

## FOREWORD

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I am pleased to introduce Issue 4 of Volume 34 of the *William Mitchell Law Review*. The issue has a dual focus. The first part of the issue examines an eclectic collection of Minnesota laws and cases. The issue begins with a retrospective on the opinions of Associate Justice Sam Hanson, then turns to the Law Review's traditional—and critical—look at selected (mostly recent) Minnesota Supreme Court decisions, and finally scans and audits the state's animal protection laws. The second part of the issue has a decidedly more international scope, reflecting the robust work of William Mitchell's Tobacco Law Center, particularly the work product of a symposium on tobacco law held at the College in the fall of 2007.

The issue begins with a piece by Jeffrey A. Ehrich, a former editor of the Law Review, which looks back over the work of recently retired Minnesota Supreme Court Justice Sam Hanson. One of eleven Mitchell alumni to serve on the high court, Justice Hanson's tenure spanned a seven-year period. Ehrich, who clerked for Justice Hanson, characterizes the judge's work as impartial, deliberative, and respectful of the proper division of governmental powers. Despite the short duration of Justice Hanson's tenure, his work will have a longstanding influence on the court's jurisprudence.

Professor Michael Steenson's article explores an intersection of tort and property law, examining the duty owed by a landowner to entrants onto the land. More than thirty years ago, the Minnesota Supreme Court abandoned the common-law's approach, in which the landowner's duty depended on the legal status of the entrant as trespasser, licensee, or invitee. In *Peterson v. Balach*,<sup>1</sup> the court combined the latter two categories, adopting a

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1. 294 Minn. 161, 199 N.W.2d 639 (1972).

general duty of reasonable care for the new category. But since the decision, Steenson points out, Minnesota courts have regularly placed substantial reliance on pre-*Peterson* law to resolve those claims. Professor Steenson seeks to understand the reasons underlying this move (is it based on a mistake, or is it part of a more conscious effort to move away from the *Peterson* reform?). Professor Steenson also explores more broadly the role of duty and primary assumption of risk in tort law. He considers the impact of post-*Peterson* law both on how cases are litigated and how juries might be instructed according to the apparently prevailing set of rules governing landowners' duties in Minnesota.

In *The Filed-Rate Doctrine: Leaving Regulation to the Regulators*, Kevin Decker examines the tension between regulatory uniformity and regulation-by-litigation. The "filed-rate doctrine," seeks to advance the uniformity and predictability of regulation by limiting litigation challenges to governmentally approved rate tariffs. Long a feature of federal administrative law, the doctrine was imported into state law in *Schermer v. State Farm Fire & Casualty Co.*<sup>2</sup> Examining recent appellate application of this precedent, Decker predicts an inhospitable climate for litigation challenging administrative judgments affecting regulated commerce.

Professor Mehmet Konar-Steenberg's article examines another federal-state issue of administrative law. In *In re Annandale*,<sup>3</sup> the Minnesota Supreme Court held that a state administrative agency's interpretation of an ambiguous federal regulation was entitled to deference. The Minnesota court relied on federal precedent, including *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>4</sup> as persuasive authority for its holding. Professor Konar-Steenberg's article critiques the court's claims that its analysis is consistent with federal precedent, listing several key ways in which the state court's deference holding differs. The article ends with some post-*Annandale* developments and practical observations for Minnesota administrative-law practitioners.

Corwin Kruse's article departs from the recent decisions theme, exploring instead an aspect of Animal Law, a cross-doctrinal area of law only recently gaining sustained professional attention. In *Adding a Bit More Bite: Suggestions for Improving Animal-Protection Laws in Minnesota*, Kruse addresses a core concern: how to improve

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2. 721 N.W.2d 307 (Minn. 2006).

3. 731 N.W.2d 502 (Minn. 2007).

4. 467 U.S. 837 (1984).

the level of protection for animals in Minnesota. The article systematically audits Minnesota law, identifying areas where improvements are necessary. Referencing legislation in other states, the author provides a practical and comprehensive blueprint of a legislative agenda.

Emily J. Bucher argues for greater protection for tribal court jurisdiction in her student note, examining *In re Welfare of Child of T.T.B.*<sup>5</sup> The article worries that the Minnesota Supreme Court has been too quick to uphold a finding of “good cause” for denial of transfer of a child welfare proceeding to tribal court. Bucher suggests that strictly applying a de novo standard of review would enable the appellate courts to monitor the jurisdictional boundaries more vigilantly.

Jennifer Young uses her student note to examine the interaction between federal welfare regulations and state contract law in the operation of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). The Minnesota Supreme Court read the federal rules as imposing strict liability on stores, upholding a three-year disqualification from participation in the WIC program on a store that had inadvertently accepted a WIC voucher in payment for a grocery order that included a \$3.19 pack of cigarettes. Though the transaction arguably amounted to a “mutual mistake” and was not legally a “sale,” the court’s interpretation of the federal rules made this irrelevant. Young argues that the result is an unbalanced and problematic welfare policy.

Katherine L. Johansen’s student note critiques a recent Minnesota Supreme Court decision interpreting the statute of limitations for actions for damages based on installation of an improvement to real property. Exploring the legislative and interpretive history, Johansen critiques the court’s statutory interpretation in *Lietz v. Northern States Power Co.*<sup>6</sup> Approving in general of the result that narrows tort liability, the author advocates a more straightforward reading of the statute.

In her student note, Christina M. Mann argues that the Minnesota Supreme Court reached an incorrect result in its consideration of vicarious liability under a Minnesota statute for injuries caused by an intoxicated motorist, allegedly illegally served

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5. 724 N.W.2d 300 (Minn. 2006).

6. 718 N.W.2d 865 (Minn. 2006).

by a local American Legion Post. In *Urban v. American Legion Department of Minnesota*,<sup>7</sup> the court held that liability under the statute was limited to “licensees,” thus allowing state and national veterans organizations to escape liability. Analyzing both the statute and the common-law doctrines, Mann argues that policy considerations should have dictated a different result.

Brian Carter-Stiglitz’s student note examines the double jeopardy and ex post facto implications of re-sentencing in a post-*Blakely* world. In *Hankerson v. State*,<sup>8</sup> the Minnesota Supreme Court held that re-sentencing a defendant, whose original sentence had been reversed for violation of the *Blakely* rule, could not be based on judge (rather than jury) fact-finding. Carter-Stiglitz argues that allowing the new sentencing based on a newly passed law undercuts double jeopardy protection by allowing piecemeal proof of the elements of a crime.

The issue concludes with five papers presented at the fall 2007 Symposium sponsored by the Tobacco Law Center at William Mitchell College of Law, along with a foreword to the symposium by the Center’s Director, Doug Blanke. The articles examine important dimensions at the frontier of public health regulation, as it is being implemented in the control of smoking. Written by an international array of experts, these essays trace through the complex relationships among the state’s public health power, the proper role of science in policy-making, and the implications for personal privacy and autonomy.

Professor David Sweanor describes the success of tobacco control efforts in Canada and the potential obstacles to their continued effectiveness. Next, Professor Simon Chapman considers whether advocates of certain smoke-free policies—namely, those in support of a complete ban on outdoor smoking—have gone “too far.” He finds that anti-secondhand smoke efforts premised on reducing harm to others through bans on smoking in outdoor settings are ill-considered. But, Professor James L. Repace, M.Sc., uses scientific evidence to argue in support of state and local bans on smoking in outdoor settings and even in motor vehicles. Then, Lewis Maltby, President of the National Workrights Institute, addresses the increasingly common trend of employers prohibiting employees from smoking in their private life. He suggests that our

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7. 723 N.W.2d 1 (Minn. 2006).

8. 723 N.W.2d 232 (Minn. 2006).

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national approach to tobacco policy should focus on supporting efforts to help smokers quit, and not on punitive or prohibitory action that threatens individual autonomy and the fundamental right to make a living. Finally, Professors Micah Berman and Robert Crane, M.D., examine the controversial “tobacco-free workforce” policies that are being adopted by a growing number of corporate and public employers, ultimately arguing that such policies can be business-friendly as well as beneficial to public health.