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The Boston University Pre-Law Review is a student run publication open to all Boston University undergraduates. The organization was founded in 1991 and has evolved since then. From its inception, the PLR has served the Boston University community by fostering awareness of pre-law issues, highlighting the resources available for students preparing for law school, and providing commentary on major issues facing the law and the legal profession.

Each semester, the staff and writers of the Pre-Law Review create a 150+ copy publication that addresses these issues. This publication is distributed through the Boston University Pre-Law Advising Office to currently enrolled pre-law students. It is also included in the materials that entering pre-law students receive upon registration as well as the information packets that are circulated during many of the pre-law presentations on campus.

The organization consists of approximately twenty members from throughout Boston University. The staff spans a variety of majors, schools and class years, as no specific academic or experiential requirements are necessary to work on the PLR. All that is expected of members is an interest in learning more about the law and a commitment to furthering the publication’s objectives by contributing one article per semester or assisting in the other aspects of the publication.
Law schools are infamous for their rigorous and stressful educational programs. But despite the recognized difficulties, the perception of success and prestige associated with a legal career is enough for many students to suffer through the intensity of a legal education. While most students would agree that the difficulties of law school are manageable, fewer would say that about the price.

The term insolvency is not traditionally affiliated with a legal career. However, in recent years, the law school loans that graduates acquire have become so daunting that they often find themselves confronting onerous financial debt. Tuition can cost up to $43,000 even at law schools with little competition for admission and the cost has only increased in recent years.1 “Because it’s so easy to get a student loan, law school tuition has grossly outpaced the rate of inflation for the last 20 years. It’s now astonishingly high,”2 asserts Andrew Morris, a law school professor at the University of Alabama. Many of these loans actually bankrupt young law school graduates, whose hard-earned educations accumulate too much debt for them to pay off. Situations of this sort have deterred some to search for more “reasonable” professions; nevertheless, interest in law school is still considerable. So why endure three years of intense work to end up bankrupt? This is a question that many are beginning to ask.

The quantity of law school applicants has dropped by an unprecedented 11% during the 2010-2011 cycle, and has continued to plummet through 2011-2012.3 Consequently, the likelihood of admission has likewise increased significantly, especially in middle tier law schools where applicant pools are smaller. Aaron Taylor of the National Jurist explains the reason for the favorable applicant environment: “Applications fell 11 percent — the largest one-year decrease on record. When applications fall, law schools tend to admit a higher percentage of their applicants.”4 The decreased admission standards are a considerable incentive, since many of the applicants are being admitted to better programs that would typically be out of reach. Graduating from affluent law schools typically translates to better paying legal positions that help pay off steep law school loans.

While graduates do amass considerable loans, lawyers generally enjoy unemployment rates of less than 1%, which is a far smaller percentage than the average United States unemployment.5 So although graduates must pay off inflated tuition costs, they are likely to acquire a job to help pay off the expenses quickly after graduation. Moreover, with a median starting salary of around $63,000 and a mean salary of $85,000, lawyers maintain a decent salary to pay off their debts.6

Although the United States economy is suffering a recession, the legal profession has proved to be

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notably resilient to bad economies. Lawyers have managed to retain an unemployment rate of 1.5%, which is far below the current national 9% average.\(^7\) Moreover, in 2010, *U.S. News* reports that 87.6 percent of law school graduates secured a job less than nine months after graduation.\(^8\) Hence, young law school graduates are not in jeopardy of remaining unemployed for long in the legal job market, even in a poor economy.

However, these statistics may not be as promising as they appear. David Segal of the *New York Times* contends that these surveys also consider non-legal jobs into their calculations: “A law grad, for instance, counts as ‘employed after nine months’ even if he or she has a job that doesn’t require a law degree.”\(^9\) A law school graduate working at Subway would therefore be included in the 87 percent of graduates who secured a job nine months after graduation.\(^10\) But in spite of strategies to finesse their survey’s information, *U.S. News*’ most recent rankings definitively report that more and more graduates are finding jobs, with 93 percent of graduates finding employment in the first nine months.\(^11\) Although these statistics may not be as positive as they appear, the increased percentage of employed lawyers certainly indicates an encouraging shift.

With the recession and the inflation of law school tuition, law school may appear less worthwhile then it has in the past. While the inflated loans have made it increasingly necessary to attain a job directly out of law school, due to the low unemployment numbers of the legal profession it is relatively easy for law school graduates to gain the jobs they need to pay off their loans. Therefore even with severely inflated tuition prices, law schools’ benefits seem to continue to outweigh the drawbacks.

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The Effects of Alabama’s Toughened Immigration Law

By: Silvia Zeng

In early June 2011, Alabama Governor Robert Bentley signed the state’s highly controversial immigration law, HB 56. Federal Judge Sharon Blackburn wrote a decision, green lighting a majority of sections of the law. HB 56 essentially gives state and local police the authority to investigate the immigration status of those detained during routine traffic stops so long as there is reasonable suspicion that the individual is undocumented; penalizes companies that employ undocumented immigrants; prohibits renting property to undocumented immigrants; makes it a felony for undocumented immigrants to apply for a driver’s license, license plate, or business license; and also prohibits undocumented immigrants from making business transactions with the state. HB 56 has been widely considered as the nation’s strictest, arousing quite different views in the political arena.

Since Governor Bentley’s signing of the law, there have been a number of lawsuits brought against HB 56, challenging its constitutionality. The American Civil Liberties Union and other civil rights groups have filed a lawsuit charging this law, which allows for search and seizure of Alabamians without a warrant, a violation of the Fourth Amendment. Church leaders have filed another lawsuit against this extreme anti-immigration law due to the violation of their First Amendment rights, because “administering of religious sacraments, which are central to the Christian faith, to known undocumented persons may be criminalized under this law.” In addition, the Obama administration’s lawsuit against this law argues that federal law prohibits the state from adopting its own immigration regime because it would interfere with the federal immigration system.

Alabama’s stringent law contains many measures comparable to those passed in Arizona’s in 2010, among which include the authorization of police officers to detain an individual upon “reasonable suspicion” that he is an illegal immigrant, and the requirement that businesses use the federal E-Verify system to determine whether potential employees are legal residents. One of the harshest provisions of HB 56 requires Alabama’s elementary and secondary schools to determine the immigration status of students upon enrollment. Many parents have opted not to send their children to school out of fear that doing so will lead to their arrest and/or deportation. The morning after the law had passed, the state’s entire Latino student population dropped 5 percent despite the promise that this law does not apply to students who have been enrolled before September 1, 2011.

However, the federal judge also blocked five notable provisions of the law that criminalize harboring, transporting, or hiding undocumented immigrants; prohibit undocumented immigrants to seek employment.

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in the state; make it illegal for businesses to deduct wages paid to undocumented workers from their taxes; ban illegal immigrants from enrolling in and attending public universities; and allow for discrimination lawsuits against employers who hire undocumented workers in place of employees who are United States citizens.10

Despite these provisions, HB 56 has created a number of unintended consequences. Judge Blackburn’s stringent ruling has left illegal immigrants in a state of panic. Just hours after the stringent new law took effect in September 2011, thousands of Hispanic families had packed and fled their homes in Alabama, to Tennessee, Illinois, Oregon, Florida, Arkansas, Mexico — essentially anywhere but Alabama.11

In a brief statement given after the law was put into effect, Governor Bentley noted, “Today Judge Blackburn upheld the majority of our law. With those parts that were upheld, we have the strongest immigration law in the country.”12 In a separate interview with Governor Bentley, he explains that the enforcement of this law is intended to protect the rights of Alabamians to work. “In Alabama, we intend to protect the long-term interest of our citizens and legal immigrants. We will ensure that jobs in our state go to those who are legally present. We intend to keep dollars rolling over in our local economy, not overseas. We intend to lessen the burden on our taxpayers. We intend to do so by enforcing our new law. If looking out for Alabamians is draconian, so be it.”13 Though it poses a plight to undocumented citizens, Alabama’s new law helping to prevent heavy immigrant occupancy within state borders is being upheld by state officials in efforts to decrease local unemployment. If too many immigrants leave then there may be unintended consequences if there are not enough farm laborers, or hotel or restaurant workers, or large shifts in school demographics or a drop in tax revenues.

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Motorola’s Patent War with Apple

By: Dustin Vandenberg

Apple, Inc. has been involved in numerous headline-stealing patent cases with a wide variety of companies. Apple has some of the best intellectual property lawyers available. However, Motorola recently beat Apple in a series of court cases in Germany, forcing Apple to respond to new injunctions against their products. This is one of the first major losses for Apple in the realm of patent litigation, and was dealt by none other than Motorola – who is in the process of being bought out by Google (Apple’s main rival in the mobile technology world). There were two separate court cases in Germany pertaining to Apple and Motorola. First, Motorola contested that Apple International (the branch of Apple responsible for online sales internationally) used their data packet transfer technology (GPRS) in iPhones and iPads.¹ Motorola won this case, and an injunction was filed to prevent the online sale of iPhones and iPads in Germany.² However, Apple responded that Motorola did not offer the patents under fair conditions, so the injunction has been temporarily suspended.³ The second court case involved the use of “push e-mail” in Apple’s “iCloud” service. Motorola contested that they had a patent for the use of “push e-mail,” and the courts agreed, creating a permanent injunction against the use of push e-mail within Apple’s iCloud software in Germany.⁴ These cases, along with the possible acquisition of Motorola by the technology giant Google, are just the beginning of a long patent war between Apple and Motorola.

To begin with the first court case in Germany, one needs to understand the background of GPRS. GPRS is patented by Motorola under European Patent #EP1010336, yet Apple has been using the technology since the original iPhone in 2007. Motorola believes that Apple should pay not only to use the patent with current and future devices, but also that they are obligated to pay for all use of GPRS technology since 2007. Apple is willing to pay for the use of the patent with current and future devices, but has refused to pay for its past use of GPRS. In December 2011 the Mannheim Regional Court decided that until Apple has paid for the use of the patent, it will grant an injunction preventing Apple International from selling iPhones and iPads online in Germany.

In response to the injunction, Apple appealed the decision to the Karlsruhe Higher Regional Court. Their appeal was based upon a principle of patent law in both the United States and Europe called FRAND.⁵ FRAND is an anti-monopoly measure that holds that patents that are a standard of an industry must be available for use under fair, reasonable, and non-discriminatory means. Apple is arguing that the GPRS technology is an industry standard, and that they have made attempts to pay royalty fees under FRAND stan-

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(Continued from page 8) standards that Motorola has not accepted. Motorola argues that the offers made by Apple were not reasonable, and therefore the technology should not have been used by Apple without royalty payments. Until the question of whether or not Motorola was following FRAND standards has been answered by the Karlsruhe Higher Regional Court (which is currently deciding upon Apple’s appeal), the German courts have temporarily lifted their injunction on Apple’s online sales.

Unlike the first court case between these two technology giants, the second case was a decisive win for Motorola. In this case, Motorola contested that Apple used their patented “push e-mail” technology without paying royalties. Essentially, when a phone checks for e-mails, it periodically sends a request to the e-mail server to find any new e-mails. With push e-mail, whenever new e-mails arrive at the mail server, they are automatically “pushed” to the user’s phone. This improves the speed that e-mails can be received and was implemented by Apple in their “iCloud” software package. Motorola took the case to the Mannheim Regional Court in Germany, claiming that Apple used Motorola’s European Patent #EP0847654 to implement push e-mail functionality in their devices. The courts ruled in favor of Motorola, creating a permanent injunction against Apple, forcing them to remove the push e-mail functionality from their iCloud software package. The decision in this case is appealable to Karlsruhe Higher Regional Court and the injunction will only be enforced if Motorola is willing to pay a €100 million Euro bond. The reason for the bond is to ensure that if the decision is appealed to the Karlsruhe Higher Regional Court and the ruling is overturned, Apple will have the lost money reimbursed. However, with Motorola in the process of being acquired by Google, it is very likely that the bond will be paid, in which case Apple users in Germany would lose push email functionality.

These two separate, yet strategically related, lawsuits by Motorola have shown that the technology giant Apple is not impervious to patent litigation. While Apple may have deflected the injunction placed against the sale of iPhones and iPads online that resulted from the first lawsuit, they were not able to avoid the second injunction preventing the use of push e-mail technology in their software. While the enforcement of these injunctions is pending on the €100 million Euro bond to be paid by Motorola, their possible acquisition by Google creates a strong possibility that they will have the capital to fight against Apple. Only time will tell who the final victor will be in the patent wars, but as of right now, Motorola has dealt a decisive blow to Apple’s team of intellectual property experts. In addition, there is no reason to believe that this patent war will come to an end any time soon, as both companies fight for consumers around the world; they both will use the court system to gain a tactical advantage in the

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Supreme Court Strikes Down Warrantless GPS Tracking

By: Joseph Beebe

As society continues to rapidly develop new and better technology, methods of surveillance have changed to a point that requires re-examination of laws, written before said methods had even been invented. In one such example, a man named Antoine Jones was arrested based on evidence discovered via a Global Positioning System (GPS) monitoring system installed on Jones’ car without a valid warrant. Facing a life sentence in prison, Jones appealed the decision. His case eventually reached the Supreme Court, where Justices unanimously ruled that GPS surveillance requires a search warrant.

In 2004, Washington D.C. Police suspected nightclub owner, Antoine Jones, of trafficking cocaine. In a joint operation with the FBI, the police placed a GPS tracking device on Jones’ Jeep Grand Cherokee, without a proper warrant. Evidence found using the tracking device was used to convict Jones of selling cocaine, who subsequently received a life sentence in prison. In August of 2010, the United States Court of Appeals for the District of Columbia Circuit overturned the conviction, citing a violation of the Fourth Amendment. In June of 2011, the Supreme Court agreed to hear the case to resolve the question: “whether the government violated respondent’s Fourth Amendment rights by installing the GPS tracking device on Jones’ vehicle without a valid warrant and without his consent.”

Oral arguments presented before the Court focused on the question of privacy versus the technical definition of a “search”. The appellant argued that the placing of such a tracking device, without a proper warrant or consent of the tracked, constituted an illegal search and seizure, violating the Fourth Amendment. In response, the Government argued that a warrant was not needed, because the GPS tracking did not constitute a “search”, citing legal precedence in the case of United States v. Knotts 460 U.S. 276 (1983). Knotts states that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” According to the Government’s argument, a GPS tracker gives no more information to law enforcement agencies than what could be observed through visual tracking by officers, a type of tracking established to not require a warrant.

In their decision, the Court unanimously ruled that the placement of a tracking device constituted a search, and thus, required a warrant. However the Justices were split 5 – 4 on the question of whether or not Jones’ reasonable expectation of privacy was violated. Writing for the majority, Justice Antonin Scalia, ruled in favor of the appellant based on the fact that a person’s property is legally sacred. “The government physically occupied private property for the purpose of obtaining information,” said the ruling. “We have no doubt that such a physical intrusion would have been considered

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a 'search' within the meaning of the Fourth Amendment when it was adopted. Justices Anthony Kennedy, Clarence Thomas, and Sonia Sotomayor, along with Chief Justice John Roberts, concurred. However, Justice Samuel Alito led the minority opinion that the court should have utilized the case to define the parameters of police monitoring in a rapidly developing digital age. Joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan, Alito wrote that "The availability and use of these and other devices will continue to shape the average person’s expectations about the privacy of his or her daily movements...In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative."

The implications of Jones could vary depending on future courts' interpretations of the ruling. Under Scalia's property based judgment, law enforcement agencies may only need to obtain a viable warrant to use new electronic surveillance techniques. However, Alito's minority interpretation may set the precedence for what can be considered a reasonable expectation of privacy in the digital age. Regardless, the case of United States v. Jones, is only the first of many arguments to come as the legal system is put to the test by advances in technology.

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Transgender Bill of Rights: An Overdue Transition to Equality

By: Daniel R. Mello, Jr.

On January 20, 2012, Massachusetts became the sixteenth state to acknowledge transgendered individuals as a protected class, free from discrimination and hate crimes.\(^1\) This wide-ranging Bill of Rights touches all aspects of life from employment to housing, civil rights, and education.\(^2\) Although the passing of this bill is an undeniable victory, it is concerning that no laws had been previously enacted to protect the fundamental rights of our peers. Furthermore, thirty-four other states still do not offer such basic rights to the transgender population. Why has there been such a lag? The minimal exposure to transgendered individuals—in addition to the small number of transgender rights activists—is certainly in part to blame, but arguably the history of mislabeled discrimination and misunderstanding plays a more integral role. Understanding the nexus between vocabulary confusion and misdirected discrimination towards transgendered individuals will hopefully encourage other states to reconsider their existing policies to afford equal protection to all of their citizens.

Only a small handful of people can differentiate transgenderism from homosexuality, androgyny, intersexuality, or transvestism. Even fewer can distinguish between transgenderism and transexuality. With novel colloquial terms such as “genderqueer” and “drag king/queen” disseminating faster than the education needed to understand them, the aforementioned categories seemingly meld into one umbrella classification. This socially acceptable interchanging of terms can lead to infectious mislabeling.

One who is transgendered has “a gender identity [that] is not consistent with the biological sex.”\(^3\) Beginning in childhood, these individuals generally experience dissonance through the feeling of being “trapped” inside the body of a biological sex that does not equate to their psychological gender.\(^4\) Transgendered individuals generally interact most comfortably with the opposite biological sex and fit many of the stereotypes characteristic of that gender.\(^5\) A transsexual, by contrast, refers to an individual who actively undergoes gender modification through hormone treatment or sex reassignment surgery (SRS) and “transitions sexes” from a biological male into a biological female or vice-versa.\(^6\) Transsexuals are often, but not always, transgendered.

Note that these two terms are fundamentally different from homosexuals, who are members of a specific gender and find themselves “sexually attracted to and generally desirous of emotional attachment to members of one’s own biological sex.”\(^7\) Almost always, a homosexual’s gender identity is “consistent with his/her biological sex.”\(^8\) By contrast, transgendered individuals who have sexual attraction to members of the same biological sex may or may not consider themselves to be gay depending on their elected gender identity.\(^9\)

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Another term commonly confused with transgender is transvestite. A transvestite "adopt[s] the appearance of the other sex" by mimicking the stereotypes of how the opposite sex should dress. Transvestites generally adorn themselves in such a way that other people cannot distinguish them from their portrayed gender. The reasons behind their behavior can be sexually motivated (fetishism) or for entertainment ("drag kings/queens") and generally have no connection with identifying as transgender.

Even after a lengthy description of each of these terms, it can still be difficult to precisely label transgenderism. The "who," "why," and "how" of gender dimorphism—the formal term for transgenderism—remains obscure, causing discriminatory behavior and sexual stereotyping of the various members listed above to be unfairly misdirected at transgendered individuals.

This type of bias can be seen in the trademark transgender case, Karen Ulane v. Eastern Airlines, Inc. Ulane sued her employer for wrongful termination under gender protection afforded by Title VII after receiving full hormone injections and SRS. Eastern Airlines claimed they were unaware of Ulane's gender reassignment process until she attempted to return to work as a female. Eastern Airlines fired Ulane because she was transsexual. Ulane lost the case as the court held that transsexuality is not included in the list of codified protections under Title VII. In another case, Jane Doe v. Boeing Company—also known as the "Pink Pearls" case—Doe sued on the premise of unaccommodated disability after being fired for wearing "excessively" feminine attire (pink pearls) against company directives. Doe asserts that her disability was being transgendered and her company would not allow her to fully assimilate as a female pre-operation. Boeing won because its policy was uniform across employees.

In both cases listed above, each employer admits to its discriminatory practice, yet neither plaintiff is awarded relief. The employer hostility is a reaction to transgenderism, but is also based on the stereotypes of the biological sex. This creates a perception of homosexual and transvestic behaviors that are the premise for discharge in the Ulane and "Pink Pearls" cases. In Ulane, Eastern Airlines asserts they were entirely unaware of her status as a transgendered individual, yet when she attempted to return to work, Ulane was harassed and treated like a man. Colleagues would also make homosexual references and expect male gender stereotypes. Likewise, in "Pink Pearls," Boeing knew of Doe's transsexuality, but refused to let her fully identify as a female until post-surgery. Boeing's decision was based on its uniform policy that had strict codes based on gender. These two cases are landmark in the sense that they demonstrate the paradox of forcing and trapping transgendered individuals into socially determined gender stereotypes based on bio-

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logical sex rather than perceived gender. This carries with it a history of negative stigma associated with gays and cross-dressers, both of which are not necessarily characteristics of transgenderism.\textsuperscript{25} The courts in both instances permitted transgender discrimination.

The Transgender Bill of Rights passed in Massachusetts is undeniably an achievement for transgender rights. Even still, many groups continue to speak out against the Bill. One such group, the Massachusetts Family Institute, makes the common mistake of confusing transgenderism with homosexuality.\textsuperscript{26} The group “strongly opposes any efforts by political activists to normalize homosexual behavior and all attempts to equate homosexuality with immutable characteristics such as skin color.”\textsuperscript{27} These types of biased attitudes have become rampant, negatively affecting transgendered individuals across the nation. Permission of this problematic mistreatment can be partially attributed to the 7th Circuit’s assumption that transgendered individuals make a gender choice, which is not a protected category under precedent. Misunderstandings and muddied definitions causing these biases are the crux that will continue to prolong the full acceptance of transgendered individuals in America.

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Bubbling at the Source
By: Catherine Simon

When one thinks of water, one thinks of an unlimited resource that flows in and out of our lives in a seemingly trivial way. Most do not stop and think where their water is coming from, who owns it, or who has a right to it.

In reality, water is a finite resource, a fact that has recently entered the forefront of many concerned citizens’ and nations’ minds as climate change has begun to alter the hydrological landscape. Even before recent droughts in Africa and rising sea levels began to affect small island nations in the Pacific, bottled water companies took root and tapped into what they call “blue gold.”

This commoditization of water has fundamentally changed the public perception of traditional sources of water, such as the tap. The public has been conditioned to think bottled water is safer, cleaner, and healthier than tap water. The public buys into these marketing tactics because it prefers the convenience and taste or believes the advertising it sees about bottled water. Peter Gleick of the Pacific Institute for Studies in Development, Environment and Security points out, “bottled water has become so ubiquitous that it’s hard to remember that it hasn’t always been here.”

However, the bottled water industry did not become significant in the United States until 1977 when Perrier came across the ocean from France to our shores. Furthermore, once soda sales began to drop in 1989, PepsiCo and Coca-Cola decided to break into the market with a healthier substitute for soda. Original profit motives combined with today’s profuse consumer demand have resulted in the creation of and the sustainment of one of the largest global industries.

The average person does not typically associate bottled water with environmental harm, as he or she would the fossil fuel industry, for example. Despite the public’s unawareness that bottled water and environmental degradation are connected, the bottled water industry acts in many of the same ways as the oil industry in that corporations move from town to town harvesting groundwater, which feeds local springs and reservoirs, until, in some cases, the resource runs out.

Nestlé S.A., a transnational corporation based in Switzerland, is the world’s largest purveyor of bottled water. Nestlé is the parent company of Nestlé Waters North America, which operates regionally as Poland Spring, Deer Park, Zephyrhills, Ozarka, Ice Mountain, and Arrowhead. In 2010, Nestlé Waters’ profit from bottled water sales was $8.7 billion. Bottled water companies are generating substantial profits but at a high cost to society.

Legal battles between bottled water distribution plants and their local citizens have been bubbling up across the country. As bottled water plants pump huge volumes of water out of the ground, local residents frequently start to notice that streams in their

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backyards cease to flow and lakes are no longer deep enough for boaters to enjoy. These instances make citizens aware of the violation of their riparian rights, which “belong to landowners through whose property a natural watercourse runs, to the benefit of such stream for all purposes to which it can be applied.”

The citizens of Fryeburg, Maine issued such a complaint in 2005 against Nestlé Waters. Groundwater rules and legislation are dependent on individual state regulation. In Maine, for example, the rule of absolute dominion is in place, which grants the landowner the right to pump as much water as wanted without consequence to others. Thus, Nestlé Waters can legally pump its millions of gallons of water every day from their own property.

With vast legal resources at their disposal, corporations like Nestlé Waters can wage long-lasting cases with little expense, whereas the private citizens and groups who seek justice often run out of funds. Many court cases have failed to resolve the environmental consequences of pumping bottled water, but sometimes the amount of water that can be extracted is reduced. Communities are still struggling to successfully coexist with bottled water plants, which the continued abundance of cases springing up in various areas across the country demonstrates.

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The Debate on Juvenile Delinquency Laws: Finding ‘Justice for All’

By: Elyssa Sternberg

There is a fine line between an innocent child and a teenager fully cognizant of his/her crimes against society. In the past fifteen years, there has been a change in laws concerning juveniles. Specifically, these laws pertain to the treatment of juveniles in the criminal justice system. Some argue that prosecution should be based upon the crime committed, not the age of the offender. For example, fifteen states have “mandatory waivers” that automatically transfer a youth’s case into adult court for certain offenses. The idea that the time should be based on the crime, and not the age of the offender, is a morally sound argument. However, this may not be the most effective way of stopping crime.

After the age of eighteen, no one is treated differently; a twenty-three year old is equal to someone who is fifty-three years old. One may question why there is a difference between someone who has two months until his/her eighteenth birthday and someone who has been eighteen for two months. In 2007, 24.56% of juvenile delinquent cases nationwide were violent crimes against the person. This displays the frequency of violent crimes committed by juveniles, showing that juveniles are capable of committing an adult action and are, in fact, doing so at an alarming rate.

PBS’ Frontline, followed four teenagers between the ages of sixteen and seventeen as they progressed through the criminal justice system, to see if they were fit to stand trial as a juvenile. One of the teenagers, Manny, was convicted of rape at the age of fourteen, and was being tried at the age of seventeen for violently attacking a family, including a pregnant woman.

There was an additional teenager, Marquese, who had been convicted of seven juvenile theft felonies at the time of his new theft conviction shown in the episode. He committed these crimes two months before his eighteenth birthday. If he had committed those crimes two months later, the question of keeping him in juvenile court would not have been an issue.

While these points are valid, the effectiveness of transferring juveniles into adult court has been questioned. It has been demonstrated that youth who are transferred into adult courts are more likely to become repeat offenders. By comparing changes in crimes committed by youth before and after legislation calling for the harsher punishment of juveniles had been passed, it was displayed that passing such legislation may not deter youth crime. This demonstrates that, despite the idea some youth can understand the nature of their crimes, they do not learn or rehabilitate well in the adult court system.

There is also a concern of whether or not minority youth are receiving the same type of treatment. Jolanta Juszkiewicz’s 2005 study shows that youth of a minority race receive different treatment than youth of a majority

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race, treatment that is more favorable in some circumstances. This highlights another issue about the regulation of transferring juveniles into the adult system. It may end up that an attempt at fair justice is not justice at all.

In addition, some are concerned that youth are being punished too harshly for a crime they do not fully understand. “A fair punishment for an adult is unfair when applied to a child who did not understand the consequences of his or her actions or who was unable to exert control over his or her behavior.” This idea is supported by the notion that not every youth of the same age has the same maturity level or has developed in the same way. “Development tends to be gradual rather than abrupt and highly variable among individuals of the same chronological age.” While one may interpret a person who committed a violent crime as having adult maturity, it may be that a youth is severely immature and therefore does not understand the nature of his/her crimes.

Determining what characteristics make up an adult and what characteristics make up a child is the heart of this debate. In conjunction with this idea, the line between when one has developed maturity, and how the law should handle this variable factor is also a point of debate as well. In order to resolve this matter, some have looked into adding a third category to the definition of individuals in the legal system. “...juveniles, who should be categorically non-transferrable to criminal court; adults, who should automatically charged in adult court; and, youths, whose transferability to criminal court should be determined not on the basis of the alleged offense, but through competence testing.”

The concept of when to transfer youth into the adult court system is important to determining if juveniles are being fairly treated in the justice system. By understanding the difference between what should happen and what is actually effective, one can help to improve the system to make sure there is really justice for all.

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Citizens United and Corporate Rights in History

By: Michael Ferron

Citizens United vs. Federal Election Commission (FEC)\(^1\) case revolved around whether Citizens United, a conservative political advocacy group, had the right to air a broadcast of Hillary: The Movie, which was highly critical of the then-senator on pay-per-view television shortly before one of the Democratic Party’s primaries in 2008\(^2\). The FEC found this proposed action in violation of the McCain-Feingold Act, which forbade corporations from using general treasury funds to engage in any cable broadcast specifying a candidate for federal office within thirty days of a primary, excepting Political Action Committees (PACs) and media corporations\(^3\). Citizens United believed that this was an unconstitutional ban on their right to free speech, as the Supreme Court had held previously that spending restrictions on political speech limits political discourse and are subject to first amendment protections\(^4\). Citizens United proceeded to sue the FEC on these grounds. The appeals were heard as high as the Supreme Court where Justice Kennedy finally ruled in favor of Citizens United, striking down the McCain-Feingold Act as unconstitutional\(^5\).

If one scans the multitude of articles written about the controversial case Citizens United vs. FEC one might happen upon one (whose title and author are omitted for decency) that forcefully decries Chief Justice Robert’s opinion claiming that money is speech and the effective removal of all limitations on corporate campaign donations. However, it doesn’t seem so forceful to those who have read the actual opinion, written by Justice Kennedy, but emblematic of the sad misconception surrounding the dispute.

It is noteworthy that Justice Kennedy did not emphasize the right of individuals to speak freely whether independently or in groups, as Justice Scalia did in his concurrence, but rather the rights of corporations themselves, as legal persons\(^6\). This is hardly a new idea, as John Dewey explores in his 1926 article, “The Historic Background of Corporate Legal Personality”\(^7\). Here, Dewey explores the various conceptions of groups of people as legal agents that have influenced the way the United States deals with such issues. One major influence comes from our time as British colonies. Under British Common Law, a “person” was anything capable of having rights or duties, what Dewey terms “a right-and-duty bearing unit”\(^8\). Companies would be granted Royal Charters enumerating the rights and duties a given organization would have, thereby granting the association personhood. However, corporations had only those rights granted by charter, and could not claim any rights of citizenship that were not included in the document\(^9\). Another influence came from Ecclesiastical Law, in which corporations were recognized as people in that they could act of themselves and of

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their own accord. Yet, here too they were limited, considered only “false persons” for the purposes of action, as only things with souls can have moral (and legal) responsibilities and privileges. In this view, a corporation’s rights are merely the sum of its member’s rights.

Dewey feared that corporations could play off of competing conceptions of their own personhood to assert rights they were never meant to have and avoid limitations that might reasonably be placed on them. In November a company might assert the right to free speech as a right-and-duty bearing unit to influence an election, but deny that as a false person it can have any duties not arising from the aggregate responsibilities of its members during April tax season. Whether or not the Supreme Court’s decision justifies Dewey’s concerns is unclear.

Whether there is a constitutional argument to be made either way for a corporation’s right to free speech is even less apparent. Under the Common Law conception, a corporation is perfectly capable of possessing some of the same rights as actual persons. Yet, there is not an actual need for a corporation to have any of those rights, and in a day without Royal Charters the Constitution is unhelpfully vague on the subject. On the other hand, the false persons’ model would seem to imply that corporations do not have a right to speech, and indeed have no rights at all. Still, this does not rule out the possibility that there is an aggregate right of the corporations’ members to make themselves heard either individually or in assembly, as Scalia reminds us.

Even if such a right to corporate free speech, there may be grounds to override it. The Supreme Court in its ruling found not only that corporations had a right to speak, but that under certain conditions the right to speak could be overridden if a compelling state interest could be provided. The FEC put forward the position that the McCain-Feingold Act avoided the corruption that comes with an influx of corporate dollars into elections, or at least the appearance of said corruption. This could be the compelling interest for which the Supreme Court was looking. Citizens United responded by pointing out that direct contributions to candidates were still illegal under preexisting statute. Not content with that, the FEC also claimed that there was a compelling state interest in seeing that the political process was not distorted by disproportionate amounts of corporate money taking up the airwaves rather than the potentially more popular, but less funded groups. Citizens replied that the statute did not prohibit advocacy for most of the year, merely in the last days before a primary or general election, and thus that it could not be the intent of the law. Further, they argued that such measures would undoubtedly be held unconstitutional if applied to wealthy individual persons, and thus must be held so with corporate persons.

Ultimately it was this latter view that the Supreme Court accepted, and the one that was written into
war of attrition we know of as the technology sector.

Sources:

2. Ibid.
3. Ibid.
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law in Justice Kennedy’s opinion. Whether he was right or wrong in his decision is a matter about which we can have a significant and nuanced legal debate. For good or ill, Citizens United furthers a view of campaign finance reform that the majority of the country may not hold. As of yet, Citizens United has not facilitated the corporate takeover of the government, unprecedented assertion of rights, or the collapse of the democracy. These things exist in the media only. While it is a contentious and controversial issue, those individuals who create such fear ought to find a better use for their time, perhaps to read a book on legal history.

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4. Citizens United
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Of Pulpits and Press Coverage:
The Catholic Church Fights PPACA Birth Control Amendment
By: Nicole Falgoust

Since its ratification on March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) has remained in a cloud of controversy due to the nature of its included provisions and the effects those provisions have on the nation’s healthcare system. In November 2011, PPACA faced appeals courts in Virginia, where challengers of the healthcare reform stated that an individual mandate was unconstitutional on the grounds that the government could not regulate it, as Congress cannot regulate commerce or lay taxes on a citizen’s economic inactivity. The mandate requires citizens to purchase public health insurances or pay a fine. The government attempted to curb disputes regarding constitutionality by announcing that each state would define their residents’ “essential benefits” as covered by PPACA. The government believes that “the Affordable Care Act is constitutional and [it is] confident the Supreme Court will agree” when it hears the challenges (starting as early as March 2012).

Recent debates, however, focus not on a breach of the Commerce Clause; the Commerce Clause states that Congress may regulate commercial relations between “foreign Nations, and between the several States, and with the Indian Tribes.” Instead, opponents of the mandates believe the government is violating the First Amendment’s stipulation that “Congress shall make no law respecting an establishment of religion, or prohibiting the free practice thereof.” The Obama administration decided, on January 20, 2012, to include prescription contraceptives to the list of preventive health services as covered by PPACA. The Catholic Church, which finds the use of birth control objectionable on moral grounds, is now required to cover contraceptive prescriptions for their female employees and, in the case of Catholic Universities, for their students. Unless religious organizations with this same belief structure – i.e., that contraceptive use is sinful – decide to “employ primarily or exclusively members of their own faith, exist primarily for the inculcation of religious values and provide their service primarily to members of their own faith,” the law cannot exempt them from including birth control in women’s preventive health services packages. The above constraints mean that Catholic schools, hospitals, social services, and the like must offer contraceptive coverage to female employee at the risk of paying penalties if they do not comply.

What does the mandate, and the Church’s resistance to comply with it, mean for American women? According to the National Women’s Law Center (NWLC), “the coverage of contraception is a neutral regulation that applies to all employers; it does not single out any religious entity or practice...guaranteeing contraception coverage does not violate the First Amendment.” For the millions of American women

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relying on contraceptive prescriptions, the new amendment to PPACA eliminates any misgivings about seeking prescriptions because they cannot afford either the doctor visits or the contraceptives themselves.\textsuperscript{10} Women without birth control may face unplanned pregnancies and the medical ramifications of those pregnancies, whether through gestational diabetes and other health concerns for the mother or low birth-weight or related complications for the child.\textsuperscript{11} Therefore, groups such as the NWLC advocate that it is “unacceptable as a matter of law and policy – for an agency to create an exception to longstanding civil rights principles that allow religious employers not to comply with the law.”\textsuperscript{12}

The Church, however, considers the new amendment a blight on religious freedom rather than the helping hand women with moderate-to-low income – those who could not necessarily afford birth control without government assistance – regard it as. The United States Conference of Bishops states the “unjust regulation” is an attack on religious freedom, announced that the “president is saying we have a year to figure out how to violate our consciences.”\textsuperscript{13} Keeping in mind the Church’s belief that Obama challenges the concept of separation of church and state, the media informed voters – particularly voters with strong ties to their religious organizations (Catholic or otherwise) – of Republican candidates’ opinions on various morally controversial topics (e.g. abortion) during the state caucuses earlier in the election year.

The first articles covering the election process state that candidates Rick Santorum and “[Newt] Gingrich both support ‘personhood’ initiatives that would legally declare fertilized eggs to be persons, effectively banning not just all abortions but also certain contraceptives, including Intrauterine devices (IUDs) and some types of birth control pills.”\textsuperscript{14} Mr. Gingrich also advocates removing government funding from Planned Parenthood – an organization responsible for offering preventive services, as well as educating communities about sexual health – due to the organization’s abortion practices.\textsuperscript{15} Yet with a reported 98% of Catholic women relying on contraceptives despite Church doctrine’s strict instructions to abstain from using them, one cannot be sure that Catholic voters would choose a candidate with such strong objections to prescribing contraceptives or performing abortions.\textsuperscript{16}

Society may face one extreme or the other: disregarding the Catholic Church’s religious freedom by forcing them into covering their employees’ birth control prescriptions, or completely removing a woman’s ability to delay or terminate pregnancy. Though the nation was founded on ambitions separating church dealings from government action, the current predicament finds voters incapable of truly detaching their religious opinions from their political ones. The health care reform might further the “holy war”
Evaluating Anti-SLAPP Legislation

By: Sam Wildman

A Strategic Lawsuit Against Public Participation (SLAPP) is a tool used by plaintiffs to suppress critical statements made by a defendant. A person or group uses the courts to sue another group or individual who has criticized or opposed the first person or group. The idea is to swamp the second person or group with court costs in order to force the cessation of the criticism or opposition. Anti-SLAPP is the attempt to stop the first person or group’s behaviors. The plaintiffs in a SLAPP suit are usually organizations or individuals able to write-off high legal fees (and potential fines for bringing a lawsuit in bad faith). SLAPPs most often claim defamation or damage to the plaintiff’s reputation caused by false statements. However, SLAPPeters may use other claims such as intentional or negligent infliction of emotional distress, interference with contract, or ironically, malicious prosecution.

The essential feature of a SLAPP is the fact that the plaintiff brings their claim or counterclaim (a lawsuit in response to the plaintiff’s claim) in bad faith. In other words, the SLAPPer deliberately files an un-winnable. If fully litigated, most SLAPP actions would fail.

However, the purpose of a SLAPP suit is not to stand up to the adversary process. Rather, a SLAPP aims to silence the defendant by presenting them with the prospect of an expensive and prolonged lawsuit (in the United States, a defendant is usually required to pay their own legal fees even whether or not they win their suit). Moreover, the SLAPPer often uses excessive discovery (requests for documents or information) and other delaying tactics to drive up the defendant’s legal fees. These tactics are effective in silencing defendants, who either run out of money or settle the case. SLAPP settlements typically require that the defendant retract or remove their previous claims or that they cease and desist in any further comments on the issue. SLAPP suits also aim to intimidate defendants and other parties with extremely high damages.

The legal status of SLAPPs is not in question: filing a lawsuit in bad faith is illegal. Moreover, SLAPP suits suppress (at the very least) an individual’s First Amendment right “to petition the government for a redress of grievances.” More generally, it is argued that SLAPPs have a chilling effect on free speech protected by other parts of the First Amendment.

This essay addresses the question of the best methods to reduce bad-faith litigation without interfering with a plaintiff’s equally legitimate right to petition by discouraging them from suing when a legitimate grievance exists. Currently 47 US states (and Washington D.C.) have anti-SLAPP legislation of some form, while many states without such statutes include some kind of common-law protections.

While the exact scope of anti-SLAPP legis-
tion varies by state, many of the general provisions of these laws are fairly similar to each other. Typically an anti-SLAPP statute allows the defendant to file a pretrial motion that removes part or all of the plaintiff’s case. After filing this motion, the defendant’s must show that the complaint in the SLAPP suit relates to a protected sort of first amendment exercise (this varies by state).

Then, the plaintiff must prove that they have a prima-facie case against the defendant; that is, they must prove that they are bringing a strong case. If the judge rules in favor of the defendant plaintiff must pay the defendant’s legal fees. Finally, many laws enable plaintiffs to recover damages by facilitating malicious prosecution suits against a SLAPPer.

The range of protected speech varies in different states’ anti-SLAPP legislation. States such as Massachusetts interpret ‘public participation’ strictly. The Massachusetts law only protects speech that is a part of a government proceeding. Testifying before the legislature, criticizing a local housing development at a town meeting, or making comments about the Iraq War are examples of protected speech. However, statements about a local business would not be protected.

At the other end of the spectrum, California’s Code of Civil Procedure § 244.12 explicitly defines public participation as “any...conduct in furtherance of...free speech in connection with [an] issue of public interest.” This protects almost all kinds of First Amendment activity related to public issues.

The most worrying criticism of strong anti-SLAPP legislation such as that of California is that it discourages plaintiffs with less-certain cases from filing suit: the prospect of paying the defendant’s legal costs is a very strong deterrent to individuals who do not have deep enough pockets to absorb those costs. One might counter that California’s legislation requires that a case be prima-facie frivolous. This standard is more likely to exclude illegitimate suits than it is to falsely include a legitimate complaint. Because the issue must be decided on its face value both parties are on more even footing. Moreover, the California statute requires that the SLAPP action be malicious.

A far more serious and controversial issue is whether there is a place for federal anti-SLAPP legislation, but before we examine these objections it is worthwhile considering why some believe federal legislation to be necessary. Because of the closely connected world that we live in it is possible, indeed likely, that the plaintiff and defendant in a SLAPP suit reside in different parts of the United States. This means that a plaintiff can go ‘venue shopping’ and select a court in a state without anti-SLAPP legislation or in the federal courts which may not necessarily consider state anti-SLAPP laws. Therefore, federal anti-SLAPP legislation is designed to provide greater consistency and to limit abusive ‘venue shopping.’

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However, federal first-amendment protections, particularly strong ones based on California’s Code of Civil Procedure § 244.12 potentially run afoul of states’ rights because it grants an entirely new area of federal jurisdiction outside that of the traditional role of the federal government. 16

As with so many issues in our legal system, this particular question is a thorny one that calls for us to weigh our priorities carefully, as each side has important pros and cons. Ultimately, however any federal anti-SLAPP legislation will be strongly tested in US Courts of Appeals, and it is not a certain thing that it would survive even if it is preferable.

Sources:

Special interests’ increasing role in citizen petitions

By: Michael D’Ortenzio Jr.

Our system of democracy, President Abraham Lincoln once said, is “of the people, by the people, [and] for the people.”1 However, power does not always rest equitably with us. Democracy is exercised in many American states through ballot initiatives and referenda. Hallmarks of the Progressive Era, these electoral processes were designed to protect average citizens from special interests’ influence on state government. An initiative petition allows the electorate to decide directly whether a proposal should be law.2 A popular referendum lets the voters choose whether to repeal an act of a state’s legislature.3 Both of these processes require the petitioners to gather a certain number of signatures for a question to be printed on the ballot.2 While the ballot initiative and referendum processes protect the average voter from corruption, they are often co-opted by special interest groups who do not hold the public’s best interest. These processes should be strengthened in order to achieve their original principle.

One of the core tenants of the initiative and referendum system is the requirement to gather signatures in order for a question to appear on the ballot.4 This requirement prevents irrelevant questions and those without broad support from qualifying.5 In many states, the number of signatures required is tied to the number of voters in the last election, preventing the state legislature from setting an artificially high eligibility number.6 Today, however, the signature requirement rarely acts as a check on an out-of-touch or inactive government because grassroots citizen groups are frequently not the ones proposing initiatives. Often, large corporations and businesses with very narrow, complex interests are actually proposing questions for the voters. In addition, money is regularly buying space on the ballot with the growth of signature gathering firms.7 Many registered voters do not even understand what they are supporting when they sign a nomination form.8 There is confusion on Election Day, too. While the Attorney General usually reviews ballot measures for legality, the questions are typically about complicated, nuanced topics with which an average voter is not experienced.9

When passed, initiative petitions usually have far reaching effects on states. For example, taxes on alcohol were removed in Massachusetts in 2008.10 In many states, legislation was approved recently to limit or ban gay marriage.11 In 2012, when a group of citizens in Missouri tried to cap predatory interest rates, which can be over four hundred percent, in the payday loan business, the industry filed two similarly sounding petitions designed to protect the status quo.12 Initiative use has skyrocketed in recent decades; over half of American states currently allow for some form it.13 Unfortunately, many petitions today have increasingly become focused on narrow special interests, in-

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instead of asking voters important, relevant questions about how they want their communities to be run.\textsuperscript{14}

While important topics are put before voters, many of the ballot questions today deal with highly specialized, technical questions that are better left to a legislative committee or independent regulatory agencies.\textsuperscript{15} These petitions are not only confusing, but on Election Day, there are often many of them. Voters in San Francisco, California had twenty-two questions before them on the November 2008 ballot about obscure topics with little background information.\textsuperscript{16} In 2009, then-Chief Justice Ronald George of California worried publicly about the effect of this on liberty, questioning whether “the voter initiative [has] now become the tool of the very types of special interests it was intended to control, and [is] an impediment to the effective functioning of a true democratic process.”\textsuperscript{17} Rather than force voters to make decisions about important legislation in the few minutes they have to vote, the initiative and referendum processes should be more stringent to separate the questions that are meant for voters and the legislation that should go, at least first, to the statehouse. Many citizen initiative processes do not currently require that proposed laws go before a legislature first, which may help sort out which ones are truly the right questions for the voters. In addition, the number of signatures required to appear on the ballot should also be higher; today, when many signatures are collected on a fee basis, this would deter less relevant questions from reaching the polls. Petitions and referenda can be the democratically minded, republican exercises they were designed to be. In a representative democracy, however, it is critical that the role of the statehouse and people be clearly delineated. Early American political theorists “would no doubt [have felt] unalterably opposed” to today’s easily purchased initiative process.\textsuperscript{18} The process should be corrected to truly function as a safeguard for the people.

Sources:

3. Ibid.
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waged against the government regarding birth control and abortion. And until the election results in November, America seems stuck in No Man’s Land, unsure of which side to choose: religion or political freedom.

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