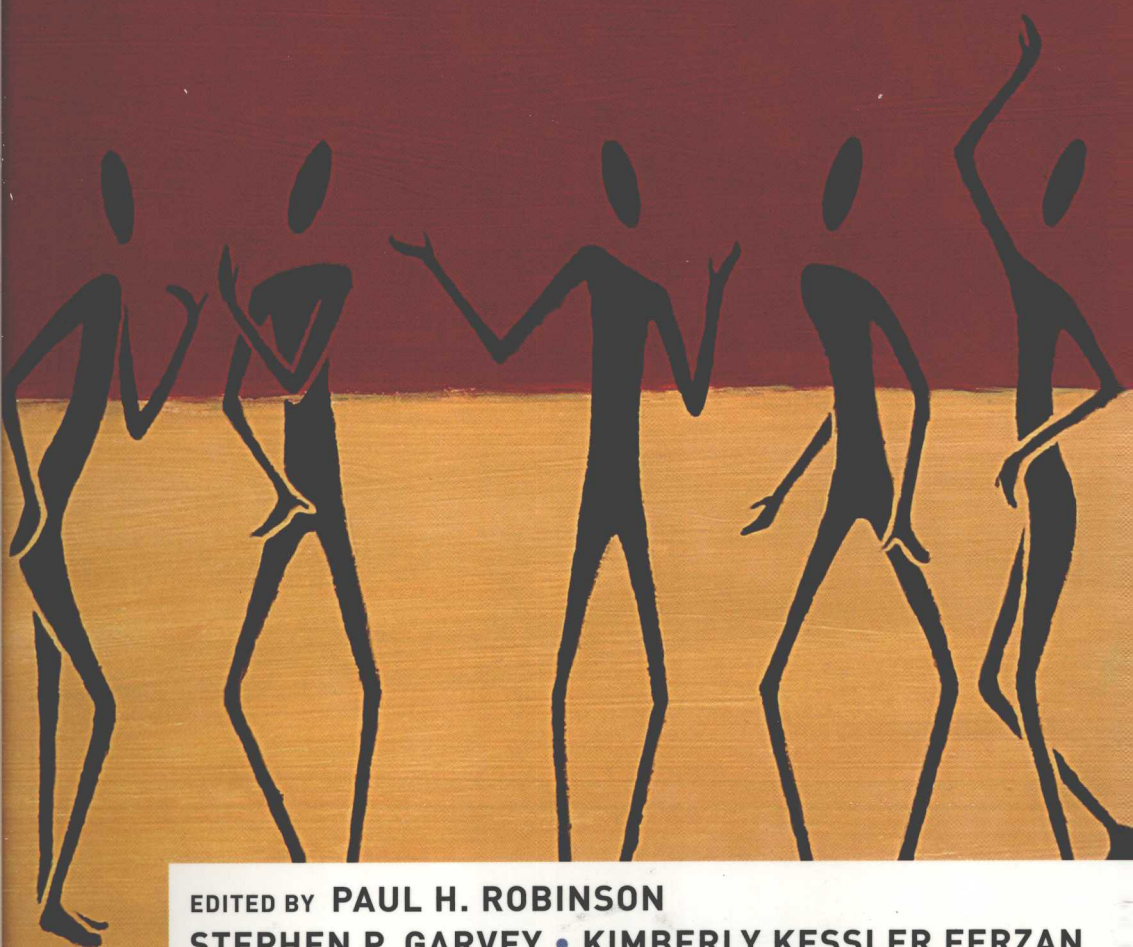


CRIMINAL LAW CONVERSATIONS



EDITED BY **PAUL H. ROBINSON**
STEPHEN P. GARVEY • KIMBERLY KESSLER FERZAN

OXFORD

CRIMINAL LAW CONVERSATIONS

EDITED BY PAUL H. ROBINSON
STEPHEN P. GARVEY
KIMBERLY KESSLER FERZAN

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York

Auckland Cape Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne
Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy
Japan Poland Portugal Singapore South Korea Switzerland Thailand Turkey Ukraine
Vietnam

Copyright © 2009 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Oxford is a registered trademark of Oxford University Press
Oxford University Press is a registered trademark of Oxford University Press, Inc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press, Inc.

Library of Congress Cataloging-in-Publication Data

Criminal law conversations / edited by Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-19-539163-3 (hardback : alk. paper)

I. Criminal law—Philosophy. I. Robinson, Paul H., 1948- II. Garvey, Stephen P., 1965-

III. Ferzan, Kimberly Kessler, 1971-

K5018.C753 2009

345—dc22

2009003990

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

<p>You may order this or any other Oxford University Press publication by visiting the Oxford University Press website at www.oup.com</p>

For Sarah, my lifetime conversation partner
—PHR

For Carolyn and Liam
—SPG

For Marc, for his love and support
—KKF

PREFACE

The means of human communication have dramatically improved over the past several decades, but the form of scholarly intercourse has remained the same. Scholars publish articles to which another scholar may, or may not, respond a year or two, or a decade, later. The strength of this traditional discourse is its deliberateness. Its weakness, at least as a means of scholarly interchange, lies in the fact that the long delay and dispersed audience commonly make it unlikely that scholars will genuinely “join issue,” or if they do, that other scholars will easily become aware of the exchange. Blogs, in contrast, provide an immediacy and responsiveness that make for true dialogue, but they tend to sacrifice the deliberateness of the traditional form. What we offer here is a process and a format that we hope retains the virtues of the traditional scholarly form but promotes the kind of targeted conversation in which scholars do join issue.

Another virtue of what we offer is the way in which the issues contained in this collection have been selected. A collection traditionally reflects the scholarly interests of its editors, or perhaps its editors’ beliefs about the interests of the scholarly community at large. In this project, the community of criminal law scholars itself has determined the issues to be included.

In early 2008, all English-speaking criminal law scholars were invited to post on the project Web site—<http://www.law.upenn.edu/cf/faculty/phrobins/conversations/index.cfm>—nominations of any article, book, or chapter that they thought contained issues worth public discussion. In all, 112 pieces were nominated, sometimes by the author but more commonly by another scholar. The members of the scholarly community could “vote” in support of a nomination by publicly expressing an interest in writing a comment on the piece. Nearly 350 expressions of interest in commenting were posted.

When a nomination had attracted three or four expressions of interest in commenting, the author of the nominated work was asked to write and post a “core text” succinctly presenting the central ideas of the nominated piece in 5,000 words or less. Because the core texts, often based on seminal articles in the field, were written in an accessible form, many participants have suggested that the core texts themselves are the most valuable contribution of the project, enabling the ideas presented in the original article to reach a broader audience. Once a core text was posted, edited, and finalized, the commentators posted comments of 800 words or less. Almost 190 comments were posted.

Once the comments were edited and finalized, the author of the original core text posted a reply that addressed each of the comments. Again, authors were encouraged to use direct and accessible style and again operated under word

PREFACE

limits, typically 250 words times the number of comments, allocated among the comments as the author chose.

By the end of the process, in late 2008, more than 150 different scholars had submitted more than 1,200 postings of one kind or another to the project Web site.

The present volume includes 31 completed conversations, containing 227 contributions from 107 different contributors. As the reader will quickly see, the conversations present a wide range of issues and extremely diverse points of view—a fine portrait of the interests and perspectives of today's criminal law scholarly community.

—The Editors

TABLE OF CONTRIBUTORS

References are to chapters.

Ainsworth, Janet	9e, 12b
Alexander, Larry	7, 7 reply, 13, 13 reply
Anderson, Michelle J.	14, 14 reply
Appleman, Laura I	2k, 28d
Baer, Miriam	6a, 23b
Bandes, Susan A.	9c, 29, 29 reply
Barkow, Rachel E.	24e, 30, 30 reply
Baron, Marcia	15c, 19b
Bergelson, Vera	15b
Berman, Douglas A.	5b, 12c, 28, 28 reply, 29a, 30b
Berman, Mitchell N.	16c
Bibas, Stephanos	9b, 27a, 29a, 30c
Bowers, Josh	25d, 26f
Brown, Darryl K.	24a
Brudner, Alan	13c
Buell, Samuel W.	1b, 24b
Burke, Alafair	31h
Butler, Paul	26, 26 reply
Cahill, Michael T.	2c
Capers, Bennett	26e
Charlow, Robin	14c, 26b
Chiesa, Luis E.	17, 17 reply
Colb, Sherry F.	9a, 14d, 17c, 22b, 23a, 25c, 26d
Collins, Jennifer	31d
Corrado, Michael Louis	3a, 21b
Coughlin, Anne M.	1c
Covey, Russell D.	4a, 5a
Dan-Cohen, Meir	1, 1 reply
Davis, LaJuana	26c, 29g
Dempsey, Michelle Madden	11e, 13b
Dolinko, David	27b
Dressler, Joshua	15, 15 reply
Duarte d'Almeida, Luís	1d
Duff, R.A.	11, 11 reply
Erickson, Steven	49d
Etienne, Margareth	27c, 28f
Ferzan, Kimberly Kessler	7, 7 reply, 13, 13 reply, 14b, 18c, 19c

TABLE OF CONTRIBUTORS

Filler, Daniel M.	72c
Fletcher, George P.	17, 17 reply
Forell, Caroline	20d
Garvey, Stephen P.	13d, 15f, 21a
Gertner, Nancy	28c
Green, Stuart P.	6d, 11a
Griffin, Lisa Kern	9d
Gruber, Aya	31c
Hanna, Cheryl	31e
Haque, Adil Ahmad	1e, 2j, 11c, 18a
Harcourt, Bernard E.	8, 8 reply
Harel, Alon	4b, 6, 6 reply, 8c
Hay, Bruce	23c
Hessick, Carissa Byrne	20b
Hoffman, Morris B.	4d
Holder, Jeremy	7d, 19e, 20e
Huigens, Kyron	1a
Hylton, Keith N.	4c
Kaufman, Whitley R. P.	17e, 18d, 19, 19 reply
Kelman, Mark	10, 10 reply
Kennedy, Joseph E.	2h, 3e, 12, 12 reply, 24c, 27d, 28e, 29e
Kitai-Sangero, Rinat	3c
Kolber, Adam J.	2b, 28b
Krause, Joan H.	15d, 19d
Lee, Cynthia	20, 20 reply
Lee, Youngjae	2e
Leipold, Andrew D.	25, 25 reply
Leonard, Gerald	7a
Levy, Ken	8d
Lister, Matthew	2f, 11d
Litton, Paul	10a, 22c
Luna, Erik	27, 27 reply
Marcus, Michael	3b
Maroney, Terry A.	20c, 21d, 29h
Marshall, S. E.	11, 11 reply
Masur, Jonathan S.	5d
Matravers, Matt	3d, 22d
McAdams, Richard H.	5d, 23d, 24, 24 reply, 25a
McMahan, Jeff	18, 18 reply
Mikhail, John	10b, 16d, 17b
Miles, Thomas J.	5d
Miller, Eric. J.	1f
Miller, Marc L.	30a

Morawetz, Thomas	7c
Morse, Stephen J.	21, 21 reply
Murphy, Jeffrie G.	9, 9 reply, 29c
Murray, Melissa	31a
Myers, Richard E.	28a
O'Hear, Michael M.	8b, 27e
Raymond, Margaret	10c
Ristroph, Alice	2d, 2g, 8a, 10d
Robinson, Paul H.	2, 2 reply, 5, 5 reply, 16, 16 reply
Rosenbury, Laura A.	31b
Rosenthal, Lawrence	26a
Rozelle, Susan D.	15a, 20a, 21c, 22a
Sack, Emily J.	31f
Sangero, Boaz	17a
Schopp, Robert F.	21e, 29d
Seidman, Louis Michael	23, 23 reply
Sigler, Mary	2a, 29b
Simons, Kenneth	13f, 15e, 20f
Slobogin, Christopher	3, 3 reply, 22, 22 reply
Steiker, Carol S.	25b, 29f
Suk, Jeannie	31, 31 reply
Tadros, Victor	18e
Taslitz, Andrew E.	2i, 11f, 13e, 14a, 24d, 30d
Teichman, Doron	4, 4 reply, 5c, 6b
Thorburn, Malcolm	18, 6c
Tuerkheimer, Deborah	31g
Wallerstein, Shlomit	11b, 16b, 17d, 18b
Weisburg, Robert	27f
Wesson, Marianne	12a, 14e, 15g
Westen, Peter	7b, 16a
Wright, Ronald F.	24f, 30a
Yaffe, Gideon	19a
Zaibert, Leo	13a

ACKNOWLEDGMENTS

Most of the criminal law scholarly community contributed to this volume in one way or another. Many scholars have no written contribution in this final volume to mark their participation in the project, so we are particularly indebted to them for their invaluable contributions to the nomination and selection process that was at the heart of the project.

Particular thanks, as well as congratulations, go to those who nominated the pieces that produced the conversations contained in this final volume. The community's interest in commenting on those pieces would seem to confirm the wisdom of the nominators' judgments.

Number	Title	Nominator
1	Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law	Huigens, Kyron
2	Empirical Desert	Markel, Dan
3	Defending Preventive Detention	Slobogin, Christopher
4	The Economics of Crime Control	Teichman, Doron
5	The Difficulties of Deterrence as a Distributive Principle	Kahan, Dan
6	Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions	Harel, Alon
7	Results Don't Matter	Robinson, Paul
8	Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtue of Randomization	Harel, Alon
9	Remorse, Apology, and Mercy	Bandes, Susan
10	Interpretive Construction in the Substantive Criminal Law	Huigens, Kyron
11	Criminalization and Sharing Wrongs	Dempsey, Michelle Madden
12	Monstrous Offenders and the Search for Solidarity Through Modern Punishment	Bandes, Susan

ACKNOWLEDGMENTS

Number	Title	Nominator
13	Against Negligence Liability	Garvey, Stephen
14	Rape Law Reform Based on Negotiation: Beyond the No and Yes Models	Anderson, Michelle J.
15	Provocation: Explaining and Justifying the Defense in Partial Excuse, Loss of Self-Control Terms	Garvey, Stephen
16	Objective versus Subjective Justification: A Case Study in Function and Form in Constructing a System of Criminal Law Theory	Fletcher, George
17	Self-Defense and the Psychotic Aggressor	Dressler, Joshua
18	Self-Defense Against Morally Innocent Threats	Tadros, Victor
19	Self-Defense, Imminence, and the Battered Woman	Kaufman, Whitley R.P.
20	Reasonable Provocation and Self-Defense: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness	Harris, Angela
21	Against Control Tests for Criminal Responsibility	Kolber, Adam
22	Abolition of the Insanity Defense	Slobogin, Christopher
23	Entrapment and the "Free Market" for Crime	Robinson, Paul
24	The Political Economy of Criminal Law and Procedure: The Pessimists' View	Buell, Samuel W.
25	Against Jury Nullification	McAdams, Richard
26	Race-Based Jury Nullification: Black Power in the Criminal Justice System	Tuerkheimer, Deborah
27	In Support of Restorative Justice	Medwed, Daniel
28	The Virtues of Offense/Offender Distinctions	Garvey, Stephen
29	The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty	Bandes, Susan
30	Mercy's Decline and Administrative Law's Ascendance	Barkow, Rachel
31	Criminal Law Comes Home	Ristroph, Alice

We also owe a special debt to our many friends and colleagues who helped work out the original plan for the project and to the University of Pennsylvania ITS Department, and Christine Droesser in particular, who produced such an excellent website in execution of that plan. Finally, our thanks go to Kelly Farraday for her administrative and secretarial help on so many aspects of the work.

—The Editors

CONTENTS

Preface xix
Table of Contributors xxi
Acknowledgments xxv

I. PRINCIPLES

Chapter 1. Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law 3

MEIR DAN-COHEN

Comments:

- Kyron Huigens—Duress Is Never a Conduct Rule 12
Samuel W. Buell—Decision Rules as Notice: The Case of Fraud 13
Anne M. Coughlin—Of Decision Rules and Conduct Rules,
or Doing the Police in Different Voices 15
Luís Duarte d’Almeida—Separation, But Not of Rules 17
Adil Ahmad Haque—The Constitutive Function of Criminal Law 19
Eric J. Miller—Are There Two Types of Decision Rules? 20
Malcolm Thorburn—A Liberal Criminal Law Cannot Be Reduced
to These Two Types of Rules 22

Reply:

Meir Dan-Cohen 24

Chapter 2. Empirical Desert 29

PAUL H. ROBINSON

Comments:

- Mary Sigler—The False Promise of Empirical Desert 39
Adam J. Kolber—Compliance-Promoting Intuitions 41
Michael T. Cahill—A Fertile Desert? 43
Alice Ristroph—The New Desert 45
Youngjae Lee—Keeping Desert Honest 49
Matthew Lister—Desert: Empirical, Not Metaphysical 51
Alice Ristroph—Response to Lee and Lister 53
Joseph E. Kennedy—Empirical Desert and the Endpoints
of Punishment 54
Andrew E. Taslitz—Empirical Desert: The Yin and Yang of
Criminal Justice 56

CONTENTS

- Adil Ahmad Haque—Legitimacy as Strategy 57
Laura I Appleman—Sentencing, Empirical Desert,
and Restorative Justice 59

Reply:

Paul H. Robinson 61

Chapter 3. Defending Preventive Detention 67

CHRISTOPHER SLOBOGIN

Comments:

- Michael Louis Corrado—Slobogin on Dehumanization 75
Michael Marcus—Don't Abandon Sentencing Reform to Defend
Preventive Detention 78
Rinat Kitai-Sangero—The Presumption of Innocence versus
Preventive Detention 80
Matt Matravers—Unreliability, Innocence, and
Preventive Detention 81
Joseph E. Kennedy—The Dangers of Dangerousness as
a Basis for Incarceration 83

Reply:

Christopher Slobogin 84

Chapter 4. The Economics of Crime Control 87

DORON TEICHMAN

Comments:

- Russell D. Covey—The Limits of the Economic Model: Becker's
Crime and Punishment 93
Alon Harel—The Economic Analysis of Crime Control:
A Friendly Critique 95
Keith N. Hylton—Efficient Deterrence and Crime Control 97
Morris B. Hoffman—Law, Economics, and
Neuroethical Realism 100

Reply:

Doron Teichman 101

Chapter 5. The Difficulties of Deterrence as a Distributive Principle 105

PAUL H. ROBINSON

Comments:

- Russell D. Covey—Deterrence's Complexity 116
Douglas A. Berman—Making Deterrence Work Better 118
Doron Teichman—In Defense of Deterrence 120

Jonathan S. Masur, Richard H. McAdams, and
Thomas J. Miles—For General Deterrence 122

Reply:

Paul H. Robinson 124

**Chapter 6. Why Only the State May Inflict Criminal Sanctions:
The Case Against Privately Inflicted Sanctions 129**

ALON HAREL

Comments:

Miriam Baer—Eliminating the Divide Between the
State and Its Citizens 137

Doron Teichman—Why the State May Delegate the Infliction
of Criminal Sanctions 139

Malcolm Thorburn—Why Only the State May *Decide* When
Sanctions Are Appropriate 140

Stuart P. Green—Why Do Privately Inflicted Criminal
Sanctions Matter? 142

Reply:

Alon Harel 144

Chapter 7. Results Don't Matter 147

LARRY ALEXANDER AND KIMBERLY KESSLER FERZAN

Comments:

Gerald Leonard—Some Reasons Why Criminal Harms Matter 153

Peter Westen—Why Criminal Harms Matter 155

Thomas Morawetz—Results Don't Matter, But . . . 157

Jeremy Horder—On the Reducibility of Crimes 159

Reply:

Larry Alexander and Kimberly Kessler Ferzan 160

**Chapter 8. Post-Modern Meditations on Punishment: On the
Limits of Reason and the Virtue of Randomization 163**

BERNARD E. HARCOURT

Comments:

Alice Ristroph—Games Punishers Play 173

Michael M. O'Hear—Chance's Domain 175

Alon Harel—The Lure of Ambivalent Skepticism 177

Ken Levy—Punishment Must Be Justified Or Not at All 179

Reply:

Bernard E. Harcourt 181

Chapter 9. Remorse, Apology, and Mercy 185

JEFFRIE G. MURPHY

Comments:

- Sherry F. Colb—Retaining Remorse 195
Stephanos Bibas—Invasions of Conscience and Faked Apologies 196
Susan A. Bandes—Evaluation of Remorse Is Here to Stay:
We Should Focus on Improving Its Dynamics 198
Lisa Kern Griffin—Insincere and Involuntary Public Apologies 199
Janet Ainsworth—The Social Meaning of Apology 201

Reply:

Jeffrie G. Murphy 203

Chapter 10. Interpretive Construction in the Substantive

Criminal Law 207

MARK KELMAN

Comments:

- Paul Litton—Unexplained, False Assumptions Underlie
Kelman's Skepticism 218
John Mikhail—Unconscious Choices in Legal Analysis 220
Margaret Raymond—Interpretive Constructions and the
Exercise of Bias 222
Alice Ristroph—Interpretive Construction and Defensive
Punishment Theory 224

Reply:

Mark Kelman 226

Chapter 11. Criminalization and Sharing Wrongs 229

S.E. MARSHALL AND R.A. DUFF

Comments:

- Stuart P. Green—Sharing Wrongs Between Criminal
and Civil Sanctions 238
Shlomit Wallerstein—Victim, Beware! On the Dangers of Sharing
Wrongs with Society 240
Adil Ahmad Haque—Sharing the Burdens of Justice 241
Matthew Lister—Contractualism and the Sharing of Wrongs 243
Michelle Madden Dempsey—Sharing Reasons for
Criminalization? No Thanks . . . Already Got 'Em! 245
Andrew E. Taslitz—Public versus Private Retribution
and Delegated Revenge 247

Reply:

S.E. Marshall and R.A. Duff 248

**Chapter 12. Monstrous Offenders and the Search for Solidarity
Through Modern Punishment 253**

JOSEPH E. KENNEDY

Comments:

Marianne Wesson—Domesticated Monsters 262

Janet Ainsworth—"We Have Met the Enemy and He Is Us":

Cognitive Bias and Perceptions of Threat 264

Douglas A. Berman—Have Good Intentions Also Fueled
the Severity Revolution? 266

Reply:

Joseph E. Kennedy 268

II. DOCTRINE

Chapter 13. Against Negligence Liability 273

LARRY ALEXANDER AND KIMBERLY KESSLER FERZAN

Comments:

Leo Zaibert—For Negligence Liability 281

Michelle Madden Dempsey—The Object of
Criminal Responsibility 283

Alan Brudner—Is Negligence Blameless? 285

Stephen P. Garvey—Fatally Circular? Not! 286

Andrew E. Taslitz—Cognitive Science and Contextual
Negligence Liability 288

Kenneth W. Simons—The Distinction Between Negligence and
Recklessness Is Unstable 290

Reply:

Larry Alexander and Kimberly Kessler Ferzan 291

**Chapter 14. Rape Law Reform Based on Negotiation: Beyond
the No and Yes Models 295**

MICHELLE J. ANDERSON

Comments:

Andrew E. Taslitz—Self-Deception and Rape Law Reform 305

Kimberly Kessler Ferzan—Sex as Contract 308

Robin Charlow—Negotiating Sex: Would It Work? 310

Sherry F. Colb—Conversation Before Penetration? 312