

## In This Issue

This issue of *Law & Social Inquiry* presents six research articles and a major review essay. Individually quite distinct, the research articles collectively traverse a continuum in empirical sociolegal studies, from large-scale and extensive (whether measured by scope, time, or theoretical intent) explanatory studies to somewhat smaller-scale, intensive investigative work. As one proceeds along the continuum one may observe “law”—whether as institution, discourse, or ideology—displaced from a central architectural position in our conception of society and politics to one in which regimes of legality or justice appear as one more environmental element whose relative situational impact is mediated by experience, or by technocratic processes of management, or administration. This issue’s review essay offers a variation on the same theme by showing how distinct bodies of contemporary literature—on negotiation and on “new governance” both manifest a discourse of flexible problem-solving rather than objective rule-boundedness.

The issue’s first two articles focus on inquiry into legal rules. In “Siting the Death Penalty Internationally,” David F. Greenberg and Valerie West use data from 193 nations to examine sources of variation in possession and use of the death penalty. Their goal is to test theories of punishment. They find the death penalty to be rooted in a country’s legal and political systems and to be influenced by its religious traditions. A country’s level of economic development, its educational attainment, and its religious composition shape its political institutions and practices, indirectly affecting its use of the death penalty.

Our second article takes a longitudinal historical approach to a distinct rule-centered question. In “The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?,” Julie Novkov notes that historically inclined legal scholars have taken to examining the history of the elimination of bans on mixed-race sexual relationships in the United States in search of guidance about the recent controversy over same-sex marriage. The analogy can certainly be helpful, Novkov argues, but it is limited by the particular historical circumstances of the battle over antimiscegenation laws.

Regulations prohibiting interracial marriage were at the heart of defining and perpetuating the political and institutional system of white supremacy. As such they served a distinct purpose from the bans on same-sex marriage. Where the analogy is best used is in the promotion of a critical consideration of the history of marriage as a heteronormative institution, generating a broader agenda for empowering change. Such a use of history takes the experience of the struggle against the antimiscegenation regime as a cautionary tale rather than a guidepost.

Our third article, "Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law," by Austin Sarat and Conor Clarke, remains focused on legal institutions but introduces the theme of displacement. Sarat and Clarke examine a familiar institutional phenomenon—prosecutorial discretion. They theorize discretion not as a phenomenon of administered legality but rather of legality's displacement. Both academic literature and the mainstream media recognize that prosecutors have substantial discretion. The question is, what does discretion represent? A necessary tool for administering prosecutorial capacities or something rather different? By moving from the language of discretion to that of sovereignty, and by focusing on the decision not to prosecute, the authors aim to emphasize that the exercise of discretion is an expression of the sovereign power to exempt. That is, drawing on Carl Schmitt and Giorgio Agamben, they propose that prosecutorial decision making clearly involves the exercise of a sovereign power to decide whether or not to grant individuals exemptions from the reach of valid law. This sovereign power of prosecutors is, in most jurisdictions, an all but unreviewable power. It is most vividly on display when prosecutors decline to bring charges where there is a legally sufficient basis for doing so.

Our fourth and fifth articles together examine law, belief, and consciousness in the domain of harassment. So doing, they take us further down the path of rule displacement though in a direction distinct from Sarat and Clarke. In "'People Are Too Quick to Take Offense': The Effects of Legal Information and Beliefs on Definitions of Sexual Harassment," Justine E. Tinkler investigates how legal understanding, opinions about the regulation of sexual harassment, and social status affect whether people define uninvited sexual jokes or remarks as harassment. Using data from a nationwide study of sexual harassment in the U.S. federal workplace, Tinkler finds that how people define sexual harassment is directly related to the extent to which they view sexual harassment rules as ambiguous and threatening to workplace norms. Her results also show that while women generally define sexual harassment more broadly than men, they actually resist defining sexual jokes or remarks as harassment. Finally, knowledge of the workplace sexual harassment policy moderates the effect of beliefs on definitions of sexual harassment. Tinkler concludes that knowledge of the law and personal views about power and social interaction in the workplace are reconciled in complex ways. In "Claiming 'Victim' to Harassment Law: Legal Consciousness of the Privileged,"

Susan A. Munkres holds that diversity and harassment training is one important site of reconciliation, but that outcomes are not conducive to strict maintenance of harassment law as a rule regime protective of clear rights. Sociologists of law, Munkres says, have long been concerned with the effectiveness of rights; the emergence of diversity training in the 1990s spurred renewed attention to questions of how laws are enacted in daily life. Much scholarship has constructed the managerialization of civil rights law and popularization of diversity concepts as diluting efforts to redress structural discrimination. Here Munkres studies diversity and antiharassment trainings in practice. She argues that training gives rights expression as obligations, but simultaneously dilutes their content as trainers find it necessary to negotiate the resistance of trainees to their new obligations under civil rights law. Like Tinkler, Munkres observes complexity in the relationship between rules and workplace: trainees evince a variable legal consciousness in relationship to the rights-promoting legality to which they are being exposed.

Our final article studies the capacity to reach outcomes that can be accepted as fair in the negotiations that, Tinkler and Munkres variously suggest, displace strict rule adherence in “administering” antiharassment rights. In “Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential,” Rebecca Hollander-Blumoff and Tom R. Tyler employ two correlational studies to test the hypothesis that procedural justice, or fairness of process, plays a role in acceptance of agreements reached through bilateral negotiation. Both studies test the relationship between the fairness of the process used to resolve a dispute, objective monetary outcomes, subjective assessments of outcome favorability, and subjective assessments of outcome fairness. Additionally, the second study tests the hypothesis that negotiations characterized by greater procedural justice result in more potential for integrative bargaining. The results suggest that procedural justice encourages the acceptance of negotiated agreements, as well as leading to the opportunity for increased integrative bargaining.

Our review section in this issue of *Law & Social Inquiry* features one essay, by Amy J. Cohen, “Negotiation, Meet New Governance: Interests, Skills, and Selves.” Cohen examines critically two bodies of scholarship—negotiation literature and new governance literature—that seem distinct but that our research articles have already suggested in different ways, direct and indirect, can be nudged together. Cohen focuses on *The Negotiator’s Fieldbook* (2006), an ambitious survey of negotiation theory and practice edited by Andrea Kupfer Schneider and Christopher Honeyman, and key works by U.S. new governance architects Michael Dorf, Charles Sabel, and William Simon. Cohen notes the conjunction may surprise readers: negotiation literature largely focuses on interpersonal dynamics, new governance literature aims at institutional change. Cohen proposes that the two literatures share similar assumptions about subjectivity that drive a shared sense of political hopefulness. Both envision a flexible problem-solving subject—shaped in

negotiation by a discourse of skills and in new governance by a discourse of institutional design. Based on this descriptive claim, Cohen shows how reading these literatures together allows the emergence of alternative perspectives from which to consider questions of power, inequality, and distribution directed at both fields—and, we might add, of relevance too for the questions addressed in this issue's research articles. We conclude, as usual, with book notes.