

# Good Reads

By the full-time faculty. January 1, 2007 through December 31, 2007. (Short pieces have been omitted.)

## BOOKS

**Adler, Barry**  
*Cases, Problems, and Materials on Bankruptcy*. 4th edition. New York: Foundation Press, 2007 (with Douglas G. Baird and Thomas H. Jackson).

**Allen, William T.**  
*Commentaries and Cases on the Law of Business Organization*. 2nd edition. Austin: Wolters Kluwer Law & Business/Aspen Publishers, 2007 (with Reinier H. Kraakman and Guhan Subramanian).

**Alston, Philip**  
*International Human Rights in Context: Law, Politics, Morals: Text and Materials*. 3rd edition. Oxford: Oxford University Press, 2007 (with Ryan Goodman and Henry Steiner).

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**Chase, Oscar**  
*Civil Litigation in Comparative Context*. St. Paul: Thomson/West, 2007 (with Helen Hershkoff, Linda Silberman, Yasuhei Taniguchi, Vincenzo Varano and Adrian Zuckerman).

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**Edwards, Harry T.**  
*Federal Courts—Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions*. St. Paul: Thomson/West, 2007 (with Linda Elliott).

**Estlund, Cynthia**  
Editor. *Employment Law Stories*. New York: Foundation Press, 2007 (with Samuel Estreicher and Gillian Lester).

*Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*. Oxford: Hart Publishing, 2007 (with Brian Bercusson).

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Editor. *Antitrust Stories*. New York: Foundation Press, 2007 (with Daniel A. Crane).

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*Payment Systems and Credit Instruments*. New York: Foundation Press, 2007 (with Robert E. Scott).

**Halbertal, Moshe**  
*Concealment and Revelation: Esotericism in Jewish Thought and Its Philosophical Implications*. Princeton: Princeton University Press, 2007.

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**Holmes, Stephen**  
*The Matador's Cape: America's Reckless Response to Terror*. New York: Cambridge University Press, 2007.

**Issacharoff, Samuel**  
*The Law of Democracy: Legal Structure of the Political Process*. 3rd edition. New York: Foundation Press, 2007 (with Pamela S. Karlan and Richard Pildes).

**Narula, Smita**  
*Americans on Hold: Profiling, Citizenship and the "War on Terror"*. New York: Human Right Watch; Center for Human Rights and Global Justice, New York University School of Law, 2007 (with Jennifer Kim, Naseem Kourosh, Jayne Huckerby and Kobi Leins).

*Hidden Apartheid: Caste Discrimination against India's Untouchables. A Shadow*

*Report to the U.N. Committee on the Elimination of Racial Discrimination*. New York: Human Right Watch; Center for Human Rights and Global Justice, New York University School of Law, 2007 (with Stephanie Barbour, Jayne Huckerby, Tiasha Palikovic and Jeena Shah).

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*Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*. New York: Cambridge University Press, 2007 (with Nicholas Bamforth).

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**Bar-Gill, Oren**  
*Consent and Exchange*. Cambridge, MA: National Bureau of Economic Research, 2007. NBER working paper no. 13267 (with Lucian Bebchuk).

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"The Rise and Fall of the Political Question Doctrine," in *The Political Question Doctrine and the Supreme Court of the United States*. Nada Mourtaba-Sabbah and Bruce E. Cain, editors. Lanham, MD: Lexington Books, 2007.

## Judaism and the Challenges of Modern Life

EDITED BY MOSHE HALBERTAL AND DONNIEL HARTMAN

“The Bible orders the destruction of the pagan religions found in the land of Israel, because it does not allow for the existence of competing gods. For the adherents of monotheistic religions, it is not only important that the God that they represent be admired and worshipped; it is also important that he be the one and only God. The biblical God does not tolerate the worship of other gods alongside himself... The internal nexus between monotheism and exclusivity might lead to violence and intolerance. How do adherents of monotheistic faith confront the demand for exclusivity, particularly when accompanied by the call for total war against its rivals? This question became sharpened and exacerbated at the beginning of the present century, during which it seems possible that two monotheistic civilizations—Islam and Christianity—might stand against one another in a violent confrontation. Is it indeed correct to say that there is a connection between the structure of monotheism, and intolerance and violence? Is there a place in which monotheistic religions could move on from a clash of civilizations to a collaboration between civilizations? The negation of idolatry is the ultimate basis of Judaism. What is a possible approach of Judaism to this painful and complex subject?

From the chapter "Monotheism and Violence" by Moshe Halbertal. Published by Continuum, 2007.



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"La Demande de Bijuristes Canadiens," in *Le Bijuridisme: Une Approche Économique*. Albert Breton and Michael J. Trebilcock, editors. Paris: ESKA, 2007.

"The Role of Non-Profits in the Production of Boilerplate," in *Boilerplate: The Foundation of Market Contracts*. Omri Ben-Shahar, editor. New York: Cambridge University Press, 2007.

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## Fighting for the City: A History of the New York City Corporation Counsel

WILLIAM E. NELSON

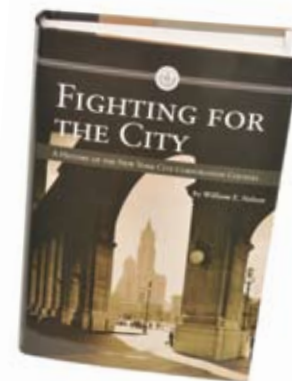


While New York City was growing, America was democratizing. When they rejected monarchy in the Declaration of Independence, Americans forced themselves to invent a new form of government, and slowly, over the half-century that followed, the nation as a whole, and the city in particular, moved in the direction of government of the people, by the people, and for the people. Together with New York's enormous growth, which fueled the city's demand for legal services, democracy transformed the job of the city's legal advisor. Increasing legal needs tended to professionalize the office, while democracy tended to politicize it.

By the time he assumed the office of Recorder in 1798, Richard Harison, the last man to serve the city simultaneously both as Recorder and as lawyer to the corporation, found that he could not personally perform all the tasks of the office.... Accordingly it became necessary to employ additional outside counsel as assistants. The Common Council authorized Harison to do so, but the authorization raised a problem. Traditionally, the Recorder had been compensated by fees provided to all judges and lawyers under a state fee schedule.... Other work, such as advising the council or drafting legislation for it, had been provided for free. As Harison's work increased and he needed to hire others to substitute for him, he faced an impossible choice: either he had to pay other lawyers to do the work for which he received no compensation or he had to give them the fees for compensated work and perform all the uncompensated labor by himself. In the end, he avoided having to choose by asking the Common Council to pay him for the work previous Recorders had done without pay, and the council agreed to give him a \$500 annual retainer.

The retainer and the authorization to employ assistant counsel altered the character of Harison's position. When the office of Recorder had first been created in the seventeenth century, everyone knew that the man whom the Governor appointed to fill it necessarily would serve as a judge on the city's court and as the city's legal counsel. That was what English Recorders always had done, and what they always had done defined the office. But now the Common Council, the city's elected legislative body, exerted its local, popular power by appointing counsel of its own choice. Harison or lawyers substituting for him would now act as attorneys for the city not because the Governor had appointed them Recorder but, at least in part, because the Common Council had created a mechanism for retaining and compensating lawyers to represent it. And those lawyers would be responsible not only to the Governor and to centuries of customary law, but to the electorate of New York City.

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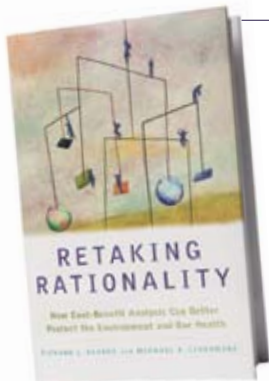
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## Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health

RICHARD L. REVESZ AND MICHAEL A. LIVERMORE

Progressive groups have had many important successes in challenging the status quo by framing their arguments in terms of individual rights. The civil rights movement provided the template for other important social justice movements like the women's and gay rights movements, and the environmental justice movement. There are important tactical advantages to arguing in terms of rights—perhaps most important, for these groups, has been access to the courts as a lever of power to move their agendas. Rights-based arguments are also professionally attractive to the cadre of lawyers that staff many proregulatory groups. And the rhetoric of rights resounds strongly within the American public. Because cost-benefit analysis argues in terms of aggregate welfare, rather than individual rights, it is unfamiliar to many progressive organizations. That does not mean, however, that it is ineffective.

The same story can be told in many ways. In order to reach as broad an audience as possible, proregulatory groups must be able to tell their stories so that every sector of American society can hear them. Environmental, consumer, and labor organizations know how to tell compelling narratives of the consequences of governmental failure—the children with asthma, the young father crushed in an industrial accident. These stories are important and should be told. They galvanize public support, and speak to our essential humanity by calling on our compassion for the troubles of our fellow human beings. But such narratives can lose their power in judicial or regulatory proceedings—in the eyes of judges or regulatory agencies, these are soft and unscientific, mere anecdotes that lack concrete, quantifiable meaning. And there are many Americans who require not only individual stories, but hard numbers to convince them that regulation is justified. It is in these contexts that proregulatory groups can reach for cost-benefit analysis. The heart of any movement may be individual stories of hardship and struggle, of injustice and redemption. But at some point, reason—coolly calculating, rational, disinterested—must be applied. Proregulatory groups need not lose their souls in order to embrace cost-benefit analysis. They only need to be reminded that reason is often on their side as well.

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# Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law

NICHOLAS C. BAMFORTH AND  
DAVID A. J. RICHARDS

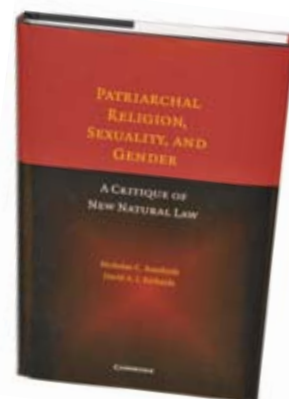


[W]hat motivates the new natural lawyers' [quite bad normative] arguments?

We offer... a historical, cultural, and psychological study of the impact of patriarchal assumptions

on the formation, development, and continuing existence of the Catholic Church's traditionalist views concerning sexuality and gender. We consider how such patriarchal views arose in the works of Saint Augustine and Saint Thomas and on this basis evaluate the motivations that led the new natural lawyers to defend such views today in the way that they do. We argue that whatever may once have been a reasonable basis for such views, they are today demonstrably unappealing in substantive moral terms. If this analysis is correct, then the new natural lawyers' arguments about important questions of individual liberty and public and private morality—relating to marriage, the role of women, lesbian and gay sexuality, pregnancy, contraception, and abortion—can be seen as playing a role in unjust contemporary rationalizations of constitutional and moral evils such as sexism and homophobia. In many ways, these points go to the heart of our critique: for we suggest that the new natural lawyers' argument will strike anyone with a concern for individual liberty as being morally unappealing (indeed, radically so) and as unintelligible without a prior commitment of a sectarian religious nature. The new natural lawyers' underlying motivation is to defend the authority of a patriarchal Church, with a rigid and unchanging set of doctrines, against reasonable internal criticism from other Catholic thinkers and reasonable external criticisms from society at large. The legitimacy problem currently posed by patriarchal Papal authority is, we argue, well illustrated by the Catholic Church's inadequate response to the recent priest abuse scandal in the United States. Viewed in this light, new natural law must ultimately be seen as a defense of anachronistic patriarchal religion, a key reason for thinking that the theory's arguments cannot be acceptable in modern-day [secular] constitutional democracies.

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## Releasing Prisoners, Redeeming Communities

ANTHONY C. THOMPSON

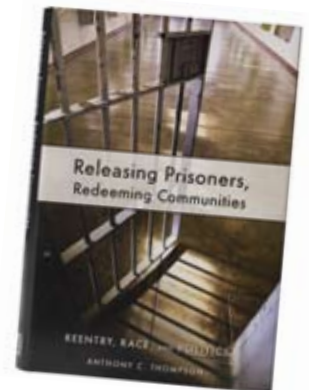
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Years after becoming a law professor, as a participant in criminal justice meetings and in conducting Socratic dialogues with judges, often I heard them say, 'Oh, I have learned so much about relapse and recovery. I remember when I used to send someone to prison for one dirty test.' Strikingly, as we developed our knowledge base, we did not go back and adjust sentences or sentencing schemes to compensate for our new knowledge. Rather, the criminal justice players and policy makers simply sat back idly and let a generation of young men and women, most often persons of color, sit needlessly and uselessly behind bars. Too often, those men and women received no treatment, vocational training, or education.... Slowly, the political discourse began to include and embrace broader notions of punishment and community corrections. But reconnecting with the community is difficult for recently released individuals. We never stopped to think that limiting access to education and vocational training would make reentry so terribly challenging.

At the same time, no one focused on the fact that employers habitually discriminated in hiring ex-offenders. Moreover, by limiting access to drug treatment both inside and outside of prison, we did not recognize that the temptation ex-offenders faced upon release was a recipe for disaster. We spent so much time trying to fend off the incredibly long and harsh prison sentences that we lost sight of how our clients were being transformed in prison.... We didn't anticipate the long-term negative consequences of the policies that were developing.

Racial imagery, mixed with police practices and racial profiling, transformed our society. The confluence of pervasive media images, popular culture, and our nation's history has led us to an almost unconscious acceptance of racial stereotyping and a deep-seated fear of people of color.... A collision course of race, and the pre-suppositions about crime, and the tacit acceptance of police misconduct began a chain of events whose effects and implications we are only now beginning to feel.

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