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

Vol. 15, No. 6: Dec 17, 2013

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

Table of Contents

^top

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

"Truthiness: Corporate Public Figures and the Problem of Harmful Truths"

Minnesota Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 361

ASHUTOSH AVINASH BHAGWAT, University of California, Davis - School of Law
Email: aabhagwat@ucdavis.edu

This paper is an invited response to Deven Desai's excellent article, Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine. Desai argues that modern law has created an asymmetry in the treatment of corporations. The source of the problem, Desai argues, is that cases like Citizens United v. Federal Election Commission provide robust protection for corporate speech. At the same time, however, trademark law and (to a lesser extent) the commercial speech doctrine permit corporations to silence the speech of others criticizing them. The result is an uneven playing field, where corporations have robust rights to strengthen their reputations, while critics are hamstrung. The solution Desai proposes is a "corporate public figure doctrine." Drawing on Supreme Court's landmark decision in New York Times v. Sullivan regarding defamation law and the First Amendment, Desai argues that in order to bring legal claims for infringement or dilution of their trademarks, corporations should be required to prove falsehood and "actual malice," meaning knowledge or reckless disregard of the truth. This, Desai concludes, will provide the robust protection for speech criticizing corporations that the First Amendment demands.

I agree with many of Desai's arguments, including the increasingly important political role of corporations, and fact that trademark law unfairly restricts criticism of corporations. My primary critique of Desai's paper focuses on the appropriateness of importing the falsehood requirement from defamation into trademark dilution law. I argue that there is a disconnect here, just as there was a fundamental disconnect in the Supreme Court's importation of falsehood and actual malice into the intentional infliction of emotional distress tort. The problem is that neither trademark dilution or IIED turn in any way on falsehood or the harms caused by falsehood. I conclude by exploring the implications of this insight for Desai's analysis, and for trademark dilution law.

"The Free Speech Foundations of Cyberlaw"
UC Davis Legal Studies Research Paper No. 351

ANUPAM CHANDER, University of California, Davis - School of Law
Email: achander@ucdavis.edu
UYEN P. LE, University of California, Davis -- School of Law
Email: uyen.p.le@gmail.com

Cyber-law is today's speech law. When civic engagement is increasingly mediated online, the law regulating cyberspace becomes the law regulating speech. Yet, free speech texts pay little attention to the ways that cyber-law configures what has become the principal mechanism for exercising free speech rights today — communication online. Conversely, while many have long observed that the Internet enables speech, scholars have failed to recognize the role that the First Amendment played in shaping the law of cyberspace. A First Amendment-infused legal culture that prizes speech proved an ideal environment on which to build the speech platforms that make up Web 2.0. Free speech was Silicon Valley's killer app.

Today's speech law is being made in the major cyber-law disputes of the day. From the Stop Online Piracy Act, criminal copyright enforcement, and a plurilateral free trade treaty, to United Nations control of the Internet, the European Union's proposed right to be forgotten, and the revelations of pervasive NSA surveillance, cyber-law controversies show that we are still seeking to translate free speech values into the Information Age. How we approach these disputes will determine the extent of government censorship, private third-party censorship and self-censorship. This article offers a framework for resolving cyber-law disputes, duly attendant to their speech implications.

"Engines Turn or Passengers Swim: A Case Study of How ETOPS Improved Both Safety and Economics in Aviation"
Journal of Air Law and Commerce, Vol. 78, No. 1, 2013
UC Davis Legal Studies Research Paper No. 359

J. ANGELO DESANTIS, University of California, Davis - School of Law
Email: jadesantis@ucdavis.edu

Under the Federal Aviation Administration (FAA) regulations, no commercial airplane with fewer than three engines may fly a route that at any point exceeds 60 minutes flying time from a suitable airport. The industry calls this "the 60-minute rule." ETOPS is the exception to that rule. By satisfying stringent ETOPS requirements, an airline may fly two-engine planes on "extended operation" routes exceeding 60 minutes. ETOPS has enormously influenced the aviation industry. This article traces the early history of ETOPS, including its creation and the evolution known as "early ETOPS." In doing so, it identifies factors contributing to ETOPS's success. The article then evaluates these factors in light of the nearly unprecedented grounding of the Boeing 787 Dreamliner following two serious battery failures. The author argues that the difficulties of the Boeing 787 warrant the application of ETOPS-like principles to the adoption of novel technology, such as lithium-ion batteries, for aviation.

"The Applicability of Privileges to Employees' Personal E-Mails: The Errors Caused by the Confusion between Privilege Confidentiality and Other Notions of Privacy"
Michigan State Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 362

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

Americans will generate approximately seven trillion e-mails this year. Each year employees send hundreds of billions of e-mails from their work accounts. Some of these e-mails relate to personal matters, including communications with spouses and confidants such as attorneys and therapists. Yet, many employers have formal policies both prohibiting personal use of the work account and reserving the employer's right to monitor e-mails sent through the work account.

The question has arisen whether the traditional privileges such as attorney-client and spousal attach to e-mails sent through the employee's work account. Does the employer policy negate the confidentiality ordinarily required for the privilege to attach?

That general issue has triggered a number of splits of authority. Two are especially noteworthy. One question is

whether the same confidentiality standard applies whether the employee is asserting the privilege against the employer or a third party. Some courts have indicated that the employee may invoke the privilege against a third party even when the employee could not assert the privilege against the employer. A second question is whether the existence of an employer policy automatically precludes privileges from attaching. Some courts have adopted a flexible, multi-factor test including such considerations as whether the employer actually monitors or has made inconsistent representations to the employee. However, other courts -- the majority -- have ruled that the existence of the employer policy is dispositive, precluding any privilege claim by the employee.

This article criticizes the view that the confidentiality standard varies as well as the view that the existence of an employer policy is dispositive. Both views distort the basic concept of confidentiality. The first view is flawed because the concept of confidentiality requires the holder's intent to exclude all parties outside the circle of confidence. The employer is not within the circle including the employee and his or her confidant. Thus, if the employee impliedly consents to the employer's monitoring, there is no privilege to assert -- whether the opposing litigant is the employer or a third party. The second view is equally unsound. That view confuses the normative meaning of reasonable expectation in Fourth Amendment jurisprudence with the factual meaning of reasonable expectation in privilege law.

Confidentiality is the central concept in modern privilege law. Three quarters of the published opinions addressing privilege issues turn on the confidentiality concept. The courts must resolve the modern disputes over the applicability of privileges to employees' e-mails on work accounts without distorting that basic concept.

"The Beginning of the End: The Immigration Act of 1965 and the Emergence of Modern U.S./Mexico Border Enforcement"

Immigration & Nationality Review (Forthcoming)
UC Davis Legal Studies Research Paper No. 360

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

This was prepared as a chapter for a forthcoming book on the 50th anniversary of the Immigration Act of 1965 and as an original article for the IMMIGRATION & NATIONALITY REVIEW.

In the celebratory wake of the passage of the Civil Rights Act of 1964, Congress enacted the Immigration Act of 1965. Consistent with the emerging popularity of the extension of civil rights protections to racial minorities in the United States, the 1965 Act eliminated the discriminatory national origins quotas system from the U.S. immigration laws, which Congress had passed in 1924 when xenophobic sentiment was at one of its periodic highpoints in American history.

In the 1965 Act, however, Congress went considerably further than simply removing the discriminatory quotas from the immigration laws. Affirmatively acting to eliminate various forms of bias that had been part and parcel of the American immigration laws for generations, Congress flatly prohibited a variety of considerations from influencing the U.S. government's decisions to issue immigrant visas: "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence . . . ." This firm admonition imposes on the U.S. government the equivalent of what might be characterized as a color-blindness-plus requirement in the evaluation of immigrant visa applications, a fundamental transformation of the nation's previous approach to immigration admissions.

Almost reflexively characterizing the law as a welcome by-product of the civil rights movement that fueled passage of a flurry of civil rights laws, most observers have in unqualified terms praised the 1965 Act as a progressive, if not revolutionary, measure. As Professor Bill Hing glowingly put it, the Immigration Act of 1965 reformed the American immigration laws in the spirit of the "new global egalitarianism."

The elimination of the discriminatory quotas system benefited large numbers of prospective immigrants from Asia, who since the late nineteenth century had been denied lawful admission into the United States through the operation of the quotas system combined with an insidious and intricate web of "Chinese exclusion laws," born out of widespread racial animosity directed toward the Chinese. Over time, Congress had expanded the various exclusions to restrict immigration not only from China but from all of Asia, thus making them most appropriately termed "Asian exclusion laws."

As racial sensibilities slowly but surely changed over the course of the twentieth century, the discriminatory quotas system increasingly became difficult to defend both at home and abroad. Criticism, including from prominent political leaders such as President Harry Truman and Senator (and later President) John F. Kennedy, grew over time as it became more difficult to square the systematic national origin quotas system with the burgeoning American ideal of non-discrimination against racial and ethnic minorities. The blatant discrimination in the immigration laws became a foreign policy embarrassment that seriously handicapped the U.S. government in its ongoing Cold War efforts to persuade hearts and minds the world over of the righteousness of the American cause.

Despite the significant anti-discriminatory improvements to the American immigration laws, the Immigration Act of

1965 also made less well-known changes to the law that are unworthy of celebration. They in fact deserve outright condemnation by precisely the same civil rights advocates who praise the law. Intentionally discriminatory at their core, the changes in fact are wholly inconsistent with the extension of civil rights to racial minorities in the United States and operate to deprive a discrete group of noncitizens of color – Latina/o immigrants – to equal treatment under the law.

Specifically, the 1965 Act added a new, although considerably more sophisticated – and less visible – form of racial discrimination than the national origins quotas system, to the modern American immigration laws. Rather than unintentional, or reluctant, racial discrimination, Congress admitted its discriminatory goals and enthusiastically backed those reforms with an express hope of significantly restricting the number of Latina/o immigrants coming to the United States. Indeed, Congress collectively expressed the fear that, absent bold new restrictive steps in the Immigration Act of 1965, Latina/o immigrants might well overrun, and possibly even destroy, American society.

Seeking to fill a serious gap in the scholarly literature, this chapter examines what might accurately be described as the anti-Latina/o underside of the Immigration Act of 1965. In doing so, it places into question the heretofore largely unchallenged myth that the 1965 Act represents one of the sterling achievements of the much-heralded civil rights movement, marking a positive reform of U.S. immigration law by bringing racial neutrality, objectivity, and equality to American immigrant admissions.

The truth of the matter is that, despite its decidedly pro-civil rights reputation, the Immigration Act of 1965 represents one of the first major changes to the immigration laws in American history that demonstrates an unmistakable intent to cap immigration from Mexico, as well as all of Latin America, to the United States. In so doing, the law established a sturdy foundation from which the modern American immigration enforcement state has evolved, with its glaringly disparate racial impacts on Latina/os that is achieved through seemingly objective, facially neutral (i.e., color blind), and ostensibly fair means.

Specifically, the Immigration Act of 1965 set the stage for the creation and implementation of a virtually unbroken series of restrictive U.S. immigration laws and enforcement measures directed primarily at Latina/os that remained in place for the last third of the twentieth century. With broad public support, those measures have been expanded dramatically in the early years of the new millennium and have resulted in record numbers of removals of immigrants from the United States – now running in the neighborhood of 400,000 a year, an increase of more than ten-fold in the last twenty years. Not coincidentally in light of the disparate focus and impacts of the modern removal machinery, the new enforcement measures year after year have yielded record numbers of removals of Latina/os.

In the five decades since passage of the 1965 legislation, U.S. immigration law and its enforcement have slowly but surely built on the anti-Latina/o roots of the law. As a result, immigration enforcement has progressively focused – some would contend almost exclusively – on limiting migration from Mexico to the United States. The transformation of immigration law has been so complete that many Americans today firmly believe that curbing Mexican immigration is what U.S. immigration law and border enforcement should be all about. Some informed observers, especially critics of the status quo, would lament that that in fact is the case today.

The chapter explains how the implementation of the Immigration Act of 1965 contributed to the subsequent growth of a series of interlocking laws and enforcement programs primarily targeting Latina/os, which, at the dawn of the new millennium, dominated modern American immigration law and enforcement. One might claim that, over the last 50 years, the United States replaced the Chinese exclusion laws of the 1800s with something akin to the Mexican exclusion laws of the twenty-first century.

By re-allocating opportunities for lawful immigration from Latin America to Asia – and diminishing legal discrimination in admissions against Asian immigrants while expanding discrimination against Latina/os, the Immigration Act of 1965 transformed the relative mix of Asian and Latina/o immigrants legally coming to the United States. The Act, on the one hand, contributed to a surge in legal immigration from Asia, which historically had been stunted by discriminatory laws as well as the long travel distances from Asia to the United States. On the other hand, by placing an artificial ceiling on legal migration from Mexico wholly disconnected from the great (and increasingly unsatisfied) demand for immigration, the legislation simultaneously spurred the growth of a large – and consistently expanding – population of Mexican immigrants unauthorized by the U.S. immigration laws from being in, and subject to removal from, the country. These two dominant trends in immigration to the United States in turn contributed to noticeable changes in the racial demographics of American society in the post-1965 period, the public's view of immigration and the need for enforcement, and ultimately the overall direction of U.S. immigration law and its enforcement.

Changes to the racial composition of the overall population helped to provoke the public's sporadic outbursts of venom directed at immigrants and frequent demands for reform, as well as heightened enforcement, of the U.S. immigration laws. The new racial demographics of modern immigration also fueled the demands for a variety of changes to the immigration laws that would transform – some observers might contend that the conscious intent was to "whiten" – the racial demographics of the flow of immigrants to the United States. One well-known (and rather blatant) example of such efforts is the "diversity" visa program that Congress added to the immigration laws in 1990, which at its core was designed to facilitate greater migration to the United States from Europe. In the end, those legal maneuvers in combination greatly limited legal immigration from Mexico to the United States.

"Teaching Legal History at a Small Law School"
American Journal of Legal History, Vol. 53, Issue 4, October 2013
UC Davis Legal Studies Research Paper No. 358

CARLTON F. W. LARSON, University of California, Davis - School of Law
Email: clarson@ucdavis.edu

In this short piece, written for a symposium in the American Journal of Legal History, Professor Larson describes his experiences teaching legal history at the UC Davis Law School.

"The Undocumented Closet"
North Carolina Law Review, Vol. 1, 2013
UC Davis Legal Studies Research Paper No. 357

ROSE CUISON VILLAZOR, University of California, Davis
Email: rcvillazor@ucdavis.edu

The phrase “coming out of the closet” traditionally refers to moments when lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals decide to reveal their sexual orientation or gender identity to their families, friends, and communities.In the last few years, many immigrants, particularly those who were brought to the U.S. illegally when they were very young, have invoked the narrative of “coming out.”Specifically, they have publicly “outed” themselves by disclosing their unauthorized immigration status despite the threat of deportation laws.In so doing, they have revealed their own closet — ”the undocumented closet” — in which they have been forced to hide their identity as “undocumented Americans.” Notably, by choosing to become visible, these undocumented Americans are slowly yet powerfully reforming immigration policy by demanding that they are recognized as lawful members of the American polity.

This Article explores the roles that the closet metaphor and the act of “coming out” play in the immigration justice movement. Drawing on scholarship examining the “closet” as the symbol for the oppression of LGBTQ persons, this Article theorizes the “undocumented closet” and argues that this analytical framework facilitates a deeper understanding of the lived experiences of undocumented immigrants in the United States. First, the “undocumented closet” reveals the extent to which immigration and other laws that are designed to exclude unauthorized immigrants both literally and figuratively from the United States have compelled them to become invisible in society. Second, the “undocumented closet” framework underscores that public disclosures about one’s undocumented status, despite the risk of deportation, constitute acts of resistance against legal subordination and, importantly, claims for legal membership in the American polity. Finally, the “undocumented closet” facilitates a critical lens for reviewing immigration reform. Importantly, it calls for a rethinking of immigration law that would prevent the further “closeting” and subordination of immigrants and their families.

^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**

Submissions

To submit your research to SSRN, sign in to the **SSRN User HeadQuarters**, click the My Papers link on left menu and then the Start New Submission button at top of 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, European Corporate Governance Institute (ECGI)
Email: **rgilson@leland.stanford.edu**

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

^top

^top