisor's adverse treatment is presumptively nondiscriminatory, adopting the strong inference that the negative employment decision was not motivated by bias.

When originally elaborated by the 4th Circuit in *Proud v. Stone*, the same-actor doctrine applied only when an “employee was hired and fired by the same person within a relatively short time span.” In the two decades since, the doctrine has widened and broadened in scope. It now subsumes many employment contexts well beyond hiring and firing, to scenarios in which the “same person” entails different groups of decision-makers, and the “short time span” has been elastically extended over seven years.

In his new article, Victor Quintanilla and co-author Cheryl R. Kaiser conclude that this doctrine should be curtailed. They recommend that federal courts resolve the existing Circuit split by adopting the 7th Circuit’s approach: Same-actor evidence should be one evidentiary datum for the ultimate trier of fact to weigh along with all other possible evidence of discrimination. Victor resumes his duties at the law school this fall when he returns from a one-year fellowship at the Center for Advanced Study in the Behavioral Sciences at Stanford University.

Our new faculty walk in the shadows of scholarly giants. Their scholarly contributions, even so early in their careers, do justice to the legacy they have inherited. •

Austen L. Parrish is dean and James H. Rudy Professor at the Indiana University Maurer School of Law. Views and opinions expressed are the author’s.