LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
UC DAVIS SCHOOL OF LAW
Vol. 15, No. 1: Feb 26, 2013

VIKRAM D. AMAR, EDITOR
Associate Dean and Professor of Law, University of California, Davis - School of Law
vdamar@ucdavis.edu

Browse ALL abstracts for this journal

Links: Subscribe ~ Unsubscribe | Distribution | Network Directors | Submit ~ Revise Your Papers

Table of Contents

^top

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

"Protecting the Religious Liberty of Religious Institutions"

Journal of Contemporary Legal issues, Forthcoming
UC Davis Legal Studies Research Paper No. 326

ALAN E. BROWNSTEIN, University of California, Davis - School of Law
Email: aebrownstein@ucdavis.edu

This article is a preliminary inquiry into the question of whether the freedom of the Church, as a distinct religious institution, can be justified from an American legal perspective. The first part of the article identifies respect for the individual dignity and autonomy of the person as a primary justification for providing distinctive legal protection to religious liberty. It goes on to discuss whether distinctive religious liberty protection for religious institutions can be derived from the dignitary interests of the institution's members – and if so, whether there is some limit beyond which institutional religious liberty claims cannot be grounded in the individual dignitary interests of congregants or constituents.

The second and longer part of the Article examines whether an argument for protecting and accommodating the autonomy of religious institutions can be grounded in American history during the 1700's and early 1800's. The history of this period includes multiple cross currents of values and interests that very by time and region – making it difficult to reach more than tentative conclusions. However, the Protestant commitment by religious liberty proponents to the belief that each man must judge for himself on matters relating to religion, the virulent anti-Catholicism of the period, at least some of which may be attributed to fear of and antipathy toward top down ecclesiastical hierarchy, and the prevalence of anti-clerical attitudes suggest some limits to the American commitment to the freedom of the Church as an institution. Clearly, a sphere of religious liberty extended to the local congregation and to a considerable extent to democratically created and accountable ecclesiastical decision-making bodies. It may be argued, however, that Americans of this period viewed non-democratic, hierarchical religious institutional structures – that challenged the intrinsic right of individual conscience in matters of faith – to be much less deserving of respect and protection.

"Are Ballot Titles Biased? Partisanship in California's Supervision of Direct Democracy"
U.C. Irvine Law Review, Vol. 3, 2013
UC Davis Legal Studies Research Paper No. 322

CHRISTOPHER S. ELMENDORF, University of California, Davis - School of Law
Email: cselmendorf@ucdavis.edu
DOUGLAS M. SPENCER, University of California, Berkeley, School of Law
Email: dspencer@berkeley.edu

This study investigates whether and if so under what conditions the California Attorney General, who authors the ballot title and summary ("label") for statewide ballot initiatives, writes ballot language that is biased rather than impartial. State law demands an impartial label, but commentators frequently complain that the AG chooses misleading language to bolster (undermine) measures that the AG or his/her party supports (opposes). Using a convenience sample of students from several universities, we measure ordinary observers' perceptions of bias in ballot labels for initiatives dating back to 1974. Separately, we calculate an objective measure of bias using a readability algorithm. We then test hypotheses about AG strategy, examining whether the extent of bias in ballot labels varies with the closeness of the election and the degree to which the measure elicits partisan division. We also examine the correlation between bias perceptions and observer characteristics such as support for the ballot measure, trust in government, and social trust.

"Rebalancing Public and Private in the Law of Mortgage Transfer"
UC Davis Legal Studies Research Paper No. 327

JOHN P. HUNT, University of California, Davis - School of Law, Berkeley Center for Law, Business and the Economy
Email: jphunt@ucdavis.edu
RICHARD STANTON, University of California, Berkeley - Finance Group
Email: stanton@haas.berkeley.edu

NANCY WALLACE, University of California, Berkeley - Real Estate Group
Email: wallace@haas.berkeley.edu

The law governing the United States' $13 trillion mortgage market is broken. Courts and legislatures around the country continue to struggle with the fallout from the effort to build a 21st century global market in mortgages on a fragmented, arguably archaic legal foundation. These authorities' struggles stem in large part from the lack of clarity about the legal requirements for mortgage transfer, the key process for contemporary mortgage finance.

We demonstrate two respects in which American mortgage transfer law is unclear and offer suggestions for fixing it. Revisions to the Uniform Commercial Code adopted around the turn of the century may be interpreted as doing away with preexisting laws arguably requiring parties to record their ownership interests to protect them. But the interaction of these revisions and preexisting state recording laws is most unclear.

Moreover, it is not clear just what parties have to do to invoke the provisions in question: the rules require that the mortgages be transferred "in return for any consideration sufficient to support a simple contract," but that concept is notoriously malleable. In fact, our study indicates that in many transactions the requirement may not have been met because the parties used only nominal or other questionable consideration. At least in some states, the use of questionable consideration in existing transactions makes foreclosure more difficult and makes mortgage investments less secure. Consequently, the use of nominal consideration seems to strengthen mortgage investors' claims that transactions were not executed properly.

We suggest an approach to law reform that would provide needed clarity and bring about an appropriate balance between private and public. The Article 9 revisions reflect a preoccupation, prevalent in the 1990s, with reducing the cost of mortgage transfers to the transacting parties. Obviating public recording, as the Article 9 revisions purport to do, does reduce cost, but it also tends to eliminate public records of mortgage ownership. As we show, these public records have value not just for parties that may transact in mortgages, but for the public more generally. A more balanced approach would clearly require transacting parties to record their interests in order to protect them, but would adopt this change in tandem with an expansion of low-cost digital recording. This approach provides the public benefits of high-quality mortgage records while reducing the cost and inconvenience of recording to transacting parties.

"Wading into the Daubert Tide: Sargon Enterprises, Inc. v. University of Southern California"
UC Davis Legal Studies Research Paper No. 323

DAVID L. FAIGMAN, University of California Hastings College of the Law
Email: faigmand@uchastings.edu
EDWARD J. IMWINKELRIED, University of California, Davis - School of Law
Email: EJIMWINKELRIED@ucdavis.edu

There are two competing approaches to determining the admissibility of expert testimony, including scientific evidence. Under the traditional, Frye approach, the question is whether the expert is relying on a theory or technique that is generally accepted in the relevant specialty fields. At one time that test was employed by the federal courts as well as 46 states. However, in 1993 in its celebrated Daubert decision, the Supreme Court construed the Federal Rules of Evidence as impliedly overturning Frye. The Court derived a new validation test from the text of Federal Rule 702. As of 2013, only a minority of courts continue to adhere to Frye while a majority of states have embraced some version of the Daubert standard.

Although most states have adopted a version of the Daubert test, until recently the California Supreme Court continued to staunchly follow Frye. The California Supreme Court initially adopted the Frye test in 1976. In 1994, the year after the United States Supreme Court rendered Daubert, the California Supreme Court declined the invitation to abandon Frye.

However, as more jurisdictions shifted to Daubert, in a growing number of cases advocates urged the California courts to modify their position and incorporate some elements of the Daubert approach into California jurisprudence. In November of 2012, the California Supreme Court handed down its decision in Sargon. Sargon certainly represents a step toward the Daubert approach. In Sargon, the court approvingly cited Daubert as well as the two later cases in the Daubert trilogy, Joiner and Kumho. Moreover, in its opinion the court followed many of the essential teachings of Daubert, Joiner, and Kumho. Most importantly, the substance of the analysis in Sargon is strikingly similar to the Supreme Court's analysis in Joiner.

In this light, some commentators are now declaring that California has joined the ranks of the Daubert jurisdictions. The purpose of this article is cautionary; the thesis of this article is that it is premature to proclaim that California is now a Daubert jurisdiction. To begin with, in footnote the Sargon court affirmed its commitment to Frye. Moreover, the facts in Sargon were so extreme that in future cases, attorneys will have a plausible argument for distinguishing Sargon. Finally, in Sargon the court emphasized that it was authorizing trial judges to conduct a carefully circumscribed inquiry. The court stopped well short of tasking trial judges to conduct the sort of probing inquiry that Daubert empowers federal trial judges to conduct under Federal Rule of Evidence 104(a). The California courts may have embarked on a gradual, incremental movement toward Daubert, but California is not there yet.

"Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases"
Intercultural Human Rights Law Review, Vol. 5, 2010
UC Davis Legal Studies Research Paper No. 321

RAHA JORJANI, University of California, Davis - School of Law
Email: rjorjani@ucdavis.edu

Current immigration laws governing the detention of noncitizens are rife with statutes and regulations that raise due process concerns. The Automatic Stay provision found at 8 C.F.R. § 1003.19(i)(2) is one such regulation. This regulation allows the Department of Homeland Security to, in effect, ignore an Immigration Court's order of release on bond in certain cases, simply by filing a notice with the Court stating their intention to invoke the Automatic Stay. This means that even where an Immigration Judge has determined that an individual should be released on bond, the Department of Homeland Security can choose to nullify that order by invoking the Automatic Stay. Once invoked, the Immigration Judge's order of release is stayed pending final resolution from the Board of Immigration Appeals; a process that can take up to 177 days.

This article first provides a historical context for the Automatic Stay provision and compares the October 2001 regulations with the November 2006 regulations currently in place. The article argues that the 2001 regulations failed to cure the constitutional concerns raised by the previous ones. The article then examines the operation of the Automatic Stay in detail, exploring the way in which DHS derives an unfair legal advantage from the stay that impacts the outcome of any deportation case. Contextualizing the discussion in an exploration of the significance of human incarceration, the article also compares bail procedures in the federal criminal context to bond procedures in the civil immigration context, arguing that there are fewer due process protections in the latter. Finally, the author argues that the Automatic Stay provision is unconstitutional and recommends that it be immediately repealed.

"Patents and the University"
UC Davis Legal Studies Research Paper No. 324

PETER LEE, University of California, Davis - School of Law
Email: ptrlee@ucdavis.edu

This Article advances two novel claims about the internalization of academic science within patent law and the concomitant evolution of "academic exceptionalism." Historically, relations between patent law and the university were characterized by mutual exclusion, based in part on normative conflicts between

academia and exclusive rights. These normative distinctions informed “academic exceptionalism” — the notion that the patent system should exclude the fruits of academic science or treat academic entities differently than other actors — in patent doctrine. As universities began to embrace patents, however, academic science has become internalized within the traditional commercial narrative of patent protection. Contemporary courts frequently invoke universities’ commercial nature to reject exceptional treatment for such institutions. The twin trends of internalization and exceptionalism have evolved again in recent legislative patent reform. On one hand, the interests of academic science have become completely internalized within the patent system to the extent that they inform general rules of patentability applying to all inventions. On the other hand, academic exceptionalism has been resurrected in the form of special statutory carve-outs for universities. Turning from the descriptive to the normative, this Article concludes with recommendations for improving the patent system’s regulation of academic science.

"Trade Secret and Human Freedom"
In INTELLECTUAL PROPERTY AND THE COMMON LAW (Cambridge University Press 2013), Forthcoming
UC Davis Legal Studies Research Paper No. 325

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

Trade secret law has long sought to promote the freedom of employees to leave their employment and seek a better life. But recent accounts of this law rationalize trade secret as having one goal: promoting efficiency. Scholars argue that trade secret law prevents over-investment in secrets. This article turns to the common law roots of trade secret law and seeks to reinstate this law’s plural values, including the promotion of human freedom.
^top

About this eJournal

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)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management,

European Corporate Governance Institute (ECGI)
Email: bblack@northwestern.edu

RONALD J. GILSON
Stanford Law School, Columbia Law School
Email: rgilson@leland.stanford.edu

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.
^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 Support@SSRN.com or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

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

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

- Accounting Research Network
- Cognitive Science Network
- Corporate Governance Network
- 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
- Classics Research Network
- English & American Literature Research Network
- 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 subscription)**

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: **http://www.ssrn.com/subscribe**

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to **Subscribe@SSRN.com**

^top

To ensure delivery of this eJournal, 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 subscriptions, please contact us at Site@SSRN.com

^top

Copyright © 2013 Social Science Electronic Publishing, Inc. All Rights Reserved