

# DEAN'S WELCOME

Toni M. Massaro

Our College is at a significant turning point in our history, and our future capacity to provide outstanding teaching, research, and service will depend upon how we act upon our opportunities and meet the challenges before us. This is true of all of the nation's law schools, though our hearts and minds lie with this one. This Anniversary issue of the *Arizona Law Review* affords a suitable arena for reflecting on this turning point and our response to it.

Two items in particular stand out in the year's landscape, both of which reflect and shore up our strengths. The first is the completion of the College of Law's most comprehensive facilities renovation in almost 30 years—The Law Commons Project. This project is the first step in our Promise to the Future Campaign, which is dedicated to fortifying the four pillars of College excellence—outstanding students, superb faculty, compelling academic programs, and exceptional research and community outreach.

Thanks to the generosity and foresight of many professional, community, and academic friends, our Law Commons Project has completely renovated the law library, improved our teaching and community space, and relocated all of our student offices to the College main floor. It is a truly transformational project that better facilitates learning and engagement and enables us to address ever-unfolding changes in how modern legal education, research, and communication are conducted.

Contemporary educators, legal professionals, and law students interact through “wireless” teleological connections as never before. Yet, we continue to engage in and value face-to-face encounters and small group interactions. The modernized College thus maintains the still indispensable physical library collection, user services, and multiple “sticky” spaces for seminar-style and informal student and faculty exchange. And it emphasizes the College's historical identity as a close-knit culture where students are the heartbeat of the educational experience and where the many communities we serve are welcome and active participants in that experience. But it also takes into account the pervasive impact of information technology and recognizes that student-centered and collaborative teaching methods now complement the professor-centered methods of earlier eras. Finally, it mirrors and sustains the ways in which “intellectual space” today is both physical and metaphysical—that learning occurs both here and everywhere, and legal information sources are local and global at once. In other words, the facilities

transformation preserves the best of our traditions while ushering in important innovations that will enable the College to adapt to a world in constant flux.

A second turning point likewise reflects our proud past and dynamic future and is captured here, in the 50th anniversary issue of the *Arizona Law Review*. Over the course of its first half century, the *Review* has contributed to the College's achievement of its current leadership position among American law schools and has enabled us to fulfill our distinctive professional mission of contributing meaningfully to the world's store of ideas through critical free exchange about the law and about legal institutions. Its members have created a nationally respected forum in which distinguished legal academics, judges, and practitioners express influential ideas about law's progress and promote law reform at its best.

The *Review*, too, must look to the future with new methods of responding to technology, to developments in our profession, and to other global dynamics. It will need to be more flexible and globally connected as it moves forward, while also respecting local needs, the abiding characteristics of human exchange, and the best of our intellectual and professional traditions.

Given these goals, it is fitting indeed that the *Review* editors have chosen to celebrate its important milestone by showcasing our own academic community. Their choice illustrates well the change-stasis dynamic. The inaugural issue of the *Review* likewise featured articles by Arizona Law faculty, as well as case notes and comments written and edited by Arizona Law students who went on to become respected state and nationally known lawyers, academics, and judges—Steven Duke, Phil Weeks, Bill Browning, Jack Pfister, Phil Toci, John Christian, Bob Beshears, and John McDonald, among other contributors.

This anniversary issue is a literal bookend to that first issue. Like the first volume did, this issue features the work of prominent writers and equally promising students. The contributions deal with themes that readers of fifty years ago would have recognized as important matters for our profession and those whom we serve, yet they also raise issues that are new to our generation and do so through new lenses.

The issue opens with an essay by Distinguished Visiting Jurist Sandra Day O'Connor and Distinguished Faculty Fellow RonNell Anderson Jones, who describe Arizona's appointive/elective merit-based judicial selection process and reflect on its balance of judicial independence and judicial accountability. This balance is a topic of abiding global, national, and local significance. From the nation's founding, public officials and other policymakers have wrestled with the proper relationship between and among the three branches of government and whether and when the judiciary should bend to popular will. Courts here and abroad continue to face challenges to their authority and jurisdiction, and lawyers and jurists in many parts of the world have risen up to defend the rule of law and the integrity of their judicial systems. At the same time, scholarly and lay critiques of judicial power outline the risks inherent in a politically insulated judiciary. These debates make clear that the line between judicial independence and judicial accountability is not self-evident and is likely to remain contested in the decades ahead.

Recognizing the enduring significance of this and related themes, the College recently established the William H. Rehnquist Center on Constitutional Structures of Government. The Center is named for the late Chief Justice, who taught at the College for over a decade as Visiting Jurist in Residence. The mission of the Rehnquist Center is to promote the dispassionate and nonpartisan study of judicial independence, separation of powers, and the interplay between federal, state, and other sovereignties. The conversation begun in these pages by Justice O'Connor and Professor Jones therefore will continue in future issues of the *Review* and among conferees and others drawn to the work of the College's new Center.

The commemorative issue then continues with articles by Arizona Law faculty on traditions of transactional fairness, climate change, the Indian Child Welfare Act, antitrust law, law and entrepreneurship, the tort of emotional distress, tax policy, federal constitutional law, trademark law, and the collaborative law movement within the legal profession. Here again, the old walks amidst the new in legal thinking and writing.

The federal constitutional law amendment process is the subject of Professor Jack Chin's essay, coauthored by Arizona Law graduate Anjali Abraham. They describe the legal and symbolic value of post-adoption ratification of constitutional amendments, which can perfect procedurally questionable amendments and make a powerful normative statement about shared constitutional values. This is hardly a theoretical exercise; Professor Chin has spearheaded on-the-ground efforts to urge post-adoption ratification of the fourteenth amendment of the United States Constitution.

Professor Dan B. Dobbs, surely the nation's leading authority on tort doctrine, here offers a reexamination of the proper role of a defendant's undertakings and special relationships in emotional distress cases. He identifies a gap in current tort doctrine: it typically does not honor the duties created by a defendant's special relationship with or undertakings to care for a plaintiff. Professor Dobbs regards the gap as inconsistent with the general tort principle that an undertaking initiates a duty commensurate with that undertaking and argues that this general principle should be applied to emotional distress cases.

Co-authors Gordon Smith and Darian Ibrahim describe a new field of law—or is it a new field? They offer their preliminary thoughts on how law might better encourage entrepreneurial activity—a topic of considerable interest here in Arizona—and offer preliminary thoughts on whether “law and entrepreneurship” should be categorized as a discrete area of curricular and intellectual inquiry versus a derivative of other established legal domains.

Emerging legal thought on how to deter environmental threats is the focus of Lohse Chair Carol M. Rose's essay. Rose draws on historical lessons from American water rights regimes, including Western legal traditions, and ties them to modern debates about regulation of greenhouse gas. She combines expertise in property law, history, and economics in her typically thoughtful and elegant discussion of contemporary “cap and trade” measures that address the escalating dangers of global climate change.

Professor John Swain takes up the contrast between national and subnational tax policy as it relates to cross-border transactions and identifies common questions that arise in both contexts whose answers diverge. “What explains these variations?,” he wonders. “Context matters,” is his response. The primary explanation for the divergence is that the United States is far more integrated in almost all respects than is the international system. He therefore predicts that as the world economy becomes more integrated, the treatment of international cross-border transactions likely will mirror more closely the treatment of subnational cross-border transactions. Time will tell, of course, whether his predications prove to be accurate, and his future scholarship is sure to track these developments.

Of specific importance to jurisdictions with a large population of Native Americans is Professor Barbara Atwood’s analysis of the Indian Child Welfare Act (“ICWA”). Atwood concludes that ICWA can and should be construed to allow for greater voice and active participation by Indian children in ICWA proceedings. Given her established role as one of the nation’s most respected authorities on children’s rights, Atwood’s piece makes an important contribution to this aspect of ICWA enforcement.

Professor Graeme Austin, a leading international voice on intellectual property law, challenges a trademark law’s justification of trademark protection in terms of protecting the “ordinarily prudent consumer” from the harms of confusion and dilution. Austin argues that protecting consumers from confusion and dilution may be a necessary component in trademark law but is not necessarily sufficient. The thrust of his work looks closely at assumptions that typically are advanced in support of the legal doctrine, revealing that all is not as the conventional account suggests. The result is a more nuanced account of trademark law that may offer a firmer foundation for future work in this area.

In an article that reinforces the conclusions of Justice O’Connor and Professor Jones, Professor Jean Braucher analyzes the Arizona tradition of transactional fairness. She links Arizona courts’ approach to contract law to Arizona’s landscape, to its western culture, and to its merit-based selection system for judges. Braucher concludes that all three contribute to sound public policy as it relates to contracts and continue to serve Arizona’s citizens well.

Professors Marc Miller and Ron Wright take on a very powerful—even foundational—premise about federal law’s proper relationship to state laws. The conventional wisdom is that state courts and legislatures cannot go below a federal constitutional “floor” for personal liberties. Miller and Wright identify significant “leaks” in this “floor,” which stem from the inherently fuzzy nature of rules, from state legislation that challenges federal standards, and from varying judicial interpretations of federal law. The authors offer a corrective to the conventional wisdom—one that is likely to destabilize very basic ways of thinking about national versus local authority.

Professor Barak Orbach likewise tests common assumptions and offers an amendment to conventional thought. He describes a century-old debate within antitrust law about “resale price maintenance” (“RPM”)—manufacturer-imposed restrictions on retail prices of goods that artificially inflate prices—and identifies a

conundrum: why would manufacturers be interested in high retail prices that seem to protect retailers' profits? He concludes that traditional accounts of the motivations for RPM often fail to consider that consumers occasionally desire higher prices of goods—especially for luxury or status goods. Thus discounts or sales of luxury items at discount stores can reduce their brand appeal. He speculates that antitrust scholars underplay this undeniable phenomenon because of their commitment to a weak premise: that paying lower prices always serves consumers' true and best interests. His article upends this assumption by identifying common, concrete instances throughout history and at present belying that general claim. Orbach maintains that a *per se* rule for RPM is unwarranted given these instances in which RPM may make economic sense.

Finally, Professor Ted Schneyer brings his formidable knowledge of the legal profession to bear on the subject of the Collaborative Law Movement ("CL"). His goal is not to add to the already significant body of literature on the ethics of CL but to study the "mainstream" bar's response to this innovation. In general, he notes, the bar has been receptive to the CL innovation. Taken alone, however, the bar's favorable response is not sufficient to guarantee the movement's viability as an alternative to adversarial methods. Schneyer then offers insights from game theory that illuminate obstacles to negotiating mutually advantageous agreements and that suggest how these obstacles might be overcome. In particular, the CLM needs to develop its own professional associations to create the infrastructure that will assure an effective negotiating process. Schneyer also suggests that the CLM lends support to the view that ethical regulation of law practice is moving away from top down production of general, uniform rules and has taken a turn toward decentralization in response to lawyer specialization and other centrifugal forces.

This sampling of the rich diversity of faculty scholarly interests echoes the corresponding rich diversity of the modern law school curriculum and the wide range of professional interests of our faculty and our students. It illustrates that legal scholarship and legal education still are very much anchored, as they were fifty years ago, in the common law and foundational principles that have molded lawyers and law throughout American history. Yet, they also have evolved over time to meet the needs of a changing profession, academy, and world.

One aspect of this evolution is reflected in the pieces by Rose, Orbach, Schneyer, and Ibrahim and Gordon and is something that law schools nationwide have been experiencing: the increasing influence of other disciplines on legal scholarship and on law faculty. Although the problems that lawyers address have *always* been inherently interdisciplinary, and the academy has for decades taken an active interest in the intersection of law and other disciplines, law's indisputable interdependence upon other disciplines and professions today has a far more explicit impact on legal training, judicial opinions, and legal scholarship. Standard doctrinal analysis now is often complemented by interdisciplinary and empirical studies of legal problems, which can help us to better understand and measure law's relationship to the economy, to peoples' psychological well being, to civic and political institutions, to the environment, to social and cultural practices, and to other aspects of human existence.

Since the *Review* began in the 1950s, we have witnessed many other notable transformations as well. Legal ethics now is a mandatory and central part of the law school curriculum. Clinical education and other experiential programs compose a significant portion of the law school internal and public identity. Technological changes in law office management and the legal process and new structures of the legal profession have altered how we prepare students and how they perform their work when they leave us. The democratization of our profession and lowered barriers for women and for members of racial, ethnic, and sexual minorities have changed our student body, our faculty, and our profession. The increasing influence of globalization and international and comparative law on domestic law and legal practice have altered the College, American legal education, and America itself. All of these developments have made their mark on the *Review*.

Yet, the *Review* not only mirrors intellectual and professional shifts; it creates them. When our student editors choose which topics to cover and which authors to publish, they determine which ideas are given a national voice, and thus which ones may have public influence. In any given year, the *Review* literally receives thousands of submissions for publication. Selecting among them is a weighty responsibility—one that very few professions place in the hands of their students rather than in the hands of more senior professionals.

This student-centered approach to our profession's academic voice has many virtues. Law students exist in between two worlds; they are both pre-professional laypeople and individuals with professional identities and vocabularies and habits already taking shape. In this transitional space, ideas that are fresh, organic, or counter to customary ways of thinking stand a greater chance of expression than in venues umpired solely by professionals with solidified intellectual habits. Our profession's distinctive tradition of allowing these pre-professional student editors to umpire so much of the universe of legal scholarship teaches the students much about contemporary legal writing and thought, allows for interaction between student editors and leaders in the profession, broadens students' exposure to a variety of legal issues, and compels legal scholars and other contributors to write lucidly, transparently, and in a voice that students can understand—not just intellectual insiders. The educational arrow points in two directions in another respect: many law students possess technological savvy that some of their professors lack. The pace of the IT revolution is exceedingly brisk, and teachers can and do learn much from their students about emerging technologies.

Student-edited reviews also require academics to bridge generations, as well as gaps in expertise and between disciplines. This serves, in turn, our profession's abiding commitment to public access to law and to assuring that law and legal discourse are transparent enough to engage citizens who are willing to study them as part of a serious commitment to the democratic process. In a world of increasing specialization, making legal knowledge and expertise accessible to non-specialists is a worthy endeavor that may mitigate somewhat the centrifugal forces identified by Professor Schneyer.

All of this is to the good, and there is much to celebrate as we look ahead to the next chapter in our history. But major challenges also loom—for the *Review* and for the College as a whole. One of these is that despite the new power and social relevance of contemporary scholarship, some judges and lawyers report that they rely less often on law reviews than they did in the past because law reviews have become more disconnected from their workaday analysis of statutes and cases.<sup>1</sup> One federal appellate judge recently went so far as to say that he hasn't "opened up a law review in years. . . . No one speaks of them. No one relies on them."<sup>2</sup>

Given that legal scholarship has never been more connected to the wider world, and never has been more sophisticated in terms of its ability to address legal problems from multiple sides, what is the root of this sense that this work is not as relevant as it was years ago? How should law schools and law reviews respond to this critique?

Surely one part of the problem—though not the only one—is the pace of modern work and life. Judges and practitioners live in a world of instant messaging, electronic filings, and burgeoning dockets. The ever increasing expectation that lawyers and legal institutions respond almost instantaneously to clients and litigants compels them to parse new cases, statutes, and other legal developments before traditional law review treatments of them emerge. Blogging and e-journals written by law professors and others offer a partial answer to the new "need for speed,"<sup>3</sup> but these media alone do not solve the problem. The next chapter of the *Review* thus almost certainly will include electronic versions of the publication, so that the slower cycle of written submissions, iterative edits, page proofs and final publication will be complemented by swifter, journalistic practices.

But the deeper indictment—that reviews are irrelevant because of their content, not just their timeliness—raises concerns that technology alone will not solve. The *Review* may evolve to include issues that respond in particular to the needs of judges and practitioners, perhaps with niche substantive identities and followings. The members may write and solicit shorter articles that emerge more quickly and that analyze legal trends in the manner of the most sophisticated web-based legal journalists. Yet, the academy still will be populated by professors whose scholarly interests extend beyond the careful analysis of cases and statutes *per se*. Law-trained biologists, chemists, and hydrologists—to take an example that is important to Arizona—will often write more to each other on the intersection of

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1. See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, NY TIMES, March 19, 2007, at A8. This complaint from judges is not new. Judge Harry Edwards wrote a highly influential article in 1992 that sparked significant discussion that has endured. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

2. Liptak, *supra* note 1 (quoting Second Circuit Court of Appeals Chief Judge Dennis G. Jacobs).

3. Some evidence of the growing phenomenon of blogging and its influence on the profession is that the ABA Journal recently listed the best web sites for lawyers and by lawyers. See Molly McDonough & Sarah Randag, *ABA Journal Blawg 100*, A.B.A. J., Dec. 2007, at 30.

science and environmental policy than to the rest of us. Law-trained economists, statisticians, and philosophers will continue to speak in languages that traverse multiple disciplines but that are wholly accessible only to those who are similarly cross-trained. And these writings surely will seem “irrelevant” to judges, lawyers, students, and other law professors who are not also multilingual in this sense.

This is not, I believe, a development to rue. Nor does it bespeak an academy unmoored from the profession or from the world. On the contrary, it represents a far more powerful capacity of the academic wing of our profession to exercise thoughtful influence over the processes, individuals, and institutions that create the public policies that judges and lawyers eventually encounter in the cases that come before them. The academy does not think, as one journalist has put it, that “they are under no obligation to say anything useful or to say anything well.”<sup>4</sup> On the contrary, many professors are often working on the ground floor of some of the world’s most pressing problems and are seeking to say something useful before the legal system—which is largely a problem-reactive system—becomes involved. In other words, the academy is experiencing some of the same dissatisfaction with traditional legal methods that some practitioners have expressed. We, too, hope to find alternatives to wildly expensive, inefficient, and contentious adversarial methods of managing conflict. We, too, seek new ways of solving legal problems—even before laws are crafted, before standard legal procedures cramp parties’ ability to experiment and respond wisely to variable and complex societal needs.

In my view, legal scholarship’s relevance is more pervasive and cross-cutting than it was in the 1950s or even 1970s, though some of it is less exclusively and distinctively tied to the work of courts. Law professors today are less guild-like, less operating within an intellectual silo transparent only to lawyers than in decades past. They are more connected to the wider world, more likely to appear on panels of academic conferences of other fields, to serve as thesis advisors to Ph.D. students across campus, and to teach cross-listed courses. They also offer more clinical education and bring students into the work of everyday lawyers far more than in decades past. Here at Arizona, for example, students worked hand-in-hand with faculty in the Indigenous Peoples Law and Policy Program on a path-breaking case in Belize and helped to secure a major victory for the Maya people seeking recognition of customary property rights. These and other changes in how we teach, what we teach, and how we conduct research all bespeak our greater vitality and connection to world events.

Faculty still interpret legal developments for the lay public and serve as legal commentators on national news programs such as *The News Hour* and are consulted by reporters from the *Wall Street Journal*, *The New York Times*, and other influential news providers. They still opine on doctrinal and statutory developments in blogs and other e-venues. And, contrary to the most expansive claims to the contrary, they still continue to write treatises and pen doctrinal articles for the nation’s law reviews that are aimed primarily at judges and practitioner audiences. But they offer multiple forms of scholarship and outreach

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4. Liptak, *supra* note 1.



today, which have a wider and deeper impact on law and public policy than in generations past.

The challenge for the College and the *Review* thus is not to be relevant but to better demonstrate our relevance—over and over again—to the judiciary and to the many other professional and public communities we serve. We must continue to write, teach, and serve in ways that meet the needs of the world around us as we move forward, without sacrificing nuance or sophistication. Above all, we must act on our responsibility to forge new understandings and a better world through our teaching, writing, and service—even if the full practical import of our work is not always apparent to all in its first, theoretical appearance.

We pursue this complex mission in a dynamic world filled with uncertainty, risks, conflicting imperatives and demands, and murky signposts. Today's headlines alone—including the suicide bombing assassination of Pakistan's pro-democracy opposition candidate Benazir Bhutto, a domestic economy battered severely by a crisis in the subprime mortgage industry, ongoing genocide in Darfur, and post-election riots in Kenya—are reason enough to inspire us to pause and consider how we should respond to the world's weighty problems. As lawyers, researchers, teachers, and world citizens we need to shape our goals in light of the world's most pressing needs. As educators and students, we also must pursue our work in a world that is at times skeptical about higher education's contributions, impatient with new theories, reluctant to accept some of the insights of academic research, and unwilling to support fully the escalating costs of public education. All of these forces are ones that we must wrestle with in the upcoming decades as our College and our *Review* forge ahead.

Yet, if our College history is prologue, then we will continue to make exceptional contributions to the communities we serve. We will work in creative continuity with our past and will negotiate wisely the passage between the rock of the known and the whirlpool of change. And along the way, we will occasionally pause, observe the arc of our progress, remap our course, and, yes, celebrate.

This is such a moment for reflection and for celebration. It is also an opportunity for me to express, on behalf of the faculty and administration, our gratitude to the student members of the *Review*—past, present, and future—for their many contributions to our College's proud history. May we all continue to build on the very best of Arizona Law's traditions as we create new traditions, cut new intellectual paths, and advance new methods of promoting social justice in the decades that lie ahead.

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