

# Washington Law Review

---

Volume 89 | Number 2

---

6-1-2014

## Contents

anon

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>

---

### Recommended Citation

anon, Table of Contents, *Contents*, 89 Wash. L. Rev. i (2014).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss2/12>

This Table of Contents is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# WASHINGTON LAW REVIEW

VOLUME 89, NUMBER 2, JUNE 2014

---

Published by Students of the  
University of Washington School of Law

---

## CONTENTS

### ARTICLES

“All His Sexless Patients”: Persons with Mental Disabilities  
and the Competence to Have Sex

*Michael L. Perlin & Alison J. Lynch* 257

Much Ado About Something: The First Amendment and  
Mandatory Labeling of Genetically Engineered Foods

*Stephen Tan & Brian Epley* 301

Enlightened Regulatory Capture

*David Thaw* 329

The Constitutional Structure of Voting Rights Enforcement

*Franita Tolson* 379

### RESPONSE AND REJOINDER

*Gully* and the Failure to Stake a 28 U.S.C. § 1331 “Claim”

*Lumen N. Mulligan* 441

The Claim-Centered Approach to Arising-Under Jurisdiction:  
A Brief Rejoinder to Professor Mulligan

*Simona Grossi* 487

### COMMENTS

Arriving at Clearly Established: The Taser Problem and  
Reforming Qualified Immunity Analysis in the Ninth Circuit

*Kate Seabright* 491

Not-So-Harmless Error: A Higher Standard for Mitigation Errors  
on Capital Habeas Review

*Ryan C. Thomas* 515

“Without Good Cause”: The Case for a Standard-Based  
Approach to Determining Worker Qualification for  
Unemployment Benefits

*Emily Toler* 559

Loss-of-Chance Doctrine in Washington: From *Herskovits* to  
*Mohr* and the Need for Clarification

*Matthew Wurdeman* 603

Copyright © 2014, Washington Law Review Association. Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed at or below cost, (2) the author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the Washington Law Review Association is notified of the use.

---

WASHINGTON LAW REVIEW (ISSN 0043-0617) is published quarterly by students of the University of Washington School of Law. Periodicals postage paid at Seattle, Washington, and additional mailing offices.

POSTMASTER: Send address changes to:

Frances Johnson  
Washington Law Review  
University of Washington  
Gallagher Law Library  
William H. Gates Hall  
Box 353025  
Seattle, Washington 98195

SUBSCRIPTION INFORMATION: Subscription price for Vol. 89: \$41.06 per year in Washington State (tax included), \$37.50 per year in the United States, and \$47.50 elsewhere. Single issue: \$12.00 (order directly from Washington Law Review Business Office). Subscriptions are renewed automatically unless the business office is notified of cancellation. No refunds will be issued.

BACK ISSUES: See advertisement at the back of this issue.

SUBSCRIPTION & BACK ISSUE CORRESPONDENCE:

Frances Johnson  
Washington Law Review  
University of Washington  
Gallagher Law Library  
William H. Gates Hall  
Box 353025  
Seattle, Washington 98195  
e-mail: [franjan@u.washington.edu](mailto:franjan@u.washington.edu)

MANUSCRIPTS: WASHINGTON LAW REVIEW invites the submission of unsolicited manuscripts. Manuscripts should be double-spaced with double-spaced footnotes. WASHINGTON LAW REVIEW prefers the use of gender-neutral language.

CITATION FORM: For Volume 89, WASHINGTON LAW REVIEW adopts the citation form of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010).

EDITORIAL CORRESPONDENCE: Editor-in-Chief  
Washington Law Review  
University of Washington  
School of Law  
William H. Gates Hall  
Box 353025  
Seattle, Washington 98195  
e-mail: [wlr@u.washington.edu](mailto:wlr@u.washington.edu)

Member, National Conference of Law Reviews

WORLD WIDE WEB HOME PAGE: <http://www.law.washington.edu/WLR>

# WASHINGTON LAW REVIEW

VOLUME 89  
2014

---

---

## 2013–2014 EDITORIAL BOARD

	<i>Editor-in-Chief</i> LAUREN WATTS	
<i>Associate Editor-in-Chief</i> MATTHEW SOUZA	<i>Associate Editor-in-Chief</i> ARTHUR MICHAEL EDWARDS	<i>Associate Editor-in-Chief</i> STEPHANIE LIU
<i>Chief Articles Editor</i> BROOKE HOWLETT	<i>Chief Managing Editor</i> LAURA POWELL	<i>Chief Comments Editor</i> CAITLIN PARK SHIN
<i>Executive Articles Editor</i> ADAM MURRAY	<i>Executive Managing Editor</i> BROOKE SARGEANT	<i>Executive Comments Editor</i> JONATHAN COLLINS
<i>Articles Editors</i> PETER DOLAN DAVID LAI TONY NGUYEN KATHERINE SEABRIGHT	<i>Managing Editors</i> BRIAN EPLEY SCOTT FORBES WILLIAM GOODLING NIKI MORRISON DANIEL RICHARDS SAMUEL SEAL ANDREA WOODS	<i>Comments Editors</i> BRADY DOUGLAS GLENDA GERTZ JENNA SMITH EMILY TOLER

## EDITORIAL STAFF

JOHNATHAN CHONG DEVRA COHEN ANDREW DURLAND JESSICA ERICKSON MICHAEL ELLIS MALLORY GITT LE HOANG CHARLES HAUSBERG	MAUREEN JOHNSTON DARIN JONES JESSICA KNOWLES KELSEY MARTIN BRYCE NELSON KIRSTEN NELSEN PHILIP PAINE CECILY SHIEL	WALKER STANOVSKY ROSS TANAKA RYAN THOMAS DANE WESTERMAYER BRADLEY WESTMORELAND RACHEL WILKA ALEXANDER WISBEY MATTHEW WURDEMAN
---	---	--

## WASHINGTON LAW REVIEW ASSOCIATION FACULTY BOARD

CRAIG ALLEN THOMAS ANDREWS	KAREN BOXX SARAH KALTSOUNIS	LINDA HUME KATHY MCGINNIS
-------------------------------	--------------------------------	------------------------------

## BUSINESS STAFF

<i>Faculty Business Manager</i> PENNY HAZELTON	<i>Faculty Adviser</i> ROBERT GOMULKIEWICZ	<i>Business Office</i> JONATHAN FRANKLIN FRAN JOHNSON
---	---	---

---

## University of Washington School of Law 2013–2014

### OFFICERS OF ADMINISTRATION

Michael Young, B.A., J.D., President of the University  
Kelye Y. Testy, B.A., J.D., Dean, James W. Mifflin University Professor of Law  
Patricia Kuszler, M.D., J.D., Associate Dean for Academic Administration, Professor of Law  
Penny A. Hazelton, B.A., J.D., M.L.L., Associate Dean for Library & Computing Services, Professor of Law  
Mary Hotchkiss, B.A., M.S.L.S., J.D., LL.M., Associate Dean for Students & Academic Life, Senior Law Lecturer  
Kathryn Watts, B.S., J.D., Associate Dean for Research & Faculty Development, Associate Professor of Law  
Stephanie Cox, B.A., Assistant Dean for Advancement  
Michelle Gonzalez, J.D., M.P.A., Assistant Dean for Professional & Leadership Development  
Michele Storms, B.A., J.D., Assistant Dean for Public Service

### FACULTY EMERITI

William R. Andersen, B.S.L., LL.B., LL.M.  
Robert H. Aronson, B.A., J.D.  
William T. Burke, B.S., J.D., J.S.D.  
Robert L. Fletcher, A.B., LL.B.  
Roland L. Hjorth, A.B., LL.B.  
John Huston, B.A., J.D., LL.M.  
John M. Junker, B.A., J.D.  
John R. Price, A.B., LL.B.  
Roy L. Prosterman, B.A., J.D.  
Marjorie D. Rombauer, B.A., J.D.  
Charles Z. Smith, B.S., J.D.  
Frank W. Smith, B.A., J.D., LL.M.  
William B. Stoebeck, B.A., M.A., J.D., S.J.D.  
Philip A. Trautman, B.A., J.D.

### FACULTY OF LAW

Craig H. Allen, B.S., J.D., LL.M., Judson Falknor Professor of Law  
Kimberly D. Ambrose, B.A., J.D., Senior Law Lecturer  
Helen A. Anderson, B.A., J.D., Associate Professor of Law  
Robert T. Anderson, B.A., J.D., Professor of Law, Director of Native American Law Center  
Thomas R. Andrews, B.A., M.A., J.D., Professor of Law  
Karen E. Boxx, B.A., J.D., Professor of Law  
Steve P. Calandrillo, B.A., J.D., Charles I. Stone Professor of Law  
Ryan Calo, B.A., J.D., Assistant Professor of Law  
Thomas D. Cobb, B.A., M.A., M.A., J.D., Senior Law Lecturer  
Molly M. Cohan, B.A., J.D., Law Lecturer  
Ronald K.L. Collins, B.A., J.D., Acting Professor of Law, Harold S. Shefelman Scholar  
William Covington, B.A., J.D., Assistant Professor of Law  
Signe Dortch, B.A., J.D., Law Lecturer, Director of Immigration Law Clinic  
Dwight J. Drake, B.S., J.D., Associate Professor of Law  
Jonathan A. Eddy, B.A., J.D., Professor of Law, Director of Asian Law Center, Manager of Afghanistan Legal Educators Project  
Mary D. Fan, B.A., J.D., M.Phil., Associate Professor of Law  
Julia Gold, B.A., J.D., Principal Law Lecturer, Director of Mediation Clinic  
Robert W. Gomulkiewicz, B.A., M.A., J.D., Professor of Law, Director of Law, Technology & Arts Group  
James H. Hardisty, A.B., LL.B., Professor of Law  
Penny A. Hazelton, B.A., J.D., M.L.L., Professor of Law  
Gregory A. Hicks, B.A., J.D., Professor of Law  
Mary A. Hotchkiss, B.A., M.S.L.S., J.D., LL.M., Senior Law Lecturer  
Maureen A. Howard, B.A., J.D., Associate Professor of Law, Director of Trial Advocacy Program  
Linda S. Hume, B.A., J.D., Professor of Law  
Stewart M. Jay, A.B., J.D., Miller, Pendelton Endowed Professor of Law  
Sarah Kaltsounis, B.S., M.Ed., J.D., Law Lecturer  
Yong-Sung (Jonathan) Kang, B.A., J.D., Assistant Professor of Law  
Sylvia Kang'ara, LL.B., LL.M., S.J.D., Assistant Professor of Law  
Lisa Kelly, B.A., J.D., Professor of Law, Bobbe & Jonathan Bridge Professorship in Child & Family Advocacy, Director of Children & Youth Advocacy Clinic  
Alan Kirtley, B.A., J.D., Associate Professor of Law  
Sanne Knudsen, B.S., M.S., J.D., Assistant Professor of Law  
Anita K. Krug, B.A., M.A., J.D., Ph.D., Assistant Professor of Law  
Patricia C. Kuszler, B.A., M.D., J.D., Charles I. Stone Professor of Law, Director of Multidisciplinary Initiatives  
Clark B. Lombardi, B.A., M.A., J.D., Ph.D., Associate Professor of Law, Adjunct Associate Professor of Law in

#### International Affairs

Deborah Maranville, B.A., J.D., Professor of Law, Director of Clinical Law Program, Director of Unemployment Compensation Clinic  
Lisa Marshall Manheim, B.A., J.D., Visiting Assistant Professor of Law  
Anna C. Mastroianni, B.S., B.A., J.D., M.P.H., Professor of Law  
Shannon McCormack, B.A., J.D., LL.M., Assistant Professor of Law  
Kathleen M. McGinnis, B.A., J.D., Senior Law Lecturer  
Jacqueline McMurtrie, B.G.S., J.D., Associate Professor of Law, Director of Innocence Project Northwest  
Theodore A. Myhre, B.A., M.A., M.A., J.D., Law Lecturer  
Joel M. Ngugi, LL.B., LL.M., S.J.D., Associate Professor of Law  
Peter Nicolas, B.A., M.P.P., J.D., Jeffrey & Susan Brotman Professor of Law  
Sean O'Connor, B.A., M.A., J.D., Professor of Law, Director of Law, Technology & Arts Group, Director of Entrepreneurial Law Clinic  
Kathleen O'Neill, B.A., J.D., Professor of Law  
Elizabeth Porter, B.A., M.Ed., M.A., J.D., Assistant Professor of Law  
Anita Ramasastry, B.A., M.A., J.D., D. Wayne & Anne Gittinger Professor of Law, Director for Journals & Conferences, Law, Technology, & Arts Group  
Beth Rivin, B.A., M.D., M.P.H., Research Associate Professor of Law, Director of Global Health & Justice Project  
William H. Rodgers, B.A., J.D., Stimson Bullitt Professor of Environmental Law  
Zahr Said, B.A., J.D., Ph.D., Assistant Professor of Law  
Sallie Thieme Sanford, B.A., J.D., Assistant Professor of Law  
Eric Schnapper, B.A., M.A., B.Phil., LL.B., Betts, Patterson & Mines Professor of Law  
Scott A. Schumacher, B.A., J.D., LL.M., Associate Professor of Law, Director of Federal Tax Clinic, Director of Graduate Program in Taxation  
Toshiko Takenaka, B.A., LL.M., Ph.D., W. Hunter Simpson Professor of Law, Director of CASRIP, Director of Law, Technology & Arts Group  
Kellie Y. Testy, B.A., J.D., Dean, James W. Mifflin University Professor of Law  
Michael E. Townsend, B.A., M.A., Ph.D., J.D., Associate Professor of Law  
Lea B. Vaughn, A.B., J.D., Professor of Law  
Walter J. Walsh, B.C.L., LL.M., S.J.D., Associate Professor of Law  
Kathryn Watts, B.S., J.D., Garvey, Schubert & Barer Associate Professor of Law  
Ron J. Whitener, B.A., J.D., Senior Law Lecturer, Director of Tribal Court Criminal Defense Clinic  
Brenda Williams, B.A., M.P.A., J.D., Law Lecturer  
Jane K. Winn, B.Sc., J.D., Charles I. Stone Professor of Law, Director for International Programs, Law, Technology & Arts Group  
Louis E. Wolcher, B.A., J.D., Charles I. Stone Professor of Law  
Dongsheng Zang, LL.B., LL.M., LL.M., S.J.D., Associate Professor of Law  
David Ziff, A.B., J.D., Law Lecturer

#### ADJUNCT AND VISITING FACULTY

William Bailey, B.A., J.D., Professor from Practice  
Matt Bareto, B.S., M.S., Ph.D. Adjunct Associate Professor, Political Science  
Gad Barzilai, B.A., LL.S., LL.B., M.A., Ph.D., Adjunct Professor of Law  
Katherine Beckett, B.A., M.A., Ph.D., Adjunct Professor, Law Societies and Justice Program, Sociology  
Andrew Benjamin, J.D., Ph.D., Affiliate Professor of Law  
Sharan E. Brown, B.A., M.A., J.D., Ed.D., Adjunct Research Associate Professor of Law  
Denise Dudzinski, Ph.D., MTS, Adjunct Professor, Bioethics and Humanities  
Carl Goodman, B.B.A., J.D., LL.M., Visiting Professor, Georgetown University  
Michael Hatfield, B.A., M.A., J.D., Visiting Professor  
Thomas Hazlet, B.S., Pharm.D., Dr.P.H., Adjunct Associate Professor, Pharmacy  
Nancy S. Jecker, B.A., M.A., M.A., Ph.D., Adjunct Professor of Law  
Michael McCann, B.A., M.A., Ph.D., Adjunct Professor of Law  
Arzoo Osanloo, B.A., J.D., Ph.D., Adjunct Associate Professor of Law, Law, Societies and Justice Program  
Saadia Pekkanen, B.A., M.I.A., Ph.D., M.S.L., Adjunct Associate Professor of Law  
Stephen A. Rosenbaum, B.A., J.D., M.P.P., Visiting Senior Lecturer  
Clare Ryan, B.S., M.S., Ph.D., Adjunct Professor, School of Environmental and Forest Sciences  
Hugh D. Spitzer, B.A., J.D., LL.M., Visiting Professor of Law  
Anna Tolin, B.A., J.D., Supervising Attorney and Visiting Lecturer  
Susan Whiting, B.A., Ph.D., Adjunct Associate Professor of Law  
Todd Wildermuth, B.S., M.S., Ph.D., Scholar in Residence  
Richard O. Zerbe, Jr., A.B., Ph.D., Adjunct Professor of Law

#### GALLAGHER LAW LIBRARY STAFF

Crystal Alberthal, B.A., Library Specialist, Serials  
Karen Ballard, B.A., Library Specialist, Cataloging  
Rob Britt, B.A., M.A., M.A., Japanese Legal Materials Specialist, East Asian Law  
Judy Davis, B.A., M.L.S., Librarian, Resource Sharing  
Anna Ender, B.A., J.D., M.L.I.S., Librarian, Reference  
Flora Escarez, B.S., Library Specialist, Cataloging  
Grace Feldman, B.A., J.D., M.L.I.S., Librarian, Reference  
Jonathan Franklin, A.B., A.M., J.D., M.L.S., Associate Law Librarian

Sharon Hall, Library Specialist Supervisor, Cataloging  
Tricia Hart, B.A., M.L.S., Librarian, Cataloging  
Ingrid Holmlund, A.B., J.D., M.L.I.S., CILP Co-Editor  
Peggy Jarrett, B.A., M.S.L.I.S., Librarian, Collection Development & Reference  
Fran Johnson, Fiscal Specialist, Washington Law Review, Pacific Rim Law & Policy Journal  
Richard Jost, B.A., M.A., M.A., Information Systems Coordinator  
Choong Kim, B.A., Fiscal Specialist  
Sherry Leysen, B.A., M.A., J.D., M.L.I.S., Librarian, Reference  
Kaden Mack, B.A., Library Tech, Circulation  
Craig Morley, B.A., Library Materials Conservation Supervisor, Serials  
Ann Nez, B.A., M.L.S., Technical Services Coordinator  
Vickie Northington, B.A., Library Supervisor, Circulation  
Cheryl Nyberg, B.A., M.S.L.S., Librarian, Coordinator of Reference Services  
Nikki Pike, Information Specialist, CILP  
Natalie Riha, B.F.A., M.F.A., Assistant to the Director  
Patty Roberts, B.A., Library Tech Lead, Evening Circulation Supervisor  
Tania Schriwer, B.A., J.D., M.L.I.S., CILP Co-Editor  
Dave Tawatao, Senior Computer Specialist  
Reba Turnquist, B.A., M.L.S., Librarian, Collection Development  
Mary Whisner, B.A., J.D., M.L.S., Librarian, Reference  
Alena Wolotira, B.A., J.D., M.L.I.S., Librarian, Reference; CILP Co-Editor  
Quan (John) Zhang, B.A., M.A., Ph.D., Library Specialist, Acquisitions