HARVARD UNDERGRADUATE LAW REVIEW

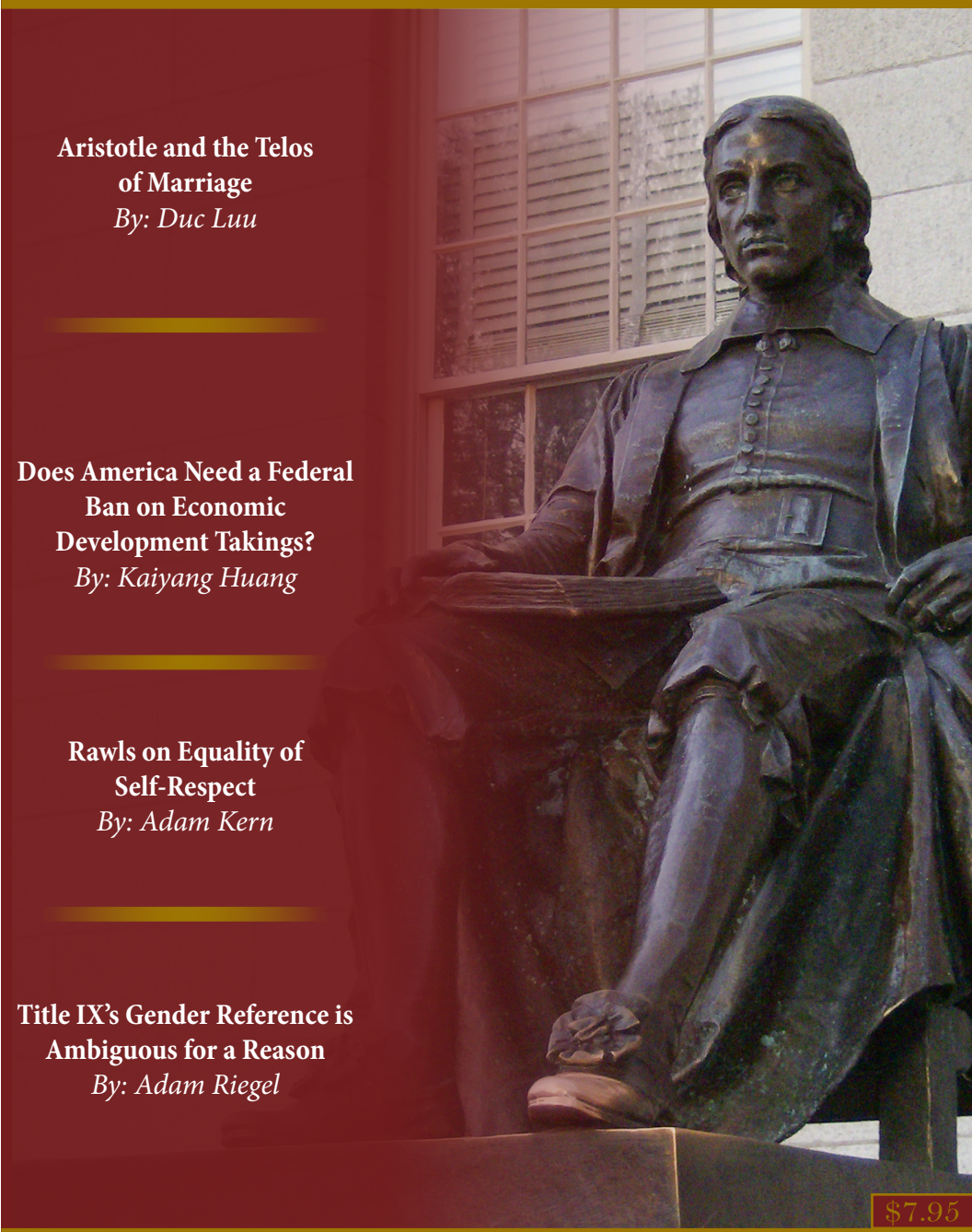
Fall 2011

Aristotle and the Telos of Marriage
By: Duc Luu

Does America Need a Federal Ban on Economic Development Takings?
By: Kaiyang Huang

Rawls on Equality of Self-Respect
By: Adam Kern

Title IX's Gender Reference is Ambiguous for a Reason
By: Adam Riegel



$7.95

The Publication of the Harvard College Law Society

Harvard College Law Society Executive Board

Sabina Ceric
President

Evan Zepfel
Vice-President

Lucy Silver
Secretary

Stephen Pauzer
Treasurer

Hank Clausner
Outreach Chair

Alyssa Blaize
Environmental Law

Mary Prezioso
Careers and Internships

Alexandre Popp
Intellectual Property

Katherine Hernandez
Law and Medicine

Kevin Hernandez
Freshman Liaison

Alexander Guzov
HULR Editor-in-Chief

Graeme Crews
HULR Assistant Editor

Frances Pak
HULR Outreach Director

Jane Seo
Publicity Chair

Contents

Letter from the President

Dear Members of the Harvard Community,

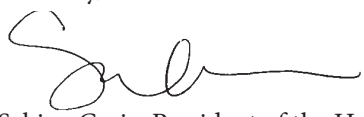
On behalf of the members of the Harvard College Law Society, I am pleased to announce the publication of the second annual issue of the Harvard Undergraduate Law Review. It is with great effort and enthusiasm that we have continued this publication into its second year and been able to expand our outreach both within and beyond the Harvard community.

The endeavor of the Harvard Undergraduate Law Review itself comes from the Harvard College Law Society, a student-run organization at Harvard College that is dedicated to providing Harvard College students with an opportunity to learn about the field of law and the academic and professional career options that it provides. As one of the largest pre-professional groups on campus, we seek to promote greater awareness and understanding of those opportunities by hosting informational sessions with law school deans, speaker events and seminars with both law school students and Boston-area lawyers and judges, educational simulations and hands-on experiences such as visits to Boston courthouses, and importantly - publications such as this one. Throughout the year, we work closely with the Harvard Office of Career Services, as well as other student organizations on campus and around the Boston area in order to bring forth this support and education to students interested in the law sector.

The Harvard Undergraduate Law Review contributes to this education through analyses of current events, commentary on court decisions and international legal proceedings, as well as information about the law school admissions process. It is with these contributions that both the Undergraduate Law Review staff and members of the Law Society hope to establish a more comprehensive understanding of the law sector today, and how best to cultivate one's interests within the field. Importantly, it is a forum for discussion on scholarly legal pursuits and an expressive way of developing both academic and professional student interest in law.

I would like to thank the members of the Executive Board of the Harvard College Law Society whose hard work made this effort possible, as well as the over seven-hundred members of the Law Society whose interests have contributed to the success of this publication and the Law Society at large.

Sincerely,



Sabina Ceric, President of the Harvard College Law Society

FEATURES

EMINENT DOMAIN AND LOCAL AUTHORITY: DOES AMERICA NEED A FEDERAL BAN ON ECONOMIC DEVELOPMENT TAKINGS?

By: Kaiyang Huang

In 2003, Columbia University announced plans to build a new 17-acre campus in Manhattanville, New York City. This, the private university explained, was necessary to maintain its role as a leading educational and research hub. Moreover, Columbia emphasized the economic benefits that expansion would bring to the community. But, this proposed development encountered voluble resistance from Manhattanville residents, who feared urban gentrification. Five years later, New York State's Empire State Development Corporation (ESDC) – a quasi-public body that finances and operates state development projects – approved Columbia University's request to acquire the remaining plots of land through compulsory acquisition. This process by which the government can appropriate private property for "public use" in exchange for market-rate compensation is known as eminent domain. In 2009, business owners in Manhattanville sued the ESDC, arguing that the approval of eminent domain for a private entity violated the U.S. Constitution. The business owners won, but one year later New York State's highest court overturned the previous ruling and upheld Columbia University's campus expansion plan (Kirschenbaum, "Timeline"). Following this judicial decision, politicians and homeowners now plan to take this case all the way up to the U.S Supreme Court – the stakes for both parties could not be higher. On the one hand, Columbia University claims that expansion through eminent domain is necessary for its future standing among elite universities, and stresses that the development of Manhattanville will create jobs and revitalize the area. On the other hand, libertarians are outraged at what they see as an egregious use of eminent domain to benefit large, powerful private entities at the expense of poor minorities. Moreover, these property rights advocates claim that courts have stretched their understanding of "public use" so much that virtually any property taking garnished with the promise of economic de-

velopment is now deemed legitimate. As such, libertarians argue, there is now little to stop a huge corporation like Wal-mart from invoking eminent domain against homeowners all across the country for private, not public, gain. Therefore, property rights defenders insist that there should be a federal ban on these economic development takings (EDTs).

However, a closer examination of this hotly debated issue reveals that many lines are not as clearly drawn as they seem, and that property rights advocates overstate their case for a ban on EDTs. Firstly, there is a lack of convincing empirical evidence that alternatives to eminent domain for private entities obtain more economically efficient outcomes. As such, a ban might just deny these entities a legitimate means to acquire land efficiently. Moreover, the increasing prevalence of development partnerships between local governments and private developers suggests that the delineation between the public and private spheres is no longer as crisp. Given the scale and complexities of today's urban redevelopment projects, a ban on EDTs would deprive a state of the hybrid partnerships that community revitalization seems to demand. Finally, a federal ban on EDTs ignores each state's needs and economic situation: heavily urbanized states like Massachusetts and New Jersey may have different concerns from relatively rural ones like Wyoming. As such, what proves effective in one may not work as well in the other. Thus, given the paucity of data on alternatives to eminent domain, the changing urban landscape, and states' different needs, a federal ban on EDTs is excessive. Each state should therefore exercise its legislative authority and decide for itself the extent to which EDTs suit its needs.

In recent years, supporters of EDTs have argued that the economic benefits accompanying development justify the use of eminent domain on behalf of private entities. The New York Court of Appeals justified its ruling in favor of Columbia University in part by acknowledging the economic revitalization of Manhattanville that the new campus would bring about. Not only would there be "upgrades in transit infrastructure," the project was expected to "stimulate job growth in the local area" by generating 6,000 permanent jobs upon com-

pletion (New York Court of Appeals, "Kaur"). Compared to the locally-owned restaurants and warehouses that currently exist, the new campus would generate more tax revenue and "revitalize" the urban surroundings. This economic justification for EDTs was echoed in a "New York Times" editorial in 2007 titled "Don't Cripple Eminent Domain," which referred to another instance of EDTs under attack. The newspaper cautioned against the New Jersey legislature's attempt to tighten standards for such forced takings. The editorial argued: "New Jersey is so built up that long-term economic growth will depend on the revitalization of its cities with new industry, housing and stores" (1). The proposed bill, the newspaper asserted, would compensate property owners too generously and make it "prohibitively expensive" for cities to invoke eminent domain. Supporters of EDTs thus argue that, by fostering job growth and increasing tax revenues, eminent domain ensures the future health of local communities and economies.

Furthermore, supporters of EDTs say that eminent domain is necessary in solving scenarios where property owners make land acquisition and development prohibitively expensive for developers. Potential sellers who are aware of their strategic position "hold out," knowing that they can receive a monopoly price by forcing developers to pay a premium. As libertarian law professor Charles Cohen explains in his paper titled "Eminent Domain After Kelo V. City of New London," one supposed advantage of EDTs over open market purchases is that the former facilitates property purchases in "thin markets" (Cohen 534). Where the land necessary for development is "scarce or uniquely suited to the project," socially beneficial projects may not be completed (Cohen 534). For example, imagine a plot of land which contains soil uniquely suited to the building of a wind power plant. In this scenario, some of the owners of the property refuse to sell, even at a generous price. Unless some form of state coercion is invoked on behalf of the power company and just compensation is made, the state as a whole is unable to benefit from the creation of jobs and tax revenue. Thus, as Cohen asserts, "eminent domain is designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that

would take place only at an inefficiently high cost" (536). Urban developers and city officials have long stressed this point as well. However, a closer examination of the Columbia University case through the lens of thin markets reveals that this justification was not submitted by ESDC, for the proposed campus site is a distance away from the main campus. Arguably, when compared to a private pipeline or football stadium, a university campus does not necessarily have to comprise one contiguous parcel of land. An unbroken plot of land would not be critical for universities like Columbia, which are located within heavily urbanized areas. As such, an argument for eminent domain on these grounds would have been weak. Nevertheless, there seems to be a need for EDTs to overcome possible hold outs in order to obtain optimal societal wealth.

On the other hand, libertarians oppose EDTs for a number of reasons; first, they believe that compulsory land acquisition by the state for a private entity is economically inefficient. The use of eminent domain, they argue, should be confined to the provision of services that do not exclude anyone – like national defense or interstate highways. This ensures that any societal surplus created by eminent domain is not captured by special interests. As libertarian legal scholar Richard Epstein notes, this restriction of eminent domain use to the furnishing of public goods ensures that "the taking of a piece of land or a naval shore installation cannot give rise to the abuse in which one individual calls upon the state to do something he is unable to do himself" (167). There is something not only economically inefficient, but deeply abhorrent, about a for-profit organization using a taxpayer-funded government apparatus chiefly for its own monetary benefit. Ilya Somin, associate professor of law at George Mason University, builds on Epstein's analysis, saying that EDTs allow politically powerful interest groups to "enrich themselves at the expense of the poor and the politically weak" ("Controlling" 271). As such, Somin asserts, "'economic development' can justify almost any condemnation that transfers property to a commercial enterprise" ("Controlling" 188). The prospect of losing one's home to a private company has terrified many homeowners. Yet, evidence shows that this is highly improbable:

a 2008 survey of county managers in North Carolina revealed that only 2% of properties was acquired by local counties for economic development purposes (McCall 11). A closer examination of the Columbia University case reveals that, contrary to popular belief, no large, occupied residential properties have been subject to the eminent domain process (Columbia). Just like how some people grossly overestimate the risks of air travel, it seems that the probability of eminent domain being used against one's home is greatly overstated. Nevertheless, libertarians like Epstein and Somin warn that the increasingly loose definition of the "public use" clause endangers property rights and leads to inefficient outcomes.

Echoing Somin's argument that victims of EDTs are usually poor and politically feeble, Supreme Court Justice Clarence Thomas notes in his dissenting opinion on the Kelo v. City of New London ruling that the outcome was unjust. He writes: "Those communities [the poor and minorities] are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful" (Supreme Court of the United States 17-18). Moreover, this occurrence is not new, but has its roots in America's history. Writing in an op-ed appearing in the Orlando Sentinel in 2008, Somin and history professor David Beito asserts that "some 3 million to 4 million Americans, most of them ethnic minorities, have been forcibly displaced from their homes as a result of urban-renewal takings since World War II" (1). In the same Kelo dissent, Justice Thomas also traces eminent domain's historical injustice, stating that "of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite" (Supreme Court of the United States 18). Furthermore, he writes: "In cities across the country, urban renewal came to be known as 'Negro removal'" (Supreme Court of the United States 18). For the Columbia University case, a demographic analysis of Manhattanville reveals that its median household income in 2008 was more than $20,000 less than in New York. Furthermore, blacks and Hispanics constitute more than four-fifths of Manhattanville's population, compared to less than

40% in New York State itself (City-data.com). Fearing an exodus of longtime inhabitants, soaring housing costs, and neighborhood segregation, residents and business owners in Manhattanville have denounced the Columbia plan as "criminal," "greedy," and "heartless" (Eviatar). Hence, besides being economically inefficient, EDTs seem to be a pretext for unjust acquisition and private enrichment.

In light of the inefficiency and injustice that EDTs create, libertarians advocate a federal ban on them, arguing that alternative methods are more effective in acquiring land for private entities. Legal scholars like Cohen and Somin have been especially vocal about the necessity of banning EDTs. This would ensure that eminent domain use is restricted to the sole provision of public goods, and nothing more. In particular, legal scholar Daniel Kelly asserts that alternative methods to eminent domain – like secret purchases – are more effective for all parties. With this method, private parties hire secret buying agents to overcome potential strategic behavior by property owners. By not alerting owners to the presence of a project which requires contiguous plots of land, secret agents increase the odds that owners will sell at a lower price. Kelly's argument is not just theoretical in nature, but grounded in real cases; he cites Harvard University and Disney as successful examples. According to Kelly, Harvard University used secret agents to avoid strategic sellers and "purchased fourteen parcels of land [in Allston] for $88 million". Likewise, "Disney has used…buying agents to assemble thousands of acres for its theme parks" (Kelly, "Secret Purchases" 4). In response to arguments that it takes very little to reveal the purchaser's identity, Kelly states that purchasers implement a "double-blind acquisition system" ("Secret Purchases" 15). Not only does an existing owner not know that a wealthy institution like, say, Harvard wants to buy her property, even the buying agent hired by Harvard does not know that he is attempting to purchase this property for a larger project. As such, the chance for information to leak is minimized. Therefore, Kelly writes: "Secret buying agents thus [ensure] that there is no a priori reason to believe that the marketplace is incapable of crafting private-order

solutions to the problem of holdouts" ("Secret Purchases" 15). Hence, because alternative methods are viable and superior, libertarians argue that a federal ban on EDTs is firmly in the realm of possibility, and thus should be enacted.

However, a deeper consideration of these arguments reveals three reasons why this federal ban overreaches and is thus undesirable. To begin with, there is no compelling evidence that secret purchases are viable and more efficient than EDTs. Reliable empirical data on the efficacy of secret purchases is hard to find; even the anecdotes which Kelly raises have a mixed record. Law professor Mark Seidenfeld examines the Disney and Harvard examples that Kelly cites as successful examples of secret purchases and comes to a different conclusion from the libertarian legal scholar. Painting a more nuanced picture of these two purchases than Kelly does, Seidenfeld argues that these were not unalloyed successes, and questions the supposed superiority of secret purchases over EDTs. For Disney, Seidenfeld notes that while it had gotten a good deal, it still "had to pay more than double the initial market value of the property" (11). Moreover, Seidenfeld writes: "Had the signal that a private buyer essentially sought all contiguous property in the area been identified earlier, there is a chance that strategic behavior and the potential for hold outs could have scuttled the Disney project" (12). For Harvard, as the secret purchases in Allston were conducted over seven years, there was a lower chance that property owners could have realized that land was being purchased en masse. Since the long time horizon an established institution can afford may not be available to a private developer, the use of secret purchases may therefore be less available. Furthermore, according to Seidenfeld, after the purchase, Harvard informed its university community that while expansion into Cambridge – as opposed to Allston – had been preferable, it was "not in the university's interests or the realm of possibility" (12). This suggests that purchasing contiguous parcels of land in Cambridge was impossible. It's certainly possible that Harvard's expansion in a heavily urbanized area like Cambridge would have alerted buyers, even over a long time horizon. Moreover, once even one person discovers that a large purchaser is behind property ac-

quisitions, the subsequent spreading of news makes it exponentially harder and more expensive for that purchaser to obtain a contiguous parcel of land. Given the limitations of secret purchases in acquiring land at close to market prices, as well as the fragility of the double-blind acquisition system itself, there remains a need for EDTs in certain cases.

Furthermore, by prohibiting state offices from working with private developers on projects, a federal ban on EDTs risks crippling the city's ability to promote urban renewal. Environmental law attorney Marc Mihaly argues that since the late 1960s, "mixed-use" developments have become increasingly common. Citing examples such as "a structure with a public indoor plaza, a food court, and an arcade with shops," he illustrates the increasing intertwined nature of developments nowadays – something libertarians like Cohen and Somin fail to address. (49) Mihaly then asks, whether, in this new land use world, one can "find the 'bright line' dividing the prohibited use of eminent domain exercised for development of private uses from the permitted use of eminent domain for redevelopment of public uses" (50). Locating this elusive dividing line, Mihaly suggests, is impossible. Moreover, separating the public and private spheres deprives one of the other's strengths – with development projects today reaching unprecedented sizes and levels of complexity, both sides need each other more than ever. Mihaly supports this point, stating that city agencies "appreciate the private sector's access to capital and its capacity to accept risk." On the other side, private developers understand that "government has planning powers, legitimacy, and fiscal attributes to contribute to a project that a private party does not" (51). Hence, a federal ban on eminent domain for anything other than public goods, as Cohen and Somin call for, would deprive local officials of an important tool in tackling urban renewal problems.

Finally, by imposing an undiscriminating blanket rule across the United States, a federal ban on EDTs would ignore each state's and county's needs. Epstein argues in his book Takings: Private Property and the Power of Eminent Domain that "in every case the takings clause recognizes that the claims of individual au-

tonomy must be tempered by the frictions that pervade everyday life" (Preface ix). This is a valid point, but one might add that these frictions differ from state to state, and even between urban and rural areas within each state. The frictions between property rights and the needs of urban renewal are largely determined by levels of urbanization, blight, and population densities. For example, California and New York both have very high population densities; not only is competition for land use more frequent, secret purchases are correspondingly harder to carry out (Census Bureau). For example, in a highly built-up area, the ratio of owners to plots of land is exponentially higher than that of a swampland (the latter condition accounted for Disney's successful secret purchase). Even Kelly, who has argued for the efficacy of secret purchases, admits that people are "more likely to notice this [secret purchase attempts] in Manhattan than in Florida" (Kelly). The different levels of friction differ not only from state to state, but within each state. Within New York State itself, Manhattan's population density is 25,846/km^2, while that of Utica – a city in Central New York – is about one-eighteenth (Census Bureau). In 2006, New York Mayor Michael Bloomberg echoed this sentiment when he asserted that without EDTs, "every big city would have all construction come to a screeching halt" (Eviatar). A federal ban on EDTs would deprive America of the benefits that accompany decentralization: laws better suited to local needs, and flexibility to change them if they fail to show results.

Therefore, given the lack of good data which show the efficacy of alternatives to eminent domain, the increasingly hybridized nature of urban development, and states' different needs, a federal ban on EDTs overreaches and is therefore undesirable. While EDTs may sometimes be economically inefficient or unfair, they remain, in some cases, the only tool local governments can use for urban development. Quasi-public bodies that finance and operate state development projects – like the ESDC in New York – should submit to heavier scrutiny by elected officials and be made more accountable to the public. This should prevent the more egregious uses of eminent domain and help restrict its use to compelling

development projects. Instead of imposing a ban on EDTs at a federal level, each state or local county should exercise its legislative authority to decide for itself the extent to which EDTs suit its needs. In doing so, they will be better able to overcome the "frictions" described by Epstein, and thus strike a balance between respect for property rights and the need for urban revitalization.

Works Cited

Beito, David T., and Ilya Somin. " Shared Roots of Property, Civil Rights." Or lando Sentinel 2008. Web. 18 Nov 2010.

Casolaro, John R., and Norman H. Siegal. Kaur Vs. New York State Urban Dev. Corp. . New York Court of Appeals Vol. , 2010. web. Web. 17 Nov 2010.

Census Bureau. Twenty-Second United States Census., 2000. Web. 18 Nov 2010.

City-data.com. "Manhattanville neighborhood in New York, New York (NY), 10031, 10027 detailed profile." 2010.Web. 18 Nov 2010 <http://www.city-data.com/neighborhood/Manhattanville-New-York-NY.html>.

Cohen, Charles E. "Eminent Domain After Kelo V. City of New London: An Argument for Banning Economic Development Takings." Harvard Journal of Law & Public Policy 29.2 (2006): 491-568. Print.

Columbia University. "Manhattanville in West Harlem, Frequently Asked Questions."Web. <http://neighbors.columbia.edu.ezp-prod1.hul.harvard.edu/pages/manplanning/faqs/index.html#19>.

Epstein, Richard Allen, 1943-. Takings : Private Property and the Power of Eminent Domain. Cambridge, Mass.: Harvard University Press, 1985. Print.

Eviatar, Daphne. "The Manhattanville Project." The New York Times 2006. Web.

New York Court of Appeals. Kaur vs. New York State Urban Dev. Corp. No. 125. 24 June 2010. Web.

Kelly, Daniel B. Personal Interview. 17 Nov 2010.

---. "The Public use Requirement in Eminent Domain Law: A Ratio nale Based on Secret Purchases and Private Influence."Cornell Law Review, Vol.92, No.1, 2006. Print.

Kirschenbaum, Kim. "Manhattanville Expansion Timeline." Columbia Specta tor 2010. Web. 18 Nov 2010.

McCall, James Randall. "The use of Eminent Domain by North Carolina Counties: Historical Patterns, Current Trends, and Decision Variables."

Master of Public Administration University of North Carolina at Chapel Hill, 2008. Web. 18 Nov 2010.

Mihaly, Marc. "Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London." Vermont Journal of Environmen tal Law (2007): 41-61. Print.

Porter, Douglas R. "Eminent Domain: An Important Tool for Community Revitalization." Urban Land Issues Current Report 2007. Print.

Seidenfeld, Mark. "In Search of Robin Hood: Suggested Legislative Responses to Kelo." SSRN eLibrary (2007)Print.

Somin, Ilya. "Controlling the Grasping Hand: Economic Development Takings After Kelo." Supreme Court Economic Review15.1 (2007): 183-271.

---. "The Limits of Backlash: Assessing the Political Response to Kelo." Minne sota Law Review, Vol.93, No.6, pp.2100-2178, June 2009 (2009)Print.

Supreme Court of the United States. Kelo v. City of New London., 2005. Web. 18 Nov 2010.

The New York Times. "Don't Cripple Eminent Domain." The New York Times, sec. Editorial: 2007. Web.

CONTESTING ENDS: ARISTOTLE AND THE TELOS OF MARRIAGE

By: Duc Luu

At stake in the debate over same-sex marriage are competing conceptions of the purposes of marriage itself. This essay, therefore, will offer an account of how to reinterpret the purpose or telos of marriage by using moral reflection and judgment. Then, it will argue that the telos of marriage according to a due reflection of moral principles is a "deeply personal commitment to another human being…fulfil[ling] yearnings for security, safe haven, and connection that express our common humanity." This essay will then address alternative conceptions of the telos of marriage – mainly, that homosexual sex acts cannot realize the highest end of human sexuality, which is producing a child – that would exclude homosexuals from the institution of marriage and reject those alternatives as inadequate and inconsistent accounts of marriage's ends. This essay, finally, argues that the state has a role to play in promoting this vital social institution that serves the highest public and private good: the social values of mutual responsibility and fidelity embodied in marriage itself. This argument connects the telos and the social goods embodied in marriage with our reasons to honor its enactment and to preserve it.

As opponents and proponents of same-sex marriage readily admit, marriage "[l]ike all social institutions…is constituted by a unique web of shared public meanings." However, to argue that marriage is "constituted" by social meanings is not equivalent to arguing that "[a] given society is just if its substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of the members." Walzer's argument that "[j]ustice is relative to social meaning" would justify the claim that marriage and its ends are whatever our society understands them to be. However, Walzer's argument for the "relativity of justice" seems to violate one of our deepest shared understandings about justice and moral arguments. According to Walzer, practices such as slavery or same-sex marriage would be wrong if our particular society disapproves of

them. But his reasoning is backwards, for we disapprove of certain institutions because they are wrong. They ignore or fail to advance important values that are intrinsically worthy. The wrongness of an institution or practice is a reason for, not the product of, our shared understandings. Thus, Walzer's relativism renders justice the creature of convention when, in fact, justice can and should help advance important human goods and ends. My critique of cultural relativism is meant to show that we should not remain committed to particular shared understandings of institutions merely because they are "traditional" or "conventional." Thus, I acknowledge that my reinterpretation of the telos of marriage "marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman." However, I believe that ends are not fixed nor frozen by social convention; instead, we can reevaluate the ends of practices and institutions based on how they advance our ideals of human goods and ends – essentially, how they promote an Aristotelian conception of human flourishing.

Marriage is a solemn, reflective, and deliberate expression of fidelity and commitment, carrying with it "the redemptive potential to transform the individual into a person whose self-regarding preferences and desires are defined communally, and that is a morally desirable, not undesirable, transformation of self-regard and identity." The institution of marriage presupposes a shared social meaning of transforming our desires and inclinations into ones of mutual love and responsibility to others. According to this essay's conception of the telos of marriage, the framework of marriage – indeed, its very embodiment – connects "separate" individuals into one "whole" and accustoms them to "total mutual self-giving." The transformative aspect of marriage on individuals is connected with the highest end of "human flourishing." Connecting the transformative aspect of an institution with the end of human flourishing is an Aristotelian argument stemming from his claim that "the city exists by nature and… is prior to the individual" because the city "transforms" individuals so that they

may realize their ends or telos (Aristotle, The Politics 1253b25). By deliberating on aspects of the good life and practicing the moral virtues as a member of the polis, individuals gradually realize their telos of Eudemonia or "human flourishing." The polis, therefore, provides individuals with the opportunities to practice particular moral virtues that could not be developed in isolation, inculcating individuals with the virtues necessary to be good citizens and lead a moral life.

Aristotle's arguments for the importance of the city in realizing human flourishing applies with equal force to the institution of marriage, for it is only through the unique framework of marriage can we "practice" certain virtues of fidelity, commitment, honor, respect, and love that habituate us to subordinate our inclinations for the spouse that we have made a solemn vow "to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, until death do us part." Regarding the ends of fidelity and commitment, the social meaning of marriage can be said, like Aristotle's conception of the polis, to "come into existence for the sake of mere life [but] exist[ing] for the sake of a good life" (Aristotle, The Politics 1252b27). Therefore, teleological reasoning that prioritizes the ends of human flourishing and the cultivation of moral virtues in regards to the institution of marriage provides us with a means to rationally revise the conventional conception of marriage as strictly between a man and a woman so that our particular social understanding can better accord with our ideals of human ends and goods. Moreover, by identifying the telos of marriage itself, we can identify then the relevant factors that could justify discrimination and restrictions of the right of marriage: homosexuality does not seem to be a morally relevant factor in denying anyone the right to marry since homosexual couples can realize deliberative commitments of fidelity, love, and honor just as much as heterosexual couples. They can practice the same virtues and realize the same ends of human flourishing. Barring same-sex couples from being recognized by the state, therefore, would constitute a truly "arbitrary" discrimination that serves no purpose.

However, fundamental objections to this essay's conception of the telos

of marriage remain. The most compelling objections focus on the inability of same-sex couples to procreate and that recognition of same-sex marriages fundamentally alters the "child-centered" aspect of "conjugal marriages." John M. Finnis believes that the "union of the reproductive organ of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their personal reality)…the spouses are indeed one reality and their sexual union therefore can actualize and allow them to experience their real common good. Finnis adds that any same-sex attempts to replicate the unity of heterosexual marriage are illusory and sinful, for "whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure." For Finnis, the intrinsic perfection of heterosexual sex acts as biological expressions and embodiments of truly mutual self-giving and unity means that "[a]ll nonprocreative, recreational sexual acts merely instrumentalize bodies for mutual use and pleasure." Monte Neil Stewart, moreover, focuses on the inability of same-sex couples to bear children but in a slightly different way, arguing that a "fundamental purpose of marriage…is to situate heterosexual passion within a social institution that will…assure that the consequences of procreative passion (namely, children) begin and continue life with adequate private welfare."

We can debate the moral arguments of these theorists in the same way we could for any other arguments about justice: testing the assumptions that the arguments rely on, pointing out inconsistent standards, and criticizing an argument's implications when it neglects important competing values. For example, Finnis's belief in the perfection and the desirability of the biological unity of the male and female and Stewart's argument that a fundamental purpose of marriage is to "situate heterosexual passion" to care for children both rely on the same flawed assumption that implicitly creates a double standard. The double standard is for

the benefit "of sterile heterosexuals given that their bodies, like those of homosexuals, can form no 'single reproductive principle,' no 'real unity…' If there is no possibility of procreation then sterile couples are, like homosexuals, incapable of sex acts 'open to procreation.'" Finnis may reply that sterile couples may still "unite their reproductive organs in an act of sexual intercourse, which, so far as they then can make it, is of a kind suitable for generation, do function as a biological (and thus personal) unit." His argument is tenuous and unconvincing, however, because "penises and vaginas do not unite biologically, sperm and eggs do (at least under the right conditions). For Finnis, however, the crucial thing is penises and vaginas, functional or not." Moreover, in response to Stewart's claim that a fundamental purpose of marriage is to ensure the conditions for the care of children, "[w]e might say that gays and lesbians…can be, and many are, prepared to engage in the kinds of loving relations that would result in procreation—were conditions different. Like sterile married couples, many would like nothing better."

The force of Macedo's argument derives from the inconsistent double standard that opponents of same-sex marriage would apply to sterile couples. This standard seems unfair because it appears arbitrary: it purports to promote some intrinsic good while reflecting no morally relevant and blatantly shallow differences between same-sex and sterile couples. And this standard seems unjust because it "appears opportunistic: selected so as to allow sterile heterosexuals into the tent while keeping all homosexuals out." As the Massachusetts Supreme Court declared: "The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." 'Marriage is procreation' seems to use prejudice as the basis for "necessary" discrimination.

Finally, we can imagine the possibility of opponents of same-sex marriage biting the bullet and denying the right of marriage to sterile couples as well as same-sex couples for the same reasons that they now oppose same-sex marriages. We then must choose between a conception of human sexuality as it relates to marriage

that stamps a whole range of human activities as illicit and inferior or one that "broaden[s] the scope of legitimate sexuality to include committed gay couples." We must choose between a moral conception of marriage that excludes more people from participating in committed, faithful relationships because of their procreative capacity or a conception of marriage that includes more people for their capacity to commit to loving relationships and to become better persons as a result of them. It is not difficult to imagine a society in which marriage means little more than an economic arrangement rather than a full-spirited commitment to fidelity, honor, and love. The way to avoid this is to honestly and reflectively judge whether or not current social practices conform to the highest ends or purposes – the telos – of the practice in question.

Works Cited

Aristotle. The Politics. Translated by Carnes Lord. Chicago: University of Chi cago Press, 1984.

Finnis, John M. "Law, Morality, and 'Sexual Orientation.'" Notre Dame Law Review 69 (1994): 1049-76.

Hillary Goodridge & Others vs. Department of Public Health. 798 N.E. 2d 941 (Mass. Supreme Ct. 2003).

Macedo, Stephen. "Homosexuality and the Conservative Mind." The George town Law Journal 84 (1995): 261-300.

Stewart, Monte Neil. "Marriage Facts." Harvard Journal of Law & Public Policy 31 (Winter 2008): 314-69.

Walzer, Michael. Spheres of Justice: A Defense of Pluralism and Equality. New York: Basic Books, 1983.

RAWLS ON EQUALITY OF SELF-RESPECT

By: Adam Kern

John Rawls' Theory of Justice is chiefly a theory of how to distribute "social primary goods," and "perhaps the most important" of these are the social bases of self-respect. Justice mandates that the social bases of self-respect be available to everyone and that all inequalities in the distribution of these bases be to everyone's benefit. Rawls thinks that this demand is satisfied when each person has available to him a community of fellow-feelers, who appreciate his plan for life and whose plans for their lives he appreciates. On this last point I think Rawls is wrong, and this error illuminates that at least one of his premises is problematic. His premises entail a broad restructuring of society as we see it, a new order either objectionable itself or impossible to attain.

My argument is chiefly about the implications of the premises of Rawls' theory. Only at the very end of this essay, by which time I hope to have demonstrated some problems of those implications, will I briefly question these premises. For now I shall assume their validity. In this first section I would like to make them clear. Rawls' theory makes prescriptions for society's "basic structure"—that is, its distribution of fundamental rights, duties, and advantages (Rawls §2, p. 6). A society's basic structure is just when it conforms to principles which free and rational persons would accept in the original position (Rawls §3, p. 10). The original position is purely hypothetical, designed to render a selection of principles of justice uninfluenced by considerations of circumstances caused by natural chance. (Rawls §3, p. 11). Each party in the original position, behind a "veil of ignorance," knows nothing of his place in society, his social status, his natural talents, his conception of the good, or his psychological propensities (Rawls §3, p. 11). Each party then selects principles of justice rationally, with regard only for maximizing his own interest (§3, p. 12). His interest is to secure his maximum share of primary social goods: goods which "normally have a use whatever a person's rational plan of life": rights, liberties, opportunities, income,

wealth, and, most important of all, the social bases of self-respect (Rawls §11, p. 54). Rawls believes that the parties, in such circumstances and so concerned, will select two principles:

1. [The Principle of Equal Liberty]: Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

2. [The Difference Principle]: Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (Rawls §11, p. 53).

The relation of self-respect to the two principles of justice is not as simple as it may first seem. Self-respect is an alloyed primary good, an amalgam of the two types of primary goods, natural and social; whereas the principles of justice only concern the distribution of primary social goods. So Rawls' principles of justice demand that the "social bases" of self-respect be distributed such that all inequalities in their distribution are to everyone's advantage. Self-respect in Rawls' theory is a psychological state, one's own estimation of his plan for his life. It arises on two conditions (Rawls §67, p. 386):

1. One is confident that his plan of life is worth striving for.

2. One is confident in his ability to achieve the goals of his life's plan.

Those are the premises of Rawls' discussion of self-respect; hereafter we shall be concerned with their implications. To determine those we must first ask "What are the social bases of self-respect?" That is: What are the social bases of satisfying the above two conditions? Rawls assumes that each person requires at least some approval of others to be confident in the value of his life plan. Thus one precondition on the first aspect of self-respect is "finding our person and deeds appreciated and confirmed by others who are likewise esteemed and their association enjoyed" (Rawls §67, p. 386). One often will not find admirers in every corner of society, for plans and accomplishments often are of such intricacy that only some portion of society will be able to appreciate them appreciably (Rawls §67, p. 387). Thus a "well-ordered" society will divide itself into man communi-

ties, each organized around a different pursuit. There will be some of scientists, some of NASCAR drivers, and others of philosophers—and perhaps they will overlap. These are not obdurate communities: they are not, like neighborhoods or towns, defined by geography and definitive of their members' identities and sets of human interchanges. They are rather loose associations of like-minded people, designed (consciously or not) to foster appreciation of what they consider good. Our closest term for one might be a "cohort group."

Rawls believes that the social bases of self-respect begin and end with a web of these affirmational communities, (at least) one community for every individual. He writes: "This democracy in judging each other's aims is the foundation of self-respect in a well-ordered society" (Rawls §67, p. 38). Now this sentence does admit of less conclusive interpretations: as a foundation might rather have other supportive basic structures laid atop it, so too might this web of affirmational communities be only the beginning of the social bases of self-respect. But Rawls does not continue to specify any further bases of self-respect. And furthermore, this web of affirmational communities, available to all, non-competitive with one another is, like Rawls' theory in whole, noble, coherent, solemnly beautiful. It is "democratic" in the metaphorical sense, the sense which alludes to a certain set of values. It is that vision which I think Rawls would like his theory to propound.

But the implications of Rawls' argument extend further. Self-respect, as Rawls has defined it, requires more social bases for its support. Affirmational communities reinforce only one's confidence in the worth of his plan. Confidence in one's ability to achieve one's plans is just as important as confidence in their worth, and it too has a social basis. Just as others' affirmation of one's goals increases his confidence in their worth, judgments of one's abilities and accomplishments affect one's confidence in his ability to achieve them. These judgments can be communicated as plaudits—prestigious positions, awards, praise—and criticism—bum jobs, demerits, denunciations. (Neglect is a special case: it could imply no judgment or tacit criticism.) The impact of these judg-

ments is easy to envision: a writer employed by the New Yorker, or granted a Nobel Prize, or given ten positive reviews is more likely to have confidence in his ability to be a great writer than one who is confined in his mother's basement, or listed as one of the top five molesters of the English language, or trashed by ten reviewers. Thus plaudits and criticisms are also social bases of self-respect, and thus their distribution must be governed by the Difference Principle.

The Difference Principle ordains a society in which all inequalities in the distribution of plaudits and criticisms be to everyone's advantage. Such a society, even sketchily imagined, is obviously different from any currently in existence. Our societies countenance great disparities in the plaudits they give to different peers, without regard for whether or not such distribution is for the benefit of all. The society which gave Saul Bellow three National Book Awards is not better for the anonymous scribbler than one which gives them equal praise. Perhaps one could argue that the glorification of some to the neglect or disdain of others incentivizes excellence, prompting greater achievement from society as a whole, which is an advantage to even its lowest members. Though I have not the space to treat this counterargument with the seriousness it deserves, I think the following objections are sufficient to set it aside. First, an institution that dispenses honors incentivizes one type of excellence, the excellence that pleases its taste. The world of letters and the world at large might be better if it was not dominated by the characters who please the New York Times Book Review or the Nobel Prize Committee. And second, one's self-respect is so important to one's ability to have a good life that only an exceedingly great amount of societal achievement could overcome its absence to an individual. A life without self-respect is sound and fury signifying nothing. As Rawls has put it, "the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect" (Rawls §67, p. 386).

So the Difference Principle commands the revision of society to an equal (or at least far more equal) distribution of plaudits and criticisms. What exactly does that entail? We must first clarify the relationship between self-confidence,

plaudits and criticisms, and the underlying facts of achievement. Self-confidence can have three relations to societal communications of merit and facts in the world.

(1) The confidence is rational. It arises from social communication and is justified by facts. The agent has a confidence in his abilities directly proportional to the plaudits and criticisms he receives, and these plaudits and criticisms correspond to the facts of whether or not his plan of life actually is succeeding.

(2) The confidence is irrational (contrary to reason). The agent's confidence is not proportional to the plaudits and criticisms he receives, though those plaudits and communications correspond to the facts. An example of this agent is the blustering general who maintains his vainglory against a sortie of aides delivering him news of misfortune.

(3) The confidence is rational from the agent's perspective, but irrational from a spectator's perspective. The agent's confidence is proportional to the plaudits and criticisms he receives, though those plaudits and criticisms do not correspond to the facts. Surrounded by a throng of flatterers (whom he has been given no reason to distrust), the agent concludes that he has great ability to accomplish his plans, and that his designs are proceeding splendidly. And he made no error in reasoning. But his conclusion is still, objectively, wrong. His plans are not going well. The emperor has no clothes.

There are thus two different ways of altering the social bases of self-respect. One, corresponding to (3), is to alter the distributions of plaudits and criticisms without altering the facts of success. The other, corresponding to (1) is to alter the facts of success at plans of life while hoping that the agent's mental state, perhaps with recourse to (hopefully) truth-tracking societal communications, will track those facts. (For the irrational there is nothing that society can do.) I find both possible revisions objectionable. Let us start with the first. It is objectionable for two reasons. One is practical. How would we actually achieve such a state? Set aside the problems of indexing, of quantifying what is inherently qualitative and then determining its current and proper distribution for

every person. Even if such determinations could be made, how could a societal institution enact them? I can envision some Ministry of Confidence, licensed with the power to regulate each individual's act of praising and shaming, such that the distribution conformed to the Difference Principle's command. But this raises obvious problems of justice. It would entail the wholesale regulation of each person's ability to voice his opinion. I can also envision a Ministry of Praise, licensed with the power to compensate the lowly-esteemed with honors minted by it. These honors would not correspond to any actual ability to achieve one's goals; they would be entirely illusory. I doubt that a society could perpetuate such an illusion. Surely at least some, perhaps most, people would distinguish the empty praise from the pregnant; and then the society would be back to square one. And this brings us to the second objection, the more speculative one that haunts every attempt to equalize social communications of success without equalizing the success itself. Even if we could create a society of perfectly crafted illusion, I doubt that we would want to. We would all live lives deceived. Everyone would be an emperor with no clothes.

The second possible societal revision is to try to attempt reordering society such that the facts of success at plans of life are unequal only insofar as their inequalities are to everyone's advantage. Thus Oscar the wit would be just as successful a wit as Vladimir the novelist is a novelist and Bryan the linebacker is a linebacker. This possibility does require some assumptions about the perception of such success. It assumes that at least one of the two following conditions obtains. The first is that society communicates plaudits and criticisms in accordance with what the facts demand—that a good runner is called a good runner, and that a talented cellist is called a talented cellist, etc. The second is that each agent is able to discern with his own mind his intrinsic worth, even in the silence or the spite of others' observations. Neither of these assumptions can be taken for granted. They both require a perhaps naïve optimism about human tendencies and capabilities. Yet still they remain at least conceptual possibilities, and so does this restructuring of society.

Yet there is a reason why I have continuously described this as a reordering of society. All societies that exist now, and I suspect have ever existed, include persons whose plans of life are essentially comparative and competitive. By "essentially comparative," I mean plans that are constituted by a relation of their designer to one or more other people. Such is the plan to be a wealthier man than one's father, or the first Jones to attend college, or to be the best composer in Austria. Not all essentially comparative plans are problematic. In the cases of the young acquisitor or the young scholar, the person(s) with which the agent is comparing himself might not incorporate within their plans the very same goal: the father might not found his good on being wealthier than his son, nor might the rest of the family found their good on being more educated than their relative. But the case of the composer is difficult. It is also essentially competitive. For not only Mozart but also Salieri has planned his life and staked his self-respect upon being the best composer in Austria. They cannot both share the title. Each composer's success at achieving his plan is defined by his rival's failure at achieving his. And each composer's level of self-respect, related as it is to his life plan, is similarly antagonistic to his rival's. At any given moment, one's confidence in his ability to enact his plan is indexed to how much better or worse he perceives he is faring at it than his rival. As Mozart receives more plaudits, his confidence in his ability to enact his plan greatens while Salieri's diminishes. One's self-respect increases while the other's necessarily decreases.

Discount the possibility that our hypothetical Austria deceives Mozart and Salieri by giving them equal perceptions of their abilities to become the best composer in the land. We have already seen the ailments of such a cure. The remaining possibility is to eliminate essentially comparative and competitive life plans. Mozart and Salieri would no longer desire to be the best composer, but rather a very good composer. This vision, entailing the reform of man along with the state, is utopian. That is no slight against its theoretical coherence, though. These broad revisions to society might be difficult to achieve, but Rawls could rejoin that they remain achievable. He could conclude that for that reason, given

the primacy of justice, they ought to be strived for.

Yet we have reason to doubt even the revisions' conceivable possibility. Though some plans of life may not be, strictly speaking, comparative, every evaluation of success at one's plan of life depends on a comparison to others (Nozick 240). Examples of this can be drawn from any situation in which a fish is cast into a more brilliant pond (Nozick 243-244). The man who thought he was a good student begins to have doubts when he enters Harvard. The stud college quarterback begins to doubt the quality of his arm (if nothing else) when he lands the 4th-string position in the pros. Their self-esteem is only rehabilitated when they reflect upon their relation to the population at large and realize how much better they are than them. Thus all plans of life, even if they have absolute goals in theory, have comparative goals in practice. And we cannot entertain the possibility that no two people will ever plan to achieve the same goal. Thus essentially comparative and competitive plans of life are ineradicable.

To sum up my foregoing critique of Rawls—the Difference Principle demands that the social bases of self-respect be distributed such that all inequalities in their distribution are to everyone's advantage. One condition of self-respect is confidence in one's ability to achieve one's plan for life. The social bases of this condition are two: society's communication of plaudits and criticisms, and the arrangement of social circumstances that shape the goals of individuals' life plans. Altering the former to vindicate the Difference Principle is both impractical and unjust; altering the latter to vindicate the Difference Principle is impossible.

I have argued that we must reject the implications of Rawls' theory of distributive justice with regards to self-respect. One corollary of my argument, then, is that at least one of Rawls' premises must be rejected as well. This premise could be as trivial to the rest of Rawls' theory as his definition of self-respect—but it could also be as fundamental as its general egalitarian motivation which suggests the principles of justice: that "the basic structure can be arranged so that [contingencies in natural talents and starting places in society] work for the

good of the least fortunate" (Rawls §17, p. 87-88). The principles of justice are a "fair way of meeting the arbitrariness of fortune" (Rawls §17, p. 87-88). If Rawls' principles of justice cannot apply to their "most important" object, then perhaps we have reason to doubt their justice whatsoever.

Works Cited

Nozick, Robert. Anarchy, State, and Utopia. New York, NY: Basic Books, 1974.
Rawls, John. A Theory of Justice. Revised ed. Cambridge, MA: Belknap Press of Harvard UP, 1999.

TITLE IX's GENDER REFERENCE IS AMBIGUOUS FOR A REASON

By: Adam Riegel

Starting with the heavily influential ruling of Brown v. Board of Education in 1954 and then Title IX in 1972, the face of women in American culture has been rapidly changing. When Brown v. Board of Education ruled that separate but equal is not actually equal, this ruling had huge implications with regards to race. This ruling stated that separate but equal was inherently unequal, which in regards to the establishment of Title IX meant that women had to be provided with the same opportunities in the same setting as men. It was with this basis in mind that Title IX was established. This legislation states, "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise discriminated against in any interscholastic, intercollegiate, club". At the time of its establishment, Title IX was specifically implemented to achieve equality for women at all levels of education including college. Now, thirty years later, not only have women achieved equality in terms of student representation in college, but also, as the statistics show, in college, they are proportionately over represented; their proportional representation in college is substantially greater than their proportion of the college age demographic. Thus, female activists groups who call for more female opportunity in sports are actually overlooking that now men, not women, are the unrepresented gender on college campuses across the country and are now protected by Title IX. Yet despite women outnumbering men in college since the 1980s , only one case has occurred where men made any gains as a result of Title IX . As the gender gap in education continues to widen, Title IX must now be used to protect men's equal opportunity because, as studies show, the college admission process, although unintentionally, discriminates against men. While it is significant to observe that women are underrepresented in sports, by cutting men's sports or reallocating funds from men's sports, opportunities are being taken away from men to receive the same education. With

men now substantially underrepresented at colleges across the country, Title IX should be used similar to affirmative action to reestablish the proportional equality of men and women in collegiate settings; disproportionality in sports provides a venue for men to receive the same college opportunities as women.

As today's society changes from its archaic inequalities with regards to college acceptances of the 1970s, the function of Title IX must similarly adapt. When Congress passed the Education Amendment of 1972, the face of the nation in regards to gender equality in college enrollment was far different. According to the National Center for Education Statistics, women were outnumbered almost two to one in colleges in 1970. In 1970, women were 3.5 million of the 8.5 million college students in America. There was an even greater gap in athletics at this time. Both in high school and at the college level this enormous disparity was apparent. "In 1971, fewer than 295,000 girls participated in high school varsity athletics, accounting for just 7 percent of all varsity athletes; in 2001, that number leaped to 2.8 million, or 41.5 percent of all varsity athletes, according to the National Coalition for Women and Girls in Education." This major change is also reflected in collegiate athletics. "Prior to Title IX, 30,000 females competed in intercollegiate athletics. By 2001, that number jumped to more than 150,000, accounting for 43 percent of all college athletes." These growths can be attributed directly to the success of Title IX. In terms of college scholars, the attendance rate of women has vastly increased as well. In 2007, women made up fifty-seven percent of all enrolled students with about 10.5 million. Both academically and athletically, many of these huge successes can be attributed to Title IX. With Title IX's success – at least in regards to growth or opportunity for women – it is now time to reexamine Title IX.

Title IX, while made with women in mind, has ambiguous wording so that it can be used to help either men or women; now that equal representation in educational settings, such as college, has been reached and surpassed, Title IX must be used to again establish equality. One of the most prominent ways that Title IX tests for equality of opportunity in sports is through proportionality.

However, the original intention for Title IX – equality of educational opportunity – seems to have been lost. If the tests for equality in sports were applied to schools in terms of proportionality of gender in education, then most schools would fail. In the United States today, women make up about fifty-two percent of the population, yet they make up fifty-eight percent of college students. This six percent gap does not fall within Title IX's standard of "substantially proportional". Thus, according to Title IX because men show an interest in education, but are not receiving the opportunity, any school that does not meet this proportionality is in violation of Title IX. It is important to note that while the clarification of Title IX was made in regards to sports, Title IX as a whole is for gender-based discrimination of any kind, so this clarification should be made applicable to enrollment as well. Because it is not, men make up only forty-two percent of all college students; their opportunity for education is being lost in the efforts to achieve success for women.

There are a number of factors that contribute to the vast disparity in college enrollment. The most prominent reason is that although unintentional, the college admissions process discriminates against men. While women are gaining opportunities in the academic realm, men are being cut off early and often by the college admissions process. This process is gender blind, so theoretically the proportion of men and women applying to college should be reflected in the acceptance rates of each gender. Yet statistics indicate otherwise. The most recent poll from the US Census Bureau shows that in the demographic 18-24 there are more men than women, 15 million to 14.2 million women. However as previously stated, only forty-two percent of the men in this demographic go to college, while almost sixty percent of the women in the same demographic enroll. Because this large gap in proportion of gender acceptance exists, it suggests that other factors – ones that, although not done with malicious intent, discriminate against men – are in play. One major factor is the areas of emphasis of the admissions process. Reading and writing are huge parts of the college admissions process. The SATs, a form of standardized testing which almost all

colleges use as part of admissions, is made up of an essay and two other writing and grammar components. Further, most colleges require one college essay as well as a supplementary essay or two. Unfortunately, studies show that boys in high school are substantially behind women in reading and writing levels. "The Council of Ministers of Education released [a study showing that … for writing … among 13-year-olds, about 10 percent more girls than boys met expected skill levels. Among 16-year-olds, about 17 percent more girls than boys wrote at an age-appropriate level." Interestingly, this seventeen percent gap is almost the exact gap that exists between men and women on college campuses. While these statistics simply show that women are outperforming men, when applied to the college admissions process, problems arise. These factors, which numerous studies have shown favor one gender, result in indirect discrimination against men in the acceptance process. With men being unintentionally discriminated against, their disproportionate representation in college athletics is acceptable because it allows them an avenue to attain a college education they would otherwise not receive.

While biological differences result in the difference in performance in college admissions, changes in cultural norms around the time of Title IX have played a key role as well. Prior to Title IX in the 1970s, the role of women was quite different. Women were expected to marry younger and rear the children, while the man was the family's breadwinner. Conveniently, as Title IX passed, so too did the age of women as only housewives. During the housewife era leading up to the passing of Title IX, there were 1.55 undergraduate males for every female. Meanwhile, a lack of video games and less televised violence had prevented the idea of hyper masculinity from invading the minds of young adolescent men; with these factors present, girls spend more time on their homework and focusing in the classroom, while boys tend to be distracted by both and are also more susceptible to "behavioral problems (or a lower level of noncognitive skills)" that impede their progress academically. Today, many of these roles have changed. According to prominent researcher and UCLA Professor

Linda Sax, "[I]n the United States … with respect to education, we have already achieved [equality] … the real educational gender gap is one that favors women, and that it's men who are really at risk." The endangerment of men in education is a result of numerous changes. First and foremost is the change in the role of women in American society. Women's expected economic influence and potential gain changed around the time of Title IX. The average age at which a woman was married increased by two and a half years, making the idea of a four year college education much more feasible. With a college education a more viable option, women began to explore the financial benefits and potential of higher education. This new interest along with the open opportunity created by Title IX, combined to cause female enrollment in colleges to skyrocket and surpass male enrollment around 1980.

While admission discrimination is far and away the biggest factor in the gender gap in college, the rising dropout rate of men adds to this problem. Statistics from the Department of Education show that from 2000 to 2006, thirty percent of students left in the first year, and half of all college students never graduated. Further, men are dropping out at an even greater rate than women. More men are dropping out of high school and college today to enter the work force. Some students, mainly men, whose friends went to vocational schools, cited that they feel strange being in college and not making money while some of their friends are plumbing and making seventy thousand dollars a year. Thus, men in the college world feel pressured to rush through their education or simply drop out and start making money. This rush stems from statistics that show that men who graduate from college receive almost double the average income of those who do not, a significant enough increase that men are tempted to scrape by and receive their degree. With culture pressuring men to rush through their education, it is Title IX's role to make sure they have an equal shot at one.

Title IX should be used to defend men's sports because sports are an avenue providing men an opportunity to attend college, an opportunity that already overrepresented women do not need. With women already having

more spots than is proportional, providing them with additional opportunities to attend college by creating new athletic slots only increases the severity of the gender gap. One study shows that for every one female spot created in college sports, three and two-fifths male spots are lost. By continually trying to create more women's sports, men who already are at a disadvantage in the college process are losing even more spots. While the government stated that cutting men's sports was one of the discouraged ways of conforming to female athletics Title IX violation claims, it is often an option that is employed. Often times, the sports that are cut are smaller sports – tennis, wrestling, golf, and gymnastics – all sports that cater to a very specific audience. By taking away these sports to conform to Title IX, the colleges are actively removing chances for men in these specific demographics from receiving scholarships and college degrees. Along the same lines, athletic funding is finite. As women continue to demand proportionality in sports, which in turn results in reallocation of funds, men are losing scholarship money, and are losing their opportunity to receive a scholarship to come to college. Women who continue to demand proportionality in sports overlook the enormous gap between men and women in college as a whole. There are currently about two hundred and fifty thousand male student athletes, or about three percent of the male student population, participating in intercollegiate athletics. With a sixteen percent gender gap, taking funds – opportunities – from men only increases the disparity. For this reason, disproportionality in sports is acceptable; without it even more men would be left without a college education.

While it is true that women may be underrepresented in collegiate sports, people who dwell on this issue are overlooking the bigger picture and the initial purpose of Title IX. Supporters of Title IX have spent the last three decades using Title IX to create new opportunities for women in sports. This approach made perfect sense at the initiation of Title IX. Men literally received all the scholarship money and athletic benefits. Also men held a near two to one advantage in college enrollment. However, as women began to fill more and

more college slots, the idea of sports presenting an opportunity for education that women would not otherwise have became more irrelevant. Sports and the scholarships associated with them offer a route for students to receive a college education. Proportionality of sports at the high school and college level in the 1970s and 1980s provided another opportunity for women to get into college. In contrast, the modern college setting is just the opposite: men are underrepresented and now need the additional opportunities provided by sports to get a boost in college acceptance.

Many proponents of women in sports say that sports offer life experience that cannot be found elsewhere. In the research for her book, Professor Sax states that she found that for "women in sports, you have a peer group of other women who are both academically and athletically oriented. Many of the men involved in sports, the [Wooden] staff told me, are blindly convinced that they're going to have a career in sports after college, so academics often takes a back seat." After reading studies like this one, people may come to the conclusion that women greatly benefit from sports because they do even better academically while participating in sports, while men are indeed negatively impacted by sports and should appropriately participate less. However, women on average do better than men regardless of whether or not they participate in sports. "Women do seem to be more engaged in the learning process and are coming into college with better grades and a better habit of focusing on what they need to do to get top grades." This statement made by Linda Sax reflects her studies in gender differences that indicate that women do not need sports to excel academically. This support system is not necessary for women to be succeeding. With NCAA regulations for minimum GPA for eligibility on the rise (it was recently bumped up to 2.5), men need these teams to provide a base support structure and motivation for them. While this statement may appear counterintuitive to the studies that show that men often believe they will go pro and thus put education on the back burner, a closer examination proves that without sports, they are even less likely to succeed.

While some theories such as the one stated by Linda Sax show that men lose focus on their studies as a result of athletics, statistics show that men in sports are performing better than their non-athlete counterparts. "In a report released yesterday from the National Collegiate Athletic Association (NCAA), nearly 80 percent of freshman student-athletes who started college in 2002 graduated." This is a huge jump from the average percent of graduation, which is only fifty-seven percent nationally. Detractors to this claim may point to statistics in major sports such as football stating that "football players graduate at a lower rate than regular students, fifty-five to fifty-seven percent." These statistics need closer examination. Unfortunately, within these statistics a case of Simpson's Paradox occurs. Simpson's Paradox takes place when two small sets of data, take for example graduation rates of black male and white male football players, are combined into one larger data set, which results in the exact opposite result being observed. In fact, when the data about graduation rates is broken down, both black and white male football players are graduating at substantially higher rates than their non-athlete counterparts. White males are graduating at a five percent higher rate than white non-athletes, while black male athletes are outperforming their counterparts by an astounding twelve percent. Not only are the student-athletes graduating at a higher rate than their peers, but also studies show that they also receive additional opportunities through sports. African American athletes only make up nine and three-tenths percent of the population as a whole, but they represent twenty-six and three-fifths percent of all male athletes, which indicates that sports are giving them more chances than the regular school admissions. Sports are offering men chances at a college education that biased admissions do not, and thus sports should be provided in disproportionate amounts to favor men so that they can receive the same education and benefits as women.

Across the spectrum, college statistics are showing high graduation rates among athletes in typically low graduating sports. One online database cites all sports and their exceptional graduation rates. A couple of key notes from

this site are that many schools are performing well above the national average in regards to graduation rate and despite popular belief, some of the national powerhouses in sports are graduating students at a remarkable rate. In football, Florida University – the 2008 National Champions – is graduating eighty percent of its players while Nebraska is graduating eighty-five. Other notables are Stanford, Washington, Notre Dame, Virginia Tech, and Michigan. They are all graduating players at higher rates than the national average with Stanford and Notre Dame graduating over ninety percent. Similar trends occur in numerous other sports. All of the following schools are graduating their basketball players at a rate of ninety percent or better: Washington, Stanford, Wake Forest, Villanova, Illinois, Florida, Navy, Army, Pacific, Rice, Indiana. The lists go on and on for every sport. In some sports such as hockey, baseball, and basketball, these outstanding graduation rates are established despite top teams sending players to professional leagues before they have finished their degree, which counts against their graduation rates. These successes are a result of the study groups and tutoring established to help maintain required eligibility. All teams in the NCAA must follow its strict eligibility regulations, which requires a certain number of courses being taken and a minimum GPA. For this reason male athletes must do reasonably well in the classroom so that the sport they love is not taken away from them. In Alexander Astin's book *What Matters in College: Four Critical Years Revisited*, he clarifies the reason for male athletes' success. "Frequency of student-student interactions [study groups] correlates with improvement in GPA". Further, "students may be motivated to expend more effort if they know that their work is going to be scrutinized by peers; and second, students may learn course material in greater depth if they are involved in helping teach it to fellow students." The knowledge that a tutor will be reviewing their work or that the athletes will have to work together to study results in them doing better academically. Fear of ineligibility and losing the sport they love actually keeps more men doing better in college, while women, who are thriving in the college setting already, do not need this additional boost.

One last counterargument must be addressed. Some dissenters to the statistics of athlete's higher graduation rates may argue that it is because of the course load. They may cite that while the students are graduating, it is only a result of them taking undemanding classes and a minimal course load. However, this argument is irrelevant. Simply graduating with a college degree statistically results in a higher average income. Further, Astin points out that "the student's peer group is the single most potent source of influence on growth and development during the undergraduate years." Simply being in a college setting for four years has a significant positive impact on the mental growth and increase in intelligence and ability of these athletes. Additionally, "Frequency of student-student interactions (including discussing course content with other students, working on group projects, tutoring other students, and participating in intramural sports) correlates with improved analytical and problem-solving skills, leadership ability, public speaking skills, interpersonal skills, preparation for graduate and professional school, and general knowledge". The fact that these men are in college gaining the experiences related to college far outweighs the difficulty of the classes they are taking.

To eliminate men's sports or reallocate funds to provide additional opportunity for women in sports, while acceptable upon first glance, actually puts men at a further disadvantage. Title IX must be used to provide equality for the underrepresented gender. At this point in our nation's history, men are underrepresented in education. While Title IX was undoubtedly created with women in mind, the wording is specifically ambiguous so that Title IX can protect the underrepresented gender from discrimination. As studies have shown, men and women excel in different areas. Since the areas that women excel in make up the majority of what colleges look for during the admissions process, men are inadvertently discriminated against. This situation is similar to implementing literacy requirements for voting after equal voting rights were established: sure everyone must submit all aspects of a college admission, but most women do it substantially better than men, just as most whites could read and very few blacks

could. To prevent discrimination, legislators should reexamine Title IX and look to use its testing for Title IX violation in sports and apply it to education, which was the original intent of Title IX. An adjusted Title IX, using proportionality tests to inspect whether or not schools are discriminating against either gender is the best way to provide equal opportunity.

Works Cited

"10 Questions for Linda Sax." Interview by Ajay Singh. 10 Questions for Linda Sax. UCLA Today, 12 Dec. 2008. Web. 21 Nov. 2009. <http://www.today.ucla.edu/portal/ut/10-questions-for-linda-sax-75715.aspx>.

Astin, Alexander W. What Matters in College: Four Critical Years Revisited. San Francisco: Jossey-Bass, 1993. Print.

Bailey, Rick (2006-10-05). "State College Notebook: Toppers' switch to I-A probable". Lexington Herald-Leader. Retrieved 2009-21-11.

The Bootleg Staff. "The Bootleg's Graduation Rate Analysis." Scout.com The Bootleg's Graduation Rate Analysis. Scout.com, 14 Apr. 2006. Web. 8 Dec. 2009. <http://stanford.scout.com/2/520523.html>.

"College Dropout Rate Climbs as Students Face Challenges; Life Coach Offers College Tips to Success." College Dropout Rate Climbs as Students Face Challenges; Life Coach Offers College Tips to Success. Market Wire, Sept. 2007. Web. 8 Dec. 2009. <http://findarticles.com/p/articles/mi_pwwi/is_200709/ai_n19509491/>.

Francis, David R. "Why Do Women Outnumber Men in College." Why Do Women Outnumber Men in College. National Bureau of Economic Research. Web. 8 Dec. 2009. <http://www.nber.org/digest/jan07/w12139.html>.

"Graduation Rates Among Student Athletes Increasing." Graduation Rates. Scholarships.com, 19 Nov. 2009. Web. 7 Dec. 2009. <http://blog.scholarships.com/tag/graduation-rates/>.

Hogshead-Makar, Nancy, and Andrew Zimbalist, eds. Equal Play Title IX and Social Change. Philadelphia: Temple UP, 2007. Print.

Horsey, Jen. "Boys Continue to Struggle with Reading and Writing." NASSPE: Links Boys Lag in Reading and Writing. National Association for Single Sex Public Education. Web. 9 Dec. 2009. <http://www.singlesexschools.org/links-boysreadwrite.htm>.

Lewin, Tamar. "At Colleges, Women Are Leaving Men in the Dust." The New York Times. 9 July 2006. Web. 21 Nov. 2009. <http://www.nytimes.com/2006/07/09/education/09college.html?pagewanted=1&_r=2>.

Longley, Robert. College Degree Nearly Doubles Annual Earnings. US Census Bureau. Web. 8 Dec. 2009. <http://usgovinfo.about.com/od/censusandstatistics/a/collegepays.htm>.

Marklein, Mary. "College Gender Gap Widens." USA Today 19 Oct. 2005, Education sec. USATODAY.com. Gannet Co. Inc, 19 Oct. 2005. Web. 21 Nov. 2009. <http://www.usatoday.com/news/education/2005-10-19-male-college-cover_x.htm>

Matheson, Victor A. "Research Note: Athletic Graduation Rates and Simpson's Paradox." Diss. College of the Holy Cross, 2005. Http://www.holycross.edu/departments/economics/RePEc/Matheson_GraduationRates.pdf. College of the Holy Cross Economics Department, Mar. 2005. Web. 7 Dec. 2009. <http://www.holycross.edu/departments/economics/RePEc/Matheson_GraduationRates.pdf>.

"New Student Eligibility Regulations." New NCAA Student Athlete Eligibility Rules. Athleticschoarships.net. Web. 8 Dec. 2009. <http://www.athleticscholarships.net/ncaaeligibility.htm>.

Rogers, Tom. "Simpson's Paradox - When Big Data Sets Go Bad." Simpson's Paradox. Intuitor.com, 2 Apr. 1996. Web. 8 Dec. 2009. <http://www.intuitor.com/statistics/SimpsonsParadox.html>.

Sax, Linda J. The Gender Gap in College Reinforcing Differences. San Francisco: Jossey-Bass Inc Pub, 2008. Print.

Schwartz, Allan N. Men and Women and Difference - Child Development And Parenting For Enfants. MentalHelp.net, 7 Mar. 2009. Web. 8 Dec. 2009. <http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=28827&w=5&cn=461>.

United States. Cong. Education Committee. Title IX Regulations. Cong 34 C.F.R. GPO, 1975. Print.

United States. U.S. Department of Commerce. National Center for Education Statistics. Dropout Rates in the UNited States: 204 - Table 8. National Bureau of Economic Research, Nov. 2006. Web. 8 Dec. 2009. <http://nces.ed.gov/pubs2007/dropout/Table2.asp?Table=8>.

United States. U.S. Department of Commerce. National Center for Education Statistic. Dropout Rates in the United States: 204 - Table 8. National Bureau of Economic Research, Nov. 2006. Web. 8 Dec. 2009. <http://nces.ed.gov/pubs2007/dropout/Table2.asp?Table=8>.

United States. U.S. Department of Education. Institute of Education Sciences. Fast Facts. Comp. National Center for Education Statistics. National Center for Education Statistics. Web. 21 Nov. 2009. <http://nces.ed.gov/fastFacts/display.asp?id=98>.

VIEWPOINTS

Law and Medicine

LESS FOR MOORE: DEFINING THE SOCIAL LIMITS OF MEDICAL RESEARCH

By: Alyssa Blaize

John Moore, an Alaskan pipeline surveyor who worked twelve-hour days, seven days a week, thought his job was killing him. In 1976, he began experiencing bouts of gum bleeding, stomach swelling, and extreme bruising. When he finally consulted a doctor in September of 1976, John Moore learned he had hairy-cell leukemia, a type of blood cancer. Seeking a second opinion, Moore traveled from his home in Seattle to the UCLA Medical Center, where he met Dr. David Golde, a leading hematologist and oncologist. At this point, Dr. Golde confirmed the diagnosis and there began their seven-year relationship. Over that seven-year period, Moore would re-visit Dr. Golde almost a dozen times. What Moore did not know was that that Dr. Golde was extracting tissue samples to use in his personal research with which he would eventually patent a cell line, the Mo cell line – ironically named after the patient who did not even know that this cell line existed. The cell line was in fact a model organism – one that could combat any foreign invaders. Most importantly, the cell line was manipulating natural processes; it was not artificial, it was "natural." It has two primary uses in regards to cancer: 1) to help patients tolerate higher chemotherapy doses and 2) to increase the effectiveness of other drugs such as cytosine arabinoside, which is used to treat leukemia.

Upon learning of this discovery, Moore immediately sued Dr. Golde for conversion, claiming that he had rights to his body parts even once they were

excised from his body. Arguing that Moore did not have sufficient interest in his cells at the time of conversion, the Los Angeles country Superior Court dismissed the case and it never went to trial. However, Moore's lawyer, Sanford Gage, appealed the case to the California Court of Appeals in 1988. The California Court of Appeals ruled that Moore did in fact have cause for conversion and maintained rights over his cells even after they were excised. At this point, the Regents of University of California then appealed the California Court of Appeals ruling to the California Supreme Court, which reversed the Court of Appeals ruling. In July 1990, the California Supreme Court ruled that Moore did not have rights to his excised cells, but that there was indeed a breech of fiduciary duty and lack of informed consent.

This case, though championed for its dealing with property rights to body parts, ultimately was significant in that it defined the social limits of medical research. The Court determined to what point the owner of those raw materials should be involved in the scientific process. With its desire to avoid inhibiting medical research, the Court circumvented the issue of property rights to body parts. In fact, the final ruling was largely inconclusive in that it did not establish any new precedence for body property rights. The case was certainly not the landmark case it was meant to be as the Court was very careful not to rule in a way that would preclude scientists from pursing their projects and very adamant in saying that what they decided is not in any way universal, but specific to the case at hand. A century's worth of progress in medical research was coming to a close, but this case was demonstrative of the fact that that progress had yet to be contextualized. The John Moore vs. U.C. Regents case emerged at the end of the twentieth century, at the end of an era of medical progress - an era marked by new technologies that provided a foundation for an unprecedented amount of medical innovations. This case showcases the tension between biomedicine and the people it proposes to help. It was the first time that a court had ever dealt with one's rights to parts excised from the body through the patient-subject's perspective. An era was coming to an end and John Moore, the patient-

subject, exposed a need for a re-evaluation of medical research practices. That this case was driven by an individual, rather than a large institution, is proof of that fact. The social limits of medical research needed to be defined. This unexpected focus on medical research resulted in this case setting a precedent for biomedical research by declaring that medical research need only be social in its application.

Legal historian Lynne Curry describes the common assumption that one must be involved in the proceedings of one's body, whether it be something as small as a cell or as large as an organ, by characterizing it as "a modern version of the centuries-old notion of personal autonomy." It was this assumption that guided Moore to Court to call for a defining of the social limits of medical research and ironically, it was this assumption that was rendered invalid.

In her book, *Culturing Life: How Cells Became Technologies*, Hannah Landecker explores evolution of the cell as used in research and provides some insight with regards to how a centuries-old notion could be rendered invalid so abruptly. In the final chapter of her book she considers the tension that this case exposes. Quoting anthropologist Margaret Lock, she underlines the fact that "in order for body parts to be made freely available for exchange, they must first be conceptualized as thing-like, as non-self and as detachable from the body without causing irreparable loss or damage to the individual or generations to follow." This is where the issue lies – the patient-subject is adverse to the notion that his excised parts are simply "things." They are a part of his autonomous individual. Alluding to this notion, Margrit Shildrick and Roxanne Mykitiuk, in their book *Ethics of the Body*, explain that the practice of biotechnology has in effect disrupted certain human constants. Before, "the material body could be taken as relatively stable and predictable," but, "the technological possibilities of a post-modern age continually disrupt humanist certainties." These new technologies challenge an accepted assumption, an assumption which would posit that medical research should be social from the beginning because it is utilizing part of an autonomous person. This case shattered that assumption.

In determining that medical research need only be social in its application, the Court did render the cell to be a "thing." The product of Golde's research was a thing for society – regardless of whether it came from a person, the product was simply an object to be used. While the focus on the science itself is of utmost importance, the observer of life sciences must always ask "what is the social and cultural task of being biological entities—being simultaneously biological things and human persons—when "the biological" is fundamentally plastic?" This case suggests that one can not only easily accept this plasticity, but also relinquish this inclination of ownership for social advancement through public health should be a common priority.

For decades medical researchers deemed raw human tissue an integral part of the research process, without acknowledging the origins of that raw tissue. For decades American society was rewarded with the rewards of that research. Progress was and still is without a ceiling – possibilities are endless. It was this case that reaffirmed this pattern. When the public called for a configuration of the social limits of research, the Court replied, but did not comply. For medical research to be social only in its application to its connection to the vitality of society is sufficient. Societal betterment trumps the individual's concerns.

Works Cited

Curry, Lynne. The Human Body on Trial. Santa Barbara: ABC-CLIO, 2002.

Golde, D W, S G Quan, and M J Cline. "Human T lymphocyte cell line producing colony-stimulating activity." Blood 52, no. 5 (November 1978): 1068-1072.

Landecker, Hannah. Culturing Life: How Cells Became Technologies. Cambridge, Mass.: Harvard University Press, 2007.

Moore v. Regents of University of California, No. S006987 Cal. 3d, 51, 120 (Supreme Court of California).

Shildrick, Margrit, and Roxanne Mykitiuk. Ethics of the body : postconven

tional challenges. Cambridge, Mass.: MIT Press, 2005.
Skloot, Rebecca. "Taking the Least of You." New York Times. April 16, 2006.

REPRESSED MEMORIES AND THE STATUTE OF LIMITATIONS

By: Annie Mitran

United States federal law includes a statute of limitations in criminal cases, specifically that, "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." This statute is meant to protect "individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." There are a variety of circumstances, however, in which the applicability of the statute of limitations has been called into question, and the recent trend has been to provide exceptions in these cases. Once such case is that of repressed childhood memories of abuse.

Cases of memory repression have been documented since the time of Freud. In such cases, individuals that have experienced traumatic events will push difficult memories from their minds as a coping mechanism. These individuals live in ignorance of the incident unless the memories spontaneously resurface, which can occur years or even decades later. In these cases, victims often seek legal action as a form of empowerment or compensation. However, the validity of these repressed memories has been called into question. Patients can be easily influenced by the slightest suggestion from their therapist, and some individuals that have come forth have later withdrawn their allegations. In recent years, lawmakers have had to decide whether legal action should be permitted in cases where repression recollections have fallen outside the statute

of limitations for the crime.

In response to a flurry of these cases coming forward in the 1980's (as well as cases where barriers other than repression prevented a victim from coming forward), Congress quickly enacted legislation to extend the statute of limitations in the case of child abuse and kidnapping to "the life[time] of the child." Legal action involving repressed memory of abuse was therefore allowed to go forward. However, the issue of the memories' validity remained pressing, and courts had to further determine whether repressed memories should be considered permissible as courtroom evidence.

Under the Supreme Court ruling of Daubert v. Merrell Dow Pharmaceuticals, Inc., courts admitting scientific evidence must consider error rates and the likelihood of false results. Because no studies yet exist that empirically prove that repressed memories are valid, recovered memories do not meet inclusion standards in the eyes of the Court. However, if memories are uncovered and other evidence can be assembled, the extended statute of limitations allows for legal action in the case of uncovered repressed memories of childhood abuse.

If the psychological community continues to be divided on the validity of repression, repressed memories cannot be included as evidence in a court of law. However, if a method is uncovered to distinguish false memories from legitimate ones, recovered memories would fulfill the requirements for inclusion specified in Daubert. In sum, more psychological research may be needed before patients that have uncovered repressed memories can finally attain justice.

Works Cited

18 U.S.C. § 3282(a) (2006).

American Medical Association. "Reports of the Council on Scientific Affairs."

Coleman, Brenda C. "Recovered Memories of Childhood Sexual Abuse Unreliable AMA Says." Assoc. Press, June 15, 1994.

CSA Report 5-A-94, June 16, 1994. Subject: Memories of Childhood Abuse.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993).
Kisch, Wendy J. "From the Couch to the Bench: How Should the Legal System Respond to Recovered Memories of Childhood Sexual Abuse?" Ameri can University Journal of Gender & the Law. (1996): 207-246.
Powell, Lindsay. "Unraveling Criminal Statutes of Limitations." American Criminal Law Review. (2008): 115-154.
Prosecutorial Remedies and Tools Against the Exploitation of Children To day Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 202, 117 Stat 650, 660 (codified at 18 U.S.C. § 3283).
Toussie v. United States, 397 U.S. 112, 114-15 (1970).

INFLEXIBLE LAW: A DANGEROUS PRECEDENT FOR THE MENTALLY ILL

By: Antonia Silver

Eric Clark was a diagnosed paranoid schizophrenic suffering from severe delusions that aliens had invaded his resident town, Flagstaff, Arizona, and that they were attempting to kidnap him. On the morning of June 21, 2000, Eric Clark shot and murdered a police officer. Granting Clark's mental diagnosis, his lawyers attempted to solicit an insanity plea. Under Arizona Law, this indicated that the person's mental illness had to "distort his perception of reality so severely that he did not know his actions were wrong." While both the trial judge and the prosecution acknowledged that Clark was a schizophrenic, the judge ruled, "while the Defendant was affected by his mental illness, it did not…distort his perception of reality so severely that he did not know his actions were wrong." After the subsequent trial to determine a verdict for the case of Clark v. Arizona, Clark was convicted of murder under the Arizona Statutes § 13-1105(A)(3), which states that a person is guilty of first degree murder if: "intending or knowing that the person's conduct will cause death to a law en-

forcement officer". Clark's verdict was "guilty but insane" and consequently, all mental health evidence was excluded from the trial.

While I will not interrogate the judge's verdict nor throw his rejection of the insanity plea into the line of question, I will firmly examine the role of evidence regarding mental health. Eventually, the issue argued before the Supreme Court was whether or not it was constitutional to limit the use of mental health evidence in the determination of verdicts and sentencing. The Supreme Court ruled that it was constitutional and permissible to restrict mental health evidence only to the determination of insanity – a serious misconception. This underscores that certain aspects of cases cannot be appropriately comprehended without context administered by mental health evidence and ultimately, a fair and appropriate verdict cannot be reached. Eric Clark was legally deprived of a fair and just sentencing, rendering the judicial system incapable of understanding and dealing with mental illness in a systematic and impartial way.

When considering the future of a defendant, the court must consider two factors: intent and the defendant's capability of viewing the morality of their actions. While a complex matter for sane defendants, the matter is further obscured when handling mental illness. In the particular case of Clark v. Arizona, the court's inability to consider mental health evidence hinders the understanding of intent to two parts: the determination of whether Clark's actions constitute murder in the first-degree and the establishment of mens rea.

For Clark to be guilty of first-degree murder, he would have had to know that the person whom he was attempting to kill was in fact a law enforcement officer. Throughout trial, the defense counsel counter-argued this, claiming that Clark believed the officer to be an alien. This theory was unable to be supported by mental health evidence. Thus, its omission forced a ruling of Clark's actions as murder in the first-degree. Justice Kennedy, in his acutely worded dissent highlights the congenital failings in allowing Arizona to restrict such use of mental health evidence. Kennedy says "It is one thing to say he acted with intent of knowledge to pull the trigger. It is quite another to say he pulled the trigger to

kill someone he knew to be a human being and a police officer."
Without mental illness evidence, the assumption that Clark was aware that the victim was a police officer is illogical and unethical. This is because the case is deprived illumination through relevant context such as Clark's delusions. It is the prosecution's duty to prove beyond a reasonable doubt that the defendant consciously attempted to murder a police officer. Instead, the court draws its conclusions by ignoring the mental health evidence that contradicts their conclusions. Again, this restriction breaches every defendant's fundamental right: innocent until proven guilty. Therefore Clark v. Arizona sets a dangerous precedent by allowing the judicial system to treat the mentally ill with brutal prejudice.

The second issue previously mentioned was the inability to determine mens rea (simplistically, that is the defendant's recognition that his action was morally wrong and malignant). Clark was unaware that killing an alien was wrong. Therefore it does not satisfy the requirement of mens rea. The Supreme Court ruled that once again, mental health evidence cannot be considered for mens rea. Justice Souter's argument underscores the distinction being discussed:

> When the Arizona statute refers to whether or not the criminal act was wrong, the criminal act is the act of intentional killing, period. And if that's what they mean, then it is irrelevant that he thought he was killing a Martian. But if the Arizona reference to the criminal act being wrong refers to the act in this case -- i.e., killing somebody you believe is a Martian -- then the (mental health) evidence could come in.

The Supreme Court casts this argument as irrelevant and invalid. This ruling repeatedly hampers the court's ability to understand the implications of mental illness on the defendant's actions.

It is fairly granted that there is no simple way for the legal system to handle schizophrenia. The Supreme Court's ruling in Clark v. Arizona made it exponentially more difficult for the judicial system to treat the mentally ill

fairly. By allowing states to restrict mental health evidence in the courtrooms, the Supreme Court has maintained that mental illness is irrelevant to context of the situation surrounding crimes. Clark v. Arizona has set a poisonous exemplar for the judicial system's ability to adapt to new understandings of schizophrenia and mental illness. While the medical world is versatile, constantly adapting and changing with new discoveries, the judicial system has sadly been rendered inflexible, apparently incapable of, or struggling to deal with, advances in other fields.

Works Cited

Clark v. Arizona, 548 U.S. 735 (2006).

COMPULSORY LICENSING: A THREAT TO DEVELOPED COUNTRIES

By: Milorad Dragicevic

Where does cheap medication come from? To answer this question, it is important to consider the issue of "compulsory licensing" that has been the source of numerous controversy in the last few years. A practice that the World Trade Organization defines as the right of a government to allow a company to produce a patented product or process without the patent owner's consent has caused numerous lawsuits involving governments and pharmaceutical companies. Drug producers from developed countries question the legality of compulsory licensing, when it seems clear that no government is violating any laws established through the World Trade Organization. In a 2007 article published in the *Economist* entitled "A Gathering Storm", Jon Pender from GlaxoSmithKline reacted to the increase of compulsory licensing by stating that this practice was legal "only under limited circumstances, such as national health emergencies, and only after lengthy efforts to negotiate prices with firms." However, the World Trade Organization claims that this is a common misunderstanding and that

"the TRIPS [Trade-Related Aspects of Intellectual Property Rights] agreement does not specifically list the reasons that might be used to justify compulsory licensing." While there are conditions mentioning prior negotiation with firms, the TRIPS agreement does not specify the length or the terms of negotiations. In that sense, it seems that the legality under the TRIPS agreement should not be in question.

Therefore, the issue of legality in these cases is secondary only to economic benefit. The same article from the *Economist* mentions that middle-income countries that are using compulsory licensing might shift the balance of power. This kind of assessment seems problematic for several reasons. First, let's consider the example of India, one of the countries that would benefit the most from compulsory licensing. Although India is a middle-income economy, it is at the lower end of this category. Therefore, allowing it to produce generic drugs would help its economy grow significantly without major economic damage done to big companies such as the Swiss Novartis. The fact that Novartis decided not to appeal to the Supreme Court after the ruling was made in India's favor in a case Novartis brought against this country in 2007 might indicate that the losses of big pharmaceutical companies due to compulsory licensing are not as significant as they claim. If compulsory licensing does not cause major loss for leading pharmaceutical companies, why not allow India to produce generic drugs and develop its economy, making those in need have better and cheaper access to necessary drugs?

In addition, it seems that the idea of "shifting the balance of power" dominates the issue of compulsory licensing. Is it possible that the developed countries are worried about the impact that the growth of pharmaceutical industries in developing countries might have on the global economic picture? While individual companies like Novartis might not be threatened by compulsory licensing, India's rather successful example and a $4.5 billion pharmaceutical company might overtake the markets for drugs from developed countries. Therefore, it seems that the opposition to compulsory licensing stems from the

desire by developed countries to maintain the status quo on the global market. Yet, by doing so, they are hindering the economic growth of developing countries at a price of denying access to drugs to those who need them most.

Works Cited

"A Gathering Storm." The Economist. 7 June 2007. Web. <http://www.economist.com/node/9302864>.

Gentleman, Amelia. "Setback for Novartis in India Over Drug Patent." The New York Times. 07 Aug. 2007. Web. <http://www.nytimes.com/2007/08/07/business/worldbusiness/07drug.html?_r=1>.

"WTO | Intellectual Property (TRIPS) - TRIPS and Public Health: Compulsory Licensing of Pharmaceuticals and TRIPS." World Trade Organization - Home Page. Sept. 2006. Web. <http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm>.

Sports and Entertaiment Law

THE NFL STALEMATE: THE PLAYERS' PERSPECTIVE

By: Katelin Weil

May 2008: NFL owners set the final date for the Collective Bargaining Agreement (CBA) extension as March 3, 2011 at 11:59 p.m.
Feb. 17, 2011: NFL owners and the NFL Player's Association (NFLPA) agree to the use of a federal mediator to assist in already strained negotiations toward a new CBA.
March 3, 2011: Super Bowl-winning quarterbacks Tom Brady and Peyton Manning are slated to be the lead plaintiffs in a potential antitrust lawsuit against the NFL in the event of the NFLPA's decertification. Both sides agree to a 24-hour extension on negotiations.
March 4, 2011: Negotiations are extended another seven days, until March 11, 5 p.m. ET.
March 11, 2011: Negotiations break down completely. The union decertifies and files an antitrust lawsuit in U.S. District Court in Minnesota, with the objective to block a lockout. Later that day, the owners announce the lockout.

The core of the players' argument is that the NFL owners are in violation of U.S. antitrust law. How does antitrust law apply to the NFL? The answer is simple – when considering whether or not the NFL owners have violated antitrust laws, it is easiest to think of the term antitrust more basically as "anti-

competition." As sports legal analyst Eric Macramalla explains in his sports law blog, "the NFL has 32 individual teams that are all competitors. These competitor teams have gotten together and imposed a number of limits that restrict the marketplace for players." This is the essence of the players' lawsuit.

With this in mind, there are many clear examples of rules that inhibit competition, and thus violate existing antitrust laws. Players argue that NFL owners have rigorously enforced specific limitations on free agency, the recruitment of talent, and the number of players each team can employ. The NFL owners also preside over team finances, including the enforcement of a hard salary cap. Penalties for violating or circumventing the cap, which totaled $128 million per team in 2009, include fines of up to $5 million, cancellation of contracts, and/or loss of draft picks. In addition to the claim of price-fixing, the players argue that the imposed lockout of the players, a recent action of NFL owners which prohibits the use of team facilities and any contact with team coaches, trainers, and other personnel, is itself an anti-trust violation, since it can be viewed as an "illegal group boycott." According to the players, "the NFL defendants possess monopoly power in the market for major league professional football in the United States" in general. Players claim that restrictions and limitations like those outlined above prohibit competition in a way that is detrimental to their individual incentives.

THE NFL STALEMATE: A CASE FOR THE OWNERS

By: Nat Miller

Over the course of the past weeks as the NFL Lockout has ground to what seems to be an impasse that will never be resolved, public opinion has overwhelmingly favored the players, and really how could it not? They are the ones, after all, who have risked life and limb making the NFL the most watched sport in America, and in the process making their bosses incredibly wealthy.

Furthermore, they are the ones now who are unable to work, unfairly locked out of team facilities by owners unwilling to give them fair compensation for their piece in creating the $9 billion enterprise that is the modern-day NFL. While this argument favoring the players seems to work on the surface, it is ultimately founded on several mistruths and over exaggerations of the players' case. An examination of both the legal and business implications of the lockout show it to be an inevitable consequence of the player's inability to negotiate in goodfaith under the former CBA (collective bargaining agreement) and desire to bring an anti-trust lawsuit against the NFL.

The NFL lockout is not a product of cold-hearted NFL owners trying to prevent their players from simply doing their jobs, but rather it is a necessary reaction to the legal action brought about by the players and their union. As communications broke down and the old CBA expired, the players decided to dissolve their union. This dissolution of the union was a necessary legal step for the players, as it was only by dissolving their union that they could bring about an anti-trust lawsuit against the league. This anti-trust lawsuit, known as Brady vs. NFL, allows players to challenge all the current NFL rules that they deem unfair in court, such as restrictive free agency and the salary cap. Despite having claimed to have completely dissolved their union, however, the players still have a de facto union working on their behalf, and have therefore not been negotiating in good faith under the terms of the antitrust lawsuit. A lockout is not a malicious attack by ownership on the players, but rather a powerful legal means of leverage that must be employed in the face of the players refusal to negotiate on fair terms.

Not only do the owners have strong legal reasons for locking out the players, they are justified in their resistance to sharing more of the revenue from the teams with the players. Many times in this debate the owners are portrayed as selfish millionaires unwilling to share money with the players who worked so hard to earn it. Yet this image confuses the reality of the situation. While most NFL owners are quite wealthy, it is not their personal wealth which is important

here, but rather only the total revenue created by the teams. Furthermore, the owners are the ones who put themselves at great financial risk by owning the teams. Should a player perform poorly, his spot on the roster may be threatened, yet should the entire franchise perform poorly, the ownership is at risk of losing large sums of money. Players are unreasonable in their demands to share in only the profits of the NFL without accepting any of the risks.

Works Cited

Feldman, Gabriel A. "NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations." The Huffington Post. 9 Feb. 2011. Web. 09 Apr. 2011.

King, Peter. "The NFL labor situation is bad, but resolution closer than it ap pears." Sports Illustrated. 14 March. 2011. Web. 09 Apr. 2011.

VICTORY FOR THE ASSOCIATION OF TENNIS PLAYERS

By: Steven Roach

In professional tennis, most of the disputes usually take place on the courts over line calls, but a recent case demonstrated that heated debates can spill into the courtroom. A recent case between the Association of Tennis Professionals (ATP), an organization for men's professional tennis players and organizers of tennis events and the German Tennis Federation, raised the issue of more clearly defining the ATP's power to reshape the tour and promote interest in tennis at the expense of certain tournaments. This court decision solidified the ATP's ability to make these decisions, granting more power to the umbrella organization than the players and tournaments that compose it.

It's no secret that tennis is not the most popular sport in the United States. Declining ratings and interest in the game forced the ATP to restructure

the tour in order to increase viewership and fan attendance. The way the tour was previously structured did not allow for the top players to play against one another as much as fans indicated they would have liked. To achieve this goal, the ATP devised a new system by creating new tiers for different tournaments and requiring players to participate at the highest-tier events.

In restructuring the tour, the ATP demoted an annual tournament in Hamburg, sponsored by the German Tennis Federation, from Tier I to Tier II. The reasons for this were a decrease in fan attendance at the event and decline in interest in tennis in Germany, among other reasons. According to the German Tennis Federation, this downgrade may have caused less top players to attend the tournament in Hamburg, which could have the effect of decreasing fan attendance even more and bringing in less revenue.

The German Tennis Federation filed a lawsuit against the ATP, using the Sherman Antitrust Act as a basis for its two major claims. The first claim was that the ATP "conspired and combined to control the supply of top men's professional tennis players' services," by requiring the top players to compete at the highest-tier tournaments and, therefore, reducing lower-tier tournaments from competing for players to attend their events. The second claim was that the ATP tried to monopolize the market for men's professional tennis players' services.

On both of these claims, the jury ruled against the plaintiffs. For the first claim, the jury cited the plaintiff's failure to provide any evidence that members of the ATP entered into contracts to conspire and noted that the ATP Board of Directors were not "materially self-interested" when they voted in favor or restructuring the tour. For the second claim, the jury ruled against the plaintiffs for their "failure to provide a relevant market." The German Tennis Federation claimed that this monopolization stifled competition, but the jury could not investigate this effect without undergoing extensive market analysis. Furthermore, the ATP is not an organization of competitors, but instead one of tournaments that cooperate to produce the best product for men's professional tennis. The court's decisions made clear the ATP's power in structuring the best men's pro-

fessional tour.

BONDS NOT GUILTY, AT LEAST IN COURT

By: Matthew Coe-Odess

In the eyes of most, the writing was on the wall. Unfortunately for the prosecution, walls have never been much of an obstacle for Barry Bonds. Nearly a decade ago, the greatest homerun hitter in the history of baseball told a grand jury he never took steroids. Now, facing three perjury counts and one count of obstruction of justice, Bonds claims he never knowingly took steroids, a claim that, for too many, is even more preposterous.

Although it seems highly unlikely that Bonds mistakenly thought he was taking flax seed oil and arthritis cream rather than anabolic steroids, the prosecution had a difficult task of proving beyond reasonable doubt that Bonds knowingly lied to the grand jury. Arguably the most indicative sign of his guilt was paradoxically the prosecution's biggest downfall, as Bonds trainer and alleged steroid provider, Greg Anderson, accepted jail time rather than testify against his former client.

In need of a star witness, the prosecution relied heavily on Steve Hoskins, Barry Bonds' childhood friend and former business manager. Hoskins testified that he suspected Barry Bonds had been using steroids from 1999-2003, and produced an audio recording of a conversation with Greg Anderson, in which Anderson says, "Everything I've been doing at this point is undetectable. See the stuff that I have, we created it and you can't buy it anywhere else, can't get it anywhere else, but, you can take it the day of (a drug test), pee, and it comes up perfect." Hoskins insisted he made the tape to prove to Barry's father that his son was taking steroids.

Unfortunately for the government's case, the prosecution shot themselves in the foot. First, they did not provide a transcript of the audio record-

ing, and when the jury asked for a transcript during deliberations, Judge Susan Illston, although she allowed the recording to be replayed, denied the request for a transcript since no such evidence had been produced during the trial. Furthermore, and perhaps more damagingly, the prosecution called to the stand Bonds' personal orthopedic surgeon, Arthur Ting, who they thought would support Hoskins' testimony. Ting, however, turned on the prosecution, as he flatly denied Hoskins' claim that he had discussed Bonds' steroid use with Ting on "at least 50 occasions." This effectively threw a wrench in Hoskins' credibility and negated much of his testimony.

The prosecution was understandably surprised by this unexpected turn, but their failure to recover was the last straw in what was already a frail case. The prosecution should have taken advantage of Rule 607, which stipulates that in a federal case, the "credibility of a witness may be attacked by any party, including the party calling the witness." The prosecution should have confronted Ting about the blatant contradictions between his previous testimony to the grand jury and his current testimony. They needed to press Ting about his five-year probation following "unprofessional conduct," which stemmed in part from his prescribing unauthorized drugs to athletes. Ting threw them a curveball, and the prosecution froze.

Despite the lack of a guilty plea, justice was served nonetheless. Although he won't spend any time behind bars, the mere trial is another stain on Bonds' tainted legacy. Ultimately, while Bonds might not be guilty in a court of law, little doubt remains in the court of public opinion.

MAJOR LEAGE BASEBALL'S ANTITRUST ISSUES

By: Hank Clausner

The thrill of opening day has come and gone and to many fans' delight, America's pastime is getting another season started. Yet, there exists an uncom-

fortable question that burns in the minds of many devoted sports fanatics: is Major League Baseball an illegal institution? Moreover, what are the consequences of America's beloved sports' antitrust-exempt status? The Sherman Antitrust Act of 1890 is the federal statute which aims to eliminate the unscrupulous behavior that was prevalent by trusts, monopolies, and cartels. Monopolies, without any competition, can artificially raise prices, and force inequitable contracts. The Sherman Act was an effort by the United States Federal Government to protect the rights of businesses and consumers. In 1922 the Supreme Court, in a unanimous decision, ruled that baseball was exempt from the Sherman Antitrust Act in the infamous case of Federal Baseball Club of Baltimore, Inc. v. National Baseball Clubs, citing that the interstate travel is a "mere incident, not the essential thing". In light of the nature of the Sherman Act's constitutional justification as a method to regulate interstate commerce, this decision seems troubling.

In order to analyze this decision further, the basic structure and history of Major League Baseball (MLB) must be addressed. MLB is composed of two leagues, the National League and the American League. This institution is comprised of 30 teams: 29 teams are located in the United States and one team plays in Toronto, Canada. When the decision was made, the two leagues were not unified. They were considered umbrella organizations because they controlled the larger scheduling and regulation issues. However, business was not conducted on the national level because there was no revenue sharing, media contracts or national corporate sponsors. Currently however, MLB has become a single organization with massive national television, radio, and internet contracts. This begins to exemplify the incredible far-reaching power that this organization yields. MLB has exclusive rights to all baseball media coverage, runs the sale of official baseball merchandise, tickets, runs paid fantasy baseball leagues, and runs the auctioning of baseball memorabilia-- some of which are also accessible through MLB.com, another source of revenue for MLB. Certainly this is more than enough evidence to demonstrate the monopolistic qualities of MLB.

Yet, one may wonder, why does any of this matter? It becomes evident that this is a questionable situation because of its unique nature. MLB is the only sport with this exemption: boxing, golf, football, basketball, and hockey have all tried and failed to achieve this antitrust-exempt status. Often this argument focuses on the inability for teams to move freely from one city to the next. Of course, moves are fairly rare in professional sports, but MLB has made it basically impossible. At the moment, an owner cannot freely move his team to a more profitable location in a more profitable market because such a bid would be blocked by MLB. Without this antitrust exemption, these moves would be available for owners and baseball would become a much more profitable financial investment.

However, there is a more important casualty at hand because this exemption completely alters the way baseball is run and played. For example, major-league teams can currently control the rights of minor-league players deep in the farm system. Thus, teams who have an interest in the development of young players subsidize minor-league operations and take great interest in the development of excellent high school players. Without this exemption MLB would have to forfeit the right of all of their minor-league players. This could potentially free young players to develop in college, instead of the minor league system, which would significantly ameliorate the level of collegiate baseball. Perhaps college baseball could become a major source of revenue for colleges and universities, something that would be very useful and appreciated in this current economic climate. Furthermore, legitimate collegiate programs would provide countless numbers of young men with necessary and useful educations. Indeed, college baseball does exist and is a viable option for many young baseball players. However, the increased spotlight, revenue, and popularity that would inevitably come from higher level play could have long-term payoffs through increased scholarships and extended recruiting. Indeed, players' dreams to play in the big leagues often are not realized. A college degree and education would be extraordinarily advantageous for young men who fall into this category. The

opportunity to attend college is not always available for American and foreign players alike and this could extend this opportunity to those in need. At the end of the day, it is unfair for Major League Baseball to support its antitrust-exempt status because an ameliorated environment is potentially available to the sport's most loyal fan-base, the players.

Works Cited

259 U.S. 200. The Yale Law Journal. US Supreme Court. 1922. Web. <http://supreme.justia.com/us/259/200/case.html>

Belth, Alex. "Ending Baseball's Antitrust Exemption What Would It Mean?" November 26, 2001. <http://courses.cit.cornell.edu/econ352jpw/readme/Baseball%20Prospectus%20-%20Ending%20Baseball's%20Antitrust%20Exemption.htm>

"Labor and the Sherman Act." The Yale Law Journal. January 1940. <http://www.jstor.org/stable/792668>

Rovell, Darren. "Baseball's antitrust exemption: Q & A." ESPN.com. December 5, 2001. <http://sports.espn.go.com/espn/print?id=1290707&type=story>

SPORTS REGULATION

By: Evan Zepfel

The Major League Baseball Commissioner's power stems from Article I of the MLB Constitution, which grants the commissioner the broad power to act 'in the best interests of the game' (§2). The commissioner of baseball enjoys two significant legal advantages over the commissioners of the NFL and NBA: a judicially created antitrust exemption and a waiver of recourse that insulates his decisions from the court system. Although the waiver of recourse has been

limited in recent years by court rulings determining it to apply only to the commissioner's role as an arbitrator, the courts have historically been generous in construing the powers of the MLB commissioner. The commissioner also has broadly defined powers to 'uphold the integrity of the game' that have been judicially confirmed in Finley v. Kuhn and Milwaukee American Association v. Landis.

Article I, Section II of the Major League Baseball constitution provides the commissioner with the power to take actions 'in the best interests of Baseball,' although Section 5 of the constitution ensures that the commissioner cannot take any action within the realm of the Collective Bargaining Agreement (CBA). Section 4 also limits the commissioner's 'best interests' authority by preventing him from taking action that restricts the ability of clubs to vote on matters that require 'joint league action.'

The MLB constitution specifically allows the commissioner to levy a fine of up to $5,000 or a 10-game suspension without the possibility of an appeal for on-field conduct. Any greater suspension or fine allows the player to appeal the decision either to an impartial arbitrator or to a three-member arbitration panel. All commissioner-assessed punishments are also subject to a 'just cause' standard of review.

The commissioner's 'best interests' powers were judicially confirmed in Milwaukee American Association v. Landis and much later upheld in Finley v. Kuhn (1978), although the court's decision in the second case limited the waiver of recourse present in the MLB constitution. However, once the teams were allowed some judicial recourse, the commissioner's powers began to decline (Chicago National League Ball Club v. Vincent).

The courts have intervened in instances where the commissioner has overstepped his bounds. When Commissioner Bowie Kuhn banned women from the Yankees locker room, the court found such action to be a violation of equal protection (Ludtke v. Kuhn). Similarly, when Commissioner Fay Vincent attempted to utilize his 'best interests' power to overrule the National League

constitution by forcing a team move divisions without consent, the courts ruled in favor of the teams.

The commissioner is also restricted by Article XI, Section A(1)(b) of the MLB Collective Bargaining Agreement. This section provides the commissioner with the right to overrule any disciplinary decision made by an arbitrator, and gives him the right to act as the final word on all punishment cases. However, the section also provides that the Collective Bargaining Agreement would be re-opened if the commissioner were to ever utilize this power. This clause has effectively prevented the commissioner from utilizing this authority, as it would likely be to the detriment of the league and the owners to re-open the CBA.
MLB's antitrust exemption proved to be quite advantageous when dealing with 'conduct detrimental' cases, such as Pete Rose's gambling incident. When Rose admitted to betting on baseball and was given a lifetime ban from the sport in a settlement with Commissioner Bart Giamatti, he was unable to challenge the ban on antitrust grounds. NBA and NFL players would not be so restricted, and have successfully used antitrust claims to challenge lifetime bans, although in one case the court found that the ban did not violate antitrust law (Molinas). The antitrust exemption has also helped the MLB commissioner to maintain his power, since players and the MLBPA cannot challenge decisions on antitrust grounds. However, many of the commissioner's powers have been eroded due to collective bargaining.

Baseball's waiver of recourse also provides an advantage for the commissioner, as his decisions are more likely to be upheld in courts than the decisions of the commissioners of other sports (Finley v. Kuhn). Since the courts generally cannot review disciplinary decisions, the commissioner is not able to benefit from favorable case history and often faces rulings by arbitrators that diminish his punishments (Steve Howe).

The commissioner of the National Football League (NFL) enjoys much stronger authority than the MLB commissioner in the area of player conduct and discipline. The broadly defined Player Conduct Policy (PCP) and the lack

of outside arbitration give the commissioner almost unlimited authority over the players, both in conduct on and off the field. Although the NFL commissioner has the de jure right to act as the final word on all decisions involving player discipline, just as the MLB commissioner does, only the NFL commissioner is able to make decisions without the fear of appeal, as his rights are not limited by the re-opening of the CBA.

Unlike MLB and the NBA, the office of commissioner of the NFL is technically a neutral position, while the other two commissioners represent the owners. It is his neutral position that allows him more power over player discipline.

The commissioner of the National Basketball Association (NBA) enjoys many of the same powers as the MLB commissioner. Commissioner's decisions in each league are subject to review by an arbitrator, although the MLB commissioner is able to levy small fines and suspensions without review.

As mentioned earlier, the NBA does not enjoy the antitrust exemption that MLB does, which allows players to challenge the commissioner's actions under antitrust law. Such was the case in Molinas v. National Basketball Association, when Commissioner Maurice Poldoff suspended Jack Molinas indefinitely for gambling on games he was playing in. Although Molinas lost his challenge in court five years later, he was able to successfully bring suit using antitrust claims.

The NBA commissioner's powers regarding conduct 'on the court' are much more broadly defined than the MLB commissioner's, as the NBA defines "conduct on the playing court" to be any action from the time the player arrives at the arena until he leaves. Also, the league is able to make new rules concerning on-court conduct without approval from the NBPA, while in MLB such decisions must be negotiated.

The commissioner of baseball is able to levy small fines and suspensions against players without the fear of player appeal, while in the NBA, all fines and suspensions under $50,000 are appealable. Similarly, while all fines and suspen-

sions in the NBA are laid out in a list in Article 35 of the NBA constitution, the MLB constitution leaves such decisions to the discretion of the commissioner. Following the 'Black Sox' scandal in 1919, Major League Baseball elected Kenesaw Mountain Landis as commissioner in 1920. Landis's powers as a 'benevolent despot' were confirmed by the court in Milwaukee American Association v. Landis, although this decision referred specifically to Commissioner Landis and it did not apply to later commissioners. After Landis' death, the owners sought to limit the commissioner's power, by eliminating the waiver of recourse and limiting the 'best interests' power to deal only with conduct that expressly violated MLB rules. These two changes were revoked in 1964, but the commissioner's power was then limited by the advent of the MLBPA and first collective bargaining agreement in 1968. Players were allowed to appeal disciplinary decisions through a grievance procedure with an impartial arbitrator, and the Seitz decision eliminating the reserve system quickly followed. Finley v. Kuhn limited the waiver of recourse to matters in which the commissioner acted as an arbitrator, and the new Section 3, which was added to Article 1 of the Major League Constitution restricted the commissioner's power to punish clubs to enumerated punishments. Ludtke limited the commissioner's authority over those not party to the CBA. Multiple drug-related arbitration cases, including Howe and Vida Blue, demonstrated the arbitrator's willingness to overrule the commissioner by reviewing disciplinary decisions using the 'just cause' standard. In 1992, the commissioner was no longer recognized as neutral and his powers to affect collective bargaining were eliminated. The most recent CBA also presents specific limits to the commissioner's power, including the possibility of arbitration for suspensions over 10 games and fines over $5,000, as well as the potential re-opening of the CBA if the commissioner overrules an arbitrator's decision. The 'best interests' power has been recently expanded, however, to include financial and moral issues.

Major League Baseball benefits from a judicially-created antitrust exemption that allows the league to escape antitrust scrutiny in the courts. The

exemption stems from a decision in Federal Baseball Club v. National League (1922). The court's decision in Federal Baseball held that the Sherman Anti-Trust Act was not applicable to the 'business of baseball', as baseball does not constitute interstate commerce. Two later decisions, Toolson v. New York Yankees, Inc (1953) and Flood v. Kuhn (1972), upheld the ruling in Federal Baseball, although many believe that these decisions were based on faulty reasoning. Major League Baseball has historically been hesitant to utilize its exemption, fearing that it might be overturned.

The antitrust exemption is most relevant when considering franchise relocation. This exemption provides the MLB commissioner significantly greater power than the NFL and NBA commissioners with regards to franchise relocation. Although the exemption no longer applies to MLB players, it still applies to the territorial claims implemented by MLB. In order to approve an "expansion, sale, or transfer of control of a club," the proposition must be approved by ¾ of the other clubs in the league, as well as a majority of clubs in the other league. Similarly, Major League Rules specifically define the territory that each club controls by county.

Very specific rules exist for clubs in similar territories, including a minimum distance between ballparks as well as payments that must be made by a club moving into a territory to the club that already has rights to the territory. Before the Flood Act was passed, the courts changed their definition of the antitrust exemption, and ruled that franchise relocation in baseball was subject to antitrust claims (Piazza and Tirendi v. MLB, Butterworth v. National League). However, McCoy v. MLB returned to the earlier decisions of Federal Baseball and found that the exemption applied to the business of baseball as a whole, overturning the findings in Piazza and Butterworth. Similarly, MLB v. Crist found that baseball's decision to contract franchises was not subject to antitrust scrutiny, as it was part of the business of baseball as well. Since the antitrust exemption was so broadly defined in the area of franchise relocation and contraction/expansion, challenges based on antitrust claims in MLB would be un-

successful.

The state of Minnesota has prevented MLB from contracting the Minnesota Twins franchise in Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, using the Twins' lease to keep them in the facility. The Twins were not forced to pay rent, but the state made money by collecting from advertising revenue and concessions sales. Thus, MLB was unable to contract the franchise due to the Twins' contract with the Metrodome.

Other leagues, however, are forced to deal with antitrust claims in matters concerning franchise relocation. The NFL's rules regarding franchise relocation require a unanimous vote when a team wants to move within 75 miles of another team, and a ¾ majority at all other times. However, when Al Davis's Raiders were not allowed to move after losing a vote, he filed suit and won on antitrust grounds. The courts, using rule of reason analysis, concluded that the NFL franchises were sufficiently independent and competitive, and that the effect of the rule restricting franchise relocation was inherently uncompetitive. Major League Baseball, however, is able to uphold its franchise territorial claims because it does not have to worry about antitrust claims; rather, groups seeking to affect MLB's decisions regarding franchise movement and expansion/contraction must use more creative methods than antitrust claims.

In the upcoming CBA negotiations, the MLB commissioner and owners should be able to use the antitrust exemption and waiver of recourse to their advantage. Similarly, the judicial precedent upholding the commissioner's authority cements his position much more strongly than the NBA or NFL commissioner. Using these advantages, the owners and commissioner should be able to expand their 'best interests' and 'conduct detrimental' power to insulate drug and personal misconduct related incidents from the arbitration process, as is the case in the current CBA. This would be a step towards the Personal Conduct Policy that Roger Goodell instituted in the NFL, although it would only relate to drugs and criminal allegations, specifically performance enhancing drugs and federal perjury charges that have resulted from Congressional

investigations about Performance Enhancing Drugs ("PED's") in baseball. As seen in the Howe case, a player disciplined for drug use had his suspension shortened by an arbitrator. A reduction of a sentence imposed by the commissioner undermines his authority and, in the long run, is detrimental to baseball. As publicity about PED's have come to undermine many fans' confidence in the game, a persuasive argument can be made that the commissioner should have the final say on all punishments relating to drug use (performance enhancing or not) and criminal charges. While MLB already has the "Joint Drug Prevention and Treatment Program," it would benefit from a system that insulates all drug related incidents and related discipline involving MLB players from the arbitration process.

Since punishments laid out under the new commissioner-controlled drug punishment plan would be subject to the waiver of recourse, the players would not be allowed to challenge the penalties in court. Rather, they would only be appealable to the commissioner. In the other two leagues, players would be able to appeal any suspensions to the courts.

Such a system would represent a limiting of player rights and MLBPA would no doubt demand concessions in return. By lowering the minimums for grievance arbitration to $2,500 and 7 games, players would be able to contest punishments much more easily, and would be likely to agree to the expanded drug punishment system.

The expanded punishment system will serve to increase the public confidence in the game and also provide more discouragement to players who want to use PED's. Eventually, the system will restore public confidence in the game, and hopefully, increase attendance and team revenues.

Environmental Law

THE RIGHT TO REGULATE?

By: Lindsey Waters

President Barack Obama pledged in his 2008 campaign to reverse the Bush administration's policy on tailpipe emissions, and he is now initiating massive efforts to fulfill that promise. Having already advanced efforts to grant California and thirteen other states the right to set strict automobile emission and fuel efficiency standards, Obama is continuously paving the way for his new environmental agenda. Some states, however, oppose the legal implications that come with expanding the rights of states to take such environmental precautions. Though a large restructuring of environmental law may need to be attended to if many of Obama's plans for a cleaner atmosphere become a reality, the current Presidential administration believes such efforts are well worth the energy.

In June 2010, Obama declared, "Each of us has a part to play in a new future that will benefit all of us. As we recover from this recession, the transition to clean energy has the potential to grow our economy and create millions of jobs - but only if we accelerate that transition" ("Energy & Environment"). Since then, The Recovery Act has constituted an unprecedented and historic investment in the clean energy economy. Instead of relying on other countries to provide the United States with the energy necessary to power our nation, the power should be, and eventually will be, held by the federal government and the

states to enforce and regulate environmental aspects of the law.

A large emphasis has been placed on the efficiency of our automobiles and public transportation methods, perhaps because such aspects of our society consume most of our energy resources. While in office, Obama has announced the first-ever joint fuel economy/greenhouse gas emissions standards for cars and trucks and has initiated the first-ever efficiency and emissions standards for medium- and heavy-duty cars and trucks ("Energy & Environment"). Such policies, however, have larger legal implications associated with them. The responsibility to create fuel-efficient vehicles now falls solely on the automotive industry, which may eventually lead to higher prices for consumers or higher taxes by the general public. Critics of these policies do not believe the power should lie with the President to make such executive decisions that will effect all aspects of the country in lieu of what he believes to be the greater environmental good, and some even claim his impulsive actions are unconstitutional.

A top Republican lawmaker, Michigan's Representative Fred Upton, is one of those critics. Aside from assessing Obama's goal of achieving sustainability through regulating automobiles, Upton declares regulation of greenhouse gases released from industrial facilities to be a "regulatory assault against America's energy producers." He and his partners are trying to rally lawmakers in Congress to oppose what they termed "an unconstitutional power grab" by the Environmental Protection Agency and the President (Dlouhy).

But President Obama is, in fact, enacting these laws and regulations for the greater good of our nation, which should therefore allow them to be justified, constitutional acts. By becoming a world leader in renewable technology and "green" methods, the United States will set a precedent for future nations. These initiatives will lead our country, and eventually the world, to a better, healthier way of living—one that may potentially reverse the incredible amount of environmental damage that past generations and we have created. As an economic stimulus, the focus on environmentally friendly machinery and methodology will create new jobs and allow for new ideas to be implemented. Thus, Obama's

goal of a conscious nation, and the policies and laws that are associated with that plan, should be considered a great asset to current United States structure.

Law and Technology

BIOMETRICS: THE SOLUTION TO IDENTITY THEFT

By: Nathan Clement

Once a thief knows your name and social security number, the information required to steal your identity is only a few clicks away. The only additional personal information required for an online credit card application is a phone number, date of birth, address, and imprecise financial information like "household income." An inexpensive reverse social security search like those provided by USATrace.com can fill out most of this information, or research can be conducted for free by looking through social media or even conducting a google search. It is even easier to steal the identity of a "friend." Since millions of Americans have their identity stolen every year, and have to spend approximately 45 hours and $500 to control the damage done to their credit reports, it seems vital that the law find some solution to cure the problem.

Current government efforts to slow down the identity theft scourge include campaigns to inform the public about how to protect their identity, and the enforcement of more stringent penalties against the perpetrators of identity related crimes through the passage of various laws like the Fair Credit Reporting Act. Despite all of these measures, identity crime remains a major problem, indicating that further action should be taken to reduce or eliminate its problematic influence on our society.

One solution that presents itself is the possibility of mandating in-per-

son "identity tests" based on biometric technologies like fingerprinting, DNA, or even retinal scans in order to procure items like credit cards, which are the most common tool of identity thieves to steal money. Such technologies are very difficult to fool, especially when combined with existing information based identity proofs. Additionally, forging someone's fingerprint or other personal features would present a particular challenge if tests were administered under supervision, as the most common way to bypass a fingerprint detector is to use the finger from a cadaver, or a gelatin mold.

The only institutions which would have to purchase advanced identification technology would be banks, and government organizations since they are at the root of our monetary transactions and legal accountability. This way, a credit card could still be stolen and used fraudulently; however, a new credit card could not be started without the physical presence of the person who must eventually pay it off.

With advancing technology and the rise of the internet, it is not longer practical, ethical, or wise to allow someone's legal identity to consist merely of bits of information on a piece of paper. Rather, unique physical features should be used in conjunction with such bits of information at the most essential institutions in order to ensure that each man is held responsible only for his own actions, so that future Americans will no longer have to live in fear of the life-altering consequences of malicious identity fraud.

Works Cited

Biometric expert shows an easy way to spoof fingerprint scanning devices. (2005). Retrieved from PhysOrg.com website: http://www.physorg.com/news8954.html

Capital One Card Application. (2010). Retrieved from Capital One Bank website: https://www.securecardsignup.com/enroll/SilverApp_M2.htm?camefrom=99&utm_campaign=601536&camefromid=null&u

tm_medium=cpc&generic0=monetize&utm_source=99
Credit Card Fraud - It Happens All Too Frequently. (2010, June 25). Retrieved from Credit Card Info Center website: http://www.creditinfocenter.com/rebuild/fraudAccts.shtml
The Fair Credit Reporting Act. (2010, July). Retrieved from Federal Trade Commission website: http://www.ftc.gov/os/statutes/fcradoc.pdf
Identity Theft and Your Social Security Number. (2009, August). Retrieved from USA.gov website: http://www.ssa.gov/pubs/10064.html
Retinal Biometrics. (2005). Retrieved from Quest Biometrics website: http://www.questbiometrics.com/retinal-biometrics.html
SSN Trace. (n.d.). Retrieved April 3, 2011, from USATrace website: http://www.usatrace.com/ssntrace.html
What is Biometrics? (2009). Retrieved from Tech Target website: http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci211666,00.html

DISTINGUISHING PUBLIC FROM PRIVATE

By: Peter Bozzo

In an 8-1 decision released on March 2, the Supreme Court ruled that the First Amendment protected Westboro Baptist Church (WBC) protestors from damages incurred while protesting outside a military funeral. The damages, which were initially millions of dollars and were imposed for the intentional infliction of emotional distress, had been lessened by a District Court and eventually dismissed by the Fourth Circuit Court, with the Supreme Court upholding the Circuit Court's decision. Ultimately, the case raises new questions about the means of distinguishing between public and private speech, as Justice Alito's passionate dissent and Justice Breyer's intriguing concurrence suggest.

The Court's decision ultimately rested on the distinction between public

and private speech. As Justice Roberts noted in his majority opinion, the WBC's goal was to demonstrate its view that God despises the United States (especially the U.S. military) for its acceptance of homosexuality. In addition, according to Justice Roberts, the Church's picketing reflected this point; signs read, "Thank God for Dead Soldiers," "Fags Doom Nations," and "America is Doomed." As a result, because the protestors were not targeting a specific individual or family at the funeral, their speech fell under First Amendment protections, and the damages imposed for inflicting emotional harm were invalid.

Nonetheless, Justice Alito's dissent complicated the Court's view of privacy and publicity. According to George Washington Law Professor Jeffrey Rosen, Alito's dissent marks his emergence as the Court's "privacy cop." In Snyder v. Phelps, he defended a family's right to privately mourn its loss against the impositions of a protesting church; in Doe v. Reed, Alito authored a concurring opinion that specifically mentioned that "individuals have a right to privacy of belief and association." Therefore, in contrast to Justice Scalia — whose originalist interpretation of the Constitution has led him to deny that a constitutional right to privacy even exists — Alito acknowledges both its existence and its robustness in cases that weigh privacy against other values. In a unanimous opinion released in January, Alito implicitly assumed the existence of a right to privacy, reflecting values he has held since his undergraduate years at Princeton — where, in 1971, he ran a conference whose final report noted that "we sense a great threat to privacy in modern America" and "privacy is too often sacrificed to other values."

In addition to demonstrating Alito's emergence as a privacy defender, Snyder v. Phelps demonstrates the difficulty of weighing privacy against competing claims — especially when that balancing process involves the classification of speech as either public or private. For Alito, the decision to protest at the military funerals was a fundamental invasion of privacy; even if the protestors were speaking on public matters, their decision to stage their protest at a place that would likely offend people made their act into a private attack on a family's

mourning process. Alito even cited Internet postings by the Westboro Baptist Church that accused the parents of the fallen soldier of "rais[ing their child] for the devil." In Alito's view, the protestors' actions transcended the boundary between public and private, and this invasion of privacy overrode their claims to free speech.

Justice Breyer's concurrence raises even more intriguing questions about the implications of privacy in a technological age. In Breyer's view, "the Court's opinion … does not hold or imply that the State is always powerless to provide private individuals with necessary protection"; nonetheless, the specific facts of this case dictated the justices' final decision. In addition, at the beginning of his concurrence, Breyer notes, "The opinion does not examine in depth the effect of television broadcasting. Nor does it say anything about Internet postings." Although Breyer does not expound on this thought, his raising of these issues suggests a fundamental concern with the implications of technology for invasions of privacy. For example, postings on Internet websites are accessible to a wider audience than small protests, and they last longer: They are forever available for all to view. While Snyder v. Phelps raises intriguing questions about when the public becomes private, future cases will likely deal with these technological issues, and the Court's rulings will shape a generation of privacy and free speech rulings.

Works Cited

Jeffrey Rosen, "Justice Samuel Alito, the Supreme Court's Privacy Cop," Washington Post (6 March 2011), accessible online at http://www.washingtonpost.com/wp-dyn/content/article/2011/ 03/04/AR2011030406329.html.

Snyder v. Phelps, et. al, 130 U.S. 1737 (2010).

THE LEGALITIES OF THE ACQUISITION OF T-MOBILE BY AT&T

By: Bilguun Ulammandakh

Although AT&T claims that the U.S. wireless market is currently "fiercely competitive" and will remain so even after its acquisition of T-Mobile, the sheer fact that the acquisition would lead to 80 percent of the U.S. wireless market being owned by only two companies – AT&T and Verizon – casts doubt on the claim's veracity. With many scores of small companies sharing the remaining 20 percent of the market, it appears that competition in the wireless carrier market would significantly drop. Furthermore, AT&T would become the only national carrier in the U.S. that would use the GSM wireless standard, which is far more popular around the world than the CDMA standard used by the other U.S. carriers. Due to the robustness of the GSM system, the phones compatible with the system also tend to be more developed and more competitively priced. As such, the acquisition would increase AT&T's market power not only due to its market share increase, but also due to the fact that AT&T would have a monopoly on GSM-standard phones, and international GSM roaming in the U.S. market.

Given these facts, it seems that the U.S. antitrust laws would be clearly violated and the acquisition not approved by the Justice Department. Thus, from a legal perspective, the acquisition is unlikely to succeed. However, the economic aspect of the acquisition presents several compelling arguments in support of the acquisition, which, although reducing competition, might ultimately benefit consumers due to the nature of the wireless carrier market. Therefore, this article will examine both legal and economic aspects of the acquisition in question, and will weigh the merits of each side in the short and long run.

Because it is obvious that the national level of competition in the wireless market would decrease, and a decrease in competition is almost always detrimental to the consumer, the crux on which the legality of the AT&T acquisition rests is the amount of cost reduction that AT&T would be able to achieve through the acquisition. In other words, the acquisition is desirable only if the

cost reduction is so large that AT&T would have the incentive to lower prices in spite of its increased market power. For a company to lower its product and service prices while being faced with only little competition, the cost reductions due to the acquisition must be very large. The interest expressed for the acquisition on the side of AT&T might lead us to believe that this is the case, but one must keep in mind that AT&T might be interested in the acquisition solely on the basis of increased market share, regardless of increased profits. Because even a situation unchanged in terms of service prices but worsened in terms of competition is undesirable, the principal issue to be dealt with by the regulators is the making of profits AT&T expects to earn from the deal clear and ascertaining whether these profits are large enough to assure price reduction.

If the profits are found to be large enough, the next important aspect of the acquisition to consider would be its long term effects on the wireless market in the U.S. Even if AT&T is able to make vast cost reductions, and thus reduce its prices in the short term, in the long term, the whole of the wireless market is likely to become less "healthy" than it is today. Inevitably, some smaller regional carries will disappear as a result of the acquisition, and it will become increasingly difficult for new carriers to enter the market. With only two major carriers, innovation will probably slow down, and after the rustle created by the acquisition settles down, AT&T will slowly revert back to a giant that could easily abuse its market power. Even if it does not abuse its power, it would be undesirable if it turned into an unabusing but stagnant giant after its post-acquisition hubbub.

Works Cited

"AT&T." AT&T to Acquire T-Mobile USA from Deutsche Telekom. Web. 15 Apr. 2011. <http://www.mobilizeeverything.com/competition.php>.

"ComScore Reports March 2010 U.S. Mobile Subscriber Market Share - Com Score, Inc." ComScore, Inc. - Measuring the Digital World. 6 May 2010. Web. 15 Apr. 2011. <http://comscore.com/Press_Events/Press_Releases/2010/5/comScore_Reports_March_2010_U.S._Mobile_Subscriber_Market_Share>.

"GSM World Coverage Map- GSM Country List by Frequency Bands." Time - Current Time around the World and Standard Time Zones Map of the World- 12 Format. WorldTimeZone.com. Web. 15 Apr. 2011. <http://www.worldtimezone.com/gsm.html>.

"Traveling Overseas with Your Cell Phone, GSM vs. CDMA." Consumer Reports: Expert Product Reviews and Product Ratings from Our Test Labs. Consumers Union of U.S., Inc., July 2009. Web. 15 Apr. 2011. <http://www.consumerreports.org/cro/electronics-computers/phonesmobile-devices/cell-phones-services/cell-phone-service-buying-advice/cell-phone-service-guide/cell-phone-networks/cellphone-travel-tips/gsm-vs.-cdma/cell-phone-travel-tips-gsm-vscdma.htm>.

Intellectual Property Law

NEW IMPLICATIONS FOR THE CONSEQUENCES OF INTELLECTUAL PROPERTY LAW

By: Gargi Chaudhuri

The basis of many legal arguments, the efficiency approach, has long been a point of debate. It dictates that economic factors should be the determining force in the creation of laws; that is, legal practices should aim to create the best environment for a growing and expanding economy. Among others, the efficiency approach has been used to both defend and criticize the field of property rights, particularly, intellectual property rights. To some, the efficiency approach could dictate that protecting intellectual property limits the field of trade. With more restrictions on copyright, fewer sales are made, and thus, limits increase on both the consumer's access to products and the producers' potential sales, creating a stinted economy. However, the same rule can be applied to defend an artist's desire to protect his work. With no limitations, the market would become so diluted with reproductions and copies, little economic gain could be reaped from the artist's profession.

However, the efficiency approach stems from the 1960s, a completely different age of economic development than now. In 50 years, the expansion of the internet and technological advances have resulted in a constantly changing market. Rather than being influenced by the law, the market now seems to have a will of its own. By simply taking a look at Apple, which has released five

different versions of iPods, two versions of the iPad, and four versions of the iPhone within the span of nine years, it becomes apparent the constantly evolving field of technology has forever changed economic trends. Competing companies then created even more options for consumers, such as Google Phones and Android, naturally expanding the market. In a more static economy, legal regulations had a much larger influence on growth.

Furthermore, consumer information regarding price-comparisons and the quality of various products was much less accessible. However, in the current age of vast and widespread information, consumers have the resources to be smart shoppers easily and without hassle. With less need for legal encouragement, the new state of the economy makes the efficiency approach seem outdated. Although still an important factor to consider when passing any law, using it as the basis for any legal argument encounters a few obstacles.

Rather, the debate over intellectual property should take new turns. Involving the very value of art, IP laws center on the question of whether the creation of art or the distribution of art holds more importance. Despite an author's or musician's pride in his creation, it is society itself that defines the worth of art. Limiting a consumer's access to it could be argued as detrimental to the work itself. On the other hand, the protection of a creator's rights is essential to the motivation of any artist. No one would create if the right to own his or her product did not exist. The shift in economic trends now forces lawyers to critically analyze the implications of intellectual property law in much more abstract and philosophical terms. The debate over intellectual property is increasingly changing its focus from the "property" aspect to the "intellectual" one. Although this makes it a far more complicated argument, it also promises a more satisfying compromise: one which will help society understand the role of art as both a creation and an experience.

Works Cited

"Efficiency and a Rule of 'Free Contract': A Critique of Two Models of Law and Economics." Harvard Law Review. Vol.97, No.4 (1984). Pp.978-996. JS TOR. Web. 4 April 2011.

Lewin, Peter. "Creativity or Coercion: Alternative Perspectives on Rights to Intellectual Property." Journal of Business Ethics. Vol.71, No.4 (2007). Pp.441-455. JSTOR. Web. 4 April 2011.

THE APPLICATION OF INTELLECTUAL PROPERTY TO THE INTERNET IN THE 1994 TRIPS AGREEMENT

By: William Roller

In 1974, political philosopher Robert Nozick asked the question: "If I own a can of tomato juice and spill it in the sea . . . , do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" (Nozic, Munzer 75). Nearly forty years later, the more relevant question seems to be: if one owns the rights to digital content and distributes it on the internet, do they now own the internet or has their ownership simply been diluted by the vast expanse of the World Wide Web? Obviously, most would conclude that the ocean and internet can't be claimed as property, but what of the tomato juice? Indeed, such perplexing questions lie at the heart of the tension between the internet as a liberalized market and the intellectual property interests that populate it.

Since its inception, the Internet was designed to facilitate open networking and information sharing on a borderless basis. However, this stood in direct opposition to digitized content owners' desire to build legal and technical fences around their assets . Certainly, a resource with low excludability like the Internet, a "globally distributed, always-on copying machine" makes such legal protections inherently hard to create. The fact that property is indeterminate at the margin was bound to create disagreements.

That was the case that led to ratification of the 1994 Trade Related As-

pects of Intellectual Property Rights (TRIPS) agreement, an international treaty that helped formally solidify the rights of IP interests in what had once been an unconquered frontier of law. In the 1980s, the United States began to break up the telecommunications monopoly held by AT&T to foster greater competition and innovation in the information technology sector. In this decentralized model, barriers to entry in this global network were effectively reduced to zero. Thus the internet became "the most powerful mechanism in history for locating and retrieving information that you might want to copy . . . and for facilitating the sharing of it with limitless others."

Consequently, two groups began to form in light of this radical paradigm shift in information distribution. On one hand, the early advocates of a liberalized internet advocated (and still do) open source and open information. On the other hand, those with property interests anchored themselves to legal movements in an effort to protect their ownership rights. Ultimately, parameters defining the limitations of private property were clarified in landmark statutory laws such as the 1984 legislation known as Section 301 in U.S Trade Law. It stated that "unreasonable practices" came to include "inadequate protection for intellectual property." IP interest now was able to flex a modicum of muscle on IP infringement. However, it still took ten more years for a formal international decree to truly extend such legal protection to the internet on an international level.

Eventually, Article 10.1 and 10.2 of the TRIPS agreement formalized that "computer programs, whether in source or object code, shall be protected as literary works . . . [and] Compilations of data or other material, whether in machine readable or other form . . . shall be protected as such." The World Trade Organization came to enforce the TRIPS agreement and protect the specific internet-related rights necessary for the burgeoning industry. Finally, a large international enforcement mechanism was created in an effort to protect the seemingly intangible property that had, up to that point, struggled to find adequate legal protection. Liberalization gave way to legality as WWW changed

from the Wild Wild West to the World Wide Web.

Certainly, the utopian ideal of a completely liberalized network wavered in light of a world-wide legal framework that helped to shape the internet that we know today. We now see an abundance of legal jargon populating the internet, such as disclosure agreements, that make clear to the everyday user that property is becoming more clearly defined. Yet, we still beg the incessant question: who truly owns information on the internet? Is that Facebook post ours or does it simply become part of the aggregate data-trove stored in a remote data center? Such cases still necessitate clarification. Nonetheless, today, Robert Nozick's proverbial can of tomato juice seems more intact than ever, well defined, floating through the ocean of the digital age.

Works Cited

Blakeney, Michael. Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement. Sweet & Maxwell Limited, 1996. Pg. 46.

Mueller, Milton L. Networks and States. Massachusetts Institute of Technology, 2010. Pg. 130.

Nozick, Robert. Anarchy, State, and Utopia. Basic Books, 1974. Pg. 175.

Law and Politics

OBAMA FORCED TO MOVE 9/11 TRIALS TO GUANTANAMO BAY

By: Lauren Paul

On Monday, April 4th, the Obama administration reported a new direction for the case against self-professed mastermind of the 9/11 attacks, Sheikh Mohammed. Instead of pursuing the trial in federal court in New York, Attorney General Eric Holder announced that Mohammed and four co-conspirators will be tried at Guantanamo Bay. In his address, Holder insisted that "we simply cannot allow a trial to be delayed any longer for the victims of the 9/11 attacks, or for their family members who have waited nearly a decade for justice."

This change in venue poses a complex new discourse of issues, both within and surrounding the case. Though Holder is adamant that victims need swift justice, the initiation of and process of the trial could take years. Since Holder's November 2009 decision consequently withdrew the original military commission charges in favor of prosecution in federal court, a new set of charges must be filed, followed by a new arraignment. Judging from Mohammed's dramatic declarations and wish to become a martyr at his last arraignment, these new proceedings could prove just as problematic.

Furthermore, the recent laws passed by Congress that forced these new military commissions pave the way for a multitude of legal challenges. For one, The Military Commissions Act of 2009 includes a "Determination of Voluntariness" that instructs the military judge about the kinds of circumstances he or she

should consider when making an assessment as to the voluntariness of a defendant's statement. This could make admissions of evidence exceedingly complicated, especially considering the CIA's acknowledgment that Mohammed was waterboarded. Thus, litigation over the rules, the evidence, and allegations of torture could carry on for years.

In terms of the Obama administration, the decision is sure to be met with mixed and passionate feelings. Many will recall that on his first day in office, President Obama vowed to shut down Guantanamo Bay within a year. Not only has this failed to occur, but with these new military trials, Guantanamo is sure to be in use for years to come. This could easily be interpreted as further demonstration of Obama's naiveté when entering office as a result of his lack of experience. Additionally, many feel that his administration merely backed down, allowing Congress to take over.

But the President and his Attorney General were up against a number of obstacles, tangible and verbal, that ultimately forced this decision. New York mayor Michael Bloomberg spoke out against holding the trials in federal courts, out of fear that it may instigate additional plots against citizens and that it will cost the city $200 million a year. The chief of the New York Police Department Joseph Esposito seconded this opinion, insisting that military trials have no place in a civilian system. The final push came when Congress implemented statutes putting federal courts off limits.

Finally, one is left to ask: shouldn't Attorney General Holder have seen this coming? But Holder responds that he always believed that if the United States were given the opportunity to examine both sides, they would always choose to do it themselves. But it seems that the people are uncomfortable placing this in civilian hands. As stated by Charles Wolf, husband of a victim of the attacks, "the man was caught in a military environment, in a war environment, and should be tried in a military tribunal."

Works Cited

Isikoff, Michael. "9/11 suspects military trials face many legal challenges." MS NBC. 4Apr 2011. <http://www.msnbc.msn.com/id/42422877/ns/us_news-security/>.

Williams, Brian. "Trial for 9/11 Attacks moved to Guantanamo." NBC Nightly News Broadcast. 4 Apr 2011.

AN INTRODUCTION TO LAW AND ECONOMICS

By: Billy Cember

How do we assess the efficacy of laws? One tool at our disposal is economics. More specifically, the use of the methods of economics to assess the law is the central idea of the legal theory known as law and economics.

The theory and practice of economics can tell us many things about the law. Take for instance rent control, which refers to laws that set maximum amounts—also known as price ceilings—on the amount a landlord can charge her tenant. Most economists believe that rent control causes shortages in housing available for rent. Assuming that this is indeed the case, the question arises whether rent control should be the law or not.

The idea that rent control causes shortages is an example of positive law and economics: the idea that the tools of economics can be used to describe the effects of laws. This idea is useful because economists have many tools available to determine causal relationships between events, so in particular, these tools can be used to examine the relationship between the passage of a law and some other event. The economic analysis of law can also be extended to prescriptive recommendations, and this is known as normative law and economics. An example would be a person advocating that a city discontinue its rent control pro-

gram under the premise that such a program would cause shortages in housing.

Normative law and economics is a specific example of the more general question of how we decide what laws are good in the first place. Going back to the rent control example, if one advocates abolishing rent control in order to increase the availability of housing, one is implicitly assuming two things: (1) an increased availability of housing would be a good thing for society and (2) the availability of housing is a variable the government should be considering when legislating.

In the example of the previous paragraph, the two assumptions underlying the application of economic analysis to rent control policy are reasonable. However, this is not always the case. Consider the following quotation by Senator Rand Paul regarding the outlawing of certain types of light bulbs: "Now, I'm not suggesting that this collective body is against electricity per se, or for quashing individualism. But I am suggesting that we're against choice." Paul is replying to the argument that certain light bulbs should be outlawed because they are inefficient by saying that this inefficiency doesn't matter. That is, Paul is saying that while the economic analysis shows that inefficient light bulbs cause a certain amount of extra carbon dioxide to be emitted and electricity to be expended, which causes a certain amount of societal costs, such an analysis doesn't matter. This follows because, to Paul the libertarian, individual freedom outweighs any societal gains in utility that could be measured by an economic analysis.

As the last paragraph shows, an economic analysis of law is only pertinent when the thing that the analysis is measuring is important in the first place. Nonetheless, with regards to many laws, the things that an economic analysis can measure, such as the actual effects of laws, are relevant. Indeed, even in the light bulb example above, the effects of the light bulbs' inefficiencies are only unimportant because of Paul's underlying libertarian philosophy. To many other people, whether a light bulb is efficient or not should be a relevant factor in deciding whether it should be permitted.

Therefore, while law and economics is not always a useful framework, it

often is. In particular, when one is concerned with the actual effects of the law, while an economic analysis might not be enough on its own, it certainly gives a useful perspective in both evaluating laws and making policy prescriptions.

Works Cited

Krugman, Paul. "Reckonings; A Rent Affair." The New York Times. 7 June 2000. Web. <http://query.nytimes.com/gst/fullpage.html?res=9F02E4DF153FF934A35755C0A9669C8B63>.

Linkins, Jason. "Rand Paul Uses Ayn Rand To Fight Compact Fluorescent Lightbulbs." The Huffington Post. 12 Apr. 2011. Web. <http://www.huffingtonpost.com/2011/04/12/rand-paul-uses-ayn-rand-i_n_848252.html>.

CRIMINAL. DELINQUENT. VILLAIN. TEENAGER?

By: Jesse Sanchez

When deciding a verdict, how often does one take a second glance at the defendant and find that they are below the legal age of 18? What runs through one's mind?

The thought of such a young person being tried and sent to jail can at times be too much to handle, but this feeling is mediated by the idea that if a person commits a crime, "justice" must prevail. And just like that, so much potential- gone. Often, without even a chance to reach that full potential. How often do we immediately disregard the person's situation and look only at the mistake that has brought them before the law?

Unfortunately, changing the circumstances of a person's past cannot be done. Their future, on the other hand, can definitely be influenced.

When dealing with youth, it is important to consider the possibilities

that an individual's life can hold. To disregard any hidden potential because of a misguided decision would be to throw away another potential positive contributor to society. These are people who deserve a second chance.

Of course, I am in no way urging the reader to disregard the repercussions for an individual's actions. I am only asking for consideration- a second look at a young man or woman who has so much to offer.

A second chance can go a long way. For example, when Eduardo, a young San Diego resident, faced 6 years in jail as only a ninth grader in High School, the expectations people had of him were low, to say the least. Many would have said, "There goes another kid from 'that' neighborhood who dresses like 'them' and who talks 'this way.'" Everyone knew who he was, knew what he was thinking, and knew where he was headed – or so, they thought. It seemed like his entire being was defined by this one misguided decision.

Luckily, the judge who received Eduardo's case saw something more in him than what others saw. The judge felt that Eduardo could become so much more than what others may have expected him to and gave Eduardo the opportunity to prove that he could reach this potential by offering him a second chance. Through his own personal drive and involvement in a youth program called Reality Changers, Eduardo was able to double his GPA to a 3.8/4.0 and become an award-winning mechanical engineer at UC San Diego before his sophomore year. This is the same young person who so many disregarded as a "lost cause." Because of a second chance, Eduardo was able to prove to everyone who doubted him that he was able to do great things. Today, instead of spending 6 years in jail, he is currently investing 4 years in receiving a college degree as the first one in his family to go to college.

This was all possible because of a second chance and an opportunity to find a way to transcend expectations.

If one argues that every wrong comes with consequences and that this "second chance" is not justice, one must first consider the social wrongs that youth face in inner-city neighborhoods every day. So many youth face circum-

stances that leave them feeling alone and without positive guidance. Some argue that by incarcerating these teenage criminals, we will ensure the safety of the other youth. But see, the youth we might completely disregard and decide to sentence to jail-time are the same youth we were trying to protect just a few years ago. It seems to be a never-ending cycle. If one is truly searching for justice, this search should begin at the root of the problem. Immediately concluding that jail-time is the only option is not the answer when dealing with youth.

Making sure the youth we are so ready to persecute are given an equal opportunity to reach their full potential is what we should actually be striving for. Again, I am not asking to disregard an individual's actions, only to offer some consideration when deciding the fate of a young person's life. As seen in Eduardo's story, a second chance could make the difference between 6 years in jail or 4 years in college.

Wouldn't that result in coming closer to true justice?

Admissions and Advising

THE END OF A TREND: WHY LAW SCHOOL APPLICATIONS HAVE DROPPED BY 11.6%

By: Vivian Lee

After four years of noteworthy increase, law school applications have dropped by a shocking 11 percent nationwide. Pursuing an education in law has always been viewed as a wise decision, a gateway into the lucrative world of law with numerous opportunities. And while lawyers and law practitioners are still highly respected in society, the environment, at the moment, may not be conducive to future employment. In addition, the idea of doling out, on average, close to $40,000 a year may deter students from applying. Especially considering the economic condition that the country is in, going to law school just does not seem like the most beneficial option.

An issue that arises when students weigh the costs and benefits of attending law school is that the data that many law schools around the country are providing are oftentimes misleading. Schools often boast about their rather high post-law-school employment rates, which are skewed by the inclusion of part-time jobs and careers that are unrelated to legal fields. This lack of accurate data poses a problem for prospective law school students because it is so crucial to understand what they will be getting out of their costly law school experience. This issue is already being addressed by the American Bar Association. Officials have stated that transparency is especially important in light of the recession and because students are entitled to knowing what they should expect.

In a society that is focused on rankings, the American Bar Association's choice to promote accurate, straightforward information is refreshing. Rather than looking at U.S. News' rankings, students can expect schools to be more honest and upfront about employment to potential law students. However, despite these roadblocks, many are encouraging students to look past starting salaries and employment rates. There are many other factors at play. Money is highly relevant, but it should not be the sole deciding factor behind a career choice.

The national drop is 11 percent, so one might expect to see various numbers depending on the law schools. But even the current top law school, Yale Law, has faced a startling 16.5% decrease in application by its March deadline. Schools like the University of Chicago and Duke are down by 12 percent and 20 percent respectively. This drop in applications doesn't discriminate and has negatively impacted numerous law schools. Aside from the issue of numbers, the drop in applicants may lie more in our culture. Over the past few years, some of the most legitimate (New York Times, Wall Street Journal) and illegitimate (random internet blogs) sources have been denouncing law schools by calling them "scams" and claiming that they are not worth the money. So perhaps this is a wake up call to all law schools to push for accurate numbers and a better image. Perhaps it's a call for students to be realistic about their future prospects. While it is unclear whether the application rate will rise anytime soon, we better first hope for a better economy and more honest numbers.

Supreme Court Decisions

GOVERNMENT INFRINGEMENT ON UNALIENABLE RIGHTS

By: Melanie Guzman

Five years ago, a majority of the Supreme Court held in Kelo v. City of New London that it was permissible for the government to seize homes, under the eminent domain clause, if such an action would improve the state of the overall community. This ruling left many Americans with great discomfort and unease as they pondered the limitations on the government's power to seize property and its impact on their rights as citizens. As the the philosopher John Locke asserts, God has endowed men with certain unalienable rights-- the right to life, liberty, and property. The actions of the city of New London, in its seizure of the properties of New London residents for the "benefit of the economy," breached two out of three of these moral obligations. Even with compensation, by taking a person's house as part of project of economic development, a city or state violates the property rights of the individual or infringes on his personal liberty. While the Supreme Court may have discussed various rationales at length, the consequences of such a decision for America and its ideals are undeniably serious.

Susette Kelo had lived in the "condemned" Fort Trumball area since 1997. She made an exhaustive number of renovations over the years, using her own resources to improve the home's condition, and mixed her labor with an

object that would have previously belonged to someone else. By adding her labor to the home, Kelo, "joined to it something that is [her] own, and thereby makes it [her] property" (Locke § 27). The little pink house in a neighborhood near an 18th century fort belonged to, and only to, Kelo.

Once established that Kelo's home was in fact her own property, some may question where the notion of property ownership derives, and how we determine that human beings may in fact possess "property."

We begin with the premise that men, being the children of God, are therefore His property, "made to last during his, not one another's pleasure" (Locke § 85) He has instilled in each man a property to himself, his body, and his labor, one that cannot be revoked by any external force. Ultimately, as the "master of himself and proprietor of his own person and the actions or labour of it," man has inherent in his being the establishment of property.

Kelo has, by right of God, property that mortal man, or group of men, can never strip of her. In the case of Kelo and her fellow petitioners, the city of New London attempted to seize from them what could not be seized. New London's long and forceful pursuit to acquire the homes of Fort Trumbull from their rightful owners is a transgression against their God-endowed, unalienable right to own property.

Although the majority of the Supreme Court ruled that the City of New London was justified in its acquisition of the homes after having created a "carefully formulated economic development plan that it believes will provide appreciable benefits to the community," the Court failed to consider the iniquities of the city government, whose sole purpose is to provide men with a, "secure enjoyment of their properties" (Locke § 95).

When men enter civil societies, they give up their absolute freedom to unite with other men for the, "mutual preservation of their lives, liberties...and properties" (Locke § 123). The people place their trust into the society, rely on it for the protection of their property, and expect it to follow through in assuring its preservation. And while the commonwealth intends to serve the commu-

nity's best interests, "the power of the society...can never be supposed to extend farther than the common good, but is obliged to secure every one's property." (Locke § 131). Above all, society has a moral obligation to defend the estate of its citizens. Man could have chosen to remain in a state of perfect freedom, and yet he decided to better his condition, to entrust in a higher body the responsibility of justice.

On this foundation, the city of New London failed. Men willingly consented to have their property protected by their government and the supreme power cannot simply take away this property without their consent. Otherwise, what protection does the government offer? A man's property can in no way be considered secure if the governing body has, "the power to take from any private man what part he pleases of his property, and uses and disposes of it as he thinks good" (Locke § 138). New London does not have the authority nor the ability to take the homes of the residents of Fort Trumball, even with compensation, simply because it hopes that the new facilities will perhaps improve a distressed economy. Even if the New London Development Corporation did believe that its reconstruction plan would create jobs and increase tax revenue, it does not have the right to seize a home without the owner's consent. The owner may have forfeited his right to execute his own justice, but he did not forfeit his right to his property - he merely allowed another group to preserve it, such as when a person places money in a bank account. He may have to suffer high maintenance costs, but he's secure in his knowledge that his money is safe and secure and the bank cannot just take that money because it believes it may benefit another entity. This behavior errs on the side of tyranny, which Locke defines as the, "exercise of power beyond right, which nobody can have a right to do" (Locke § 199). No government— federal, state or local— has the right to deny someone their own property, the right to which is intrinsic in his or her being. Thus, the City of New London breached Kelo's and the petitioners' rights when it sought to take their homes for the purpose of ameliorating economic distress.

Born in 1918, Wilhelmina Dery had lived on Walbach Street in the Fort

Trumball area in a home that had been in her family for over 100 years. In 1946, her husband Charles moved in with her, and they lived together thereafter. Her son and his wife lived right next door. Dery not only had the right to own the property, but she also had the freedom to do what she wanted with that property, as long as she did not infringe on the liberty interests of her contemporaries. Because she had lived in the home for nearly a century, it is highly unlikely that Dery ever did such a thing.

Born with a natural right to liberty, Dery has the freedom to do with her property whatever she pleases, subject only to the interest of her neighbors. Her unwillingness to surrender her home to the City of New London to "help the economy" was completely just. Her right to personal liberty dictates that she is, "entitled to serve [her] own purposes and not to be treated simply as an instrument to promote someone else's purposes" (Friedman 50). The government had no right to infringe on Dery's personal freedom as a means of improving the state of the entire city. Her autonomy is not a tool subject to manipulation by the government. It is absolute and guarantees her the right to do what serves her own best interests.

An argument against Dery's conduct is that she is selfish in her efforts to keep her home. Her behavior, it is asserted, contradicts the basic principle of democracy—equality— and prevents everyone from a right to the same resources. But, the word "equality" does not imply that everyone should have the same income and the same standard of living. Rather, equality means that, "no one should be prevented by arbitrary obstacles from using his capacities to pursue his own objectives" (Friedman 50). Dery was not posing an obstacle to her fellow residents of New London. The other members of the community have an equal opportunity to better their living conditions if they so desire. Dery simply pursued the freedom to live in a home that had been in her family for nearly a century.

Supporters of the Supreme Court's decision may argue that by neglecting to surrender their homes to the city, the petitioners encroached on the au-

tonomy of the rest of the town and denied the other residents the right to an economically thriving city. This argument has its roots in the utilitarian theory, which maintains that what is just is what produces the greatest pleasure for the greatest number of people. Analyzing the arguments from a utilitarian perspective produces a decision in which the petitioners forfeit their land so that New London can develop a park and a research facility in its place. These "improvements" will theoretically amend the financial state of the city and make the town more aesthetically pleasing.

But, this theory only considers the superficial and short-term collective happiness and fails to recognize the long-term outcomes that support the idea of utilitarianism. The petitioners do not infringe on the freedom of the residents of New London by fighting to maintain their ownership in the land; on the contrary, their efforts are an attempt to protect the town's independence from the government encroachment. Where does the City of New London draw the line in determining which homes prevent the town from reaching its economic potential? The government defended its actions not by asserting that the land will go directly toward public use, but by arguing that the end result would improve the financial state of the city, and somehow, indirectly, maybe one day benefit the community as a whole. While the city government may have started out targeting only a fraction of homeowners, defending its actions under the pretense of the Fifth Amendment essentially gives the government free reign under eminent domain principles and will also, "wash out any distinction between private and public use of property–and thereby effectively delete the words 'for public use' from the Takings Clause of the Fifth Amendment." The statute leaves the rest of the city vulnerable to the actions of the local government. A logical consequence is that any other person would then have to relinquish an 18th century Victorian-style home in exchange for a nominal sum so that New London Development Corporation can build a shopping mall and possibly augment the fiscal state of New London.

The dissenting opinion and the petitioners advance the right of the

entire town to have their liberties protected, not violated, by the government. Because the principle of utility supports actions when the, "tendency it has to augment the happiness of the community is greater than any it has to diminish it," the government's seizure of New London homes to buttress its economy is in direct contradiction of the utilitarian principle (Bentham 10). Taking away one's personal liberty will cause more pain than pleasure, which is the desirable outcome in utilitarianism. The Supreme Court ruling in the case of Petitioners v. City of New London is unjust and immoral because, "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness" (Mill 17). The local government strips the community of its liberty when it decides it has the power to take its citizens' homes for new structures that may or may not positively impact the city. The City of New London reduces the happiness of not only that singular group, but also that of the collective whole, who would undoubtedly experience the "reverse of happiness" if they too had their homes seized.

The Supreme Court's decision in Kelo v. City of New London has been the subject of much discussion and controversy because of its implications for the rights of Americans. Regardless of whether the government believes it may improve economic circumstances, it does not have the right to seize a home without the owner's consent solely for the purpose of improving fiscal conditions. Doing so violates natural liberty and property rights, both of which are at the core foundation of our democratic government. For any sense of morality to exist in our country, Americans must be fully cognizant of the power the government has over their lives and recognize when an injustice has occurred.

THE SUPREME COURT AND CAMPAIGN FINANCE MEET AGAIN

By: Alex Birns

Fourteen months after the Supreme Court of the United States decided

Citizens United v. Federal Election Commission, ruling that corporations can spend in federal elections more or less without limit, the Court is again entering the arena of campaign finance law, this time looking at publicly financed campaigns. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett and McComish v. Bennett will be consolidated into a case in which the Supreme Court will review the issue of whether the First Amendment forbids a state from providing a candidate who has opted to accept state funding for his campaign with additional funds in two circumstances. The first is when an independent group exceeds a predetermined amount of spending in campaigning against the aforementioned candidate; the second is when the candidate's opponent chooses not to accept state funding and himself surpasses a similar limit in spending on the campaign. Oral arguments were held on Monday, March 28, 2011.

In 1998, Arizona voters faced with what they understood as campaign finance abuse passed an initiative – a measure called the "Clean Elections Act" – championed as a way to allow candidates and political leaders to act in the entire public's interest, as opposed to acting only on behalf of those deep-pocketed organizations to whom they had been beholden. Under the Act, candidates for state office can qualify for state subsidy by raising a certain amount in private donations. Once they receive state funds, they can no longer fundraise privately, and state law enforces ceilings on total campaign spending. Further, the Act also contains a provision that enables subsidized candidates to qualify for even more subsidized funding if an opposing, privately funded candidate spends more on his own campaign than the amount of the original subsidy received (or obtains such an amount from an independent group), with the additional funds matching the difference in the two figures to a maximum of twice the value of the initial subsidy.

This "matching" provision was challenged and struck down in federal court in 2008 – this ruling was then appealed to the Ninth Circuit and overturned in May 2010, which ruled to uphold the provision. It is this provision that is now directly under review by the Supreme Court. Petitioners on both

sides of the issue argue that their free speech is on the line – candidates funded privately claim that they must deliberately limit their speech in order to avoid the states providing their opponents with additional money, while less wealthy candidates assert that they need the subsidies in question in order to have their voices heard by voters.

There is little in the way of national precedent to consider – the Supreme Court has only once before ruled on an issue regarding public campaign financing, in Buckley v. Valeo in 1976, where it upheld transferring taxpayer donations to presidential candidates on condition that they adhere to federal spending limits. The Court there seemed overall to approve of the practice, stating that public funding in that instance seemed to be in the interest of the nation's "general welfare." If the court were to rule against state subsidies (which they are not necessarily forced to consider) or even just against the state providing additional matching funds, there could be serious implications for the future. Public financing schemes, like Arizona's here, are largely posited as the only alternative to private funding that can preserve campaign integrity, and ruling against state systems can create precedent for challenging federal systems – the Court's overturning the Ninth Circuit holding could create on-point precedent to invalidate federal public financing. This case ought to be closely watched – within it is the potential for major changes to the condition of campaign finance as we understand it today.

POLITICAL CONSIDERATIONS IN BROWN VS. BOARD OF EDUCATION

By: Eric Cervini

The process by which nine Supreme Court justices reached a unanimous decision in Brown vs. Board suggests the importance of extralegal considerations in judicial decision-making. Specifically, the importance of political considerations over legal precedent suggests a deeper conflict between law and

politics that often arises in controversial court cases. In Brown vs. Board of Education and the Civil Rights Movement, Michael Klarman describes what appear to be two forms of political considerations: a justice's personal beliefs and his concerns about the power of the Court as an institution. Although Barry Friedman, in *The Will of the People*, alludes to the Cold War and changing public sentiment as other political factors that contributed to the Brown decision, Klarman's argument—especially regarding the Court's fear of dissension and further exacerbation of the racial divide—seems more persuasive. More importantly, it demonstrates the importance of political considerations as justices reach their decisions.

Klarman admits that these "extralegal" considerations, such as "personal values, social mores, and external political pressure," are present in all judicial decisions; however, he contrasts them with the law "as reflected in text, original standing, precedent, and custom." While justices generally follow the law when it is clear—as it was in 1954—Klarman argues that Warren's court rebuked it in favor of its own political preferences. He explains this decision by describing the justices' "culturally elite biases" resulting from their high level of education and economic status. As a result, the justices who preferred not to reverse Plessy (i.e., the ones that entered the minority after Vinson's death) decided to place their political preferences over their legal principles after the case's result—and their lack of power—became clear.

Although these personal political preferences are a convincing part of Klarman's thesis, his argument concerning the "good of the institution" seems more persuasive for justices who were less likely fall back upon personal convictions. Because the justices recognized that a divided court would lead to anger and violence in the white South, they suppressed their political beliefs to maintain the position and perception of the Court. The justices were perfectly aware that resisters would take advantage of division within the court, and they did not wish to exacerbate the issue. Therefore, when considered with shifting political sentiment and the perception of segregation by third-world countries during

the Cold War, political considerations seem to have been especially important as the Supreme Court decided Brown vs. Board.

A CORPORATION'S RIGHT TO FREE SPEACH – ELECTION FINANCING

By: Jonathan Hunt

On January 21st 2010 the United States Supreme Court made a decision in Citizens United v Federal Election Commission holding that there is "no basis for allowing the Government to limit corporate independent expenditures" and it was noted that, "the Court has recognized that the First Amendment applies to corporations." In the past couple of weeks, however, there have been two referendums in Wisconsin, one in the city of Madison and the other in Dane County, to determine whether there should be a constitutional amendment that would reverse the Citizens United case. The amendment, which would remove the First Amendment rights for corporations, eliminating the concept of corporate personhood, was supported by 84% in Madison and 78% in Dane County. Polls conducted since the Supreme Court's decision have largely shown that the ruling on Citizens United has been unpopular. An ABC News/Washington Post poll in February 2010 showed that some 80% of people oppose the decision. It is also interesting to note that there was no real partisan divide in this opinion.

Legislation is also being used to reduce the effects of the Citizens United case. In Maryland SB 592 looks to "require companies trying to influence state elections to report expenditures directly to their shareholders." SB 5021 in Washington State also seeks to enhance "election campaign disclosure requirements to promote greater transparency for the public." The fact that state legislatures are looking towards removing personhood from corporations would seem to suggest that politicians are aware of the dissatisfaction that their electorate feel towards the Citizens United ruling and so feel compelled to take action against it.

In yet another attempt to attempt to control how a corporation contributes to campaigns, the Securities and Exchange Commission (SEC) issued a no-action letter which promotes increased shareholder accountability over political spending. The transparency of political donations given on behalf of a corporation by executives should be increased. One criticism of the Citizens United case is that the interests of executives may be vastly different to those of the shareholders, and so after the Supreme Court's ruling, new laws would have to be put into place to give shareholders more control over how corporations spend money on political campaigns. If shareholders are not made fully aware of how money is being spent by the corporation, then they cannot make a fully informed decision on whether to continue to invest in the company or not. Should executives donate in a manner that many shareholders deem to be inappropriate then the shareholders can react accordingly, and over time the corporation will be representing correctly the views of the majority of the shareholders. Without the checks in place, corporations could donate contrary to shareholders' wishes, thereby undermining the right the organization should have with respect to free speech. It could therefore be construed that the no-action letter from the SEC does not oppose the Citizens United case as such, but simply deals with problems that may arise from the ruling, possibly making the ruling more legitimate.

Recently there appears to have been quite a sizeable negative reaction to the Supreme Court's ruling. With such seemingly large popular disaffection with the Citizens United ruling perhaps a thorough, public review of the case is in order.

Works Cited

Bebchuk, Lucian A., and Robert J. Jackson. "Corporate Political Speech: Who Decides?" Harvard Law Review 124 (2010). Social Science Research Network. 1 Sept. 2010. Web. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670085>.

"CITIZENS UNITED v. FEDERAL ELECTION COMM'N." Legal Information Institute at Cornell Law School. 24 Mar. 2009. Web. <http://www.law.cornell.edu/supct/html/08-205.ZS.html>.

Francisco-McGuire, Cristina. "Legislators, Voters Take on Corporate Influence in Elections." Progressive States Network. 14 Apr. 2011. Web. <http://www.progressivestates.org/node/27113>.