

SOCIAL SCIENCE RESEARCH NETWORK

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

UC DAVIS SCHOOL OF LAW

Vol. 9, No. 2: May 22, 2007

Editor: KEVIN R. JOHNSON
Associate Dean for Academic Affairs, School of Law, and
Mabie/Apallas Professor of Public Interest Law and Chicana/o Studies,
University of California, Davis
KRJOHNSON@UCDAVIS.EDU

BROWSE all abstracts in this subject:
<http://www.ssrn.com/link/uc-davis-legal-studies.html>

SEARCH entire eLibrary at: <http://ssrn.com/search>

TABLE OF CONTENTS

"Precaution, Science, and Learning While Doing in Natural Resource Management"
HOLLY DOREMUS, University of California, Davis - School of Law

"Coolies, James Yen, and Rebellious Advocacy"
BILL ONG HING, University of California, Davis - School of Law

"Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's
Inability to Afford Rebuttal Evidence"
EDWARD J. IMWINKELREID, University of California, Davis - School of Law

"Protecting National Security Through More Liberal Admission of Immigrants"
KEVIN R. JOHNSON, University of California, Davis

"Misjudging: Implications for Dispute Resolution"
DONNA SHESTOWSKY, University of California, Davis - School of Law

"Precaution, Science, and Learning While Doing in Natural Resource Management"
UC Davis Legal Studies Research Paper No. 103

Contact: HOLLY DOREMUS, University of California, Davis - School of Law
Email: hddoremus@ucdavis.edu

Auth-Page: <http://ssrn.com/author=37460>

Full Text: <http://ssrn.com/abstract=982203>

ABSTRACT: Dealing with uncertainty is widely recognized as the key challenge for environmental and natural resource decision-making. Too often, though, that challenge is considered only from an ex ante perspective, treating uncertainty as an invariant feature that must be accounted for but cannot be changed. With respect to many natural resource management decisions, that picture is misleading. Decisions which are iterative or similar can provide significant opportunities for learning. Where such opportunities are available and inaction is not feasible or desirable, learning while doing can provide the benefits of both the precautionary principle and scientific decision-making, while minimizing the key weaknesses of each.

After highlighting the benefits of a learning-while-doing approach for natural resource management, this paper briefly addresses how management agencies might be encouraged to adopt such an approach.

"Coolies, James Yen, and Rebellious Advocacy"
UC Davis Legal Studies Research Paper No. 107
Asian American Law Journal, Forthcoming

Contact: BILL ONG HING, University of California, Davis - School of Law
Email: bhing@ucdavis.edu

Auth-Page: <http://ssrn.com/author=331631>

Full Text: <http://ssrn.com/abstract=982409>

ABSTRACT: Those of us who engage in progressive legal work need to be constantly reminded that we do not know everything - that we are not knights in shining armor swooping in to save subordinated communities. We should be collaborating: working with rather than simply on behalf of clients and allies from whom we have much to learn. Though lawyering for social change is arduous work, there is much to gain in these battles against subordination, not simply from the potential outcome but from the collaborative process itself: as our clients gain strength and confidence, we too are renewed. Thus invigorated by the talent, spirit, and innovation that our clients and allies bring to the table, we aspire to bring that same sense of renewal to those with whom we work.

As a legal services attorney, a law school clinical instructor, and a volunteer with the Immigrant Legal Resource Center (ILRC), I am constantly amazed by the talented clients and non-lawyer allies I have encountered. From my contact with such allies I have drawn the invaluable lesson that the fight against discrimination - in essence, the fight against subordination - is one that community lawyers wage most effectively with allies and clients. In their work, these allies demonstrate that the struggle requires skills, techniques, and approaches that, unfortunately, conventional law school classrooms neglect.

If we seek to become more effective collaborative lawyers, then we should keep our eyes open for individuals from whom we can learn. Long before I became a lawyer, I met such a person named Y.C. James Yen. Though perhaps little-known among contemporary community lawyers, Yen's work has merited accolades all over the world, as well as broadened and enriched my own perspective of progressive lawyering.

Indeed, Yen's approach fits well within the theoretical lawyering framework advanced by Jerry López, Lucie White, and Ascanio Pomelli. These scholars, who are grounded in ongoing community work, have challenged us to re-imagine our roles as community lawyers. They advocate a collaborative approach that respects clients' decision-making capacities, seeks allies in the pursuit of social justice, and is open to learning from clients and community partners.

In this article, I first provide some background on Yen and describe his incredible work in Europe, China, and the Philippines. I then revisit the scholarship of López, White, and Piomelli as their theories and experiences pertain to community lawyering in the rebellious or collaborative style, and I relate Yen's historic work to the philosophy and concepts they advance.

My hope is thus to remind contemporary rebellious advocates of collaborative possibilities.

"Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence"

UC Davis Legal Studies Research Paper No. 104

Connecticut Law Review, Forthcoming

Contact: EDWARD J. IMWINKELREID, University of California, Davis - School of Law

Email: EJIMWINKELRIED@ucdavis.edu

Auth-Page: <http://ssrn.com/author=366139>

Full Text: <http://ssrn.com/abstract=982209>

ABSTRACT: There is a marked tendency toward the expanded use of expert testimony at trial. However, such testimony can be expensive. A 15 second computer generated animation (CGA) can cost \$20,000, and likewise DNA testimony can be quite costly. Thus, the increased use of expert evidence places poorer litigants at a distinct disadvantage.

One way to level the evidentiary playing field is to provide the poor litigant with expert services. Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Constitution sometimes compels the appointment of an expert for an indigent accused. An appointment for an indigent accused is also possible under the Criminal Justice Act. However, in practice, such appointments are few and far between.

Another way to level the playing field is to exclude the wealthier proponent's expert testimony. In a 2006 decision, *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d 2006 (2006), in dictum several members of the Pennsylvania Supreme Court expressed the view that when the opponent cannot afford rebuttal testimony, that state's Rule 403 sometimes authorizes the trial judge to bar the proponent's testimony. Pennsylvania's Rule 403 is identical to Federal Rule of Evidence 403; and in a survey mentioned in the article, a number of federal District Court judges expressed the same view.

The purpose of this article is to analyze the propriety of using Rule 403 in that fashion. On the one hand, the article concludes that Rule 403 does not embody any egalitarian objective. Rule 403 does not authorize the judge to exclude the proponent's testimony simply because the jury is likely to find the testimony impressive and the opponent cannot afford to hire a rebuttal witness.

On the other hand, the article argues that on occasion, there is a justification for barring the proponent's testimony under Rule 403. Rule 403 tasks the trial judge to balance the probative value of the evidence against its incidental probative dangers.

One of those dangers is the risk that the jury will attach excessive weight to the testimony. The article contends that that risk is acute when three factors concur: The proponent's expert has impressive credentials, the expert's analytic technique does not include an objective decisional rule, and there are no data as to the error rate for the technique. To be sure, in many cases, the trial judge has other tools - the invocation of the learned treatise hearsay exception, judicial notice, and cautionary instructions - to minimize the risk. However, in an extreme case when the three factors concur and these tools are unavailable to the judge, the drastic step of exclusion under Rule 403 is warranted.

"Protecting National Security Through More Liberal Admission of Immigrants"
UC Davis Legal Studies Research Paper No. 106
University of Chicago Legal Forum, 2007

Contact: KEVIN R. JOHNSON, University of California, Davis
Email: krjohnson@ucdavis.edu

Auth-Page: <http://ssrn.com/author=185338>

Full Text: <http://ssrn.com/abstract=982236>

ABSTRACT: When it comes to immigration law and policy, September 11, 2001 had especially dramatic impacts. Fears of terrorism led to tighter immigration restrictions in many areas, from stricter monitoring of scholars and students entering the United States on temporary visas to new and more restrictive immigration requirements and procedures. Many measures targeted Arab and Muslim immigrants. A vocal group of observers and policy-makers claimed that the fear of a repeat of September 11 required increased enforcement along the southern border with Mexico, thereby deeply influencing the national debate in 2005-06 over immigration reform.

This article contends that, even assuming that such a policy outcome were possible, efforts to improve the nation's security need not necessarily mean closing the borders. Put differently, an open society does not need to be a country whose national security is more at risk than one with nominally closed borders.

In modern times, to improve the security of the nation, the United States needs a more reasonable immigration admissions scheme. A scheme that better matched the political, social, and economic factors contributing to immigration—and did not [1] contribute to the creation of a shadow population of millions of people—would better ensure the security of the nation.

A proposal to liberalize admissions to protect national security may seem counter-intuitive. But, as this article explains, a carefully crafted liberal admissions scheme could allow for a more secure and safer nation. This article seeks to outline the argument for this proposition. In my mind, a safer immigration system would need to bestow lawful immigration status on the millions of undocumented immigrants who today live in the United States. The current systems of tracking lawful immigrants and temporary visitors, which are woefully inadequate, need to be improved.

Part I of this article looks at the current border restrictions in the United States, with a focus on those ostensibly based on national security concerns. Part II contends that less restrictive admissions would contribute to a more secure America.

The article contends that the U.S. immigration laws need to be radically reformed to be more consistent with the economic, social, and political pressures fueling modern migration to the United States.

"Misjudging: Implications for Dispute Resolution"
UC Davis Legal Studies Research Paper No. 105
Nevada Law Journal, Forthcoming

Contact: DONNA SHESTOWSKY, University of California, Davis - School of Law
Email: dshest@ucdavis.edu

Auth-Page: <http://ssrn.com/author=402976>

Full Text: <http://ssrn.com/abstract=982227>

ABSTRACT: In the lead symposium article, Chris Guthrie describes recent research demonstrating empirically that judges, just like other people, are affected by cognitive, informational and attitudinal blinders. He argues that these blinders promote inaccurate trial outcomes and, as a result, disputants might find trials less desirable for resolving disputes. In her response, Shestowsky argues that these findings might not affect disputants in the way that Guthrie supposes because disputants are not primarily guided by outcome accuracy considerations when evaluating dispute resolution procedures. Rather, when choosing procedures, they prefer ones that they expect to deliver outcomes that will advance their self-interests. When evaluating procedures after they have experienced them, they are similarly not focused on outcome accuracy; in fact, they focus more on process (i.e., how they were treated). Shestowsky proposes some alternative implications of judicial blinders for the dispute resolution context.

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, <http://hq.ssrn.com>, 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 Institution is interested in learning more about increasing readership for its research by becoming a Partner in Publishing or starting a Research Paper Series, please e-mail: Management@SSRN.com.

DISTRIBUTED BY

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

SUBSCRIPTION MANAGEMENT

You can change your journal subscriptions by going to the SSRN User Headquarters: <http://hq.ssrn.com>. Please enter the email address where you received this email in the "Your Email Address" field and click "Submit". Click on "Email me this information" on the next screen, and your User ID and Password will be emailed to you. Once you have successfully logged in, you will be able to change your journal subscriptions. If you have questions or problems with this process, please email UserSupport@SSRN.com or call 877-SSRNHelp (toll free). 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

http://www.ssrn.com/update/arn/arn_site-licenses.html

Economics Research Network

http://www.ssrn.com/update/ern/ern_site-licenses.html

Entrepreneurship Research & Policy Network

http://www.ssrn.com/update/erpn/erpn_site-licenses.html

Financial Economics Network

http://www.ssrn.com/update/fen/fen_site-licenses.html

Legal Scholarship Network

http://www.ssrn.com/update/lsn/lsn_site-licenses.html

Management Research Network

http://www.ssrn.com/update/mrn/mrn_site-licenses.html

Social Insurance Research Network

http://www.ssrn.com/update/sirn/sirn_site-licenses.html

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please email 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 countries).

If you are undergoing financial hardship and you cannot pay for a journal, please email a detailed explanation to Subscribe@SSRN.com

To ensure delivery of this journal, please add LSN@publish.ssrn.com (Legal Scholarship Network) to your email contact list.

REDISTRIBUTION

Individual and professional subscriptions to the journal are for single users. It is a violation of copyright to redistribute this document electronically or otherwise without the explicit permission of Social Science Electronic Publishing, Inc. Site licenses for organizations are available by emailing Site@SSRN.com

Copyright 2007
SSEP, Inc., all rights reserved.