



EMORY
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HEALTHCARE

Entwined, at Odds

Liza Vertinsky on
the growing conflict
between medicine
and profit

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- **Timothy Holbrook:** How 3D printing affects global patents
- **Kay Levine:** The impact of negative stereotypes in criminal justice

“When traditional corporations are left to make their own decisions about matters that involve human health, their decisions are based on financial goals. Thus, where the financial incentives facing healthcare companies do not adequately reflect public health needs, it should be no surprise that this system fails to produce good public health outcomes.”

—Liza Vertinsky, Associate Professor of Law





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About Emory Law Insights

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Thorny Problems: Healthcare, Labor Law, Global Patents and Stereotypes in Criminal Law

This issue of *Insights* presents complex issues that derive from decades of custom, case law, and legislation. While the four subjects presented vary widely, all have one thing in common—they affect a lot of Americans.

Associate Professor of Law **Liza Vertinsky** and her colleagues explain some inherent conflicts in our healthcare system, a topic on many voters' minds right now. They argue the norms of *caveat emptor* don't apply to consumer medicine anymore. In the current healthcare market, customers can't use price as a good indicator of value. The system is dominated by corporations driven to generate stockholder profit rather than good outcomes for patients. Furthermore, Vertinsky writes, regulation and market structure limit competition.

"We suggest that as long as the US continues to rely on its current market-based healthcare system, changing the internal incentives of the companies themselves is one of the most effective ways of addressing this disconnect," she says, adding, "encouraging (or requiring) healthcare companies to operate under new hybrid legal forms that mandate consideration of stakeholder (not just shareholder) interests will narrow the divergence between private incentives and public health needs in ways that benefit public health."

We also excerpt Asa Griggs Candler Professor of Law **Timothy Holbrook**'s chapter from a new handbook on intellectual property and digital technology. He says 3D printing "has the potential to impact patent law in a manner similar to the impact digital files had on copyright law." He discusses how digital patent infringement could permit the extension of a US patent extraterritorially.

The Federal Circuit's opinion in *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.* opened the door for those selling CAD files to be infringers, Holbrook says. Transocean concerned a contract to sell a drilling rig; the contract was executed in Norway but the rig was to be delivered to the United States. So would an offer to sell that was made outside the US infringe a US patent if the ultimate sale occurs in the United States? "Transocean dealt with more than simply the tangibility aspect of infringing

sales and offers to sell," Holbrook writes. "The Federal Circuit also addressed the territorial limits of those infringement doctrines."

Associate Professor of Law **Deborah Dinner** examines the connection between the rise of equal rights and the fall of labor protection. She argues that certain turning points limited Title VII both in scope and enforcement.

She disagrees with scholarship that says the death of maternalist labor laws was the beginning of women's equality. "Instead, I highlight labor feminists' understanding that sex equality required state action to mitigate capitalism's excesses," she writes. "These feminists, who used unions to fight for women's rights, argued for protective labor standards as well as equal employment opportunity. As the concept of antistereotyping came to replace that of labor protection, this ideal got lost." And as a result, "employers, business trade associations, courts, and scholars . . . deployed Title VII in ways that legitimated the status quo distribution of power between workers and employers as well as a minimal welfare state," Dinner writes.

Professor **Kay Levine** and longtime collaborator Ronald Wright have written a series of articles about pressures that affect those we elect or appoint to zealously represent the state's case. They say prosecutors' zealousness may conflict with their professionalism.

The good-guy, bad-guy, stereotypes that thrive in the courtroom can be destructive, Levine says. "Wearing the white hat," being a "true-believer," and "drinking the Kool-Aid," are a few of the clichés examined. And woe to the young prosecutor who leaves for the defense bar, or "the dark side." They're often viewed as traitors who learn prosecutorial secrets, then use them for personal gain.

Many of the metaphors prosecutors use "suggest a sense of moral superiority to the defense bar, both in terms of their willingness to make sacrifices for ideals and in terms of their authentic commitment to the office," Levine writes. A better model, she says, would allow prosecutors to be fallible but willing to correct mistakes, and for us to see heroes and community servants on both sides of the courtroom.

Business and Medicine: Entwined, but at Odds



Liza Vertinsky
Associate Professor of Law

BA, Oxford University, 1991
MA, University of British Columbia, 1992
JD, Harvard Law School, 1997
PhD, Harvard University, 1998

Scholarly interests: regulation of healthcare markets and technologies, global health, intellectual property, law and economics

Professor Vertinsky joined Emory Law in 2007 after a decade of legal practice focusing on intellectual property transactions. Her scholarship builds on a practical background of assisting entrepreneurs, emerging companies, and universities with the development, acquisition, and leveraging of intellectual property. Her research is motivated by a deep interest in how legal rules—particularly patent law and contract law—influence the ways in which individuals and groups organize their economic activities. While at Emory, she has focused on exploring the institutional environments within which alternative forms of intellectual production and innovation take place, particularly within healthcare markets. Her strong interest in the intersection of law and global health and development led to her involvement in Emory’s Global Health Law and Policy Project. She is also a fellow at the Emory Global Health Institute. Her affiliation with Emory’s Vulnerability Project allows her to explore the roles that intellectual property plays in addressing or impeding access to health and economic development.

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Excerpt: Why Healthcare Companies Should Be(come) Benefit Corporations

Yaniv Heled, Liza Vertinsky & Cassidy V. Brewer

There are many contributing factors to the broken state of the healthcare system. Current proposals for how to fix our healthcare system have focused on changes to healthcare regulation, alternative incentive schemes for healthcare companies, changes in healthcare purchaser and consumer behavior, and efforts to increase competition in healthcare markets. All of these proposals, including those currently being debated at the federal and the state level, share a presumption that the provision of healthcare products and services will remain largely in the hands of traditional corporations and, to a lesser extent, nonprofit organizations. The proposed interventions are all targeted at changing the market environment in which these entities operate rather than changing the entities themselves. By failing to directly target the limitations of the corporate form as a mechanism for healthcare provision, these approaches neglect an important avenue for market-driven change.

We argue that many of the problems besetting the healthcare system have a common foundation in the pervasive disconnect between the private incentives of the companies that develop and provide healthcare products and services and public health needs. We suggest that as long as the US continues to rely on its current market-based healthcare system, changing the internal incentives of the companies themselves is one of the most effective ways of addressing this disconnect.

Currently the development and provision of healthcare products and services to meet public health needs remains, with the exception of hospital services, largely in the hands of traditional corporations. These corporations are primarily incentivized to pursue the maximization of value for their shareholders, making stock value and profits from the sale of product and services the primary focus of corporate decisions. This profit-driven approach is not unusual, nor is it considered undesirable or unwarranted in many markets. But healthcare markets, particularly markets for pharmaceutical products, have three distinctive characteristics, the combination of which leads to the failure of the traditional corporate model to effectively meet public needs. These three characteristics are: (1) the failure of price to serve as a good indicator of public health value, (2) the quasi-public goods aspects of many healthcare products and services, and (3) regulation and market structure that limit competition. When traditional corporations are left to make their own decisions about the provision of healthcare products and services in this type of market their actions are often socially suboptimal and sometimes in direct conflict with

public health needs, resulting in high social costs and poor public health outcomes.

We address the disconnect between private incentives and public needs head-on, proposing an alternative approach to healthcare reform from within the market-based system that seeks to align private incentives with public need by changing the business form of healthcare companies. We argue that healthcare companies should be strongly incentivized or even required to assume alternative business forms that would both enable and oblige them to take broader stakeholder and public interests into account in corporate decision-making beyond just shareholder value. We propose the collection of business forms generally referred to as “benefit corporations” as desirable business forms for healthcare companies. . . .

While there are a variety of ways in which the public interest in health can be defined, few would dispute that the public has a shared interest in lowering their general morbidity and mortality. The goals of reducing morbidity and mortality underlie public health policies and inform generally accepted measures of public health benefit. The US healthcare system relies largely on a market-based system to produce the goods and services needed to meet these public health objectives. Yet when traditional corporations are left to make their own decisions about matters that involve human health—for example, what products and services to produce and at what prices—their decisions are based on financial goals rather than public health outcomes. Thus, where the financial incentives facing healthcare companies do not adequately reflect public health needs, it should be no surprise that this system fails to produce good public health outcomes.

The disconnect between private incentives and public health needs is perhaps most stark in the pharmaceutical industry. In this part, we use examples drawn from four different decision-making points in the discovery, development, and sale of pharmaceutical products to illustrate the pervasive and continuous disconnect between private incentives and public health needs at every stage of the healthcare product life cycle. We begin with early-stage decisions about what drug development projects to pursue, and not pursue, to illustrate how financial incentives shape decisions regarding project choice in ways that do not align well with public health needs. We then examine choices made during the clinical testing of a drug, using the example of disclosure of clinical trials information to show how the public interest in disclosure of information critical

to public health conflicts with the private incentives of pharmaceutical companies to keep such information secret. Moving to product pricing decisions, we provide examples of direct conflicts between the interests of pharmaceutical companies and the public's healthcare needs at the product launch and marketing stages. We conclude with certain practices prevalent in the pharmaceutical industry that are geared towards thwarting or delaying the entry of competitors into pharmaceutical product markets, prolonging periods of high prices. These decision points are not unique, and there are many other types of decisions we do not have room to discuss that also impact the gap between what the market provides and what the public needs, ranging from early-stage decisions about whether to publish early-stage research findings to late-stage decisions about advertising, promotional activities, rebranding and repackaging. We also exclude from our consideration corporate decisions that are considered to be illegal, focusing only on decisions made by companies acting within the boundaries of the law to maximize shareholder value. The examples that we provide illustrate how companies, simply by doing what they are mandated to do, contribute to the problems besetting the healthcare system. . . .

In this part we focus on three characteristics that distinguish many parts of the healthcare market, particularly the pharmaceutical market, in ways that make traditional profit-focused models of healthcare production problematic. We explain how these characteristics allow for a divergence of private incentives and public health needs when traditional corporations are left to produce healthcare products and services.

Healthcare Market Failures

In a market-based system producers make production and pricing decisions in response to (1) consumer demand and willingness to pay, and (2) their own costs of production. In a simple neoclassical world, the outcome is an efficient one. Private companies compete with each other in the price and quality of their goods and services in efforts to maximize profits. Profit reflects both supply costs and consumer demand, and competition pushes prices down until supranormal profits are eliminated and goods are provided at prices that equate the cost of production and value of consumption for the marginal unit produced. Although the neoclassical assumptions required for perfectly competitive markets are rarely if ever satisfied, in modern economies such as the US corporations operating via the market continue to be viewed as efficient mechanisms for meeting consumer needs under most circumstances. . . .

Few commentators would disagree that healthcare markets are not perfectly competitive, and many would agree that the government has some role to play in healthcare markets. Yet, there remains much disagreement over the magnitude, nature, and sources of the failure(s) of healthcare markets as well as over what the appropriate policy responses should be. We focus here on the market conditions that make relying on profit-focused companies to produce healthcare products and services to meet public health needs problematic. Corporations in healthcare markets, like corporations

The problems besetting healthcare have a common foundation in the pervasive disconnect between the private incentives of the companies that develop and provide healthcare products and services and public health needs.

in other markets, make their decisions based primarily on maximizing shareholder value, which involves maximizing revenue streams from their portfolio of products and services over time. The time frame over which to optimize shareholder value is determined in part by investors, for private companies, and the stock market, for public companies. In the case of public companies, managing stock price becomes an additional important driver of corporate decision-making. The profits that these corporations earn will reflect their costs, the volume of products or services that they can sell, and the prices they can charge for their products and services, both during periods of market exclusivity and beyond. In an efficient market, consumers have sufficient information about the comparative benefits that a product or service will afford them; they can value those benefits; they have the ability to choose from a range of competing alternatives; they know what the price is, and they elect to purchase the good or service when the value it provides exceeds the cost. Competition among producers acts to reduce prices that diverge too much from underlying costs of production. In healthcare markets, however, many of these conditions are absent, resulting in markets where profits have been maximized at the expense of, rather than in pursuit of, public health value. We argue that this divergence of private and public value is due to three distinctive characteristics prevalent in many healthcare markets, most particularly the market for pharmaceuticals, *(continued on page 15)*

3D Printing and Global Patent Infringement



Timothy R. Holbrook

Asa Griggs Candler Professor of Law
Vice Provost for Faculty Affairs

BS, North Carolina State University, 1993
JD, Yale Law School, 1996

Scholarly interests: intellectual property, international patent law, patent litigation, patent law, property law, trademark law and policy

Professor Holbrook is an internationally recognized patent law scholar who has written more than forty publications and has presented more than one hundred times around the world on patent law. His recent work explores 3D printing's impact on patent law, the extraterritorial reach of US patent law, and the function of patent disclosures. Holbrook's work has been cited in briefs before the US Supreme Court, the US Court of Appeals for the Federal Circuit and various district courts. He is an elected member of the American Law Institute. He is also an advocate for the rights of the lesbian, gay, bisexual, transgender, and queer community. Before joining Emory's faculty, Holbrook was a tenured professor at the Chicago-Kent College of Law, and also served as visiting faculty at Stanford Law School, the University of Denver Sturm College of Law, and Washington University School of Law in St. Louis. He was also a scholar-in-residence at the Center for Media and Communication Studies at the Central European University in Hungary.

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Excerpt: Extraterritoriality and Digital Patent Infringement

Timothy R. Holbrook

Additive manufacturing, or 3D printing as it is colloquially known, has the potential to impact patent law in a manner similar to the impact digital files had on copyright law. . . . Unfortunately, patent law doctrines cannot protect rights holders in the same way as copyright law did. . . .

Patent law has generally been concerned with the tangible. It has not yet addressed whether a CAD file itself could trigger infringement under § 271. In particular, could a party be found to make, use, sell, offer to sell, or import an invention based on its activity with a CAD file? . . .

In [the] context [of infringing sales of, or offers to sell, the patented invention], the appropriation is not the physical invention but instead its commercial value. In this context, the Federal Circuit has found infringement in the absence of a physical infringing device. In *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, the court encountered a patent on a drilling rig. The rig that was ultimately delivered did not infringe, but the design of the rig that was the subject of the offer and the original sale seemingly did infringe. The court rejected the argument that the rig had to be complete at the time of contracting in order for there to be an infringing sale. . . . As a result, a physical embodiment of the claimed invention is no longer required for infringing sales or offers to sell.

Transocean thus opens the door to permitting the sellers of CAD files to be direct infringers. . . . [T]his theory does provide a means for patent owners to regulate CAD files through direct infringement, which we dubbed “digital patent infringement.”

Others have suggested different ways to regulate CAD files. Professor Daniel Brean has suggested that patent owners should draft claims that cover CAD files per se. Under this theory, a patent applicant would draft claims not only to cover an apparatus but also for a CAD file programmed to print the apparatus. . . .

Regardless of which approach one might embrace, there has been the suggestion that CAD files should be regulated as forms of direct patent infringement. Opening the door to such infringement can pose a number of issues. . . . The concern discussed within this chapter, however, is how digital patent infringement could permit the extension of a US patent extraterritorially.

. . . *Transocean* dealt with more than simply the tangibility aspect of infringing sales and offers to sell: the Federal Circuit also addressed the territorial limits of those infringement doctrines. This section explores the territorial rule articulated by *Transocean* and its

implications for the digital patent infringement theory advocated above.

In *Transocean* the negotiations and execution of the contract for the sale of the oil rig at issue did not take place in the United States. Instead, they were in Norway. The rig was to be delivered in the United States, however. Thus, the question was whether the offer to sell made outside of the United States nevertheless infringes a US patent if the location of the ultimate sale would be in the United States. . . .

There are a variety of considerations that could factor into a conflicts analysis: variations in validity, claim construction, and infringement doctrines; ownership of any relevant patents; and whether there is even a patent in the country at issue.

. . . In answering this issue, the court spoke more broadly than simply answering whether this scenario infringes. Instead, the court noted, “In order for an offer to sell to constitute infringement, the offer must be to sell a patented invention within the United States. The focus should not be on the location of the offer, but rather the location of the future sale that would occur pursuant to the offer.” . . .

. . . [T]he litmus test for infringing offers to sell is where the sale contemplated in the offer will be completed. The same is true for actually completed sales: regardless of where the agreement is negotiated and completed, the geographic location of the sale is determined by factors such as the place of performance and delivery. . . .

The *Transocean* rule for offering to sell or selling a patented invention creates considerable extraterritorial concerns in the context of digital patent infringement. Even for the narrow theory that Professor Lucas Osborn and I have advocated, the reach would be considerable. Anyone selling a CAD file on the Internet could be subject to patent infringement in the United States. The situation is even worse if one considers the approach of permitting patentees to claim CAD files themselves.

Depending on how courts would interpret the “making” or “use” of such claims, anything on the Internet could trigger US patent infringement, regardless of where the infringer is located. . . .

[One] way to address the potential extraterritorial reach of digital patent infringement would be to assess whether such infringement would create a conflict with the law of the country in which the infringer is located. One of the primary concerns with applying US law extraterritorially is that it could generate conflicts with foreign law. The Supreme Court has noted, however, that the presumption [against extraterritoriality] applies regardless of whether there is a risk of such a conflict. But such language seems to be a bit of hyperbole: the Supreme Court often addresses whether there is a conflict with foreign law in these cases.

RJR Nabisco v. European Community itself is most notable in this regard. While acknowledging the language in *Morrison*, the court clarified, “Although ‘a risk of conflict between the American statute and a foreign law’ is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex.” The only way to determine if the presumption is at its “apex,” then, is to expressly consider the existence of potential conflicts. . . .

. . . *RJR Nabisco*, however, appears to leave room for the consideration of conflicts as a formal matter, and one court has done just that in the trademark context. In *Trader Joe’s Co. v. Hallatt*, the US Court of Appeals for the Ninth Circuit concluded, post-*RJR Nabisco*, that the Lanham Act can have extraterritorial reach, specifically considering potential conflicts with foreign laws. The Ninth Circuit at least believes that a formal consideration of potential conflicts with foreign law is appropriate even after *RJR Nabisco*.

The courts could take a similar approach in the context of digital patent infringement. A court would consider whether finding infringement would create a conflict with the country in which the infringer is located. Elsewhere, I have offered a formal methodology for making this determination. Other scholars have embraced the consideration of conflicts to deal with extraterritorial situations. The underlying rule would be that, for there to be infringement of the US patent, there would also have to be infringement within the country where the defendant is located.

There are a variety of considerations that could factor into a conflicts analysis: variations in validity, claim construction, and infringement doctrines; ownership of any relevant patents; and whether there is even a patent in the country at issue. My approach was particularly stringent: if there would be no infringement in the foreign country, then there would be no infringement of the US patent. If the patent

owner did not have patent in the foreign country, and no third party did, then the courts could use the US patent as a proxy for applying the law of the foreign country. In this way, courts would perform fairly sophisticated analyses of foreign patent law. One need not take the strict approach I have advocated. Instead, a court could take a more wholistic approach, treating various potential conflicts as factors to be weighed in determining whether it would be appropriate to find infringement of the US patent. . . .

Nevertheless, the express consideration of conflicts with foreign law would have a number of laudable advantages. Having courts engage with the patent laws of other countries could help educate courts about the variations in those countries. This approach could facilitate convergence on certain international norms. Conversely, it could help make clear divergences in national laws, which could be the subject of future treaty negotiations or domestic amendments to the law, if harmonization is deemed appropriate.

One could be concerned about the institutional capacity of US courts to consider foreign law. This concern is often overstated, particularly in the patent context. Given that the Agreement on Trade Related Aspects of Intellectual Property has created, at a level of generality, a basic framework across patent regimes, US courts should be able to understand the law of foreign jurisdictions fairly readily. Institutionally, courts seem positioned to be able to deal with this approach.

How would this methodology work in the context of digital patent infringement? In the near term, it likely would mean that there is no extraterritorial protection afforded patent owners for potentially infringing CAD files. Given that all the theories advanced for digital patent infringement require either an extension of the law or a modification to claim drafting convention, it is highly likely that this form of infringement would not be recognized in foreign jurisdictions. Under the strict approach, at least, digital patent infringement could not be used to reach foreign actors, even if they ultimately are selling the CAD file in the United States under the *Transocean* rule.

In the long term, however, it may be conceivable that other jurisdictions could embrace variations of digital patent infringement. If that were to take place, then a patent owner could assert its patent over these foreign activities, so long as the conflict is eliminated under the strict approach or was deemed minor under the more malleable, factor-based approaches.

—from *Extraterritoriality and Digital Patent Infringement*, in *Research Handbook on Intellectual Property and Digital Technologies* (Tanya Aplin ed., 2018)

Antidiscrimination's Advance, Labor Protection's Retreat



Deborah Dinner
Associate Professor of Law

BA, Yale College, 1999
JD, Yale University, 2005
PhD, Yale University, 2012

Scholarly interests: employment discrimination, family law, legal history, property

Professor Dinner is a legal historian whose scholarship examines the interaction between social movements, political culture, and legal change. Her research focuses on how law responds to vulnerabilities that derive from familial and employment relationships, at home and at work. Dinner's forthcoming book, *The Sex Equality Dilemma: Work, Family, and Legal Change in Neoliberal America* (Cambridge University Press) examines debates about the meaning of sex equality in the late twentieth century. Her article, "The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities," offers the first legal history of the fathers' rights movement and analyzes its consequences for class-differentiated experiences of fatherhood. Dinner joined Emory in 2015, after serving as an associate professor at Washington University in St. Louis School of Law. Following law school, she clerked for Judge Karen Nelson Moore of the US Court of Appeals for the Sixth Circuit and served as the Raoul Berger–Mark DeWolfe Howe Legal History Fellow at Harvard University and the Samuel I. Golieb Fellow in Legal History at New York University School of Law.

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Excerpt: Employment-Discrimination Law in the Neoliberal Era

Deborah Dinner

This article brings new insight to bear on a puzzle in American legal and political culture: why has economic inequality grown, even as the nation has taken significant strides toward social equality? In the late twentieth century, the antidiscrimination ideal gained legitimacy at the same time that economic inequality rose to an apex unmatched in American history. Both the political Left and Right subscribe to ideals of formal equality, meritocracy, and individual freedom. Most Americans abhor discrimination on the basis of race and sex, at least in the abstract. Yet the United States has among the largest disparities in income and wealth of all developed countries. Sociologists and political theorists link these disparities to the ascendance of neoliberal policies, including the deregulation of capital and labor markets and a retrenchment in the welfare state. In sum, while our legal and political culture aspires to end discrimination on the basis of identity categories, we also tolerate deepening subordination on the basis of class. This article analyzes a more specific formulation of the larger puzzle: what is the socio-legal function of employment discrimination law in the neoliberal age?

To answer this question, we must begin by exploring a corresponding scholarly dilemma. Voluminous bodies of scholarship examine anti-discrimination law, on one hand, and neoliberalism, on the other. Antidiscrimination scholarship celebrates Title VII for containing the promise of sex and race equality, even if the statute has not yet fully realized that aspiration. Title VII, the scholarship argues, has the capacity to help dismantle a socio-legal system that enforces ideas about race and sex difference. Scholarship in the humanities, meanwhile, decries neoliberalism as the constellation of ideologies, laws, and policies that has entrenched economic inequality. Neoliberalism, this literature argues, has functioned as a “mode[] of governance” to deregulate capital and labor markets, privatize former state functions, and cut welfare entitlements. These two literatures on antidiscrimination law and neoliberalism, however, are siloed from each other. The failure to put them in conversation hinders scholars’ capacity to analyze the historical relationship between sex-discrimination law and neoliberalism and as well as the normative consequences of this relationship for gender and class inequities today. This article is among the first to recognize that antidiscrimination may function as a “master legal frame” to legitimate neoliberalism.

The article analyzes how employment-discrimination law advanced neoliberalism in the late twentieth century and explains why this history matters. It uses historical examples to illuminate unexamined shortcomings in contemporary legal

scholarship and doctrine. The article begins in part I by reviewing dual scholarly narratives: Title VII’s importance to sex equality and neoliberalism’s impact on class inequities. Analyzing these narratives side-by-side offers new insight into the values that underpin both Title VII and neoliberalism. These values include the ideal of efficient markets, the notion that the fundamental subject of law is the individual rather than the collective, and the primacy of negative rights enforced by the judiciary. The article thus points to conceptual overlap between employment discrimination law and neoliberalism.

I argue that the rise of the antidiscrimination ideal and the decline of the protective ideal were not merely coincidental; rather, the deployment of Title VII played a causal role in the decline of labor protection.

Part II considers how the historical implementation of Title VII via legal institutions, doctrine, and thought helped to catalyze and entrench a neoliberal labor market. To examine this dynamic, the article focuses on legal contests in the late twentieth century about the meaning of sex equality in employment. I make two historical claims. The first argument is that Title VII came to eclipse labor protection as the leading framework for understanding legal sex equality. I argue, more provocatively, that the rise of the antidiscrimination ideal and the decline of the protective ideal were not merely coincidental; rather, the deployment of Title VII played a causal role in the decline of labor protection. Second, I argue that while inherently limited in its capacity to promote economic equality along class lines, Title VII once held more capacious meaning. Trends in scholarship and in doctrine through the 1970s, however, interpreted Title VII according to neoliberal principles and thereby narrowed its scope. I conclude that neoliberalism left its imprint on Title VII both in the design and the implementation of the statute.

Rather than providing a comprehensive historical narrative, I analyze two illustrative moments that were pivotal to constructing the meaning of sex equality. The first was the end of maternalist labor

laws in the early 1970s. I challenge the scholarship that celebrates these laws' demise as the genesis of contemporary sex equality doctrine. Instead, I highlight labor feminists' understanding that sex equality required state action to mitigate capitalism's excesses. These feminists, who used unions to fight for women's rights, argued for protective labor standards as well as equal employment opportunity. As the concept of antistereotyping came to replace that of labor protection, this ideal got lost. As a result, antidiscrimination law protected women's rights to equal employment opportunity in a labor market characterized by the absence of protective regulation.

The second turning point was the framing of Title VII as an efficiency-promoting statute. This impulse manifested in the scholarship on race discrimination, which sought to ground the normative justification for Title VII in part on market values. But doing so made disparate-impact liability appear increasingly problematic and thereby foreclosed gender-discrimination claims that sought not merely to increase opportunity but rather to transform labor-market structures.

In part III, the article analyzes the consequences of this history for contemporary understandings of equality. Today, the Equal Employment Opportunity Commission (EEOC) and scholars advocate institutional "best practices" to prevent discrimination. Such best practices involve prohibitions on gender and racial stereotypes and reinforce the idea that employment-discrimination law promotes efficient labor markets. I argue, however, that these best practices are incapable of redressing the structural inequalities facing low-income workers. The dominance of antistereotyping theory relinquishes challenges to the fundamental terms of the employment relationship and gives up claims that the state has a responsibility to regulate those terms. In addition, efficiency continues to act as a prominent rationale cabining the scope of employment-discrimination law. As a consequence, antidiscrimination doctrine and theory limit the kinds of disparate-impact litigation that would not only promote gender inclusion within the workplace but also redistribute power between employers and workers. I show that the failure to recognize the imbrication of employment discrimination law with neoliberalism obscures the interests of working-class women in debate about work-family conflict and legitimates class inequalities.

By opening a new window into the history of sex-discrimination law, this article raises a host of important questions about the limitations of contemporary antidiscrimination theory. It is a common observation that current legal doctrines and institutions have not realized full inclusion and equal opportunity for women and racial and sexual minorities. Antidiscrimination law's limits, however, run deeper. Employers, business

trade associations, courts, and scholars have in specific instances deployed Title VII in ways that legitimated the status quo distribution of power between workers and employers as well as a minimal welfare state. I conclude by calling for greater attention to class as well as to sex to promote a labor market that offers adequate income as well as benefits and schedules that enable low-income workers to realize economic security, to gain greater control over the terms of their jobs, and to maintain fulfilling lives outside of work. . . .

The passage of Title VII did not presuppose neoliberalism; neoliberal policies were not a precondition for the emergence of employment discrimination law. The enactment of Title VII represented the fulfillment of multiple political movements and aspirations—most significantly, the movement for civil rights for African Americans. Nonetheless, the potential existed for Title VII to facilitate neoliberalism. Because Title VII and neoliberalism are both rooted in the American liberal tradition, they share common, animating values. These values include individualism, efficiency, and negative rights.

First, employment-discrimination law shares with neoliberalism an emphasis on individual self-determination and flourishing. Neoliberalism defines inequality as a problem of artificial constraints on individual agency. Employment-discrimination theory, and the antistereotyping principle in particular, similarly focus on injury to individual potential. This focus sidesteps questions of structural disadvantage. Neoliberal philosophies suggest that the purpose of government is to promote freedom of opportunity rather than to create more just economic structures. Employment-discrimination law likewise promotes inclusion of those excluded from labor-market opportunity, but falls short of reconceptualizing the fundamental terms of the employment relationship. The metaphor of "opening" signals opportunity and access, but not transformation.

Second, the hegemony of the market ideal is evident in both neoliberal ideology and scholarly and judicial interpretations of Title VII. Efficiency has emerged as a rationale both justifying and limiting interpretations of sex discrimination. Although not all scholars argue that efficiency provides the normative underpinning for employment discrimination law, it is a predominant rationale within the case law. The judicial construction of Title VII as a statute meant to promote market rationality helps to explain why courts routinely foreclose certain kinds of disparate-impact claims under Title VII.

Third, Title VII doctrine, as it has evolved in the crucible of particular legal and political contexts, has functioned at specific moments to legitimate neoliberalism's assault on the welfare state. Neoliberal ideology affirms the ideal of a minimal state, even
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Prosecution, Defense Stereotypes in Criminal Justice



Kay L. Levine

Professor of Law
Associate Dean of Faculty

AB, Duke University, 1990
JD, UC Berkeley, 1993
MA, UC Berkeley, 1999
PhD, UC Berkeley, 2003

Scholarly interests: criminal procedure, criminal law, regulation of sexuality

Professor Levine is an empirical scholar who examines how criminal law works in the real world, with an emphasis on US state courts. Her research focuses on how prosecutors make decisions; interpret ethical rules; structure relationships with victims, judges, and defense attorneys; and also, think about their careers. Levine's forthcoming book *The Inside World of Prosecution* (with Ronald Wright) stems from years of empirical research involving approximately 270 state court prosecutors. It yields a highly nuanced perspective on 21st-century prosecution, considering the influences of office structure, leadership, and culture on prosecutorial decision-making, morale, and career mindsets. Levine also researched drug enforcement patterns in Fulton County, Georgia, for a multidisciplinary project funded by the National Science Foundation. Titled *Race, Place and Discretion*, it explores various legal actors' understanding of, and willingness to use drug-free zone laws to impact drug selling activity. Before joining Emory in 2003, Levine clerked for US District Court Judge David Alan Ezra, and served as a deputy district attorney in Riverside County, California.

SELECTED PUBLICATIONS

Oxford Handbook on Prosecutors and Prosecution (Oxford University Press, forthcoming 2019) (with Ronald F. Wright & Russell Gold eds.)

Career Motivations of State Court Prosecutors, *George Washington Law Review* (forthcoming 2019) (with Ronald F. Wright)

Process as Intergenerational Punishment: Are Children Casualties of Parental Court Experiences?, in *The Legal Process and The Promise of Justice, A Conference to Honor the Work of Malcolm Feeley*, (UC Berkeley, Cambridge University Press, forthcoming 2019) (with Volkan Topalli)

Prosecutor Risk, Maturation and Wrongful Conviction Practice, *42 Law and Social Inquiry* 648 (2017) (with Ronald F. Wright)

Place Matters in Prosecution Research, *14 Ohio State Journal of Criminal Law* 675 (2017) (with Ronald F. Wright)

Images and Allusions in Prosecutors' Morality Tales, *5 Virginia Journal of Criminal Law* 38 (2017) (with Ronald F. Wright)

Excerpt: Images And Allusions In Prosecutors' Morality Tales

Kay L. Levine & Ronald F. Wright

Spend enough time hanging around state prosecutors in the United States and you are sure to notice their particular way of speaking. [Aside from] shorthand references to the penal code sections they use most often or comments on the preferences of judges . . . prosecutors regularly call up images that implicitly signal what it means to be a prosecutor, who their adversaries are, and how best to get the job done. . . . In this essay, we catalog and explain four stock images, and their accompanying narratives, that prosecutors use most often when they describe their own duties and those of their counterparts across the aisle. Prosecutors speak frequently about "wearing the white hat," "going over to the dark side," "being a true believer," and "drinking the Kool-Aid." For the prosecutors who invoke these terms, their meaning is self-evident; such is the power of shared symbols and values in the profession. We comment on what these "practical poetic" images reveal about how prosecutors see their place in the larger legal profession. . . .

I. Wearing the White Hat

*The prosecutor is probably the only lawyer that doesn't have to go in and argue someone's case. My only allegiance is to the truth, and that's kind of freeing, you know? It's nice. I get to wear the white hat all the time. . . . —Dean 1445**

. . . Invoking the imagery of old western movies in which the sheriff wears the white hat and the outlaw the black hat, the prosecutor in the white hat depicts himself as the savior and protector of the community. "I think the idea that you wear the white hat—community betterment, fighting crime, serving the public—I like that idea of serving the public," said Everly 710. . . .*

Aside from the community safety angle, the white-hatted prosecutor is inherently on the side of the truth, never faced with the choice between justice and playing games, able to dismiss cases she doesn't believe in with the discretionary power of her pen. She is thus not only the community savior, but also the community representative of morality, the embodiment of doing the right thing. Brooks 920* put it like this: "It's the most noble profession for an attorney. You never ever have to do anything wrong when you are a prosecutor." . . .

The prosecutor-as-natural-good-guy is only part of the white hat story, however; [for some prosecutors] wearing the white hat triggers responsibilities, not just praise. Because the prosecutor wears the white hat . . . she must never cut corners or skate the edges of

The white-hatted prosecutor is inherently on the side of the truth, never faced with the choice between justice and playing games, able to dismiss cases she doesn't believe in with the discretionary power of her pen.

ethical requirements. She must be generous. . . when meeting her disclosure obligations, and she must be respectful of defense attorneys and judges. Dean 1210* described it like this: "[M]y philosophy in trial . . . is that the prosecutor always needs to wear the white hat. Out of anyone in that courtroom, I want my juries to trust me. . . . So at the end of the day, I've given you the good, bad and the ugly." . . .

In this depiction, in order to earn and keep the trust of the public, prosecutors should regard wearing the white hat as a normative command for how to do their jobs "honorably," akin to the minister of justice language found elsewhere in the literature. . . .

II. Going Over to the Dark Side

*Number one response [to a prosecutor joining the defense bar] every time is they are a traitor. They are sellout[s], they're scum of the earth. . . . It's like the office—I'm not going to say it brainwashes you, but you're led to believe in the culture that if you ever leave this job for any reason, you are a traitor and how can you live with yourself. —Parton 1445**

. . . When we asked about how colleagues react when one of their own leaves the office to become a defense attorney, we frequently heard that this colleague had "gone to the dark side," or become a traitor. . . .

Prosecutors who use the "dark side" concept to describe the defense bar draw on imagery that has been around for centuries. . . . The first use of the term is found in Christian imagery from the seventeenth century, when radical theologian Jacob Bauthumley described the light side of God as heaven and angels and the dark side as evil, sin, and the Devil. . . .

Translating these concepts into the modern criminal justice system requires some awareness of the facts of professional life as prosecutors see them. . . .

Prosecutors . . . do not make a lot of money; [instead they] embrace the psychic rewards of their profession . . . and thus can tolerate their lower pay in actual dollars. Private defense attorneys, in the view of

these prosecutors, . . . are merely paid mouthpieces for their clients. Hence, joining the dark side means a lawyer is trading his idealism—and being on the right side of criminal cases—for mercenary reasons. . . .

Beyond demeaning the tradeoff between ideals and money, some prosecutors see colleagues who switch sides as traitors, as people who came to the office for a few years to learn some skills that they will then use to fight against the office in court. For these prosecutors, joining the dark side embodies a betrayal of one's colleagues and of the investment the office made in that attorney's career. "[P]rosecutors are reluctant to welcome a Trojan horse into the tent and give [up all of our] secrets about how to prosecute cases and then have somebody leave and go back to the dark side." . . .

. . . The regular invocation of these narratives, particularly by respected prosecutors, reminds others who work in the office of the risk inherent in switching sides. These terms fortify a boundary between us and them; they help establish community solidarity. . . .

As with the white hat metaphor, the most common prosecutor uses of the dark side imagery suggest a sense of moral superiority to the defense bar, both in terms of their willingness to make sacrifices for ideals and in terms of their authentic commitment to the office. . . .

III. True Believers and Kool-Aid Drinkers

*[E]ither you have the vision that these people are all innocent, you drank that Kool-Aid, you're swimming in it—or you drink the Kool-Aid of, there are people who do bad things and I need to make sure they pay for it. So it's almost like . . . which side are you on? . . . —Dean 1210**

. . . "[T]rue believers" and "Kool-Aid drinkers" are lawyers who display excessive, fervent zeal for their side of an argument or their worldview. They are dogmatic followers of their causes, professing absolute belief in the rightness of their perspectives and the wrongness of the other side. . . .

Visual metaphors stress the limited range of figurative eyesight among true believer attorneys. True believers have "tunnel vision;" they have lost perspective, lack an objective view of the strength of the evidence or the credibility of their witnesses, [or] have "blindness" on . . .

These lawyers [also] display "rabid" passion for their causes and are "gung-ho" about their beliefs. . . . For example, one prosecutor characterized a particular defense attorney as a "crusader, out there to save the world one defendant at a time." Another commented that true believer defense attorneys assume "that prosecution is racially or socially motivated." The true believer prosecutor's agenda is similarly intense and categorical: "if you got arrested you are guilty of

something and they are going to do whatever they can to make you suffer for it, to punish you." . . .

. . . True believers also profess unshakable belief in the credibility of the people they represent, or of those who work with them on a regular basis. . . . For true believer prosecutors, that unwavering commitment extends to victims, police officers, and "the good tax-paying, law-abiding citizens of this county." True believer defense attorneys, by contrast, place complete faith in their clients and overly empathize with their plight. . . . The true believer's passion for the cause [sometimes] leads to a strong belief that the other side is lying, engaging in underhanded practices, or manipulating the system. . . .

Whichever side an attorney is fighting for, our interviewees consistently told us that true believer legal practice is "not conducive to good work." As a result of their "inflexible" beliefs, true believers carry bigger caseloads and go to trial more often than other attorneys, because they refuse to make deals that would suggest their evidence or witness credibility is weaker than they believe it to be. . . .

Epilogue: Connected Images and the Potential for Reform

. . . The pervasiveness of these narratives among prosecutors suggests that they . . . ought to have a place in our discussions about potential criminal justice reform strategies. For example, scholars and policymakers might take the white hat metaphor (around which prosecutors already rally) and stress the normative meaning that some of our interviewees mentioned. In so doing, they would remind prosecutors to earn the white hat, every day, by proper behavior and avoidance of gamesmanship: the white hat demands that its wearer actually be the good guy, not just claim to be playing the good guy part. Moreover, the derided image of true believers may be one bridge across prosecutor-defense attorney divides. Formally embracing the white hat command and formally rejecting the true believer mentality thus could inspire innovations in various contexts. . . .

But we ought to be cautious about uncritically accepting these narratives as tools of reform, as there is a dark side to this set of prosecutor images and allusions. Even if prosecutors fully supported the normative aspect of the white hat imagery, we worry about the zero-sum assumption embedded in the assignment of hat colors at all. For every white hat there must be a black hat—someone to fight against, someone whose natural inclination is to promote evil and immorality and danger. A prosecutor who casts the defense in the dark hat, working for the dark side, shows a lack of faith in a criminal justice system that benefits from checks and balances and from collective wisdom. . . .
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that together lead to market failure when traditional corporations are left to select and produce these healthcare products and services. These distinct characteristics are: (1) the failure of price to serve as a good indicator of public health value, (2) the quasi-public good aspects of many healthcare products and services, and (3) regulations and market structure that limit competition. While there may be other markets that have one or more of these characteristics, their combination and magnitude in key parts of the healthcare system creates and perpetuates a divergence of private-sector incentives and public health needs. In the discussion below, we suggest that these three characteristics of healthcare markets limit the responsiveness of companies to the needs of

consumers and allow profit-driven decisions to distort product choice and pricing. . . .

New hybrid legal forms offer the possibility of accomplishing both social good and private wealth creation within the same entity. We argue that encouraging (or requiring) healthcare companies to operate under new hybrid legal forms that mandate consideration of stakeholder (not just shareholder) interests will narrow the divergence between private incentives and public health needs in ways that benefit public health. . . .

—from *Why Healthcare Companies Should Be (come) Benefit Corporations*, 60 *Boston College Law Review* (forthcoming 2019)

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as it aggrandizes some elements of the state while weakening others. The enactment of Title VII reinforced the courts' role as engines of state building, but it has also undermined the ideal of positive entitlements to social welfare as guaranteed by legislatures and administrative agencies.

To say that neoliberalism and antidiscrimination law share values is not to argue that Title VII necessarily served neoliberal purposes. Such an argument would ignore historical contingency. The shared liberal values, however, did create the necessary condition for the historical possibility that Title VII would be construed and used in a manner that comported with neoliberal purposes. The overlap in the principles underpinning antidiscrimination law and neoliberalism enabled employers, courts, and scholars to frame Title VII to advance free-market ideologies, even though it did not predetermine that this would happen. Metaphorically speaking, the chemical compounds existed for a reaction to take

place, but external events were necessary to catalyze the reaction.

Understanding how Title VII and neoliberalism intertwined historically requires empirical analysis into the dynamic political and institutional contexts in which employment-discrimination law evolved. A host of questions require further investigation: How did legal institutions facilitate or block the convergence between antidiscrimination doctrine and neoliberal policies? In what ways did employers and business trade associations deploy Title VII? Did their actions facilitate or frustrate social movement mobilization to enforce Title VII? This article initiates an inquiry into these questions and ultimately suggests that answering them should be critical to future research agendas in legal history, feminist theory, and employment law.

—from *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 *Indiana Law Journal* 1059 (2017)

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. . . There is more safety, and a better chance of democratic accountability, in a set of images that depict prosecutors as fallible, as human beings capable of making mistakes, and as responsive agents who are willing to rectify those mistakes. These more complex narratives would also reflect shared values held by prosecutors and defense attorneys: a sense of idealism, a dedication to public service, a corresponding willingness to sacrifice prestige, and a commitment to case-based lawyerly craft. We believe

that the stories that showcase the best in our justice system leave room for shared contributions to the overall cause of justice from the prosecution and the defense, and the best storytellers are those who recognize that heroes can emerge on both sides of the courtroom. . . .

—from *Images And Allusions In Prosecutors' Morality Tales*, 5 *Virginia Journal of Criminal Law* 39 (2017)

*As in previous works in this series, we protect our interviewees' identities by using pseudonyms for their names and their jurisdictions.

Recent Accomplishments by Emory Law Faculty

Bagley receives Global Health Institute grant



Margo A. Bagley, Asa Griggs Candler Professor of Law, received a 2018 EGHI Seed Grant Award of up to \$50,000 from The Emory Global Health Institute. The grants fund preliminary research on a global health challenge, with the goal of securing additional funding

from external sources to expand the research conducted during the pilot phase. The project title is “Pharmaceutical Quality Assurance Pilot Program-Mozambique,” and Deborah McFarland, professor of global health at the Rollins School of Public Health, is her co-investigator.

Blank, Nash, to lead university legal centers



Laurie Blank, clinical professor of law and director of the International Humanitarian Law Clinic, now leads Emory Law’s Center for International and Comparative Law. “I look forward to building on Professor [Abdullahi Ahmed] An-Na’im’s outstanding

and meaningful work leading the Center for International and Comparative Law over the past decade and am excited to work with students, faculty, and partners across the university and beyond to enhance Emory’s engagement in the dynamic and challenging international legal issues we face today and in the future,” Blank said.



Jonathan Nash, Robert Howell Hall Professor of Law, is director of the Emory University Center for Law and Social Science, which hosts interdisciplinary conferences and speakers, and fosters interdisciplinary initiatives between the law school and social science departments

at Emory College. “I am very honored and proud to assume this leadership role,” Nash said. “The center does a fantastic job of fueling cutting-edge cross-disciplinary ties and research at Emory and beyond. I hope to enrich further the already strong ties between Emory’s political science department and the school of law and to forge new ties between the school of law and other social science disciplines.”

Broyde wins Fulbright for study in Israel



Michael J. Broyde won a Fulbright award to spend the 2018–2019 school year at Hebrew University in Israel studying religious arbitration in diverse western democracies. His project focuses on regulating religious communities in ways that encourage modernization

and discourage radicalization. He will address one of the most serious challenges confronting Western democracy: preventing the rise of radical religion. The project is a follow-up to his recent book, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford 2017).

Dudziak honored by American Society for Legal History



Asa Griggs Candler Professor of Law **Mary L. Dudziak** was elected an honorary fellow of the American Society for Legal History, the society's highest honor, during the society's annual meeting in October 2017. Election recognizes distinguished historians whose scholarship

has shaped the discipline and influenced the work of others. "Honorary fellows are the scholars we admire, whom we aspire to emulate, and on whose shoulders we stand," according to the society. Dudziak is a leading US legal historian and past president of the Society for Historians of American Foreign Relations. Her research is at the intersection of domestic law and US international affairs. "I grew up at this conference," Dudziak said, when accepting the award. "My whole professional life has been nurtured by you."

Fineman receives Stoneman Award, named most-cited in family law

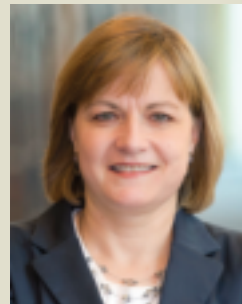


Martha Albertson Fineman, Robert W. Woodruff Professor of Law and founding director of the Vulnerability and the Human Condition Initiative and of the Feminism and Legal Theory Project, received the Miriam M. Netter '72 Stoneman Award from

Albany Law School this year, in recognition of her efforts to expand opportunities for women. Previous honorees include US Supreme Court Associate Justice Sonia Sotomayor.

Also, based on data from the 2016 Sisk study, Fineman was the number one most-cited family law faculty member in the country, with 580 citations between 2010 and 2014. The survey analyzed the mean and median citations to tenured faculty scholarship for the years 2010–2014, using 2015–16 faculty rosters as the benchmark.

Price named 2017 Carnegie Fellow



Asa Griggs Candler Professor of Law **Polly Price** was one of 35 scholars chosen as 2017 Andrew Carnegie fellows, who receive up to \$200,000 to fund significant research and writing in the social sciences and humanities. The program recognizes both

established and emerging scholars, journalists and authors. Price devoted her award to research for her forthcoming book, *Governing Disease: Epidemics, Law, and the Challenge of Disease Control in a Democratic Society*. "The book's premise is that we have much to learn from the study of governmental response to public health crises in the past," Price said. Drawing from historical examples, the book will provide a set of important lessons for lawmakers. "The goal is to help initiate, encourage, and frame the terms of public debate on how government may best respond to health threats in the future," she said.

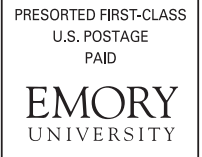
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ALSO INSIDE

“A prosecutor who casts the defense in the dark hat, working for the dark side, shows a lack of faith in a criminal justice system that benefits from checks and balances and from collective wisdom.”

—Kay L. Levine, Professor of Law