Amitai Aviram

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Academic Appointments

Professor, University of Illinois College of Law	**2008-**
Director, Corporate Law Program	2014-
Visiting Professor, University of Haifa Faculty of Law	2014
Lynn & Daniel Murray Faculty Scholar, University of Illinois College of Law	2010-2012
Associate Professor, University of Illinois College of Law	2006-2008
Assistant Professor, Florida State University College of Law (tenure-track clock begins in 2002)	2004-2006
Visiting Associate Professor, University of Illinois College of Law	2005
Visiting Assistant Professor, George Mason University School of Law	2002-2004
John M. Olin Scholar of Law & Economics, University of Chicago Law School	2001-2002

Courses Taught: Business Associations (3, 4 & 6 credits); Mergers & Acquisitions; Business Strategy for Lawyers; Evolution of Corporate Law & Policy; Unincorporated Business Entities; Antitrust Law; Antitrust Policy.

- Best instructor teaching awards: 2008-09; 2009-10

Committees Served: Admissions (Chair); Appointments; Career Services; Courtesy Appointments & VAPs; Curriculum; Discipline (Chair); Discipline (Investigator & Prosecutor); Graduate & International Studies; International Appointments; Lectures & Symposia; Legal Writing Appointments; Promotion & Tenure; Promotion & Tenure Appeal (advisory committee to Provost); Student scholarship.

Education

The University of Chicago Law School: **J.S.D.** (Ph.D. equivalent in Law) 2001-2003
Doctoral dissertation titled: "Regulation by Networks". Supervisor: Judge Richard A. Posner.

The University of Chicago Law School: **LL.M.** (Master of Law) 1999-2000
Grade Average: 181.03 (equivalent to graduating *magna cum laude*).

Tel-Aviv University Faculty of Law: **LL.B.** (J.D. equivalent)**,** *magna cum laude* 1991-1995
Member of the Editorial Board, Tel-Aviv University Law Review.

Legal Practice

Israel Antitrust Authority (Israeli equivalent of the FTC) – Consultant 2001-2003
Supervised a merger investigation in the retail food industry. Advised regarding a merger in the cable television industry and regarding an industry-wide investigation of anticompetitive practices in the retail food industry.

Wachtell, Lipton, Rosen & Katz – Associate 2000-2001
Drafted memos regarding assessments of contemplated M&A transactions. Assisted in representing clients before antitrust authorities. Prepared Hart-Scott-Rodino pre-merger notification filings.

Israel Antitrust Authority – Attorney 1998-1999
Drafted legal opinions, Authority decisions and litigation briefs. Defended Authority decisions in judicial proceedings. Advised Authority economists regarding antitrust law.

Judge Advocate General Corps, IDF – Assistant to the Attorney General of the West Bank 1995-1998
International Law: Participated in Israeli-Palestinian civil affairs negotiations. Member of the Treasury Subcommittee of the Israeli-Palestinian Civil Affairs Committee. Commercial Law: Legal advisor to the Treasury Department of the Civil Administration. Drafted contracts for the Civil Administration and advised on contract disputes.

Publications

1. *Teaching the History of Corporate Law: A Framework*, in: TEACHING LEGAL HISTORY: COMPARATIVE PERSPECTIVES (Robert Jarvis & William Butler, eds., Journal of Comparative Law Studies in Comparative Law, Volume 9), pp. 146-150 (2014)

While many law schools offer a rich selection of courses in corporate law spanning doctrinal, clinical and interdisciplinary approaches, courses on the history of corporate law (and more broadly the law of business organizations) are largely absent. This essay explains the structure of a course I teach on the legal history of corporate law and finance.

The course surveys key developments in organizational law (from early regulation of lending to modern corporate law) through three dimensions: "history" (a chronological dimension), "law" (a functional dimension that tracks the development and debates over key traits of business organizations), and "evolution" (a social dimension that explores key policy and political forces that shape corporate law).

2. *Path Dependence in the Development of Private Ordering*, 2014 *Michigan State Law Review* 29-58 (2014)

Contrary to some idealized notions, Private Legal Systems ("PLS") are not typically locked in Darwinian competition over the efficiency of their norms, and do not form autonomously (that is, without reliance on preexisting institutions) upon the identification of an efficient norm. The evolution of PLSs is primarily driven by the PLSs' relative enforcement costs, not by the relative efficiency of the norm they attempt to enforce.

Because of enforcement costs' role, PLSs form in a path dependent manner, beginning by enforcing a collaborative core norm – typically one that provides religious or social identity – then gradually expanding to enforce increasingly adversarial expansion norms. PLSs sometimes attempt to reduce path dependence by "inventing tradition" (creating rituals and symbols that suggest a shared identity) – an activity that has thus far not received much attention in the private ordering scholarship.

3. *Conceptualizing the Evolution of Corporate Law*, 53 *American Journal of Legal History* 431-435 (2013)

This is an earlier version of the article later published as: *Teaching the History of Corporate Law: A Framework* (see above).

4. *Officers' fiduciary duties and the nature of corporate organs*, 2013 *University of Illinois Law Review* 763-784 (2013)

The nature of officers' fiduciary duties (and in particular whether the Business Judgment Rule applies to officers) is the subject of heated scholarly debate and conflicting case law. This Article analyzes the question using a neglected conceptual tool: the corporate organ. Corporate organs are bodies that act on behalf of the corporation but are not subject to its control and thus are not governed by agency law (the board of directors is the prototypical organ). This Article argues that corporate organs differ from, and complement, the other type of corporate actor (corporate agents) in the allocation of discretion whether to approve acts that are in the fiduciary duty penumbra. For agents, this oversight function is given to the beneficiary (the principal); for organs, it is given to judges.

The nature of an officer's fiduciary duties depends on whether oversight by the beneficiary, or by judges, would maximize accountability. The answer differs between officers, so in contrast to the arguments of both sides of the debate, officers should not be uniformly classified as agents or organs. Such classification is best left to private ordering. Extant law allows for such private ordering but provides officers with an incentive to maintain an ambiguous status. This Article suggests tweaks to the law that would incentivize officers to self-select their status as organs or agents.

5. *Allocating Regulatory Resources*, 37 *Journal of Corporation Law* 739-769 (2012)

This article analyzes how law enforcers (with particular emphasis on securities regulators) should allocate their limited resources among multiple targets, as well as how they are likely to allocate these resources. It modifies existing models in one significant way: it considers the effect of regulation not only on the behavior of those subject to it (potential wrongdoers), but also on the perceptions – and as a result, on the behavior – of those whom regulation seeks to protect (potential victims).

Normatively, the article challenges the view of regulation as a two-way tradeoff between enforcement costs and deterrence of wrongdoing (i.e., the effect of regulation on potential wrongdoers' risk perception), because it ignores the effect of regulation on potential victims' risk perception. The article maps a more nuanced tradeoff between regulation's effects on three key actors: regulators (administrative effects), potential wrongdoers (accountability effects), and potential victims (placebo effects).

Descriptively, the article demonstrates how regulators' ability to bias arbitrage (create placebo effects for private gain) generates incentives for either under- or over-enforcement, depending on the circumstances. Structural conditions that affect regulators' incentive to use regulation for bias arbitrage are explored.

6. *Bail-ins: Cyclical Effects of a Common Response to Financial Crises*, *2011 University of Illinois Law Review* 1633-1652 (2011)

In the wake of financial crises, public authorities often respond by using law to modify private contracts to transfer value from those who fare better in the crisis to those who fare worse. From the perspective of the crisis victim, this is a bailout. Because this article focuses on the perspective of the other party to the contract (specifically, on the incentives this response creates to that party), this article will refer to such responses as "bail-ins". Recent examples include staying foreclosures, authorizing bankruptcy courts to modify mortgage terms, or threatening criminal prosecution to induce banks to undo transactions made with their clients.

Bail-ins have greater political appeal than other forms of redistributive government action (e.g., increased government spending and taxation). Bail-ins are expected to reduce future investment, as investors fear similar actions in future crises. But how harmful is that? Market-skeptics question that the market correctly determines the optimal amount of investment, and are thus untroubled by government's manipulation of it. And to appease those who do trust market allocation of investment, government can offset the investment reduction by subsidizing investment (e.g., making mortgage interest tax-deductable to encourage lending and offset the effects of staying foreclosures or of court-modified mortgage terms).

This essay argues that bail-ins are significantly harmful from both market-trusting and market-skeptic perspectives. Rather than a permanent reduction in future investment, bail-ins reduce investment cyclically – significantly when the bail-in is imposed, but declining gradually as cognitive biases cause managers to underestimate the risk of future contract modifications and agency costs incentivize the managers to increase investment regardless of future bail-in risk.

Cyclical fluctuation in investment deterrence may seem less harmful than permanent deterrence, but the opposite is true. As this essay explains, cyclical fluctuation of investment makes bail-ins harmful from the perspectives of both market-skeptics and market-trusters, and exacerbates the magnitude of future business cycles.

7. *Forces Shaping the Evolution of Private Legal Systems*, *in: Peer Zumbansen & Gralf-Peter Calliess (eds.), LAW, ECONOMICS AND EVOLUTIONARY THEORY* (2011), pp. 183-201

Private legal systems ("PLSs") are to the universe of law as dark matter is to the physical universe: while PLSs are invisible to the casual study of law, they are observable by their impact on individuals' behavior and by their interaction with the public legal system. PLSs expand to fill voids where the public legal system cannot or does not wish to enforce norms, and contract when the public legal system moves to displace them. But the public legal system is not the only force shaping the course of PLSs' development.

This chapter identifies two other forces that significantly affect the evolution of PLSs. The first – incumbent's enforcement advantage – impacts the identity of the PLS that will enforce the norm. The second – bias arbitrage – impacts the type of norms the PLS would choose to enforce. These forces challenge both parts of an idealized notion that PLSs form spontaneously (without reliance on pre-existing institutions) to enforce norms that maximize their members' welfare.

Due to the influence of incumbent's enforcement advantage, PLSs tend to begin their life enforcing a core norm that has very low enforcement costs (typically, providing social or spiritual services). Once this core has developed, PLSs may then choose expansion norms that can be more expensive to enforce, and that benefit from the PLS's ability to compel compliance with the new norm by denying a member the benefits of its enforcement of the core norm and any expansion norms already successfully enforced. The expansion norms that are chosen will not necessarily be those that maximize the social welfare of PLS members. Rather, the PLS's will often attempt cause its member to perceive it as valuable by conducting bias arbitrage through enforcing norms that address risks that its members significantly over-estimate.

8. *What do Corporate Directors Maximize? (Not Quite What Everybody Thinks)*, 6 Journal of Institutional Economics 47-53 (2010)

The agency problem at the core of corporate law stems from a chronic potential conflict of interest between directors' self-interest and that of shareholders. Corporate law views directors' self-interest in terms of diverting welfare to directors at the expense of shareholders. Another component of directors' self-interest – being perceived as maximizing shareholders' welfare – is seen not as part of the agency problem but as part of the solution (aligning directors' incentives with shareholders').

This is true only if taking actions that maximize shareholders' welfare is also the optimal manner for a director to be perceived as maximizing welfare. However, directors have more appealing ways to be positively perceived. In conducting bias arbitrage, directors identify risks that shareholders over-estimate, take action to address the risk, and then take credit for the "lowered" risk (i.e., shareholders' corrected assessment of the risk).

Bias arbitrage is more attractive as shareholders' misperception of a risk increases. The opportunity to bias arbitrage thus leads directors to address highly-misperceived risks instead of highly-remediable risks.

9. *Counter-cyclical Enforcement of Corporate Law*, 25 Yale Journal on Regulation 1-33 (2008)

Corporate and securities laws are seen to mitigate corporate fraud by manipulating the incentives of agents: presenting corporate agents with a probability of being caught and punished if they commit fraud. This article suggests that the same laws also affect corporate fraud in a significant but unappreciated manner, by manipulating the perceptions of the principals: affecting the principals' efforts in monitoring the agents by making them perceive the risk of fraud as more or less likely.

Due to several cognitive biases discussed in this article, principals misperceive the risk of fraud by their agents in a cyclical manner: they under-estimate the likelihood of fraud during booms and over-estimate it following busts. As a result, they insufficiently police the agents during booms and excessively do so during busts.

Conspicuous law enforcement triggers cognitive biases that could be thoughtfully used to counter the public's cyclical bias. But political pressures that prosecutors face, as well as their failure to consider law enforcement's effect on principals' perceptions, result in enforcement that is itself cyclical and may exacerbate the biased perception of the risk of fraud.

Monetary policy is analogous in requiring counter-cyclical government intervention, and central banks have successfully stepped up to the task despite facing similar pressure not to intervene counter-cyclically. This article concludes by examining whether institutional safeguards that free central banks to operate counter-cyclically can be adapted to the context of corporate fraud.

10. *Bias Arbitrage*, 64 Washington & Lee Law Review 789-828 (2007)

The production of law – including the choice of a law's subject matter, the timing of its enactment and the manner in which it is publicized and perceived by the public – is significantly driven by an extra-legal market in which politicians and private parties compete over the opportunity to engage in bias arbitrage. Bias arbitrage is the extraction of private benefits through actions that identify and mitigate discrepancies between objective risks and the public's perception of the same risks.

Politicians arbitrage these discrepancies by enacting laws that address the misperceived risk and contain a "placebo effect" – a counter-bias that attempts to offset the pre-existing misperception. If successful, politicians are able to take credit for the change in perceived risk, while social welfare is enhanced by the elimination of deadweight loss caused by risk misperception.

However, politicians must compete with private parties such as insurers, experts and the media, who can engage in bias arbitrage using extra-legal means. This article analyzes methods in which parties engage in bias arbitrage and the effect of interaction between potential bias arbitrageurs on the production of law.

11. *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 George Washington Law Review 54-104 (2006)

Much of legal scholarship, and in particular Law and Economics, evaluates law and predicts its effects based on an analysis of law's manipulation of individuals' incentives. Although manipulating incentives certainly explains some of law's impact on behavior (e.g., increasing airport security may deter some airplane hijackers), law has an equally important impact on behavior by manipulating perceptions (e.g., causing the public to believe that the risk of airplane hijacking has diminished as a result of the law that increased airport security).

Thus, like the placebo effect of medicine, a law may impact social welfare beyond its objective effects by manipulating the public's subjective perception of the law's effectiveness. Failure to consider this largely ignored "legal placebo effect" may cause significant overstatement or understatement of a law's benefits.

By shedding light on laws' effects on perceptions, this Article reveals forces that shape the creation of law. Legal placebo effects are a method by which politicians extract private benefits from the identification and mitigation of gaps between real and perceived risks.

12. *Network Responses to Network Threats: The Evolution into Private Cybersecurity Associations*, in THE LAW AND ECONOMICS OF CYBER-SECURITY (Mark Grady & Francesco Parisi, eds.) (Cambridge University Press, 2005), pp. 143-192

The enforcement of certain norms on network participants – such as norms supporting information exchange and governing access to the network – is critical in ensuring the security of the network. While a public norm enforcer may be feasible in many situations, private norm enforcement may, and frequently does, complement or substitute public enforcement. Private enforcement of cyber-security is often subsidized, primarily in non-pecuniary manners (e.g., by exemption from antitrust laws). These subsidies may be necessary to capture the positive externalities of providing security to the network, but they also bias private parties' incentives and may result in the formation of inefficient security associations that are beneficial to their members only due to the subsidy. To mitigate this concern, subsidies should be awarded only to associations that are likely to be effective in enforcing norms on the network participants. This Article offers a framework that assesses the likelihood that an association would become an effective norm enforcer.

Norms that are expensive to enforce are rarely enforced by newly-formed private legal systems (PLSs), because the effectiveness of mechanisms used to secure compliance (e.g., the threat of exclusion) depends on the PLSs' ability to confer benefits on their members, and newly-formed PLSs do not yet confer such benefits. Pre-existing functionality inexpensively enhances a PLS's ability to enforce norms, and therefore most PLSs rely on preexisting institutions that already benefit members, typically by regulating norms that are not very costly to enforce. The threat of losing these benefits disciplines members to abide by the PLS's rules, thus permitting the PLS to regulate behavior.

Network security norms are usually expensive to enforce, and thus a private association enforcing them would be more successful and thus more deserving of public subsidies if it relied on a suitable pre-existing functionality. The Article suggests criteria for assessing the effectiveness of pre-existing functionalities.

13. *In Defense of Imperfect Compliance Programs*, 32 Florida State University Law Review 763-780 (2005) (Symposium)

In *Organizational Misconduct: Beyond the Principal-Agent Model*, Professor Krawiec argues that organizations have perverse incentives to implement ineffective compliance programs, and supports this argument with a survey of empirical research. Based on her argument she urges that organizations be held strictly liable to corporate crimes (in terms of both guilt and punishment), regardless of the implementation of a compliance program by the accused organization. Assuming *arguendo* that criminal law's current treatment of compliance programs gives organizations an incentive to design inefficient programs, this Article posits that corporate crime may be better deterred if criminal law embraces, rather than remains agnostic to, compliance programs.

First, Karwiec's policy suggestion overstates the impact of the legal sanction on corporate behavior. The legal sanction is only one of several sanctions imposed for organizational misconduct. The public relations effect of misconduct may harm organizations more than any legal sanction, giving them an incentive to implement compliance programs that assure the public of the organization's compliance with the law. Second, Krawiec does not consider utility that is derived from reducing the public's subjective perception of the likelihood of misconduct. This 'placebo effect' that exists whether a compliance program is objectively effective or not, may increase utility by offsetting behavioral biases that cause the public to overestimate the probability of organizational misconduct.

14. *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 Yale Law & Policy Review 1-68 (2004)

Scholarship on private legal systems (PLS) explains the evolution of norms created and enforced by PLSs, but rarely addresses the evolution of institutions that form PLSs. Such institutions are assumed to form spontaneously (unless suppressed by law) when law is either unresponsive or incapable of directing behavior in welfare-maximizing manners.

But, as this paper demonstrates, PLSs typically cannot evolve spontaneously. Newly formed PLSs cannot enforce cooperation since the effectiveness of mechanisms used to secure this cooperation (e.g., the threat of exclusion) depends on the PLS's ability to confer benefits to its members, and newly formed PLSs do not yet confer such benefits.

Successful PLSs bypass this barrier by building on extant foundations – preexisting institutions that already benefit members, typically through functionalities requiring less costly enforcement. The threat of losing preexisting benefits disciplines members to abide by the PLSs' rules, which in turn allows the PLSs to regulate behavior. This pattern indicates that rather than developing spontaneously, PLSs may develop in phases, initially facilitating activities that are unrelated to regulating behavior and incur lower enforcement costs, the provision of which enables the PLS to regulate behavior in a later stage (or stages).

The paper suggests normative applications of this observation in the fields of antitrust, critical infrastructure protection and corporate governance.

15. *Overcoming Impediments to Information Sharing*, 55 Alabama Law Review 231-279 (2004) [Co-written with Avishalom Tor]

When deciding whether to share information, firms consider their private welfare. Discrepancies between social and private welfare may lead firms excessively to share information to anti-competitive ends - in facilitating of cartels and other harmful horizontal practices - a problem both antitrust scholarship and case law have paid much attention to. On the other hand, legal scholars have paid far less attention to the opposite type of inefficiency in information sharing among competitors - namely, the problem of sub-optimal information sharing. This phenomenon can generate significant social costs and is of special importance in network industries because the maintenance of compatibility, a key to producing positive network effects, typically requires information sharing. Understanding the hitherto neglected impact of sub-optimal information sharing is important not only for many areas of antitrust law, but also for developing effective policies towards network industries and critical infrastructures more generally, as well as for improving those procedural rules that concern information exchange among litigating parties.

This paper therefore advances the legal analysis of impediments to efficient information sharing in a number of significant ways: First, it shows that the strategic behavior of competitors may erect an economic barrier to information sharing that has not been previously addressed in the literature - the fear of degradation. This form of strategic behavior involves the strategic refusal to share information when the refusal inflicts a greater harm on one's rivals than on oneself, and thus generates a competitive advantage. Second, the paper reveals a hitherto unrecognized set of behavioral impediments to information sharing, wherein rivalry norms and managers' risk attitudes bias competitors' judgments of the prospects of information sharing and the status-quo bias and ambiguity aversion lead these decision makers to avoid such arrangements. Third, it integrates these economic and behavioral insights with the findings of the extant literature to create a new framework for predicting when private information sharing will be suboptimal. Finally, we suggest how the alignment of private information sharing with social optimality may be promoted, based on the framework developed here.

16. *Regulation by Networks*, 2003 BYU Law Review 1179-1238 (2003)

The Private Ordering literature examines how non-government institutions mitigate opportunistic behavior in transactions. It emphasizes two elements that facilitate cooperation and reduce opportunism: repeated-play and reputation. This paper explores the implications of a third element: network effects.

Network effects create an incentive for a unique form of opportunism that exists only in network environments – degradation. On the other hand, network effects facilitate mechanisms that may be very effective in regulating opportunism. Therefore, in certain industries, networks (institutions characterized by significant network effects) regulate connectivity (mitigate opportunism), largely displacing in that role the parties to the transaction and the government.

This paper identifies mechanisms used by networks to reduce opportunism, and market characteristics that are conducive to the effectiveness of these mechanisms (and therefore to the efficiency of networks as connectivity regulators). This helps explain the prevalence of networks in certain markets as compared to others, and gives tools to assess networks' ability to self-regulate and anticipate the type of opportunism a given network is more likely to be susceptible to.

17. *Cyclical Market Power*, 36 Israel Law Review 103-145 (2002)

This paper examines temporal aspects of market power. It explores an industry – the Israeli PVC industry – in which the dominant firm's market power fluctuates cyclically, and identifies the conditions that result in such phenomena.

The existence of cyclical market power may lead the market participants to strategic behavior that is markedly different from that in markets with either steady market power or constantly declining market power. It is suggested that in markets characterized by cyclical market power, a dominant firm may find it both possible and profitable to combat the cyclical decline in its market power by 'temporal leveraging' of its market power: policing a cartel in the downstream market in return for exclusivity in sales to the cartel members. Such a scheme may resist the criticism against the plausibility of most types of monopoly leveraging and exclusive dealing.

18. *Revaluation of Funds Returned by Public Authorities in the West Bank*, 13 Army & Law 27-78 (1999)

This paper examines an issue in which public international law, private international law and commercial law intersect. The Civil Administration of the West Bank, which provided governmental services to the Palestinian population in the West Bank, held for various reasons funds paid by individuals (e.g., bail in criminal proceedings). The paper examines whether the Civil Administration had a duty to revaluate funds returned in due course, so as to compensate for inflation. A complex network of laws govern this issue, ranging from principles of English Law and Jordanian legislation, through Israeli administrative law (governing the conduct of the Israeli-controlled Civil Administration), Israeli contract law, and principles of public and private international law.

The paper argues that while no duty of revaluation is imposed by local law (i.e., English and Jordanian law enacted during the time each controlled the West Bank), the Civil Administration should revaluate funds based on principles of Israeli contract law imposed through Israeli administrative law on the Civil Administration. The paper then addresses another complex issue - what would be the standard for revaluation, given that funds were paid in several currencies (mainly the Israeli Shekel and the Jordanian Dinar), and by people living in communities with different economies and inflation rates (West Bank Palestinians, Jordanians and Israelis).

19. *Towards a More Certain Definition of Private Securities Offerings*, 42 Ha'Praklit - Israeli Bar Law Review 346-375 (1995)

The paper examines the various tests courts and scholars in Israel and the United States offered in order to differentiate between public offerings of securities (which have to comply with broad regulation) and private ones (which are exempt from most such regulation). After classifying the various tests and finding the relationship between them, the paper points to the strengths and weaknesses of the various groups of tests, then balances strengths and weaknesses, showing that a single test - the number of people the offering is made to, is better suited than a combination of several groups of tests.

20. *The Fiduciary Duty of Shareholders*, 19 Tel-Aviv University Law Review 309-352 (1995) [Co-written with Joseph Gross]

This paper examines the relationship between corporations and their stakeholders using rudimentary game theory concepts. It argues that barring legal restrictions, the equilibrium of this relationship is likely to be inefficient. Surveying various possible legal solutions for this problem, the paper argues for a fiduciary duty of shareholders to their corporation in actions and transactions which grant them a certain degree of control over the company. The paper then suggests guidelines for the efficient scope of such a duty and the types of actions that invoke the duty.