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*Vanderbilt University Law School*  
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## **EDUCATION**

Yale Law School: 1976 to 1979, J.D.

City College of New York: 1969. MA in Elementary and Secondary Education

Princeton University: 1965 to 1969. A. B. in History and Anthropology

## **EMPLOYMENT**

July 2009 to Present: University Professor of Law and Political Science, Vanderbilt Univ. Law School

July, 2005 to July 2009: Dean and John Wade-Kent Syverud Professor of Law, Vanderbilt Univ. Law School

September, 1998 to June 2005: Professor of Law, (Theodore K. Warner, Jr. Professor of Law from 2003 to 2005), Univ. of Pennsylvania

July, 1987 to August 1998: Professor of Law, Univ. of California School of Law (Richard W. Jennings Professor of Law from 1996 to 1998)

January, 1989 to June, 1992: Associate Dean, Univ. of California School of Law

Sept., 1982 to June, 1987: Acting Professor, Univ. of California School of Law

Sept., 1980 to June, 1982: Associate, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York (Entertainment Department)

July, 1979 to August, 1980: Law Clerk, Hon. Jon O. Newman, Associate Judge, U.S. Court of Appeals for the Second Circuit

Sept., 1970 to June, 1976: Curriculum Planner, New York City Board of Education

## **PUBLICATIONS**

### Books

Rethinking Legal Scholarship: A Transatlantic Dialogue, Cambridge University Press (editor, with Rob van Gestel & Hans Miklitz), Cambridge University Press, 2017

The Heatstroke Line, Sunbury Press, 2015 (novel)

Soul, Self and Society: The New Morality and the Modern State, Oxford University Press, 2015

The Regulatory State, 2nd ed. (with Lisa Bressman and Kevin Stack), Aspen, 2013

Legal Education in the Digital Age (editor), Cambridge University Press, 2011

Federalism: Political Identity and Tragic Compromises (with Malcolm Feeley), University of Michigan Press, 2008 (paperback edition 2011)

Beyond Camelot: Rethinking Politics and Law for the Modern State, Princeton University Press, 2005 (paperback edition, 2007)

Minimizing Harm: A New Crime Policy for Modern America (editor), Westview Press, 1998 (paperback edition 1999)

Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons (with Malcolm Feeley), Cambridge University Press, 1998 (paperback edition 1999)

Minimizing Harm as a Goal for Crime Policy in California (Editor), California Crime Policy Seminar, 1997  
The Payment System: Cases, Materials and Issues (with Robert Cooter), West Publishing Co., 2d ed. 1994

Articles and Book Chapters

- Administrative Guidance and Genetically Modified Food, 60 *Ariz. L. Rev.* 539 (2018) (with Joanna K. Sax)
- Statutory Design as Policy Analysis, 55 *Harv. J. Legis.* 143 (2018)
- Varieties of Judicial Independence, (Cambridge University Press, 2018) (volume in honor of Malcolm Feeley)
- Phenomenology, Colonialism, and the Administrative State, 95 *Wash. U.L. Rev.* 1097 (2018)
- The Constitution and the Administrative State, in John Compton & Karen Orren, eds. *THE CAMBRIDGE COMPANION TO THE CONSTITUTION* (Cambridge University Press, forthcoming 2018)
- Lochner and Property, in Nicholas Parrillo, ed., *ADMINISTRATIVE LAW FROM THE INSIDE OUT: THE SCHOLARSHIP OF JERRY MASHAW* (Cambridge University Press, 2017)
- From Coherence to Effectiveness: A Legal Methodology for the Modern World, in Rob van Gestel, Hans-W. Micklitz & Edward Rubin, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (2017)
- Federalism as a Mode of Governance: Autonomy, Identity, Power, and Rights, in Amon Lev, ed., *The Federal Idea: Public Law Between Governance and Political Life* (Bloomsbury, 2017)
- The Role of Federalism in International Law, 40 *Boston Coll. Int'l & Comp. L. Rev.* 195 (2017)
- Settlement, Alternative Dispute Resolution, and the Public Interest: Reconsiderations in the Light of *SEC. v. Citigroup*, in Russell L. Weaver & Steven I. Fiedland, *Recent Developments in Administrative Law and Alternative Dispute Resolution*, Carolina Academic Press, 2017)
- The Supreme Court in Context: Conceptual, Pragmatic and Institutional, 69 *Vand. L. Rev.* 1116 (2016)
- Rejecting Climate Change: Not Science Denial, but Regulation Phobia: 32 *J. Land Use & Env. L.* (2016)
- Executive Action: Its History, Its Dilemmas and Its Potential Remedies, 8 *J. of Legal Stud.* 1 (2016)
- The Dominance of Norms, in Nicholas Mercuro, ed., *LAW AND ECONOMICS: PHILOSOPHIC ISSUES AND FUNDAMENTAL QUESTIONS*, Routledge, 2015
- Federalism as a Problem of Governance, Not of Doctrinal Warfare, 59 *St. Louis Univ. L.Rev.* 1117 (2015) (commentary)
- Statutory Interpretation and the Therapy of the Obvious, 68 *Vand. L. Rev.* 159, 2015 (book review)
- The Future of Legal Education: Are Law Schools Failing and, If So, How?, 39 *Law & Soc. Inquiry* 499 (review essay)
- Corruption, Governance and Morality, 92 *TEX. L. REV.* 943 (2014) (review essay)
- Empiricism's Crucial Question and the Transformation of the Legal System, in Jean Braucher, John Kidwell & William Whitford, eds., *REVISITING THE CONTRACTS SCHOLARSHIP OF STUART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL* (Hart Publishing, 2013)
- The Illusion of Property as a Right and Its Reality as an Imperfect Alternative, 2013 *WIS. L. REV.* 573
- The New Course Book and the New Law School Curriculum, in Edward Rubin, ed., *Legal Education in the Digital Age* (Cambridge, 2012)
- Hyperdepoliticization, 47 *WAKE FOREST L. REV.* 631 (2012)
- Obstructing Law's Future with Conceptions from its Past, in Sam Muller et al., eds., *THE LAW OF THE FUTURE AND THE FUTURE OF LAW*, Vol. II 415 (The Hague: Torket Opsahl 2012)
- Bureaucratic Oppression: Its Causes and Cures, 90 *WASH. U. L. REV.* 291 (2012)

The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights, 53 WM. & MARY L. REV. 1639 (2012)

Keeping the Regulatory Faith, 5 J. TORT L. 239 (2012) (commentary)

Shocking News for Legislators and Law Schools: Statutes Are Law, Sept. 22, 2011 VERENIGING VOOR WETGEVING EN WETGEVINGSBELEID 1 (2011)

Can the Obama Administration Renew American Regulatory Policy? 65 U. MIAMI L. REV. 357 (2011)

The Real Formalists, The Real Realists, and What They Tell Us About Judicial Scholarship and Legal Education, 109 MICH. L. REV. 863 (2011) (book review)

Curricular Stress, 60 J. LEGAL EDUC. 110 (2010)

Assisted Suicide, Morality and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause, 63 VAND. L. REV. 763 (2010)

Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges, 29 UNIV. QUEENSLAND L. J. 101 (2010)

The Regulatizing Process and the Boundaries of New Public Governance, 2010 WIS. L. REV. 535.

The Possibilities and Limitations of Privatization, 123 HARV. L. REV. 890 (2010)

Question Regarding *D.C. v. Heller*: As a Justice, Antonin Scalia is A) Great, B) Acceptable, C) Non-Judicial, 54 WAYNE L. REV. 1105 (2009)

The Citizen Lawyer and the Administrative State: Redefining the Substance and Pedagogy of Legal Ethics, 50 WM. & MARY L. REV. 1335 (2009)

Judicial Review and the Right to Resist, 97 GEORGETOWN L.J. 61-118 (2008)

Should Law Schools Support Faculty Research?, 17 JOURNAL OF CONTEMP. LEGAL ISSUES 139 - 169 (2008)

Federalism and Interpretation, 38 PUBLIUS 167-191 (2008) (with Malcolm Feeley)

What's Wrong with Langdell's Method, and What to Do About It, 60 VAND. L. REV. 609-665 (2007)

The Internet, Consumer Protection and Practical Knowledge, in Jane Winn, ed. CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 35-58 (Ashgate, 2007)

Leadership and Literature, in Inside the Minds: Law School Leadership Strategies 209-224 (Aspatore, 2006)

The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse, in Michael Dowdle, ed., PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES (Cambridge, Eng.: Cambridge University Press, 2006)

Embracing Consent: An Administrative Era Approach to Consent Decrees, in Andrew Rachlin, ed., CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES 52-82 (Princeton, N.J.: Policy Research Institute for the Region, 2006)

Sex, Politics, and Morality, 47 WM. & MARY L. REV. 1- 48 (2005)

Rational Choice and Rat Choice, Some Thoughts on the Relationship Among Rationality, Markets, and Human Beings, 80 CHI-KENT L. REV. 1091 (2005)

The Conceptual Explanation for Legislative Failure, 30 LAW & SOC. INQUIRY 583-606 (2005)

The Myth of Accountability and the Anti-administration Impulse, 103 MICH. L. REV. 2073-2136 (2005) (*ABA Administrative Law Section prize for best article of 2005*)

Images of Organizations and the Consequences of Regulation, 6 THEORETICAL INQUIRIES IN LAW 347-390 (2005)

Charity Begins in Washington, D.C. 52 BUFFALO L. REV. 793 (2004)

Just Say No to Retribution, 7 BUFFALO CRIMINAL L. REV. 17 (2004)

Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It, 41 SAN DIEGO L. REV. 55 (2004)

It's Time to Make the Administrative Procedure Act Administrative, 88 CORNELL L. REV. 95 (2003)

Judicial Policy Making and Litigation Against the Government, 5 U. PENN. J. CONSTITUTIONAL L. 617 (2003) (with Malcolm Feeley)

Jon Newman's Theory of Disparagement and the First Amendment in the Administrative State, 46 NEW YORK L. SCH. L. REV. 249 (2003)

Trial by Combat, Trial by Argument, 56 U. ARK. L. REV. 261 (2003)

Rethinking Human Rights, 9 INT. LEGAL THEORY 5 (2003)

Dynamic Statutory Interpretation in the Administrative State, Issues in Legal Scholarship, bepress.com (2002)

Independence as a Governance Mechanism, in Stephen Burbank & Barry Friedman, eds., JUDICIAL INDEPENDENCE AT THE CROSSROADS, (Sage, 2002)

Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby, 87 CORNELL LAW REV. 309 (2002)

Passing Through the Door: Social Movement Literature and Legal Scholarship, 150 U. PENN. L. REV. 1 (2001)

The Inevitability of Rehabilitation, 19 LAW & INEQUALITY 343 (2001)

Puppy Federalism and the Blessings of America, 574 ANNALS 37 (2001)

Getting Past Democracy, 149 U. PENN. L. REV. 711 (2001)

Legal Scholarship, in THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (Pergamon, 2001)

Responsive Law and the Judicial Process, in Kenneth Winston & Robert Post, LEGALITY IN INSTITUTIONS AND SOCIETY: ESSAYS IN HONOR OF PHILIP SELZNICK (University of California Press, 2001) (with Malcolm Feeley)

Scholars, Judges and Phenomenology, 32 RUTGERS-CAMDEN L. REV. 241 (2000)

Computer Language as Networks and Power Structures: Governing the Development of XML, 53 SMU. L. REV. 1447 (2000)

Types of Contracts, Interventions of Law, 45 WAYNE L. REV. 1903 (2000)

If the States Had Been Sovereign, 16 CONSTITUTIONAL COMMENTARY 555 (1999)

Jews, Truth and Critical Race Theory, 93 N.W.U. L. REV. 525 (1999)

Putting Rational Actors in their Place: Economics, Behavioral Economics, and Phenomenology, 51 VAND. L. REV. 1705 (1998)

Politics, Doctrinal Coherence, and the Art of Treatise Writing, 21 SEATTLE L. REV. 837 (1998),

Communing with Disaster: What We Can Learn from the Jusen and the Savings and Loan Crisis, 29 LAW & POLICY IN INT'L BUSINESS 79 (1998)

Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law, 1998 WISC. L. REV. 131

Administrative Law and the Complexity of Culture, in Ann Seidman, Robert Seidman & Janice Payne, eds., LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA (Macmillan, 1997)

The Fundamentality and Irrelevance of Federalism, 13 GA. ST. L. REV. 1009 (1997)

Rational States?, 83 VA. L. REV. 1433 (1997)

Discretion and its Discontents 72 CHI-KENT L. REV. 1299 (1997)

The Code, The Consumer, and the Institutional Structure of the Common Law, 75 WASH. U. L. Q. 15 (1997)

Law And and the Methodology of Law, 1997 WISC. L. REV. 521 (1997) (reprinted in Steve Sheppard, ed., THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, Salem, 1999)

Legal Reasoning, Legal Process and the Judiciary as an Institution, 84 CALIF. L. REV. 265 (1997)

Creating Legal Doctrine, 69 SOUTHERN CAL. L. REV. 1989 (1997) (with Malcolm Feeley)

Public Choice and Legal Scholarship, 46 J. LEGAL EDUC. 490 (1996) (Review)

The New Legal Process, The Synthesis of Disclosure and the Microanalysis of Law, 109 HARV. L. REV. 1393 (1996)

The Phenomenology of Contract: Complete Contracting in the Entertainment Industry, 152 J. INST. & THEORETICAL ECON. 123 (1996)

Legal Scholarship, in D. Patterson ed., BLACKWELL'S COMPANION TO THE PHILOSOPHY OF LAW (1996)

Institutional Analysis and the New Legal Process, 1995 WISC. L. REV. 463 (1995)

The Non-Judicial Life of Contract: Beyond the Shadow of the Law 90 NW. U. L. REV. 107 (1995)

Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice, 31 IDAHO L. REV. 775 (1995)

Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903 (1994) (with Malcolm Feeley)  
(reprinted in Modern Constitutional Theory, John Garvey & T. Alexander Aleinikoff, eds., 1999)

Public Choice in Practice and Theory, 81 CALIF. L. REV. 1657 (1994)

Interpreting Statutes: A Comparative Study, 41 AM. J. COMP. L. 128 (1993)

Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4, 26 LOYOLA L.A. L. REV. 743 (1993)

Prison Litigation and Bureaucratic Development, 17 LAW & SOCIAL INQUIRY 125 (1992)

On Beyond Truth: A Theory For Evaluating Legal Scholarship, 80 CALIF. L. REV. 889 (1992) (reprinted in Readings in Race and Law: A Guide to Critical Race Theory, Alex Johnson, ed., West, forthcoming)

The Lifeline Banking Controversy: Putting Deregulation to Work for the Low Income Consumer, 67 INDIANA L. J. 213 (1992)

Legislative Methodology: Some Lessons from the Truth-in Lending Act, 80 GEORGETOWN L. REV. 233 (1992) (reprinted in Ann Seidman, Robert Seidman & Thomas Walde, eds., MAKING DEVELOPMENT WORK, Kluwer, 1999)

What Does Prescriptive Legal Scholarship Say and Who Is Listening To It: A Response to Dan-Cohen, 63 COLO. L. REV. 731 (1992)

Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross, 45 VAND. L. REV. 579 (1992)

The Evaluation of Prescriptive Scholarship, 10 TEL AVIV STUDIES IN LAW 101 (1991)

The Concept of Law and the New Public Law Scholarship, 89 MICH. L. REV. 792 (1991)

Efficiency, Equity and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REV. 551 (1991)

Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross, 45 VAND. L. REV. 579 (1992)

The Evaluation of Prescriptive Scholarship, 10 TEL AVIV STUDIES IN LAW 101 (1991)

Beyond Public Choice: Comprehensive Rationality in the Reading and Writing of Statutes, 66 N.Y.U. L. REV. 1 (1991)

The Concept of Law and the New Public Law Scholarship, 89 MICH. L. REV. 792 (1991) Efficiency, Equity and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REV. 551 (1991)

Review, J. Mitchell, Electronic Banking and the Consumer 38 AM. J. COMP. L. 969 (1991)

Politics, Politics, Bureaucracies and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan, 193 U. PA. L. REV. 369 (1990) (with Thomas Litt, Jon Macey and Geoffrey Miller)

Television and the Experience of Citizenship, 68 TEX. L. REV. 1155 (1990)

Automated Teller Machines and the Marine Midland Decision, 44 BUS. LAW. 1082 (1989)

Judicial Policy Making and Litigation Against the Government, 5 U. PENN. J. CONSTITUTIONAL L. 617 (2003) (with Malcolm Freeley)

The Revision of Articles 3 and 4 of the Codes, 44 BUS. LAW. 1538 (1989) Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369 (1989).

Deregulation, Reregulation and the Myth of the Market, 45 WASH. & LEE L. REV. 1249 (1989)

Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System, 49 OHIO ST. L. J. 1251 (1989)

Legal Scholarship as Practice and Discourse, 86 MICH. L. REV. 1835 (1988)  
Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987, 35 U.C.L.A. L. REV. 1115 (1988) (with Robert Cooter)  
Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC, 43 BUS. LAW 621 (1988)  
A Theory of Loss Allocation for Consumer Payments, 66 TEX. L. REV. 61 (1987) (with Robert Cooter)  
Nazis, Skokie, and the First Amendment as Virtue, 74 CALIF. L. REV. 233 (1986)  
Procedural Due Process and the Administrative State, 72 CALIF. L. REV. (1984) (reprinted in Administrative Law Anthology, Thomas Sargentich, ed., Anderson, 1994)  
The Enforcement of Personal Service Contracts, 3 ENT. & SPORTS LAWYER, No. 1 at 3 (1984)  
The Growing Edge of the Due Process Clause: Procedural Due Process and the Right to Treatment, 17 HARV. C. R. -C.L.L. REV. 61 (1982)  
Toward a General Theory of Waiver, 28 U.C.L.A. L. REV. 478 (1981)  
The Descendibility of the Right of Publicity: Is there Commercial Life After Death?, 89 YALE L. J. 1125 (1980) (with Peter L. Felcher)  
Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L. J. 1588(1979)(with Peter Felcher)

## **POSITIONS**

University Secretary, University of Pennsylvania Senate, 2000-2002  
Member at Large, University Council, University of Pennsylvania, 2000-2004  
Chair, University of California, Berkeley Privilege and Tenure Committee, 1995 to 1998  
Chair, University of California, University-wide Privilege and Tenure Committee, 1996 to 1998  
Director, Crime Policy Project, California Policy Seminar University of California, 1994 to 1998  
Co-Director, Sho Sato Japanese-American Legal Studies Program, 1986 to 1998

## **PROFESSIONAL ASSOCIATIONS**

Association of American Law Schools, Committee on Nominations, 2010 and 1998  
Association of American Law Schools, Section on Administrative Law, Chair, 2008-2009  
Association of American Law Schools, Committee on Curriculum, Chair, 2006-2009  
Association of American Law Schools, Section on Socio-Economics, Chair, 2003-2004  
Association of American Law Schools, Section on Scholarship, Chair, 2002-2003  
Association of American Law Schools, Committee on Curriculum and Research, 1989 to 1991 and 1996 to 1999  
Association of American Law Schools, Committee on Professional Development, 1992 to 1994  
American Bar Association, Chair of the Subcommittee for Articles 3 and 4 of the Ad Hoc Committee on Payment Systems, 1986 to 1990  
Reporter for the Financial Institutions Committee of the Business Law Section of the State Bar of California on Banking Law Revision, 1987 to 1989

## **INTERNATIONAL DEVELOPMENT**

Consultant, Asia Foundation Project on the Administrative Licensing Law for the People's Republic of China,

1998 to Present

Consultant, Legal Reform Project, Russian Privatization Center, Harvard Institute for International Development, 1994 to 1995

**Consultant**, U.N. Development Programme, to the People's Republic of China for Administrative Law, 1992