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SOCIAL JUSTICE IN THE 21ST CENTURY

DRUM MAJORS FOR JUSTICE—LEADING THE MARCH TOWARD SOCIAL JUSTICE

by Gary Williams ................................................................. 925
Professor Gary Williams reminds us that thirty-four years after Dr. Martin Luther King's assassination, the need for drum majors for social justice is extant. The problems that Dr. King identified in 1968—hunger, poverty, and incarceration—persist, and threaten to become even more daunting today. In light of these problems, the editors asked the participants in this symposium two questions. First, what are some of the pressing social justice issues facing America today? Second, if lawyers are to become drum majors for social justice,
what role should law schools and law professors play in addressing these issues? Professor Williams reviews each of the participants’ contributions, and comments that such contributions are essential if law students, law professors, and practicing lawyers are to master the strategies for effective social change, and acquire the passion, courage, and stamina for a lifelong pursuit of social justice.

GANGS, SCHOOLS AND STEREOTYPES
by Linda S. Beres and Thomas D. Griffith................................. 935
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A NEW PERSPECTIVE ON THE “WAR ON DRUGS”: COMPARING THE CONSEQUENCES OF SENTENCING POLICIES IN THE UNITED STATES AND ENGLAND
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TOWARD PROVIDING A WELCOMING HOME FOR ALL: ENACTING A NEW APPROACH TO ADDRESS THE LONGSTANDING PROBLEMS LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH FACE IN THE FOSTER CARE SYSTEM
by James W. Gilliam, Jr. ................................................................. 1037
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IN THE MEANME TIME: STATE PROTECTION OF DISABILITY CIVIL RIGHTS
by Sande L. Buhai ................................................................. 1065
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“CHASING THE WIND”: PURSUING SOCIAL JUSTICE, OVERCOMING LEGAL MIS-EDUCATION, AND ENGAGING IN PROFESSIONAL RE-SOCIALIZATION
by John O. Calmore ................................................................. 1167
Professor John Calmore observes that the current model of law school education insists on teaching students that the law is reason based, abstract, and value-free. In this model, law professors strive to teach students how to “think like lawyers”—to become amoral technicians
whose personal moral values are baggage or distractions that complicate the task of representing clients. Calmore argues that for law schools to train law students to pursue social justice most effectively, they must encourage students to broaden their understanding of how the law works and how it can be used to affect positive social change. Professor Calmore uses his experience teaching his Social Justice Lawyering class to suggest that law school education can do much more to sensitize law students to the needs of people who are marginalized, subordinated, and underrepresented.

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by Robert W. Scholla, S.J. ................................................................. 1209
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A PRO BONO REQUIREMENT FOR FACULTY MEMBERS
by Erwin Chemerinsky ................................................................. 1235
Professor Erwin Chemerinsky argues that law schools, and the entities that regulate them, ought to establish mandatory pro bono service requirements for law school faculty. Chemerinsky demonstrates that pro bono service enhances a law professor’s ability to teach the law, and creates opportunities to involve law students in the practice of the law in the public interest. Chemerinsky points out that encouraging, if not compelling, law professors to gain practical experience will improve their teaching by showing them how theory intersects with practice.
NOTES & COMMENTS

REMATCH IN THE RING: GIVING DEATH ROW INMATES ANOTHER CHANCE TO CHALLENGE THEIR SENTENCES IN SUMMERLIN V. STEWART *

by Sara N. Williams ................................................................. 1247

Whether new constitutional rules apply in post-conviction proceedings requires consideration of the Supreme Court’s retroactivity doctrine, as set forth in Teague v. Lane. Last year, in Summerlin v. Stewart, the Ninth Circuit concluded that Ring v. Arizona established a new constitutional rule of criminal law, and applied that rule retroactively to vacate an unconstitutionally imposed death sentence. In this Comment, Sara Williams examines the retroactivity doctrine, and the Ninth Circuit’s analysis of Ring. She demonstrates that neither statutory nor case precedent preclude applying Ring retroactively, and concludes that the Ninth Circuit correctly decided Summerlin because to deny convicted criminals the opportunity to challenge their unconstitutionally imposed death sentences violates public policy.

FINE TUNING CALIFORNIA’S APPROACH TO INJURED PARTICIPANTS IN ACTIVE SPORTS

by Glenn Anaiscourt ................................................................. 1273

Glenn Anaiscourt argues that over the course of several decades, the California Supreme Court has been unconsciously seeking a “middle ground” with respect to the standard to which defendant sports participants should be held. He concludes that over the long term, the court is likely to settle upon a standard for imposing liability that lies somewhere between negligence and recklessness. Anaiscourt reasons that the court’s most recent decision in this area contains the seeds of factors that should, in certain cases, permit a court to lower the shield of protection defendant sports participants enjoy under Knight v. Jewett, and make them liable for plaintiff sports participants’ injuries under a theory of ordinary negligence.

* Recipient of the 2003-04 Loyola of Los Angeles Law Review Best Student Article Award.
THE PRISONER’S DILEMMA: REASSESSMENT OF BORRERO V. ALJETS AND THE INDEFINITE DETENTION OF INADMISSIBLE ALIENS

by John W. Lam ................................................................. 1297

In Borrero v. Aljets, the Eighth Circuit Court of Appeals authorized the indefinite detention of aliens found within United States borders. John Lam argues that the holding of Borrero leaves inadmissible aliens vulnerable to the whims of the political process, deters future aliens from complying with U.S. immigration laws, puts undue strain on government resources, and reflects poorly on the United States within the international community. Lam reasons, moreover, that unless courts extend the six-month reasonable detention period set forth by the United States Supreme Court in Zadvydas v. Davis with respect to removable aliens, inadmissible aliens imprisoned in the United States will be subject to indefinite detention regardless of whether they have paid their debts to society.

IN-COURT RACIAL VOICE IDENTIFICATIONS: THEY DON’T ALL SOUND THE SAME

by John K. Son ................................................................. 1317

In Clifford v. Chandler, the Sixth Circuit affirmed a defendant’s drug trafficking conviction and upheld the admissibility of a witness’ racial voice identification of the defendant. Amidst conflicting accounts of the drug dealer’s identity, the court admitted testimony that the drug dealer sounded like a Black male. This Comment argues that the court’s reliance on factually distinguishable cases admitting similar testimony essentially creates a bright-line rule of admissibility, and that a proper case-by-case balancing inquiry would have excluded the testimony because its probative value was substantially outweighed by the danger of undue prejudice.

MILITARY DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION: “DON’T ASK, DON’T TELL” AND THE SOLOMON AMENDMENT

by Lindsay Gayle Stevenson ................................................................. 1331

This Note evaluates the constitutionality of the Solomon Amendment in light of the U.S. military’s discriminatory policy against homosexuals, embodied in the notion of “Don’t Ask, Don’t Tell.” The author concludes that the Solomon Amendment creates an unconstitutional condition because it forces universities to choose between First Amendment rights and federal funding. The Solomon Amendment
requires a university to permit the U.S. military to recruit on-campus even if “Don’t Ask, Don’t Tell” directly conflicts with its nondiscrimination policy. Failure to comply risks the loss of hundreds of millions of dollars. The Solomon Amendment forces a university to choose between federal funding and its right as an expressive association to convey a message of strict nondiscrimination, thereby placing an unconstitutional condition upon the receipt of federal funds.

A SYMPATHETIC VEHICLE: MICHIGAN v. KATT AND SETTING DANGEROUS PRECEDENT

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In Michigan v. Katt, the Supreme Court of Michigan held that the residual exception of the Michigan Rules of Evidence could be used to admit statements that were similar to, but not admissible under the categorical hearsay exceptions. This allows admission of evidence that fails to conform to any of the categorical rules and thus could compromise a defendant’s right to an equitable trial. This Comment argues that interpreting the residual exception broadly sets dangerous precedent and considers the implications of such a decision.
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IN THE WAKE OF HURRICANE ASMUS: A LOST OPPORTUNITY IN OUR STRUGGLE WITH EMPLOYMENT HANDBOOKS
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The handbook exception to employment-at-will gained general acceptance by the early 1980s. Many employers reacted to this development by issuing new handbooks that modified those provisions capable of invoking the exception. In reviewing employer modifications to employee handbooks, courts have applied a myriad of rules on a seemingly ad hoc basis. In 2000, the California Supreme Court, in Asmus v. Pacific Bell, reviewed a question that should have exposed as distinct those handbook provisions that contain express conditions of duration. The author concludes that courts have struggled because they have failed to make this distinction, and asserts that express conditions of duration should be treated as implied promise option contracts. The author argues that modifying express conditions of duration should require additional consideration.

DEMORO V. KIM: IS THE SUPREME COURT DECREASING THE RIGHTS OF LAWFUL PERMANENT RESIDENTS?
by Yoh Nago................................................................. 1715
In Demoro v. Kim, the Supreme Court upheld an INS detention of a lawful permanent resident ("LPR") pending deportation proceedings, without a bail hearing to determine whether the detention was necessary. This Comment explains how the Court's decision reflects a shift in the protection of LPRs, setting new precedent for further erosion of the constitutional rights of aliens within the United States. Although national security is a critical issue, detaining a resident of the United States who has not yet been found to be deportable without a bail
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MAKING A CASE FOR WEALTH-CALIBRATED PUNITIVE DAMAGES
by Leila C. Orr.................................. 1739

The debate over how to limit punitive damage awards has a long history. Defendants—especially wealthy corporations—have long argued that juries should not hear evidence of a defendant’s wealth in deciding the appropriate punitive damage award. In State Farm Automobile Insurance v. Campbell, the Supreme Court agreed, holding that juries cannot use a defendant’s wealth to inflate a punitive award. In a Seventh Circuit opinion, Judge Posner interpreted the decision in State Farm as creating a narrow circumstance where the defendant’s wealth would be relevant. In this Note, the author argues that Judge Posner’s opinion is consistent both with the history of punitive damages and with the two goals underlying punitive damages: punishment, and deterrence.

“SILENCE IS A FENCE AROUND WISDOM”: HOW CONANT V. WALTERS BROKE DOWN THE FENCE BY SECURING PHYSICIANS’ FIRST AMENDMENT RIGHT TO RECOMMEND MEDICAL MARIJUANA TO THEIR PATIENTS
by Kathy S. Pomerantz................................. 1771

In Conant v. Walters, the Ninth Circuit held that physicians have a First Amendment right to recommend medical marijuana to their seriously ill patients. This Comment analyzes the court’s proper application of strict scrutiny to the government’s federal drug policy pertaining to recommendations of the drug to determine that the policy is an unconstitutional content-based restriction on speech. This Comment also explores the limitations on physicians’ recommendations, recognizing that physicians may not go so far as to aid or abet patients in committing a crime in order to obtain medical marijuana. This Comment concludes that the decision is important because it not only affects the right of physicians to recommend medical marijuana, but it also impacts the right of patients to receive information about the drug.
WHY CALIFORNIA SHOPPING CENTERS CAN'T PROTECT MICKEY MOUSE FROM UNION HANDBILLING: A COMMENT ON GLENDALE ASSOCIATES V. NLRB

by Gena M. Stinnett........................................................................................................................................ 1799

In this Comment, the author reviews the Ninth Circuit’s decision in Glendale Associates, Ltd. v. NLRB. In Glendale Associates, the Ninth Circuit held that a shopping center could not prevent union handbillers from distributing flyers containing a mall tenant’s name to the mall’s patrons. The shopping center at issue maintained a rule forbidding distribution of handbills naming its tenants. As part of a labor dispute, Union handbillers distributed flyers at the shopping center that mentioned the Disney Store, a tenant of the shopping center. In response, the shopping center threatened to arrest them. The Ninth Circuit upheld the right of union handbillers to distribute the handbill, relying on First Amendment jurisprudence to determine that the shopping center’s rule violated the free speech provisions of the California Constitution. The author presents a compelling argument that while the Ninth Circuit correctly decided the case, the court should have relied on existing California case law, In re Lane, to support its analysis.

While the California Supreme Court had not yet addressed the specific type of rule that the mall promulgated, its holding in Lane went to the heart of the issue.

TAKING A STEP BACK: THE UNITED STATES SUPREME COURT’S RULING IN OVERTON V. BAZZETTA

by Marsha M. Yasuda..................................................................................................................................... 1831

In Overtton v. Bazzetta, the United States Supreme Court found regulations that severely restricted an inmate’s visitation rights were constitutional. This Comment analyzes the Court’s decision by focusing on the importance of rehabilitation as a theory of punishment and examines the Court’s application of the four-factor Turner v. Safley balancing test. This Comment argues that the United States Supreme Court should reevaluate the Turner test so that in determining whether prison regulations are constitutional, all penological interests should be taken in to account, particularly rehabilitation. The Comment concludes that by giving prisons great discretion to point to any legitimate penological interest to justify their regulations, the Court allows prisons to ignore the goal of rehabilitation, a theory of punishment that ultimately benefits both the inmate and the prison.
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Ted S. Reed

UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
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