

[Links: Subscribe ~ Unsubscribe | Distribution | Submit ~ Revise Your Papers](#)

Table of Contents

- **Integrating the Financial Crisis in the Business Associations Course: Benefits and Pitfalls**
[Afra Afsharipour](#), University of California, Davis - School of Law
- **Clearing Credit Default Swaps: A Case Study in Global Legal Convergence**
[Anupam Chander](#), University of California, Davis - School of Law
[Randall Costa](#), *affiliation not provided to SSRN*
- **The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis**
[Edward J. Imwinkelried](#), University of California, Davis - School of Law
[Andrew Amoroso](#), University of California, Davis - School of Law
- **It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)**
[Kevin R. Johnson](#), University of California, Davis - School of Law
- **Theories and Models of Corporate Governance**
[Thomas Wuil Joo](#), University of California - Davis Law School
- **Review of 'Intellectual Property and Theories of Justice'**
[Madhavi Sunder](#), University of California, Davis - School of Law

[^top](#)

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES UC DAVIS SCHOOL OF LAW

■ **"Integrating the Financial Crisis in the Business Associations Course: Benefits and Pitfalls"**

Journal of Business and Technology Law, Vol. 5, pp. 5-21, 2010
UC Davis Legal Studies Research Paper No. 209

AFRA AFSHARIPOUR, University of California, Davis - School of Law
Email: aafsharipour@ucdavis.edu

In a time of economic turmoil, teaching business law classes can be both inspiring and precarious. The inspiration is easy to come by; in a class that students once took somewhat begrudgingly, they are now participating in impassioned discussions. At the same time, one cannot ignore the difficulties that can arise when discussing such tumultuous activity. The challenges of teaching about economic turmoil are magnified when teaching about a global financial crisis, the likes of which the world has not seen in many decades. It is often difficult to balance conveying the essential substantive material that should be covered in a class with the undertaking to help students comprehend the crisis, especially at a time when its causes and full effects are not yet fully understood. This essay provides a first-hand account of integrating the financial crisis in the Business Associations course and discusses the benefits and pitfalls in doing so.

■ **"Clearing Credit Default Swaps: A Case Study in Global Legal Convergence"**

Chicago Journal of International Law, Vol. 10, No. 639, 2010
UC Davis Legal Studies Research Paper No. 211

ANUPAM CHANDER, University of California, Davis - School of Law
Email: achander@ucdavis.edu

RANDALL COSTA, *affiliation not provided to SSRN*
Email: randall.costa@citadelgroup.com

In the wake of the global financial crisis, American and European regulators quickly converged on a reform intended to help stave off similar crises in the future: central counterparty clearinghouses for credit default swaps. On both sides of the Atlantic, regulators identified credit default swaps (CDS) as a central factor in the crisis that seized Bear Stearns, Lehman Brothers, American International Group (AIG), and ultimately global credit markets. Introducing a well-capitalized central counterparty between CDS buyers and sellers would, regulators came to believe, help contain financial failures in the future.

How and why did this convergence occur? This Article reviews the American and European responses, concluding that they converged on a similar structure largely because the financial crisis revealed the vulnerabilities of a system in which buyers and sellers entered into CDS directly, through bilateral contracts. These bilateral derivatives contracts created a web of interconnected obligations, such that the failure of one firm could bring down a chain of others. The threat of this domino effect led governments to intervene in the financial markets with massive direct and indirect support. Forced to spend public money to bail out private firms, regulators risked an unsustainable moral hazard - firms that were "Too Interconnected to Fail." Regulators concluded that the introduction of a central counterparty (CCP) would reduce the risk that the bankruptcy of a principal in a credit default swap would precipitate a domino fall through the credit markets. Where critics argue that CCPs concentrate risk, regulators came to recognize that Bear, Lehman, and AIG had each also concentrated risk, serving as de facto central clearing counterparties, lacking the disciplines of a regulated CCP.

"The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis"

UC Davis Legal Studies Research Paper No. 215

EDWARD J. IMWINKELRIED, University of California, Davis - School of Law
Email: EJIMWINKELRIED@ucdavis.edu

ANDREW AMOROSO, University of California, Davis - School of Law

Several recent high-profile cases such as the prosecution of Martha Stewart have focused attention on the question of whether and to what extent the attorney-client privilege applies to communications exchanged by clients, attorneys, and their consultants. The high-profile cases are merely the tip of the iceberg. This has been called the age of consultants. As many corporations downsize, they have outsourced functions previously performed in-house by employees on staff. These companies increasingly rely on external consultants. In particular, when the companies become involved in litigation, their counsel may have to turn to such a consultant.

In order to support this practice, several courts have extended the attorney-client privilege to interactions among clients, attorneys, and external consultants. The practice is certainly legitimate, and it is understandable that these courts would want to remove disincentives to the practice. However, the extension has drastic consequences. Unlike the work product protection, the legal privilege is absolute; the privilege cannot be surmounted by an opponent's showing of case-specific need for the privileged information. Unlike the medical privileges, the legal privilege is not subject to a patient/litigant exception. Thus, if the attorney consults an expert who forms an unfavorable opinion, the client can invoke the privilege to suppress the opinion. Further, if the client has the financial resources, the client can monopolize the available expertise. If the expert forms a favorable opinion, the attorney calls the expert as a trial witness; but again, if the expert reaches an unfavorable conclusion, the attorney can "bury" the opinion.

While these consequences do not preclude the extension of the attorney-client privilege to interactions among clients, attorneys, and experts, the courts should think long and hard before deciding to extend the privilege that far. To date, though, most of the discussions of this topic in the literature suffer from two weaknesses. One is that the discussions tend to lump together all of the varying types of communication involved in these interactions. As this article explains, several very different types of communication occur in these interactions. The second is that the discussions often pose the wrong questions. For example, they address the general question of whether there is a need to protect communications between the expert and the attorney rather than the dispositive issue of whether the communication in question can realistically be characterized as either a communication from the client to the attorney or one flowing from the attorney to the client.

The purpose of this article is to present a more precise, fundamental analysis of interactions among clients, attorneys, and experts. For instance, the article points out that in the typical interaction, there are three distinct types of communication. The article differentiates among: (1) the initial communication in which the attorney engages the expert; (2) the intermediate communication in which the expert conveys his or her analysis to the attorney; and (3) the final step in which the attorney forms his or her advice and communicates that advice to the client. With respect to each different type of communication, the article reaches the fundamental question: In principle, should this be treated as a communication from client to attorney or one from attorney to client?

As a generalization, the article concludes that the absolute legal privilege should extend to these interactions in only two situations. One is the situation discussed in the Second Circuit's 1961 decision in *United States v. Kovel*. In this limited situation, the expert serves as an interpreter or translator for the client. The client possesses private

data such as information about his or her mental condition, the attorney needs an evaluation of the data to prepare for trial, but neither the client nor the attorney possesses the expertise to evaluate the data. Here the expert serves as an essential conduit for communication between client and attorney. The second is the situation governed by the United States Supreme Court's 1981 decision in *Upjohn Co. v. United States*. In this setting a corporate employee possesses information needed by corporate counsel; and in communicating with counsel, the employee – no matter how low-ranking – is deemed to personify the entity. If the corporation has outsourced the function of compiling and maintaining that information to an external consultant, the consultant's communications with counsel ought to be treated as a communication originating from the client to the attorney.

This article contends, though, that beyond these two situations, it is indefensible to extend the legal privilege to these interactions. It has been argued that the courts "need" to encourage these interactions. However, the necessity argument proves too much. While it may be necessary for counsel to obtain input from an expert consultant, it is even more necessary that the counsel interview the percipient lay witnesses to the underlying events; and no one would argue that necessity justifies applying the legal privilege to those interviews. It could also be argued that unless the legal privilege extends to communications with external consultants, there will be unfair discrimination against corporations that are too poor to keep expert consultants on the payroll.

The last section of this article demonstrates that that argument is badly flawed. In short, in these cases there is no justification for distorting the basic concepts of "client" and "attorney" at the heart of the legal privilege.

"It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)"

Chapman Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 203

KEVIN R. JOHNSON, University of California, Davis - School of Law
Email: krjohnson@ucdavis.edu

This is a contribution to a symposium at Chapman University Law School in January 2010 that will be published in a symposium issue of the *Chapman Law Review*. Part I of this Essay will attempt to debunk the frequently-made, but never persuasively argued, charge that U.S. immigration law and enforcement is central to the so-called "war on drugs" as well as the "war on terror." At most, immigration has a very limited role to play in those two metaphorical "wars." Rather, the berating of immigrants and immigration for everything wrong with America in those (and many other) contexts is nothing more than a smokescreen to hide the true political ends of the speaker. The real hope and intent of many of the users of inflammatory rhetoric is to bring more political heat to bear on immigration and to promote a particular restrictionist political agenda. Immigrants are people who many love to hate and if you add their so-called involvement to drugs, crime generally, or terrorism, then you have the perfect enemy, the most unpopular of the unpopular. Part II of this Essay discusses how most immigration is connected directly or indirectly to labor migration of individuals and families and the relative economic opportunity in the United States, with family reunification a secondary (and often related) major motivating factor for the movement of people across national borders. There indeed are some legitimate issues to discuss concerning the labor aspects of immigration, including the class, economic, and general social consequences of the migration of workers to the United States. A true dialogue about immigration must be open, honest, transparent, and above-board. If, for example, one is concerned with the racial, ethnic, and cultural composition of the immigrants to the United States, we should talk about that, rather than make a blanket claim that one is not racist in seeking to change the racial mix of the immigrant stream but simply is "anti-illegal immigrant." A rational discussion of immigration would go a long way toward making sensible reform in the realm of possibility.

"Theories and Models of Corporate Governance"

CORPORATE GOVERNANCE: A SYNTHESIS OF THEORY, RESEARCH, AND PRACTICE, H. Kent Baker, Ronald Anderson, eds., John Wiley & Sons, 2010

UC Davis Legal Studies Research Paper No. 213

THOMAS WUIL JOO, University of California - Davis Law School
Email: twjoo@ucdavis.edu

This essay is a brief historical survey of the leading models of the corporation in American legal theory, with emphasis on the contemporary theory of contractarianism. "Corporate governance" is often said to chiefly concern the "internal" governance of corporations: that is, the relationship among the participants in the corporate enterprise. "Internal" governance is sometimes distinguished from "external" regulation of the nominally "private" business corporation by the state. But the internal and external relationships are intertwined and not mutually exclusive. Thus, even as the contemporary legal discourse on corporate governance purports to focus on internal matters, it advances arguments regarding the extent to which internal relationships are, and should be, structured by private claimants, and the extent to which they are, or should be, structured externally by the state.

These issues are often framed in terms of a debate over the "nature" or "essence" of the corporation. Recurring questions include who "owns" the corporation, whether a corporation is an "artificial" phenomenon created by state fiat or a "natural" byproduct of human interaction, whether the corporation is an entity separate from its constituent individuals, and why decision-making authority is concentrated in professional managers. The shifting

answers to these questions are presented as justifications for, or critiques of, the existing corporate governance regime, but can also be seen as shorthand for unspoken normative assumptions about the respective roles of the group, the state, and the individual.

"Review of 'Intellectual Property and Theories of Justice'"

Erasmus Journal for Philosophy and Economics, Vol. 3, No. 1, Spring 2010
UC Davis Legal Studies Research Paper No. 214

MADHAVI SUNDER, University of California, Davis - School of Law
Email: msunder@ucdavis.edu

Legal scholars of intellectual property ought to welcome increased interdisciplinary engagement with this area of law, from fields as diverse as anthropology and science and technology studies to philosophy. Each of these disciplines brings an important lens to contemporary intellectual property law, and challenges the dominance of the singular law and economic vision. Anthropology helps us to consider more deeply a central purpose of this law: the promotion of culture. Science and technology studies reveal that technology is not merely science, but also a social and political artifact. Philosophers attend to the moral questions raised by intellectual property. Such questions are legion today with the exponential growth of intellectual property to cover everything from medicines to seeds, and with the steady march of this law into every corner of the globe, including the poorest countries on Earth. Understanding intellectual property as the incentive-to-create reduces to the claim that the ability to pay, as evidenced in the marketplace, should determine the production and dissemination of knowledge and culture. *Intellectual Property and Theories of Justice* (Gosseries, et al. 2008) is a much-needed intervention into current debates over intellectual property and social justice, a topic once thought irrelevant to IP. The book considers the theoretical foundations of intellectual-property claims are these rights rooted in Lockean claims, or are they merely tools to promote innovation? The contributors to this volume ask whether IP law ought to attend to maldistribution of resources and wealth that flow from IP law, from pricing medicines out of the reach of the poor to the redistribution of wealth from the IP-consuming South to the IP-producing North. Perhaps most importantly, the book is focused on plural values, for example, not just efficiency or equality, but also freedom. As Axel Gosseries writes in the Introduction, Not having enough money to buy non-generic drugs clearly raises problems of both equality and freedom. Gosseries argues that while efficiency concerns are important, they are not the end of the matter. They need to be plugged into theories of justice. Scholars in this volume consider not only the relevance of Locke and Nozick for understanding intellectual-property rights (some argue they are less relevant than many think), but also of Rawls and G. A. Cohen.

[^top](#)

Solicitation of Abstracts

The University of California, Davis School of Law Legal Studies journal contains abstracts and papers from this institution focused on this area of scholarly research. To access all the papers in this series, please use the following URL: <http://www.ssrn.com/link/UC-Davis-Legal-Studies.html>

To submit your research to SSRN, log in to the [SSRN User Headquarters](#), and click on the My Papers link on the left menu, and then click on Start New Submission at the top of the page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: RPS@SSRN.com

Distributed by:

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

[^top](#)

Links: [Subscribe to Journal](#) | [Unsubscribe from Journal](#) | [Join Site Subscription](#) | [Financial Hardship](#)

Subscription Management

You can change your journal subscriptions by logging into [SSRN User HQ](#). If you have questions or problems with this process, please email UserSupport@SSRN.com or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site License Membership

Many university departments and other institutions have purchased site licenses covering all of the journals in a particular network. If you want to subscribe to any of the SSRN journals, you may be able to do so without charge by first checking to see if your institution currently has a site license.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

Accounting Research Network

NEW Cognitive Science Network NEW

NEW Corporate Governance Network NEW

Economics Research Network

Entrepreneurship Research & Policy Network

Financial Economics Network

Health Economics Network

Information Systems & eBusiness Network

Legal Scholarship Network

Management Research Network

Political Science Network

Social Insurance Research Network

HRN Classics Research Network

HRN English & American Literature Research Network

HRN Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

Individual Membership (for those not covered by a site license)

Join a site license, request a trial subscription, or purchase a subscription within the SSRN User Headquarters:
<http://www.ssrn.com/subscribe>

Financial Hardship

SSRN understands there is financial hardship in certain countries (for example the former Soviet Union and Eastern Bloc). If you are undergoing financial hardship and believe you cannot pay for a journal, please send a detailed explanation to Subscribe@SSRN.com

[^top](#)

To ensure delivery of this journal, please add LSN@publish.ssrn.com (**Legal Scholarship Network**) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email usersupport@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site licenses, please contact us at Site@SSRN.com

[^top](#)