

EDITOR'S NOTE

Modern writing at its worst does not consist in picking out words for the sake of their meaning and inventing images in order to make the meaning clearer. It consists in gumming together long strips of words which have already been set in order by someone else, and making the results presentable by sheer humbug.

George Orwell¹

GROWTH & CHANGE: JOURNALS STAND FOR MORE THAN BASE PRESTIGE

Any transition brings with it growing pains, and this past year the Lewis & Clark Law Review has experienced many transitions. First, when last year's editors committed the journal to the current board's care, the current board had to learn their new roles while also adapting to isolation and quarantine. As I write this note, America is transitioning to a new administration, while in simultaneous microcosm the current editorial board is handing control over to the future leaders who will shape what our journal is to become.

All of these changes required great flexibility coupled with intense resilience from our staff. In this isolated time, a consistent bright spot for me was our editorial team. Returning members showed incredible patience and charity to the managing board as we threw spaghetti at the wall of remote journaling; the processes with which they were familiar went away, replaced by web-based tools and Zoom meetings. New members demonstrated determination, persistence, and compassion; even though our on-campus communal workspace in which the comradery of law review is usually forged could not be occupied, they still found ways to connect and help each other. I am firmly convinced that, no matter what challenges arise in future issues of the Lewis & Clark Law Review, this generation of editors will overcome these problems with poise and resolve.

Although this has been a difficult year, it has also been an exciting and dynamic time at the journal. Issue 24.2 collected the scholarship that came out of our Fall 2019 Symposium *Class Actions, Mass Torts, and MDLs: The Next 50 Years*. Topics included state MDLs, class actions for social justice, class action arbitration, mass

¹ George Orwell, *Politics and the English Language*, in *ALL ART IS PROPAGANDA: CRITICAL ESSAYS* 270, 278 (George Packer, ed. 2009).

torts, and a conversation with Professor Arthur Miller and Professor Robert Klonoff.²

Issue 24.3 saw us turn our attention to several pressing topics facing our nation. Among the articles we published were an original study of the role of automation in immigration detention decisions, a proposal for the regulation of First Amendment infractions by AI, and a prescient multi-axial analysis of Title VII's "because of . . . sex" language that both mapped and diverged from Justice Gorsuch's majority opinion in *Bostock v. Clayton County*.³

Issue 24.4 is touched by a deep grief. It has only recently gone to print because production was paused to allow our students and faculty to draft tributes to one of the true leading lights in the Lewis & Clark community: the recently departed Professor Jeffrey D. Jones. His article on Workforce Housing was published in 24.4, and the quality and passion of that scholarship is a testament to his enduring legacy.⁴

As such, we dedicated Issue 24.4 to Professor Jones's memory.

Appearing alongside Professor Jones's piece are several other remarkable works of scholarship that our community soldiered through remote journaling to put together. Among them are a forceful call to end the deportation of immigrant veterans and an historical and biological inquiry into the retributivist model of criminal justice.⁵

Issue 25.1 saw another monumental effort by our editors to get several essential contributions to legal scholarship and societal change into print. The topics covered in this Issue include an original attorney-interview study on the Invisible Border Wall, a call to use First Amendment protections to curtail the school-to-prison pipeline, and a proposal for using the common law to make web scraping an actionable tort.⁶

² See generally Robert H. Klonoff, *Foreword*, 24 LEWIS & CLARK L. REV. 359 (2020) (detailing the topics covered by the Fall 2019 Symposium).

³ Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789 (2020); Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. 857 (2020); Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731 (2020) (discussing *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020)).

⁴ Jeffrey D. Jones, *Workforce Housing and Housing Preference Policies Under the Fair Housing Act*, 24 LEWIS & CLARK L. REV. 1413 (2020).

⁵ Deenesh Sohoni & Yosselin Turcios, *Discarded Loyalty: The Deportation of Immigrant Veterans*, 24 LEWIS & CLARK L. REV. 1285 (2020); Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339 (2020).

⁶ Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71 (2021); Frank LoMonte & Anne Marie Tamburro, *From After-School Detention to the Detention Center: How Unconstitutional School-Disruption Laws Place Children at Risk of Prosecution for "Speech Crimes"*, 25 LEWIS & CLARK L. REV. 1 (2021); Benjamin L.W. Sobel, *A New Common Law of Web Scraping*, 25 LEWIS & CLARK L. REV. 147 (2021).

Issue 25.2 will be another fantastic symposium issue, although the format had to change substantially to accommodate COVID-19 safety protocols. In 25.2, we have attempted to advance the area of racially sensitive criminal justice reform. Colin Bradshaw, our submissions editor, curated a thought-provoking and timely selection of articles.⁷ The topics range from proposed sentencing policies that would make criminal justice reform enduring and principled, suggestions for achieving accountability in policing reform, a discussion of how neuroimaging should impact racially-neutral sentencing, a critique of racially based hierarchies of victims, and a guidebook for trauma-informed prosecutions.⁸ We will be hosting the authors to present their papers in April at an event titled *Justice, Race, & Reform: Examining Proposals for Responsive Change*, and it promises to be an enlightening event.

With this Volume, Lewis & Clark Law Review reaches its 25th year. Although we are a comparatively young law review, we have established ourselves as a top 100 journal,⁹ and our articles have been cited numerous times by Federal District and Bankruptcy courts,¹⁰ as well as state appellate courts ranging from our native Ore-

⁷ For a discussion of the woes facing submissions editors, and a proposal for reform, see Joseph Scott Miller, *The Immorality of Requesting Expedited Review*, 21 LEWIS & CLARK L. REV. 211 (2017) (suggesting that authors include either a pledge to not leverage publication offers for prestige, or a frank admission of their intent in every cover letter).

⁸ Mirko Bagaric, Gabrielle Wolf, Daniel McCord, Brienna Bagaric, & Nick Fisher, *American Exceptionalism at Its Finest: Soft on Crime Now A Vote Winner in the World's Largest Incarcerator*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021); Michael D. White, Henry F. Fradella, & Michaela Flippin, *How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021); Alison J. Lynch & Michael L. Perlin, "I See What Is Right and Approve, but I Do What Is Wrong": *Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021); Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021); Eric M. Werner, *Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021); see also Tung Yin, *The Time Is Now: Criminal Justice Reform in the Wake of George Floyd's Killing*, 25 LEWIS & CLARK L. REV. (forthcoming June 2021). The symposium website and registration information is available at *Justice, Race, & Reform: Examining Proposals for Responsive Change*, LEWIS & CLARK L. SCH.: CALENDAR, https://law.lclark.edu/calendars/events/#!view/event/event_id/327820 (last visited Mar. 16, 2021).

⁹ *W&L Law Journal Rankings*, WASHI. & LEE U. L. LIBR., <http://go.wlu.edu/lawjournals> (last visited Mar. 16, 2021) (listing Lewis & Clark Law Review in position 66).

¹⁰ See, e.g., *D.R. Distributions, LLC v. 21 Century Smoking, Inc.*, 2021 WL 185082, at *2 n.1 (N.D. Ill. 2021); *United States v. Cook*, 2019 WL 2721305, at *1 (E.D. Tenn. 2019); *In re Prosser*, 2016 WL 4821261, at *3 (D. Bankruptcy B.V.I. 2016); *Bush v. City of Gretna*, 2011 WL 13232128, at *2 (N.D. Fla. 2011); *United States v. Hendrix*, 2010 WL 1372663, at *2 (W.D. Wis. 2010).

gon all the way to Delaware.¹¹ Whether prestige metrics like these are truly of any import is a matter open to debate, given the baked-in hierarchies of the study of law.¹² However, I firmly believe that careful study and critique of the law is one of the only ways to bend the moral arc of the universe towards justice. And that, certainly, is important.

In 2017, a predecessor of mine cursed his reader to live in interesting times.¹³ This curse may have been tongue-in-cheek, but nowadays I pine for the relative tedium of 2017.¹⁴ In his note, he said both that law reviews can save the world, but they cannot save the legal academy.¹⁵ A diffusion of “source-checker spirit,” or the ideal that words mean something and there is such a thing as Truth, certainly could help us to fix endemic problems in our nation and beyond our borders.¹⁶ So, I agree with him on the first statement. However, I disagree on the second statement. Law reviews can save the legal academy and the profession more broadly, but only if we are committed to the first idea: Truth—with a capital letter—is worth seeking.

Indeed, many of the ills our editors encounter—substantive deficiencies with articles, inconsiderate negligence in formatting, and lack of careful scholarship—would be fixed if current law review members across the nation would all take their “source-checker spirit” with them into practice.¹⁷ A culture shift towards precision of thinking and consideration for those who are tasked with dealing with the ramifications of our ideas is sorely needed, and I am hopeful that we are in the process

¹¹ See, e.g., *Auto Equity Loans of Delaware, LLC v. Baird*, 2020 WL 2784752, at *3 n.24 (Del. 2020); *Elizabeth P. v. Gid M.*, 2019 WL 5289927, at *3 (W. Va. 2019) (Workman, J., dissenting); *In re B.G.L.S.*, 2018 WL 3153684, at *1 n.2 (Pa. 2018); *State v. Supanchik*, 323 P.3d 231, 242–43 (Or. 2014).

¹² Cf. Ronen Perry, *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 CONN. L. REV. 1, 8–12 (2006) (discussing citation analysis and the merits of supposed differences between pedagogical value and practical value).

¹³ Brandon L. Thornburg, *Editor’s Note*, 21 LEWIS & CLARK L. REV. ix, ix–x (2017).

¹⁴ Cf. *King v. Whitmer*, 2020 WL 7134198, at *13 (E.D. Mich. 2020) (“[T]his lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People’s faith in the democratic process and their trust in our government.”).

¹⁵ Thornburg, *supra* note 13, at xii.

¹⁶ See Hamid Furoughi et al., *Leadership in a Post-Truth Era: A New Narrative Disorder?*, 15 LEADERSHIP 135, 136–37 (2019) (describing the rise and the political power of dissent about what constitutes reality).

¹⁷ See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 931–32 (1990) (“The few who ‘make law review’ no doubt receive exceptionally good training in logical thought and formal expression, not to mention source-checking. Indeed, the reviews can do a good job correcting deficiencies in . . . the traditional law school curriculum [and] offer an outlet for student initiative in the face of curricular boredom.”). *But see id.* at 932 (castigating the exclusivity and navel-gazing of the legal academic culture).

of making that shift. This transition towards clarity of meaning has already begun and the fact that growth can be painful will not stop it.

The Lewis & Clark Law Review has made exciting contributions to a dizzying diversity of fields during its short career. For the next quarter-century, we will continue this tradition no matter how many transitions we endure. It is my sincere wish that we, and the authors who collaborate with us, will do so in ways beyond just the publication of scholarship by fostering careful intellectualism and mutual respect.

Connor B. McDermott
Editor in Chief
2020–2021