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The admissions process at one of the nation's most prestigious law schools is as much art as it is science. Sarah Zearfoss, Director of Admissions and Assistant Dean at the University of Michigan Law School, offers a firsthand account of the school's admissions program. In the process she answers the commonly asked question, just what do admissions committees take into account when they review an application? She describes the Law School's admissions program from a functional point of view, and explains why the concept of diversity embodies far more than race. She also refutes Justice Rehnquist's analysis in dissent in Grutter v. Bollinger by explaining how the number of accepted students from each group is a function of the number of applicants, rather than an intentional numerical quota.

THE TOO-MANY-MINORITIES AND RACEOATING DYNAMICS OF THE
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Twenty five years ago, in Regents of the University of California v. Bakke, the United States Supreme Court validated certain considerations and uses of race in university and college admissions decisions. Writing only for himself in one part of the Bakke Court's opinion, Justice Powell expressed his view that the attainment of a diverse student body was a constitutionally permissible goal for an institution of higher education. A quarter century later, in the University of Michigan affirmative action cases discussed in this article, a majority of the Court endorsed Powell's view that the compelling state interest in student body diversity justified the use of race in university admissions. Discussing and commenting on the Court's journey from Bakke to the 2003 Michigan decisions, this article also argues that the next battles over the constitutionality of affirmative action in higher education have just begun, as those
who unsuccessfully asked the Court to hold that race-conscious and diversity-focused affirmative action violated the Constitution will continue to be animated by the too-
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cludes that public school officials who desire to use race in making student assignment decisions probably will be able to articulate a compelling governmental interest under Grutter. However, under Gratz, they will have significant difficulty in meeting the nar-
row tailoring prong of strict scrutiny analysis if they seek to use race as an express, mechanical means of selecting and assigning students. Because school districts will
search for race-neutral assignment plans as they attempt to comply with both Supreme Court opinions, Professor Levine then discusses the results of the race-neutral student assignment plan being used in San Francisco public schools.

The school district devised the new race-neutral plan, a Diversity Index based on socioeconomic status, academic achievement, and language skills, after they settled a law suit Professor Levine helped bring on behalf of all Chinese American children in the school district. The lawsuit had challenged the constitutionality of the school dis-
trict's previous plan, which used racial quotas to assign children to public schools in San Francisco. As part of the settlement, the school district agreed to use race-neutral means to assign children. The article concludes by reporting on the mixed results the new Diversity Index has achieved in its first two years of use.

CONSTITUTIONAL SUNSET?: JUSTICE O'CONNOR'S CLOSING
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By Vikram David Amar and Evan Caminker ........................ 541

In this essay, Professors Amar and Caminker discuss the observation Justice O'Connor's majority opinion in Grutter makes that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." While they acknowledge the highly ambiguous nature of this sen-
tence, Amar and Caminker hypothesize this passage as a warning from the Court that it will not necessarily rule a quarter century from now the way it did last summer, even if the underlying demographic facts remain the same. Amar and Caminker discuss how this possible reading fits in with the rest of the Grutter opinion, and with Justice O'Connor's past jurisprudence.
“Bread for the Poor”: Access to Justice and the Rights of the Needy in India

Marc Galanter & Jayanth K. Krishnan

India’s courts suffer from enormous backlogs. To remedy this, Indian politicians and judges have been promoting various reforms, including alternative forms that would dispose of cases more quickly. One forum in particular, the Lok Adalat or people’s court, has been promoted with special fervor for nearly two decades. The Lok Adalat has been widely trumpeted as a success by its proponents, but very little information is available on the workings of this institution. This study is a preliminary empirical assessment of several sorts of Lok Adalats. These Lok Adalats exhibit great variation in how they function. We find that their performance is highly problematic, both in terms of effectiveness in resolving cases and in the quality of justice received by the parties. These findings have serious implications for the millions of Indians currently being encouraged or required to submit their grievances to Lok Adalats and for the prospects for efficacious reforms of the Indian legal system.

In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help

Norman Lefstein

A significant national problem is the enduring widespread crisis in providing adequate legal representation for indigent defendants in state criminal prosecutions. Insufficient funding and lack of oversight undermines the quality of public defense delivery systems while constantly risking the conviction of innocent persons. Thus, the Constitution’s promise of counsel, first recognized in 1963 by the U.S. Supreme Court in Gideon v. Wainwright, remains unfulfilled. This Article, which draws upon an in-depth study of English criminal legal aid, focuses on
sources of funding, selection of counsel by the client, and programs to monitor the quality of representation. Comparing the current American and English systems, this Article suggests that there are important lessons the United States should borrow from England. Foremost among these, this Article argues, is for the federal government to provide financial support to assist state and local governments in fulfilling their duty to implement the right to counsel, an approach endorsed almost twenty-five years ago by the American Bar Association.

POST-REALISM, OR THE JURISPRUDENTIAL LOGIC OF LATE CAPITALISM: A SOCIO-LEGAL ANALYSIS OF THE RISE AND DIFFUSION OF LAW AND ECONOMICS

Eric M. Fink ................................................................. 931

Law and Economics has been widely identified, by proponents and critics alike, as the most influential movement within legal scholarship over the past two decades or more. The emergence and growth of the Law and Economics movement coincides with a set of economic, political, and cultural developments representing a fundamental transformation of social relations on a global scale. The trends that others have identified as driving the rise of Law and Economics are encompassed within this broader transformation. Previous accounts, however, do not fully locate the movement within that historical-sociological context. Nor have they gone very far in tracing the diffusion of Law and Economics out of the academy and into the courtroom.

This Article begins by developing a critical socio-legal account of Law and Economics as a constitutive element in a restructuring regime of capital accumulation and social regulation, identifying the socio-economic relations and interests that both give impetus to a neo-Liberal project of reconstituting capitalism and foster Law and Economics as a theory of law in harmony with that project. Noting the controversy over various programs that endeavor to inculcate Law and Economics among judges, the Article measures citations to Law and Economics scholarship in federal appellate judicial opinions, as a first step toward gauging the impact of Law and Economics on judicial decision-making.
The data reveal that direct citation to Law and Economics scholarship, other than by judges who are themselves closely identified with the movement, has increased only slightly during the period of the movement's rise. Further empirical research is suggested, to examine other, more indirect, ways that Law and Economics may be influential within legal practice. Such research will enhance the critical investigation of the Law and Economics movement in particular, and contribute to the socio-legal understanding of law as a constitutive element of society more generally.

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PREJUDICE PRESUMED: THE DECISION TO CONCEDE GUILT TO LESSER OFFENSES DURING OPENING STATEMENTS

Robert J. Nolan......................................................... 965

On March 1, 2004, the Supreme Court granted certiorari in Florida v. Nixon to resolve whether Strickland v. Washington or United States v. Cronic applies to ineffective assistance of counsel claims where defense counsel unilaterally conceives guilt to a lesser offense. A number of lower courts have considered this issue. Some have applied Stickland's two prong test and required the defendant to prove both deficient performance and prejudice. Other courts have held that such a concession amounts to a failure of meaningful adversarial testing and under Cronic, prejudice should be presumed. Since Bell v. Cone, where the Supreme Court held that in order for Cronic to apply the concession must amount to an entire failure, courts have increasingly applied Strickland and required the defendant to prove prejudice. This Note contends that when defense counsel's conceives guilt to a lesser included offense during opening statements, the concession amounts to an entire failure of meaningful adversarial testing. Such a concession not only relieves the prosecution of their entire burden of proof as to that offense but takes one of the most fundamental decisions—whether to plead guilty to each offense—out of the hands of the defendant. Prejudice should therefore be presumed. A concession made during closing arguments, on the other hand, may serve as an acknowledgment of overwhelming evidence already presented against the defendant. Where the evidence is indeed overwhelming, Strickland should apply and prejudice should not be presumed.
A COLD NIGHT: UNCONSCIONABILITY AS A DEFENSE TO MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS

Michael Schneidereit .................................................................................. 987

Mandatory arbitration clauses in employment agreements are the subject of a fair amount of controversy. While arbitration is a cost-effective method for the employer to resolve disputes, employees often have little choice as to whether to sign such agreements. Recent cases in California have found certain types of mandatory arbitration clauses in employment contracts to be unconscionable. This Note examines the larger problem of mandatory arbitration in employment agreements, and assesses various potential solutions to the problem. More specifically, it evaluates the unconscionability remedy that has been crafted by the California courts, and contrasts this remedy with the arbitration jurisprudence that has been developed by the United States Supreme Court. Finally, this Note argues that the California state remedy is inconsistent with federal jurisprudence.

BAILEMENT AND VETERINARY MALPRACTICE: DOCTRINAL EXCLUSIVITY, OR NOT?

Katie J.L. Scott ........................................................................................... 1009

Animals are considered the personal property of their owners, and as such, when they are delivered by their owners to a veterinarian, the facts of the situation perfectly satisfy the elements of a bailment relationship. Nonetheless, when courts consider negligence by a veterinarian, animals’ classification as property is disregarded and bailment principles are not applied. Instead, veterinary malpractice principles are used. If bailment principles were applied, it would be easier for owners to prove liability for injury to their animals. In these same cases, animals’ classification as property is an important factor in the determination of damages, usually limiting damages to the fair market value of the animal. This approach is inconsistent: it disregards animals’ status as property when it would be beneficial to them to be treated as such, but applies it when it is detrimental to their interests. This Note explores this inconsistency. First, animals’ status as property, bailment doctrine, and veterinary malpractice principles are each reviewed. Second, the reasons for applying veterinary malpractice rather than bailment are explored and critiqued. Lastly, this Note concludes that bailment principles should be applied in cases regarding negligence by a veterinarian.
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HAPPY (?) BIRTHDAY RULE 11

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Rule 11 became a metaphor for the problems and promise inherent in our civil justice system: To what extent can we afford courts open to all who have a perceived grievance? Do we need a potent tool to weed out the filings of those who may not be practicing at the highest levels of professionalism? Will we sacrifice the evolution of new legal theories if we use such a tool too aggressively? A distinguished cast of authors has provided us with their thoughts about Rule 11 at the time of its amendments’ tenth and twentieth birthdays. Most believe Rule 11 has now largely achieved its purposes. Others believe the 1983 version of
Rule 11 opened a Pandora's box: even though the 1993 amendments cured many of the problems with the administration of Rule 11, judges may be using alternative sanctions tools in troubling ways. Finally, two of our authors argue that Rule 11 can be reformed to achieve the higher purpose of enforcing the Model Rules of Professional Conduct. This Symposium is important because it provides a variety of reflections on the importance of the rule, and whether it is or ever can be a positive force in improving the administration of civil justice.

**A REFLECTION ON RULEMAKING: THE RULE 11 EXPERIENCE**

*by Paul D. Carrington and Andrew Wasson* ............................................. 563

Professor Paul Carrington, senior author to this Article, and Andrew Wasson provide a superb overview of the rulemaking experience of Rule 11. Professor Carrington's intimate involvement in the rulemaking process as Reporter to the Advisory Committee on Civil Rules is evident in his excellent analysis of the important developments surrounding Rule 11. His article provides an inside look at the impact of the revision process on the current version of Rule 11. In so doing, he details the criticisms surrounding the 1983 version of the rule that eventually led to the changes reflected in the 1993 version. Ultimately, Professor Carrington concludes that the 1993 version of Rule 11 is thus far the most effective.

**RULE 11 AND RULE REVISION**

*by Margaret L. Sanner and Carl Tobias* ............................................. 573

In this article, Margaret L. Sanner and Carl Tobias take a critical look at the Rule 11 experience, as well as rulemaking in general. In contrast to Professor Carrington and Mr. Wasson, Ms. Sanner and Professor Tobias discuss the dangers of ad hoc rulemaking without the benefit of empirical data. They argue that when rules are adopted without due consideration of the reality of practice, unfortunate and unintended consequences may result.

**HINDSIGHT, REGRET, AND SAFE HARBOURS IN RULE 11 LITIGATION**

*by Charles Yablon* ................................................................. 599

This Article begins by surveying the evidence that the 1993 amendments have been successful in substantially reducing both frivolous litigation and abusive Rule 11 motions. Professor Yablon
concludes that considerations of hindsight and regret have played a major role in that success. By effectively prohibiting Rule 11 motions from being made after the merits of the underlying claims have been adjudicated, the 1993 safe harbor provision deprived movants of the powerful “hindsight effect” under which judges, having just dismissed a case as non-meritorious, were then asked whether the claim should never have been brought in the first place. By decreasing the likelihood of hindsight bias and increasing the ability of certain categories of litigants to act on their feelings of regret over filing baseless or frivolous claims, the 1993 amendments, particularly the safe harbor provision, have improved the efficacy of Rule 11 without increasing frivolous filings.

by Danielle Kie Hart.......................................................... 645
In this article, Professor Hart explores the standards for imposing sanctions under Rule 11, section 1927 and the court’s inherent power. Professor Hart then tests her hypotheses that the 1993 amendments have led to more activity under section 1927 and the inherent power of authority by setting forth the results of her research on the sources of sanctioning power after the 1993 amendments. Professor Hart’s review of reported cases shows not only that Rule 11 activity has decreased and that alternate sanctioning activity has increased, but also that in many cases the defendants in civil rights cases have used the alternative devices because they had failed to comply with the Rule 11 safe-harbor.

THE REALITY OF “A LAST VICTIM” AND ABUSE OF THE SANCTIONING POWER
by George Cochran.............................................................. 691
In 1983, the Advisory Committee on the Federal Rules of Civil Procedure took an ill-considered, precipitous step when it amended Rule 11 to impose mandatory sanctions on counsel, including reasonable attorneys’ fees. This amendment led to a flood of satellite litigation. The impeachment proceedings of Judge James Peck and the Rule 11 sanctioning of Professor Barry Nekell illustrate the injustices such a rule performs. In this article, Professor George Cochran praises the 1993 amendments to Rule 11, most notably the “safe-harbor” provision, which facilitate arguing for a change of law, provide a fairer standard
for attorney liability, and place greater constraints on judges imposing sanctions. Turning to sanctions under 28 U.S.C. § 1927, Professor Cochran details the current conflict in circuits with respect to standards for attorney liability. Presuming a future grant of certiorari, the article sets forth the legislative history of the 1980 amendment and recommends that the Court put in place a new test compatible with the “serious and studied disregard of justice” standard contemplated by Congress.

Sanctions Under Rule 11: A Cross-Circuit Comparison
by Jerold S. Solovy, Norman M. Hirsh, Margaret J. Simpson, and Christina T. Tomaras

This article compares the circuit courts’ approaches to Federal Rule of Procedure 11: when a paper, including a complaint, may be sanctioned for the presenter’s improper purpose, when safeguards afforded an attorney or party before the imposition of Rule 11 sanctions including the standard to be applied when a court imposes sanctions on its own initiative, and the safe harbor provision. The authors agree with the majority of circuits that an objective standard should apply to Rule 11 inquiries, and that the safe harbor provision is jurisdictional and strictly apply to each sanctions motion. On the issue of Rule 11 improper purpose sanctions, the authors recommend an amendment that makes clear that nonfrivolous complaints and other papers may not be sanctioned for improper purpose.

The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers
by Peter A. Joy

In this article, Professor Joy analyzes the relationship between Rule 11 sanctions imposed on lawyers by federal courts and discipline imposed on lawyers by state disciplinary authorities. First, he discusses the history of lawyer regulation. Then, he reviews the use of Rule 11 by the federal courts since 1993 and examines whether there is a correlation between Rule 11 sanctions and subsequent discipline for the same litigation conduct. Finally, because the data demonstrate little correlation between Rule 11 sanctions and subsequent discipline, he evaluates current institutional choices to determine whether discipline should follow more Rule 11 sanctions. Professor Joy concludes that the
current system, in which Rule 11 violations do not require mandatory discipline, results from wise institutional choices.

INTEGRATING LEGAL ETHICS & PROFESSIONAL RESPONSIBILITY WITH FEDERAL RULE OF CIVIL PROCEDURE 11
by Richard G. Johnson ................................................................. 819

Attorney Richard G. Johnson examines the impact that the primary litigation ethic rules (A.B.A. Model Rules of Professional Conduct R. 3.1–3.4) have had on Federal Rule of Civil Procedure 11 case law. In so doing, Mr. Johnson discusses the criticism of using Civil Rule 11 to enforce these rules versus referral to the disciplinary system, and he explains why they have generally been separated from Civil Rule 11 analysis as well as the consequences that have flowed there from. Mr. Johnson concludes that the litigation ethic rules should become the Civil Rule 11 standard, and he proposes a revision to that rule, which would integrate legal ethics and professional responsibility law with Civil Rule 11.
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COMPARATIVE CORPORATE GOVERNANCE SYMPOSIUM

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The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance

Roberta S. Karmel 849

Foreign issuers comprise over ten percent of the issuers registered and filing reports under the Securities Exchange Act of 1934. This Article considers the application of the Sarbanes-Oxley Act of 2002 to such foreign issuers. After tracing the fluctuating policies of the United State Securities and Exchange Commission (SEC) with regard to foreign issuers—from isolationism to internationalism to unilateralism—this Article discusses the Sarbanes-Oxley provisions that impinge upon the corporate governance of foreign issuers. Next, this Article explains the foreign issuers' negative reaction to many of these provisions. Finally, this Article speculates on the possible implications of the new foreign issuer regulatory regime, asserting that it may lead either to fewer foreign issuers entering the SEC reporting system or to worldwide improvements in corporate governance.

Corporate Governance Divergence and Sub-Saharan Africa: Lessons from out Here in the Fields

Naomi Cahn 893

Much of the literature discussing comparative corporate governance focuses on the Anglo-American system of corporate governance and the ways in which other countries are assimilating this model. However, this model is not effective in dealing with the problems in developing countries. Corporations wanting to enter these countries are faced with unique dilemmas because the countries often lack the base conditions that are necessary for a successful business climate. This Article focuses on the particular problem of corporate social responsibility and corruption, first exploring the barriers to developing commerce with an examination of business traffic along the Congo River, and second utilizing the Chad-Cameroon Oil and Pipeline Project to demonstrate the problems faced when nongovernmental organizations, multilaterals, and governments attempt to interact. This Article further recommends directions for the integration of corporate social responsibility into the laws and practices of non-European developing countries.

The European Origins and the Spread of the Corporate Board of Directors

Franklin A. Gevurtz 925

Different nations take different approaches to comparative corporate governance—e.g., two-tier versus single-tier boards, codetermination versus election of directors solely by the shareholders, and shareholder primacy norm versus stakeholder models. Despite many differences, nations have converged upon a common institution for the governance of large business organizations. Around the world, it is the legal norm that corporations are managed by, or under the direction of, a board of directors. This Article explores, on both descriptive and analytical levels, the origins of the corporate board of directors and the reasons why the corporate board originated in Europe and spread from there. This Article
also explains why the origin of the corporate board of directors is important and concludes with broad lessons that emerge from examining the reasons for the European origin and the spread of the corporate board of directors.

Fox in S-Ox North, a Question of Fit: The Adoption of United States Market Solutions in Canada  
Ronald B. Davis  955

With the adoption of the Sarbanes-Oxley Act of 2002, the United States Congress addressed a number of concerns raised by Enron's dramatic collapse. Now, Canadian securities regulators are poised to adopt regulations that essentially parallel provisions of that Act, despite the divergence in the capital structures of the two nations. This Article argues that, in doing so, Canadian regulators may be applying a convergence model of corporate governance beyond the limits of its usefulness and are missing an opportunity to consider and address those issues of corporate governance that are actually implicated by Canada's capital structure. This Article also suggests that such disparities between regulation and the behaviors it should encourage or deter could be avoided if, before formulating new rules, regulators articulated those behaviors they sought to affect and the best regulatory tools available to do so.

UK Corporate Governance and Banking Regulation: The Regulator's Role as Stakeholder  
Kern Alexander  991

The United Kingdom is home to the world's second most important financial center and the world's most important international banking, securities, and insurance markets. The globalization of banking markets has raised important issues regarding corporate governance regulation for banking institutions. In the UK, the Cadbury Report of 1992 defined corporate governance as the system by which companies are directed and controlled. In 1998, the Hampel Report combined the Cadbury recommendations and those of the Greenbury Report on directors' duties of disclosure into the Combined Code of Corporate Governance. Although the standards contained in the Combined Code are not compulsory, listed companies are required to comply or explain why they do not comply. A major weakness of the Combined Code is its failure to address directly issues of concern to financial institutions and to the operation of financial markets. The Financial Services and Markets Act of 2000 has sought to fill this gap by authorizing the UK financial regulator (the Financial Services Authority) to devise rules and regulations to enhance corporate governance for financial firms. This Article discusses the rationale of corporate governance for the banking and financial sector and suggests that the regulator's role should be that of a stakeholder representing society's broader interests. The UK regulator does this by creating objective standards of conduct for senior management and directors of financial companies. The objective standards of conduct provide a reasonable person standard for holding senior management and directors of UK financial companies accountable for breach of duty, and this improves overall accountability in the financial sector. Finally, this Article suggests that UK corporate-governance regulation in the financial sector can serve as a model for corporate-governance reform for companies in the nonfinancial sector.
CASENOTE

*Kasky v. Nike*: The Effect of the Commercial Speech Classification on Corporate Statements  
Elliott L. Dozier 1035

Mixed speech is speech that contains commercial and noncommercial elements. Commercial statements receive less protection than noncommercial statements under the First Amendment. In 1996 and 1997, Nike, Inc., was involved in a media debate about working conditions in several of its overseas factories. Marc Kasky sued, alleging that Nike’s statements defending its practices were false and misleading. The California Supreme Court in *Kasky v. Nike* separated Nike’s mixed speech into commercial and noncommercial elements and granted less protection to the commercial speech. This Note argues that the California Supreme Court incorrectly decided *Kasky v. Nike* when it departed from United States Supreme Court precedent and further asserted that the decision could have a detrimental effect on corporate statements. The Note also provides a new definition of commercial speech that better accounts for mixed speech.

COMMENT

"Blood and Judgment": Inconsistencies between Criminal and Civil Courts When Victims Refuse Blood Transfusions  
Beth Linea Carlson 1067

Refusing to accept a blood transfusion raises some of the most difficult legal issues facing judges today because it invokes tort law, criminal law, and constitutional law. The legal issues implicate anyone who opts not to accept certain medical treatment on moral grounds. In both criminal and civil cases, defendants contest causation, claiming that the victim’s refusal of a blood transfusion, and not the defendant’s actions, caused the victim’s death. Criminal courts reject this argument, but civil courts often accept it, allowing for little or no recovery under the complicated theory of avoidable consequences or mitigation of damages. This Comment argues that courts should apply the "second injury rule" to these kinds of civil cases, treating the plaintiff as his own, faultless second injurer. Applying this rule eliminates the dilemma of guilt without liability. It also removes the predicament of forcing a jury to decide the reasonableness of religion or religion-based medical decisions. It avoids constitutional problems, upholding the rights of self-determination and religious freedom, and it ultimately allows victims to make personal medical decisions without penalizing them or their families.
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