Law & Social Inquiry

Journal of the American Bar Foundation Volume 30, Number 1, Winter 2005

The University of Chicago Press

Law & Social Inquiry

Journal of the American Bar Foundation
Dedicated to the Study of Law,
Legal Institutions, and Legal Processes
Published by The University of Chicago Press

Editors John P. Heinz

William J. Novak

Review Editor Howard S. Erlanger

Associate Editors Bonnie Honig Janice Nadler

Joanne Martin

Christopher Tomlins

Tracey Meares

Manuscript Editors Susan F. Messer

Cindy Crumvine

Editorial Coordinator Lila Stromer

Editorial Board

Richard Brooks, Law and Economics, Yale University

Ronit Dinovitzer, Sociology, University of Toronto

Phoebe C. Ellsworth, Psychology, University of Michigan

David Engel, Law, New York University

William Forbath, Law and History, University of Texas School of Law

David Garland, Sociology, New York University

Robert W. Gordon, History, Yale Law School, Yale University

Joel Grossman, Political Science and Law, Johns Hopkins University

Gillian Hadfield, Law and Economics, University of Southern California

Christine Harrington, Political Science, New York University School of Law

Milton Heumann, Sociology, Political Science, Rutgers University

Wolf Heydebrand, Sociology, New York University

John Kelly, Anthropology, University of Chicago

Heinz Klug, Law, University of Wisconsin, Madison

Lewis A. Kornhauser, Economics, New York University School of Law

Edward Lawmann, Sociology, University of Chicago

Robert MacCoun, Law and Public Policy, University of California, Berkeley

Anne M. Piehl, Economics, Harvard University

Robert Post, Law, Yale Law School, Yale University

Annelise Riles, International Law, Cornell University

Mary Rose, Psychology, University of Texas at Austin

Rebecca L. Sandefur, Sociology, Stanford University

Ann Southworth, Law, Case Western Reserve University

David Tanenhaus, History, University of Nevada, Las Vegas

Mariana Valverde, Criminology, University of Toronto

Barbara Yngvesson, Anthropology, Hampshire College

Albert H. Yoon, Law, Northwestern University

Law & Social Inquiry

Volume 30, Number 1, Winter 2005

ARTICLES	
The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History Christine Desan	1
Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20 th Century Brian Donovan	61
The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making Stephen M. Feldman	89
(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases Kimberly D. Richman	137
REVIEW ESSAY	
From Pluralism to Individualism: Berle and Means and 20 th -Century American Legal Thought Dalia Tsuk	179
BOOK NOTES	227

Publication Policy

The American Bar Foundation (ABF) is an independent research institute committed to sociolegal research. Consistent with its mandate to create and disseminate knowledge about law, the legal profession, and legal institutions, and individuals' interactions with legal systems, Law & Social Inquiry: Journal of the American Bar Foundation invites the submission of manuscripts that make original contributions to the understanding of sociolegal processes. Law & Social Inquiry publishes both empirical analyses and theoretical studies from a variety of disciplinary perspectives. The analyses, conclusions, and opinions presented in Law & Social Inquiry are those of the authors alone.

Manuscript Evaluation: Law & Social Inquiry is a refereed journal. Manuscripts that the Editors deem appropriate for the journal are evaluated by two or more reviewers with expertise in the relevant subject matter and methodology. Manuscripts produced by ABF research fellows are evaluated by the same process as outside manuscripts and are not accorded priority in publication.

Submission of Manuscripts: Law & Social Inquiry uses the author/date citation system, as described in The Chicago Manual of Style, 14th Edition. You may obtain our style guidelines via surface mail by writing to us at: Editorial Coordinator, Law & Social Inquiry, American Bar Foundation, 750 N. Lake Shore Drive, Chicago, Illinois 60611; or from our Web site at: http://www.journals.uchicago.edu/LSI/. Manuscripts submitted to Law & Social Inquiry should be typed double-spaced and be accompanied by an abstract of not more than 150 words. The review process is anonymous; all identifying information should appear only on a separate cover sheet and not in the body of the manuscript.

Law & Social Inquiry does not accept multiply submitted articles. The Editors endeavor to make decisions promptly, usually about three months after submission.

Editing of Manuscripts: All manuscripts accepted for publication are edited for style by professional copy editors in consultation with the author. Copy editors do not check citations. Authors see edited manuscripts and/or proofs.

Off-Prints to Authors: Without charge, we offer authors a choice of 25 off-prints, 10 free copies of the journal in which their contribution appears or a complimentary 1 year subscription. Authors automatically receive 1 copy of the issue in which their contributions appear; additional off-prints may be ordered at the author's expense.

Republication Rights: The Foundation normally permits authors to republish their manucripts in books or use their manuscripts after publication, but *Law & Social Inquiry* has the right to first publication of edited manuscripts. The journal retains the right to republish manuscripts as reprints or as part of any reproduction of the issue or volume in which they appear, by any means, including without limit electronic means or microfilm.

Copying Beyond Fair Use: The code on the first page of a contribution in this journal indicates the copyright owner's consent that copies of the contribution may be made beyond those permitted by Sections 107 or 108 of the U.S. Copyright Law provided that copies are made only for personal or internal use, or for the personal or internal use of specific clients and provided that the copier pay the stated per-copy fee through the Copyright Clearance Center, Inc., 222 Rosewood Drive, Danvers, MA 01923. To request permission for other kinds of copying, such as copying for classroom use without charge, copying for general distribution, for advertising or promotional purposes, for creating new collective works, or for resale, kindly write to the Permissions Department, University of Chicago Press, 1427 S. 60th Street, Chicago, IL 60637-2954.

Comments and Responses: Comments on or responses to articles or review essays in the form of brief, scholarly statements will be published at the discretion of the Editors or Review Section Editor.

Send article manuscripts to:
The Editors
Law & Social Inquiry
American Bar Foundation
750 N. Lake Shore Drive
Chicago, IL 60611

(312) 988-6517

Send inquiries regarding review essays to:

Howard S. Erlanger
Review Editor
Law & Social Inquiry
Institute for Legal Studies
Law School
University of Wisconsin
Madison, WI 53706
(608) 253-7405

For further information via the Internet—

Web site: http://www.journals.uchicago.edu/LSI/

E-mail: lsi-abf@abfn.org

Law & Social Inquiry is available for full-text search on the LEXIS™/

NEXIS™ and WESTLAW™ on-line services.

Annual U.S. subscription rates:

	1 yr.	2 yr.	3 yr.
Individual	\$ 42	\$77.30	\$107.10
Academic	\$ 37	\$68.10	\$94.35
Institution	\$180	\$331.20	\$459.00
Student	\$ 29	\$53.35	\$73.95

Outside U.S. please add a postage charge of \$13.00 per year to the U.S. rates. **Canadians please add** a postage charge of \$6.00 per year and 7% GST tax to above rates.

Single copies: \$50.00 for institutions, \$15.50 for individuals. Checks should be made payable to *Law & Social Inquiry*, University of Chicago Press, Journals Division, P.O. Box 37005, Chicago, Illinois 60637. (Fax: 733-753-0811; E-mail: subscriptions@press.uchicago.edu) Volumes 1–12 available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209. (800) 828-7571.

Volumes available in microfilm from University Microfilms International, 300 North Zeeb Road, Ann Arbor, Michigan 48106.

© 2005 American Bar Foundation. All rights reserved.

Law & Social Inquiry: Journal of the American Bar Foundation (ISSN: 0897-6546) is published quarterly—winter, spring, summer, and fall—by The University of Chicago Press, 1427 S. 60th Street, Chicago, Illinois 60637-2954. Subscription agent for Japan: Kinokuniya Company, Ltd. Periodicals postage paid at Chicago, Illinois, and at additional mailing office.

POSTMASTER: Send address changes to: Law & Social Inquiry, P.O. Box 37005, Chicago, IL 60637.

Volume 29-2004

Acknowledgments to Reviewers

The Editors wish to thank the following reviewers whose careful evaluations and helpful recommendations have greatly assisted us in selecting manuscripts for Volume 29 of Law & Social Inquiry. We are grateful for their willing contributions for expertise and judgment, which help to maintain LSI's high standards for scholarly work in sociological studies.

Richard Abel Gregory Alexander Karen Alter David Baldus Jennifer Balint Susan Bandes Daniel Brinks **David Chambers** Simon Cole Rosemary Coombe Davina Cooper Frank Cross Stephen Daniels Yves Dezalav Charles Epp Howard Erlanger Samera Esmair Ben Fleury-Steiner Mayer Freed Marc Galanter Bryant Garth James Gibson Tom Ginsburg Ion Goldberg-Hiller Risa Goluboff Robert Gordon Mark Graber Lisa Hajjar Terence Halliday Keith Hart Frances Hasso

Carol Heimer Carla Hesse Bonnie Honig Kathleen Hull David Kairys Yasuhide Kawashima Michael Klarman Lewis Kornhauser Jane Larson Mindie Lazarus-Black Ron Levi Mona Lynch Stewart Macaulav Ioanne Martin Michael McCann Aiav Mehrotra Carrie Menkel-Meadow Sally Merry Ethan Michelson Bronwen Morgan Rosalind Morris Laura Nader Laura Beth Nielsen Peter Novick John Ohnesorge Pat O'Mallev Anne Piehl Bruce Price Daniel Richman Kimberly Richman Annelise Riles

Leonard Rubinowitz Teemu Ruskola Lucy Salyer Joseph Sanders Kim Lane Scheppele Ted Schnever Susan Shapiro Susan Silbey Jonathan Simon Rogers Smith Maximo Sozzo Susan Sterett Lior Strahilevitz Carolyn Strange Robin Stryker Brian Tamanaha Alan Tarr Ruti Teitel Mark Tushnet Frank Upham Mariana Valverde Jerry Van Hoy Lea VanderVelde Jenny Wahl Michael Willrich Victoria Saker Woeste David Woodruff Barbara Yngvesson Franklin Zimring

Law & Social Inquiry 2005 Graduate Student Paper Competition

The editors of Law & Social Inquiry are pleased to announce a competition for the best journal-length paper in the field of sociolegal studies written by a graduate student. The winning paper will be published in Law & Social Inquiry, and the author will receive a cash prize of \$500. Submissions will be judged by the editorial board, and the winning submission will be internally reviewed for publication. The author must be a graduate student or law student at the time of submission. Entries should be received by March 1, 2005. The winner will be selected by May 1 and the prize will be awarded at the annual meeting of the Law and Society Association.

Law & Social Inquiry publishes both empirical and theoretical studies of sociolegal processes from a variety of disciplinary perspectives.

Please send your best work to:

The Editors, *Law & Social Inquiry*, American Bar Foundation, 750 N. Lake Shore Drive, Chicago, IL 60611. For further information send an e-mail to lsi-abf@abfn.org, or call (312) 988-6517.