



The University of Sydney



Sydney Law School

Sydney Law School Postgraduate Students Conference 2009

LAW AND CRISIS

9.00am-6.00pm

Saturday 31 October 2009

Sydney Law School

New Law Building

The University of Sydney

EVENT PROGRAM

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CONFERENCE PROGRAM

9.00-9.15am	Registration (<i>level 4 foyer</i>)		
The morning session will take place in the Faculty Common Room			
9.15-9.30am	Welcoming address - Amanda Stephens		
9.30-10.00am	Keynote Speaker - Dr Irene Watson		
10.00-10.30am	<i>Surviving the PhD</i> , Dr Rita Shackel and Dr Arlie Loughnan		
10.30-11.00am	Morning Tea		
Location	Common Room	Board Room	Seminar Room
11.00-12.30pm	Paper session: economic regulation Kai Luck Sharmin Jaha Tania Megan Bowman	Session: Judicial processes Julian Ligertwood Christopher Walshaw Greg Walsh	Session: Law in the Asia/ Pacific region Marian Trevor Bastian Mazlifah Mansoor Mai Hanh Do
12.30-1.30pm	Lunch		
1.30-3.00pm	Session: Criminal law Dave McDonald Rezana Karim Allan McCay	Session: Healthcare law Patrick Foong Tammy Johnson Anna Walsh	Session: Families and the law Amanda Stephens Pamela Angus-Leppan Janice Sim
3.00-3.30pm	Afternoon Tea		
3.30-4.30pm	Session: Migration and citizenship Louise Boon-Kuo Richard Bailey Mostafa Haider	Session: Public international law Saiful Karim Jodie O'Leary Wenwen Lu	Session: Mixed bag Sophia Christou Bruce Arnold John Gava
4.30-4.50pm	Closing Address - Professor Terry Carney		
4.50-5.00pm	Award Presentation		
5.00-6.00pm	Cocktail function		

PG CONFERENCE OUTLINE OF PAPER SESSIONS

11-12.30pm

Session: Economic regulation

Kai Luck: *The Consistency between Part 5.3A of the Corporations Act 2001(Cth) and the Allocation of Resources to Insolvent Company Employees required by Rawlsian Distributive Justice*

Sharmin Jahan Tania: *The Applicability of the Principle of Non-Discrimination in GSP Schemes: Revisiting the EC-tariff preferences case*

Megan Bowman: *Banking on Climate Change*

Session: Judicial processes

Julian Ligertwood: *Toward a Normative Account of Precedent*

Christopher Walshaw: *The Judicial Process in the Exercise of Statutory Discretions*

Greg Walsh: *The Merits of the Pluralist Model in Guiding Religion-State Interactions*

Session: Law in the Asia/Pacific region

Marian Trevor Bastian: *Transborders: Migrant women downunder*

Mazlifah Mansoor: *International Cooperation in Combating Transnational Organised Crime: A Southeast Asian perspective*

Mai Hanh Do: *Transplanting Common Law Precedents: An appropriate solution for defects of legislation in Vietnam?*

1.30-3.00pm

Session: Criminal law

Dave McDonald: *Ungovernable Monsters: Law, paedophilia, crisis*

Rezana Karim: *Victims, Politics and Moral Panic: A comparative study of UK and NSW sexual assault law reform*

Allan McCay: *Some Concerns About the Use of Behavioural Genetics as a Mitigating Factor in Sentencing*

Session: Health law

Patrick Foong: *To legislate on Human Embryonic Stem Cell Research in Malaysia?*

Tammy Johnson: *Don't Throw the Baby out with the Bathwater: A snapshot of Queensland's proposed new surrogacy legislation*

Anna Walsh: *The Legal Status of Pre-Natal Life in Australia*

Session: Families and the law

Amanda Stephens: *Criminal vs. Child Welfare Perspectives in Suspected Non-Accidental Head Injury ('Shaken Baby Syndrome') Cases: a clash of cultures*

Pam Angus-Leppan: *Adult Guardianship and the Elderly: A critical evaluation of future changes*

Janice Sim: *Loving Fathers? Implications of State intervention*

3.30-4.30

Session: Migration and citizenship

Louise Boon-Kuo: *Migration Control and Social Citizenship*

Richard Bailey: *Strategy and Rupture in the Camp*

Mostafa Haider: *Micro Credit and the Marketisation of Citizenship in Bangladesh*

Session: Public international law

Saiful Karim: *Litigation as a Strategy for Legalised Settlement of Maritime Security Disputes: The 'Volga case' revisited*

Jodie O'Leary: *The sieve of state responsibility: an analysis of Indonesia's responsibility for international crimes in Timor Leste*

Wenwen Lu: *The Influence of Motive in the Definition of Terrorism on Constitutional laws: A comparative study of Australia, Hong Kong, Singapore and Malaysia*

Session: Mixed bag

John Gava: *Another Study in Judging: Sir Owen Dixon and Yerkey v Jones*

Sophia Chrisou: *From Mass Media to New Media: Social and legal constructions of audiences*

Bruce Arnold: *Doesn't ADD up? A metrics of ADD and ADHD in Australian Courts*

POSTGRADUATE STUDENTS CONFERENCE 2009

ABSTRACTS

Strategy and Rupture in the Camp

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In a series of recent articles, Emiliios Christodoulidis has raised the notion of a strategic engagement with the law, suggesting that “acting must re-orient itself to carving out a space for the possibility of acting”. In the face of an ever-intensifying complex of biopolitical rule, such a suggestion seems more useful for thinking a politics of resistance than most recent accounts of imperial biopower. In addition, it more accurately reflects the experience those confronted by the camp.

The various strategies of resistance engaged in by detainees in Australian immigration detention can be described as strategic engagements oriented towards carving out a space for the possibility of action. Both ontological and ontic space is successfully opened in the very place where politics should be utterly foreclosed in the biopolitical. Whether engaging in acts of resistance within the camp or strategically engaging the law, detainees simultaneously attempted to constitute an ontological space for their resistance and a legal space for their bodies within the Australian community. According to theorists such as Giorgio Agamben, such acts might seem to achieve nothing but the valorisation of law and sovereign power. However Christodoulidis’ approach offers the possibility of locating such struggles within “a meta-level struggle against the registers of democratic Capitalism”, or perhaps as a strategy of rupture.

This paper will explore these theoretical issues with reference to the struggles of immigration detainees in Australia and their engagement with the Australian courts in pursuit of asylum claims.

Micro Finance and the Poor: Destabilising the concept of citizenship

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Micro-credit aims at assisting the poor with small loans for self-employment projects. From a Neo-liberal perspective, it is an important tool towards socio-economic empowerment of poor people. But from a Marxist viewpoint, micro-credit integrates the poor into the capitalistic system, making them in effect a new market for exploitation. This paper translates these economic ideas on micro-finance into legal and political terms and relocates them in broader debates around citizenship and governance. Drawing on a case study of the Grameen Bank in Bangladesh, this paper seeks to demonstrate that the increasing role of NGOs in the marketisation of citizenship essentially highlights the failures of the government in complying with its distributional goals. It suggests that the political citizenship based on welfare state and market citizenship based on regulatory state model are inadequate for a critical understanding of the predicaments of the poor in a country like Bangladesh.

Migration Policing and Social Control: Migrants and citizens

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We are said to be living in the “age of migration”, in a “world in motion”. Migration has shifted, and for many migrants, is temporary. The increasingly punitive turn in migration control in the Global North has attracted attention to the “criminalisation” or “securitisation” of migration law. Much of this scholarship emphasises the ideological role of these processes in producing the deviant immigrant, or else on the way in which this criminalisation asserts sovereign power at a time when it is under challenge.

This paper takes a different approach. It starts with explanations offered through the Chicago School of Sociology on the limits of disciplinary normalisation over immigrants, a perspective that resonates with the rationale for immigration detention today, and moves to exploration of migration control as governance over citizens, in generating the comfort of citizenship. This paper examines the tension between elements of migration control that seek to institute self governance, and those elements that operate as repressive power, through the example of the bridging visa release from detention. It argues that far from the release decision being about the recognition of rights, or even solely about the individual detainee, the release decision is critical in instituting political consensus over migration control through requiring the involvement of civil actors in the bridging visa policing relationship.

Criminal vs. child Welfare Perspectives in Suspected Non-Accidental Head Injury (‘Shaken Baby Syndrome’) cases: A clash of cultures

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Suspected non-accidental head injury (NAHI) cases provide significant challenges to decision-makers within child protection and criminal jurisdictions. These challenges arise partly from the controversies surrounding NAHI within the medical literature and from the difficulties experienced by legal decision-makers as they attempt to comprehend and apply expert medico-scientific evidence. The conflicting objectives and practices of the criminal legal system, compared with the child protection jurisdiction, can also be problematic. That is, the criminal jurisdiction is primarily concerned with issues of individual culpability and guilt of suspected perpetrators whilst the child protection jurisdiction aims to ensure the safety and wellbeing of children. Empirical data, from a large study of suspected NAHI cases in NSW, will be used to demonstrate the conflicts between these different perspectives and to discuss their potential impact on securing the best interests of the child in these cases.

The Legal Status of Pre-Natal Life in Australia

Anna Walsh (Faculty of Law, University of Sydney)

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A confusing state of affairs exists with regard to laws affecting pre-natal life in Australia. Much debate has ensued regarding the parameters which the law should place around how we create and destroy human life prior to birth. The law has moved slowly to respond to new situations, taking its time to develop and build upon previous decisions, recognise attitudes and practices already considered to be acceptable in our society and make exceptions where it sees fit. This paper reviews the current legislation and case law in Australia affecting pre-natal life including medical abortion, criminal acts by third parties that harm the foetus, civil cases for compensation arising from the birth of a child born as a result of the negligence of a health professional, maternal duty of care and property rights of the unborn. This review explores the reasoning behind those decisions; the legal fiction created to underpin that reasoning, and considers whether consistency of approach can ever exist with regard to laws affecting pre-natal life.

Ungovernable Monsters: Law, paedophilia, crisis

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Australian jurisdictions have, in recent years, moved to address the risk of those deemed to be serious sex offenders through the implementation of post-sentence measures including continued detention and supervision. To date, both post-sentence preventative detention and/or monitoring are now realities in Queensland, Victoria, New South Wales and Western Australia. These moves have been described elsewhere as regimes of suspended rights. However more than this, they also signify a suspension or reversal of legal principle: while the law has historically been concerned with actuality, post-sentence preventative detention and/or supervision of a particular class of sex offenders signals a shift away from actual conduct towards a new, rigorous preoccupation with possible future conduct. This paper examines the nature of these laws alongside their parliamentary debates. It is argued that a perception of crisis – a common trope attached to public debate about law and crime more broadly – contextualises, and necessitates, implementation of these legislative regimes. The sense of crisis is compounded at the same time by the figure of the paedophile that underpins the law's imagination of child sexual assault. Specifically, via the signification of the serious sex offender as monstrous, as risk par excellence, the crisis which the law is called to arbitrate is reinforced. This paper seeks to use the example of sex offender reform as an occasion in which to think through both the claims made by law about the serious sex offender, and the some of the implications of their implementation.

The Merits of the Pluralist Model in Guiding Religion-State Interactions

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Many theorists propose a religion-state continuum where at one extreme there is a theocracy and the other extreme a hostile separation where the State actively persecutes citizens who hold religious convictions. In contemporary Australia very few individuals argue for a model of religion-state interaction that would be located on either extreme of this religion-state continuum. Instead most of the conflict about the appropriate approach to religion-state interactions is based on a preference for two different models positioned in the middle of the continuum that can appropriately be labelled separationism and pluralism

This paper argues in favour of adopting the pluralist model in appropriately resolving issues involving the interaction between the State and religious groups in Australia. The paper begins with a discussion of the importance of ensuring that an appropriate relationship is achieved between the State and religious groups. It then provides an overview of the key elements of the separationist and pluralist models and outlines the reasons in favour of preferring the pluralist model in resolving issues involving religion-state interaction. Finally, the paper focuses on the practical operation of the pluralist model with a particular focus on the appropriate operation of anti-discrimination legislation.

The Sieve of State Responsibility: An analysis of Indonesia's responsibility for international crimes in Timor Leste

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The anniversary of the popular consultation in Timor Leste provoked renewed debate surrounding accountability for the events that occurred in East Timor shortly before, during and immediately following Indonesia's occupation.

Much has been written previously on the limitations of the mechanisms founded to achieve individual accountability for the crimes perpetrated in East Timor. Both judicial forums, in Timor Leste and in Indonesia, have garnered criticism.

Less has been written about the responsibility of states for the atrocities in East Timor. Authors that have considered state responsibility have focused on the complicity of other states, assuming Indonesia's primary responsibility. This assumption may seem to be justified, given the various bodies, individuals and organizations that have heard evidence of and/or have issued reports imputing responsibility to Indonesia. For example, the Commission for Reception, Truth and Reconciliation found that Indonesia bore the "the greatest moral and legal responsibility to repair the damage caused by its policies and agents."

This paper will examine the tests used to attribute responsibility to the state of Indonesia to determine whether they satisfy the requirements at international law. It will go on to consider the available apparatus to make such a determination, the possible remedies that follow a finding of state responsibility and the capacity for enforcement. Ultimately, it will use Indonesia as an example to demonstrate the shortcomings of the concept of state responsibility.

The Consistency Between Part 5.3A of the Corporations Act 2001(Cth) and the Allocation of Resources to Insolvent Company Employees required by Rawlsian Distributive Justice

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This paper uses the theoretical framework of Rawlsian distributive justice to examine the allocation of resources in favour of employees that is effected by the corporate and business rescue procedure contained in Part 5.3A of the Corporations Act 2001 (Cth). Specifically, this paper assesses whether Part 5.3A is consistent with the treatment of insolvent company employees that is required by Rawlsian distributive justice. It is explained that, because employees occupy a particularly disadvantaged position in the event of corporate insolvency, Rawlsian distributive justice requires Australian corporate insolvency law to ensure that the greatest benefit of employees is achieved. This paper suggests that, in facilitating employment and the payment of entitlements, corporate and business rescue pursuant to Part 5.3A is consistent with the Rawlsian framework. However, if consistency with Rawlsian distributive justice is to be maintained, Part 5.3A must not implement a rescue attempt that is 'hopeless' or that overrides the interests of secured and quasi-secured creditors. It is observed in this paper that Part 5.3A contains mechanisms to prevent the pursuit of 'hopeless' rescue attempts and to preserve the interests of secured and quasi-secured creditors. However, it is noted that Part 5.3A, in allowing substantial charge holders to remain outside the scope of a rescue attempt, may go beyond what is necessary to preserve the interests of secured and quasi-secured creditors and consequently may contravene Rawlsian distributive justice by compromising the greatest benefit of employees.

Transplanting Common Law Precedents: An appropriate solution for defects of legislation in Vietnam

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Vietnam is now in the process of legal and judicial reforms to construct successfully the market-based economy. There is more and more likely that the Vietnamese legal system has been unpredictably changed to complement with the market economy. This is resulted from much legal transplantation Vietnam has imported legal rules from the Civil law and the Common Law.

Recently, the Vietnamese government is planning to borrow Common Law precedents as a solution to fill the gaps of its sources of law which have traditionally been of legislative origin. These sources include Codes, Laws, Ordinances, Decrees, Resolutions, and Circulars. Precedents and customary laws, on the other hand, have not been officially recognized. Partly due to the acceptance of a single source of law i.e. legislation, the application of law in Vietnam is critically evaluated not to be consistent, uniform and effective.

Precedents are major sources of law in the Common Law system which is one of the most pre-eminent legal families in the world. As sources of law, precedents are usually considered to possess merits that make the legal system certain, consistent, fair, predictability and stability. Therefore, with those strong points, precedents can supplement the certainty and stability which the legislation lacks.

Beside the factual demand of Vietnam of solving the weakness of its legislation, strengths of precedents which can fill the gaps of legislation and the readiness of Vietnam in the judicial reform, the possibility of success of legal transplants which is confirmed to be successful to a large extent is also a motive for Vietnam to transplant precedents into its legal system. Therefore, the introduction of the Common Law precedents is completely an appropriate solution for defects of the Vietnamese legislation.

Transborders: Migrant Women Downunder

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Citizenship is a status which entitles a person legal membership in a political community along with its associated rights and obligations. The purpose of this article is to explore the links between migrant women and citizenship. The article begins by exploring the concepts of citizenship. After addressing the assumption in Western liberal democracies that formal citizenship is the primary determinant of rights and obligations, the article questions whether the formal conferral of citizenship is a necessary component of acceptance into Australian society, and considers the implications for migrant women. The article argues that the experience of many migrant women in this country reveals a tension between the formal and informal concepts of citizenship in contemporary liberal democracies, and considers the implications of this tension.

Banking on Climate Change

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At the turn of this year the world received the wake-up call that the global financial crisis had arrived. Simultaneously, alarm bells have been deafening about the rapid decline of our natural climate. The global climate crisis is a reality for every person, just like the global financial crisis. Yet when the efficacy of international law and nation-state negotiations on global warming is questionable, we look elsewhere for potential solutions. Could our salvation in the global climate crisis lie in leading business practices of the very sector responsible for the global financial crisis? The finance sector - particularly banking, investment and insurance - has potential through its own business practices to facilitate and incentivize greenhouse gas emission reductions by other corporate actors, which can assist the progression of the global economy to low-Carbon. In recent years this concept has been getting airtime in industry circles, yet it is still a relatively unexplored option within the academy. This paper focuses on the banking industry and evidences that, despite (or even because of) the global financial crisis, certain 'leading banks' throughout the world are publicly documenting changes to their business practices (particularly lending and project finance) to accommodate climate change. The paper will outline what is a 'leading bank' in the context of climate change mitigation, motivations (legal and business) for adopting climate risk assessment and mitigation practices, and how leading banks are publicly disclosing their own practices.

To Legislate on Human Embryonic Stem Cell Research in Malaysia?

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Currently, human embryonic stem cell research is still at research stage and it is a matter of time when the research moves from science laboratories to clinical trials and ultimately translates to therapies. The research is very critical as there are many potential benefits arising from this research and scientists hope that the research would lead to cures for various diseases such as Parkinson's and Alzheimer's disease. However, this technology is highly controversial as it involves the destruction of the human embryo and thus it raises many ethical arguments.

In my presentation, I consider whether in the first place Malaysia should legislate on this highly controversial area. This point is debateable as there are also compelling reasons in not passing the law and leave it as status quo. If on balance the government decides that law is to be passed, then I shall consider the proposed regulatory model that Malaysia could adopt. In addition, I will explore the various challenges that regulators are going to face; the challenges include regulatory legitimacy, regulatory effectiveness and regulatory connection. I will also attempt to address each of this difficulty.

Victims, Politics and Moral Panic: A comparative study of UK and NSW sexual assault law reform

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This paper aims to examine the relationship between the sexual assault complainant, the contemporary victim's movement and the adversarial criminal trial process through a comparative study of NSW and the United Kingdom's sexual assault law reform. The research specifically examines the period of 'crisis' (or moral panic) that each respective jurisdictions experienced and the law reforms that were implemented during these times.

While the United Kingdom has experienced changes to criminal law procedure arising from high profile cases such as Stephen Lawrence and Julia Mason, NSW has experienced dramatic changes to sexual assault law and procedure following the moral panic phenomenon of the 'deviant' Bilal Skaf and the 'Sydney gang rape' trials. NSW parliament, since 2001 has enacted a steady stream of legislation predicated on protecting sexual assault victims from re-trauma and empowering victims. While changes have been victim centric and highly punitive against the accused, they have produced nominal results for sexual assault complainants.

The situation in NSW partly parallels developments in the United Kingdom. UK researcher Paul Rock's analysis of the impact of gender and race politics on victim's rights exposes that pursuing a political agenda to give victims' rights that is superficial in approach means that no such rights are actually given. UK academics Trevor Jones and Tim Newburn's research with respect to the transfer of policy in crime control observe that the impact of reactionary politics render reform to mere rhetoric. They conclude that it is imperative to look at types of influence on reforms that have the hallmarks of a politicised process. My paper uses this transfer of policy form of analysis, i.e. historical, political, agency-led, structural and empirical analysis of the 'mode' of policy incorporation, to examine sexual assault law reform in New South Wales and the United Kingdom. This form of examination ultimately assists to explain processes of change; how policy adherence occurs and reveals what ability the criminal trial process in both jurisdictions has to successfully incorporate victims.

From Mass Media to New Media: Social and legal constructions of audiences

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With the introduction of radio and television into Australia may be seen the emergence of the domestic, 'private' audience as an object of public regulation. Throughout public discussion of the significance and necessity of state intervention and control over these media may be found repeated appeals to the notion of the 'public interest'.

Like radio and television before it, the internet has become the most recent 'mass' medium to reach into the domestic, and increasingly, particularly with the advent of mobile media, into the personal space of 'audiences'. At the same time that the internet began to work its way into discussion about perceived paradigmatic changes in the media environment of the late twentieth century, the concept of the 'audience' gradually came to be displaced, in favour of the idea of the 'user'.

This paper will take a brief look at the historical emergence and evolution of the domestic audience as both a construct and concern of broadcast regulation in Australia, in order to contextualise current debate on the regulation of users' online activities and interactions. Discussion will focus upon how the legitimising concept of the 'public interest' was utilised by both government and various other groups, including educational and cultural institutions, as a key rationale for regulating early radio and television, and through this, constructing, responding to, and regulating these audiences.

Litigation as A Strategy for Legalised Settlement of Maritime Security Disputes: The 'Volga Case' revisited

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Maritime security issues have become a great source of disputes involving international law. Illegal, unreported and unregulated (IUU) fishing can be identified as a major maritime security threats for Australia. Consequently Australian government has responded to the issues with a very stringent legal framework. The IUU fishing turned out to be one of the main threats for existence of commercially valuable and vulnerable Patagonian Toothfish in the remote areas of Southern Ocean. In the early 2002 a Russian flagged long-line fishing vessel Volga was detained by the Australian authority few hundred metres outside the Exclusive Economic Zone of Australian Heard and McDonald Islands in the Southern Ocean. The vessel was reportedly engaged in IUU fishing. This incident gave birth to several litigation in international and Australian courts. Apart from these cases, Russia also foreshadowed a separate litigation against Australia for violation of articles 111 and 87 of UNCLOS. Considering the outcome of these cases, this article intends to critically examine the characteristics of litigation as a strategy for legalised settlement of maritime security disputes.

Applicability of the Principle of Non-Discrimination in GSP Schemes: revisiting the EC-tariff preferences case

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The Generalised System of Preferences (GSP), standing on the legal basis of the 1979 Enabling Clause, allows preference-giving countries to grant preferential tariff treatment to the products of developing countries. The objective of the Enabling Clause is to encourage the WTO-Members to deviate from the MFN-treatment of Article 1 in pursuit of 'differential and more favourable treatment' for developing countries so that enhanced market access can stimulate their economic development. Paradoxically, all the major GSP schemes incorporate conditionality which discriminates among the preference-receiving countries and whereby GSP-schemes are often used by developed countries as a tool for reward or punishment. Through India's challenge of the European Communities' GSP scheme in the EC-Tariff Preferences case the issue of non-discriminatory feature of the GSP scheme was brought to forefront. Though decided in India's favour, the Appellate Body by interpreting the term 'non-discriminatory' as allowing treating different developing country beneficiaries differently, overturned the Panel's interpretation of the term. This article argues that the Appellate Body seems to have upheld the view shared by developed countries that GSP, being merely a 'gift' to developing countries, depends on their (preference-giving countries) political will. On the other hand, the Panel's interpretation was more progressive and more in favour of developing countries' interest since it recognised their legal entitlement to equal favourable treatment with other developing countries and also acknowledged the special situation of LDCs requiring more favourable treatment.

The Influence of Motive in the Definition of Terrorism on Constitutional laws: A comparative study of Australia, Hong Kong, Singapore and Malaysia

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This paper focuses on the ways in which the definition of "terrorist act" in the counter-terrorism laws of Australia, Hong Kong, Singapore and Malaysia challenges constitutional protections in those jurisdictions. In particular, it considers the most controversial part of the definition: the motivational element of the definition, namely a political, religious or ideological cause.

The first part of the paper contrasts the definitions of "terrorist act" across the four jurisdictions with an emphasis on motive. It concludes that all states make some effort to create a relatively stringent and extensive definition of terrorism that all contain the motive element.

This supposition is tested in the next section which outlines the relevant constitutional guarantees of the four jurisdictions. Though Australia does not have a comprehensive system of statutory or constitutional protection of human rights and fundamental freedoms, its High Court has found that the Commonwealth Constitution contains an implied freedom of political participation and communication, with some possibility of freedom of association necessarily included in that.

Then the paper explores how the motivational element in the various definitions may affect constitutional rights, paying special attention to the ways in which the definition might be used to impact directly and indirectly upon freedom of speech.

The paper concludes that by promulgating extensive definitions to guarantee our security, we may violate constitutional laws and isolate and ostracise members of our community. How Australia, Hong Kong, Singapore and Malaysia deal with this issue will to a large extent affect the integrity of Constitutional laws or at least the integrity of constitutional commitments to free exchange and debate of religious and political perspectives.

Some Concerns about the use of Behavioural Genetics as a Mitigating Factor in Sentencing

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In this paper I will outline some research from the field of behavioural genetics which may have relevance to sentencing. I will focus on research relating to the MAOA gene and consider how such research might be used in a plea in mitigation. The idea of genetic mitigation produces some disquiet and I will then evaluate some concerns about the acceptance of genetic influences on criminal conduct as a factor relevant to sentencing.

Doesn't ADD Up? A Metrics of ADD and ADHD in Australian Courts

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The paper analyses judicial assimilation of Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD). It is based on analysis of judgements in over 500 cases in federal and state/territory courts and tribunals. That analysis covers criminal, discrimination, social services and family law. It highlights significant variation, on a jurisdiction by jurisdiction basis, of whether ADD/ADHD is being referred to in judgements. It also highlights variation in judicial recognition of ADD/ADHD regarding sentencing decisions.

ADD/ADHD comprise what have been characterised as alternative cognitive styles or pathologised as behavioural disorders and developmental dysfunctions. They have been diagnosed in children and adults. Research suggests that many prison inmates experience the disorders, although diagnosis often does not occur until after conviction. The disorders appear to have a genetic basis, with some studies suggesting that particular dysfunctions are exacerbated by substance abuse, by co-morbidity such as chronic anxiety or depression states, and by environmental factors such as stress and poor nutrition associated with ADD/ADHD-related unemployment. They may be effectively addressed through medication. They are not a function of low intelligence and may have positive attributes such as high creativity. Negative attributes experienced by some people include impulsivity and difficulty with concentration, which may fundamentally disadvantage both the individual (eg poor performance at school and in the workplace or hostility in social interaction) and parents or other carers.

ADD/ADHD is discernable across Australia. However its appearance in Australian legal fora is uneven, with for example markedly higher references to ADD/ADHD in the courts of Western Australia and New South Wales than those of the Northern Territory and Tasmania. Law reports do not allow an authoritative assessment of the extent to which ADD/ADHD has been raised by defendants or barristers in lower courts. Data presented in the paper suggests that judges in higher courts have typically noted the disorders but not made explicit allowance for them, for example through lighter sentences in criminal cases on the basis of lower responsibility. The paper identifies significant exceptions. It also notes idiosyncratic discrimination decisions. Decisions by social services tribunals indicate a recognition that ADD/ADHD children may impose "extraordinary" and "enormous" demands on carers. The same decisions illustrate that support for those carers may not be forthcoming because of the construction of law.

Law in some jurisdictions has yet to fully discover ADD/ADHD. The paper hypothesises that jurisdictional differences are attributable to different epistemic communities, with individual and institutional 'champions' in particular states fostering an awareness among medical practitioners that is reflected in higher rates of diagnosis and prescribing than in other states, an awareness that informs judicial practice.

The Judicial Process in the Exercise of Statutory Discretions

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Statutes are an integral and vital part of our law. Commonly they confer wide discretions on the courts. An example is section 9 of the Fair Trading Act 1986 (NZ), which prohibits conduct that is misleading or deceptive or is likely to mislead or deceive. The courts must decide if the impugned conduct contravenes s 9 and, if so, the content of an order for relief under s 43. Traditionally this task is described as one of interpreting or giving meaning to the statute. Central to the paper is an alternative view: courts exercising this function are not 'interpreting' - they are exercising a discretionary power given to them by Parliament to find a solution to the conflict before them. There are implications for jurisprudence. Traditionally we ask what foundations objectively constrain or ground statutory interpretation and adjudication, and answer by reference to rules, canons, methods, 'rational criteria', and other traditional terminology. The paper asks how courts go about the task of exercising a statutory discretion when adjudicating the cases before them. Instead of a search for what the courts should do when exercising a statutory discretion, the search is for what actually occurs.

The paper advances philosophical hermeneutics as an important and useful resource for this search. It introduces the significance of theory, the nature of philosophical hermeneutics, its relevance to the judicial process, and the divergent development of hermeneutics in American Critical Legal Studies and by Continental academics. Ideas will be suggested for a new theory of how we say the law in the practical legal decision-making that resolves conflicts before the courts, in the context of statutory discretions.

Loving fathers? Implications of State Intervention

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This paper examines the context in which child killing occurs. The discussion is structured around two key themes: masculine representation and the state of dysfunction. Looking at cases where state intervention has failed, the paper argues for a theoretical conception of the state of dysfunction in a family. Recognising the state of dysfunction is important in order for support agencies and early intervention to better approach the family in crisis. A section of the paper also discusses whether mandatory arrest laws are an appropriate strategy in the long term to tackle the problem of domestic violence and improve child safety.

Toward a Normative Account of Precedent

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Counter to the recent remarks made by Judge Sotomayor during her confirmation hearings as an appointee to the US Supreme Court (remarks usually associated today with political conservatives) that the role of a judge is to apply the law rather than to make it, in this article I argue at a conceptual level that cases decided at common law require both the making and application of law. This conclusion is inconsistent with a coherence model of precedent which I reject, but consistent with two other broad conceptions of precedent commonly held by jurists: a positivist rule based model, and a result model of precedent. This argument is part of a larger project, the subject of my PhD thesis, of attempting to provide a normative account of the doctrine of precedent.

International Cooperation in Combating Transnational Organised crime: A Southeast Asian perspective

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Today, the field of international cooperation in criminal matters has taken new orientation and new dimension, compared to half centuries ago. The orientation of the earliest effort to cooperate in criminal matters was based on mutual interest to safeguard national boundaries. Cooperation in criminal matters complements the limitation of states to adjudicate and enforce penal matters beyond national boundaries. There was evidence of states negotiating and adopting bilateral instruments in criminal matters, and to a lesser extent, multilateral agreements under the auspicious of regional intergovernmental organisations. However, to some degree, the field of international cooperation in criminal matters was not fully developed. There was no promulgation of universal instrument embracing wide-range of mechanisms to facilitate cooperation in criminal matters until toward the end of the nineteenth century. The enactment of the United Nations Conventions against Drug Trafficking in 1988 and United Nations Convention against Transnational Organised Crime in 2000 states an important milestone in the history of international cooperation in criminal matters. The shift towards elaboration of international conventions was oriented on the international concern on the ability of individual states to suppress multi-jurisdictional crimes such as transnational organised crime.

The purpose of this paper is to examine the adequacy of the existing international cooperative instruments to substantiate national and regional framework to suppress transnational organised crime. This is to verify the contention that global cooperative framework able to respond effectively to the challenges of transnational organised crime. Based on this insight, the paper evaluates the legal bearing of international cooperation in criminal matters on the landscape of cooperative measures in Southeast Asia.

Adult Guardianship and the Elderly: A critical evaluation of future changes

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Plenary adult guardianship is a legal relationship whereby the rights, possessions, and decision-making power of one person (the impaired elder) are transferred to another (the guardian). The vast majority of guardianship cases involve aged people with serious physical or cognitive disabilities. The rationale for guardianship was originally based on a paternalistic view. However in recent years there have been moves to balance this protection against the competing aim of autonomy for the elderly.

Demographic, economic and social changes now make it essential to re-evaluate the future role of guardianship, given that, by 2050, 6% to 8% of Australians will be impaired and over 85 and there will only be 40% of working age Australians to provide for them.

Supported by evidence from a sample of cases of financial abuse brought to the NSW Guardianship Tribunal (GT) I will consider a range of possible alternatives to full GT hearings which could provide justice for frail elders in efficient and effective ways. They vary from mediation and informal consultations through to full court procedures, restorative justice hearings or community court processes. Other socio-legal interdisciplinary proposals also need consideration to take better account of cultural, ethnographic and educative factors which are often neglected in forming legal judgments.

My conclusions will be based on my empirical analysis of the characteristics of financial problems which have led to tribunal applications. In putting forward proposals I will suggest appropriate ways of streaming tribunal applications to choose an appropriate method of dealing with them.

Another Study in Judging: Sir Owen Dixon and Yerkey v Jones

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One of the central debates in law concerns the nature of judging and, in particular, whether judicial reasoning is in any way bound or whether it is essentially open-ended. In Australia a particularly influential view for many years was that expressed by Sir Owen Dixon that judging should be in accord with a "strict and complete legalism". In more recent times this view has waned in influence and it has received much criticism from scholars within Australia and from other countries. In this paper I will consider in detail one of Sir Owen Dixon's most important contracts decisions to see if his reasoning is in line with his self-described judicial method.

In the recent High Court of Australia decision of *Garcia v National Australia Bank* Kirby J suggested that the "equitable principle expressed by Dixon J" in *Yerkey v Jones* (that there was a special married women's equity) amounted only to "his individual opinion" which had not attracted "the support, express or implied, of a majority of the participating judges" in that case. In *Barclays Bank v O'Brien* Lord Browne-Wilkinson, effectively speaking for the House of Lords, claimed that the special equity theory embodied in Dixon J's judgment in *Yerkey v Jones*, while not inconsistent with later decisions, was derived from the Privy Council decision in *Turnbull & Co v Duval*, a decision which he described as "obscure," as proceeding on a "mistaken basis" and providing an "unsure foundation" for the special equity applied by Dixon J. Given Sir Owen's Dixon's claimed fidelity to a "strict and complete legalism" it is appropriate to examine his judgment in *Yerkey* in light of these critical comments.

Don't Throw the Baby out with the Bathwater: A snapshot of Queensland's proposed new surrogacy legislation

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Surrogacy has existed since Biblical times when Hagar the maidservant of the infertile Sarah acted as a surrogate to bear Sarah and her husband Abraham a son. Despite the longevity of the practice of surrogacy, modern society has been reluctant to embrace surrogacy arrangements due to the ethical and, sometimes practical, debates they spark. This reluctance is evidenced by the general lack of legislative support for surrogacy arrangements in Australia and worldwide.

In Australia the legal position in relation to surrogacy is somewhat fragmented. The most extreme example of legislative opposition to surrogacy is in Queensland where, under the current regime, a breach of the Surrogate Parenthood Act 1988 is an offence punishable by up to three years' imprisonment.

It was recently announced that Queensland will decriminalise altruistic surrogacy. While this decision can be viewed as a step towards bringing Queensland in line with other Australian jurisdictions, it also has the potential to open up a Pandora's Box of legal and ethical issues.

This paper will provide a snapshot of the anticipated new Queensland surrogacy legislation together with a brief overview of existing surrogacy legislation in other Australian jurisdictions. The purpose of this paper is to identify any potential shortcomings of the proposed legislation by comparing it to the existing legislative regimes throughout Australia.