

2012

Law Abstracts

Ninth Annual International
Conference on Law
16-19 July 2012, Athens, Greece

Edited by Gregory T. Papanikos

THE ATHENS INSTITUTE FOR EDUCATION AND RESEARCH



Law Abstracts
9th Annual International
Conference on Law
16-19 July 2012, Athens,
Greece

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First Published in Athens, Greece by the Athens Institute for Education and Research.

ISBN: **978-960-9549-41-7**

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Preface

This abstract book includes all the abstracts of the papers presented at the *9th Annual International Conference on Law, 16-19 July 2012*, organized by the Athens Institute for Education and Research. In total there were 43 papers and 51 presenters, coming from 17 different countries (Australia, Barbados, Brazil, Finland, Greece, Hong Kong, Germany, India, Iran, Iraq, Korea, Kurdistan, South Africa, Taiwan, Ukraine, UK and USA). The conference was organized into 9 sessions that included areas such as Law e.t.c As it is the publication policy of the Institute, the papers presented in this conference will be considered for publication in one of the books of ATINER.

The Institute was established in 1995 as an independent academic organization with the mission to become a forum where academics and researchers from all over the world could meet in Athens and exchange ideas on their research and consider the future developments of their fields of study. Our mission is to make ATHENS a place where academics and researchers from all over the world meet to discuss the developments of their discipline and present their work. To serve this purpose, conferences are organized along the lines of well established and well defined scientific disciplines. In addition, interdisciplinary conferences are also organized because they serve the mission statement of the Institute. Since 1995, ATINER has organized more than 150 international conferences and has published over 100 books. Academically, the Institute is organized into four research divisions and nineteen research units. Each research unit organizes at least one annual conference and undertakes various small and large research projects.

I would like to thank all the participants, the members of the organizing and academic committee and most importantly the administration staff of ATINER for putting this conference together.

Gregory T. Papanikos
President

FINAL CONFERENCE PROGRAM
9th Annual International Conference on Law
16-19 July 2012
PROGRAM

Conference Venue: [Metropolitan Hotel of Athens](#), 385 Syngrou Ave., 175 64,
Athens, Greece

ORGANIZING AND SCIENTIFIC COMMITTEE

1. Dr. Gregory T. Papanikos, President, ATINER.
2. Dr. David A. Frenkel, Head, Law Research Unit, Athens Institute for Education and Research (ATINER) & Professor, Ben-Gurion University, Beer-Sheva, Israel.
3. Dr. George Poulos, Vice-President of Research, ATINER & Emeritus Professor, University of South Africa, South Africa.
4. Dr. Chris Sakellariou, Vice President of Finance, ATINER & Associate Professor, Nanyang Technological University, Singapore.
5. Dr. Michael P. Malloy, Distinguished Professor & Scholar, University of the Pacific, USA.
6. Ms. Anna Chronopoulou, Academic Member, ATINER & Ph.D. Student, Birkbeck College, UK.
7. Dr. Robert Ashford, Professor, Syracuse University, U.S.A.
8. Dr. J. Kirkland Grant, Distinguished Visiting Professor of Law, Charleston School of Law, USA.
9. Dr. Angelos Tsaklanganos, Visiting Professor, University of Nicosia, Cyprus & Emeritus Professor, Aristotle University of Thessaloniki, Greece
10. Dr. Demetra Arsalidou, Lecturer, Cardiff University, U.K.
11. Dr. Margarita Kefalaki, Director of Communication, ATINER.
12. Ms. Lila Skountridaki, Researcher, ATINER & Ph.D. Student, University of Strathclyde, U.K.
13. Mr. Vasilis Charalampopoulos, Researcher, ATINER & Ph.D. Student, University of Strathclyde, U.K.

Administration: Fani Balaska, Stavroula Kiritsi, Eirini Lentzou, Konstantinos Manolidis, Katerina Maraki & Celia Sakka

C O N F E R E N C E P R O G R A M
(The time for each session includes at least 10 minutes coffee break)

Monday 16 July 2012

08:30-09:00 Registration

09:00-09:30 Welcome and Opening Remarks

- Dr. Gregory T. Papanikos, President, ATINER.
- Dr. David A. Frenkel, Head, Law Research Unit, Athens Institute for Education and Research (ATINER) & Professor, Ben-Gurion University, Beer-Sheva, Israel.

09:30-11:00 Session I

Chair: Poulos, G., Vice-President of Research, ATINER & Emeritus Professor, University of South Africa, South Africa.

1. Curcio, A., Professor, Georgia State University, USA. Developing A Way to Measure Law Students' Understanding of the Impact of Culture on the Lawyering Process.
2. Anderson, J., Associate Professor, University of Newcastle, Australia, Berman, M., Professor, Touro College Jacob D Fuchsberg Law Center, USA & Bar-Morh, H., Netanya Academic College, Israel. Court is in Session: Integrating the Courtroom Experience into the Law School Classroom.
3. *Colon, F., Associate Dean/Professor, Texas Southern University, USA. Technology and Assessment in the Legal Classroom: A follow-up to an Empirical Study.
4. Bonadio, E., Lecturer, City University London, UK. Plain Packaging of Cigarettes and Trademarks under EU Law. (Monday, 16th of July, 2012, morning, first session)
5. Malinauskaite, J., Lecturer, Brunel University, UK. Critical Reflections on the Interdisciplinary Course at Master's Level - EMCA.

11:00-12:30 Session II

Chair: *Colon, F., Associate Dean/Professor, Texas Southern University, USA.

1. Malloy, M., Distinguished Professor and Scholar, University of the Pacific McGeorge, USA. Governing Foolishness - A Comparative Analysis of Executive Compensation Rules.
2. Georgakopoulos, N., H.R. Woodard Professor of Law, Indiana University, USA. Pyres, Haircuts, and CACs: Lessons from Greco-Multilateralism for Creditors.
3. Conway, G., Lecturer, Brunel University, UK. Juridification of Economic Governance in the EU.
4. Sangkuhl, E., Lecturer, University of Western Sydney. Australia. The Impact of the Major Economic Theories, Classical Liberal, Social Liberal and Neo-Liberal, on the Taxation of Corporations.
5. Lim, E., Assistant Professor, University of Hong Kong, Hong Kong. Religious Exemptions in the United Kingdom: Some Doctrinal, Theoretical and Institutional Issues. (Monday, July 16th, 2012, morning).

12:30-13:30 Lunch (details during registration)

13:30-15:00 Session III

Chair: Malloy, M., Distinguished Professor and Scholar, University of the Pacific McGeorge, USA.

1. James, W., Lecturer, The University of the West Indies, Barbados. Challenging Traditional Notions of Standing in the Commonwealth Caribbean Bills of Rights.
2. Shoarian Sattari, E., Law Department Member, University of Tabriz, Iran. Obligee's Duty to Cooperate in Contract Performance.
3. Chronopoulou, A., Ph.D. Student, University of London, UK. Lipstick, High Heels and Sexy Deals": Portrayals of Female Corporate Lawyers in England.
4. Goncalves, L.H., Student, University Federal of Ouro Preto, Brazil & Batista Lopes, C.S., Student, University Federal of Ouro Preto, Brazil. The Construction of Precontractual Liability as a Link between Social Contact and Objective Good Faith in the Brazilian Legal System.

15:00-16:30 Session IV

Chair: *Mandelbaum, S., Researcher, King's College London, UK.

1. Cerone, J., Professor, New England Law Boston, USA. Regulating the Use of Force By and Against Non-State Actors.
2. Drobac, J., Professor, Indiana University, USA. Abandoning Teenage "Consent" for Adolescent Assent: Harmonizing Development Sciences and the Law.
3. Brammer, A., Lecturer, Keele University, UK. Carers and the Mental Capacity Act 2005 – Angels or Devils?
4. Sofinska, I., Ph.D. Student, L'viv National Ivan Franko University, Ukraine. Citizenship as a Primary Legal Aspect of Self-Identity (Or Just Self-Labeling)?
5. Carran, M., Lecturer & Ph.D. Student, City University, London and Queen Mary University of London, UK. Regulation of Adolescents Gambling – Too Narrow Approach?

16:30-18:00 Session V

Chair: Drobac, J., Professor, Indiana University, USA.

1. Huang, J., Associate Professor, Shanghai Institute of Foreign Trade School of Law, China. Implement ECFA: Prospects of a Bilateral Investment Agreement between Mainland China and Taiwan.
2. Nehme, M., Senior Lecturer, University of Western Sydney, Australia. Indigenous Corporate Governance in Australia and beyond.
3. *Mandelbaum, S., Researcher, King's College London, UK. On Making Sense of Contradictions: Dialectics and International Investment Law.
4. Ason, A., Ph.D. Student, Free University of Berlin, Germany. __Court

- Review of Arbitral Awards Involving Competition Law.
5. Forgi, A.G., LL.D Candidate, University of Helsinki, Finland. Between Promise and Peril: International Law and the Framing of Development Initiatives for Africa.

21:00–23:00 Greek Night (Details during registration)

Tuesday 17 July 2012

09:00-10:30 Session VI

Chair: O' Connor, M., Professor, Phoenix School of Law, USA.

1. Belenko, S., Professor, Temple University, USA & Spohn, C., Professor, Arizona State University, USA. Factors Affecting Plea Offers among Drug Trafficking Cases in U.S. District Courts.
2. De Villiers, W., Associate Professor, University of Pretoria, South Africa. Is the Two-Hour Evidentiary Presumption in the Context of Drinking and Driving Cases a Sufficiently Compelling Factor to Override a Suspect's Right to Counsel under South African law?
3. Jabbari-Gharabagh, M., Associate Professor, Allameh Tabataba'ee University, Iran. The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air: An Analysis of its Scope of Application and Benefits.
4. Caldwell, G., PhD Student, University of Southampton, UK. A UN Court System for Somali Pirates: Adequate Deterrence, or Costly Ineffective Mistake?
5. Murad, M., Lecturer, University of Salahaddin-Erbil, Kurdistan Region, Iraq. The Role and Function of Dispute Settlement under the World Trade Organization & Reform of Dispute Settlement System.

10:30-12:00 Session VII

Chair: Belenko, S., Professor, Temple University, USA.

1. O' Connor, M., Professor, Phoenix School of Law, USA. Arab Spring to American Winter: The Need to Embrace "Structured Spontaneous Disorder" In 21st Century Social Rebellion.
2. van As, H., Professor and Director, Nelson Mandela Metropolitan University, South Africa. Providing Quality Legal Aid in South Africa: Surfing the Wave or heading for the Rocks.
3. Mallory, C., PhD Student, Northumbria University, UK. Exporting Rights: The Development of Jurisdiction in the European Convention on Human Rights in Light of Recent Iraq War Cases.
4. Mohammadi, M., Assistant Professor, Islamic Azad University, Iran & Mohammadi, S.A., Lawyer, Legal and Consultant Institution of Manshoore Adl and Dad, Tehran, Iran. Fear from Freedom Tendency to the Suicide.

12:00-13:00 Lunch (Details during registration)

13:00-14:30 Session VIII

Chair: van As, H., Professor and Director, Nelson Mandela Metropolitan University, South Africa.

1. Rumann, C., Professor, Phoenix School of Law, USA. Witches and the Law in the 21st Century.
2. Wolff, L., Associate Professor, Bond University, Australia. Japanese Law and Popular Culture.
3. Mercer, S., Lecturer, Northumbria University, UK & Sandford-Couch, C., Professor, Northumbria University, UK. The Trial of Oscar Wilde – Lawyers and Literature.
4. Orji, P., Ph.D. Student, University of Reading, UK. The Determination of a Regulatory Framework for E-commerce Transactions.
5. Johnson, M., Lecturer, University of Hertfordshire, UK. Inchoate Offences in Cyberspace – A Moveable Feast or the End of Harm?
6. Griffin, R., Professor, Washburn University, USA. Informational Divide: Cyberspace and the Creation of the New Ignorance.

14:30-16:00 Session IX

Chair: Frenkel, D.A., Head, Law Research Unit, Athens Institute for Education and Research (ATINER) & Professor, Ben-Gurion University, Beer-Sheva, Israel.

1. Wilson, W., Professor, Queen Mary University, UK. A Scheme of Liability for Preparing to Commit Crime.
2. Alhudathi, Y., PhD Student, University of Lancaster, UK. Franchising Law in Saudi Arabia.
3. Johari, R., Student, Nirma University, India. The Contrariety Between Generic Term and Trademarks: Mystified Laws or Flawed Immunity?
4. Phillis, M., Ph.D. Student, Australian National University, Australia. Standards and Objectivity: Are the Common Law's Problems Pervasive?

17:00-20:00 Urban Walk (Details during registration)

20:00-21:00 Dinner (Details during registration)

Wednesday 18 July 2012

Cruise: (Details during registration)

Thursday 19 July 2012

Delphi Visit: (Details during registration)

Yousef Alhudathi

PhD Student, University of Lancaster, UK

Franchising Law in Saudi Arabia

John Anderson

Associate Professor, University of Newcastle, Australia

Myra Berman

Professor, Touro College Jacob D Fuchsberg Law Center, USA

&

Hadara Bar-Morh

Netanya Academic College, Israel

Court is in Session: Integrating the Courtroom Experience into the Law School Classroom

For more than two decades, legal education reforms have focused on the development of traditional skills required for the practice of law, such as problem-solving, legal analysis, research, communication, and ethics. In order to teach students those lawyering skills, curricular reforms have generally taken the form of expanded legal process courses, such as interviewing, negotiating and counseling, pre-trial litigation, and trial advocacy, plus diverse specialist clinical programs. To varied extents, law schools have injected such courses and programs into their traditional doctrinal-based curricula. Nevertheless, the primary problem with new attorneys, as identified by a majority of practicing attorneys and judges, remains the same: upon graduating from law school, students have virtually no idea about the actual practice of law and lack essential practice skills.

Reformers have suggested that law schools should follow the medical model, but law school administrators argue that this is impossible because law schools are not usually affiliated with teaching institutions in the same way that university medical schools are directly connected to a hospital. Yet, at an American law school, Touro Law Center, an Australian law school, Newcastle Law School, and an Israeli law school, Netanya Academic College, legal educators have discovered ways to do precisely what other law schools have said cannot be done: we have developed collaborative court programs where, to varying degrees, courts (the judges, court personnel, and practicing attorneys) become active participants with the law school in educating law students.

Our panel will present a model for a collaborative court program that incrementally integrates the work of the courts into the typical three-year law school curriculum. The model begins with court observation, progresses to in-depth court studies, and ends with full student participation in selected trial-level courts. After explaining this experiential model, we will explore how it has been implemented and replicated, either fully or in part, and will suggest how differently

situated law schools can utilize these programs, given variables like access to courts, budgetary realities, available resources, and existing programs.

Agnieszka Ason

Ph.D. Student, Freie University Berlin, Germany

Court Review of Arbitral Awards Involving Competition Law

Arbitration has been traditionally considered to be a serious threat to the effective competition law enforcement. Only twenty years ago, an idea of arbitrating antitrust issues was unanimously rejected. A breakthrough came in the 90s from the US. Within a few years, the arbitrability of antitrust disputes has been widely acknowledged in Europe. Surprisingly, the process was a smooth transition from distrust to embrace. A fear that arbitrators could evade competition rule has been easily replaced by a appraisal for antitrust arbitration and its dynamic development. Judges have started to give up their control powers over an outcome of arbitration at the setting aside and enforcement stage. As a result, the public policy control of awards lost its characteristic as an ultimate safeguard against violation of competition law. Limited in scope and, in most cases, to the brief lecture of an award, it is no more fitted to identify serious infringements. It is therefore necessary to pose a question, if a minimal standard of review of awards is an acceptable option when a violation of antitrust rules is at stake. The question is subject of an emerging debate among scholars and practitioners. Distinction can be drawn between "minimalist" and "maximalist" approaches to the supported intensity of the order public control. As the former is the predominant view, it is a challenge to endorse the latter. The risk has been taken and the time is ripe to show that an in-- depth review of antitrust arbitral awards is not an outdated wish but a modern postulate.

Steven Belenko

Professor, Temple University, USA

&

Cassia Spohn

Professor, Arizona State University, USA

Factors Affecting Plea Offers among Drug Trafficking Cases in U.S. District Courts

Research on case outcomes in U.S. District Courts focuses primarily on sentencing decisions. There is relatively little research examining federal prosecutors' plea bargaining decisions, especially for drug trafficking cases which represent a substantial proportion of the U.S. District Court caseload. This gap in the literature is important, given that most federal drug traffickers plead guilty, nearly all in response to a plea offer from the U.S. Attorney. We use data on offenders convicted (by plea) of drug trafficking offenses in three U.S. District Courts to examine the types of plea bargains offered and to determine if there are racial/ethnic or gender disparities in the types of offers made, controlling for offense seriousness, prior criminal record, type of drug, and other legally relevant factors. We also examine variation in plea offers by jurisdiction and by the individual U.S. Attorney handling the case.

Enrico Bonadio

Lecturer, City University London, UK

Plain Packaging of Cigarettes and Trademarks Under EU Law

Plain packaging is a new tobacco control tool that has been recently adopted by Australia and is currently being considered by UK and at EU level. It mandates the removal of all attractive and promotional aspects of tobacco product packages. As a result, the only authorized feature remaining would be the use of brand name, which would be displayed in a standard font, size, color and location on the package. In opposing this new strategy, the tobacco industry is particularly keen in emphasizing both the ineffectiveness of plain packaging in reducing smoking rates and its incompatibility with national and international trademark-related provisions. In particular, the tobacco industry as well as other regulated industries, such as food, alcohol, and cosmetics, believe that plain packaging jeopardizes their trademark rights. This presentation, after introducing the reader to the genesis and rationale of plain packaging within the broader context of the WHO Framework Convention on Tobacco Control, offers a detailed analysis of the compatibility of this new packaging measure under EU trademark law.

Alison Brammer

Lecturer, Keele University, UK

Carers and the Mental Capacity Act 2005 – Angels or Devils?

Adult social care in the UK is dependent on millions of unpaid carers together with a significant workforce of carers who provide care on a more formal basis. Some carers may provide care for individuals who lack capacity to make certain decisions associated with their care for themselves, including for example, adults with dementia in residential settings. The law relating to such adults was radically reformed with the introduction of the Mental Capacity Act 2005, which provides a legislative framework to both empower and protect those who lack capacity. The Act provides legal authority to carers to make decisions and take actions on behalf of a person lacking capacity, provided such decisions or actions taken are in the best interests of the individual and are not negligent. It also, however, introduced a new criminal offence whereby a carer may be charged with ill treatment or neglect of a person lacking capacity in their care. The Court of Appeal have recently clarified the terms of the offence. This paper examines the background to the introduction of the offence, its position within safeguarding adults practice and the dichotomous legal position of carers under the Act. Selected reports of prosecutions illustrate application of the offence in practice and a number of themes emerge, including an apparent preference to prosecute in relation to formal carers. Questions are raised as to the position of carers under the Act and what the new offence adds to the pre existing legal framework.

Graham Caldwell

PhD Student, University of Southampton, UK

A UN Court System for Somali Pirates: Adequate Deterrence, or Costly Ineffective Mistake?

On the 26th July, 2010 the UNSC released the proposals for bringing justice to the prolific problem of Somali piracy. In the years subsequent to the 1991 fall of the Somali government, failed attempts at federalism and “Transitional Governments” have left the waters of the Gulf of Aden, and now over a thousand nautical miles into the Indian Ocean, a lawless haven for pirates. Ineffectual governance, corruption and the willingness of commercial interests to accept the “capture-ransom-release” status quo has led to a perfect climate for these men to act with impunity. However, in light of the difficulties faced by Somalia is a court system the answer and what problems will it create for EU member states, such as the UK, when it comes to enforcement?

The North Atlantic Council approved “Operation Ocean Shield” on the 17th August, 2009 to combat the threat of piracy around the Horn of Africa¹. This mission replaced the former “Operation Allied Protector”, and it was intended to draw on the previous experience and provide more comprehensive protection. However, in spite of some notable success it must be said that piracy continued, and in fact grew, in the years after its inception. It is submitted that without a means by which to arrest and detain pirates they are often released to carry on as before, sometimes more efficiently due to their gained experience, which further exacerbates the problem. For that reason a court system, dedicated to piracy, is attractive. What may not have been properly considered are the problems related to transfer and detention, within Somalia, for EU member states? Recent decisions from the European Court of Human Rights suggest that member states may well have difficulty in resisting challenges, by captured pirates, when attempting to surrender them to Somali justice. That is to say little of the problems of corruption and instability within Somalia.

The international community has recognised the problems with access to justice for ordinary Somalis and the system is far from adequate. The prisons have been referred to as “very harsh”² and sources suggest could engage the protections of Art 3. That being the case, once an EU member state is possessed of the pirate, it may be very difficult to transfer said pirate for trial or imprisonment, meaning

¹ http://www.manw.nato.int/page_operation_ocean_shield.aspx (accessed 8th May, 2012).

² US Department of State, Bureau of Democracy, Human Rights, and Labour, April 8, 2011 p8, available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154369.htm> (22nd March, 2012).

release or costly trials and detention within the host nation. It is submitted that if EU member states are to try, and imprison, captured pirates “in house” then there is no need to invest in the proposed court system. Likewise, where EU states are unlikely to be able to return Somali prisoners to Somalia post-conviction for imprisonment, or indeed post-detention for that matter, the current agreements with the Seychellois and Kenyan governments offer a more tried, tested, and attractive means by which to cope with the problem.

Margaret Carran

Lecturer & Ph.D. Student, City University, London and Queen Mary
University of London, UK

Regulation of Adolescents Gambling – Too Narrow Approach?

The vast variety of contrasting regulatory approaches towards gambling across different jurisdictions has one common element – the need to protect minors from gambling related harm. Most jurisdictions attempt to achieve that by making minors' gambling illegal and by imposing criminal sanctions on commercial providers who permit or invite adolescents to play. Despite those legislations, prevalence rates in Europe, North America and Australia indicate that large number of minors do in fact participate in gambling activities including those that are unlawful for their age.

The paper demonstrates that the relative ineffectiveness of the prohibitions of gambling by minors results from lack of cohesion between existing psychological evidence and legal responses. It is notoriously difficult, but not impossible, to change social norms by legal means. This can be achieved by targeted and coordinated approach toward an identified problem as can be demonstrated by the successful changes in attitudes towards smoking. Gambling regulations' main shortcoming is their application to gambling stricto sensu only as they normally do not extend to activities akin to gambling or those with propensity to encourage gambling.

The paper challenges the validity of this narrow approach by analysing the regulatory responses, if any, in England to those activities that constitute entry points towards gambling. This includes free online gambling practice areas; gambling within games and virtual worlds; stand – alone games such as poker, roulette or blackjack with rating of 12+ only and gaming application accessed on social networking sites. The paper also discusses the regulation of “penny auction sites” and their proximity with gambling. Secondly, the paper challenges the effectiveness of criminal sanctions due to the existence of easy to satisfy defences, lack of proxy-offences for those who allow minors to gamble by e.g. lending them their credit cards and due to the general complexity of the relevant legislation.

John Cerone

Professor, New England Law Boston, USA

Regulating the Use of Force By and Against Non-State Actors

The regulation of the use of force by and against non-state actors is one of the most hotly contested areas of international law today. The controversy is exacerbated, and in part fueled, by the complexity of the legal issues involved, implicating at least six different branches of international law -- the jus ad bellum, the jus in bello, international human rights law, the law of state responsibility for injury to aliens, international criminal law, and the rules of international law allocating jurisdictional competence. This complexity will be illustrated in the course of a comparative analysis of the legality of the killing of Osama bin Laden by US forces and a hypothetical attempt by Al Qaeda forces to kill a high-ranking US official. This illustration will bring into clear definition the legacies of both the traditional, state-centric international legal system, as well as that of the pre-existing natural law system onto which the Westphalian legal order was grafted. Against this backdrop, the paper will examine the influences these legacies have exerted on the development of each of these branches of international law, and how their evolving interaction is being shaped by continuing tensions between notions of voluntarism and necessity, positivism and transcendence.

Anna Chronopoulou

Ph.D. Student, University of London, UK.

Lipstick, High Heels and Sexy Deals”: Portrayals of Female Corporate Lawyers in England

The commodification of the legal profession has opened new ways of conceptualising the formation of legal professional identity. Aestheticisation has constituted one of the platforms upon which legal professional identity is formed and forged. Nowhere has this new “ethics of aesthetics” been more emphatic than the corporate sector of the legal profession. Recent accounts on the legal profession have made particular reference to the potential of aestheticisation in the formation of legal professional identity. Notwithstanding the importance of this work, scant attention has been paid to the impact of aestheticisation processes on issues of gender and sexuality in relation to the formation of professional identity. This paper seeks to address this absence. In doing so, it draws on a small qualitative sample of advertising material of corporate law firms and looks at the images of female corporate lawyers. This paper aims to examine the ways in which new meanings of gender and sexuality are constructed within the organisational context of contemporary legal practice, as an outcome of aesthetic strategies.

Fernando Colon-Navarro

Associate Dean/Professor, Texas Southern University, USA

Technology and Assessment in the Legal Classroom: A follow-up to an Empirical Study

Education has been challenged by technology over the last 20 years. This has begun having an impact on legal education. In legal education the Socratic Method was the primary instructional modality and its preeminence was unchallenged. The Each course had one summative final exam.

In the mid 1980s the thinking about “intelligence” began to take a dramatic shift due to advances in technology. As understanding of the complexity of human intelligences became the focus of educational psychologists, its impact was felt on the science/art of education. Ensuring that teaching methods used in the classroom would reach all learners became the primary role of the teacher, as opposed to being the primary “keeper” of the knowledge to be conveyed to the student. After the advent of computers it quickly became apparent that there was a role, even a need, for various types of intelligences in the traditional classroom and in fields where alternate types of intelligence had never been viewed as contributors to success in those fields such as the field of surgery where surgeons began training with video games which enabled them to use surgical micro robotics to perform procedures that had been impossible previously.

As psychologists introduced the idea of measuring students’ acquisition of skills to make education more efficient. Educational outcomes are the product of student aptitudes, effort and the educational program. Maximizing student outcomes and the educational process efficient became a real focus of educators, but not of legal educators. If students are making progress at a rate that will allow them to achieve the outcomes of the program on schedule, all is well; if they are not, adjustments in one or more of the three factors is necessary. Of course, affecting students’ aptitudes is not always feasible, but targeting instructional efforts utilizing their learning modality strengths is.

New technology provides the teacher an assessment of the students’ learning. It isn’t enough to know whether or not the majority of students have grasped the concept, the teacher must then make decisions about what to do with the data. We are attempting to assess whether or not this approach contributes to student outcomes, by comparing the performance of the students in my section who have been subjected to the rigors of measuring their response to instructional interventions to those of other students who have not had such formative assessments.

Gerard Conway
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Juridification of Economic Governance in the EU

The European Court of Justice (ECJ) is widely recognised to have played a central role in the process of EU integration, a role that will substantially increase if a proposal to give it jurisdiction over budget deficits is adopted under the intergovernmental treaty proposed to deal with Euro crisis. Through an expansive interpretation of the principles of free movement and undistorted competition, the ECJ has greatly expanded the process of market integration beyond that apparently envisaged by the explicit text of the original treaties. The purposive or teleological approach to interpretation of the ECJ has been applied to expand the scope of the internal market, particularly in the *Dassonville* and *Cassis de Dijon* cases, while 'spillover' from the common market has facilitated the assertion by the ECJ in some sensitive social competences, including in the matter of the right to strike. This paper surveys the extent of ECJ jurisdiction over economic matters, while also examining the normative case for an extensive judicial role in this sphere, traditionally considered 'non-justiciable' at least in terms of broad economic policy. It first outlines the expansive approach of the ECJ to the interpretation of the core common market principles, following which it examines the neo-functional concept of 'spillover' applied to legal reasoning. The final part of the paper examines the implications of the current intergovernmental proposal to give the ECJ jurisdiction over budget deficit rules for Member States of the Euro zone.

Andrea Anne Curcio

Professor, Georgia State University, USA,

Nisha Dogra

Professor, University of Leicester, UK

&

Teresa Ward

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Using Existing Frameworks to Develop Ways to Teach and Measure Law Students' Cultural Competence

Lawyers practice in a multi-cultural society and many engage in a transnational practice. Given the likelihood that lawyers will encounter people from cultures different than their own, this paper discusses why legal educators should consider developing their students' cultural competence. As part of that discussion, the paper relays some findings from a law student survey that sought to measure incoming law students' knowledge and attitudes about the role culture plays in the lawyering process. It discusses survey findings in context of the knowledge and attitudes cultural competence learning objectives articulated by medical and clinical legal educators. The paper also provides an overview of conceptual and theoretical cultural competence frameworks developed by clinical legal and medical educators, and briefly discusses work done by medical educators to identify and measure cultural competence learning outcomes. In discussing this information, the paper hopefully provides legal educators the resources necessary to begin to conceptualize, develop and measure law students' cultural competence learning outcomes..

Wium De Villiers

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**Is the Two-Hour Evidentiary Presumption in the
Context of Drinking and Driving Cases a
Sufficiently Compelling Factor to Override a
Suspect's Right to Counsel under South African
law?**

South African legislation makes it an offence for a person to drive a vehicle on a public road while the concentration of alcohol in any specimen of blood or breath is in excess of the prescribed minimum. If it is proved that a sample taken within two hours of the alleged contravention is in excess of the prescribed minimum, it shall be presumed that the concentration of alcohol was above the prescribed minimum at the time of the alleged offence. Under south African law the suspect is not afforded the opportunity to confer with or to be assisted by counsel when the sample is taken in this crucial timeline. In this paper I investigate whether the suspect is entitled to counsel during the two-hour period and if so, whether the suspect's right to counsel is being violated. I also investigate whether evidence of the sample should be excluded.

Jennifer Drobac
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Abandoning Teenage “Consent” for Adolescent Assent: Harmonizing Development Sciences and the Law

Conflicts between law and science, as well as between state civil and criminal law, prompts a revision of legal approaches teenage “consent.” Rather than eliminate default guidance or attempt to implement myriad separate rules for the regulation of adolescent activities and “consent,” society might give adolescent “consent” legal significance when it is in a minor’s best interests to do so. Drawing wisdom from recent neuroscientific and psychosocial discoveries and traditional legal guidance, this presentation offers a new mechanism to replace adolescent “consent,” legal assent.

Unlike medical assent, legal assent requires no associated parental consent or permission. Unlike legal consent, it carries no associated threshold level of legal capacity. Similar to consent by a minor under contract law, legal assent is voidable by the minor. However, legal assent operates somewhat differently from traditional, voidable contract consent by a minor.

Imagine an example. Suppose the minor gives legal assent to sex with her teacher. That “consent” is legally binding unless the minor voids her assent during her minority, or during a reasonable time thereafter. The district attorney can still prosecute him for statutory rape. A successful case results in a vindication for a society that does not want its teachers having sex with their students. If the minor reaffirms her assent, there is no parallel civil case; the controversy ends. Parents cannot void a minor’s assent for her. Alternately, if she determines that she was duped or made a mistake in assenting, she can void her legal assent and bring a sexual harassment or tort claim against her teacher to recover for her damages. Arguably, sexual intercourse with a teacher is not in her best interests and the court excludes any discovery or admission of evidence regarding the assent if the teacher raises it as a civil defense in a Title IX or tort case. Society allows her to void her assent and hopes that teachers will take warning and stay away from teenaged girls and boys. Criminal sanctions for adults clearly suggest that particular activities are not in a minor’s best interests.

With legal assent, a minor makes the first and second choices: to assent and whether to void her assent. Society permits her the second choice to protect her from the bad choices we anticipate she might make

and to facilitate her own correction of her mistake. We hold her to her assent if she errs in the revocation of assent. At that point, however, if someone challenges the abrogation, the court evaluation focuses not on the moral purity or maturity of the minor but upon whether the original assent was in her best interests. The evaluation focuses on the circumstances, not on the individual minor. This theory of legal assent is consistent with what we know about adolescent development; teenagers need maturing experiences and the opportunity to practice their skills.

Amin George Forgi

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Between Promise and Peril: International Law and the Framing of Development Initiatives for Africa

The quest for development has since the 19th century stood out as the cornerstone for relations between the West and Africa. The colonial era was articulated in terms of the civilizing mission—thus, an invocation of the need for economic and political progress for the African continent. Contemporary relations between the West and Africa are still very much grounded on various demands for the latter to engage in bold economic and political reforms that would eventually translate into development (rule of law, democracy, human rights, good governance, etc). How have various development initiatives which international law has historically legitimated for Africa shaped the continent economically? What was the economic component of the civilizing mission?

International law has during the past two centuries legitimized two key institutions that have defined the economic future of Africa, notably: trade and private property. Various International organizations have principally relied on 19th century international law assumptions on trade and investment to implement development initiatives across Africa. What are the consequences of trade and investment regimes becoming the new vehicles for development in Africa, based on neo-liberal economic logic? Have these mechanisms enable international law to finally fulfil the promise of economic progress and the liberation of Africa from the burden of poverty? What are the consequences of adopting the language of civilization and progress as a platform for development?

Nicholas Georgakopoulos

H.R. Woodard Professor of Law, Indiana University, USA

Pyres, Haircuts, and CACs: Lessons from Greco-Multilateralism for Creditors

The structure of health insurance does not compensate insurers for long-term investments in health, such as those against chronic disease. This paper explores the legal structure of chronic disease treatment by insurers, illustrates the failure of the associated incentives, explores possible improvements and recommends that subsequent insurers (including Medicare) have an obligation to compensate the prior insurer for the averted expenses on diseases that were expected but did not occur.

Luciana Helena Goncalves

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&

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The Construction of Precontractual Liability as a Link between Social Contact and Objective Good Faith in the Brazilian Legal System

Couto e Silva (1) explains that the social contact, a German concept, in a general sense, is the source of all the wider obligations, as a representation of life in society. This notion denotes the relevance to analyze the legal relationship as a whole, for example, implying the existence of pre-contractual liability, because of a pre-existing social contact which triggers reciprocal duties. The social contact breaks with the classical dogma of the will in respect to contract law, because it is related to the complex unit of its social motives and circumstances. The International Encyclopedia of Comparative Law (2) contains the approach of the social contact being the basis of protective duties and diligence at a time when the contract does not exist. That corresponds to the duty of care between a physician and a patient in the common law of England. Thus, it is relevant to discuss the social contact as a trigger for pre-contractual liability. How does it work in Brazil? This study presents a comparative outlook, because the core of the discussion meets support in a German institute expressed in the BGB (the German Civil Code), the culpa in contrahendo, an abstract concept which runs through several legal systems, but such regulation do not exist similar in the Brazilian legal system, for instance. That shows a gap in our legal system, which is supplied by an indeterminate concept of objective good faith, a principle that guides the Brazilian Civil Code and is also encompassed in our Consumer Protection Code (CDC). There are many discussions about this approach in our CDC, but we think that this contemplation should embrace our Law more intensely, based on a deeper reflection of our Law about the social background.

This study aims of analyzing the implementation of such an institute in the Brazilian legal system, as the pre-contractual liability case between a famous tomato sauce manufacturer and farmers who received seeds and cultivated them, confident that their production would be purchased. This case shows the necessity of a regulation which emerges from the bosom of society and safeguard the society itself. Therefore, the pre-contractual liability shows to be relevant not

only to international trade, which primary business are slow and costly, but to the possibility of an access to lay population to an equitable and judicial solution.

Ronald Griffin

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Informational Divide: Cyberspace and the Creation of the New Ignorance

Computers are dumming us down. Book learning has given way to computer speak. A dark age is on the horizon. When the electricity is turned off folk won't know what to do with themselves. Modern day technology overwhelms us. Users are enthralled with gadget to the point where they have lost themselves in them. We have (I argue) abandoned, perhaps, mislaid our sense for ignorance; what it means to be illiterate in the 21st century; and a working definition for truth. In this environment a dab of formal education (enough to make somebody lethal), a sprinkle of bigotry, and fear produces people with ideas that are bad for us. This essay cautions against trucking with those folk; marking what they do to us in the media that is unhealthy; and fixing what's broken among the information dispensaries (e.g., broadcasting, film and cyberspace) so future information users won't have to bother with this stuff. The essay showcases sketches (so-called alternative realities), a broader view about life, and the life of the mind. There is a period piece (Childhood) at the outset, some world views (people brooding about their surroundings), shortcomings in broadcasting, film, and other media, and what can be done about them.

Jie Huang

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Implement ECFA: Prospects of a Bilateral Investment Agreement between Mainland China and Taiwan

In close race of 2012 Taiwan presidential election, Ma Yingjeou beat opposition candidate Tsai Ing-wen of Taiwan Democratic Progressive Party. Mainland China and Taiwan will continue cooperation in economic fields. Concluding a Bilateral Investment Agreement (BIA) will be a priority. However, a cross-strait BIA has not been fully explored in literature thus far. This Article aims to fill this gap. It focuses on the practice and regulations of cross-strait investment and discusses the prospects of a BIA under the ECFA.

This Article can be divided into four parts. The first part uses statistics to demonstrate the growing cross-strait investment and incompetent contemporary investment protection mechanisms in Mainland China and Taiwan. It argues that a BIA can best boost investors' confidence. It surveys the three rounds of negotiations that have been conducted between Mainland China and Taiwan. It concludes that macro and micro challenges should be resolved for a successful cross-strait BIA. The second part concentrates on three macro challenges of the BIA: politic disputes between Mainland China and Taiwan, disagreements between KMT and DPP, and different focuses of investment between Mainland China and Taiwan. It provides solutions to each challenge. Micro challenges against a successful BIA come from differences in Mainland China and Taiwan laws. Therefore, the third part analyzes the similarities and differences of laws in Mainland China and Taiwan. It also compares the investment protection agreements concluded by Mainland and Taiwan with other countries respectively. It argues that Mainland China and Taiwan can possibility reach agreements upon major provisions of the BIA such as the definitions of investors and investment, National Treatment, Most-Favored-Nation Treatment, security exception, investment protection, and dispute resolution. Regarding the negotiation strategy, it suggests that, at the current stage, due to political disputes and partisan in Taiwan, the BIA will be a framework only. The ARATS-SEF meeting or the Cross-Strait Economic Cooperation Committee will play a significant role in developing the framework. New consensus can be added to it as amendments. The forth part discusses the BIA and the cross-strait political prospects. It argues that cautions should be put when applying

neofunctionalism, intergovernmentalism, and liberal intergovernmentalism to the cross-strait situation. It is hard to predict whether the BIA will promote political integration between Mainland China and Taiwan in the near future. However, it will certainly help bring stability and prosperity to the people of the Taiwan Strait. Peace and development are the hope of the people and should be the goal of the governments.

Mansour Jabbari-Gharabagh

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The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air: An Analysis of its Scope of Application and Benefits

The airline liability regime known as the "Warsaw System" has governed international air travel since the early days of the industry. The Warsaw System includes the original Warsaw Convention of 1929, along with several other protocols and agreements amending it. In 1999, the Montreal Convention was adopted. This convention, which came into force on 4 November 2003, replaced, among its parties, the instruments of the "Warsaw system". One of the primary goals of these Conventions is to create uniformity in the rules governing international carriage by air. In some countries, these Conventions have been enacted into domestic law.

The Montreal Convention only applies to the:

- a) international carriage,
- b) of persons, baggage or cargo,
- c) performed by aircraft,
- d) for reward or gratuitously

Even if the Convention is not applicable by virtue of failure of one of the above conditions, nevertheless the Convention might be applicable if:

- a) the jurisdiction has enacted it into either local law or,
- b) by virtue of the parties having contracted to make its provisions applicable to the transportation involved.

This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the above mentioned conditions.

In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

Lawyers must first make inquiry into these conditions for, if any of them does not apply, then the Convention is not applicable and resort to local law is required. These conditions will be examined in this article.

Westmin James

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Challenging Traditional Notions of Standing in the Commonwealth Caribbean Bills of Rights

The countries that make up the Commonwealth Caribbean possess written constitutions which have Bills of Rights that protect persons fundamental rights and freedoms based on the ECHR. Under these Bills of Rights, an applicant who allege a contravention of the Bills of Rights provisions must allege a contravention “in relation to him”. The redress clause in the Guyana’s Bill of Rights seems to be wider but it still includes the requirement of “in relation to him”. Likewise, the new Jamaican Charter expressly contemplates that a “public or civic organization” can initiate actions for redress on behalf of individuals but the individual must have standing in the first place. Therefore the test for standing for alleging the breach of any of the Bill of Rights provisions is that of being “personally affected”. The courts in the Commonwealth Caribbean have interpreted this requirement as excluding organisations representing LGBTI and environmental interest from bringing actions challenging the constitutionality of legislation. This effectively stifles public interest litigation brought by organisations of laws, for which legal challenge by personally affected individuals are unlikely due to lack of resources and/or fear of discrimination. By contrast, other jurisdictions have embraced a broader view of standing using a test of sufficient or relevant interest.

The constitutions of the Commonwealth Caribbean however also contain a provision which declares that the Constitution is the supreme law and declares that if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. This paper would explore the scope of the supreme law clause and its use as a redress clause thereby allowing persons who are not personally affected but have sufficient or relevant interest to challenge the constitutionality of legislation.

Ridhima Johari

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The Contrariety Between Generic Term and Trademarks: Mystified Laws or Flawed Immunity?

A Generic Term is a term representative of a whole class or group of a particular product or genus which is used commonly by people. The United States Trademark Act of 1946 or the Lanham Act defines Trademark as “any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others”. While Trademarks have a protected status under the legal structures for the exclusive use of the trademarks holder, their absoluteness cannot be downrightly assured. Genericness of the name is one of those reasons, when the trademark becomes the “common descriptive name of an article” and the mark literally dies. A trademark deemed generic loses its protection status because it has failed to perform the functions that justified its protection and in consequence, the holder loses his rights. The Federal Trade Commission in 1978 brought to seek cancellation of trademark independently on generic grounds. In determining, whether the mark is generic, the courts have applied inconsistent standards, the result of which has two viewpoints, one, the distortion of consumer preferences and the other, the depressed competition due to indirect restraints in the market for those who are unable to use the generic term to describe their products. (contd..)

This paper scrutinizes the legal standards which have been fixed by the courts and the differences among them prevailing in various courts in terms of both the levels of understanding deemed necessary to determine the genericness. It focuses upon the definitional deficiencies in law and how can a consumer understanding of the term be formed. It further analyses the adequacy of several types of evidences used by the courts in finding the genericness and adopt a standard that provides greatest degree of protection to the trademark holder.

Maureen Johnson

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Inchoate Offences in Cyberspace - A Moveable Feast or the End of Harm?

This paper is intended to draw attention to the number of criminal offences - in English law specifically, but also more generally - that can now be committed without harm or the risk of harm to putative 'victims'. It will be argued that traditional inchoate offences have been expanded into what may be termed 'super-inchoates' by reference to the expanded distance between perpetrator and the intended harm via the internet. The very idea of cyberspace challenges the perceptions of proximity which have been the ideology behind the traditional inchoate offence, this paper will ask whether the expansion of the criminal law in this way is ultimately a symptom of overcontrol by the State driven by a culture of fear in the post-modern society, and whether we are ultimately any safer as a result.

Ernest Lim

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Religious Exemptions in the United Kingdom: Some Doctrinal, Theoretical and Institutional Issues

This paper discusses some of the key doctrinal, theoretical and institutional issues arising from the following two questions on religious exemptions in the UK: (1) Should religious believers be exempted from laws of general applicability and (2) how should the law strike the balance between religious freedom and antidiscrimination laws when religious claimants seeks to be exempted from the latter? Part I argues that, among others, the margin of appreciation accorded to States and the fact that case law has yet to require serious or weighty reasons to be adduced in relation to discrimination of religious freedom undermine arguments in favour of religious exemptions. Part II deploys insights from theoretical literature in arguing that the normative issue here is whether proponents of religious exemptions can demonstrate the unique value of religion in order to justify granting them such exemptions. Arguments that religious believers have no choice but to obey the dictates of their religion and that minority religious believers might not have access to the democratic process are also discussed. Part III highlights some of the persistent difficulties faced by the courts when they adjudicate on religious claims (such as issues concerning the definition of religion, the centrality of the belief to the religious claimant and how tight should the connection be between belief and conduct).

Jurgita Malinauskaite
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Critical Reflections on the Interdisciplinary Course at Master's Level - EMCA

The globalised world calls for experts with specialised skills and knowledge that do not fit easily within one discipline. The emergence and further development of consumer law instigated the need for consumer law and policy specialists with good knowledge and skills in law, economics, sociology and psychology. In its report on 'the need for postgraduate education in Consumer Affairs in the European Union' (2005), the European Commission identified a gap in labour market for higher education graduates specially trained in European Consumer Affairs. In response to this report and the financial backing of the European Commission DG Health & Consumer the interdisciplinary course EMCA (European Master in Consumer Affairs) was set up to train a new generation of highly skilled individuals in European Consumer Affairs. The focus of the paper is on the EMCA job-oriented study programme delivered by five highly respected European Universities from five different countries, i.e. the Institute for LifeLong Learning of the University of Barcelona in Spain, the University of Bologna, Italy, Brunel University, UK, the University of Montpellier and finally the West University of Timisoara, Romania. The course, which was launched in September 2009 and delivered in collaboration by five universities, was deemed to fail and produced only one cohort of students. The paper aims to provide an insight into the difficulties in setting up and delivering this job-orientated interdisciplinary programme with work placements. It will critically examine the challenges faced by the consortium to work in solidarity. Lastly, possible reasons for a failure of a course - 'where all went wrong' - will also be explored.

Michael Malloy

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Governing Foolishness – A Comparative Analysis of Executive Compensation Rules

This paper seeks to explore three responses to the current financial crisis, established or endorsed by three diverse groups of policy makers – limits on executive compensation. The three approaches that I examine are: (1) the executive compensation provisions of the Dodd-Frank Act, which was enacted as the principal response of the U.S. Government to the financial crisis; (2) the European Commission's Green Paper on executive compensation, issued just weeks before enactment of Dodd-Frank and with much the same intention; and, (3) the non-binding guidelines, Compensation Principles and Standards Assessment Methodology, issued by the Basel Committee on Banking Supervision based at the Bank for International Settlements in Basel, Switzerland. Only the third approach is specifically intended for use in the supervision of financial services firms; the other two impose or recommend requirements or principles generally on executive compensation in the broader corporate setting. The paper argues that these limits are a distraction from the real issues in the financial services markets, like, for example, fraud, manipulation, gross negligence in management during the run-up to the crisis.

Conall Mallory

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Exporting Rights: The Development of Jurisdiction in the European Convention on Human Rights in Light of Recent Iraq War Cases

States who sign the European Convention on Human Rights agree to 'secure to everyone within their jurisdiction the rights and freedoms defined' within the treaty (Article 1). For over fifty years the Strasbourg Bodies of the European Court and Commission of Human Rights have struggled to define the exact limitations of a State's jurisdiction, particularly when such jurisdiction arises beyond a Contracting Party's territorial borders.

Within the past decade the European Court of Human Rights has been asked to consider the limits of jurisdiction under Article 1 on a number of occasions. Previously the Strasbourg Bodies had maintained a flexible approach in finding jurisdiction, but in the *Banković* decision of December 2001 the Court gave a restrictive interpretation of jurisdiction, defining it as 'primarily territorial'. Since then the Court has oscillated between the restrictive *Banković* approach and its more expansive early jurisprudence, leading the Law Lords of the UK to state that the European Court's jurisprudence on this issue does "not speak with one voice".

In the *Saddam Hussein, Al-Saadoon and Mufdhi, Al-Skeini and Others and Al-Jedda* applications, all concerning the Iraq War, the European Court of Human Rights attempted to present a more coherent understanding of jurisdiction under Article 1. This paper seeks to ascertain the current understanding of jurisdiction, in particular the limits of its extraterritorial application, in light of these cases.

Stefan Mandelbaum

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On Making Sense of Contradictions: Dialectics and International Investment Law

The rationale of International Investment Law is still – to use a Hegelian phrase – in a “state of becoming”. As concerns dichotomic sources of traditionally separated – private or public – domains of law and, to some extent, resulting antinomies in scholarly reflection, this field of International Economic Law is subject to a dialectical development in the true sense: it is a “progress of contradiction”. Yet, either emphasising the concept of state sovereignty or contractual obligation leads to an uncertainty with regard to legal legitimacy. Furthermore, simply deducing principles from this divergent set of rules only cements the separation of actual practice and theoretical.

In order to overcome these contradictions from the very outset, this presentation proposes a dialectical method. It will be demonstrated theoretically and exemplified concretely that its advantage lies in the fact that it treats different sources of substantive law or strands of legal tradition not as mere constituent components but as constituting moments within the legal system itself. Emphasising transcending moments of contradicting positions is conceptually developing mediating forces that eventually liquify a static perspective on the subject. An exemplarily examination of Customary International Law will illuminate the interplay of positing and being posited within the system of customs. It will be argued that, although Customary International Law is the primary and somewhat objective criterion in arbitral tribunals, it remains a perpetual process of being posited through the recognising application in the resolution of investment disputes, while also positing recognised standards for the treatment and obligations of foreign investors or the duties and rights of host-states.

It will be concluded that a dialectical analysis can serve to create normativity from within, which might provide a sound basis for the system's conceptual legitimacy as well as for the public understanding of International Investment Law.

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&

C. Sandford-Couch

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The Trial of Oscar Wilde – Lawyers and Literature

The libel action brought by Oscar Wilde against the Marquis of Queensberry in 1895 was a cause celebre of the late Victorian period and has been subsequently construed in myriad ways. Much recent commentary has emphasised the centrality of Wilde and his role in attempting to project himself to the court and to the wider world. Thus Wan ('A Matter of Style', *Oxford Journal of Legal Studies*, 2011) proposes a reading of the trial as a "text reflecting and enacting Wilde's vision of what literature is", while Foldy (*The Trials of Oscar Wilde*, London, 1997) examines, inter alia, "Wilde's justification of his work and behaviour and his various appeals to the authority of art, literature and philosophy."

This paper will attempt to explore another perspective: that of the advocates involved in the first trial. For the trial was not an open opportunity for Wilde to develop or justify his philosophy: Wilde was constrained by the courtroom setting. Trial advocacy starts with the construction of a theory of the case. The lawyers involved need to develop an idea of how they intend to portray both the individuals they represent and their actions. The development of such a strategy requires consideration of both the legal issues and of the perceptions of the jury. It is argued here that the portrayal of Wilde advanced by his counsel, Sir Edward Clarke, fitted with the then current ideas of the correct behaviours expected of a middle class man, while Queensberry's counsel, Sir Edward Carson, construed Wilde and his behaviours as at odds with such ideas. In the trial Wilde's responses were of necessity conditioned by the questions he was asked. Thus this paper will analyse the strategies of the advocates, and the ideas behind their respective constructions of Wilde.

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&

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Fear from Freedom Tendency to the Suicide

The growth of social activities for women in Iran has had two-sided outcome for women. The worst, the women have countered the phenomenon of prison which is a great problem in traditional and Islamic societies. The change of role expectations after the release from prison has imposed many restrictions on women so that there is not any vivid future for them. Lack of enough education and skill has deprived the prisoner women from retaining their pre-prison situation. The high number of suicide among prisoner women shows that subculture of encountering with prisoned women in Islamic societies is based on sin approach in that the women are sinners who will be sent to hell in the other world and they must see the punishment of their sin to be ready for the extreme heat. Disinterestedness in the interaction with other people and loving isolation are two characteristics of style life for these women. The effects of authorities to return. These women to normal life, unfortunately, have failed to work. This paper investigates the reasons and roots of exclusion for prison women in Iran and Islamic societies.

Mukhles Murad

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The Role and Function of Dispute Settlement under the World Trade Organization & Reform of Dispute Settlement System

The World Trade Organisation Agreement covered all the agreements of the Uruguay Round including GATT 1947 and GATT1994. The establishment of the WTO places the international trading system on a firm constitutional footing and the purpose of which is to provide the “common institutional framework.” It’s an organisation for liberalizing trade, a forum for governments to negotiate trade agreements, a place to settle trade dispute and it operates a system of trade rules. The Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Annex 2 to the WTO Agreement, represents the first, extensive, negotiated agreement reforming and revitalizing the GATT dispute settlement system. The WTO Dispute Settlement Process is central and vital to the WTO institutional structure is the dispute settlement procedure derived from decades of experiment and practice in the GATT. Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. It will then discuss some of the major problems of the GATT dispute settlement systems and how the Uruguay Round negotiators moved towards developing the WTO dispute settlement procedures.

Marina Nehme

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Indigenous Corporate Governance in Australia and beyond

Indigenous Australians, like their counterparts around the world, did not always have their rights acknowledged or upheld as a result of the Western colonisation. From the concept of Terra Nullius to the forcible removal of Indigenous children from their family and kinship, Indigenous Australians had to fight hard to have their rights recognized and legitimised. A major international move has already taken place with the endorsement of the United Nations Declaration on the Rights of Indigenous Peoples by 150 countries, including Australia. One of the rights given by the United Nations Declaration relates to the economic freedom that should be given to Indigenous people. However, such freedom will remain symbolic, if governments around the world do not take further steps to ensure that Indigenous people can establish their businesses based on their own cultures and traditions. In Australia, for instance, the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) has already attempted to take such a step prior to Australia's endorsement of the United Nations Declaration. This statute was introduced with the aim of empowering Indigenous Australians to run their businesses based on their culture and traditions. However, while this legislation may have high aspirations, it does not always hit the mark and achieve its objective.

This paper considers the rights of Indigenous Australians under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) and determines whether the legislation really provides enough rights to Indigenous Australians to run their businesses based on their own values and traditions. The Australian position will also be compared with steps taken by other countries to provide economic freedom to Indigenous people by allowing them to run their businesses based on their own cultures and traditions.

Michael P. O'Connor
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Arab Spring to American Winter: The Need to Embrace “Structured Spontaneous Disorder” In 21st Century Social Rebellion

This article examines the changing nature of political protest around the world, and argues that societies must embrace increasing disorder or suffer greater bloodshed and eventual civil war. Furthermore, democracies must transform to incorporate new means of responding to these expressions of popular political will or risk the fate of those repressive governments that have abruptly fallen.

From Northern Africa into the Middle East, political revolts roiled societies throughout 2011 and toppled dictators like so many dominoes. Long-simmering political, social and economic injustices seemed to suddenly boil over. Some of these revolts remained largely nonviolent, while others devolved into violent repression and even civil war. Riots and demonstrations also broke out in England and Greece. The Occupy Wall Street movement quickly spread throughout the U.S. and influenced other protests around the world. While each society affected has its own motivating forces for protest, some important symmetry can be observed in many of these protests against inequality. Those aggrieved and disenfranchised have frequently used electronic media to effectively and rapidly organize, plan and stage demonstrations. To more traditional media and political entities, these demonstrations appear spontaneous. The organizers have deliberately flouted “time, place and manner” restrictions on speech used by even permissive societies to preserve order, further enhancing this apparent spontaneous disorder. In response, many governments have resorted to mass arrests and violence, encouraging even greater disorder and protest.

This article argues that repressive measures against this new wave of social protests that are facilitated through instantaneous, global communications are disastrous tactics for governments to use. Only by embracing increased disorder and incorporating these political voices into a more democratic process can societies respond, change and survive in this brave new world.

Peter Orji

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The Determination of a Regulatory Framework for E-commerce Transactions

Electronic communication and delivery systems affecting modern business transactions raise challenging new questions about the effectiveness of traditional law, thus necessitating a new regulatory framework for electronic business. This work examines the possibility of a new regulatory framework considering the different hierarchy of regulation – personal, corporate, local, national and international – with a view to untangling overlaps, appraising the efficacy of the existing framework and analysing the compatibility of any new legal framework with the traditional role of regulation and control in society.

As a result of the novelty of e-commerce it is overwhelming to find the appropriate laws that regulate e-commerce. The discovery process reasons thus – what law is the recognized law of any commercial transactions? Does the electronic nature of e-commerce add anything new to that sort of commercial transactions? Where nothing new is apparent, e-commerce law is probably commercial law in an electronic environment, albeit with the necessary modification; where there may be something new, is there new legislation or directions from case law? Or is the new law a hybrid of old law and new principles?

This work shall look at the laws regulating e-commerce from the United Kingdom, the European Union, and, where necessary, the link with relevant international laws, particularly concentrating on the legal framework surrounding the formation of electronic contracts.

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Standards and Objectivity: Are the Common Law's Problems Pervasive?

This paper will be in two parts:

First, a discussion of some of the ways in which standards (relating to judgments of either a scientific or an evaluative kind) have played a role in common law legal systems, in particular the way their (real or imagined) objectivity has affected the balance of powers between decision-makers and courts. There seem to be two main intersections of standards and objectivity: review of executive discretion, and giving substance to legal principles. Courts have been confronted with the idea that statistics and facts are of variable objectivity, and I will briefly discuss some of the ways in which the role they play in common law systems has been challenged. Ultimately, we may need to treat judicial notice of scientific and evaluative kinds of data as qualitatively similar.

Second, carrying forward the idea that objectivity has been dealt with according to higher-order values in public law, I will ask to what extent we can expect transnational or even comparative law to build ideas of objectivity around standards without the singular legal culture generally found in each jurisdiction. Here, I will argue that both functionalist and sceptical thinkers have given us frameworks which are either implausible or not very useful. I argue that a more useful response to the undermining of objectivity in indicators could be found in post-modern or neo-Rabelist thought, and will go on to give some idea of how I see standards (and the mechanisms that have been built around them) operating in such a framework. For the sake of brevity, I will focus primarily on the notion of proportionality, as it cuts across much of the material in a reasonably selective way.

Celia Rumann

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Witches and the Law in the 21st Century

This article examines the phenomenon in a number of sub-Saharan African nations of the practice of witchcraft around the world and the use of domestic courts to prosecute those for criminal responsibility when they are alleged to have practiced witchcraft. It specifically considers the intersection of the law and the practices of witchcraft. Using the small African state of Malawi as the case study, this article focuses on the practice of criminal prosecutions of alleged witches via an intrastate criminal justice model. Malawi is one of the countries that continues to prosecute people through the criminal process for alleged witchcraft. These prosecutions have disastrous results for those convicted, but these are not the only costs associated with such prosecutions. This article considers the implications and ramifications of this practice, including its impact on those prosecuted, the potential implications under international obligations of such prosecutions, the cultural implications of this prosecutorial practice and whether eradication of the laws upon which these prosecutions are based has utility in the developing world.

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The Impact of the Major Economic Theories, Classical Liberal, Social Liberal and Neo-Liberal, on the Taxation of Corporations

The classical liberal, social liberal and neo-classical liberal positions provide taxing authorities with ethical justifications for imposing taxation on corporations. Even though economic theories may be considered to provide unrealistic models of the real world they 'have a strong influence on economic policies in practice; and they therefore have an awesome relevance – for better or worse' (Frank Stilwell, (2002) *Political Economy: the Contest of Economic Ideas*, 3).

This paper examines and evaluates the application of various theories of equity and justice developed by economists and philosophers to the issue of what constitutes an ethically fair tax contribution by corporations. The views of classical liberal economists such as Sir William Petty and Adam Smith will be studied to illustrate how these views were adopted in the taxation policies of Australia up until World War Two.

The paper then studies the views of the social liberals such as John Maynard Keynes and John Rawls and the neo-liberals such as Robert Nozick and Milton Friedman to highlight how these views have been incorporated into Australian taxation policy in the post World War Two period to the present. Most discussions of equity in taxation neglect consideration of the ethics of taxing corporations. Yet, corporations are legally constructed persons and are also significant taxpayers. It will be seen that Australian taxation policy has adopted neo-liberal positions. This has led to the shifting of the burden of taxation from corporations to individual taxpayers.

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Obligee's Duty to Cooperate in Contract Performance

Performance of most contracts would not be possible without cooperation of both parties. To receive what is deserved, the obligee owes to the other a duty, either through positive or negative action, which will enable the obligor to carry-out his/her, obligations and give full effect to the contract. For example, in a medical practice the physician cannot act alone and cooperation from the patient will guarantee a successful procedure in return. All items of such duty are not capable to cite in different kinds of contracts and in some cases they depend on terms of contract and circumstances. The most important basis of cooperation is the principle of good faith; however other factors such as implied terms, usage and custom should also be taken into consideration. Iranian legal literature has no reference to this subject, However some legal systems and international instruments about contracts such as Unidroit Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) have given enough emphasis to this principle and the effects of breach of such a duty have widely been discussed, which goes far beyond non-responsibility of the obligor. I will try to introduce this new concept by comparative analysis, and will further discuss the basis, scopes and consequences of breach of such an obligation.

Iryna Sofinska

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Citizenship as a Primary Legal Aspect of Self-Identity (Or Just Self-Labeling)?

In this paper I'd concentrate mostly on citizenship as a primary legal aspect of self-identity, however, till now there are a lot of discussions on this issue in order to determine possible strong ideological baggage, package of rights and duties and full membership in a state (features of citizenship) from everyday and personal complexity of social interaction (features of self-identity).

During last century concepts of citizenship and identity were very popular especially among sociologists (D. Beland, L. Jamieson, T.H. Marshall, S. Sassen, Ch. Tilly and B.S. Turner). In majority they concentrated on issues of self-awareness, self-definition and self-consciousness because those features help to discover self-identity as a fundamental concept of selfhood. During the last 10 years a lot of European lawyers (S. Carrera, G.-R. de Groot, J. Habermas, Ch. Joppke, M. La Torre, P. Mouritsen, H. Schneider, J. Shaw, J.H.H. Weiler etc.) analyzed in their scientific researches a legal concept of citizenship which plays an essential role in constitutional determination of personal identity of a citizen.

In order to discuss citizenship-identity interrelation we need to analyze deeply concept of identity and to define more concrete its primary and other aspects. We should not forget that citizenship is not only political, economic, cultural, geographic and social personal identity, but also a legal (constitutional) and national collective identity, which usually determine "people's relationship to a state".

Separate information I'd like to provide in order to demonstrate that question of citizenship as a primary legal aspect of self-identity stays in Ukraine pretty sharp being a special qualified feature of the interrelations between a person, state and society. That is a basic reason why we consider citizenship in this multicultural, multi-religious and multinational country to depend, firstly, on the level of state's legal, geopolitical, socio-economic and demographic development; secondly, on geographical and historical definition and thirdly, on level of civil society participation in citizen's everyday life. It must be not just self-labeling, but concrete example of self-awareness, self-definition and self-consciousness of all Ukrainians.

As we can observe personal identity is often a question of constitutional matters, therefore we emphasize that self-identity is not only a philosophic or sociological issue, but also a legal one mainly because of citizenship as its primary aspect.

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**Providing Quality Legal Aid in South Africa:
Surfing the Wave or heading for the Rocks**

It has been stated that in the global development of legal aid, five waves are identifiable. These waves, manifesting itself at different times in different countries and in different forms, have different motors driving its development and could briefly be described as follows:

Professional obligation, voluntary organisation and charitable practice;

- Statutory regulation;
- Combating poverty;
- Administration and management by government nominees; and
- Human rights

It is fairly widely assumed that legal aid schemes are combinations of three variables, namely scope (what is covered), eligibility (matters that qualify for legal aid and financial conditions) and delivery (who provide the services and at what cost).

As far as the development of its legal aid system is concerned, South Africa is currently surfing the fifth wave, but only to a limited extent, as the “scope” is largely restricted to criminal legal aid and for children in civil cases. This is justified by reference to the obligations imposed by the human rights chapter of the Constitution of the Republic of South Africa, 1996. The Bill of Rights resulted in constitutional provision for the right to a fair hearing, the right to equality before the law, the right of detained persons to choose and consult with legal practitioners, as well as the right to have legal practitioners assigned by the state and at state expense if substantial injustice would otherwise result. Accused persons were also afforded the right to choose, and to be represented by a legal practitioner, to be informed of this right promptly, and to have a legal practitioner assigned to them by the state and at state expense, if substantial injustice would otherwise result.

Section 35(3)(g) of the Constitution and its predecessor in the interim Constitution, had a major impact on the services required from Legal Aid South Africa as it acts as the agent of the state with regard to the state’s constitutional legal aid obligations. The impact is clear from the estimation that, from 1970 to 1998, a total of 997 707 legal aid cases, mostly criminal matters, were referred to attorneys. Fifty six percent of

these legal aid applications were granted between 1994 and 1998. This means that in the twenty-four years since 1970 the system handled 438 991 cases and in the next four years it had to service 558 716 matters. It became clear that the legal aid scheme was in dire need of some serious re-working.

It was an expected characteristic of legal aid in the immediate post-conflict South Africa that it took a few years to consolidate matters, to develop new policies and strategies and to implement it. In 1998, however, a National Legal Aid Forum was convened, and it was agreed that *judicare* had to be replaced with a justice centre model.

The provision of legal aid services, in some form or another, is a phenomenon that is encountered in almost all countries and in most of these jurisdictions, it is funded by the state. As is the case with all government-financed services, it is important that not only the correct application of the funding is monitored, but also that the service that is rendered complies with acceptable quality standards. For quite some time it has been accepted in various jurisdictions that mere membership of the legal profession is sufficient to ensure control of their members' ethics and competence, assuming that they provide better quality than non-members or non-lawyers. This gave rise to the notions that lawyers cost more, but that it is acceptable because they deliver higher quality. This theoretical assumption has given rise to formal protections for professions and limitations on the provision of legal services by non-members.

Various methods for the delivery of legal aid services are employed in different countries and in most instances these schemes are not static. Recently the Dutch, for example, moved from a predominantly in-house system for the supply of civil legal aid to becoming service centres. South Africa on the other hand, has moved from *judicare* to a public defender system in criminal matters. As the main choice for service delivery is between salaried-lawyer and *judicare* models, the assumption that the private profession renders a better service becomes very important for policy-makers. Where the *judicare* system is in place and the assumption is taken at face value, it would appear that there is no need for quality control as the profession assures the quality of the services rendered by its members. However, state funding is limited and competition for it is fierce, giving rise to two important considerations when a choice is made regarding the method or methods of delivery, namely cost and quality. As it is generally accepted that a public defender scheme, for example, is not as expensive as *judicare*, quality becomes a prominent factor. Measuring the quality of legal services is not an easy task, but doing so objectively has the potential to influence decisions on the method or methods that will be selected for service delivery.

This paper seeks to identify a sixth wave in the development of legal aid, namely that of quality assurance and it contrasts the methods employed to assure quality in three distinct jurisdictions, namely South Africa, the Netherlands and México. It also argues that, apart from scope, eligibility and delivery, there is a fourth variable, the combination of which make for a “good” legal aid system, namely quality.

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A Scheme of Liability for Preparing to Commit Crime

Commentators and judges have often mistaken the nature of the complementary criminal justice paradigms of retribution and prevention typically representing regulatory crime, by its failure to conform to the classical template with its emphasis on fault, as aberrational. This tendency has been compounded by the doctrinal uncertainties created when a criminal prohibition is enacted without a corresponding fault element. Judges have sometimes construed liability for such prohibitions as strict, without reference to the nature of the wrongdoing or whether the punishment is stigmatic or otherwise. Although there is now greater understanding of the internal connection between these elements in relation to regulatory crime, the confused interrelationship between the criminal justice system's retributive and other purposes continues to surface in other areas. In *McCann*, a case whose central question was whether it was permissible to augment the penalty for breach of an ASBO on the basis of the same conduct which had invoked the ASBO in the first place is a good contemporary illustration.³ Lord Steyn represented as the aim of the criminal law 'not punishment for its own sake but to permit everyone to go about their daily lives without fear of harm'⁴ No doubt the statement is true for the purpose of understanding the ASBO amongst the panoply of coercive rules and techniques but it is hardly a statement which is true of the system as a whole, which is rather more complex. The criminal justice system supports both aims - not as is traditionally asserted via the classical or harm prevention paradigm in opposition to the other but as a complementary and unified criminal justice framework. By regulating activities such as driving, education, conditions at work, health and safety, and the production and supply of foodstuffs it sustains the conditions under which the values of autonomy and freedom supported by the agency paradigm can be enjoyed.⁵

This tendency to conflate the two separate functions and forms of criminal prohibitions surfaces in other core areas of substantive law. In this paper I shall examine one such area, namely the law of criminal attempts. Here, as elsewhere commentators and judges have tried in vain to secure an accommodation made between the preventive and the

³ (Crime and Disorder Act 1998)

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⁵ Brudner (1993)

retributive aspects of the criminal law by dint of a careful balancing of its internal doctrinal elements .

The view presented in this paper is that such an accommodation is neither possible nor desirable. Either the purpose, and the doctrine which follows it, is retributive or it is preventive. It cannot be both, without compromising the ethical foundations of the system as a whole. As a result a scheme of liability must be fashioned which is both effective and yet true to the ethical principles underlying the criminal law. The law of criminal attempts can only achieve part of this project, the retributive part. We must look elsewhere to achieve prevention.

Leon Wolff

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Japanese Law and Popular Culture

This paper explores changing attitudes towards law, lawyers and legal institutions in Japan through the lens of popular culture. By analysing a corpus of popular single-series television programs since the 1980s, this paper argues that media messages about law are evolving. Although law has only occasionally featured in television shows prior to the 1990s, there has been an explosion in law-themed television dramas and comedies over the past decade. However, this paper rejects easy conclusions that Japan is "Americanising" in its more ready embrace of law, lawyers and legal institutions in its popular culture. Instead, it contends that media images are showing the power of law in building communities and relationships, but is held in contempt -- or even ridicule -- when it serves to settle rights following relationship breakdown. At the same time, there is real fear that cherished institutions, such as lifelong employment, are under attack from globalisation, even though there is open acknowledgment that these institutions are not necessarily as benign as industry and government make them out to be.