

5-1-2019

Foreword: Tempering Power

Errol Meidinger

University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Errol Meidinger, *Foreword: Tempering Power*, 67 Buff. L. Rev. 519 (2019).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol67/iss3/11>

This Foreword is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact law scholar@buffalo.edu.

Buffalo Law Review

VOLUME 67

MAY 2019

NUMBER 3

FOREWORD

Tempering Power

ERROL MEIDINGER†

For a very long time, going back at least to the 1930s, the Buffalo Law School has pursued fresh, often quite critical perspectives on law. We have sought to understand law's actual operation, its effects on and responsiveness to everyday people, and its role in the formation and working of larger social institutions.¹ We have long asserted that understanding legal doctrine is necessary, but far from sufficient for understanding law. We have known that law creates, yet is also created by, and responds to, and can sometimes reshape or curb power, and that how it does so is of utmost importance to a decent legal system.

This commitment to understanding the operation of law in its social context is manifested not only in the faculty's teaching and scholarship, but also in two important

† SUNY Distinguished Professor and Margaret W. Wong Professor of Law, Director of the Baldy Center for Law & Social Policy, University at Buffalo School of Law, The State University of New York.

1. See, e.g., Alfred F. Konefsky, "Karl's Law School, or The Oven Bird in Buffalo," in *INSIDERS, OUTSIDERS, INJURIES, AND LAW: REVISITING THE OVEN BIRD'S SONG* 56, (Mary Nell Trauter, ed., 2018); Daniel Horowitz, *David Riesman: from law to social criticism*, 58 *BUFF. L. REV.* 1005, 1008–09 (2010); ROBERT SCHAUS & JAMES ARNONE, *UNIVERSITY AT BUFFALO LAW SCHOOL: 100 YEARS, 1887-1987: A HISTORY* (1992).

institutions: the Mitchell Lecture Series and the Baldy Center for Law & Social Policy. The mission of the Baldy Center, instituted in 1978, is to advance interdisciplinary research on law, legal institutions, and social policy—and thus to see law and legal institutions from perspectives unbound from the normative and methodological constraints of conventional legal scholarship. The Center has pursued this mission in a great many ways, sponsoring countless conferences, lectures, research projects, working groups, and other initiatives over the years. It has supported many hundreds of faculty members in the Law School and other departments pursuing a huge range of topics.² Specific questions change as academic and social concerns change, and also are inherently diverse because law’s role in society is so ubiquitous and variable. Over time, the Center’s research commitments have included Asian law, child sexual abuse, desegregation, disability law, education, environmental stewardship, fair housing, gender studies, health policy, human migration, human rights, intellectual property, legal ethics, nuclear war prevention, racial justice, religion, social media, and many other topics. The Mitchell Lecture series, since the 1951 inaugural lecture by Justice Jackson on “Wartime Security and Liberty Under Law,”³ has addressed a similar range of concerns, including corporate power, feminist legal theory, gene editing, law and race, the war on terror, and surveillance through social media, to name only a few.

Consistently, the underlying concerns of both Baldy and Mitchell programs have been with the ways in which law is intertwined with power, and with how law contributes to or inhibits human dignity and flourishing. This year the Center and the Mitchell Lecture committee decided to commemorate

2. See LUKE HAMMILL, *40 YEARS AT THE BALDY CENTER: A LAW AND SOCIETY HUB IN BUFFALO* (2018), available at http://www.buffalo.edu/content/www/baldycenter/40-years/_jcr_content/par/download/file.res/bclsp-40yearsBook.pdf.

3. Roberth H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

the Baldy Center's 40th anniversary by combining forces and engaging the relationship of law and power in an increasingly connected yet highly differentiated world.

For the Mitchell Lecture we were very fortunate to attract John Braithwaite, Distinguished Professor at Australian National University and one of the world's leading scholars in the fields of criminal justice, regulation and governance, and war and peace. John set the background for the conference with his talk on "Tempered Power, Variegated Capitalism, Law and Society."⁴ His central purpose was to address the problem of curbing oppressive power in a world where power is distributed among different types of economic orders, ranging from liberal market economies through coordinated market economies to authoritarian capitalist economies. All of these are interconnected in the global economy, and all have micro-regions characterized by other variants of capitalism. Recognizing that power is essential to achieving collective goals, and that empowerment is necessary to protect freedom and minimize oppression, Braithwaite draws on his own and others' work to envisage a model of tempered power in the very challenging arena of financial markets. He sketches a governance system that structures relationships among banks, global companies, workers organizations, human rights NGOs, states, and other actors to create a regulatory community that over time can use the power of each interest to improve the wages and working conditions of workers. While deeply aspirational, the paper draws on a masterful knowledge of relevant scholarship and a lifetime of work to suggest a pathway for tempering oppressive forms of emergent power in the rapidly expanding domain of finance.

4. John Braithwaite, *Tempered Power, Variegated Capitalism, Law and Society*, 67 *BUFF. L. REV.* 527 (2019). The talk was presented at the State University of New York at Buffalo School of Law on Friday, November 9, 2018.

For the conference,⁵ the organizing committee⁶ sought to invite a diverse group of innovative scholars who would focus on different spheres of action, raise a range of important questions, and spark insightful conversations that could continue long after the conference. This volume demonstrates that we were abundantly successful. Below are some brief introductions to the articles. I must caution that they are only suggestive of the articles' contents, and fail to provide a meaningful sense of the rich and diverse understandings law and power, both empirically and normatively, that they offer. My aim is to provide sufficient glimpses of the papers to entice readers to join in these critical conversations.

In "Law and Power in Health Care: Challenges to Physician Control,"⁷ Mary Anne Bobinski describes the role that law has played in establishing and modifying the power of physicians in relation to patients, other health care providers, insurance companies, governments, and other actors in the health care system. After outlining ways in which shifting economic power has buffeted the system, and the limited role that government has taken in tempering power, she offers an analysis of the potential of fiduciary law to appropriately temper physician power in physician/patient relationships.

Susan Bibler Coutin, in "'Otro Mundo Es Posible': Tempering the Power of Immigration Law through Activism, Advocacy, and Action,"⁸ describes contending efforts to deploy law amidst the intensifying conflict over

5. The conference was held at the State University of New York at Buffalo School of Law on November 10, 2018.

6. The conference organizing committee consisted of Professors Anya Bernstein, David Engel, Matthew Steilen, Mateo Taussig-Rubbo and myself.

7. Mary Anne Bobinski, *Law and Power in Health Care: Challenges to Physician Control*, 67 BUFF. L. REV. 595 (2019).

8. Susan Bibler Coutin, *'Otro Mundo Es Posible': Tempering the Power of Immigration Law through Activism, Advocacy, and Action*, 67 BUFF. L. REV. 653 (2019).

immigration in the United States. After summarizing the nature and potentially debilitating effects of government illegalization, racialization, and criminalization of immigrants, she describes the ways in which immigrants seek to harness, reshape, and moderate that power through creating counter-narratives, pursuing legal status, and building community resistance. They thereby seek to construct another world of tempered power in which immigrants are able to thrive regardless of formal legal status.

In “Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa,”⁹ Heinz Klug describes South Africa’s experience in seeking to temper power through a new constitution intended to reform dysfunctional features of the received social order by creating six checking organs outside the three traditional branches of government. Although challenged by concentrated power in one political party, the intricate interplay between the new agencies and the traditional state organs, modulated by the Constitutional Court, may be creating a distinctive new model of separation of powers wherein the traditional branches are effectively obliged to maintain agencies that check their negative inclinations.

Martin Krygier, source of the term “tempering power” for this conference, provides a detailed analysis of why he believes the concept is necessary and how it should be understood. In “What’s the Point of the Rule of Law”¹⁰ he argues that rule-of-law prescriptions have become so muddled, inconsistent, formulaic, context-unresponsive, manipulable, and ineffectual as to be useless or worse. He proposes that we start over by focusing on the underlying

9. Heinz Klug, *Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa*, 67 *BUFF. L. REV.* 701 (2019).

10. Martin Krygier, *What’s the Point of the Rule of Law?*, 67 *BUFF. L. REV.* 743 (2019).

goal of rule-of-law: in his view, curbing arbitrary exercises of power. After outlining his concept of arbitrary power and stressing that adequate non-arbitrary power is necessary to achieving any desirable social order, he outlines a concept of tempered power that includes moderation, self-knowledge, flexibility, and distribution among multiple actors.

In “Is China a ‘Rule of Law’ Regime?”¹¹ Kwai Hang Ng interrogates the widely held view that China is a rule by (rather than ‘of’) law country. He holds three markers of rule by law – command focus, opacity, and arbitrariness – up against empirical information on Chinese legal practices. He shows that command is much less central in the daily operations of courts than is typically assumed, and that they often privilege mediation and reconciliation; that, while there are opaque areas, a growing portion of Chinese law is publicized and well understood; and that there are areas where legal expectations have become significantly more regular and predictable than in the past, although judges in many cases still weigh non-legal factors quite heavily. He then characterizes Chinese law as fundamentally about policy implementation, wherein a primary goal of the central government is to use law to gain policy conformity from local courts and governments, and to constrain corruption. Yet the system remains quite flexible and adaptable to different circumstances. It thus appears that Chinese law may temper the power of local legal officials, but not of the central government.

Nimer Sultany locates the primary challenge of justice not in particular institutions or actors, but in liberal political and legal theory, which defines the powers and objectives of institutions and actors. Focusing primarily on the work of John Rawls and Ronald Dworkin, “What Good is Abstraction: From Liberal Legitimacy to Social Justice”¹² argues that

11. Kwai Hang Ng, *Is China a “Rule-by-Law” Regime?*, 67 BUFF. L. REV. 793 (2019).

12. Nimer Sultany, *What Good is Abstraction? From Liberal Legitimacy to*

those lodestars of liberal legalism forsake their egalitarian tenets by incorporating goals of legitimacy in the form of proceduralization, public acceptance, and practicality. Through reliance on abstraction, they obscure intractable conflicts and perpetuate injustice. Their failure is further evidenced by the fact that recent decades have brought greater, not less inequality. Liberal legal theory thus legitimates and empowers the very injustice it claims to oppose.

In “Those People [May Yet Be] a Kind of Solution”—Late Imperial Thoughts on the Humanization of Officialdom¹³ David Westbrook and Mark Maguire explore the practical circumstances of bureaucrats charged with assessing and charting responses to future risks of various kinds. They find those officials humbled by the many failures to predict disasters in the early 21st century, yet needing to chart courses of action and greatly hemmed in by organizational logics. They propose a world where bureaucracies come to be understood as places where different possible futures are collectively imagined and pursued. They thus seek to foster productive power in bureaucracies.

Peer Zumbansen’s “Transnational Law as Socio-Legal Theory and Critique: Prospects for ‘Law and Society’ in a Divided World”¹⁴ describes the rapidly growing challenge to socio-legal research of discerning the effects of power, both material and cultural, in a transnationalizing world. Zumbansen draws on a range of research to outline the difficulty of academic work in addressing rapidly proliferating and changing deployments of power, many of which are based far more on polemics than any empirical understanding. The challenges are so great, he argues, that

Social Justice, 67 BUFF. L. REV. 823 (2019).

13. David A. Westbrook & Mark Maguire, *Those People [May Yet Be] a Kind of Solution*” *Late Imperial Thoughts on the Humanization of Officialdom*, 67 BUFF. L. REV. 889 (2019).

14. Peer Zumbansen, *Transnational Law as Socio-Legal Theory and Critique: Prospects for “Law and Society” in a Divided World*, 67 Buff. L. Rev. 909 (2019).

they require a new critical transnational legal theory that vigorously questions the received fundamentals of socio-legal studies, particularly the underlying state/law nexus and the center/periphery dichotomy that organize so much of its work.

Even from these brief introductions, it is obvious that the articles in this volume address a very broad range of arenas and problems, and offer multiple conceptual frameworks for addressing them. While they share commitments to figuring out how to make legal institutions more visible, adaptable, context-appropriate, dignity respecting, effective, and ultimately just, they also show how difficult that can be in practice, and how nimble and creative our thinking must be. I believe the articles would make excellent reading in advanced socio-legal studies courses; certainly, they have made excellent reading for me. I want to thank the authors, commentators, and other participants at the Mitchel Lecture and the Baldy Center's 40th Anniversary conference for creating such a rich collection of work. I am confident that other readers will find them fertile and inspiring, and that they will make important contributions to advancing our understanding of law and power in this rapidly changing world.