In This Issue

Readers will find five research articles and two review essays in this issue of Law & Social Inquiry. Ranging widely in locale and time, these studies nevertheless share a theme, in that each may be read as a case study of a distinct construction or representation of legality. None purports to explain the whole through its particular part, but each goes to considerable lengths to describe and explain the conditions that produce the representation of legality that is its particular subject. Collected in one place, these studies remind us of legality’s plurality. Through comparison among them we may determine for ourselves whether or not plurality is the only conclusion we can draw, or whether legality has certain traits in common.

We begin with “Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State,” by Rekha Mirchandani. Problem-solving courts (drug courts, community courts, domestic violence courts, and mental health courts) are unlike traditional courts, writes Mirchandani, in their attempt to get at the root of the individual and social problems that motivate criminal behavior. Theoretical understandings of problem-solving courts are mostly Foucauldian; proponents argue that these new institutions employ therapeutic techniques that encourage individuals to self-engineer in ways that subtly increase state power. But the Foucauldian approach captures only some elements of problem-solving courts and does not fully theorize the revolution in justice that these courts present. Problem-solving courts, domestic violence courts in particular, orient not just around individual change but also around social change and cultural transformation. Mirchandani proposes that combining the Foucauldian idea of a therapeutic state (as developed by James Nolan), with an understanding of the deliberative democratic mechanisms of larger-scale structural transformation (found in Habermas and others) will create a more balanced and empirically open orientation to the actual motivations, goals, and achievements of problem-solving courts.

Our second article is “The Ethic of Diversity: Local Law and the Negotiation of Urban Norms,” by Mariana Valverde. Urban diversity has
been studied by demographers, sociologists, and planners, but sociolegal analyses of the negotiation of diversity are scarce. Valverde opens the account with a study of Toronto, a city that prides itself not only on being diverse but on celebrating rather than merely tolerating diversity. Her analysis combines three elements: a study of the Toronto Licensing Tribunal, a challenge to the property standards by-law, and a campaign to reform the rules governing street food. Valverde’s key substantive finding is that municipal legal processes, in a city that takes pride in its diversity, still work to effect and naturalize distinctly ethnocentric norms: the content of (some) norms may be subject to revision, but the normative power of law as such remains unchallenged. Additionally, the study has important methodological lessons for sociolegal research. Inspired by Bruno Latour and Actor Network Theory, Valverde’s article shows the usefulness of treating local legal processes as a series of networks in which nonhuman objects (such as weeds, courtroom Bibles, and hot dogs) can sometimes be protagonists of legal dramas rather than mere objects.

Each year, we always take special pleasure to present the winners of Law & Social Inquiry’s Graduate Student Paper Competition. Our 2007 Competition attracted a large number of extremely interesting essays, and produced three co-winners: Anya Bernstein, Cheng-Yi Huang, and Leandra Zarnow. Like the other elements of this issue, as readers will see, each of these prize-winning essays offers fascinating and scrupulous research in its own right while also contributing to the general exploration of legality’s representations.

The first of our prize winners is Anya Bernstein, for “The Social Life of Regulation in Taipei City Hall: The Role of Legality in the Administrative Bureaucracy.” Bernstein explores the role of legality in conceptions of state and society among bureaucrats in the Taipei, Taiwan city government. In Bernstein’s study, legality has three settings. When administrators confront the global arena, the existence of law emblematizes modernity and the ability to participate in the international system. In interactions among administrators, law is laden with impossible ideals and fraught with assumptions of hypocrisy. In dealings with people outside the government, legality often signals the breakdown of other, more valuable social norms. Far from legitimating administrative action, legality itself is legitimated by reference to the same values as other social action: it is held up to an ideal of consensus and cultural coherence and judged by its ability to fulfill obligations and nurture relationships. Law, Bernstein concludes, does not hegemonically structure administrators’ conceptions of state and society. Rather, it defines one aspect of governance at the margins of legitimacy, dependent on justification through other ethical norms.

Our second prize winner is Cheng-Yi Huang, for “Enacting the ‘Incomprehensible China’: Modern European Jurisprudence and the Japanese Reconstruction of Qing Political Law.” In this article, Huang tells us a
gripping story that links legality with two colonialisms. The great ambition of Japanese colonialism, from the time of its debut at the end of the nineteenth century, was the reformulation of Chinese law and politics. One of the most extraordinary examples of this ambition is The Administrative Law of the Qing Empire [Shinkoku Gyōseihō], a monumental enterprise undertaken by the Japanese colonial government in Taiwan intended not only to facilitate the Japanese colonial administration of Taiwan but also to reorder the entire politico-juridical order of China along the lines of modern rational law. Huang examines the legal analysis embraced in The Administrative Law of the Qing Empire and recounts its attempt to reconstruct the Qing’s "political law" (seihō) through a strange, ambiguous, and hybrid resort to "authenticity." The strangeness of this Japanese colonial production comes from Japan’s dual position as both colonizer of Taiwan and simultaneously colonized by "modern European jurisprudence" (kinsei hōri). In uncovering the effects of modern European jurisprudence on the Japanese enterprise, Huang also traces how Japan’s pursuit of its own cultural subjectivity is embedded in The Administrative Law, epitomizing the campaign of national identities observable in the process of East Asian legal modernization.

Our third prize winner is Leandra Zarnow, for “Braving Jim Crow to Save Willie McGee: Bella Abzug, the Legal Left, and Civil Rights Innovation, 1948–1951.” Zarnow’s article, a study of a Cold War era interracial Mississippi rape case, examines the role of Bella Abzug, lead counsel for the defendant, Willie McGee. Representing McGee left an indelible mark on Abzug: she made her first trip south, wrote her first Supreme Court petition, and faced her first death threat. Participation in the Left legal bar—especially the National Lawyers Guild and Left feminist circle—shaped Abzug’s legal consciousness as she redirected the McGee defense significantly in 1950. By joining race and sex, Abzug’s legal argument zeroed in on the taboo of interracial sexual relations at the heart of Southern rape cases, thereby exposing the innermost sexual color line. She urged the courts and cause lawyers—unsuccessfully—to pursue a more radical civil rights agenda than the outlawing of public segregation ultimately achieved in Brown v. Board of Education and typically recognized in Cold War civil rights scholarship.

Reading Zarnow’s dramatic narrative of Bella Abzug’s negotiation of and with the treacherous legalities of Jim Crow, one can imagine settings, scenes, and scenery that seem tailor-made for a biographical film. In this aspect Zarnow’s article is a helpful segue to the first of our review essays, “Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in Erin Brockovich and Other Contemporary Films,” by Michael McCann and William Haltom, which highlights the errors made by filmic representations of legality in that form. Although feature films may overpraise lawyers and civil courts as means of securing justice, McCann and Haltom argue, they caricature lawyers and litigation. Their analysis of Erin Brockovich (directed by Steven Soderbergh and produced by Danny DeVito et al., 2000) reveals four motifs—two
favorable and two unfavorable to public-interest litigants and litigation—
that have characterized similar films in the last decades: Class Action (1991),
These filmic populist romances promote ordinary heroines (mostly) who redeem a
problematic system through common sense and everyday virtue rather than
through laws, lawyers, and litigation.

Our second review essay, the seventh and final contribution to this issue,
acts in a sense as a partial wrap-up on the topic—legality, its forms, appear-
ances, uses, and limits—that ties the issue together. In “The Past Does Not
Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court
Movement,” Josh Benson returns to where we started (courts, in this case
The Court) to call our attention to the reemergence over the last ten years
of fears of judicial power among scholars on the left. This renewed “Anti-Court”
movement includes the minimalism of Cass Sunstein, the popular con-
stitutionalism of Mark Tushnet and Larry Kramer, and the bipartisan judicial
restraint of Jeffrey Rosen. Benson traces the origin, development, and
implications of this movement, noting its particular ties to historic trends
in the academy: the Legal Process School, critical theory, and the positivist
work of Gerald Rosenberg and Michael Klarman. Benson also considers the
movement’s preference for majoritarian politics—a partiality borne of dis-
satisfaction with the Rehnquist Court, but also, conversely, recognition of
the failures of conservative attempts at policy making. The essay concludes
by considering the ambitions of these scholars to develop a truly apolitical
theory of judicial power. In light of the furious debate over the purported
“minimalism” of John Roberts, says Benson, severing theory from politics
may prove impossible.

As usual, the issue concludes with assorted book notes, plus the annual
“Review Section Index,” which lists all the books reviewed in our Review
Essay section in Volume 33.