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ENDING DEATH BY DANGEROUSNESS
A PATH TO THE DE FACTO ABOLITION OF THE
DEATH PENALTY
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Use of the death penalty—both in number of new death sentences and actual executions—has been steadily decreasing during the past decade. Two phenomena explain this decrease: (1) continued discovery of individuals on death row who are actually innocent of the crimes they allegedly committed, and (2) increasing use of life without parole as a sentencing alternative to the death penalty. This Article proposes a deeper exploration of the availability of life without parole. The strongest determinant of whether an individual receives the death penalty is his perceived future dangerousness to society. Given the overwhelming influence of future dangerousness in death penalty determinations, this Article argues that a wholesale removal from capital cases of the concept of future dangerousness, a concept largely irrelevant in light of the availability of life without parole (and solitary confinement), would approach de facto abolition of the death penalty.

TYING ARRANGEMENTS AND ANTITRUST HARM
Erik Hovenkamp & Herbert Hovenkamp 925

A tying arrangement is a seller's requirement that a customer may purchase its "tying" product only by taking its "tied" product. In a variable proportion tie the purchaser can vary her purchases of the tied product. Such arrangements are widely considered to be price discrimination devices, but their economic effects have been controversial. Tying has been attacked on the theory that price discrimination of this sort reduces consumer welfare. We show that this argument is based on a misunderstanding of the kind of price discrimination that is involved in variable proportion ties. We also show that tying in concentrated markets produces significant benefits from the elimination of double marginalization. Then we extend our analysis to bundled discounts, focusing on the possibility of increased harm that can occur if the monopolist increases the standalone price of one good when inaugurating the bundled discount. We conclude that no kind of unilaterally imposed tying arrangement, even by a monopolist, should be per se illegal.

TAKING THE GOOD WITH THE BAD: RECOGNIZING
THE NEGATIVE EXTERNALITIES CREATED BY CHARITIES
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The tax code allows taxpayers to deduct amounts donated to an extremely broad variety of organizations deemed to create societal benefits—that is, positive externalities. But many organizations that may receive tax-deductible contributions also cause serious negative externalities that are ignored not only by the tax code but also by subsidy theory, one of the most utilized scholarly theories developed to analyze the deduction from an economic and morally neutral perspective. In order to properly account for negative externalities, one needs to look beyond the economic models utilized by subsidy theorists. For instance, there should be some limit to the types of harms organizations can cause while retaining their subsidy, something not adequately provided for by the Kaldor–Hicks model used by subsidy theorists. This Article suggests the government should not subsidize organizations that impinge on an individual's ability to live a full and meaningful life as a fair and equal member of society. Additionally, the government should not subsidize the efforts of organizations to promote their views of societal issues upon which there is reasonable disagreement. This Article explores the question whether and to what extent donors should be able to deduct amounts donated to charities that not only provide societal benefits but also cause harm.

INNOCENCE COMMISSIONS
AND THE FUTURE OF POST-CONVICTION REVIEW

David Wolitz 1027

In 2006, North Carolina became the first state to establish an innocence commission—a state institution with the power to review and investigate individual post-conviction claims of actual innocence. And on February 17, 2010, after spending seventeen years in prison for a murder he did not commit, Greg Taylor became the first person exonerated through the innocence commission process. This Article argues that the innocence commission model pioneered by North Carolina has proven to be a major institutional improvement over conventional post-conviction review. Existing court-based procedures are inadequate to address collateral claims of actual innocence, and innocence commissions, with their independent investigatory powers, are better suited to review such claims. At the same time, the North Carolina commission suffers from the tension—inherent in all expert agencies—between efficiency and discretion, on the one hand, and procedural fairness and accountability, on the other. This article suggests procedural reform to help achieve a balance between these competing values. Overall, the record of the North Carolina commission demonstrates that the commission approach can provide justice where the traditional court system has failed, and, with the reforms suggested here, it can be a model for states across the country.

NOTES

FROM 287(g) TO SB1070: THE DECLINE OF THE FEDERAL IMMIGRATION PARTNERSHIP AND THE RISE OF STATE-LEVEL IMMIGRATION ENFORCEMENT

Nicholas D. Michaud 1083

In July 2009, the Department of Homeland Security dramatically altered the notorious 287(g) program, a program that cultivates partnerships between Immigration and Customs Enforcement and local law enforcement. This was the opening salvo of a persistent campaign to bind state-level enforcement efforts to the Obama Administration's selective immigration enforcement policy. The effort would assume the national spotlight in the legal battle over

the policy's own progeny, the controversial Support Our Law Enforcement and Safe Neighborhoods Act (SOLESNA), popularly known as Arizona Senate Bill 1070. This Note examines the foundations of local immigration enforcement. It then analyzes the evolution of the 287(g) program, concluding that the policy alterations therein have both precipitated and justified the accelerating trend toward sub-federal exercise of inherent authority and police power in the struggle against illegal immigration.

THE MERITS OF PROCEDURE VS. SUBSTANCE: *ERIE*, *IQBAL*, AND AFFIDAVITS OF MERIT AS MEDMAL REFORM
Meryl J. Thomas 1135

Even before *Twombly* and *Iqbal*, characterizing a state substantive policy effected through a procedural means presented a confounding *Erie* choice-of-law question for diversity courts. Courts have wrangled with this question, struggling to implement *Erie*'s mandate to apply federal procedural rules and state substantive law in the face of procedure that is by its nature substantive. The pleading standard—a prototypically procedural mechanism—is illustrative: states have used procedure—affidavit-of-merit statutes requiring heightened pleading of specifically defined facts—to effectuate a broader, substantive policy—medical malpractice reform. Over the years, courts have diverged, with many jurisdictions on each side of the procedure-so-federal-rule vs. substantive-so-state-law divide. But which rule should win out under the now-heightened federal plausibility pleading standard? With an eye to both the system and the policy underlying *Erie*, does federal or state law prevail?

LAW & POLICY ESSAY

ARMING STATES' RIGHTS: FEDERALISM, PRIVATE LAWMAKERS, AND THE BATTERING RAM STRATEGY
Barak Y. Orbach, Kathleen S. Callahan & Lisa M. Lindemenn 1161

This Essay provides an initial account of a strategic apparatus crafted by private lawmakers to influence federal policy. The "battering ram strategy" employs the legal powers of states and localities to challenge and weaken federal laws. Recently, a specific weapon, the "Commerce Battering Ram," has developed to challenge current Commerce Clause jurisprudence, using the heft of the Tenth Amendment and numerous state legislatures to propel its argument forward. The weapon's strength is augmented by the ability of private lawmakers, facilitated by *Citizens United*, to stack state legislatures with senators and representatives who are sympathetic to their goals. The Essay documents the core of a particular Commerce Battering Ram, the Firearms Freedom Act movement, which has proliferated and armed other Tenth Amendment platforms with a similar formula for challenging federal laws. This formula was drafted and promoted by a private citizen with a specific gun rights agenda. State legislators have enacted and cloned the formula, and its model has been adopted to challenge federal law in other regulatory domains, most notably healthcare reform. The compounding effect of these Commerce Battering Rams has not been studied. However, if their proponents—largely members of the Tea Party movement—are successful in their attempt to break through the walls of federal law, the result may have an enormous unintended impact on the American people.