Contents of Current Legal Periodicals
October 14, 2013
#1405

To view table of contents of all Journals listed below, scroll down
To view table of contents of a specific journal, click on journal title

JOURNALS L - W

The Practical Tax Lawyer, v. 27, no. 4, Summer, 2013
Real Estate Taxation, v. 40, no. 4, 2013
Real Property, Trust And Estate Law Journal, v. 48, no. 1, Spring, 2013
The Review Of Litigation, v. 32, no. 3, Summer, 2013
Tennessee Law Review, v. 80, no. 3, Spring, 2013
Texas Journal Of Women And The Law, v. 22, no. 2, Spring, 2013
Touro Law Review, v. 29, no. 4, 2013
Trusts & Estates, v. 152, no. 8, August, 2013
The Tulane European And Civil Law Forum, v. 28, 2013
UMKC Law Review, v. 81, no. 3, Spring, 2013
University Of San Francisco Law Review, v. 47, no. 4, Spring, 2013
Villanova Law Review, v. 58, no. 4, 2013
Contents

503–508 Editorial: The Politics of International Law and the Perils and Promises of Interdisciplinarity
Tanja E. Aalberts

INTERNATIONAL LEGAL THEORY

509–519 Beyond Empty, Conservative, and Ethereal: Pluralist Self-Determination and a Peripheral Political Imaginary
Zoran Oklopcic

INTERNATIONAL LAW AND PRACTICE

Symposium on Domestic Courts as Agents of Development of International Law

531–540 Introduction: Domestic Courts as Agents of Development of International Law
Antonis Tzanakopoulos and Christian J Tams

541–558 Domestic Courts as Agents of Development of the International Law of Jurisdiction
Roger O’Keefe

559–578 Domestic Courts as Agents of Development of International Immunity Rules
Rosanne van Allebeek

Devika Hovell

599–614 Silent enim Leges Inter Arma – but Beware the Background Noise: Domestic Courts as Agents of Development of the Law on the Conduct of Hostilities
Yaël Ronen

Simon Ollese

643–665 Domestic Courts and the Content and Implementation of State Responsibility
Stephan Wittich

HAGUE INTERNATIONAL TRIBUNALS

International Criminal Courts and Tribunals

667–699 The Contribution of the Eichmann Trial to International Law
William Schabas

701–723 International Criminal Law: An Ideology Critique
Tor Krever

725–746 Assessing the Control-Theory
Jens David Ohlin, Elies van Sliedregt, and Thomas Weigend

BIBLIOGRAPHY

747–750 Books and Articles in the Field of the Prevention and Peaceful Settlement of International Disputes (Summer 2013)
Ingrid Kost

REVIEW ESSAY

751–766 Discussion of T. H. Cheng’s Monograph When International Law Works, and in Particular a Defence of the Nicaragua Judgment of the ICJ
Robert Kolb

BOOK REVIEWS

767–772 E. Wilmshurst (ed.), International Law and the Classification of Conflicts
Ioannis Katsouzis

772–776 Morten Bergsmo (ed.), Thematic Prosecution of International Sex Crimes
Fletch Williams
ARTICLES

MANAGED COOPERATION IN A POST-SAGO MINE DISASTER WORLD

Patrick R. Baker 491

ADJUDICATING SEX CRIMES AS MENTAL DISEASE

Melissa Hamilton 536

ZONING FOR APARTMENTS: A STUDY OF THE ROLE OF LAW IN THE CONTROL OF APARTMENT HOUSES IN NEW HAVEN, CONNECTICUT 1912-1932

Marie Boyd 600

IT'S RAINING KATZ AND JONES: THE IMPLICATIONS OF UNITED STATES V. JONES—A CASE OF SOUND AND FURY

Jace C. Gatewood 683

NEW METHODS OF FINANCIAL WHITE-COLLAR CRIMINAL INVESTIGATION AND PROSECUTION: THE SPILLOVER OF WIRETAPS TO CIVIL ENFORCEMENT PROCEEDINGS

Andrew P. Atkins 716

TRANSCRIPT

WINNING—OR AT LEAST NOT LOSING—ON CROSS-EXAMINATION

Henry G. Miller 747

NOTES AND COMMENTS

AN ANALYSIS OF NEW YORK STATE'S FLAWED RECOVERY SCHEME IN PRENATAL MALPRACTICE ACTIONS: WHY A CLAIM OF NIED SHOULD BE AVAILABLE TO PLAINTIFFS

Amanda Campo 770

FIRST AMENDMENT RIGHTS FOR PUBLISHERS AND THE DISTRIBUTION OF UNSOLICITED MAGAZINES TO INMATES

Samantha Halpern 795
Resolving Federal Tax Deficiencies Through Bankruptcy Or Offers In Compromise

Maria L. Dooner

Regardless of how a federal tax deficiency arises, many taxpayers fear enforced collection action by the IRS and enter into formal payment arrangements with the agency. While some taxpayers can quickly eliminate their tax deficiencies through short-term payment arrangements, other taxpayers with more serious deficiencies must consider other options. Two of the main options for reducing and eliminating serious tax debts are bankruptcy and offers in compromise. This article by Maria L. Dooner addresses those options and discusses options to consider for an offer in compromise, the advantages and disadvantages of an offer in compromise, bankruptcy, the applicable bankruptcy tax rules, and the advantages and disadvantages of bankruptcy as an option.

The Examination And Administrative Appeals Process

Brendan J. Sponheimer

Relatively few federal tax controversies result in litigation. Instead, most are resolved administratively— which has advantages for both the government and the taxpayer. Nevertheless, a taxpayer’s participation in the administrative process can serve as a possible prelude to litigation later on. This article by Brendan J. Sponheimer discusses the steps in the administrative process, including return processing, pre-contact analysis, initial contact, field activity, interviews, visiting the taxpayer and reviewing books and records, closing the case, the 30-day letter, appeals, ex parte communications, general appeals conference procedures, settlements and forms, mediation, arbitration, and unagreed cases.

Irrevocable Life Insurance Trusts: An Effective Estate Tax Reduction Technique

Adam L. Abrahams

Many individuals, when contemplating their estate planning, encounter a liquidity problem in determining how to pay for their funeral expenses, any estate or trust administrative expenses, federal and state estate tax expenses, inheritance tax where applicable, and their debts. This problem arises because most if not all of an individual’s assets are illiquid (such as a closely held business) or subject to tax if reduced to cash (for example, IRAs or other retirement plans). An irrevocable life insurance trust (“ILIT”) can be an attractive option. In this article, Adam L. Abrahams discusses what ILITs are useful for (reduction or avoidance of the estate tax, liquidity, protection from creditors, etc.), typical ILIT terms and provisions, provisions to avoid, potential estate tax pitfalls, use of a grantor trust, substitution of assets of equal value, gift tax, Crummey withdrawal rights, and generation skipping tax issues.

Tax Implications Of The Intellectual Property Valuation Process

Robert F. Reilly

A thorough understanding of the valuation process can be enormously helpful to the tax lawyer in using the value of intellectual property assets for purposes such as income tax calculation, gift or estate tax planning, or litigation. In this article, Robert F. Reilly discusses the nature of the valuation process, identification of the valuation problem, highest and best use, data collection and due diligence, generally accepted valuation approaches, contingent and limiting conditions, the value conclusion, and reporting the value conclusion.

Index To Volumes 26 and 27 (2011-2013)
AR T IC LES
156
Some Further Conjectures on Target Allocation Provisions
Terence Floyd Oliff
This is not the end of the Yellow Brick Road.
175
Circuit Courts Speak on Conservation Easements, but is the IRS Listening?
David M. Woodruff, Ronald A. Levent, Gregory P. Rhodes, and Nathan Vasson.
Notwithstanding the courts' affirmation that substantial compliance applies, the Service continues to pursue the most technical of challenges.

C O L U M N S
183
CURRENT DEVELOPMENTS
"Unitary Property" for Steam and Electric Generation Property Clarified
Paul D. Caffman
186
ALL IN THE FAMILY
Does Workers' Offer Protection For Undervaluation In RPL Interests?
James John Judinski
155
FROM THE EDITOR
199
CUMULATIVE INDEX
# TABLE OF CONTENTS

**THE ATTORNEY CLIENT PRIVILEGE AND THE FIDUCIARY EXCEPTION: WHY FRANK DISCUSSIONS BETWEEN FIDUCIARIES AND THEIR ATTORNEYS SHOULD BE PROTECTED BY THE PRIVILEGE**

*Mike W. Bartolacci, Tyler Short & Bruce Talen*  
1

**SPILT TO LAST: LONGEVITY PLANNING FOR TAX ADVANTAGED TRUSTS UNDER A NEW STATUTORY DECANTING REGIME IN MICHIGAN**

*James P. Spica*  
35

**THE TRUST AS AN ENTITY AND DIVERSITY JURISDICTION: IS NAVARRO APPLICABLE TO THE MODERN BUSINESS TRUST?**

*Thomas E. Rutledge & Christopher E. Schaefer*  
83

**SHAKESPEARE AND THE LAND LAW IN HIS LIFE AND WORKS**

*Mark A. Senn*  
111
ARTICLES

Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases
Stephen D. Susman & Thomas M. Melsheimer ............................................. 431

Ethics Rules in Practice: An Analysis of Model Rule 5.6(b) and Its Impact on Finality in Mass Tort Settlements
Ronnie Gomez .................................................................................................. 467

The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue
Paul M. Janicke .................................................................................................. 497

Name the Harm: Betrayal Aversion and Jury Damage Awards in Safety Product Liability Cases
Jim Norman ..................................................................................................... 525

The Next Generation of Disparate Treatment: A Merger of Law and Social Science
Michelle R. Gomez .......................................................................................... 553
ARTICLES

THE INDENTURED GENERATION: BANKRUPTCY AND STUDENT LOAN DEBT

A generation of Americans has borrowed heavily for their education, and hundreds of thousands of them are deeply in debt. Some thirty-seven million Americans owe a total of approximately one trillion dollars in student loans. They constitute an Indentured Generation as many of them will be burdened with student loan debt for much of their lives. With one of the worst job markets in decades, members of the Indentured Generation who are in particularly dire circumstances will turn to bankruptcy for a fresh start. But most student loan debtors will not get relief through bankruptcy. This is because the Bankruptcy Code exempts student loan debt from discharge, unless the debtor can prove that repaying the debt would result in undue hardship. Courts have held this to be a very strict standard that very few debtors can meet. Accordingly, the relief that is provided to most debts under the United States Bankruptcy Code (Code) is denied for student loan debt.

This Article proposes that the Bankruptcy Code be amended to allow a student loan to be revalued according to its actual fair market value. The fair market amount would be nondischargeable, and the remaining balance of the loan would be dischargeable as general unsecured debt. This ensures that debtors who can pay their student loans will do so, but that those who are truly unable to do so will not be denied the fresh start that bankruptcy is intended to provide.

Daniel A. Austin ......................................................... 329

TAX ELECTIONS: HOW TO LIVE WITH THEM IF WE CAN’T LIVE WITHOUT THEM

Tax elections are prevalent. They include: elections that determine how certain business entities are classified; elections by individual taxpayers to either claim the standard deduction or itemize deductions; an election that determines the tax treatment of alimony payments; an election by divorced parents to determine which parent claims a child as a dependent; and elections that affect the tax consequences of certain corporate transactions; just to name a few.

Tax elections produce unfairness given that sophisticated, well-advised taxpayers will be most able to make favorable elections. Tax law is, by no means, alone in terms of benefiting sophisticated individuals. In many areas of law and of life, people who acquire relevant information and plan ahead of time will fare better than those who do not. However, despite the prevalence of societal advantages for the informed, the existence of such preferences in tax law is especially problematic. Objections to the advantages that are bestowed upon sophisticated individuals by other areas of law are often met with the response that redistribution should be relegated to the tax system. Because other areas of law dodge criticisms of bias against unsophisticated individuals in this manner, tax law must be less tolerant of bias against ill-informed, unsophisticated individuals. To further the aim of reducing such bias, this paper discusses how to design tax elections to mitigate the unfairness and other harms that they cause.

Emily Cauble ................................................................. 421
ARTICLES

CONFRONTING THE CRISIS IN SCIENTIFIC PUBLISHING: LATENCY, LICENSING, AND ACCESS

The serials crisis in scientific publishing can be traced to the long duration of copyright protection and the assignment of copyright by researchers to publishers. Over-protection of scientific literature has enabled commercial publishers to increase subscription rates to a point at which access to scientific information has been curtailed with negative social welfare consequences. The uniformity costs imposed by such over-protection can be addressed by tailoring intellectual property rights, either through legal change or private ordering.

Current open access channels of distribution offer alternative approaches to scientific publishing, but neither the Green OA self-archiving nor the Gold OA author-pays models has yet achieved widespread acceptance. Moreover, recent proposals to abolish copyright protection for academic works, while theoretically attractive, may be difficult to implement in view of current legislative and judicial dispositions. Likewise, fund open access mandates such as the NIH OA Policy, which are already responsible for the public release of millions of scientific articles, are susceptible to various risks and political uncertainty.

In this Article, I propose an alternative private ordering solution based on latency values observed in open access stakeholder negotiation settings. Under this proposal, research institutions would collectively develop and adopt publication agreements that do not transfer copyright ownership to publishers, but instead grant publishers a one-year exclusive period in which to publish a work. This limited period of exclusivity should enable the publisher to recoup its costs and a reasonable profit through subscription revenues, while restoring control of the article copyright to the author at the end of the exclusivity period. This balanced approach addresses the needs of both publishers and the scientific community, and would, I believe, avoid many of the challenges faced by existing open access models.

Jorge L. Contreras ........................................... 491

THE ZYNGA CLAWBACK: SHORING UP THE CENTRAL PILLAR OF INNOVATION

As the now multi-billion dollar online gaming company Zynga, Inc. prepared to go public, Mark Pincus, its Chief Executive, and other top executives decided some employees had gotten too many stock options. So they took the controversial step of demanding that these purportedly over-valued employees give back some of their options to the company, or else be fired and lose all of their options that had not already vested. This Zynga clawback arguably violated an informal norm of Silicon Valley startup culture, but was legal nevertheless. The combination of at will employment and generous stock option plans gives startups extraordinary flexibility in both hiring and firing employees. It also makes economic sense. It allows employers to recruit talent effectively, control agency costs, and reward effort, but also inevitably opens the door to employer opportunism. Startups can terminate employees without cause after they have irrevocably made valuable contributions, reducing dilution of founders and investors but violating informal understandings they had with employees for fair compensation. Some prospective employees, I propose, may wish to negotiate buyout rights that protect them against opportunistic termination before liquidity events. This would be valuable especially for prospective employees who expect to make important contributions to a startup's value early in their term of employment, exposing them to holdup. Startup employees with stock option plans should also get the benefit of disclosures that explain more clearly the risk of stock option clawbacks.

Thomas A. Smith ........................................... 577
COMMENTS

SHARING THE DIGITAL SANDBOX: THE EFFECTS OF UBIQUITOUS COMPUTING ON STUDENT SPEECH AND CYBERBULLYING JURISPRUDENCE

The invention and easy accessibility of social networking sites is creating new pathways for social interactions online. One unfortunate development of this technology is the rise of cyberbullying. When students in public schools use school or home computers to harass other students, or faculty members, the public schools are limited in the ways they can react. Public school students possess a certain amount of freedom of speech as long as they don’t cause disturbances in the school environment. Ubiquitous social networking technology makes disturbing any space an easy endeavor and courts have been trying to define schools’ jurisdiction over their students’ actions in cyberspace. This paper examines the intersection of cyberbullying, student speech and ubiquitous computing. The principal legal problem is the circuit split on how, when, and whether to use the iconic student-speech case: Tinker v. Des Moines.

Rashmi Joshi ................................................. 629

PREGNANCY CRIMES: NEW WORRIES TO EXPECT WHEN YOU’RE EXPECTING

Women are inextricably linked to their fetuses during pregnancy. Everything a pregnant woman does can have an impact on her fetus. Recently, states have decided to begin regulating the behavior of pregnant women through criminal statutes. This has led some women to be held criminally liable for the outcomes of their pregnancies. This note discusses these pregnancy crimes, which are really a new form of status crime aimed at pregnant women. It introduces various categories of pregnancy crimes focusing on the prosecutions of drug-dependent women, women who defy doctors’ orders, and women who attempt self-harm. If states are permitted to use existing murder and feticide laws to regulate a woman’s behavior during pregnancy, the rights of pregnant women will be severely impaired. Holding women criminally liable for the outcomes of their pregnancies will serve undermine the overarching state goal of birthing and raising healthy babies, particularly in high-risk populations, like drug-dependent women. Ultimately, if pregnancy crimes are permitted to stand, pregnant women will become a new form of second-class citizen, with their rights and liberties severely curtailed.

Kira Proehl ................................................. 661

PARTISAN GERRYMANDERING AND THE ELUSIVE STANDARD

Every ten years, states are required to redraw their districts to ensure their representatives are elected by a roughly equal number of people. Unfortunately, politicians often use the opportunity to redistrict in a manner which favors their political party. This tactic is known as partisan gerrymandering. On multiple occasions, this political tactic has been challenged as an Equal Protection Clause Violation. Unfortunately, every time it has reached the Supreme Court, the Justices have split on the issue. Some Justices believe this is a nonjusticiable political question. Other Justices split on the proper standard to adjudicate the claim. This Comment analyzes each of the Justices’ opinions and proposed standards, and concludes that while the issue is justiciable, no Justice has successfully articulated a workable partisan gerrymandering standard. This Comment proposes that the Court should use already existing tests to require plaintiffs to show the effect of a partisan gerrymander coupled with intent. The Court should require plaintiffs to use the Arlington Heights model to prove the legislature intended to dilute the voting strength of a political party, and then it should use a modified version of the Gingles test to show the effect of a partisan gerrymander.

Ethan Weiss ................................................. 693
2011-2012 SURVEY OF NEW YORK LAW

ADMINISTRATIVE LAW
   – Rose Mary Bailly 501

BUSINESS ASSOCIATIONS
   – Sandra S. O’Loughlin & Christopher J. Bonner 559

CIVIL PRACTICE
   – Michael Anthony Bottar 593

CRIMINAL LAW
   – Todd Berger & Kelly Gonzalez 643

ENVIRONMENTAL LAW
   – Mark A. Chertok & Jonathan Kalmuss-Katz 713

EVIDENCE
   – Patricia A. Lynn-Ford 745

HEALTH LAW
   – Kirsten A. Lerch & Stephen F. Johnson 805

LABOR & EMPLOYMENT LAW
   – Kerry W. Langan & Katherine Ritts Schafer 829

MEDIA LAW
   – Roy S. Gutterman 865

PROFESSIONAL RESPONSIBILITY
   – James T. Townsend 897

TORT LAW
   – Hon. John C. Cherundolo 923

TRUSTS & ESTATES
   – Emilee K. Lawson Hatch 991

ZONING & LAND USE
   – Terry Rice 1007
CONTENTS

SYMPOSIUM

FOREWORD
Becky L. Jacobs ................................................. 495

INTRODUCTION
Dr. David A. Etnier ............................................. 499

Zygmunt J.B. Plater ........................................... 501

THE OTHER DAM: GRAYROCKS VERSUS THE WHOOPING CRANES
Patrick A. Parenteau ............................................ 543

WINNING A BATTLE, LOSING A WAR: THE "SNAIL DARTER CASE" AND THE CHANGING RELATIONSHIP BETWEEN LAW AND MEDIA
Harry S. Mattice, Jr ............................................. 549

PANEL DISCUSSION
Peter Allman, Alfred Davis, Dr. David A Etnier,
Hiram "Hank" Hill, Harry S. Mattice, Jr.,
Patrick A. Parenteau, Zygmunt J.B. Plater, Sam
Venable ............................................................. 559

COMMENT

UNDERMINING THE CLEAN WATER ACT: ONE COURT'S ATTACK ON ANOTHER SAFEGUARD FOR AMERICA'S WATERS
Jennifer L. Dusenberry ........................................ 585

APPENDIX

TEXAS JOURNAL OF WOMEN AND THE LAW

Volume 22  Spring 2013  Issue 2

Articles

“Small Town Values” and “The Gay Problem:” How Do We Apply Tinker and Its Progeny to LGBTQA Speech in Schools? ......................... 131
Sara Nau

Chieftainship Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in a Jungle of Pluralism ....................... 157
Laurence Juma

Afraid of Who You Are: No Promo Homo Laws in Public School Sex Education .......................................................... 219
Leora Hoshall
TABLE OF CONTENTS

SIXTH AMENDMENT CONFRONTATION CLAUSE

Admissibility of Field Test Results at Trial to Prove Intoxication
Vincent J. Costa .......................................................... 1379

Conflicting Confrontation Clause Concerns: The Admissibility of Hospital Records Versus A Defendant's Right to Confrontation
Susan Barlow .............................................................. 1399

SIXTH AMENDMENT RIGHT TO COUNSEL

Choose Your Own Path: A Defendant's Constitutional Right to Legal Representation
Luzan Moore ............................................................... 1427

An Effective but Unreported Application of Lafler & Frye
Christopher M. Gavin .................................................. 1453

SIXTH AMENDMENT RIGHT TO COUNSEL

AND IMMIGRATION CONSEQUENCES

Are You Satisfied with Your Representation?—The Sixth Amendment Right to Effective Assistance of Counsel
Dean M. Villani .......................................................... 1469

"But My Attorney Didn’t Tell Me I’d Be Deported!"—The Retroactivity of Padilla
Tara M. Breslawski ........................................................ 1487

SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

One Less Juror: A Defendant's Right to Juror Substitution
Luzan Moore ............................................................... 1513

EIGHTH AMENDMENT RIGHT TO REASONABLE BAIL

McManus v. Horn: The Legality of Setting a Single Form of Bail
Maureen Wynne .......................................................... 1537

FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

FOR ELECTION CANDIDATES

Evaluating Candidacy Restrictions: The Implications of New York’s Modified Approach
Brian Hodgkinson ......................................................... 1555
TABLE OF CONTENTS

STATUTORY INTERPRETATION

ARMED TO THE TEETH: THE USE OF A PERSON’S MOUTH, TEETH OR BODY AS A DANGEROUS INSTRUMENT FOR AGGRAVATED OFFENSES
Vincent J. Costa .................................................. 925

DON'T FEED THE DEER: MISAPPLICATIONS OF STATUTORY VAGUENESS AND THE FIRST AMENDMENT OVERBREADTH DOCTRINE
Brian Hodgkinson .................................................. 949

CONSTITUTIONAL AND STATUTORY PROTECTIONS OF JUVENILES

THE EVOLUTION OF YOUTH AS AN EXCUSE: STRIKING A BALANCE BETWEEN THE INTEREST OF PUBLIC SAFETY AND THE PRINCIPLE THAT KIDS ARE KIDS
Ashley A. Hughes .................................................. 967

FIRST AMENDMENT FREEDOM OF EXPRESSION

THE OCCUPY WALL STREET MOVEMENT AND THE CONSTITUTION: PROTESTERS PREOCCUPIED WITH THE FIRST AMENDMENT
Christine Verbitsky .................................................. 1003

DETERMINING THE LOCATION OF INJURY FOR NEW YORK’S LONG ARM STATUTE IN AN INFRINGEMENT CLAIM
Stefan Josephs .................................................. 1025

FIRST AMENDMENT FREEDOM OF RELIGION

CURTAILING THE FIRST AMENDMENT PROTECTION TO DISCOVERY
Silvia Durri .................................................. 1063

FOURTH AMENDMENT AND AUTOMOBILES

A DELAYED SEARCH OF AN AUTOMOBILE MAKES FOR AN UNCONSTITUTIONAL SEIZURE
Sean J. McGowan .................................................. 1083

LOCKED GLOVE COMPARTMENTS: SEARCHABLE OR STASH SPOTS?
Evan Levtow .................................................. 1115
# TOURO LAW REVIEW

**Vol. 29, No. 4** 2013

**TABLE OF CONTENTS**

**FOURTH AMENDMENT BODILY SEARCHES AND DNA**

- The Blueprint: Critiques of the Fingerprint and Abandonment Paradigms Utilized to Reject an Expectation of Privacy in DNA  
  *Avi Goldstein* ............................................................. 1151

- You Have the Right to Be Free from Unwanted Bodily Intrusion—Unless of Course There is a Court Order  
  *Tara Laterza* .............................................................. 1175

**FOURTH AMENDMENT CONSENT TO SEARCH**

- You Do Not Have the Right to Remain Drunk: Expanding the Scope of Implied Consent Through Fifth Amendment Voluntariness Standards  
  *Avi Goldstein* ............................................................. 1217

**FOURTH AMENDMENT AND MODERNIZED SOCIETY**

- Fourth Amendment Right to Privacy with Respect to Bank Records in Criminal Cases  
  *Francesca M. Brancato* .................................................. 1241

- It's Reasonable to Expect Privacy When Watching Adult Videos  
  *Matthew Leonhardt* ........................................................ 1263

- Privacy in Social Media: To Tweet or Not to Tweet?  
  *Tara M. Breslawski* ....................................................... 1283

**NEW YORK'S SUPERIOR MODEL FOR PRETRIAL IDENTIFICATIONS**

- Is New York Achieving More Reliable and Just Convictions when the Admissibility of a Suggestive Pretrial Identification Is at Issue?  
  *Matthew Gordon* ............................................................ 1305

- Prearraignment Lineup Procedures: Are Multiple Lineups Unduly Suggestive or Sufficiently Reliable?  
  *Jared R. Artura* ............................................................ 1333

- The Federal Retreat from Protecting Defendants from Tainted Show-Up Identifications and the Superiority of New York's Approach  
  *Stefan Josephs* ............................................................. 1355
The Wealthrenagement.com Journal for Estate-Planning Professionals

Editor in Chief: SUSAN R. LIPPE susan.lipp@penton.com
Legal Editor: DAWN S. MARKOWITZ dawn.markowitz@penton.com
Associate Legal Editor: DAVID H. LEONOK david.leonok@penton.com
Art Director: KATHY MCGIBBON kathy.mcgibbons@penton.com
Contributing Editors, Retirement Benefits: NATALIE B. CHABAH, Nutter Mckenna & Fish LLP
Group Digital Director: GEORGE MUSCO george.musco@penton.com
Audience Development Director: JOHN PAVLICK john.pavlack@penton.com
Audience Development Manager: ANDREZA SZABO andrzea.szabo@penton.com
Digital Content Manager: JASON WESALO jason.wesalo@penton.com
Group Production Manager: JUSTIN MARICKIN justin.marickin@penton.com
Production Coordinator: LAUREN LOYA lauren.loya@penton.com
Classified Production Manager: MICHAEL PENTOIN michael.pentoin@penton.com

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Editorial and Business Office: 166 Avenue of the Americas, 10th Floor, New York, NY 10013
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As we’ve learned, it’s good to keep pace with the times and try out new ideas, but it’s also important to value what we’ve learned from the past. Our Committee Report on High-Net-Worth Families & Family Offices also reflects this lesson. Although it’s important to keep up with changes in the role of family offices, given business transitions and the needs of the next generation, it’s still important for family businesses to learn from the past. Patricia M. Soldano’s “Lessons Learned After 25 Years of Family Office Management,” p. 35, exemplifies how the core lessons we’ve learned can help us in the future. “Facilitating New Conversations in the Next Decade,” p. 28, by Sara Hamilton, reviews how best to help family office clients with the transitions they face, through initiating a dialogue about major family office decisions. “Shared Family Office,” by Marianne W. Young and Beth A. Landin, suggests a new structure that’s based on the key value of collaboration. “Investment Management Best Practices for Family Offices,” p. 42, by Stephen Campbell and David Balin, underscores the importance of asset allocation and portfolio construction. And finally, “FAQs for NextGenDonors,” p. 32, by Danielle Oristian York and Sharna Goldseder, helps us understand what’s on the minds of the next generation.

—SUSAN R. LIPPE
Editor in Chief
On the Cover

Our cover this month, “John Lennon 1965 (Hotel)” (17.1 in. by 14.2 in.) by Elizabeth Peyton, sold for $594,843 at Christie’s Post-War and Contemporary Art Sale in London on June 25, 2013. The year 1965 was big for the Beatles, and August of that year was particularly noteworthy, as it saw the start of their second American tour, kicked off by an event that marked the height of worldwide “Beatlemania”: the Aug. 15, 1965 concert in Shea Stadium.

The most famous concert of its era and one of the most noteworthy of all time, the Shea Stadium show set then-records for attendance and revenue with over 55,000 in attendance and a total gate of roughly $304,000. Interestingly, concertgoers claimed that the deafening crowd noise, combined with the distance of the band from the crowd, made the actual music itself nigh inaudible. At one point, noting the ridiculousness of the situation, John Lennon began to bang away on the keyboard with his elbow during a song while the rest of the band laughed hysterically. In spite of the poor acoustics, this concert represented a watershed moment for popular music and remains an important hallmark of the era.

—David H. Lenok, Associate Legal Editor

Some of our other favorites from this auction include:

- p. 20, “Cup of Coffee” by Roy Lichtenstein, which sold for $4,325,381.
- p. 30, “Marseille” by Nicolas de Staël, which sold for $4,757,014.
- p. 47, “Untitled (Diptych)” by Jean-Michel Basquiat, which sold for $28,928,433.

BRIEFING

10/ Tax Law Update

David A. Handler, partner in the Chicago office of Kirkland & Ellis LLP, and Alison E. Lothes,
associate in the Boston office of Sullivan & Worcester LLP, report on:

- Windsor v. United States; Hollingsworth, et al. v. Perry, et al.—U.S. Supreme Court declares Defense of Marriage Act unconstitutional and holds that residents supporting California's Proposition 8 lack standing to defend the law; and

- ILM 201327009—Qualified subchapter S corporation trustee beneficiary is entitled to deduct interest payments.

11/ Philanthropy
Laura H. Peebles, tax director in the Washington, D.C. office of Deloitte Tax LLP, shares the advantages and disadvantages of four avenues a client can take to dispose of his art collection.

FEATURES
Estate Planning & Taxation
13/ Estate Planning in Decoupled States Post-ATRA
By Bruce D. Steiner & Martin M. Shenkman
With a $5.25 million estate tax-exempt amount and portability, very few estates will pay any federal estate tax. However, for many clients, especially those in decoupled states, simplicity remains elusive. Why? For starters, states have different rules as to whether a state-qualified terminable interest property election is permitted; clients need to decide whether to create credit shelter trusts; and two states have a gift tax.

Bruce D. Steiner is an attorney with Kleinberg, Kaplan, Wolff & Cohen, P.C. in New York.
Martin M. Shenkman is an attorney in Paramus, N.J.

18/ The Modern Family
By Karen Ciegler Hansen
We have a responsibility to educate our clients about the options available for the well-being of their families, which is a different role than tax planning or asset protection. Importantly, we need to become aware of changes in our clients' lives to create a modern estate plan that's workable and addresses their concerns.

Karen Ciegler Hansen is a practicing attorney and shareholder with Winthrop & Weinstine, P.A. in Minneapolis and St. Paul, Minn.

Fiduciary Professions
23/ Mandatory Arbitration Clauses in Trusts
By Stephen W. Murphy
This year, in Ranchal v. Reitz, Texas became the first state to judicially enforce a mandatory arbitration provision in a trust under current state law. The court's reasoning is significant for trust law in Texas, but it's also applicable to other states. The decision was based on the wording of Texas' arbitration statute, which uses the same operative language as those of 22 other states, the District of Columbia and the Revised Uniform Arbitration Act. So, take note of this decision.

Stephen W. Murphy is an associate at McGuireWoods LLP in Charlottesville, Va.

COMMITTEE REPORT
High-Net-Worth Families & Family Offices
28/ Facilitating New Conversations in The Next Decade
By Sara Hamilton
What can you do to facilitate the necessary, but difficult, conversations and encourage an effective dialogue that will lay the foundation for smooth transitions? Here's advice about preparing yourself to be most helpful to private family business owners making, or contemplating, a change.

Sara Hamilton is founder and CEO of Family Office Exchange in Chicago.

32/ FAQs for #NextGenDonors
By Danielle Oristian York & Sharna Goldseker
The faces of philanthropy and family wealth are changing in the United States. But, what do we know about these under-40 high capacity donors? Read about the results of a recent study of these hard-to-reach, busy 21-to-40 years olds, and learn how they make decisions about allocating wealth and what role their families had in shaping their views.

Danielle Oristian York is the director of 21/64, a non-profit consulting practice specializing in next-gen and multi-generational engagement in philanthropy and family enterprise, based in New York.
Sharna Goldseker is the managing director of 21/64, a
non-profit consulting practice specializing in next-gen and multi-generational engagement in philanthropy and family enterprise, based in New York.

35/ Lessons Learned After 25 Years of Family Office Management
By Patricia M. Soldano
After over two decades of serving family offices, author Patricia M. Soldano gives us her list of 10 core services a family office (FO) will need. She also provides eight considerations families should address when selecting an FO model and reminds us of five core fiduciary principles to which FOs must adhere.

Patricia M. Soldano is chairman, western region, at GenSpring Family Offices in Costa Mesa, Calif.

39/ Shared Family Office
By Marianne W. Young & Beth A. Landin
Here's a third option to the single-family office (SFO) model and the multi-family office model: the shared family office. Collaborating with a shared family office may be the perfect solution for SFOs facing continued cost pressures, management succession issues or difficulty finding and retaining talent.

Marianne W. Young is president of Market Street Trust Company, a multi-family office in Corning, N.Y.
Beth A. Landin is the vice president of client and strategic relationships at Market Street Trust Company, a multi-family office in Corning, N.Y.

42/ Investment Management Best Practices for Family Offices
By Stephen Campbell & David Bailin
While family offices will monitor portfolios and measure individual risk factors, they typically don't evaluate "competency risk." Competency risk is a fundamental mismatch between a family's expectations for its portfolio and the investment process, skill and experience of the family office available to consistently satisfy those expectations. Here's how family offices can gain self-awareness as to the strengths and weaknesses of their investment process and staffing.

Stephen Campbell is managing director and head of the North America Family Office Group at Citi Private Bank, based in Seattle.
David Bailin is managing director and global head of managed investments at Citi Private Bank, based in Stamford, Conn.

PERSPECTIVES
48/ Why Do Americans Hate Expatriates?
By G. Warren Whitaker
Many Americans seem to have deeply ingrained hostilities towards individuals who choose to give up their U.S. citizenship. Most of their reasons for feeling that way, however, are more emotional than rational.

G. Warren Whitaker is a partner at Day Pitney LLP in New York.

Correction: There was a minor error in last month's article "Retirement Accounts with Foreign Beneficiaries" by P. Landon Perkins in, p. 36. The Internal Revenue Service recently decided that notarized copies of passports are no longer an acceptable form of ID for obtaining an individual taxpayer identification number. Any passport copy must be certified by the agency issuing the passport. We apologize for this oversight.
Contents

1. Civil Liability in a Mixed Jurisdiction: Quebec and the Network of *Ratio Communis* ...................... 1
   ÁDÁM FUGLINSZKY
   *Professor, Eötvös Loránd University Budapest, Hungary.*

2. The European Banking Authority: Legal Framework, Operations and Challenges Ahead .................. 51
   LUCA MARTINO LEVI
   *Honorary Fellow (‘Cultore della Materia’) in Private Law, University of Torino, Department of Law.*

3. Mixed Legal Systems—The Origin of the Species .................. 103
   VERNON VALENTINE PALMER
   *Thomas Pickles Professor of Law and Co-Director of the Eason Weinmann Center for International and Comparative Law, Tulane University.*
UMKC LAW REVIEW

Vol. 81  Spring 2013  No. 3

SYMPOSIUM

GATHERING AT THE SCHOOLHOUSE GATE: FORTY YEARS OF LANDMARK SCHOOL SPEECH CASES THROUGH THE EYES OF THOSE WHO WERE THERE

INTRODUCTION

Gathering at the Schoolhouse Gate ..........Steven M. Brown & Daniel B. Weddle 541

ARTICLES

The University Campus as Public Forum:
The Legacy of Widmar v. Vincent ..................Stephen Douglas Bonney 545

Silencing Race & the First Amendment:
The Suppression of Student Expression & Curricular Coverage of Racial Identity & Ethnic Solidarity in K-12 Education ........................................ Maurice R. Dyson 569

Black Armbands, “Boobies” Bracelets and the Need to Protect Student Speech ...............David L. Hudson Jr. 595

Tinker in the Era of Judicial Deference:
The Search for Bad Faith ........................................ Bernard James 601

Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students’ Rights ...........Andrew R. Kloster 617

Intellectual Seriousness and the First Amendment’s Protection of Free Speech for Students ...........Allen Rostron 635

The Onslaught on Academic Freedom ..........Mark P. Strasser 657

No Jokes About Dope: Morse v. Frederick’s Educational Rationale .......................Emily Gold Waldman 685

COMMENTS

Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved? ..........Sam Hotchkiss 701

Grand Theft Free Speech? An Analysis of First Amendment Restrictions on Violent Video Game Legislation ............................................................. Kathryn E. Maldonado 725

Tolerance Attracts Talent: A Stronger Missouri Human Rights Act Can Grow Our Economy ................................................................. Brian Noland 747
## CONTENTS

### ARTICLES

**Ex Parte McCcardle and the Attorney General’s Duty to Defend Acts of Congress**  
*John E. Beerbower* .................................................. 647

**Unexpected Commonalities: The Applicability of Bioethics Concepts to Insider Trading Law**  
*Samer B. Korkor* .................................................. 689

**Using Contract Law to Tackle the Coaching Carousel**  
*Stephen F. Ross & Lindsay Berkstresser* ......................... 709

**Cyberbullying and California’s Response**  
*Atticus N. Wegman* .............................................. 737

### COMMENTS

**Overdrafting Toward Disaster: A Call for Local Groundwater Management Reform in California’s Central Valley**  
*Philip Laird* ...................................................... 759

**Snake Oil in Your Pomegranate Juice: Food Health Claims and the FTC**  
*Alexandra Ledyard* .............................................. 783

**Data Expiration, Let the User Decide: Proposed Legislation for Online User-Generated Content**  
*Karen Majovski* .................................................. 807
CONTENTS

INTERNATIONAL PERSPECTIVES

PRINCIPLES OF ASIAN CONTRACT LAW:
AN ENDEAVOR OF REGIONAL HARMONIZATION
OF CONTRACT LAW IN EAST ASIA ................... Shiyuan Han 589

THE INTERPRETATION IN MEXICO OF THE
UNITED NATIONS CONVENTION ON
SALE OF GOODS .............................. Alejandro Osuna-González 601

LAW WARS: AUSTRALIAN CONTRACT
LAW REFORM VS. CISG VS. CESL ................... Lisa Spagnolo 623

RELATED INTERNATIONAL INSTRUMENTS AND ORGANIZATIONS

AN ASSESSMENT OF THE CONVENTION
ON THE LIMITATION PERIOD IN THE
INTERNATIONAL SALE OF GOODS
THROUGH CASE LAW ..................... Luca G. Castellani 645

UNIDROIT PRINCIPLES AS A
SOURCE FOR GLOBAL SALES LAW .......... Henry Deeb Gabriel 661

CISG AND UPICC AS THE BASIS
FOR AN INTERNATIONAL CONVENTION
ON INTERNATIONAL COMMERCIAL CONTRACTS .......... Jan Ramberg 681

LOOKING TOWARD THE FUTURE

CISG AS BASIS OF A COMPREHENSIVE
INTERNATIONAL SALES LAW ............... Larry A. DiMatteo 691

WHO NEEDS A UNIFORM CONTRACT LAW,
AND WHY? ..................................... Ingeborg Schwenzer 723

APPLICABLE LAW, THE CISG, AND THE FUTURE
CONVENTION ON INTERNATIONAL COMMERCIAL
CONTRACTS .......................... Pilar Perales Viscasillas 733

ATTORNEYS’ FEES—LAST DITCH STAND? ............... Bruno Zeller 761
CONTENTS

NORMAN J. SHACHOY SYMPOSIUM:
Assessing the CISG and Other International Endeavors to Unify
International Contract Law: Has the Time Come for a New
Global Initiative to Harmonize and Unify International Trade?

EDITORS’ FOREWORD
[xii]

INTRODUCTION

An Overview of the CISG and an
Introduction to the Debate About
the Future Convention ......................... Michael Bridge 487

ARTICLES

KEYNOTE SPEAKERS

Possible Future Work by UNCITRAL
in the Field of Contract Law:
Preliminary Thoughts
from the Secretariat ............................ Renaud Sorieul, 491
 Emma Hatcher,
& Cyril Emery

A New Global Initiative on
Contract Law in UNCITRAL:
Right Project, Right Forum? .................... Keith Loken 509

The Soft Law Approach to Unification
of International Commercial Contract Law:
Future Perspectives in Light of
UNIDROIT’s Experience ........................ Anna Veneziano 521

SPECIAL TOPICS UNDER THE CISG

Article 35 of the CISG:
Reflecting on the Present
and Thinking About the Future .............. Djakhonir Saidov 529

Defining the Borders of Uniform
International Contract Law:
The CISG and Remedies for Innocent,
Negligent, or Fraudulent Misrepresentation. Ulrich G. Schroeter 553
ARTICLES

THE ECONOMIC STRUCTURE OF HONG KONG ADMINISTRATIVE LAW: EFFICIENCY AND LEGALITY OF GOVERNMENT DECISION-MAKING SINCE CHINA’S RESUMPTION OF SOVEREIGNTY ................................................................. Eric C. Ip 227

A TURBULENT ADOLESCENCE AHEAD: THE ICC’S INSISTENCE ON DISCLOSURE IN THE LUBANGA TRIAL ........................................... Christodoulos Kaoutzanis 263

PRE-CONSTITUTIONAL LAW AND CONSTITUTIONS: SPANISH COLONIAL LAW AND THE CONSTITUTION OF CÁDIZ ................................................................. M.C. Mirow 313

NOTES

HYDRAULIC FRACTURING IN POLAND: A REGULATORY ANALYSIS .................. Justin P. Atkins 339

THE NEED FOR REGULATION OF DIRECT-TO-CONSUMER GENETIC TESTING IN THE UNITED STATES: ASSESSING AND APPLYING THE GERMAN POLICY MODEL ......................................................... Sarah F. Sunderman 357

OVERCRIMINALIZATION BASED ON FOREIGN LAW: HOW THE LACEY ACT INCORPORATES FOREIGN LAW TO OVERCRIMINALIZE IMPORTERS AND USERS OF TIMBER PRODUCTS ............. Matthew S. White 381