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THE EMERGENCE OF COST-BENEFIT BALANCING IN ENGLISH NEGLIGENCE LAW *Stephen G. Gilles* 489

The subject of this Article is whether, and to what extent, modern English negligence law relies on cost-benefit balancing. Some scholars have claimed that actors are subject to liability under English negligence law when they create a substantial foreseeable risk of harm to others, without regard to the costs of avoiding that risk. A close look at the leading English decisions shows that this account is incorrect. Reasoning from the fundamental principle that negligence is a failure to act as a reasonably prudent person would have acted, the English judiciary has repeatedly endorsed the proposition that a reasonable person balances the costs and benefits of avoiding foreseeable risks of harm to others. The practical importance of this proposition varies: in some contexts, such as workplace accidents, English judges—who both find the facts and apply the law in negligence cases—routinely and explicitly engage in balancing; in other contexts, such as automobile accidents, some judges balance, while others simply imagine what a reasonable person would have done. In no context, however, is balancing forbidden and liability imposed solely for creating a substantial foreseeable risk. On the other hand, when they do balance, English judges often say that a precaution should be taken unless its costs are *disproportionately* (not merely marginally) greater than its benefits. English law thus makes cost-benefit balancing a major component of the reasonable person standard, while leaving substantial room for divergent intuitions about fault and responsibility.

WHAT JUDGES TELL JURIES ABOUT NEGLIGENCE: A REVIEW OF PATTERN JURY INSTRUCTIONS *Patrick J. Kelley & Laurel A. Wendt* 587

The purpose of this Article is to help answer the question "how do judges convey the meaning of the negligence standard to juries?" The partial answer suggested in this Article comes from collecting, categorizing, and reporting on the different states' uniform or pattern jury instructions, a rich, largely untapped resource for legal scholars. The analysis of pattern negligence instructions suggests some plausible but tenta-

tive answers to other questions: how do juries understand the negligence instructions and how do they apply those instructions to the facts of individual cases? Finally, the Article discusses the relevance of those tentative answers to recurring problems in formulating an accurate descriptive theory of negligence liability.

LEGAL PHENOMENA, KNOWLEDGE, AND THEORY: A CAUTIONARY TALE OF HEDGEHOGS AND FOXES — *Ronald J. Allen & Ross M. Rosenberg* 683

Humans interact, which gives rise to legal regulation, which gives rise in turn to theorizing about that legal regulation. The theorizing may be intended to, and perhaps does, influence the evolution of the legal regulation. This Article analyzes the susceptibility of legal regulation of differing types of human interaction to being organized or explained by top-down deductive theories of general applicability. We hypothesize that at least three variables determine in part the relevance of general theories to sets of legal phenomena: ambiguity (gaps in the law), unpredictability (computational intractability), and the comparative need for specialized and common-sense reasoning. We further hypothesize that as ambiguity, unpredictability, and the utility of common-sense reasoning go up, the amenability of a set of legal phenomena to general theoretical approaches decreases. We thus predict that the meaning of negligence will be resistant to theoretical approaches, both economic and corrective justice, and that antitrust law will be influenced by microeconomic approaches. We test these predictions in various ways and find support for both of them.

THE COMMUNITIES THAT MAKE STANDARDS OF CARE POSSIBLE — *Anita Bernstein* 735

This Article argues that negligence law depends on "communities" in order to fulfill its agenda of promoting both security and freedom. Although many disciplines and discourses favor divergent understandings of the word "community," for purposes of the law the defining trait of community is group-based constraint. Communities can include various human aggregations. As far as the law understands this term, members need not have joined communities voluntarily, and the community need not have any leadership or power to change the lives of its members. Negligence law reaps benefits from the fact that certain groups exist. Their constraints make individuals less likely to hurt others (and thereby advance the "security" agenda) while sparing negligence law itself the political costs of repressing and deterring (i.e., "freedom"). In recognition of this adjuvant support, negligence law deems some group memberships relevant to its judgments about the standard of care. "Communities" in this sense helps to answer three vexing questions about the standard of care in negligence. First, what exactly is the "objective" standard of care that courts and commentators purport to favor, and what justifies it? Second, if the objective standard of care is proper, what justifies the various subjective exceptions that courts have created? Third, should the standard of care be the same for both plaintiffs and defendants?

THE KENNETH M. PIPER LECTURE

EMPLOYEE REPRESENTATION IN THE BOUNDARYLESS WORKPLACE — *Katherine V.W. Stone* 773

In this Article, Stone describes changes in the organization of work that are undermining traditional union practices and patterns of collective bargaining. Many firms have dismantled their internal labor market's job structures, repudiated their former implicit promises of job security, and instead instituted workplace practices that do not depend upon long-term attachment between the employee and the firm. As employers reorganize the workplace to achieve flexibility rather than stability, many features of the labor laws and industrial union practices have become problematic. This Article identifies the ways in which current labor law and traditional union

practices are in tension with the new employment relationship, and then proposes forms of employee representation that are compatible with the new workplace.

THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

DISCIPLINING SEXUAL HARASSERS IN THE UNIONIZED WORKPLACE: JUDICIAL PRECEDENT IS INFLUENCING ARBITRATOR ATTITUDES, AWARDS *Lisa I. Fried-Grodin* 823

Before deciding whether an employer has appropriately disciplined an employee accused of sexual harassment, many labor arbitrators draft their rulings with the employer's legal obligations in mind. When an employee's conduct rises to the level of unlawful sexual harassment or violates an employer's sexual harassment policy, arbitrators often uphold or minimally reduce harsh discipline. If, however, the grievant's conduct is less egregious, arbitrators have less tolerance for severe disciplinary measures. But before reinstating a discharged employee who was accused of sexual harassment, or otherwise reducing that employee's discipline, arbitrators consider whether the employer had a sexual harassment policy in place, what training the grievant received on harassment, and what message a lighter punishment would send to other employees in the workplace.

UNIONS IN A FRAGMENTED SOCIETY *Christopher Grant* 849

It is now well documented that over the past forty years, participation in civic organizations has declined across-the-board. All factors indicate that society is more fragmented today than in the nineteenth century. In response, various political and legal theorists have called for a return to a republican—as opposed to our current liberal—conception of freedom. Under this view, associations, such as unions, hold a special and protected place because in associations individuals learn the habits essential to self-government. Yet, if society is so fragmented, then should we not base reform upon that fragmentation? This Note argues that we cannot ignore our differences. For unions, this means giving up the idea of exclusive representation and allowing individuals to organize around their own agendas, whether economic or political.

THE AMERICANS WITH DISABILITIES ACT AFTER *UNIVERSITY OF ALABAMA V. GARRETT*: SHOULD THE STATES BE IMMUNE FROM SUIT? *Nicole S. Richter* 879

In *University of Alabama v. Garrett*, the United States Supreme Court invalidated the Americans with Disabilities Act as it applied to the states when it held that the Eleventh Amendment precludes private individuals from suing a state in federal court for money damages. Many federal antidiscrimination statutes that protect employee rights from state infringement are enforced through private litigation. Thus, given the impact that *Garrett* could have on federal antidiscrimination law, it is important to determine whether the Court came to the correct conclusion concerning the Americans with Disabilities Act. An analysis of Garrett shows that, contrary to the Court's holding in *Garrett*, the Americans with Disabilities Act should apply to the states because it is a congruent and proportional response to disability discrimination.

STUDENT NOTES

WHO FRAMED ROBERT DEVEREAUX? *DEVEREAUX V. PEREZ*, A DELIBERATE INDIFFERENCE STANDARD, AND A RIGHT NOT TO BE FRAMED IN THE CONTEXT OF CHILD SEXUAL ABUSE INVESTIGATIONS *Erika A. Swanson* 901

In this Note, Swanson examines two major flaws in the Ninth Circuit's decision in *Devereaux v. Perez*, a case centering on child sexual abuse interviewing techniques. The plaintiff in *Devereaux* was wrongly arrested and charged with child sexual abuse based on information obtained by public officials through highly improper interviewing of the alleged child victims. The plaintiff brought suit against the officials involved in the investigation under 42 U.S.C. § 1983, and the court dismissed his suit, holding that there is no constitutional due process right to have child witnesses in a child sexual abuse investigation interviewed in a particular manner or pursuant to specified standards. Swanson argues that the Ninth Circuit erred by requiring too high an intent standard to show a violation of the right at issue and by defining the due process right at issue too specifically, which allowed the court to avoid finding the violation of a constitutional right. The court instead should have found an infringement of the plaintiff's right not to have fabricated evidence used against him to deprive him of his liberty. By failing to do so, the court gives too much protection to state officials investigating child sexual abuse cases and too little protection to those accused of child sexual abuse.

SLOW DEATH OF A SALESMAN: THE WATERING DOWN OF DILUTION VIABILITY BY DEMANDING PROOF OF ACTUAL ECONOMIC LOSS *Jeffrey Enright* 937

This Note examines the split in jurisprudence among several federal appeals courts over the Federal Trademark Dilution Act. Some circuits require proof of actual consummated economic harm before they will enjoin the diluting conduct under the statute, while other circuits merely require a showing of a likelihood of economic harm. This Note performs a historical analysis of the dilution doctrine and analyzes the rationale of the various federal appeals courts. After critiquing several arguments, Enright concludes that the harm the Act seeks to prevent precludes a requirement of proof of actual consummated economic harm before an injunction can be granted.

FINANCIAL ACCOUNTABILITY IN CHARITABLE ORGANIZATIONS: MANDATING AN AUDIT COMMITTEE FUNCTION *Karyn R. Vanderwarren* 963

In recent years, the public image of charitable organizations has been harmed by highly publicized cases of executive theft of charitable assets. While the federal government has responded by requiring public disclosure of financial information and by imposing intermediate sanctions on insiders receiving excessive benefits, the best place to detect or prevent theft of charitable assets is at the board level. In many cases, charitable organizations could have prevented theft of assets by ensuring that standard procedures, designed to prevent and detect such thefts, were in place. This Note argues that placing responsibility at the board level by requiring charitable organizations to have properly functioning audit committees is the best way to prevent theft and restore public confidence in charitable organizations.