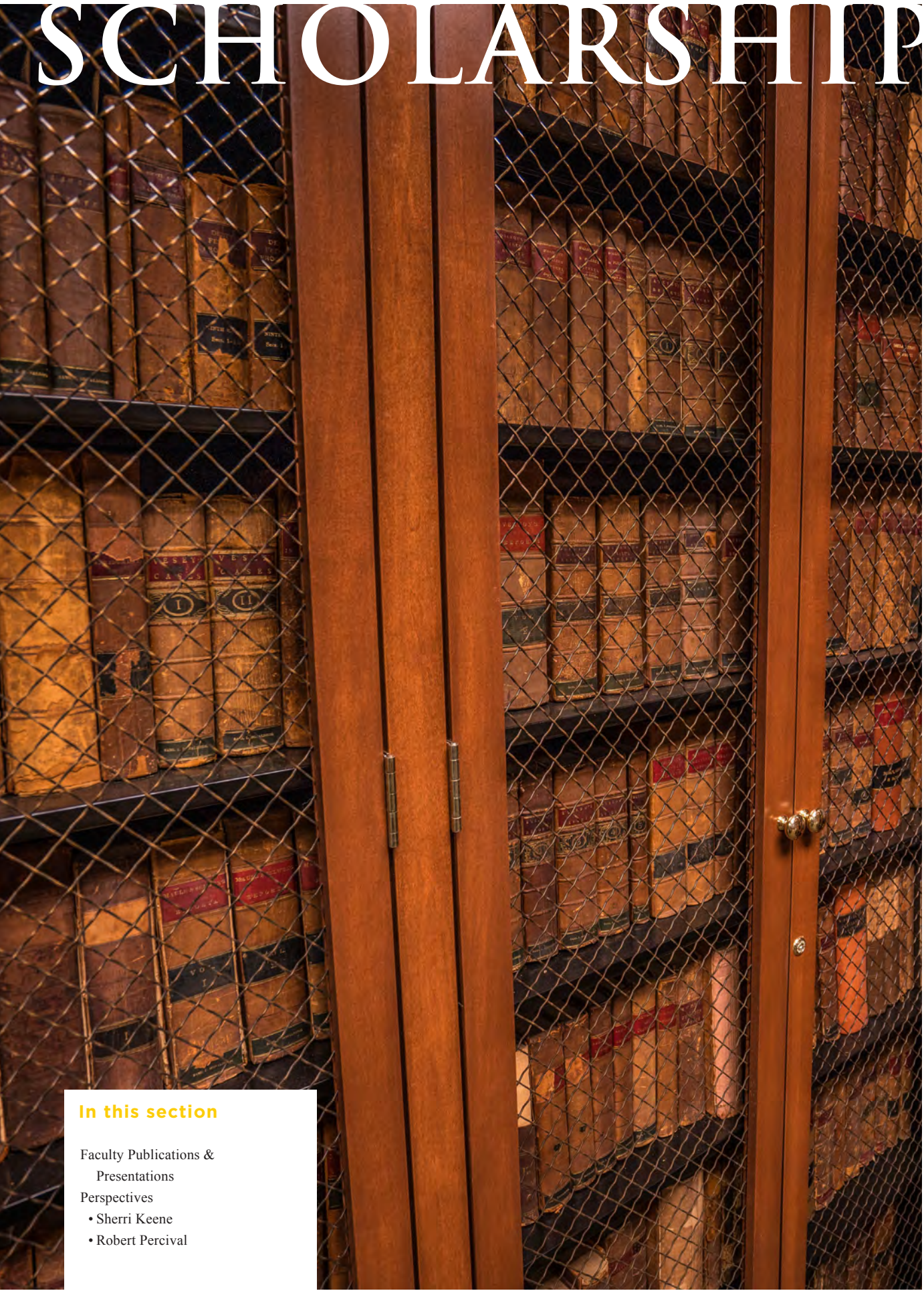
SCHOLARSHIP



In this section

FACULTY PUBLICATIONS & PRESENTATIONS

Maryland Carey Law's faculty has a well-deserved reputation for producing outstanding legal scholarship, as evidenced by the rich array of books, articles, and conference presentations its members complete each year. These entries represent only a sampling of the diverse scholarly work of our academic community.

Abstract

The Costs of Creating Environmental Markets: A Commodification Primer by Michael Pappas and Victor B. Flatt (University of Houston Law Center) in *UC Irvine Law Review* (2019)

Markets offer a potent tool for managing resources and values, even ones that have not traditionally been commodified. In the environmental context there is particular debate about market-based governance, in terms of both appropriateness and effectiveness. This article offers a broadly applicable framework for considering the emergence, appropriateness, and design of market tools in environmental governance, and it demonstrates how the model is applicable well beyond that context. This framework offers a powerful diagnostic for programs to manage resources ranging from greenhouse gas emissions to Chesapeake Bay pollution, as well as from human organs to Uber regulation.

The article provides a descriptive economic account that can help ground moral intuitions and objections about markets and commodification. As a result, it gives fresh insight into why existing laws and policies are as they are, and it bridges moral and economic arguments, providing a common point of departure for future engagement in these debates.

Taunya Banks was a panelist at the Author-Meets-Reader Colloquy of Professor Tanya Hernandez's new book, *Multiracials and Civil Rights*, at the Fourth People of Color Conference, hosted by American University Washington College of Law on March 22, 2019.

Patty Campbell presented at the "China IP Road Show: Strategies for IP Protection in China," program series hosted at Maryland Carey Law on November 1, 2018, in collaboration with the U.S. Patent and Trademark Office, U.S. Commercial Service, and the U.S. Department of Commerce.

Karen Czapanskiy published "Preschool and Lead Exposed Kids: The IDEA Just Isn't Good Enough" in the *Touro Law Review* (2019).

Peter Danchin presented on the panel, "South African Constitutionalism in Comparative Perspective," at the Conference to Honor the South African Constitutional Scholar, Professor Heinz Klug at New York Law School, on June 4, 2019.

Leigh Goodmark published *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence*, in October 2018 (University of California Press). The book provides a policy approach to intimate partner violence that relies less on the criminal legal system and more on economics, public health, and community.

Mark Graber published *Constitutional Democracy in Crisis* with Sanford Levinson and Mark Tushnet in September 2018 (Oxford University Press).

David Gray presented "Collective Rights and the Fourth Amendment after Carpenter" at Duke Law on April 6, 2019.

Michael Greenberger published "Better Prepare Than React: Reordering Public Health Priorities 100 Years After the Spanish Flu Epidemic," in the *Journal of American Public Health* (2018).

Diane Hoffmann was a panelist at the University of Maryland, Baltimore's interdisciplinary forum on the impact of chronic pain on June 19, 2019.

Kathleen Hoke presented "Maryland's Medical Cannabis Program: A Patient's Perspective and New Changes" at the Network for Public Health Law–Eastern Region and the Maryland Commission of Civil Rights conference: "A New Frontier: The Evolving Legal & Policy Landscape of Medical Cannabis in Maryland" on May 21, 2019.

Seema Kakade presented at the Emory University School of Law's Future of Environmental Law Symposium, "Environmental Law Clinics: The Secret to Saving Our Environment" on January 18, 2019.

Lee Kovarsky published "Citizenship, National Security Detention, and the Habeas Remedy," in the *California Law Review* (2019).

William Moon published "Regulating Offshore Finance" in the *Vanderbilt Law Review* (2019).

Abstract

What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors
by Professor Deborah Eisenberg, Dr. Lorig Charkoudian and Dr. Jamie Walter in *Family Court Review* (2018)

Studies have shown that court-based mediation has many benefits for litigants and the judiciary, including time and cost savings, high satisfaction rates, and more durable settlement agreements. Less is known about the actual strategies that mediators use to promote positive outcomes. Professor Deborah Eisenberg, with co-authors Dr. Lorig Charkoudian and Dr. Jamie Walter, published a peer reviewed article examining "what works" in mediation in the child custody mediation court context. This study is the first conducted in a custody context to measure the impact of observed mediator behaviors on changes in party attitudes, the probability and content of agreements, and process experiences, regardless of whether the parties reach agreement.

The article resulted from a ground-breaking study in the Maryland Judiciary that combined real-time behavior observation and coding of mediation sessions with pre- and post-mediation questionnaires. Using regression analysis, the study isolated the immediate and long-term impact of various strategies used by the mediator on party attitudes and case outcomes.

Abstract

A Rule of Persons, Not Machines: The Limits of Legal Automation by Professor Frank Pasquale in the *George Washington Law Review* (2019)

For many legal futurists, attorneys' work is a prime target for automation. They view the legal practice of most businesses as algorithmic: data (such as facts) are transformed into outputs (agreements or litigation stances) via application of set rules (the law). These technophiles promote substituting computer code for contracts and descriptions of facts now written by humans. Legal automation, however, can also elide or exclude important human values, necessary improvisations, and irreducibly deliberative governance. Due process depends on narratively intelligible communication from persons and for persons that are not reducible to software.

Language is constitutive of these aspects of law. To preserve accountability and a humane legal order, these reasons must be expressed in language by a responsible person. This basic requirement for legitimacy limits legal automation in several contexts, including corporate compliance, property recordation, and contracting. A robust and ethical legal profession respects the flexibility and subtlety of legal language as a prerequisite for a just and accountable social order. It ensures a rule of persons, not machines.

Michael Pinard was a panelist and moderator for "The Widening Reach of the Criminal Justice System and the Impact on Communities of Color," at the 4th National People of Color Legal Scholarship Conference, at American University Washington College of Law on March 22, 2019.

Natalie Ram presented "Ethical Considerations in Big Data in Medicine: The Problem of De-Identification," at the National Academy of Medicine's 2019 Emerging Leaders Forum on July 17, 2019.

Rena Steinzor was a panelist for "Congress and the Administrative State: Delegation, Nondelegation, and Un-Delegation," hosted by George Mason Antonin Scalia Law School's C. Boyden Gray Center for the Study of the Administrative State on February 22, 2019.

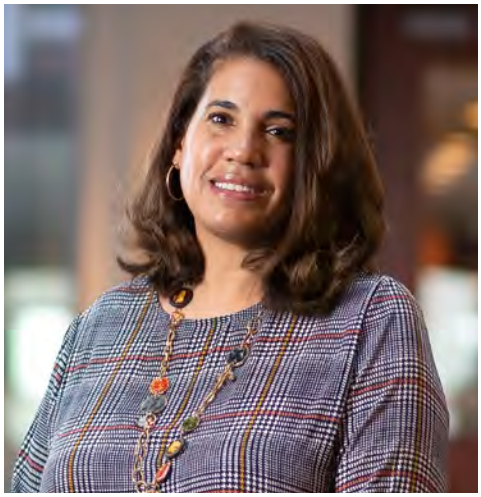
Maureen Sweeney published "Enforcing / Protection: The Danger of Chevron in Refugee Act Cases" in the *Administrative Law Review* (2019).

Marley Weiss presented "The Intersection of Equal Employment and Immigration Law," at the National Conference on Equal Employment Opportunity Law, sponsored by the ABA Section of Labor and Employment Law, Equal Employment Opportunity Committee on April 5, 2019.

PERSPECTIVE:

USING LEGAL WRITING ASSIGNMENTS TO TEACH DOCTRINE

By Sherri Lee Keene



Maryland Carey Law School Professor Sherri Lee Keene will be contributing a chapter to the edited volume Lawyering Skills in the Doctrinal Classroom: Using Legal Pedagogy to Enhance Teaching Across the Law School Curriculum *to be published by Carolina Academic Press (forthcoming 2020). Keene is drafting a chapter tentatively titled "The Benefits and Challenges of Incorporating Legal Writing Assignments into a Doctrinal Course." In writing this chapter, Keene is drawing upon her experience teaching integrated legal writing and doctrinal courses at Maryland Carey Law.*

DO YOU STILL remember the law for a legal writing assignment that you wrote in law school? The odds are that you do. Work on writing assignments engages writers and facilitates their deep thinking on the underlying subject matter. As law students work to solve legal problems, they must grapple with the law and its meaning.

Legal writing assignments involving hypothetical legal problems, a staple of legal writing courses, offer broader benefits to other law school courses as well. Legal writing furthers a professional purpose, but the writing process itself also has many benefits for the writer. Scholars have long appreciated that writing promotes critical thinking and learning. Legal scholars have explored the benefits of writing across the curriculum in the specific context of legal education. Moreover, the benefits of using legal writing to teach doctrine have been seen in practice at Maryland Carey Law.

Work on legal writing assignments presents a welcome challenge as it requires students to assume the attorney role and bring together knowledge of doctrine, practice, and the profession to complete writing tasks. Integrated teaching methods align with recommendations about how best to prepare law students for the varied demands of the legal profession. They are also consistent with relatively new ABA standards that require law schools to offer and students to complete six credit hours of experiential coursework that can include simulated courses integrating doctrine, theory, skills, and ethics.

When writing assignments are linked to doctrinal coursework, students are given meaningful opportunities to focus on the law they are learning in the classroom. Legal writing requires extended study and deep thinking about specific legal issues. Legal writing assignments also present students with valuable opportunities to test their understanding and receive feedback on their analysis while learning the law. Feedback on assignments can help students identify what they do and do not understand so that they can adjust their thinking. Providing opportunities in the curriculum for students to check their progress and receive feedback is also consistent with current ABA standards.

As legal writing is both an important skill needed for legal practice and a tool for learning about the law, there has been increased interest in recent years in providing more writing opportunities for law students. Professors who teach legal writing have long used writing assignments in their classrooms and can offer insight about how to use writing assignments effectively to facilitate student learning.

As law schools consider increasing writing opportunities, however, it is important to consider the unique goals and challenges for professors seeking to use writing assignments in doctrinal classes. For example, when incorporating writing assignments, professors teaching doctrinal classes must strike a balance between the competing goals of covering a broad scope of content and delving into discrete topics in more depth. There are also challenges to providing feedback on writing assignments to large classes, and expectations for feedback should differ as the primary goal is to promote students' understanding of the law rather than improve technical writing skills. Overall, though, the benefits of more comprehensive student learning outweigh the challenges. By sharing our collective knowledge, more law professors can realize the benefits of using legal writing assignments in the classroom to engage students and promote their understanding of the law. ■

PERSPECTIVE:

TRANSNATIONAL ENVIRONMENTAL ACCOUNTABILITY

By Robert V. Percival

THE NATIONS OF THE world have long recognized that countries and companies that cause environmental harm outside their borders should be held legally accountable. But this has proved to be an elusive goal. At both the 1972 and 1992 UN Conferences on Environment and Development the nations of the world pledged to develop "international law regarding liability and compensation" for victims of transboundary environmental harm, but this promise has not been achieved.

Professor Percival is the author of a chapter on "Transnational Litigation: What Can We Learn from Chevron-Ecuador?" that will be published by Oxford University Press in a forthcoming book on Transnational Environmental Law.

Developing countries also have struggled to develop their own effective legal remedies for harm caused to their environments by foreign extractive industries. For more than a quarter century a legal battle has been waged over oil pollution in Ecuador allegedly caused by a U.S. company during the 1970s. In 2011 a court in Ecuador held the company liable for $9 billion in damages and cleanup costs, a decision subsequently upheld by the Supreme Court of Ecuador. But the plaintiffs have not been able to enforce the judgment in any country where the company has assets. Courts in Canada, Brazil and Argentina have held that Chevron's subsidiaries in their countries are not liable to satisfy debts of their U.S. parent corporation. Claiming fraud, the oil company (Chevron) obtained a RICO judgment against the plaintiffs' lawyers in the U.S. barring enforcement action in the company's home country. But Chevron's narrative that the litigation was a fraudulent shakedown from the start is contradicted by the fact that the plaintiffs initially filed their case in New York in 1993 and it was transferred to Ecuador in 2002 only at the urging of the oil company.

Today, massive investment projects associated with China's "Belt and Road" initiative have saddled some of the world's poorest countries with monumental debt obligations and exacerbated transnational conflict. Although the Chinese government has pledged to promote a "green Belt and Road," Chinese companies operating in the developing world often do not understand or simply disregard local environmental laws and regulations, as the law school's Transnational Environmental Accountability (TEA) Project has found. Working with the TEA Project and Friends of Nature China, Lecturer in Law Zhang Jingjing, an award-winning environmental lawyer, took Maryland students on a field trip to Guinea in June 2019 to monitor the impact on local villagers of a Chinese company's bauxite mine. One of the poorest countries in the world, Guinea has one third of the global bauxite reserves and it is China's number one bauxite provider.

In July 2018 Professor Zhang appeared in court in Cuenca, Ecuador to support the efforts of the Kañari-Kichwa indigenous communities to stop a Chinese company from mining in Ecuador's Cajas Nature Reserve. Zhang argued that Chinese law requires companies to abide by both international treaties signed by China and domestic law in the countries in which they operate.

In a historic decision in August 2018 the court in Cuenca agreed and upheld an order halting the company's mining activities.

In many developing countries bribery is a serious problem undermining enforcement of environmental law. Both the U.S. and China have laws that prohibit companies from bribing officials in foreign countries. China has yet to bring any actions to enforce its laws prohibiting bribery of foreign officials, but, to its credit, the Trump administration is beefing up enforcement of the Foreign Corrupt Practices Act (FCPA) and targeting Chinese companies who may run afoul of it. For now, efforts to promote transnational accountability must rely on efforts to expose environmental harm, increase transparency and enhance respect for the rule of law in the developing and developed world. ■