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Legal Practice and Legal Theory Discourse: Critical Views of Education and Research

ABSTRACTS

Osgoode Hall Law School
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Overcoming Barriers to Access to Civil Justice in the Small Claims Court Context

The Ontario Small Claims Court, and its predecessors, were created as a "people's court" to provide expeditious and low-cost access to civil justice for claimants having smaller claims. However, recent developments have made the court less accessible, more costly, and time-consuming for litigants seeking judicial remedies. The centralization of the court in the Greater Toronto Area, the increases in court fees and the increase in monetary jurisdiction have accommodated the needs of the business plaintiffs in their pursuit of debt collection. The business plaintiffs, who are the frequent users of the court, have mastered the intricacies of the court, and are effective in obtaining judgments for their claims. At the same time, the novice or infrequent user, whether a plaintiff or defendant, who is more representative of the court's catchment area, has been somewhat marginalized in the court process. They are often in a muddled state as they seek redress for their more consumer-oriented claims, and face numerous obstacles in achieving a just outcome. The deputy judges, who preside over the adversarial trials, are primarily concerned with the need to be impartial in the trial process, and are less inclined to rectify any power imbalance, or accommodate the individual needs of the litigants. This combination of objective and subjective barriers to civil justice has resulted in an under-representation of ethno-cultural minorities, women and lower income individuals. Furthermore, when these categories of novice plaintiffs do utilize the court process, they are often left in a state of confusion and discomfort.

The alternative dispute resolution capabilities of the Ontario Small Claims provide an opportunity to return the Small Claims Court to its historical roots, and to make civil justice more accessible and cost-effective. The Settlement Conference, which is effectively mandatory in the City of Toronto and York Region, offers a forum for screening the merits of the claims and defences of the disputants, and an opportunity to engage in meaningful mediated discussions. For the first-time or novice plaintiff, who are more inclined to compromise, there is the advantage of a settlement without the cost and risk of a trial. For the business plaintiffs, there is the advantage of a higher rate of compliance from consensual outcomes.

In general, the courts and the legal profession are increasingly recognizing alternative dispute resolution as a means to enhance access to civil justice in a time efficient and cost effective manner legal profession. This, in turn, is having an impact on the curriculum of Law Schools, particularly at Osgoode Hall Law School and Windsor Law School where outreach programs involving ADR have been developed. With the availability of voluntary coached mediation, there is the mechanism for the deputy judges to seamlessly "hand off" disputes for mediation where the time constraints of pre-trials and the ambitious trial lists leave the parties in a position to continue their settlement dialogue while together at the court. This form of mediation service provides a more facilitative environment, and with its co-mediation attribute, there is the opportunity for the mediators to reflect the catchment of the court. The parties have the opportunity to have mediated discussions often involving mediators of similar ethno-cultural groups, and where a gender balance can be achieved. The empathy that can be engendered serves to dissipate power imbalances, enhance settlement dialogue, and restore the court's leading role in resolving civil disputes.

Accordingly, I encourage the continued development of skills-based courses, with the appropriate level of theoretical underpinnings, to enhance access to civil justice, and at the same time, connect classroom study to the realities of the courtroom setting.

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Securities Regulation of Ontario Venture Issuers — Rules or Principles?

Should the securities regulation of Ontario venture issuers be based primarily on rules or principles? There is a debate among Canadian securities regulators about whether detailed, prescriptive rules should be published with known, after–the–fact penalties (a "rules approach"), or whether securities regulators should publish salutary objectives and engage participants in a before–the–fact, best practices dialogue (a "principles approach"). The Ontario Securities Commission has shifted towards more rules since 2004, by adopting detailed rules based on the US Sarbanes-Oxley Act, with some exemptions for venture issuers. In contrast, the BC Commission proposed a principles–based Securities Act in 2004, with a simplified, plain language rulebook with an overarching "Code of Conduct" of twenty–eight general principles. The proposed national securities regulator (declared unconstitutional by the Supreme Court of Canada in December 2011) was also intended to be principles–based.

The rules/principles debate has tended to be more philosophical than scientific. Those in favour of rules, and those in favour of principles, have based their arguments primarily on legal theory rather than on social observation. To resolve this, eight factors are gleaned from the regulatory literature and applied to Ontario venture issuers. The analysis is tested by a survey. The results of the survey, and the consideration of other factors, are weighed in order to make rules/principles recommendations for the securities regulation of Ontario venture issuers.

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The Silent Injustice in Wrongful Convictions: Is Race a Factor in Convicting the Innocent?

The research concentrates on the phenomenon of wrongful conviction and the socio-legal context in which it operates. Within this study, the research investigates the race-crime dynamic. The connection between race and crime is made visible by the fact that racialized and Aboriginal people are over-represented, compared to the population, in every stage of the North American criminal justice system. While racial discrimination in the criminal justice system, to say the least, is morally troubling, the prospect of incarcerating an innocent person is unthinkable. What happens when these two phenomena coincide? Since the 1983 Nova Scotia Court of Appeal decision in *R. v. Marshall* and the subsequent public inquiry, the role of systemic racism in wrongful conviction cases in Canada has gone unexplored.

Situated in the writings of Critical Race Theory this research examines what has been included within the concept of miscarriages of justice and questions where are the experiences of racialized and Aboriginal people in the narratives and reports on the wrongfully convicted in Canada. Certainly, race and racism are not entirely absent from the discourse. In the United States, for example, some attention has been given to the subject with discussions showing that racial disparities found elsewhere in the criminal justice system also appear in the conviction of the innocent. However, when exploring the mainstream discourse in Canada on wrongful convictions and how to prevent them, the racialized and Aboriginal experiences are relatively ignored. If and when racial discrimination exists in cases of wrongful convictions, it is not documented and, in turn, it is denied. One explanation is that the same systemic barriers that racialized and Aboriginal defendants encounter in the criminal justice system also exist when addressing race as a factor in wrongful convictions. Another reason is that Canadian lawyers have failed to engage in racial litigation and the judiciary has resisted in the adoption of critical race approaches when invited to do so. In the end, the need to rethink the current cause and approaches to the study of wrongful convictions is paramount.

Keywords: racialization, systemic barriers, miscarriage of justice, criminal law/procedure

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Through the Looking Glass: International Criminal Law as Seen from the Global South

How is the concept of the 'Global South' to be understood in the context of international [criminal] law? Though this is not the main focus of the present article, it is precisely the question that occupies the mind of those who deal with gross and egregious crimes committed in the Global South which cannot yet be addressed by the very nation-states that they took place within. The Global South is commonly understood as a political rather than a purely geographical designation, broadly indicating uneven development patterns of global capitalism, histories of colonization, de-colonization and post-coloniality, as well as continuing and structurally conditioned material and political inequalities in the world. The term is often used to overcome the hierarchical implications of designations such as the Third World, as it refuses to attach epistemological privileges to adjectives such as 'developing' or 'developed'.

Critics of contemporary international legal regimes have long pointed out that the grid of international law is determined by the distribution of political and economic power that created a phenomenon such as the Global South in the first place. In other words, there is no substantive equality among the contemporary canvas of nation-states nor is there a reason to believe that a global regime of universal justice could be built or sustained within that system due to multiple layers of historical injustice that has gone unattended or unresolved for centuries (reference to the history of the British Empire). This kind of skepticism is not exhausted by the North-South dichotomies, either. The issue assumes different and even more complicated dimensions in terms of South-South relations as well as problems and issues to be addressed from within the states in the Global South. In most of this latter set of accounts, the Global South emerges as a domain that is paralyzed by the imposed plans of its recuperation via the laws, politics, economies, and cultures of the North. And yet, relations in the Global South are often left undefined, often only to be touched upon in terms of the common resistance they embody to the hegemonic nature of North-South relations.

If these renditions of neo-imperialist post-colonial law could be set aside momentarily, there may emerge other perspectives on international law as it relates to the Global South, which could be equally illuminating without removing the necessary emphasis on power. In the Global South, there exist patterns of injustice and abuse that are not just stemming from the historic or current interventions of the North. To start with, there is indeed law in the Global South rather than it being a lawless place or a simulacrum of Northern law. The key issue in this changed context becomes engaging with variant forms of legality, and, fragmented as well as overlapping legal regimes. Secondly, the Global South encompasses a rich canopy of political-legal entities, be it nation-states, regional bodies such as courts or regulatory institutions, or transnational actors including INGOs that operate in the Global South. It is not a landmass of ex-colonial semi-states with no teeth to bite or totally subservient to the interests of the North. Consequently, the Global South exhibits unique characteristics as an object of international law and administration, in particular international criminal law.

In this larger context, this paper addresses universal justice-related debates not from the point of view of the North imposing law and order onto the Global South, but from the angle of benefits of mitigation and litigation in the context of emergent hybrid and fragmented regimes of accountability within the Global South itself (reference to Teubner re. fragmented regimes). In particular, it focuses on the possibility of a regime of 'common but differentiated responsibilities' regarding crimes against

humanity committed by states against their own citizenry. Over-used dichotomies of North/South, developed/developing and First World/Third World offer no substantive clues in this case. However, some central questions persist. For instance, even if one refuses to conceptualise historical injustices and restitutive justice models with reference to binary categories, how could we think through unequal distributions of material wealth and political power at a global scale vis-à-vis the Global South? In a similar vein, could these societal forms of justice be served in present legal frameworks but via novel forms of collaboration facilitated through hybrid mechanisms? Ultimately, critiques of the statist paradigm alone cannot do the job of articulating possibilities of universalized notions of justice pertaining to most egregious crimes.

The greatest impediment to the understanding of the legitimacy, efficacy or even the possibility of international law in both the Global North and the Global South is the preconceived givens of democratic constitutionalism, especially pertaining to the statist paradigm. It is simply not the case that the legal practices emerging under the UN Charter, the practices of the ICC, the ECHR, or the contemporary conception of customary international law that never solely depended on state consent are troubled by structural problems of coherence, efficacy or legitimacy of a kind that national law does not suffer from. Instead, it is actually the statist constitutional thinking that distorts the description and assessments of pluralist legal practices. It drastically exaggerates the coherence, legitimacy and efficacy of domestic constitutional practices; it casts a thick cloud of suspicion over legal practices beyond the state that are fragmented and have some degree of uncertainty in terms of compliance. Last but not the least, statism neglects the connection between domestic legitimacy and efficacy and the wider regional or global contexts in which these practices take place, which is a true instance of misguided separation. The legitimacy and efficacy of national and transnational legal and political practices are much more closely connected then conventional legal wisdom allows us to acknowledge.

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Mediation in Ontario Family Law System: Embracing the Cultural Mosaic in Society

In the Ontario Family Law system, mediation is a dispute resolution method that is used as a central tool to resolve disputes. However, the field is deficient in its practice, training and empirical work. In Ontario, mediation has not embraced adequately and effectively the Cultural Mosaic of Ontario's Society. Mediators continue to use a Western traditional methodology that focuses on the practical aspects of reaching desired goals. Generally, Western methodology does not address culture adequately in four specific ways: (i) it fails to recognize the significant part culture plays in conflict; (ii) there is not enough understanding of how cultural differences can be used in problem-solving; (iii) there is a lack of specific training on culture and its' impact on the mediation process; and (iv) research specific to the influence of culture is limited. This lack of cultural competency undermines the process and outcomes of mediation in family disputes.

To begin to address the above, this paper seeks to explore through the literature the theoretical landscape of conflict, culture and mediation including intersections of race, class, gender, ethnicity, age and ability. I shall examine theories of conflict, the evolution of culture, cultural responses to conflict, philosophical and theoretical underpinnings of mediation within a western context and the interplay of conflict, culture and mediation. Interwoven in this review I shall take a close look at any available empirical data.

Keywords: Mediation, Culture, Conflict, Western, Methodology, Dispute Resolution

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“Financial Regulation: Global Concerns Since 2008”

In the wake of the 2008 financial crisis, Canada’s economy has seemingly faired relatively well. While certain economic indicators support this idea, (there have been no government bank bailouts in Canada, for example) others, such as employment rates and economic inequality measurements suggest otherwise. I will discuss the financial regulations reviewed and debated at the federal level in Canada since 2008, and explore the apparent disconnect between Canada’s “success” throughout the crisis and middle to lower class consumers.

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Problem Based & Competence Geared Legal Education. A new paradigm.

In the past, between the years 1800 and 1950, legal education was a local, generalist, apprentice-based, non-corporate, and highly academic self-explanatory affair. Most of the legal professionals regarded themselves as involved in *ex-post* private law and criminal litigation/trials. Legal theory and the curriculum, correspondingly, could focus mainly on local private and criminal law contained in approximately 10.000 pages.

At the start of the 21st century a number of things have changed. Around 100 specialized areas of legal theory and practice have emerged, along with millions of pages of new material. The sources of these new rules are increasingly international and regional, especially in Europe. The legal profession has also industrialized. The sole practitioner is outnumbered by legal professionals that are mass producing legal services and legislative instruments, as well as adjudicative products. Client demand has changed the emphasis to be more focused on *ex ante*: preventing disputes. Employers are expecting more than ever that graduates are well on their way through this increased volume of material, plus well versed in critical thinking, advocacy and research techniques. Moreover, in the countries where legal education is subsidized, universities are expected to educate more pupils for less money, plus accepting lower entry qualifications favoring historically less privileged groups. This process includes attempts, again especially in Europe, to harmonize the higher education degree structure across states.

Law school traditions have not responded to these developments yet. The curriculum and teaching techniques have remained largely the same as in the 1800 to 1950 era.

The time is ready to change legal education drastically. To guide and justify that change, a modern, 21st century paradigm is required, addressing what the legal profession entails, what issues the legal profession deals with and what legal competences are required, to solve legal problems cheaply, efficiently and in a client friendly manner. Such a new paradigm should also provide the necessary assessment criteria evaluating, which law graduates may be permitted access to legal practices, including the various professional bodies admission procedures but also corporate hiring practices for junior and senior positions.

This article provides such paradigm. It describes and defines the legal profession along four types of legal practices that exist all over the world. It identifies the “top 100 legal issues” that are most fundamental to any legal practice. It selects 50 areas of law that are necessary for instruction in law schools. More importantly, it argues which 10 legal skills/competencies should be the guiding tool for curriculum and assessment design, as well as the criteria for recruitment, life-long learning and career development in the legal profession. Furthermore, the new paradigm for legal education integrates the global ambitions (UN, OECD, G20) in the fields of sustainable development and rule of law into the daily reality of the legal profession, legal education and legal research.

Key Words: Legal Competences, Outcome Oriented Legal Education, New Paradigm, Global Harmonization of Legal Education, Millennium Development Goals.

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TAKING 'HEALTH' AS A SOCIO-ECONOMIC RIGHT SERIOUSLY: IS THE SOUTH AFRICAN CONSTITUTIONAL DIALOGUE A REMEDY FOR THE AMERICAN HEALTH CARE SYSTEM?

Nineteen ninety-six marked the beginning of a new era for South Africa. After a long struggle to free itself from the apartheid regime, it had successfully drafted "the most admirable constitution in the history of the world". Nonetheless everything still had to be done to reconcile the social and economic fracture that was tearing apart the country. This document had to provide continual reinvention to make sense of a changing world and the new South Africa. The answers provided by the Constitution had to be more than 'admirable', they had to be 'transformative'. Indeed, unlike most of liberal constitutions, the primary concern was not to restrain State power, but to accelerate fundamental changes in a legacy of injustice resulting from over three centuries of colonial and apartheid rule. It soon became obvious to the drafters that without access to basic levels of social and economic services, no effective civil or political changes could take place in the deeply divided country. Therefore, the final document incorporates a detailed list of socio-economic rights tailored to the peculiar needs and context of South Africa.

Conversely, the United States Supreme Court has not only been reluctant to recognize or incorporate socio-economic rights in its Constitution and legislation, but also remains firm in its appreciation of a 'pure' form of separation of powers, showing no real sensitivity to the American social or historical context when ruling on resource allocation. The United States Constitution as the oldest written nation-governing charter in the world is determined to stand firm on its ground. The strict balance of power that characterizes the American system makes it averse to the concept of socio economic rights, and unwelcoming to any flexibility. Unfortunately, a static conception of the separation of powers presents certain limitations seem to fail to account for the shifting nature of society.

Taking a closer look at urgent issues affecting America one cannot help but wonder why the Supreme Court has not learned yet some of the lessons from its South African counterpart when it comes to allocation of its health care resources? Today, the debate surrounding Patient Protection and Affordable Care Act's certainly revolves around central issues of constitutionality. The community of legal scholars has been extensively debating this question, but has not yet formulated any potential solution to the real underlying problem. It seems as if the insurance industry crisis and the un-insurability of millions of Americans has been overlooked and clouded by constitutional questions.

Using a comparative functionalist approach, this article aims at presenting the differences in the role played by Supreme and Constitutional Courts when it comes to the adjudication of the right to health, and more broadly socio-economic rights.

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The Circular Path of the Law: Ethical Oversight of Legal Research

An increasing number of legal researchers in North America are required to get permission from an institutional research ethics review board (IRB/REB) (or in the scientific vernacular – "to pass ethics") before they can begin the empirical part of their project. Extension of ethical oversight to empirical legal research, also known as "ethics creep", demarcates a change in the law's trajectory. Oliver Wendell Holmes's "The Path of the Law" was instrumental in setting the study of law on the course beyond formalism, towards a widespread use of social science research methods. Yet over a hundred years later formalism has found a way to reclaim its influence.

Biomedical and behavioral research has not always been a paragon of research ethics, which led to escalating regulation in research involving humans and establishment of the system of ethical oversight. Interdisciplinary standardization and harmonization in approaches to ethical governance in research involving humans has been an ongoing process during the last decades, and in recent years legal researchers have also noticed that their project "require" ethical scrutiny. All would be well if not for the REB's overt preference of positivist methodology and resistance to methodological pluralism, as a result of which educational, critical, and participatory research projects, to name a few, have encountered serious difficulties in acquiring ethical clearance. In this paper I seek to offer an explanation of how and why the REB has developed a formalist standard of prospective ethics review, which is antagonistic to a wide spectrum of legal methodologies.

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Delegating Control or Deflecting Controversy? The ALCB and the *Liquor Control Act*, 1924 to 1939

This paper explores the motivation behind the creation of the Alberta Liquor Control Board (ALCB) in 1924. Although liquor boards were common across Canada, Alberta did not have such a board during prohibition. It was only with the end of prohibition in 1924 that the provincial government created the ALCB. This paper argues that the creation and the design of the ALCB were essential to how the government wanted the *Liquor Control Act* to operate. Despite the vast powers that the Act granted to the ALCB, a close reading of the Act and an examination of how the ALCB actually operated reveals that the board was designed to be dependent on the government. Thus the government used the ALCB to disguise its own role in liquor control. The government needed the ALCB to remove the liquor issue from the political arena and to give the solutions introduced by the *Liquor Control Act* a chance to work.

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The Hand that Rocks the Cradle: Infanticide Reconsidered

There has long been debate as to whether the infanticide 'defence' has any legitimacy within Canadian criminal law, and that debate has started up once again as the Ontario Court of Appeal grapples with the Crown's unprecedented contention in *R. v. L.B.,* that the defence should be outright abolished. Moreover, the state argues that making an infanticide defence available in cases of intentional killings is "bad policy" because it "cheapens" the life of a child and is based on medically unsupported evidence that giving birth can lead to mental disturbance. It is also the Crown's position that when the infanticide legislation was enacted in 1948, there was greater social stigma surrounding unwed motherhood that no longer exists. In fact in 1984, Canada's Law Reform Commission recommended abolishing the infanticide provisions, but after the United Kingdom strongly recommended to Canada that it retain an infanticide law, calling it a "practicable legal solution" to a social problem, the defence was retained.

In *R. v. L.B.* the accused, a teen-aged mother, smothered to death two of her babies and pretended they had died naturally. Years afterwards, she admitted to the killings and was charged with two counts of first degree murder. There was no issue as to whether she had killed her children, instead from the outset of the trial the Crown's position had been that if murder was proven, then murder convictions should be entered and that the infanticide defence should not be allowed. Instead, the trial judge found that the defence should be available to the accused and found that two counts of first degree murder had been proven but acquitted the accused of murder and found her guilty of infanticide. That led to the case finding its way into the hands of the Ontario Court of Appeal where its fundamental legitimacy is currently being debated. This paper will focus on the historical journey of the infanticide defence, an interrogation of the psychological bases for post-partum depression, as well as encompass an international comparative analysis, and explore the legal and social ramifications of abolishing the infanticide defence in Canadian jurisprudence.

Key Words: Infanticide, Criminal law, Psychology, Public Policy, Legal Reform.

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Legal Anarchism: To Have or Not to Have Authority?

As an interdisciplinary research, *legal anarchism* critically analyzes the law and punishment in terms of history, religion, philosophy, economics, politics, anthropology, sociology, and psychology. In this analysis, other disciplines should not be disregarded insofar as an authority needs to be legitimized not only by the legal system, but also by all tools ensuring its ideological and mystical supremacy. In short, the logic of authority focuses on legal force and violence imposed by panoply of punishment and propaganda.

This paper uses legal anarchism to examine authority, its legitimacy, and forms. On the one hand, it analyzes some concepts concerning authority through law and punishment. On the other hand, due to the anarchists' emphasis on the primitive and the classical societies where all individuals allegedly share authority, it analyzes the place of authority in these societies. It will finally notice that authority is a complex phenomenon existing in almost all types of societies, since it is one part of human existence submitted to innumerable laws and punishments ensuring order. In other words, absolute freedom is a myth, at least in social life. Hence, to have or not to have authority, that is the question, because authority limits or destroys liberties and rights.

Keywords: Society, State, Authority, Power, Law, and Punishment

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Military Training and the Law of Armed Conflict:
How International Law is Applied and Enforced in the Canadian Forces

Scholars who study international law are recurrently facing problems with enforcement. Thus, large debates remain, with many scholars emphasizing the normative nature and non-coercive character of international law. Underlining the inability of actual institutions to efficiently enforce international law, a few authors argue that international law ought to be enforced domestically, through ratification process and norm diffusion. Some also argue further that norms have to be internalised in order to become self-enforced. Therefore, internalisation of international law on a domestic level seems crucial for enforcement. This emphasizes the normative aspect of law and takes the norm diffusion process one step further by integrating it into the society, which then considers the new norm as its own. The domestic enforcement of international law, whether by ratification, norm diffusion, or internalization, is particularly relevant to the study of humanitarian law.

While international humanitarian law has developed quickly and debates among scholars flourished, it remains unclear whether or not military training has been concerned with these developments and has evolved accordingly. What is the relationship between scholars and practitioners? How is legal knowledge disseminated within the military? Is law a concern when it comes to responding quickly to a threat in action? How is it implemented? These are central questions to this research. Concretely, it analyses how law is used and applied in the context of military training and assesses how this legal training is implemented in combat situation. Even if concerns about how international law ought to be respected by the military have been emphasized by recent events, such as the US scandals in Iraq and Afghanistan, but also the Canadian Forces (CF) conduct in Somalia and the handling of Afghan prisoners, there seems to be very little studies on how the law of armed conflict is implemented within the military training, especially the Canadian military, even though the CF adopted a series of new policies during the last fifteen or twenty years. There also seems to be no scholarly analysis of how international humanitarian law (or law of armed conflict – LOAC) training is conducted within the CF. This is the main objective of this research.

Although the process of dissemination is complex, I argue that norm internalization is crucial in enforcing international humanitarian law. Thus, I assert that soldiers must not only obey the law because they have been taught to do so, but because they, themselves, consider it valuable. This can be done through the implementation of professional ethics for the military, but also by emphasizing the importance of respecting law for the success of the mission. Consequently, military training in the LOAC requires a comprehensive approach. With the emergence of less traditional type of conflicts, counterinsurgency and peacekeeping missions, abiding by the law helps operationalization tremendously because the aim is to build (or rebuild) democratic societies. Finally, it might be useful to facilitate the dialogue between scholars and the military, between the theory and the practice, so that international humanitarian law becomes easier to apply and enforce despite the numerous operational constraints.

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Does the Law Meet the Bill in Canada: Whistle Blowing: An International Comparative Behavioural Legal Analysis

This paper compares and evaluates dissent: organizational civil disobedience — the laws or actions of their government through the use of whistle blowing laws in Canada. The purpose of the study is to examine both provincial (in BC, MB, ON,NB) and federal whistle blowing laws compared with such laws in the United states and the UK. It will examine the application of — disclosure by employers of illegal, immoral or questionable practices by their employees covered by whistle blowing legislation. This international comparative legal analysis will be one of the first of its kind in Canada.

The Study involves interviews with government officials that are responsible for implementing Whistle Laws in both the provinces of Canada and the |Federal jurisdiction

The research study will examine the cognitive dissonance of enforced loyalty to the behavioural organizational concepts of positive cultural and norms, while seemingly encouraging schizophrenic disobedience of going public against your employer. The protective element within whistle-blowing legislation will be examined in a comparative legal fashion.

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The Picture That Holds Us Captive: A Weilean Approach to Environmental Rights and Justice

The exercise of moral philosophy, as will be used in this presentation, can both unsettle and teach by confronting us with what we already know; philosophy helps us to divorce ourselves from that which enthrals us. The promise of philosophy is an irony that takes what we already know from familiar and unquestioned settings and makes the world strange. This presentation wishes to make the notion of rights strange through a sobriety and fuelled by the need to provoke a new way of seeing. As will be explored, the concept of rights is loaded with deep historical meaning, which ties it unflinchingly to the notion of property, and situates it best to attend to issues of entitlement; and yet, this meaning is most often counter to the basic and vital guarantees it is used to ensure. At the heart of the challenge of disenthralling is the reconstitution of our understanding of the concept of rights. To attend to this task this presentation will turn to the theory of philosopher Simone Weil, in order to discover whether her ethical prescriptions, on the topics of rights and justice, can help us rethink and react to our own ethical stance on environmental rights and justice.

Keywords: Environmental Law, Intellectual Property Law, Theoretical/Practical Ethics, Human Rights.

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Patent Law

My research topic examines the impact of non-practicing entities on the patent system and how remedy decisions by courts in Canada, England, and the United States can be used to maintain the objectives of a patent system. The limited monopoly that comes with a patent was originally intended to create an incentive for inventors to innovate and commercialize technological advances. The monopoly rights have had the desired effect by increasing patenting. While increased patenting has led to greater innovation commercialization, it has also created an incentive to develop business models around licensing and litigation. Companies that operate with patent licensing and litigation as their motivation are known as non-practicing entities (NPEs). Academics and practitioners have raised questions about the impact NPEs have on the patent system and there has been considerable debate whether the property and monopoly rights granted with a patent are appropriate in all situations.

Since legislators in each of the three countries have left the limited monopoly alone, patent holders have been able to enforce their patents using the threat of litigation and a subsequent injunction. The task of whether to grant the right to exclude (an injunction) has fallen to the courts. In the U.S., the Supreme Court decided that even if patent infringement was found, the right to exclude did not necessarily come with the remedy to exclude. In all three jurisdictions, an injunction is an equitable remedy and courts have some discretion whether to grant that right. Canadian and English courts have always asserted the discretion to grant injunctions, yet they have overwhelmingly granted injunctions in patent infringement suits.

The patent systems have been served well by granting strong property rights, however there has been an unprecedented rise in the number of non-practicing entities with business models designed around patent acquisition but not practice. New business strategies are testing the system's effectiveness in achieving its objectives to encourage innovation and eventual commercialization.

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CHOICE-OF-LAW: THE DRIFTING APART OF THEORY AWAY FROM PRACTICE

Choice-of-law deals with the identity of the law applied in private law litigation involving a foreign element. Which law, for example, will govern a dispute between English and Canadian domiciles over a tort committed in New York? In the era of extensive international transactions and the frequent mobility of people, this question has become increasingly pressing in the daily operation of the courts. Furthermore, this question is even more relevant in the context of federal systems such as United States and Canada. However, there is a paradox: despite growing resistance from academic scholars, recent empirical studies strongly suggest that common law courts puzzlingly have been refusing to follow the current leading theories on the subject.

My paper offers an innovative conception of Friedrich Savigny's comprehensive choice-of-law theory. This theory has been generally misunderstood in academic literature and has most often been perceived as a kind of blind reference to the mysterious "universal seat formula". In contrast to this view, it will be argued that Savigny's choice-of-law theory is fundamentally grounded in the single organizing principle of "voluntary submission" as a reflection of the persons' choice. Furthermore, it will be argued that the proposed understanding of Savigny's choice-of-law theory is not detached from reality, but in fact reflects it. The idea is that despite the popular instrumentalist conception of the subject as a tool for promotion of states' interests, the normative content of the proposed approach perfectly reflects many traditional and contemporary Anglo-American choice-of-law rules, doctrines and concepts. In this manner, the paper aims to bridge the emerging gap between the theory and practice of choice-of-law.

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Reconciliation: Dead Man Walking or Recognition of First Nations Law? Legal Education and Aboriginal Reconciliation

Chief Justice Beverly McLachlin and her two immediate predecessors have each called for a reconciliation between Aboriginal peoples and [the Crown, the Government, the rest of the Canadian population]. There does not seem to be agreement on the other party to the reconciliation and the kind of reconciliation. "A Dead Man Walking" can be *reconciled* to his fate. Reconciling First Nations legal systems and the common law may be the other end of the spectrum.

My presentation will address two questions:

(1) Are the various judges who have called for reconciliation talking about the same thing? Are the parties who are to be reconciled consistent from one judgment to the next? Is the substance of what is to be reconciled consistent? Not surprisingly, I will argue that there is very little consistency from one judge to the next on either *Who is to be reconciled?* or *What is to be reconciled?*

(2) I will relate the question of reconciliation to the matter of legal education in a number of ways.

- First and foremost, the call for a reconciliation of the common law and Aboriginal legal systems requires that both judges and lawyers develop a literacy about Aboriginal legal systems.

- How are Aboriginal legal traditions to be given fair considerations in Canadian courts unless we develop a body of jurists learned in those traditions?

- A great many Canadians, legal scholars like other Canadians have serious doubts as to the existence of Aboriginal legal systems.

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22 February 2012

Safety in Handcuffs: The Criminalization of Air Accidents and the Chilling Effect on Air Accident Investigation

The recent and growing trend by numerous governments to treat airline accidents as crimes and the aviation personnel involved in those accidents, particularly pilots, maintenance personnel, and air navigation service providers, as potential criminal defendants, is having a significantly deleterious impact on the safety of the global commercial air transport system. This threat of criminal liability, although without any basis in fact in the vast majority of accidents, threatens to undermine the primary objective of the air accident investigation process, which is to determine the cause or causes of an accident without assessing blame or apportioning liability. A crucial component of any air accident investigation is the voluntary disclosure of information by relevant aviation personnel which is vital in identifying and assessing the factors involved in causing the accident; this voluntary disclosure of information is being contravened by the chilling effect posed by criminal prosecutions and the involvement of law enforcement and judicial authorities in the air accident investigation process. The resulting failure to acquire all of the dispositive data during the course of an accident investigation has seriously negative consequences for air safety, notably the ability to learn from mistakes and prevent new ones from occurring that might cause future accidents. In my thesis, I will examine the increasing trend to criminalize air accidents and why the use of police power in this context is misplaced and unwarranted. I will also propose various legal reforms whereby the legitimate criminal justice goals of states in air accident cases can be achieved without compromising the integrity and efficacy of the accident investigation process.

Key Words: Criminal Law, Prosecution, Aviation, Accident, Investigation,

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Are Wrongful Death Actions Dead in the Water?

Common law courts maintained a tradition of refusing to compensate wrongful death claims for many centuries. Ontario's situation changed in 1847, when the Province of Canada passed legislation that permitted plaintiffs to claim compensation for losses associated with a family member's wrongful death. Although this legislation did not specify what damages were available, Canadian courts have consistently held that only economic injuries (lost financial support and valuable services) are recoverable. More than a century later, several provinces (including Ontario) passed legislation that mandated compensation for losses of decedents' guidance and companionship. Although Ontario courts have stated that these new statutory damages are "non-pecuniary," they continue to valuate such losses as if they were injuries to plaintiffs' property interests in decedents' services. Ontario courts still refuse to award non-pecuniary damages for the grief and psychological trauma that is associated with unexpectedly losing a family member.

The presenter asks why our courts have been so reluctant to recognize wrongful death as a proper cause of action. He additionally queries why Ontario's judges insist upon treating statutorily mandated wrongful death actions as claims for mere property losses. One possible reason for our courts' intransigence is that wrongful death torts exceed too many traditional common law boundaries: they involve a third party (who was likely absent when the fatal injury occurred) who is claiming compensation for losses arising from harm done to an intimate social relationship. Damages for grief and psychological trauma arising from wrongful death face yet another major common law hurdle because they compensate a purely emotional injury. However, this argument does not fully explain wrongful death's abysmal history. It also appears that 'blood money' carries a taint. This may stem from Western society's current belief that human life is unique and priceless – and therefore incommensurable with money. Or, perhaps we just don't like to see people profit from the deaths of others.

Keywords: torts, damages law, wrongful death, emotional injuries, legal history

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Regulation of the Legal Profession and Access to Justice: A "New Legal Realist" Approach

Canadian legal services are subject to relatively tight regulation, which is primarily carried out by self-regulatory Law Societies. Meanwhile, many have observed that there is an ongoing access to justice crisis in this country. Large numbers of Canadians are unable to access legal services, usually because they cannot afford them and because the state will not provide them. Is there any relationship between legal services regulation and access to justice?

Some legal ethicists suggest that regulation can increase accessibility, for example by guaranteeing quality and by promoting pro bono service. However economists and critical sociologists argue that licensing regimes and the prosecution of unauthorized practice increase the price and reduce the variety of legal services. Law and society scholars such as Constance Backhouse and Richard Abel have played an important role in this critique, showing how self-regulation and "professionalism" can function to exclude and disempower equity-seekers.

This paper will show how New Legal Realism (NLR) can further illuminate the relationship between regulation and accessibility. NLR is a methodology for studying law in action, distinguished by its empiricism and by its focus on the impact of law on laypeople. New legal realists study legal systems both from the "top down" and from the "bottom up." An NLR approach to this subject must therefore attend closely to (i) the principles of legal services regulation, (ii) its functional mechanisms, and (iii) its impacts on legal services consumer welfare, defined broadly. Such an inquiry must remain normatively committed to the interests of clients, understood not only as rational actors, but also as complex and vulnerable subjects with heterogenous needs.

The paper will outline the author's ongoing new legal realist study of the relationship between legal services regulation and the accessibility of justice. The empirical projects supporting this venture include a survey of the hourly rates and billing models of Canadian lawyers, under the aegis of the SSHRC-funded Costs of Justice Community-University Research Alliance. Comparative field work study of the legal services regulatory regimes of the United Kingdom and Canada is also under way.

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Constructing the Identity of the Legal Scholar

This presentation will explore various approaches and challenges to interdisciplinary legal scholarship. Constructing a research agenda within legal scholarship requires particular skills and specific tools, and therefore is often perceived as being the most challenging aspect within legal graduate scholarship.

I will examine the challenges encountered in formulating a theoretical and methodological framework when devising a doctoral research agenda. In order to contextualize this inquiry, I will discuss the "process" of selecting a methodological and theoretical framework by using banking law within the microfinance context as an example. Within this analysis, various methods "borrowed" from interdisciplinary fields will be considered in order to select the most compatible approach for the inquiry at issue. In particular, I will explore how legal scholarship can be shaped and defined through the use of practical legal experience; and how legal scholarship demands a completely different subset of analytical tools. The discussion will rest on conventions established, discovered, and challenged within graduate legal education, and will therefore seek to demonstrate how legal scholars may find their voice by employing strategies and techniques passed on through the "ranks". Within this context, a portion of the presentation will be devoted to overcoming research, writing and analytical impediments while trying to stay abreast of cutting-edge research. For instance, I intend to offer simple techniques to narrow the scope of research, which subsequently produces an in-depth research agenda. Finally, I will conclude by providing a personal perspective in the development of an academic identity within legal scholarship.

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Can Transnational Criminal Law draw from domestic measures countering TOC?

My research is intended to critically compare the domestic measures that have been used to countering Organized Crimes in five states in the North-Atlantic region up against the measures that have been developed for countering Organized Crimes on regional level by the European Union (EU) and on international level by the United Nations (UN). In this context I will explore if and to what extent measures taken by transnational "legislative" bodies for countering Transnational Organized Crimes differ from the measures that prosecutors and law enforcement agencies seem to be reaching out for to counter Organized Crimes domestically.

In order to study Organized Crime legislation and its transnational aspect we need to have an understanding of the problem that the legislation is intended to encounter, But I argue that we furthermore need to broaden our research into the measures actually used by practitioners. To be able to do this I will look at the experience gained from trials and errors of legislation intended for countering Organized Crime and sometimes creative use of legislation that may or may not be intended to counter Organized Crimes. Scholars that are looking into the legislation for countering organized crime but also at the local problems that this legislation is intended to counter or solve,[1] are also acknowledging that a research is needed into the application of the legislation.

We need to broaden our research into the measures used by practitioners. If scholars in their research, publications and when they have an opportunity to advise legislators fail to include measures used by practitioners, they run the risk of painting a picture that fails to describe the field accurately enough. By broadening the scopes as described above, so as to include all measures being used by law enforcement in my selected nation states for counter Organized Crimes, I will be more accurate in comparing domestic measures with regional measures of the EU and international measures of UN.

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[1] Tom Obokata, *Transnational Organised Crime in International Law: Studies in International and Comparative Criminal Law* (Hart Publishing, 2010) p 170 – 173; Francesco Calderoni, *Organized Crime Legislation in the European Union* (Springer, 2010); Andreas Schlonehardt, 'Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost Wards' (2011) ASLI Working Paper Series

Martha Simmons

**“BARRIERS TO BECOMING A BARRISTER:
FROM LEGAL EDUCATION TO GETTING CALLED TO THE BAR”**

This paper examines the restrictions on how a law student goes from law school to getting Called to the Bar and becoming a Barrister & Solicitor. The renewed discussion about the articling process calls into question the need for restrictions on who can practice law in Ontario. By discussing the structure of legal education and onwards to the Licensing Process one can examine the processes through which one becomes a Barrister. The paper will demonstrate that while law school is sometimes thought to not cover enough theory or practice it is important that the process be reformed rather than overhauled completely. Law schools serve the important function of preparing students to ‘think like a lawyer’ and the expertise to provide legal advice.

Keywords: barriers, legal education, theory, practice

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The Dangers of a Loose International Maritime Cabotage Law Regulation

Maritime cabotage has been in practice globally for many centuries but there is yet to be a fully defined and universally accepted concept of this law. It is generally defined as the right of a nation to reserve to her national instrumentalities of commerce, all trade and services between two points of her territorial waters.[2] The various approaches (Closed, Liberal, Flexible and Reciprocity) to maritime cabotage adopted at national, supranational and international levels of government fuels the controversy of maritime cabotage in international law and commercial treaties.

The failure of the World Trade Organisation (WTO) to produce a universal framework for a global harmonisation and regulation of maritime cabotage under GATS at both the Uruguay and Doha Rounds has left the regulation and the interpretation of maritime cabotage at the hands of national governments which has contributed to a loose international maritime cabotage regulation.

The danger of a loose international regulation of maritime cabotage is the tendency of national states to stretch the interpretation of cabotage laws to accommodate their needs. One of the principles at risk is the "Right of innocent passage". This has been exemplified by Iran trying to block the Strait of Hormuz - setting the whole world alarmed at the possible commercial catastrophe that could escalate. What would happen if Egypt and Panama blocked the Suez and Panama Canal respectively?

The alarm bells are starting to sound louder; Wisdom suggests now is the time to put in place an effective and efficient global framework to regulate maritime cabotage and avoid the shackling of global commerce.

Keywords: International trade, Maritime Law Regulation, WTO Law, Trade Protectionism and International Law

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[2] Hesse, N., 1953. *International Air Law: Some Questions on Aviation Cabotage*. McGill Law Journal, 1(129), 133

Paralegal Education (in Ontario): Essential skills and practice-readiness – Lessons in legal education

It's time to re-think and re-design legal education, but how? Is regulation the answer? Can it be whole-heartedly embraced? How will standardization impact the way professors teach and students learn? The fallout appears daunting, but the concept of LSUC-mandated courses and competencies is not new.

There currently exists a different model of legal education – paralegal education in Ontario. Tightly controlled and regulated by the LSUC, paralegal education can provide both insight and guidance about legal skills training and assist in re-shaping and re-defining legal education, from teaching to learning.

Does tight control over education, including mandated courses and competencies, translate into practice-readiness? The essential legal skills that we must teach and students must learn are identical for both lawyers and paralegals. To the extent of a paralegal's scope of practice, paralegals and lawyers do the same work in the same forums; they must follow the same rules of practice and procedure, apply and argue the same law and represent clients with competence. The difference in education and training is astounding, and instructive. Creative, collaborative and experiential, paralegal education appears to be filling a gap.

The author argues that paralegal education and law school education are two halves of the same whole. The best of both models should be adopted to enrich and enhance legal education in all its forms.

KEY WORDS: Paralegal education – essential legal skills – practice-readiness – one half of the legal education whole? – Re-designing legal education

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Pierre Bourdieu's *Habitus* and Jon Elster's *Character Planning* as Explanations for the Post-Colonial Influences on Human Rights Adjudication in Commonwealth Africa.

The broad objective of this presentation is to apply insights from Pierre Bourdieu's "*habitus*" and Jon Elster's "character planning" towards an understanding of how education, professional training and socialization of lawyers and judges have exerted disproportionate impact on post-colonial human rights adjudication in Commonwealth African countries. It is often assumed that the determinants of judicial behavior in real-life cases are the rules and doctrine applied to specific factual situations and therefore internal to the field of law and adjudication. However, Bourdieu's and Elster's concepts tend to show that what constrain judges are not exogenous rules or doctrine external to a judge's own attitudes (what Elster calls "first order desires"). In my presentation I will utilize these concepts to explain how what constrains human rights adjudication in the countries examined are more likely internal to the judges and become manifested from endogenous attributes, (which according to Elster are "second order attitudes"). I will argue that these attributes grow from within judges through the kind of education they have had. It also includes traits received through exposure and professional socialization as well as the impact on judges of their post-education training and real life experiences. I will be looking at examples from Ghana, Malawi and Nigeria.

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Professional Responsibility Of A Multi-Jurisdictional International Lawyer: From Colombo to The Hague via Ramallah

Global governance[3] literature suggests that there are multiple and competing conceptions of the legal order beyond the nation state. Contemporary scholars are adopting domestic law type frames to examine legal issues as a result of globalization and the subsequent specialization of specific areas of international law (commonly referred to as 'fragmentation of international law').[4] More recently scholars are borrowing from domestic formulations of constitutional law (and administrative law[5]) to understand the solidification of international law norms, the codification of specific "self-contained" regimes and the general activity at the international level.[6]

Ostensibly, the creation of international criminal institutions[7] represents a potential constitutionalization of war crimes prosecutions at the global level. This constitutionalization process, however, is ambivalent. On the one hand, a highly selective process of legalization and a 'move to institutions' is discernable. On the other hand, deep within the institutional structures and based on the day-to-day functions of these institutions, the constitutionalization process is marred by difficulty in operationalizing the stated objectives and goals. My doctoral thesis will highlight these difficulties by honing in on two such international criminal institutions[8]. Generally there are three distinguishable characteristics of these institutions that contradict the constitutionalist perspective, such as (1) a clear delineation of separation of powers[9], (2) law making powers of the judges[10], and (3) prosecutorial powers.

My thesis, engages with the contemporary literature on international constitutionalization and fragmentation. By honing in on one of the often cited example of international criminal law (and its institutions) as exemplifying constitutionalism, my thesis problematizes the very nature of the constitutional project and the inability of scholars to traverse the intersections between practice and theory (as opposed to moving from theory to practice). In this paper, I will draw from my fieldwork in Occupied Palestinian Territories, North and East of Sri Lanka and participant observation of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda to highlight the disconnect between the established conventions of public international law and its application.

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[3]David Kennedy, 2009, at 38; Kennedy then describes global governance as "how we are governed globally".
[4] Klabbers, 2009 at 14-15.
[5] Kingsbury, Krisch & Stewart, 2005; Kingsbury & Krisch, 2006.
[6] Peters & Armingeon, 2009; Simma, 1985 at 3; Stone Sweet, 2009.
[7] I use 'institutions' (as opposed to 'tribunals') to describe the different instantiations of international prosecutions worldwide.
[8] The institutions that I will focus on are: International Criminal Tribunal for Former Yugoslavia (ICTY, 1993) & International Criminal Tribunal for Rwanda (ICTR, 1994);
[9] See for example ICTY Statute Article 11 & ICTY Statute Article 10.
[10] See for example ICTY Statute Article 15 & ICTY Statute Article 14.