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Review of "Constitutional Torts" by Sheldon H. Nahmod, Michael L. Wells, Thomas A. Eaton

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Book Reviews

Sheldon H. Nahmod, Michael L. Wells, and Thomas A. Eaton, *Constitutional Torts*. Cincinnati: Anderson Publishing Company, 1995. Pp. xvi + 431.

Reviewed by Jack M. Beermann

The most interesting issues in the field of constitutional torts, involving the legal and moral bases for the government's responsibility for injuries it causes, are the most difficult ones for lawyers to explore. The question whether, as a moral or social policy matter, governments and government officials should enjoy immunities or other defenses not available to private individuals is rarely confronted directly in judicial opinions or in scholarship on constitutional torts, yet it lurks behind many of the doctrinal issues that come up in constitutional tort litigation.[1] A slight scratch on the surface of doctrines as disparate as official immunities, the role of state remedies in procedural due process, the status of agencies and officials as "persons," the appropriate circumstances for *Bivens* actions,[2] and the liability of municipalities for the constitutional torts of government officials reveals a murky history of sovereign immunity and related doctrines and an inarticulate sense that holding government responsible for all of its tortious conduct might be both morally necessary and economically disastrous.

Constitutional tort litigation under section 1983, the primary vehicle for litigating the constitutional liability of state and local officials[3] and local governments, and *Bivens* takes place against a complicated background of "ordinary" tort litigation against government entities and officials, brought under varying state common law and tort claims acts, and against the federal government under the Federal Tort Claims Act. Each of these avenues of relief contains limitations that inspire claimants and their attorneys to make a federal case, and a constitutional one at that, out of many claims against government that might not appear at first glance to be of federal or constitutional concern. While the Supreme Court often invokes the availability of "ordinary tort remedies" as a reason for not expanding constitutional tort

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1. See, for an exception, Ronald A. Cass, Damage Suits Against Public Officials, 129 U. Pa. L. Rev. 1110 (1981), which discusses the different incentive structure that influences the behavior of government officials.
2. The *Bivens* action, which provides a damages remedy against federal officials who violate constitutional rights, was created by the Supreme Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
3. Unless the context indicates otherwise, references to state officials include local government officials and vice versa.

remedies, the features of those remedies are rarely examined, and it is not clear that the features are understood or even considered relevant. For example, in many jurisdictions the amount of damages available against the government is limited, and officials enjoy immunities that shield them from personal liability. While Justice Stevens would analyze and uphold these immunities under a deferential constitutional standard of review,[4] the rest of the Court has largely ignored them and avoided addressing their relevance to the proper application of federal constitutional tort law.

The background tort liability of the federal government and federal officials is somewhat different from state liability. The Federal Tort Claims Act provides remedies for many victims of tortious conduct by federal officials and agencies, but it contains doctrinal limitations, read broadly by the Supreme Court, that prevent recovery in many circumstances where private tort liability might be available. While the Supreme Court has held that the Federal Tort Claims Act does not displace the judicially created *Bivens* remedy for constitutional torts,[5] the Court has recently restricted the availability of the *Bivens* remedy in areas where an action under the FTCA would not be available.

Sheldon Nahmod, Michael Wells, and Thomas Eaton have entered the teaching materials market in this field with their new casebook, *Constitutional Torts.* They have excellent credentials. They are authors of some of the most important and interesting articles on section 1983 since *Monroe v. Pape*[6] made section 1983 a fertile source of litigation and scholarship. Nahmod's treatise is a comprehensive look at section 1983 doctrine, a valuable resource for lawyer and scholar alike.[7] The organization of the new casebook, the editing of the cases, and the notes reflect the years these authors have spent thinking, teaching, and writing about constitutional tort litigation issues.

There are several very good casebooks in the constitutional tort field, and most focus on the interpretation and application of civil rights legislation and doctrines, not on the more theoretical issues regarding governmental responsibility. The statutes and cases, however, invite discussion of government and official accountability and related issues; it is this, and the combination of statutory, constitutional, and legal method issues surrounding constitutional torts issues, that make constitutional torts a worthwhile course for both student and instructor.

Constitutional Torts is different from the other books in this market in that it focuses exclusively on section 1983 and *Bivens.* Other books combine consideration of section 1983 and *Bivens* with more subjects including, inter alia, other civil rights legislation of the Reconstruction era, the constitutional issues raised by that legislation, and more recent civil rights legislation such as

4. See Daniels v. Williams, 474 U.S. 327, 342–43 (1986) (Stevens, J., concurring in the judgment).

5. See Carlson v. Green, 446 U.S. 14 (1980).

6. 365 U.S. 167 (1961).

7. Civil Rights and Civil Liberties Litigation: The Law of Section 1983, 3d ed. (Colorado Springs, 1991).

Title VII of the Civil Rights Act of 1964 and the Voting Rights Act.[8] A shorter, more focused book than its competitors, *Constitutional Torts* is designed for a two- or three-hour concentrated look at section 1983 and *Bivens,* and not for a comprehensive course on federal civil rights litigation.

The organization and case selection of *Constitutional Torts* allows the teaching of a very good course. The book opens with an introductory chapter to acquaint students with the basics of section 1983 (via *Monroe v. Pape)* and *Bivens* (via *Bivens* itself and *Schweiker v. Chilicky*[9]). Since *Monroe v. Pape* and *Bivens* are good starting points, the opening chapter provides a good opportunity to raise themes that should permeate the remainder of the course. It presents the history and purposes of section 1983 and the creation and evolution of the *Bivens* action. The strong point of these introductory materials is that, after a brief overview of the statutory framework,[10] the authors present *Monroe v. Pape* with a great deal of its discussion of the legislative history and purposes intact. This is the best introduction to section 1983 one can get. There is also a lengthy excerpt from Justice Frankfurter's dissent, which should help frame the discussion of the meaning of section 1983's language and the policy issues that section 1983 cases entail.

The notes following *Monroe* highlight the debate over the construction of section 1983's requirement that action be taken "under color of law." The key question presented is whether action taken by state officials that is contrary to state law is nonetheless under color of law when taken in furtherance of their governmental position or aided by the badge of governmental authority, or, to go even further, whether section 1983 should be available only to prevent the operation of unconstitutional statutes or ordinances.

The issue of whether section 1983 reaches beyond unconstitutional state law arises only out of judicial reluctance to enforce Congress's civil rights program. To fully understand these issues, one should journey beyond the confines of section 1983 and examine the entire context of public and private harms that Congress was addressing in its civil rights legislation.[11] The legislative history of the Civil Rights Act of 1871 (of which section 1983 was a part) and other civil rights acts of the period reveals a much broader purpose than providing a remedy only against action pursuant to, or not inconsistent with, state law. The history, taken as a whole, establishes that Congress intended other parts of the 1871 Act to reach purely private conduct that threatened citizens' enjoyment of everyday liberties (pages 225–33, 242); and abuses of

8. See Charles F. Abernathy, Civil Rights and Constitutional Litigation: Cases and Materials, 2d ed. (St. Paul, 1992); Theodore Eisenberg, Civil Rights Legislation: Cases and Materials, 3d ed. (Charlottesville, 1991); Rosalie B. Levinson & Ivan E. Bodensteiner, Civil Rights Legislation and Litigation (Detroit, 1994); Peter W. Low & John C. Jefferies, Jr., Civil Rights Actions: Section 1983 and Related Statutes, 2d ed. (Westbury, 1994).

9. 487 U.S. 412 (1988).

10. The authors provide the text of § 1983 and part of 28 U.S.C. § 1343, which grants district courts jurisdiction over, inter alia, § 1983 cases. They refer to the key portion of § 1343 as "§ 1343(3)"; the correct citation is now § 1343(a)(3).

11. See Jack M. Beermann, The Supreme Court's Narrow View on Civil Rights, 1993 Sup. Ct. Rev. 199, 199–212.

government power by state officials were well within the core of the conduct Congress was addressing in section 1983. Congress was legislating very widely, and it has been restrictive judicial decisions that have limited the reach of section 1983 and other nineteenth-century civil rights statutes.

By and large, the notes in *Constitutional Torts* are evocative; they do not attempt to provide detailed essays or exhaustive citations on particular subjects. On some points, where there is no pedagogical gain from obscurity, the authors provide straightforward explanations. For example, there has been lasting confusion about whether section 1983 contains a state of mind requirement. Even though the Supreme Court held in 1981, in *Parratt v. Taylor*,[12] that section 1983 contains no such requirement, some confusion over the matter persists. *Constitutional Torts* provides a clear answer when it says that in *Parratt* the Court "held that... while section 1983 in fact does not have its own state of mind requirement for the prima facie case, certain constitutional provisions do have particular state of mind requirements *as a matter of constitutional interpretation*" (12).

Another area in section 1983 litigation that has caused perennial confusion is the distinction between official capacity and individual capacity suits. The Supreme Court has chosen unfortunate language to differentiate between suits seeking remedies against the government itself (official capacity) and suits seeking remedies against the individual official (individual capacity). As the authors explain in a section titled "The Crucial Distinction Between Official and Individual Capacity Damages Actions":

> A considerable, but unnecessary, source of confusion for lawyers and judges alike in the section 1983 setting is the difference between official and individual capacity damages actions. Official capacity damages actions are actions against the governmental employer. Where an official capacity damages action is brought against a *local government* official or employee, it is a damages action against the local government itself and thus triggers [the] official policy or custom requirement. If an official capacity damages action is brought against a *state* official or employee, it is a damages action against the state itself which ... is not permitted.
>
> In contrast, an individual capacity damages action against either a local or state official or employee is a damages action against the official personally. Such a damages action may implicate absolute or qualified immunity, as the case may be, but it does *not* trigger [the] official policy or custom requirement. It also raises the possibility of a punitive damages award against the individual (167–68).

This is a very clear explanation of the problem that the Supreme Court created by using the wrong language. As Sheldon Nahmod points out in his treatise (also quoted in *Constitutional Torts*, at 168), in common parlance all suits challenging action "under color of law" would be thought of by lawyers as "official capacity" suits.[13] To avoid this problem, the authors recommend that section 1983 plaintiffs sue the officials responsible for the conduct without

12. 451 U.S. 527 (1981).

13. 1 Nahmod, *supra* note 7, at 488.

specifying whether the suit is an official or individual capacity suit (168). I do not understand this advice, because the very next paragraph in *Constitutional Torts* quotes a court of appeals opinion in which the court said that

> where a complaint alleges that the conduct of a public official acting under color of state law gives rise to liability under Section 1983, we will ordinarily assume that he has been sued in his official capacity and only in that capacity . . . . If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities . . . he should expressly state so in the complaint (168–69).[14]

If the authors' advice were followed, at least in the Seventh Circuit, the case would be presumed to be an official capacity suit, and relief would be available only if it were available against the government entity. Such relief is often more difficult to obtain than relief against the individual official. A better solution would be for courts to adopt the simpler, opposite presumption: that a plaintiff seeks relief only from those parties named as defendants. Then plaintiffs could name only those defendants from whom relief is sought. If a plaintiff names only officials, relief would be available exclusively from those officials. If the plaintiff seeks relief against a governmental entity, the plaintiff would be required to name that entity as a defendant.[15]

The second half of the introductory chapter, the focus on the status of the *Bivens* action, also leads to some very interesting issues. Here there are no questions about statutory interpretation since the *Bivens* remedy is a purely judicial creation. The Supreme Court often relies on the common law background of section 1983 to justify limiting the reach of the section 1983 remedy. The best examples are the official immunities doctrines, which are justified by the Court as well-established common law not clearly overruled by the enactment of section 1983 (234). Magically, many of the section 1983 limitations, including immunities, are applied as a matter of policy to *Bivens* actions, and when a new limitation is created in a *Bivens* action, the Court applies it to section 1983 actions regardless of the lack of historical support for its application in the statutory context.[16] This is but one of many interesting statutory construction and judicial reasoning issues that arise in a course on constitutional torts.

The absence of a statutory basis for the *Bivens* action means that the Court must develop the contours and limitations of the cause of action on its own. Although the Court quickly expanded *Bivens* beyond its original Fourth Amendment context to allow, at least presumptively, a damages action against all

14. Quoting Kolar v. County of Sangamon, 756 F.2d 564, 568–69 (7th Cir. 1985) (citations and footnote omitted).

15. Eleventh Amendment limitations on remedies against the state and state agencies would be maintained, except perhaps for the problems caused under current law simply by naming the state or a state agency in the complaint. If the plaintiff seeks relief against a state that does not violate Eleventh Amendment principles, there is no reason not to allow the plaintiff to name the state as a defendant.

16. See Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982) (finding it "untenable" to have a different immunity rule for *Bivens* and § 1983 cases). *Harlow* is excerpted in *Constitutional Torts* at 257–61.

constitutional violations by federal officials,[17] *Bivens* itself indicated that its damages remedy would not be available where there are "special factors counselling hesitation in the absence of affirmative action by Congress"[18] and where there is an "explicit congressional declaration that persons . . . may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[19] What has happened since *Bivens* is that the "special factors" exception to the *Bivens* remedy has consumed the "alternative remedy" exception. The existence, or nonexistence, of an alternative remedy in an area that the Court identifies as subject to comprehensive congressional scrutiny has been held to be a "special factor counselling hesitation," thus precluding the *Bivens* action. This is the point of *Schweiker v. Chilicky,* which follows *Bivens* in the casebook, and it leaves one wondering why the Court did not rewrite the alternative remedy exception to eliminate the requirement that Congress explicitly declare that the alternative remedy was meant to displace the *Bivens* action. In *Chilicky* the Court held that a *Bivens* remedy was unavailable, even though no other remedies for the particular injury were available, because Congress had granted a remedy for related injuries under a complex and oft-examined statutory scheme.[20] While the remedy did not meet the "explicitly declared alternative" standard, it did function as a "special factor counselling hesitation," a curious occurrence as a matter of legal reasoning.

Because the Court cannot hide behind ambiguous or incomplete statutory provisions, as it does in its section 1983 jurisprudence, its treatment of the *Bivens* action is very revealing with regard to its attitude toward the principle that there ought to be an effective remedy for constitutional violations.[21] Since the early 1980s, its propensity to limit the availability of the *Bivens* remedy indicates that the Court finds many situations in which government interests outweigh the citizen's interest in a remedy for unconstitutional conduct. Interestingly, the authors ask in notes whether, if there had never been a section 1983 or if section 1983 were repealed, a *Bivens* remedy could or should be recognized for state officials' violations of the Fourteenth Amendment (21–22). The real question might be whether today's Court would recognize a *Bivens* action at all, since in its recent jurisprudence it appears to regret the

17. See Carlson v. Green, 446 U.S. 14 (1980).

18. *Bivens,* 403 U.S. at 396.

19. *Id.* at 397.

20. For an analysis that explains this much more clearly than can be done here, see Betsy J. Grey, Preemption of *Bivens* Claims: How Clearly Must Congress Speak? 70 Wash. U. L.Q. 1087 (1992).

21. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is cited often for the proposition that for every right there ought to be a remedy. One can also look to Article 8 of the Universal Declaration of Human Rights for the proposition that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Bivens* is not an effective remedy if "effective" means generally available to all those injured by unconstitutional conduct of federal official. See Perry M. Rosen, The *Bivens* Constitutional Tort: An Unfulfilled Promise, 67 N.C. L. Rev. 337 (1989). Neither is section 1983 with regard to constitutional violations by state officials.

existence of the remedy. The Court's treatment of *Bivens* actions lately makes the answer to the authors' question pretty clear: the repeal of section 1983 would be "a special factor counselling hesitation" and the Court would not allow the *Bivens* action to replace it. Twenty years ago, the answer might have been different, since in *City of Kenosha v. Bruno*[22] the Court allowed a *Bivens* action against a city when, under *Monroe v. Pape,* cities were not persons under section 1983 and thus could not be sued under section 1983 even for unconstitutional city ordinances and policies.[23] This indicated that limitations on constitutional tort remedies against state officials inherent in or read into the text or history of section 1983 might be overcome by resort to the *Bivens* remedy. It is unlikely that today's Court would allow a plaintiff to avoid section 1983's limitations by employing the *Bivens* remedy instead.

Other noteworthy areas in *Constitutional Torts* are its comprehensive coverage of attorneys' fees, which are available to prevailing plaintiffs in section 1983 cases (391–431), and its attention to the causation issues surrounding plaintiffs' attempts to hold supervisors responsible for the constitutional violations of their underlings (205–16). Both these issues are sometimes not sufficiently covered in constitutional torts materials. Within the section 1983 framework, the scope of *Constitutional Torts* is comprehensive enough (with coverage of, inter alia, immunities, all the key statutory issues, liability of governmental entities, the "and laws" clause of section 1983, remedies, various other defenses, and state court section 1983 actions) for a good course on constitutional torts to be taught exclusively out of this book.

As I mentioned, *Constitutional Torts* is somewhat shorter than other casebooks, which for many instructors is a virtue. It is a manageable set of materials that can be covered completely in one semester, even with some modest supplementation of the instructor's choice. There is one group of teachers in the constitutional torts area that would feel the need to supplement the book extensively: those who approach the subject primarily from a federal courts perspective. Two key federal courts issues, abstention and the Eleventh Amendment, are not covered in *Constitutional Torts* except in brief notes. Further, there is scant mention of the problem of alternative constitutional remedies, which has been important in the habeas corpus area[24] and has arisen in other areas as well.[25] Abstention and the Eleventh Amendment often raise key questions in section 1983 litigation, and while it might be expected that these issues would be covered in a separate federal courts course, not every Constitutional Torts student takes Federal Courts.

22. 412 U.S. 507 (1973); see *id.* at 516 (Brennan, J. concurring).

23. This aspect of *Monroe* was overruled in Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

24. See Preiser v. Rodriguez, 411 U.S. 475 (1973).

25. See Smith v. Robinson, 468 U.S. 992 (1984) (education of disabled children). On the unsettled relationship between § 1983 and Title VII, compare Marrero-Rivera v. Department of Justice, 800 F. Supp. 1024, 1031–33 (D.P.R. 1992), with Trigg v. Fort Wayne Community Sch., 766 F.2d 299 (7th Cir. 1985), and Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1573–76 (5th Cir. 1989).

I would also find it necessary to supplement the book with material on my pet subject in section 1983 litigation, section 1988's choice-of-law provision.[26] At least, I would have to reorganize material in various units around the choice-of-law/section-1988 theme. Section 1988 provides a method for filling statutory gaps in section 1983 which the Court almost never uses; and when it does use it, as in the cases of survivorship (319–28) and statutes of limitations (339–46), it does not even attempt to explain why section 1988 applies there but not, for example, to the measure of damages or immunities.

Finally, a note on the physical presentation of the book. The pages are set with two narrow columns per page, which may cut the cost by allowing more text per page, but which leaves little room in the margins for students' notes. The book also lacks an index, tables of cases and secondary sources cited (there is a table of principal cases), and an appendix with important constitutional and statutory provisions. These features substantially enhance a casebook's usability. It is often much easier to find a subject with an index, or even a case name that is cited but not excerpted, than with a table of contents. It may also be important to refer to statutory language, and an appendix is useful for that. Finally, *Constitutional Torts* does not adopt the widespread convention of including the first names of authors of secondary materials. Widespread customs such as these usually become so because of demand from users. In the case of a table of secondary sources, potential users of a casebook are often gratified if they find a table including their own work.

26. See Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 Stan. L. Rev. 51 (1989).

Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law.* Cambridge, Mass.: Harvard University Press, 1994. Pp. xii + 330.

Reviewed by Andrew P. Morriss

Game theory has been all the rage among economists since the early 1980s. Since economics is all the rage among at least some law professors (and enrages many of the rest), this is a timely book. Baird, Gertner, and Picker (BG&P) have written a fine introduction, for lawyers, to the methodology and terminology of a powerful technique.

Most law professors are familiar with the prisoner's dilemma; inclusion of one is almost required for publication in a law review.[1] BG&P go well beyond this simple game and introduce such game theory staples as matching pennies, the stag hunt, beer-quiche, the battle of the sexes, and the Rubinstein bargaining game. Without using any math beyond occasional (and simple) algebra, they successfully explain the basics of game theory: normal and extensive form games, Bayesian equilibrium concepts, backward induction, unraveling, signaling, repeated games, the folk theorems, embedded games, noncooperative bargaining, and nonverifiable information.

They write crisply and concisely. They excel at explaining both the structure of the analysis and the importance of the resulting insights. For example, in their wonderful chapter on "Collective Action, Embedded Games, and the Limits of Simple Models" they make clear the importance of thoroughly understanding the legal background of a problem before undertaking modeling. After an example of a coordination problem, they turn to debtor-lender negotiations for an illustration. A federal statute limits debtholders' ability to renegotiate debt issued by a public debtor in financial distress. Despite the potential for gains from reorganization, individual bondholders will not restructure the debt. They "face a collective action problem. Viewed in isolation, this feature of the law might seem a weakness. Indeed, one can justify the bankruptcy laws and particularly the willingness of bankruptcy judges to confirm prepackaged plans on the ground that they solve this collective action problem" (pages 194–95). What is interesting here is not the labeling of the problem. BG&P make a far more interesting observation:

> One can argue, however, that the existence of this collective action problem is a good thing. It alters the shape of the other negotiations that the debtor faces and changes the incentives of the debtor and others during the course

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1. C. Steven Bradford, As I Lay Writing: How to Write Law Review Articles for Fun and Profit, 44 J. Legal Educ. 13, 21–22 (1994).

> of the relationship. These effects, of course, could be harmful as well as beneficial, but they need to be taken into account before one can be confident that eliminating this collective action problem is desirable (195).

Game theory excels at highlighting this sort of interconnection, and BG&P make good use of its power in developing their examples.

There are three audiences for a book like this one: law teachers seeking to learn about game theory; law teachers looking for a text for a course on game theory and the law; and nonlawyers searching for new areas of applications for game theory. The book is most successful in addressing the first of these audiences.

A law professor interested in learning enough to follow journal articles that make use of game theory will find this an excellent primer. Anyone familiar with economic reasoning will have little difficulty following BG&P's explanations of game theory concepts. The excellent bibliographic notes at the end of each chapter provide references both to more technical game theory sources and to literature applying the concepts introduced in the chapter. Combined with the thorough index and glossary, these notes enable readers to use the book as a primer or as an introduction to the literature.

The main trouble with the book as a primer is its lack of problems. No matter how many times one reads even the clearest explanation of a technique, reading is not a complete substitute for working problems. Those interested in gaining a thorough understanding of game theory will need to supplement BG&P with another book. Unfortunately many comprehensive game theory texts are dense and forbidding.[2] But an excellent supplement to BG&P would be Robert Gibbons's *Game Theory for Applied Economists*.[3] Although it does not focus on legal examples and does require more mathematical skills than BG&P, it is similarly clear and well written, and it includes a wealth of problems. An additional advantage of this book over competing texts is Gibbons's extensive use of examples from areas of economics besides industrial organization: the book will interest people who do not find antitrust fascinating.

A law teacher could also use BG&P as a text for a class on Law and Game Theory. Why teach such a course? For the same reasons one teaches Law and _____ [name your favorite social science]. (If you aren't convinced of the usefulness of such courses already, I won't try to convince you here. BG&P might convince you, however, for they offer a persuasive defense of modeling techniques throughout the book.) If the goal of Law and Game Theory is simply to show students the usefulness of game theory and convey its basic concepts, this book would be an excellent text. The lucid, nontechnical writing and the many legal examples would make it a wonderful teaching tool. Its main flaw as a teaching tool is, again, the lack of problems (not to mention a set of solutions for the professor!)

2. E.g., Drew Fudenberg & Jean Tirole, Game Theory (Cambridge, Mass., 1991).

3. Princeton, 1992. In the interest of full disclosure I should note that Gibbons was one of my dissertation advisers. He also taught the basic game theory class I took in graduate school, using the book manuscript as a text.

Whether one is planning such a course or simply seeking familiarity with game theory, a strength of the book is the wide range of subjects used as examples. In addition to such traditional law-and-economics subjects as torts and antitrust, the book includes contract, labor law, employment law, environmental law, and bankruptcy examples. It will provide useful illustrations for anyone interested in adding some game theory to an existing substantive law course as a perspective.

One of the best of these discussions is an extended analysis of *Peevyhouse v. Garland Coal and Mining Co.*[4] It begins with the information problems involved in the case and the role of default rules (drawn largely from the 1992 article by Gertner and Ian Ayres[5]), showing how legal rules influence the bargaining between parties. BG&P then develop an extended example that not only illustrates the concept of the Rubinstein bargaining game but shows how legal rules can be effectively modeled as exit options in such games.

BG&P also attempt to show "those interested in game theory a fertile and largely unexplored domain in which its tools have many applications" (xi). Here they are less successful. While they carefully use legal examples to illustrate each new concept and include examples from many areas of the law, I doubt whether a nonlawyer would come away from the book understanding the law well enough to apply game theory to it. The law enters into some of the examples primarily as the source of facts that illustrate a problem. Once the analysis is under way, the law vanishes, as in the discussion of *General Foods Corp. v. Valley Lea Dairies, Inc.*[6] After relating the essence of the dispute, BG&P note: "Much in this case turned on its peculiar facts" (68). When the reader finally reaches the discussion of the legal rule five pages later, the analysis centers not on the case but on UCC provisions. Simply drawing from the facts of a case to illustrate an example shortchanges the law portion of the book. The title accurately reflects the book's strengths: it's *Game Theory and the Law,* not *Law and Game Theory.*

Game Theory and the Law belongs on the shelf of any law teacher interested in law and economics or in understanding strategic behavior. Those already familiar with game theory will benefit from the wide range of examples; those new to game theory will find the book an accessible introduction.

4. 382 P.2d 109 (Okla. 1962), *cert. denied,* 375 U.S. 906 (1963).

5. Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules, 101 Yale L.J. 729 (1992).

6. 771 F.2d 1093 (7th Cir. 1985).