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Book Chapter

*What is a Religious Law School?, in The Role of a Religious University* (Yaacov Iram et al. eds., 2013).
Abstract

On average, nearly $46 billion of property is given to charitable organizations each year, about twenty-five percent of the total charitable deduction. This makes the charitable contribution deduction for property a tax expenditure within a tax expenditure, yet it is rarely analyzed as such. It emerged as part of a noble effort to encourage contributions to worthy organizations. But the deduction for property has never worked well. The general rule allowing a deduction based on the fair market value of the property may have some intuitive appeal, but its implementation has yielded numerous exceptions and immense complexity. The Article argues that the extensive historical effort to allow a deduction for property contributions is a failure. Given the substantial direct and indirect costs involved, the uncertain benefit to the donor from property contributions, and the absence of any affirmative policy to favor property contributions as such, it is time to reverse the general rule and not allow a charitable deduction for property contributions. Reversing the general rule would provide many benefits — increased revenue, improved tax administration, fewer abusive transactions, a simpler and more equitable tax code, and a preference for cash. Exceptions to the general rule of disallowance may be warranted, but any exception should be analyzed and fashioned according to whether it provides a measurable benefit to the donee. By following a measurable benefit to the donee standard, emphasis will be placed on providing a tax benefit that is administrable and that is based on the goal — donee benefit. Any resulting complexity should be viewed as a cost of the incentive, and weighed accordingly in deciding whether it should be provided.

Abstract

The charitable deduction for conservation easements promises a conservation benefit, lasting forever. Millions of acres have been protected by deductible conservation easements. On average over $1.5 billion are claimed in easement contributions each year, not including corporate contributions. The deduction, however, has serious problems. As use of the incentive has grown, doubts about the public benefit conveyed by conservation easements and significant enforcement difficulties have led to increased scrutiny of land trusts and to a growing chorus of calls for reform of the tax benefit and state laws governing easements. This Essay argues that it is because the tax incentive was born as an exception to the normal charitable deduction rules that many of the problems have resulted. In order to make the deduction fit within the charitable contribution framework, three special rules were enacted: that there be a qualified donee, a conservation purpose, and perpetuity. Although each requirement was intended to protect the promise of conservation, each requirement fails. This largely is because the charitable deduction framework does not contemplate an ongoing enforcement role for the IRS to police contribution use or donee effectiveness, either at the level of the charitable deduction or at the level of tax exemption. These design flaws have thus led the way to a retinue of wide-ranging reform proposals. The Essay suggests that the proven challenges of using the charitable deduction for partial interest conservation contributions warrant a comprehensive reform – either through elimination of the tax incentive, or conversion to a tax credit.
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**Rationale and Changing the Charitable Deduction, 138 Tax Notes 1453 (2013).**

Abstract

There are two principal rationales for the charitable deduction. Depending upon choice of rationale, some tax reform changes are suggested and others are not. A base measurement rationale suggests eliminating the deduction for unrealized appreciation, keeping the benefit as a deduction and not a credit, not adopting caps or a non-itemizer deduction, and protecting the tax base by narrowing the class of organizations eligible to receive deductible contributions. A subsidy rationale, depending upon which strand is emphasized, might favor a more equitable tax benefit in the form of a credit or through caps or a non-itemizer deduction, and could lead to preferring some organizations over others. Both rationales are consistent with placing a floor under the deduction and narrowing its scope. Present law presents a confusing mix of policies and priorities. Tax reform presents an opportunity to reconsider the role of the charitable deduction in the tax system and to act accordingly.

Abstract

The political and legal campaign for marriage equality rests on the proposition that the Constitution of the United States requires communal recognition of committed, same-sex relationships. The text, structure, and history of the amended Constitution, however, support precisely the opposite conclusion: i.e., that neither the United States nor any state may compel any community, association, or individual to affirm (by word, deed, or policy) the hotly disputed propositions about human sexuality that lie at the core of the debate. Nor can it plausibly be argued that any part of the Constitution requires any person, association, or polity to remain discreetly silent while progressive and LGBT positions on human sexuality become the new orthodoxy in public policy, lest dissent—openly expressed by word or deed—be taken as conclusive evidence of intolerance, lack of social sophistication, "homophobia," or actionable hostility.
Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel

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Abstract

As we mark the fiftieth anniversary of Gideon, in this Article I argue that we can and should be more realistic in our efforts to enforce the right to counsel. Assuming, as many now do, that five decades of resource-starved indigent defense will likely continue in the future, where are our efforts most effectively deployed in the years to come? I address that question in three parts. Part II briefly acknowledges the entrenched crisis in indigent defense that is as old as the Gideon decision itself. Part III examines the most salient reform efforts of the last fifty years, highlighting those that have made a lasting impact on the provision of indigent defense services. Part IV suggests that some efforts of the last five decades need to be de-emphasized to make room for efforts that are achievable and imperative in the near term. In particular, I suggest that defenders need to seize upon this political and economic climate and pursue diversion and decriminalization; that systemic litigation should be rare and only a measure of last resort; and that the defense community needs to explore the role that nonlawyers can play in protecting the rights of criminal defendants.
Where Pardons Are Concerned, Second Best May Not Be So Bad After All: A Response to Chad Flanders, 65 FLA. L. REV. FORUM 29 (2013).

Abstract

In his article, Pardons and the Theory of the “Second Best,” Professor Flanders asserts that pardons are “second best” in two ways. First, they tend to be granted when the criminal justice system has failed in some way. Second, pardons “en masse” can reflect racial bias, favoritism, and arbitrariness, all of which undermine the integrity of our criminal justice system. The heart of his article theorizes how pardons should be granted in order to avoid such undermining outcomes. Specifically, Flanders contends that pardons cannot be examined exclusively at the individual level; rather, executives should consider the patterns that emerge when looking at pardons as a whole.

Abstract

Police officers lawfully arrest a suspect, search him, and seize his cell phone. Sometime later, without first getting a search warrant, an officer answers an incoming call, reads an incoming text, or examines the phone’s memory, call log, prior text messages, photographs, or Internet access records. As a result, the police acquire information that leads to additional evidence concerning the arrest crime, or a totally different and unrelated crime. Prior to trial, the defendant moves to suppress the evidence. The prosecutor argues that the officer’s action was justified by exigent circumstances, constituted a lawful search incident to the arrest, or both. Part I of this Article sets out the general rules governing searches and seizures by the police. Part II examines the exigent circumstances doctrine and its application to cell phone searches. It concludes that, properly construed, that doctrine can be applied to cell phone searches without excessive invasions of privacy. Part III examines the search incident to arrest doctrine, criticizes the courts that have taken either too permissive or too restrictive an approach to that doctrine’s application to cell phone searches, and proposes an approach that strikes an appropriate balance between the purposes underlying the doctrine and respect for the quantity and kinds of information that the typical cell phone contains.
The Complete Advocate II: Employment Offenses in Health Care Contexts, A Practice File for Representing Clients from Beginning to End (2013).

Description

The Complete Advocate II: Employment Offenses in Health Care Contexts, A Practice File for Representing Clients from Beginning to End, is designed to guide a student through all aspects of a legal process: researching an area of law, filing pleadings, writing and arguing motions, proposing settlement, and pursuing and arguing appeals—from the beginning of the process to the end.

The Complete Advocate II: Employment Offenses in Health Care Contexts case file includes intake memos and assignments, including drafting pleadings, preparing litigation memoranda, and filing an appeal. It also includes depositions, affidavits, exhibits, motions and orders of the district court. The corresponding Teacher’s Manual provides private, confidential facts for use in mediation sessions and trial practice. The facts of the cases, set in the Tenth Circuit, revolve around the federal False Claims Act (FCA) and the federal Anti-Kickback Statute (AKS).

The Complete Advocate II: Employment Offenses in Health Care Contexts not only provides students with an education in the substantive and procedural dimensions of the subject matter; it also provides them with a paradigm for practice—a conceptual model from which they can pattern their future approaches to a litigation matter, regardless of its type.
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Book Chapter


Abstract

This Article posits the theory that, in addition to externships and clinical experience, which are now commonplace in most, if not all, legal educational settings, a practice component, which will develop “professional expertise,” sought throughout the Carnegie Report and elsewhere, should be included in students’ legal education from the outset. In other words, law students should be immersed into the world of practice by the end of their first year of law school. Part I outlines the historical foundations of the current legal education structure in the United States, spearheaded by Christopher Columbus Langdell in the nineteenth century. Part II discusses other settings in which practice skills are taught—medical school, business school, and policy school. In Part III, this Article highlights some of the newer innovations currently used in legal education to advance the efforts toward practice expertise. Finally, Part IV demonstrates that a careful combination and refraining of the techniques utilized in other settings—some currently utilized in law schools—can result in practice experiences that actually teach students to think like a lawyer and to become practice ready by the time that they emerge from the law school cocoon.

Abstract

The United States Supreme Court is scheduled to hear arguments in Medtronic, Inc. v. Boston Scientific Corp. – the first patent case of the term – on November 5, 2013. The issue in Medtronic is whether the burden of proof in patent declaratory judgment actions should be on the patent owner to prove infringement or on the accused infringer to prove non-infringement. Ordinarily, the patent owner bears the burden of proving infringement and the declaratory posture of a suit does not shift that burden. In Medtronic, however, the Federal Circuit created an exception for “MedImmune-type” suits, meaning declaratory judgment actions where the plaintiff is a licensee in good standing. In those cases, the Federal Circuit reasoned, the burden should lie with the accused infringer because the patent owner is precluded from counterclaiming for infringement. This essay advances two arguments. First, the Federal Circuit and the parties claim that this exception is limited to MedImmune-type suits, but Medtronic’s reasoning sweeps more broadly. There are other types of declaratory judgment actions where the patent owner cannot assert an infringement counterclaim, for instance because the declaratory judgment plaintiff has not yet infringed, and under Medtronic the burden would shift in those cases too. Second, the Federal Circuit wrongly concluded that the patent owner in Medtronic could not file a counterclaim. While it’s true that the license precluded an infringement counterclaim, the Federal Circuit’s own precedent makes clear that the patent owner could have filed a “reverse” declaratory judgment action seeking a declaration of future infringement. Thus, the Federal Circuit’s rationalization for this exception was unjustified, and Medtronic should be reversed.
Katz on a Hot Tin Roof: Saving the Fourth Amendment from Commercial Conditioning by Reviving Voluntariness in Disclosures to Third Parties, 50 AM. CRIM. L. REV. 341 (2013).

Abstract

In a world in which Americans are tracked on the Internet, tracked through their cell phones, tracked through the apps they purchase, and monitored by hundreds of traffic cameras, privacy is quickly becoming nothing more than a quaint vestige of the past. In a previous article discussing the intersection of technology and the Fourth Amendment, I proposed reframing the issue away from conventional commentary. The Missed Opportunity of United States v. Jones: Commercial Erosion of Fourth Amendment Protection in a Post-Google Earth World, 15 PENN. J. CON. L. 331, 333 (2012). That article posits that society has reached the point about which Justice Blackmun cautioned - the point at which privacy “expectations [have] been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms.” Society finds itself at this juncture not because of governmental conditioning, as Justice Blackmun warned, but because of a concept I defined as “commercial conditioning.”

This article further develops the concept of “commercial conditioning,” and explores not a legislative solution, but possible judicial responses to the growing reality of private commercial entities eroding privacy expectations and thereby expanding governmental power. This article seeks to guide the judiciary in analyzing evidence containing certain private information obtained by the government from these commercial entities. Such evidence should be afforded some of the procedural protections of the Fourth Amendment when the government accesses it - a protection not currently available to this private information.

Abstract

In varying ways, legislators, regulators, and judges rely upon legal scholarship in developing law and policy and in writing, amending and interpreting legal rules. Scholars have time to delve deeply into the topics on which they write. At its best, their work is respected because of the depth of inquiry involved and because of their expertise. It is important, then, for legal scholars to exercise independent judgment and likewise to be open and candid with their audiences as to how they reached their conclusions.

Abstract

Five years after Bell Atlantic Corp. v. Twombly and three years after Ashcroft v. Iqbal, the question regarding the impact these seminal Supreme Court decisions are having on the vitality of employment discrimination and other civil rights cases remains. This question was posed at a symposium aptly titled Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination, sponsored by the New York Law School Law Review and The Employee Rights Advocacy Institute for Law & Policy held in April 2012.

This question is important because if potentially meritorious civil rights and employment discrimination cases are dismissed prematurely, law enforcement and deterrence will be sacrificed for expediency and efficiency. The answer to this question is that we don't know yet. The jury is still out. Or, more accurately, the judge is still out since most cases currently never get to a jury. Trial by motion has become standard operating procedure for modern civil litigation, with the point of dismissal far earlier in the litigation cycle.

Abstract

When we think about the Federal Rules of Civil Procedure, the issues can seem very technical, and the topic dry and difficult. But procedural issues are extremely important and have a tremendous impact on all of us. Whether it is everyday folks (like employees and consumers who are trying to enforce their rights), or multi-national corporations (who are central to the economic well-being of our society), the process that we use to resolve disputes really matters.

This Article discusses the power and promise of procedure, focusing on a particular procedural device—the class action—and the Supreme Court's recent interpretation of Rule 23 (the class action rule) in Wal-Mart Stores, Inc. v. Dukes.
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**DOMESTIC RELATIONS: CASES AND MATERIALS (7th ed. 2013) (with Walter Wadlington & Robin F. Wilson).**

**Description**

The seventh edition progresses from the format of earlier editions by continuing to provide cases from state, federal and international courts that integrate the scope and dynamism of family law. There are references to uniform, state, federal and international code provisions throughout the book and there is a companion book offered addressing additional statutes and related commentary. This casebook is meant to be used in the classroom by teachers offering a class of two, three or four credits. The book has been reduced in size but the familiar topics of past editions have been retained and the cases and materials updated to include all of the changes that have occurred.
Book Chapters

*Concilium Lateranese III 1179, in 1 The General Councils of Latin Christendom (Concilia) From Constantinople IV (869/870) to Lateran V (1512-1517) (Alberto Melloni ed., 2013).*

*Concilium Lugdunense I 1245, in 1 The General Councils of Latin Christendom (Concilia) From Constantinople IV (869/870) to Lateran V (1512-1517) (Alberto Melloni ed., 2013).*
Is there a religious way to pump gas, sell groceries, or advertise for a craft store? Litigation over the HHS contraceptive mandate has raised the question whether a for-profit business and its owner can engage in religious exercise under federal law. The federal government has argued, and some courts have found, that the activities of a profit-making business are ineligible for religious freedom protection. This article offers a comprehensive look at the relationship between profit-making and religious liberty, arguing that the act of earning money does not preclude profit-making businesses and their owners from engaging in protected religious exercise. Many religions impose, and at least some businesses follow, religious requirements for the conduct of profit-making businesses. Thus businesses can be observed to engage in actions that are obviously motivated by religious beliefs: from preparing food according to ancient Jewish religious laws, to seeking out loans that comply with Islamic legal requirements, to encouraging people to “know Jesus Christ as Lord and Savior.” These actions easily qualify as exercises of religion. It is widely accepted that religious freedom laws protect non-profit organizations. The argument for denying religious freedom in the for-profit context rests on a claimed categorical distinction between for-profit and non-profit entities. Yet a broad examination of how the law treats these entities in various contexts severely undermines the claimed categorical distinction. Viewed in this broader context, it is clear that denying religious liberty rights for profit-makers would actually require singling out religion for disfavored treatment in ways forbidden by the Free Exercise Clause and federal law.

Abstract

When the Supreme Court introduced the “secondary effects” doctrine to allow for zoning of adult businesses, critics fell into two camps. Some, like Justice Brennan, predicted dire consequences for the First Amendment, particularly if the doctrine were used in political speech cases. Others, like Professor Laurence Tribe, predicted secondary effects analysis would be limited to sexually explicit speech and would not threaten the First Amendment. The modern consensus is that the doctrine has, in fact, been limited to cases about sex.

Recent cases demonstrate, however, that the impact of the secondary effects doctrine on the First Amendment has been broader and more insidious than is generally understood. It is true that courts usually avoid expressly invoking the doctrine outside the adult speech context, instead applying the standard content-neutrality analysis. But that “standard” neutrality analysis has actually been quietly warped over the past three decades by the influence of the secondary effects doctrine. These doctrinal distortions have occurred without anything like the outcry generated by the prospect of express use of the doctrine in political speech cases.

The results of this doctrinal shift are striking, with some courts treating as “neutral” laws that deliberately discriminate among speakers and messages on public sidewalks, in parade permitting, and even in what political messages can be worn on t-shirts. This Article (1) describes the manner in which the standard neutrality analysis has been warped by the secondary effects doctrine, (2) demonstrates the dangerous First Amendment effects of those changes by examining several recent cases in which courts have allowed content-based or even viewpoint-based speech restrictions to stand, and (3) explains how the Supreme Court and lower courts can and should correct this serious First Amendment problem.
UNEQUAL TREATMENT OF RELIGIOUS EXERCISES UNDER RFRA: EXPLAINING THE OUTLIERS IN THE HHS MANDATE CASES

Mark L. Rienzi

ONGOING conflict over the contraceptive mandate promulgated by the Department of Health and Human Services ("HHS") has resulted in more than two dozen lawsuits by profit-making businesses and their owners seeking protection under the Religious Freedom Restoration Act ("RFRA"). To date, the businesses and their owners are winning handily, having obtained preliminary relief in seventeen of the cases, and being denied relief in only six.1 Last month, in fact, a panel of the D.C. Circuit Court of Appeals took the extraordinary step of reconsidering and reversing its own prior ruling and granting a preliminary injunction to a business seeking RFRA’s protection.""

Abstract

On December 13, 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (“CRPD”). Widely touted as the “first comprehensive human rights treaty of the 21st century,” and effusively praised for its open negotiation process, the CRPD was opened for signature on March 30, 2007. The CRPD quickly entered into force on May 3, 2008. As it rapidly amassed signatories, the CRPD inspired great hope that its comprehensive approach would do much to overcome the consistent failure to promote the dignity of those with disabilities in meaningfully concrete ways. The CRPD has garnered much recent and renewed attention as the Senate debates American ratification of the Convention and the United Nations studies the relationship of the CRPD to the Millennium Development goals. This recent attention — which is both ongoing and new — offers an opportunity to reexamine the CRPD, its promise, and its limitations. This brief reflection does not seek to explore the legal strengths and weaknesses of the CRPD — a task that has been ably and often undertaken by others. It also does not purport to analyze the pros and cons of U.S. ratification of the CRPD — an issue that is, in many respects, distinct from questions about the merits of the CRPD itself. Instead, these reflections suggest that there are four fundamental flaws in the philosophical and anthropological foundations of the CRPD that need to be addressed or, at least, fully appreciated, before the CRPD can truly live up to the high ideals that it sets for itself. The CRPD is now an important part of international law, and the likelihood of solving these four problems seems slim. However, as the world community moves forward under the framework of the CRPD, acknowledging that these four weaknesses exist may better equip advocates and policy-makers to remedy them in ways that will allow the CRPD to achieve its potential to advance and protect the rights of those with disabilities.

Abstract

Pope Benedict XVI recently wrote about the challenges facing those who have the responsibility for the education of the next generation. His insights, expressed last year, were addressed not simply to a Catholic audience but to all who look to the future and see the obligation to train young people "in justice and peace" to be a noble vocation and one solution to some of the difficulties that face the modern world. Although it was not directed to, or intended primarily for, law professors, the document has much to say to those whose vocation lies in legal education. This essay discusses this 2012 papal message and explores the implications it may have for those involved in the enterprise of Catholic legal education specifically, and legal education more generally.

Description

George P. Smith's Palliative Care and End-of-Life Decisions completes a Bioethics-Health Care epistemology begun in 1989, which addresses the specific issue of managing palliative care at the end-stage of life. Smith argues forcefully that in order to palliate the whole person (encompassing physical and psychological states), an ethic of adjusted care requires recognition of a fundamental right to avoid cruel and unusual suffering from terminal illness. Specifically, this book urges wider consideration and use of terminal sedation as efficacious medical care and as a reasonable procedure in order to safeguard a 'right' to a dignified death. The principle of medical futility is seen as a proper construct for implementing this process.

The state legislative responses of California, Vermont, and Washington in enacting Death with Dignity legislation - allowing those with end-stage terminal illness to receive pharmacological assistance in ending their own lives - is held by Smith to be not only commendable, but the proper response for enlightened state action.

Abstract

After an examination of the four cardinal bioethical principles which define Principlism — autonomy, beneficence, non-maleficence and justice — an explication of Joseph Fletcher’s theory of Situationism is undertaken. The conclusion of this Article is that when an ethical dilemma arises and is “tested” as to its moral efficacy, rather than judge the acts in question in order to determine whether they are in conformance with one of the four bioethical principles, it is more humane and practical to determine the ethical propriety of questioned conduct by use of a situation ethic which in fact is more sensitive. This ethic “validates” conduct which is compassionate, merciful and loving — particularly when issues of end-of-life care arise. Accordingly, when medical conduct alleviating pain and suffering for patients in a futile state is pursued, common sense morality and sound medical practice should dictate that all reasonable and lawful steps be followed which allow as dignified a death as is possible.

Abstract

End-of-life decision making by health care providers must respect individual patient values. Indeed, these values must always be viewed as the baseline for developing and pursuing patient-centered palliative care for those with terminal illness. Co-ordinate with this fundamental bioethics principle is that of beneficence or, in other words, respect for conduct which benefits the dying patient by alleviating end-stage suffering — be it physical or existential. Compassion, charity, agape and/or just common sense, should be a part of setting normative standards and of legislative and judicial responses to the task of managing death. Aided by the principles of medical futility, palliative care protocols, greater acceptance of a patient’s right to refuse treatment, and a spirit of basic humanness, an ethic of adjusted care that seeks to secure dignity during the dying process without unreasonable interference by the state should be validated.

Abstract

The decision in Kiobel v. Royal Dutch Petroleum Co. left open a number of questions about the scope of the Alien Tort Statute (ATS). One such question is the extent to which Kiobel’s holding on extraterritoriality applies to the oft-neglected final words of the ATS: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” What if one such treaty obliged the United States to provide a civil forum for litigation of human rights violations that occurred abroad and did not involve piracy?

Abstract

I teach a pair of two-credit legal history courses: History of Early American Law and History of Modern American Law. I teach a variety of other courses, but none is more fun to teach than legal history.
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2013
Faculty Scholarship