

1-1-1996

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Recommended Citation

UB Law Forum (1996) "A Decade of Distinction: Reviewing 10 Years of Scholarship by the Magavern Fellows," *UB Law Forum*: Vol. 9 : No. 1 , Article 31.

Available at: https://digitalcommons.law.buffalo.edu/ub_law_forum/vol9/iss1/31

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A Decade of Distinction

Reviewing 10 years of scholarship
by the Magavern Fellows

Benjamin Franklin put it with characteristic bluntness in his *Poor Richard's Almanack*: "If you would not be forgotten, as soon as you are dead and rotten, either write things worth reading, or do things worth the writing."

The William J. Magavern Fellows Fund makes possible both parts of old Ben's dictum. For 10 years, faculty recipients of these UB Law School fellowships have published "things worth reading" about research initiatives that have been "well worth the writing." The fellowships result from a fund established by Samuel D. Magavern in 1985 in honor of his father to support special research projects at the Law School. The fellowships are being continued through the generous support of the Magavern family.

Over the years, work done under the Magavern program has resulted in publication of three books: Judy Scales-Trent's *Notes of a White Black Woman*, Charles P. Ewing's *Battered Women Who Kill* and Robert J. Steinfeld's *The Invention of Free Labor*. In these and in the many journal articles and conference papers produced by Magavern Fellows, the program has borne much fruit.

As we mark a decade of the Magavern Fellowships, it's time for a brief look at some of the scholarship the program has produced.

Professor Dianne Avery explored how the Supreme Court's 1986 Fairmont Hotel decision, which established a new test for resolving disputes about who must be allowed access to private property (leafleting Teamsters at a hotel, for example), will play out in thousands of similar cases. The test, she noted, "tended to value more highly the

property rights of employers, while devaluing the statutory rights of employees." This "balancing," she wrote, "created far more problems than it solved."

Avery worked with her spouse, Professor Alfred S. Konefsky, for a *Law and History Review* article called "The Daughters of Job: Property Rights and Women's Lives in Mid-Nineteenth-Century Massachusetts." Anti-slavery activists, they note, made explicit parallels between slavery and women's legal status. In their survey, they noted that a single woman could indeed own property, write wills, sue and be sued, and enter into contracts — but once married, she was considered "under the protection of her husband," who had nearly absolute authority over her person and her property.

Professor Guyora Binder, in another historical study, "Mastery, Slavery, and Emancipation," in the *Cardozo Law Review*, took a communitarian approach to the dialectic of master and slave in the United States. His account of slave society equates slavery with "the denial of social recognition," and argued that the Southern slave society "led both the masters and the slaves to conceive of freedom in social rather than individual terms." Thus, he said, emancipation should be perceived not as the victory of the Northern liberal idea of independence over Southern values, but the restoration of African-Americans to the sovereignty and social esteem that Southern society valued.

Professor Binder's Magavern-supported research also resulted in the article "Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics." Published in the *Cardozo Law Review*,

the article discusses pre-Civil War writer Francis Lieber's treatise on legal interpretation. "For the past quarter-century," Binder argues, "legal theory has been barking up the wrong tree."

Professor Markus Dubber, whose legal interests center on issues of justice and punishment theory, completed three papers as a Magavern Fellow, including works on the jury and the sense of justice in the German system of jurisprudence. In "Irrational and Arational Punishment: Recidivist Statutes as Symbolic Criminal Law," he placed the nation's popular "three strikes and you're out" laws into a wider context of debate about criminal justice in the United States. Because "three strikes" laws seem to function more as a political symbol of getting tough on crime, Dubber wrote, "it appears that criminal justice policy in this country has lost sight of the rational constraints on the state's punishment power ... ultimately undermining its claim to the monopoly on legitimate violence."

Professor Peter R. Pitegoff's work as a Magavern Fellow has included a special issue of the *Buffalo Law Review*, "Buffalo Change & Community"; "Child Care Enterprise, Community Development, and Work," in the *Georgetown Law Journal*; "Reflections on Child Care and Community Development," in the UB Law women's journal *Circles*; and "Unions, Finance, and Labor's Capital," a chapter in the book *Unions and Public Policy*. In the *Circles* article, Pitegoff put forth a community economic development approach as a way of improving the status of child care workers: Day care, he writes, can "help build community capacity for entrepreneurship. Beyond providing the

essential services of child care, a strategy to create day care enterprises can be a vehicle for job development and an opportunity to create stable institutions in low-income communities."

In Professor Robert J. Steinfeld's work on free labor, mentioned earlier, the professor critiques the "story" of the rise of free labor as an industrial market society supplanted feudalism and serfdom. Focusing particularly on the experience of English wage laborers in the century following the Industrial Revolution, Steinfeld argued that "economic coercion" played a powerful role in the supposedly free exchange of labor for money. His work also incorporated historical research on the early years of the United States, discussing the relationship of property ownership and voting rights in the newly formed nation.

Professor Anthony Szczygiel used his Magavern Fellowship to study legal aspects of the relationship between patient and health care provider. In an *Ohio Northern University Law Review* article titled "Beyond Informed Consent," Szczygiel describes "the law's increasing awareness of the importance of protecting patient autonomy" and the evolution of legal rules affording patients the right to participate in decisions about their own medical treatment.

Professors Elizabeth Mensch and the late Alan Freeman, longtime collaborators as well as spouses, did significant work under the Magavern program on a legal biography of Supreme Court Justice Sandra Day O'Connor. The justice, they note in their detailed and comprehensive analysis of her performance on the nation's highest court, has shown special interest in issues of federalism, religion, gender and children, as well as "issues of life and death" — capital punishment, abortion and the "right to die." Their Magavern Fellowship also supported the gathering of materials for a week-long Chautauqua seminar in 1994, "Is Authority Dead? Right and Wrong in a Pluralist Society." The seminar addressed such issues as discrimination against homosexuals; privacy and reproductive rights within marriage; and assisted suicide. ■

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Winter
1996

