FOREWORD: LAW, PSYCHOLOGY, AND THE EMOTIONS
Heidi Li Feldman

PRUDENCE, BENEVOLENCE, AND NEGLIGENCE:
VIRTUE ETHICS AND TORT LAW
Heidi Li Feldman

In this Article, Feldman aims to remedy a lapse in tort scholarship on the negligence standard in American tort law. Tort scholars have devoted much attention to the meaning of reasonableness in tort law's reasonable person standard. But the full standard, upon which the jury is instructed, emphasizes that the fictitious reasonable person contemplated by tort law possesses certain virtues, specifically prudence and due carefulness. Drawing on the virtue ethics tradition in moral philosophy, Feldman explains the relationship between human flourishing or well-being and the virtues. She focuses on prudence and due care and argues that these traits dispose their possessor to be sensitive to certain features of situations and to respond to those features specifically. Feldman argues that in a negligence action, the jury performs the function of a thought-experimenter, seeking to ascertain how a reasonable person possessed of prudence and due care would act in the situation that confronted the actual defendant. The result of the jury's experiment constitutes a normative expectation, offering guidance to those confronting similar situations. This demonstrates that a virtue-based standard can yield particular prescriptions for conduct. Feldman concludes the Article by addressing two possible worries about the negligence standard conceived in virtue-theoretic terms: a worry that it grants the jury excessive normative authority and the worry that the prescriptions generated by juries' thought experiments will not coincide with the dictates of a cost-benefit analysis undertaken from the social viewpoint. She claims that democratic principles justify the jury's normative authority in the tort context and argues that we have no noncircular reason to care if juries strike a balance between freedom and action that does not maximize social utility.

EMPATHY AND EVALUATIVE INQUIRY
Justin D'Arms

Empathic mechanisms bring about emotional convergence between models and observers. Such convergence is valuable not merely for motivating prosocial behavior, but also as a tool for evaluative inquiry. Recent scholarship on emotions has emphasized their role in revealing or constituting various realms of value. In light of such suggestions, this Article explores the mechanisms and consequences of empathy. It is argued that, by allowing one to "try on" new emotional takes on the world, empathy can expand a person's evaluative perspective in important ways. This can render an
agent susceptible to forms of evaluative experience and ultimately evaluative knowledge that might otherwise be unavailable to her.

Retribution and Redemption in the Operation of Executive Clemency  
Elizabeth Rapaport  1501

Rapaport offers a critique of the contemporary retributivist approach to executive clemency and seeks to stimulate reappraisal and development of what she calls the “redemptive” perspective. The retributivist view of clemency and of criminal justice generally is reductionist: Retributivists take both the justification and measure of punishment to be just desert. A richer account of clemency recognizes that criminal justice has a complex set of goals. Rapaport argues that, while there is clearly a sense in which justice and clemency-as-retributively-undeserved-lenity are antithetical, an account of criminal justice rich enough to reflect our traditions and practices prior to the neo-retributive retreat finds a place for clemency-as-lenity.

The Limits of Social Norms  
Jeffrey J. Rachlinski  1537

Legal scholars have expressed a growing interest in the power of social norms. They now frequently argue that people obey the law even in the absence of legal sanctions and order their lives effectively without the assistance of courts, legislatures, and administrative agencies. This work promises to provide social reformers with inexpensive and effective ways of controlling antisocial behavior. Social psychologists, however, have conducted decades of research on social norms indicating that it is difficult to manipulate behavior by manipulating social norms in a reliable manner. Although social norms are important determinants of behavior, their influence can also be quite ephemeral. This Article presents social psychological research demonstrating that social norms are both more powerful and less powerful than legal scholars have heretofore recognized.

Taking Myths Seriously: An Essay for Lawyers  
Donald C. Langevoort  1569

A close connection exists between cognitive biases and the idea of “myth.” People believe things with far more confidence than they should, which many psychologists and social theorists attribute to the need to suppress anxiety. This Essay explores this idea within the world of lawyers and clients, especially in the business setting, showing how personal mythologies can blunt ethical mandates and how storytelling can sometimes help counteract the more pernicious forms of myth.

The Hidden Economy of the Unconscious  
Anne C. Dailey  1599

Behavioral law and economics scholars rely on experimental psychology to help explain nonrational market behavior. This Article argues that cognitive psychology cannot provide an adequate account of irrationality because it downplays, or ignores altogether, the role of unconscious emotions and motivations in human decisionmaking. Psychoanalysis is the only empirical psychology that explains how internal mechanisms of exchange come to affect real transactions in the world. What psychoanalysis offers law and economics is in part an economic theory of mind, one that views the roots of irrationality as residing in the unconscious mechanisms of transference both within and among individuals.
SYMPOSIUM
COMMEMORATING THE TWO HUNDREDTH ANNIVERSARY OF CHANCELLOR KENT’S ASCENSION TO THE BENCH

Harold J. Krent
Symposium Editor