WRITING YOUR PAPER

1. Read Richard Delgado's How to Write a Law Review Article. Choose your topic, plan the project (a very important step), and begin writing.

2. Your article should be a balanced, objective treatment of a problem which you resolve. You are not writing a brief or a legal argument. Your ultimate "solution" should reflect a consideration of both sides of the issues.

3. To test your topic selection, prepare an outline. If your article does not "outline," think again. Any well-written law review article must be presented in a logical and orderly manner. An outline helps you accomplish this.

4. Aim for simplicity, clarity, and brevity. A simple writing style is easily understood.

5. The number of parts, sections, and subsections will vary according to the logical development of your individual topic. Typical case notes, which usually are in chronological form, can be outlined thus:

I. Introduction (statement of the problem and why it is important, 2-3 pages)

II. Background (This presents the context of the problem. It should include all the material you will use in your analysis, cases, law review articles, etc. Try to integrate cases and theories. Use descriptive headings to guide the reader through this material.)

III. The Main Case (This presents the immediate problem.)
   A. The Case
   B. Problem with the court's solution

III. Analysis of the problem (This is your original contribution.)
   A. Restate the problem briefly
   B. Your analysis of the problem and/or
   C. Your solution
      1. Advantages of your solution
      2. Disadvantages of your solution (very important to acknowledge)
   E. Why your solution is the best outcome

IV. Conclusion (A very brief restatement of one to two paragraphs)

6. Follow basic Blue Book citation form for footnotes for law reviews. There are two kinds

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1This document in large part was created by Professors Gerry Moohr and Meredith Duncan. I thank them for sharing.
of footnotes. The first provides the source of the statement made in the text. This elementary use of footnotes is not sufficient to develop a convincing argument unless provide information in a parenthetical that tells the reader how the source substantiates the point you made in the text.

7. The second use of footnotes demonstrates the scope of your research. The reader will more readily accept your argument if you demonstrate a knowledge of the relevant writing and case law in the field. Footnotes that properly cite other authorities insulate you from charges of plagiarism. No new work is completely original and in law especially new theories, causes of action, and ultimately legislation evolve from the past. Footnotes are a way of acknowledging this.

8. Develop your footnotes. Use parenthetical comments to explain why you are using this footnote in this place; that is, here is the place to quote from the case or article. You can also use text in the footnotes (write it as new paragraphs) drawing attention to disputes among cases and authorities.

9. A successful paper is a well-edited paper. Give yourself time to read your paper critically so that you can clarify the text and sharpen the language.

10. Proofread. Do not rely on Spell Check.

11. Mechanics:

1. Double space.
2. Use one-inch margins.
3. Number the pages.
4. Do not begin a new section on a new page if there is room on the preceding page to begin it. Avoid large patches of blank page.
5. Use headings and subheadings (these should follow your outline).
6. Use footnotes, not endnotes.

12. Although this assignment is not primarily a test of English composition, grammar, syntax, usage, or spelling, it is expected that you will not make such mistakes and that your submissions are free of such errors.
How to Write a Law Review Article *

By Richard Delgado

Professor of Law, UCLA Law School; J.D.,
University of California, Berkeley, Boalt Hall (1974).

Introduction

I HAVE BEEN ASKED TO SPEAK on how to write a law review article. Like many, I find it much easier to write something than to talk about my thought processes during that writing. Nevertheless, I have tried to distill out a series of observations, tips, short cuts, and so on that I, personally, would have found helpful had someone passed them on to me when I was starting out. Good law reviews convey many of them to their new members at orientation time. For many of you, these observations will be old hat; for this, I apologize. Also, I should state at the outset that I have included little in the way of political or critical analysis of law review writing. I have written elsewhere about that.¹

Some of the matters I expect to touch on in this talk are

I. Why write a law review article at all, in preference to some-thing else, a book or political satire, for example?
II. What varieties of law review article are there? Presumably more than just the classic "case cruncber." What are some of the other kinds?
III. Topics—where to get them? How to know a good one when you see it?
IV. Research strategies.
V. Footnotes and theory of authority.

¹ This article is a slightly edited version of an address given during the Minority Law Professors' Conference which was held at the University of San Francisco School of Law on October 26, 1985.

VI. The actual writing of the article.
VII. Submitting the article and working with your editor.
VIII. After publication, what next?

I. WHY WRITE A LAW REVIEW ARTICLE?

Why write? There are several reasons: because your colleagues are writing, because you have something to say, because you want to change the law, because it’s enjoyable (at least sometimes), or because you want professional advancement and recognition. Personally, I prefer the intrinsic reasons—writing as self-expression, writing because it is satisfying. But, I also enjoy the result when something I have written has an impact—stirs people up, helps a court make the right decision. Everyone’s motivation is, I think, mixed, and the mix varies from person to person and article to article.

II. VARIETIES OF LAW REVIEW ARTICLES

Just as there are different reasons for writing law review articles, there are different types of articles. I can think of at least ten. First, there is the “case cruncher”—the typical article. This type of article analyzes case law in an area that is confused, in conflict, or in transition. Doctrine is antiquated or incoherent and needs to be reshaped. Often the author resolves the conflict or problem by reference to policy, offering a solution that best advances goals of equity, efficiency, and so forth.

Next, there is the law reform article. Pieces in this vein argue that a legal rule or institution is not just incoherent, but bad—has evil consequences, is inequitable or unfair. The writer shows how to change the rule to avoid these problems.

There is also the legislative note, in which the author analyzes proposed or recently enacted legislation, often section by section, offering comments, criticisms, and sometimes suggestions for improvement.

Another type of article is the interdisciplinary article. The author of an interdisciplinary article shows how insights from another field, such as psychology, economics, or sociology, can enable the law to deal better with some recurring problem. Professor Charles Lawrence’s upcoming article on theories of unconscious motivation and their relation to race relations law falls within this category.

There is the theory-fitting article. The author examines developments in an area of law and finds in them the seeds of a new legal theory or tort. Warren and Brandeis’s famous article on privacy is a well-known example of this type of writing.

Discussions of the legal profession, legal language, legal argument, or legal education form yet another category of law review writing. Lawyers are like most people—they enjoy reading about themselves. There is a brisk market in such pieces.

There are the bookish, learned dialogues that continue a pre-existing debate. These pieces take the following form: “In an influential article in the W Law Review, Professor X argued Z. Critics, including Professor Y, attacked her view, arguing A, B, and C. This Article offers D, a new approach to the problem of Z (a new criticism, a new way of defending X’s position in the face of her critics, a way of accommodating X and her critics, or something of the sort).”

Another category consists of pieces on legal history. The origins and development of a legal rule or institution may shed light on its current operation or shortcomings. Similarly, comparative law articles are often valuable and engrossing for many of the same reasons: it will sometimes happen that other legal systems treat a problem more effectively or more humanely than does ours. Friedrich Kessler’s famous article on contracts of adhesion is a well-known example of a piece that draws on the experience of foreign systems to improve the quality of American justice.

The final categories are the casenote, which examines a recent decision, together with its antecedents, argument, deficiencies, and likely consequences, and the empirical research article. The latter

5. E.g., Delinko, Comment: Intolerable Conditions As a Defense to Prison Escapes, 26 UCLA L. Rev. 1126 (1979); Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape, 26 UCLA L. Rev. 1355 (1979).
is, in some ways, the most useful of all, if one can manage the logical problems it presents, because it enables the writer to expand knowledge beyond the armchair confines limiting most legal writing. An example of this type of article is Bea Moulton's article on the development of small claims courts as vehicles for oppression of the poor by the petty bourgeoisie. My point is that there are many accepted law review formats and objectives, not just one—different strokes for different folks.

III. TOPICS

Lurking somewhere in the array of genres and formats there is, optimistically, a topic that is right for you. What makes a topic good? A good topic is interesting, manageable, and significant. Most law review articles take the writer at least 150 hours from start to finish. It is critical, therefore, that your topic hold your interest. Otherwise, you are going to find reasons, at 4:15 in the afternoon, not to get to it. The topic should also be broad enough to be socially or legally significant, yet not so broad that you are swimming in abstraction or drowning in cases. Antidiscrimination law in relation to university faculty hiring may be a little too broad. Findings in perception research and the psychology of the token and their connection with antidiscrimination principles in the university setting—a topic one of the participants in this conference is currently working on—is about right.

A piece of advice that a leading law review dispensed to its members in connection with finding comment topics proved helpful and therapeutic to me: find one new point, one new insight, one new way of looking at a piece of law, and organize your entire article around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before is all you need. The article states in the introduction what that new thing is, and the rest of the article argues, illustrates, defends it in the face of possible objections, showing how it would work in practice.

Where do topics come from? You find them in advance sheets, legal and popular newspapers, conversations with colleagues, and in class. One often overlooked source is casebooks, particularly the sections of questions and comments that follow major cases or that serve as transitions to the next section. The notes and questions are placed there, often, because they have no answer as yet and because the author considers them important enough to warrant attention. Many of the questions are about the right "size" for a law review article.

A final source is practitioners in the field, especially lawyers in public interest law firms and specialized litigation centers. Often these attorneys are looking and thinking ahead. They know what areas are ripe for law reform cases and are on the lookout for them. If your interests and their agenda match, they may be able to suggest a topic that will lay the groundwork for a major case they hope to litigate in five or ten years. There is much to be said, it seems to me, for writing a casenote before the big case comes down rather than afterwards—especially if in doing so you assist the court and shape the analysis.

Preemption checking is an important aspect of finding and settling on a topic. Most law reviews will refuse to publish anything lacking novelty, that is, anything that does not contain some suggestion, slant, idea, or analysis that has not appeared before. What preempts? Certainly law review articles and cases do. Legal books probably preempt. For other publications, the question gets closer. An article in a social science or popular journal probably does not mean that your idea is out, unless the coverage overlaps with your article so much that there is little left for you to say. In most cases, your analysis will include case discussion, law-oriented policy discussion, and so forth, and is therefore likely to go beyond the scope of the piece by the nonlegal author.

It is tragic, though, to spend long hours on an article and then find out that you are preempted and cannot have your article published. So, it is essential not to cut corners with the preemption check. Most good law reviews will conduct their own check; if you slip up, they will tell you about it. As part of my own check, I am occasionally look indexes of legal periodicals (going back at least fifteen years for most topics), under as many headings as I can think of that might contain a relevant article; casebooks and hornbooks in the appropriate section, with the thought that the author may have included a reference or footnote to the article I need to know about; and treatises and encyclopedias. Finally, I make a point of asking colleagues from the field in

which I want to write ("I am thinking of writing an article about X; are you aware of any writing addressing that question?").

Late-developing preemption is a special problem in areas of law that are highly visible or that have received a great deal of recent publicity. Seniority rules and affirmative action is currently such an area. I would not be surprised if several articles or comments were being written right now on various aspects of these rules. Anyone who writes in an area such as this runs obvious risks of preemption, unless their approach is so novel that no one else is likely to have thought of it. There is no central registry of topics, no one place you can phone up and ask whether anyone is writing on your topic. Sometimes, you may be able to think of an individual or institution that a person planning to write on your topic would consult. You can then ask that person if he or she knows of anyone writing on the question. For example, anyone writing about the Patty Hearst case and the legal defense of brainwashing, or "coercive persuasion," would be likely to have communicated with Patty Hearst's lawyer, F. Lee Bailey. A check with Bailey might reveal whether you had competition or not.

IV. RESEARCH STRATEGIES AND AUTHORITIES

Research strategies and uses of authority can be discussed together, because a grasp of the conventions and uses of footnoting shapes your approach when you are researching issues and taking notes. It goes without saying that you must read everything that bears on your subject. Your footnotes and argument should reflect that you have taken into account every significant idea, book, or article that is out there. The last few things that you read may radically change your idea of the way your analysis should go. So, resist the temptation to start writing until you have read everything. I find it helpful to start with very general authorities—casebooks, hornbooks, and encyclopedias—to get an overview. Often, the authors of these books will cite leading cases and articles, so when I turn to these other sources, I already have a partial list of things to read. At first, each item you read will lead you to another, and so on. Eventually, the circle will start to close, and you will know you have read everything and are ready to write.

V. FOOTNOTES AND AUTHORITY

Essentially, each assertion of law or fact that you make in the body of your article will require a footnote. The main exceptions are topic sentences, conclusions of paragraphs and sections, and passages of pure argument. There are many different types of footnotes. Textual footnotes carry on the argument from the text. You put there material that would clutter up the text and detract from the narrative flow. The authority footnote is used to substantiate propositions in the text. This type of footnote may begin with any of a number of "signals," those little words and abbreviations, like "see," "e.g.," "see also," and "cf." that you find at the beginning of footnotes. Each signal has a technical meaning, which must be used correctly. Each signal corresponds to the strength and type of authority invoked—direct authority, indirect authority, inferential authority, authority going the other way, compare-and-contrast authority, and so on. Until you have these down pat, it is a good idea to have a copy of the Bluebook handy while you are doing research. The reason for this is that it saves much time and effort if you get the strength-of-authority right the first time, when the reporter, treatise, or article is in front of you and you are taking notes. You can always go back a second time and figure out whether the note you took five months ago ought to be a "see" or a "cf." cite. But why do things twice? And what if the book isn't there the second time?

Flipping through the footnotes to see if the author uses footnotes sensitively, with a variety of strengths and signals and an appropriate mixture of textual and authority notes is, I suspect, one of the first things an articles editor does when he or she receives a manuscript. If your footnotes are sporadic and devoid of signals, two thoughts are likely to go through the editor's mind: first, the author is inexperienced, and second, the law review (and possibly the editor) is going to have to put in the signals and textual footnotes. Would you enjoy sitting in front of a stack of books and making 100 or 200 judgment calls, for someone else, on whether the textual passage and the cited authority are related by
VI. WRITING THE ARTICLE

For the actual writing, I prefer, as many do, to write an entire section or subsection at a sitting. I like to have the section I plan to write that day outlined fairly completely before I start, so I know where I am going when I sit down at the typewriter. My own preference is to write fast and edit slowly. I find that writing fast overcomes inhibitions and forces me to write simply. Moreover, if I have something down on paper, even if it is rough, I can edit it, refine it, and improve it later at my leisure. Law review prose should aim to be spare and clean, without any conscious style or affectation. Editors want your organization to be clear as well, with an easily discernible "story line." Resist the temptation to put an idea down on paper, or discuss a case, simply because it exists. Everything should contribute to the development of your central theme; otherwise put it in a footnote. Say a thing only once.

VII. SUBMITTING THE ARTICLE

When you are finished and the footnotes are in place, submit the article—but to your friends first, law reviews later. Ask your friends to critique the article and get back to you soon. Try to find readers who know the subject; do not use people on your tenure committee. Your readers do not have to be at your law school, and there are good arguments for using outside readers. When you receive their comments and suggestions, incorporate those that you agree with.

When the article is as good as you can make it, send it to several law reviews, with a cover letter to the articles editor, saying what the article is about and conveying, inferentially, why it is novel and important. Authors these days almost invariably submit to more than one law review at a time. Many of my colleagues and I send our articles to eight to ten reviews at once, starting at the top and working down. There are various purported rankings of the law reviews. It generally takes a review several weeks to complete an evaluation of an article and get back to you. In the meantime you may get progress calls: "Professor Jones, one of us has read your article and liked it a lot. Before we complete our review, we thought we would ask if the article is still available."

VIII. WORKING WITH YOUR EDITOR

Sooner or later, a review will offer to publish the article. Get the details from the editor—when it will appear; what editing changes are contemplated; whether you will have the right to review and accept or reject final changes; whether your piece will be the lead article—and then tell them you want to think about it. In the meantime, you can consider their offer, consult with your colleagues and check with the other reviews to see whether they are close to a decision.

When I have committed an article to a review and been assigned to an editor, I like to tell the editor my preference in the way of editing. I personally like "maximalist" editing, and so I tell the editor to work on the article fearlessly, making changes and additions without the need to discuss each one with me first. That way, I think I get the editor's best work, and I also avoid the type of guessing games that ensue when the editor attempts to be deferential.

IX. AFTER PUBLICATION, WHAT NEXT?

When the article is published, get a stack of reprints and send them to your parents, your high school guidance counselor who told you to major in auto shop or home economics, and the principal legal authorities in the area in which you have written. Make sure to send copies to writers of hornbooks and casebooks. Having

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12. I am thinking of editors who return the manuscript with politely worded questions in the margin. "Had you thought about X?" "What about Y?" or "Query—is this necessarily so?" Or, the editor may state even more obliquely: "I am not convinced," "This seems weak," or "We need more here." I find it much more helpful if the editor indicates what he or she thinks about X and Y, tells me why he or she thinks Z does not follow or seems convincing, and what "more" would satisfy him or her. Most editors, I have found, will be glad to provide such directive editing, if asked.
the reprint in front of them helps them keep track of the field, and if they like the article they may mention it in their next edition, which won't hurt your reputation. Occasionally, you can use an article as a basis for a spin-off piece, such as an op-ed column in a newspaper or a practice note in a handbook or newsletter for practitioners.

Conclusion

Give some thought to what your next article will be on. It helps to coordinate your writing so as to lay a claim on some more or less defined field, rather than aiming at targets of opportunity. You get to be known as an authority in the area, your writing reinforces your teaching (assuming you also teach in this area), and the background and expertise you acquire make subsequent articles that much easier to write.
PLAGIARISM

Plagiarism is an Honor code violation. Article 1.01(i) of the Honor Code defines "plagiarism" as "quoting, paraphrasing, or otherwise using another's words or ideas as one's own without crediting the source in a way that clearly indicates the nature and extent of the source's contribution to the student's work."

Legal writers provide citations for two purposes: authority and attribution. Citations to cases, statutes, regulations, and other primary sources of law are necessary to inform your reader of the sources of the rules of law identified in your writing. Every statement of law in your writing should be followed by a reference to an authority that supports the statement. For example, if you wrote, "Texas courts have held that a contract exists where there is mutual exchange and promises," you would provide a citation to a case that so holds.

A second function of citations is to identify ideas or text borrowed from either primary or secondary sources. (Secondary sources include articles, encyclopedias, treatises, and other sources which analyze the law.) The failure to attribute ideas or text borrowed from other sources is plagiarism. Plagiarism is a serious academic offense that can result in loss of course credit or, potentially, expulsion. Even outside academic circles, allegations of plagiarism and the attendant perception of dishonesty and lack of integrity can have far-reaching repercussions.

TYPES OF PLAGIARISM

1. Quoting the words of another without attribution
2. Paraphrasing the words of another without attribution
3. Using the ideas of another without attribution

The underlying rule is simple: DO NOT USE THE WORDS OR IDEAS OF ANOTHER AND REPRESENT THEM AS YOUR OWN. GIVE CREDIT WHERE CREDIT IS DUE. AVOID PLAGIARISM BY INCLUDING A CITATION TO THE SOURCE.

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1This handout is largely taken from Louis J. Sirico, Jr., A Primer on Plagiarism (Villanova Law School 1988) and was provided to me by Professors Meredith Duncan and Gerry Mootz.
HOW PLAGIARISM APPLIES TO MEMOS, BRIEFS, AND OTHER LAW SCHOOL PROJECTS

1. **Quotations.** As a general rule of thumb, if you reproduce a sequence of seven or more words from either a primary or secondary source, you should place that text in quotation marks and provide a citation to the source.

2. **Paraphrasing.** If you take another's sentence and change a few words, you still must give a citation. If you paraphrase, do not use quotations, but use a signal, usually see. There is a grey area between paraphrasing and putting something in your own words. For example, taking a few pages from a law review article or treatise and rewriting them in your own words constitutes plagiarism if you don't make clear that is what you have done. You must decide whether or not a citation is necessary. Err on the side of caution. Usually, you will want to include a citation because a citation to authority increases the persuasiveness of what you are saying.

3. **Original Ideas.** Closely following the structure of another person's written work falls into this category. Debatable cases arise when the structure of another's argument is not particularly original. Again, err on the side of giving credit. A citation increases persuasiveness.

4. **A Sense of Proportion.** You need not place a citation after every sentence you write. Excessive cites are unattractive and break the flow of sentences and your argument. They also suggest that you have avoided thinking and instead have pasted together the words of others. This sort of cut-and-paste product rarely is effective. In deciding when to cite, use your common sense. If you have questions, ask them before your deadline for submission. Avoid putting yourself and others in an embarrassing position.
ILLUSTRATION

The left hand column is an excerpt from a fictitious law review article. The right hand column is a plagiarized version.

The classic cases on the law of lost and found property are worthless guides for a principled court. Authorities frequently cite Armourie v. Delamirie as the major finder’s case. The case, however, is about the rights of a finder against those of a subsequent possessor who wrongfully converted the property. The court’s brief discussion of the comparative rights of the finder and true owner is dictum. In *South Staffordshire Water Company v. Sharman*, workers found gold rings on their employer’s property. The court announced a rule accurate as a generality – the owner of a locus in quo presumptively possesses items on the land – when it could have relied on an uncontroversial rule – employees who find things in the course of their employment act as agents of their employers. In reaching its holding, the court entirely misread *Bridges v. Hawkesworth*, another tradition case. In *Hannah v. Peel*, the court offered a thorough discussion of the law and then ignored it to reach a curious result.

The classic cases on the law of lost and found property are worthless guides for a principled court. Authorities frequently cite Armourie v. Delamirie as the major finder’s case. The court’s brief discussion of the comparative rights of the finder and true owner is dictum. The case really is about the rights of a subsequent possessor who wrongfully converted the property. *South Staffordshire Water Company v. Sharman* concerns workers who found gold rings on their employer’s property. Though the court could have rested its opinion on an uncontroversial rule – employees who, in the course of their employment, find personal property act on behalf of their employers – it chose to rely on a rule that is accurate only as a generality – the owner of a locus in quo presumptively possesses items on the land in question. The court betrayed its lack of understanding by misreading *Bridges v. Hawkesworth*, another standard case. The court in *Hannah v. Peel* reached a curious conclusion after offering a thorough discussion of the law and then ignoring it.

COMMENTS ON THE ILLUSTRATION

The first two sentences in the right-hand column are the clearest examples of plagiarism. The writer copied them verbatim without quotation marks and without citation. The next two sentences are virtually verbatim, but in reverse order, perhaps to mislead the reader who is familiar with the original article. In the remaining sentences, the writer has rearranged parts of sentences and changed a few words here and there. Throughout, the writer has employed the organizational structure and substantive ideas of another without giving credit.
By failing to give proper attribution, the writer has reduced the persuasiveness of the argument. Citations to the article would have demonstrated that a published authority shared the writer’s view and thus made the argument stronger.

If you have any questions, please do not hesitate to ask me.
Georgia Law Review
Summer, 2003

Article

*1251 CRIMINAL MALPRACTICE: A LAWYER’S HOLIDAY

Meredith J. Duncan [FN1]

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"[T]he majority is today declaring a lawyer’s holiday. If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client . . . the client pays." [FN1]

*1254 I. Introduction

People accused of crimes in this country are too often represented by lawyers who provide negligent legal representation. [FN2] The failure of the criminally accused to receive decent representation is a complex problem stemming from a multitude of causes. [FN3] A contributing factor to the widespread delivery of substandard criminal legal defense work is that criminal defense attorneys practice largely without accountability. [FN4] The reality that criminal defense attorneys rarely have to account for their conduct provides the criminal defense bar with little incentive to improve its lawyering. This lack of incentive has devastating effects on clients, who are the criminally accused enmeshed in the justice system and arguably in need of the very best legal representation that the system has to offer because their personal liberty is at stake.

This Article will focus on the various obstacles placed in the way of even meritorious litigants seeking to complain of negligent legal representation. Because of these obstacles, the civil system is *1255 essentially unavailable as a means of monitoring-and thereby improving-criminal defense lawyering. Former criminal defendants encounter formidable, and at times unjust, difficulties in their quest to sue their attorneys for negligent legal representation. [FN5] In fact, criminal malpractice actions [FN6] are so difficult to win that, for the most part, criminal defense attorneys enjoy special protection from civil liability for substandard conduct.

*1256 This Article will examine the monumental difficulties that criminal defendants encounter when suing their former lawyers for malpractice and will provide an analysis of how criminal defense attorneys practice law free from any real threat of civil sanction for their negligent conduct. Part II presents four typical criminal malpractice actions and the difficulties each plaintiff encountered, difficulties routinely encountered by criminal malpractice plaintiffs. [FN7] Part III scrutinizes and, where appropriate, criticizes the various impediments placed in the way of criminal malpractice plaintiffs seeking to sue their former attorneys for negligence. [FN8] These common impediments include a criminal malpractice plaintiff’s failure to procure successful postconviction relief or establish innocence of the charge on which he was convicted, [FN9] inability to evade the collateral estoppel bar, [FN10] failure to circumvent the expiration of the statute of limitations, [FN11] failure to establish proximate causation, [FN12] failure to prove a legally cognizable harm, [FN13] and inability to override a host of competing policy considerations. [FN14] Part IV suggests reforms to remove the needless impediments that serve to frustrate criminal malpractice claimants’ quest within the civil system for relief against their former counsel. [FN15] Suggested reforms include the following: aligning criminal malpractice proximate cause determinations with principles of comparative negligence as opposed to principles of contributory negligence; [FN16] recognizing actual harm sufficient to support a criminal malpractice claim upon proof of a different, favorable outcome; [FN17] and adopting a two-track method of permitting criminal malpractice claimants to file their claims contemporaneously with any postconviction proceedings. [FN18] Part V revisits the four criminal malpractice case *1257 studies presented in Part II and applies the newly suggested standards to these criminal malpractice plaintiffs’ cases. [FN19]

II. Criminal Malpractice Case Studies

A. THE CASE OF THE NEGLIGENCE SHIELD
ARTICLES

WHEN CHARITABLE GIFTS SOAR ABOVE TWIN TOWERS: A FEDERAL INCOME TAX SOLUTION TO THE PROBLEM OF PUBLICLY SOLICITED SURPLUS DONATIONS RAISED FOR A DESIGNATED CHARITABLE PURPOSE

Johnny Rex Buckles

INTRODUCTION

The horrifying images perhaps will never cease to visit us. The twin towers of the colossal World Trade Center collapse in sequence when airplanes the relative size of sparrows collide with its steelly sides in blasts of fire and smoke. The fall of these monuments of commerce, terrible and forceful though it was, proved to be the catalyst for an equally dramatic rise. Literally before the dust from the crumbling towers could settle, the American people, more generous than ever before, responded with a deluge of gifts to charitable organizations soliciting funds to aid those most directly devastated by the hastily deeds of September 11, 2001. That fellow Americans decided to help the immediate victims of that historically grim day was no surprise. But the magnitude of charitable contributions to donnee organizations raising money to aid victims was nothing short of astounding.¹

* Copyright © 2003, Johnny Rex Buckles.
** Assistant Professor of Law, University of Houston Law Center. The author gratefully acknowledges the financial support of the University of Houston in the preparation of this article. The author is indebted to Cabrae Connor, Sarah Oliver, and Cristina Hendrick Burket for their dedicated research assistance. The author thanks Professors Evelyn Brody, Michael Olivas, and Ira Shepard for valuable comments to prior drafts of this article.

¹. According to The New York Times, approximately $2 billion was donated to charitable organizations for the purpose of aiding victims. Stephanie Strom, A Nation Challenged: Charities; Narrowly Drawn Rules Freeze Out Tens of Thousands of Indirect Victims, Report Says, N.Y. Times, April 23, 2002, at A9. For example, the American Red Cross reportedly received in excess of $900 million in donations following September 11. See Editorial, Truth in Charity, Times-Picayune, June 8, 2002, at 4; Red Cross Pitches to Get Specific: Ads to Clarify How Money Will Be Spent, Wash. Post, June 5, 2002, at B1 (reporting that the American Red Cross raised more than $967 million for its Liberty Fund); Jon Yates, Prejudice Also Claimed Victims in Sept. 11's Wake, Chi. Tribune, May 5, 2002, at 1. The September 11th Fund has reportedly collected in excess of $450 million in donations. Id.
Donors gave so liberally that the charitable sector, and those overseeing it, were forced to wrestle with a host of thorny legal issues. First, charitable donees found themselves puzzled and second-guessed over how to apply contributions. The American Red Cross, for example, at one time announced plans to set aside millions of dollars of donations for its Liberty Fund (which was established in response to the events of September 11) to relieve victims of future terrorist attacks and to meet general needs. But the public outcry over this announcement compelled the organization to reverse this decision (which clearly had marred its reputation). Faced with such difficulties, some donee organizations enlisted the office of the New York Attorney General in devising plans for deploying gifts.

Moreover, the gravity of concern with respect to the disposition of funds donated to charities such as the American Red Cross even sparked congressional hearings on the use of charitable contributions made in the wake of September 11. During these hearings, seemingly everyone wielded an opinion on how charitable donees of gifts designated for victims should dispose of donated funds. For example, the Director of Exempt Organizations in the Tax Exempt/Government Entities Division of the Internal Revenue Service ("IRS") testified before Congress as to the federal income tax problems presented by this charitable outpouring. He received sharp criticism, however, for too narrowly interpreting the range of activities that a tax-exempt charity can perform without jeopardizing its exemption from federal income taxation.

It soon became clear to Congress that existing law provided no solution sufficient to satisfy the perceived expectations of the donating public, on the one hand, and the limitations governing charitable donees on the use of donated funds, on the other. Thus, Congress promptly enacted special income tax legislation responding to the events of September 11, which the President signed into law. This legislation was designed in part to allay certain federal income tax concerns of charitable donees in receipt of vast sums of restricted funds.

Although the charitable reaction to the events of September 11 is an extreme example of the receipt by charities of more money than they may deem necessary to fulfill a specified charitable purpose, it is not an isolated phenomenon. A review of case reports reveals that charitable organizations frequently solicit money from the general public for a specified charitable purpose, and later sometimes find that they have received more funds than necessary to accomplish that purpose.

What is a charity to do under these circumstances? Charities cannot sensibly hope for an act of Congress every time an unusual turn of events results in their receipt of surplus funds solicited for a designated charitable purpose. A more comprehensive legal solution to this problem is necessary.

Deriving this solution obviously requires a thorough understanding of the legal landscape involving surplus funds donated for a particular charitable purpose. In developing this understanding, one must ponder several questions. Does the law limit the options available to a charity that receives excess funds in response to an appeal identifying a particular charitable need, and if so, how? Do any limitations on the disposition of surplus funds pose difficulties for charitable donees and donors, or on the courts that must resolve the problems associated with surplus funds? Do current reform proposals adequately address any problems identified in this analysis? Is there a better way to reform existing law to improve the disposition of surplus funds?

2. See Dinna B. Henriques & David Burstow, Victims' Funds May Violate U.S. Tax Law, N.Y. Times, Nov. 12, 2001, at B1 (stating that representatives of charity who met after the September 11 attacks to determine how to disburse contributions in accordance with federal income tax laws were "complaining" and saying, "What are we going to do"); Colleen Katz, Fire Union Bows, Fires Tower Funds, N.Y. Daily News, July 13, 2002, at 10 ("Blunted for sitting on more than $60 million in donations that flowed in after Sept. 11, the Uniformed Firefighters Association announced plans yesterday to give out most of the money immediately.");


4. See Truth in Charity, supra note 1; Kasindorf & E. Nussar, supra note 3; Red Cross Pitches to Get Specific Ads to Clarify How Money Will Be Spent, supra note 1.

5. See Samantha Levine, Red Cross, Red Cross, U.S. News & World Rep., Nov. 19, 2001, at 28 (describing the American Red Cross as "under fire for how it spends September 11 disaster funds"). The New York Times has described the performance of the American Red Cross in the relief effort following September 11 as "disastrous." Stephanie Strom, Red Cross Is Pressed To Open Its Books, N.Y. Times, June 5, 2002, at B7. Indeed, then American Red Cross President Bernadine Healy resigned (for unspecified reasons) after the organization faced extensive public criticism of its handling of donations. See Levine, supra; Kasindorf & E. Nussar, supra note 3.

6. See, e.g., Katz, supra note 2 (stating that the Uniformed Firefighters Association sought assistance from the charities bureau within the office of the attorney general in developing a plan for distributing donations).


8. Statement of Steven Miller, Director, Exempt Organizations, Tax Exempt/Government Entities Division, Internal Revenue Service.

9. See, e.g., Lee A. Sheppard, Was the IRS Reversal on Charity Necessary?, 93 Tax Notes 1138 (2001) (criticizing the original position articulated by the IRS in the congressional hearings on the use of charitable contributions made in response to the events of September 11 as "exceedingly narrow").


11. The legislation provides that payments made by organizations described in section 501(c)(3) of the Internal Revenue Code by reason of the death, injury, wounding or illness of any person resulting from the terrorist attacks of September 11 (or the subsequent anthrax attacks) "shall be treated as related to the purpose or function constituting the basis for such organization's exemption" in specified circumstances. Id. § 104. Such payments must be "made in good faith using a reasonable and objective formula which is consistently applied." Id.

12. See infra notes 49-71 and accompanying text.
funds restricted for a particular charitable purpose? This article analyzes these difficult issues and proposes a federal solution to the numerous problems raised.

Part I discusses and analyzes the legal problems associated with a charitable organization's receipt of excess funds resulting from a public appeal for donations to accomplish a particular charitable purpose. Part I.A surveys the relevant issues raised strictly under state law, including the general legal consequences of accepting restricted gifts, and the legal implications of receiving restricted funds when it becomes impossible to accomplish the restricted purposes for which the gifts were made. Part I.B discusses two areas of federal income tax law that must be understood in conducting a thorough analysis under state law of the effect of receiving excess donations from the general public. The first area involves the legal requirements that a charitable entity must satisfy in maintaining its exemption from federal income taxation. The second area involves the element of "finality" that must largely characterize a charitable contribution for which a deduction is claimed.

Part II discusses and analyzes four prominent proposals offered by scholars for reforming the doctrine of cy pres, the most important doctrine of state law governing restricted charitable gifts. Each reform proposal is briefly discussed and then critically examined in the context of publicly solicited gifts restricted for a designated charitable purpose. Part II identifies potential advantages and disadvantages of each proposal, and concludes that no single proposal adequately addresses the unique issues presented under state law and federal income tax law in the context of publicly solicited gifts.

Part III advances an original solution to the problems identified in prior sections of this article. Part III.A briefly identifies the criteria that should characterize any proposal for solving the problem of surplus restricted funds raised through mass appeals by charity. Part III.B then explains and justifies my proposal; amending the Internal Revenue Code to include a new section 170(f)(11). The text of my proposed statutory addition is reproduced in Appendix A. Part III.B discusses the major elements of the proposed amendment, and explains why the proposal survives scrutiny under the criteria identified in Part III.A. I then summarize this article in Part IV.


14. See Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 997-98 (Conn. 1997); Restatement (Second) of Trusts § 348 (cmt. f) (1959); Scott supra note 13, § 348.1.

15. See, e.g., Herzog Found., 699 A.2d at 998 (noting that at common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of her gift or trust unless she expressly reserved the right to do so); Warren v. Bd. of Regents, 544 S.E.2d 190, 192-94 (Ga. Ct. App. 2001) (holding that plaintiffs’ transfer in trust did not confer standing on them); Smith v. Thompson, 266 Ill. App. 165, 169 (Ill. App. Ct. 1932) (stating that “neither the donor nor his heirs have any standing in court in a proceeding to compel proper execution of the trust”); Baltimore Arts Festival v. Baltimore, 607 A.2d 1, 4 (Md. 1992) (stating that in the absence of an express reservation of rights, a donor may not sue); Hagaman v. Bd. of Educ., 285 A.2d 63, 67 (N.J. Sup. Ct. 1971) (stating that the heirs of a settlor generally cannot enforce a charitable trust); Paterson v. Paterson Gen. Hosp., 233 A.2d 487, 493 (N.J. Super. Ct. Ch. Div. 1967) (stating that the general rule denying standing to donors “is as applicable to the law of charitable corporations as to the law of charitable trusts”); Smithers v. St. Luke’s-Roosevelt Hosp. Ctr., 281 A.D.2d 127, 145 (N.Y. App. Div. 2001) (Friedman, J., dissenting) (noting that “a limited standing rule is necessary to protect charitable institutions from vexatious litigation”) (citing Alco Gravure v. Knapp Found., 64 N.Y.2d 458, 466 (N.Y. 1985)); McFarland v. Atkins, 594 P.2d 758 (Okla. 1978) (holding that a mere contributor to a charitable fund does not generally have standing unless he has some special interest in the trust, or a reversionary interest in the fund different from that of his fellow contributors); 15 Am. Jur. 2d Charities § 141 (2002) (stating that donors to a broadly supported charitable fund cannot hold trustees accountable for breach of trust without having some special interest in the fund distinct from the interests of fellow contributors); Scott,
Bad Policy: CERCLA's Amended Liability for New Purchasers

Gregg W. Kettles*

I. INTRODUCTION

One of the most significant environmental issues facing the United States today is the abandonment or underutilization of land feared to be contaminated by hazardous materials. Such sites, known as "brownfields," are blamed for a variety of ills. Beyond posing risks to human health, their disuse also contributes to the loss of municipal tax bases and helps fuel both urban sprawl and the destruction of open space.1 A number of people and institutions have sought to identify ways to encourage the clean-up of brownfields and return them to productive use.2

Many commentators have concluded that one of the most significant impediments to brownfield redevelopment has been the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),3 commonly called “Superfund.”4 Congress enacted CERCLA in 1980 to address the consequences of decades of careless hazardous waste disposal practices. CERCLA aimed to: (1) prevent further contamination and release of hazardous material by requiring prompt clean-up of existing hazardous sites and (2) deter future hazardous materials releases by

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2. 3 United States Conference of Mayors, supra note 1, at 3 (2000) ("[F]or years the redevelopment of brownfields has been a top priority for the Conference of Mayors.").


4. 3 United States Conference of Mayors, supra note 1, at 7 (2000); Jacobs, supra note 1, at 267; Paul Stanton Kibel, supra note 1, at 598-99.
imposing high liability costs on careless waste management practices.5 Congress advanced these two aims by creating a broad class of jointly and severally liable parties. Liability attached not only to those who were directly involved in the production, transportation, or management of the waste released; it also attached to the owner of the property from which a release of hazardous materials was taking place or at least threatened. Thus, a property owner would be liable even if the hazardous materials were deposited on the site long before he took title to the property.6

This broad CERCLA liability alone would have deterred the purchase of any property potentially subject to CERCLA. But reality proved even worse for prospective brownfields purchasers. Cleaning up a given CERCLA site turned out to take more time and money than most people expected. Predictably, this further deterred acquisition and development of brownfields.

Some commentators and policy makers argued that amending CERCLA was the only way to render brownfields attractive to developers. Among other things, they contended that the Act should be amended to relieve prospective property purchasers from liability.7 The reasoning was straightforward enough: if developers shied away from brownfields because of fear of CERCLA liability, remove that liability. Only then would significant brownfield development take place. Congress eventually endorsed the idea. In early 2002, President Bush signed the Brownfields Revitalization and Environmental Restoration Act of 20018 ("BRERA") into law. Among other things, BRERA amended CERCLA to relieve a certain class of property owners from liability under the Act (the "Amendment"), namely those owners who were not otherwise liable under the Act (as operators, arrangers, etc.) and who took title after January 11, 2002.9

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This article challenges the Congressional and commentator wisdom that changing CERCLA to relieve prospective property purchasers from liability is good policy. I will argue that the Amendment is actually bad policy. Previous commentators have touched on earlier proposals to free prospective purchasers from CERCLA liability. Instead, this article offers the first focused and sustained analysis of the current liability relief. Rather than addressing the subject as a proposal in the abstract, this article analyzes liability relief as it has now been enacted into law.

Amending CERCLA to shield prospective purchasers from liability was a mistake. The Amendment removed an important disincentive to the release of hazardous materials. It gave a windfall to property owners who acquired title with knowledge of their potential liability after CERCLA’s 1980 enactment. This windfall is unfair because it is arbitrary. It is also potentially inefficient. Further, the Amendment increases the likelihood that future clean-ups will be performed not by a private party, but by the government, probably at higher cost. The Amendment purports to justify these costs by pointing to the virtue of its end: to increase the development of brownfields. But significant brownfields acquisition and development activity was already taking place before CERCLA was amended. Any additional encouragement of such activity brought by the Amendment does not justify the cost.

This article aims more broadly than just to persuade Congress to correct its mistake by amending CERCLA again. Shortly after Congress’ original enactment of CERCLA in 1980, many states used it as a model to enact their own hazardous waste contamination legislation. These so-called “mini-Superfund” laws are now at risk of being changed to conform to the post-

10. Charles O榕owski, Superfund in the 106th Congress, 30 ENVTL. L. REP. 10648, 10659 (2000) (criticizing legislative proposal to relieve prospective purchasers from CERCLA liability on ground that it will not encourage clean-up); Powell, supra note 7, at 130-131 (characterizing legislative proposal to relieve prospective purchasers of brownfields from CERCLA liability as a “better proposal”); Rimer, supra note 7, at 83 (supporting legislative proposal to relieve prospective purchasers from CERCLA liability); Brian C. Walsh, Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers, 34 HARV. J. ON LEGIS. 191, 204 (1997) (criticizing legislative proposal to relieve prospective purchasers from CERCLA liability on ground that it harms the ability of EPA to pursue polluters and may discourage resale of property).


12. Id. at 272.
Amendment version of CERCLA. Thus, this article is also addressed to state policy makers to dissuade them from following Congress's lead.

My criticism of the Amendment has implications for other rulemaking as well. The pre-Amendment version of CERCLA held buyers of contaminated property liable for the waste management practices of prior owners (as well as operators, arrangers, and transporters). This is an example of derivative, or successor, liability, which is a common feature of liability regimes created by statute and the common law. By freeing property buyers from liability, the Amendment has engaged in a kind of derivative liability relief. Many of the same criticisms of the unfairness and inefficiency of the relief provided by the Amendment may also be applied against derivative liability relief in other contexts.

Part I of this article recounts the pre-Amendment CERCLA and brownfields debate. It discusses the brownfield problem, the perception that CERCLA was to blame, the structure and practice of the pre-Amendment version of CERCLA, and how the Amendment altered the Act's liability scheme.

Part II then argues that the Amendment is bad policy because it is costly and unfair for three principal reasons. First, the Amendment will encourage the release of hazardous materials. Under the pre-Amendment version of CERCLA, property owners were deterred from mishandling toxic substances. In part, this was because they could be held directly liable under CERCLA. In addition, because any subsequent property owner could also be held liable, this reduced the price the owner could fetch for the property if they chose to sell it. The Amendment removed this deterrent to releasing hazardous materials by freeing property buyers from liability.

Second, the Amendment gives a windfall to anyone who bought potentially contaminated property with knowledge of the risk of a toxic release after the enactment of CERCLA. Presumably such owners bought their property at a discount that reflected the risk of CERCLA liability. Freed from liability by the Amendment, prospective purchasers will bid up the price of these properties. The sellers will enjoy a windfall. This windfall is both unfair in its arbitrariness and potentially inefficient. While the Amendment does have a provision putatively designed to prevent windfalls to property owners, it is too narrow in scope to make a significant difference. By holding buyers derivatively
liable for the environmental mismanagement of their predecessor owners, the pre-Amendment version of CERCLA helped deter such mismanagement. By granting derivative liability relief, the Amendment makes derivative liability schemes in other parts of CERCLA and in other legal regimes seem more susceptible to change. This makes the threat of derivative liability less credible and weakens the deterrent posed by these other regimes. To maintain the same level of deterrence, government will have to make potentially costly changes in other regimes or in their levels of enforcement.

Third, the Amendment is bad policy because it will make clean-ups more expensive. The Amendment has reduced the chances of finding a liable party financially able to pay for the clean-up of CERCLA sites. This will leave more clean-ups to be performed by the government. Experience proves that government-run clean-ups are substantially more costly than those run by private, liable parties.

Part III then argues that the costs described in Part II outweigh the benefits provided by the Amendment. Thanks in large part to market-led forces, brownfield acquisition and development were becoming increasingly attractive before the Amendment was enacted. To the extent the Amendment added a welcome inducement to help support this trend, it could have been accomplished with a narrower enactment. Many of the costs identified in Part II could therefore have been avoided.

The foregoing criticisms also shed light on proposals to amend statutory programs outside of CERCLA that have used successor or derivative liability as a regulatory tool. The dangers of diminished deterrence, arbitrary and inefficient windfalls, and increased regulatory costs are just as real.

II.

Brownfields and CERCLA: The Debate

Congress enacted CERCLA in 1980 in the wake of public outcry over a few properties from which hazardous substances were being released into the environment, thereby posing risks to human health. Existing laws were perceived to be inadequate for holding those responsible for creating these sites—the generators, transporters, and site operators—liable for the costs of cleaning them up. CERCLA was enacted to bridge this gap. The basic concept was to make the responsible parties liable for
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Article

*435 VISUALIZING ADVERSE SELECTION: AN ECONOMIC APPROACH TO THE LAW OF INSURANCE UNDERWRITING

Seth J. Chandler [FN1]

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Table of Contents

INTRODUCTION .......................................................................................................................... 436
I. A BASIC UNDERSTANDING OF ADVERSE SELECTION .................................................. 440
A. The Type of Modeling Used ............................................................................................... 440
B. The Model ........................................................................................................................... 441
   1. Positions of the Insured ................................................................................................. 441
   2. The Demand for Insurance .......................................................................................... 448
   3. From Demand to Equilibrium ...................................................................................... 451
   4. The Basic "Physics" of Adverse Selection ................................................................... 453
C. The Effect of Classification .............................................................................................. 455
D. From Valuations to Normative Evaluation of an Underwriting Regime .......................... 458
   1. A Note on Compulsory Insurance ................................................................................ 462
II. REAL EXPERIMENTS .......................................................................................................... 464
A. Underwriting in a World with Low Susceptibility to Adverse Selection ....................... 464
B. Underwriting in a World with High Potential for Adverse Selection ............................. 466
C. Financial Constraints ........................................................................................................ 468
D. Costly Sorting ..................................................................................................................... 472
E. Inaccurate Classification Schemes .................................................................................... 473
   1. Symmetric but Imperfect Risk Information .................................................................. 474
   2. Asymmetric but Imperfect Risk Information .................................................................. 479
F. Risks that Can Only Be Indirectly Insured Against ......................................................... 484

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III. IMPLICATIONS ................................................................. 497

CONCLUSION ................................................................. 503

*436 INTRODUCTION

We enter this world with characteristics that create different risks for various sorts of losses. The underwriting laws of free market societies often permit insurers to charge individuals different prices for identical insurance against these losses based on these individual characteristics. The result is often an inequality of opportunity not based on any choices that we can ascribe to the individuals involved. Commentators often justify this inequality by the counterbalancing needed to stamp out a process known as "adverse selection"—the proclivity for people of greater than average risk to purchase greater than average amounts of insurance. Unchecked, adverse selection creates an upward force on prices that drives many individuals and businesses out of the insurance market, which can result in the impoverishment of society. This Article uses computer simulations and visualization technology to help determine the circumstances under which the law should support insurer efforts to classify individuals, and under which circumstances it should oppose such efforts. It thus develops a rigorous economic framework for analyzing problems of adverse selection. This framework can be used to analyze the contemporary debate regarding access by life and health insurers to genetic test information.

Private insurance transfers risk most effectively in a world of symmetric uncertainty in which the insured and insurer are equally ignorant of the probabilities of future events. Superior predictive abilities on the part of the insured shrink a private insurance market through a process known as adverse selection or, as it is sometimes known, anti-selection. [FN1] In essence, insureds with probable futures most likely to trigger an indemnity provision of an insurance agreement purchase that insurance disproportionately. This disproportionate purchase, coupled with high risk, exerts a powerful torque on insurance prices, which in turn drives those less likely to trigger the indemnity provision out of the insurance market. These individuals exit the market because it is no longer cost-effective for them to transfer their risks to insurers.

*437 In response, society often enlists the legal system in order to recreate symmetry in the predictive abilities of insured and insurer. [FN2] We enforce doctrines such as fraud and warranty that prevent the insured with superior predictive skills from enjoying the rewards stemming from the resulting information imbalance. We give legal sanction to investigative techniques such as common data banks or old fashioned snooping that cheapen the cost of acquiring predictive information, even as their use conflicts with the privacy interests of prospective insureds. We trumpet "freedom of contract" as a basis for permitting insurers to classify individuals according to prospective risk and to price policies accordingly. And many think it "fair" that those who have truly higher risk pay more for insurance rather than be cross-subsidized by those of lower risk. [FN3]

The legal buttressing of a private insurance market has costs, however; first, risk classification means that those who we would label faultless are nonetheless disadvantaged in the current economic environment, and are further disadvantaged by a reduced ability to transfer risk. This inability can have drastic financial and health consequences. [FN4] Second, investments by the insureds in acquiring information are riskier if the insurer can punish or reward the insured based on the results. If that information has social value, as it often does, this increased risk will reduce the acquisition of useful information. [FN5] Third, to the extent prospective insureds still acquire *438 information, the result of unearthng particular unfortunate signals is that some insureds will be priced out of the insurance market altogether or compelled to reduce their purchases. The consequence of laws guarding against adverse selection thus may be a process of "financial de-selection," that in its own way threatens to diminish desired transfers of risk.

This article attempts to clarify the tradeoffs involved in sculpting laws governing the ability of insurers to access predictive information. [FN6] It does so first by filling a gap in the current literature [FN7] by coupling economic theory to computer-based visualization technology [FN8] to facilitate a clear yet *439 rigorous understanding of adverse selection. It uses a relatively simple model and relatively simple mathematics to create an "adverse selection laboratory" in which one can explore the dynamics of an insurance market with varying characteristics. Although the article and model are motivated significantly by an interest in the debate over access by life and health insurers to genetic test information, [FN9] the analysis it develops is in fact far more general and applies to all forms of insurance and risk transfer contracts. The diagrams and analyses employed should help those involved in the field to better understand when it is sensible for the law to support insurance classification of individuals according to perceived risk, and when it is sensible for the law to oppose such efforts. To demonstrate the power of this method, I conclude the article by demonstrating that denying life insurers access to genetic
test information is far more dangerous than denying such information to health insurers. I further suggest that even within the health insurance market, it is unwise to regulate insurer access to genetic test information through highly general laws. Rather, regulation in this field needs to take into account the salient features of both the genetic test and the particular risks it is intended to predict.

*440 I. A Basic Understanding of Adverse Selection
   A. The Type of Modeling Used

   The model employed here is typical in many ways of those most often used in the economic analysis of law. It assumes that people are rational profit or utility maximizers. [FN10] It does not rely in any direct way on "real world" data or on econometric studies, but instead uses computer generated agents with characteristics that are drawn from distributions believed to illustrate those of actual humans in specified scenarios. [FN11] The idea is not to replicate precisely all aspects of human behavior or insurance markets, but to use simplified models to understand in a conceptual way the basic forces at work in their interactions. [FN12] This approach, though it loses the wonderful complexity of real human beings, permits perfectly controlled experiments to be run repeatedly (and without risk to the subjects), and creates tremendous flexibility in the sort of experiments that can be performed, and avoids the frailties of econometric or statistical analysis. [FN13]

   The model employed here differs, however, from much work in law and economics in that it is not generally amenable (even with powerful *441 mathematics) to the extraction of tidy "closed form" solutions. One cannot, in the typical way, use calculus or similar tools as a shortcut to move from the specification of the model to optimality conditions stated in a universal and general way. In part because of the complexity of the issues involved and in part because problems of this nature address the interactions of a system of agents, simulation must be coupled with analytic technique and used to suggest likely outcomes. Thus, while the results may in some respects lack the elegance of purely calculus-based analyses, this hybrid methodology, made possible only recently by the combination of modern computer hardware and computer algebra software, opens the door to exploration of complex and important problems otherwise impenetrable by anything other than intuition and surmise.

   B. The Model

   1. Positions of the Insured

   In my model world, people generally have three characteristics of particular interest: actual risk (a), perceived risk (\( f \)) and risk aversion (k). By actual risk, I mean a likelihood between 0 and 1 of suffering a loss. [FN14] By perceived risk, I mean the insured's estimate of the actual risk. Risk aversion (k) is measured as a number between 0 and 1 inclusive, in which 0 denotes no aversion to risk and 1 denotes severe aversion to risk.

   In this model, an entity faces a risk of something "bad" happening. I normalize the position of the entity by saying that, if it buys no insurance and the bad event does not occur, it has wealth 1; if the bad event does occur, the entity has wealth 0. I let the entity purchase insurance that will pay zero if nothing bad happens and some contractually set amount \(<\lambda>\) if the bad event does occur. The cost of the insurance is \( p \) per unit of insurance. [FN15] Thus, if nothing bad happens, the position of the entity is its wealth of 1 *442 less the amount it paid for insurance, or \( 1 - p <\lambda> \). If the bad event materializes, the position of the entity is its wealth of 0 plus the insurance \(<\lambda>\) less the amount it paid for insurance \( p <\lambda>\), for a total of \(<\lambda> - p <\lambda>\). The expected position of such an entity is a weighted average of its position if nothing bad happens and if the bad thing happens. Thus, I can write its perceived expected position as follows: [fn16]

   TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

   *443 The actual expected position of the insured is similar to the perceived expected position, except that the actual risk a is substituted for the perceived risk f.

   TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

   The perceived (ex ante) valuation such an insured places on its situation is in turn a weighted average. It is the weighted average of its perceived expected position and its position in the worst possible case, with the weighting determined by a "risk aversion" parameter of k. [FN17] For risk aversion 0, the entity values its position at its perceived expected position. For risk aversion 1, the entity values its position at its worst case. Notice that if the entity is fully insured, its perceived valuation is equal to its perceived expected position: its position if a bad thing happens is the same as its position if a bad
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Essay

*909 COPYRIGHT IN 1791: AN ESSAY CONCERNING THE FOUNDERS' VIEW OF THE COPYRIGHT POWER GRANTED TO CONGRESS IN ARTICLE I, SECTION 8, CLAUSE 8 OF THE U.S. CONSTITUTION [FN9d1]

L. Ray Patterson [FN9a1]
Craig Joyce [FN9aa1]

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I. Introduction .................................................. 910
II. The Beginnings of Anglo-American Copyright Law .... 913
   A. The Stationer's Copyright .............................. 913
   B. The Licensing Act and the Statute of Anne ......... 914
   C. Copyright from 1710 to 1774 ........................... 923
III. Copyright in the New Nation .............................. 929
   A. The Founders' Knowledge of Copyright .............. 929
   B. Before the Constitution ............................... 931
   C. The Copyright Clause and the 1790 Act .............. 936
   D. Copyright and "the freedom . . . of the press" ... 942
IV. Copyright in 1791: The Founders' View ................. 945
   A. To Promote Learning ................................... 946
   B. To Provide Public Access .............................. 948
   C. To Protect the Public Domain ........................ 949
V. Conclusion .................................................... 951

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*910 I. Introduction

The subject of this Essay is the Founders' view of copyright and the copyright power they granted to Congress in Article I, Section 8, Clause 8 of the United States Constitution, as of 1791.

The year 1791 is one of several notable years—along with 1787, 1788, 1789, and 1790—that might have been chosen. In 1787,
the Founders, in their capacity as framers, drafted the United States Constitution, including the Copyright (and Patent) Clause; [FN1] in 1788, the several states approved the Constitution; in 1789, the Founders established the Federal Government; and, in 1790, the first Congress enacted the first Copyright Act. [FN2]

The year 1791, however, has a special—and generally unrecognized—significance in American copyright history. In that year, the new nation adopted the Free Press Clause [FN3] of the First Amendment, which has a unique relevance to the Copyright Clause. Both clauses deal, among other topics, with Congress's power over the printing press (and, more generally, expression). The Copyright Clause gives Congress the power to regulate the printing of one's own writings. The Free Press Clause denies Congress any power to "abridge[e] the freedom of . . . the press." Superficially, at least, the two constitutional provisions are in conflict. And because the First Amendment was adopted subsequent to the Copyright Clause, there is at least a superficial argument that it is superior to that clause as a matter of both constitutional interpretation and public policy. [FN4]

*911 But to say that the two provisions are in conflict, even superficially, is to cast discredit on the Founders—men of learning and sophistication who framed a constitution, secured its ratification, formed the first government thereunder, and enacted the new nation's first copyright statute by virtue of its authority—and to charge them with committing an error of the most simple kind. If they did err, it was by not including more words of accommodation in the two provisions. It is more likely, however, that the fault lies in our understanding—at a distance of 200 years and through the prism of subsequent events—rather than in their execution.

We live today in the aftermath of the courts' "discovery" of the First Amendment in the early twentieth century and in the presence of the vast changes in the media wrought by new technologies at the dawn of the twenty-first. But our concern here is not the proper application of the Copyright Clause and the First Amendment, jointly or severally, to the Digital Age. What interests us is the Founders' view of the copyright power they granted to the new Congress under the new Constitution. To learn that view, we return to the eighteenth century and examine the materials that shaped it.

The quest for an understanding of the Founders' view is not as difficult as it might at first seem. They left an abundance of documents as evidence of their intent, perhaps because they were people of learning themselves, but *912 perhaps also because the technology of their time did not allow a single-click deletion of every page they penned. The quest for their understanding is, however, much like an archaeological dig at a site that turns out to be twice as ancient as expected. While the framers of American copyright law left many documents of their own creation, those documents were almost all derivative of English documents, a product of history that informed their knowledge and their judgments.

The American documents on which we rely, as will appear shortly, are official and informative: the 1783 Resolution of the Continental Congress recommending the enactment of appropriate legislation by the states; the actual state copyright statutes enacted between 1783 and 1786; the Copyright Clause of the U.S. Constitution; the Copyright Act of 1790; and the First Amendment.

But insofar as they are concerned with the press and with ideas, all of these documents are essentially variations on a preexisting theme. [FN5] The distillation of the relevant prior developments was the first English copyright statute, the Statute of Anne, [FN6] enacted early in the eighteenth century, and the two key cases construing it, Millar v. Taylor [FN7] and Donaldson v. Beckett, [FN8] decided shortly before the American Revolution (each taking a different view of the statute and of copyright). The Statute of Anne, however, did not spring full-blown from Minerva's brow, but instead derived from its predecessor, the Licensing Act of 1662. [FN9] And the Licensing Act, in turn, was a codification of the stationers' copyright—a trade concept so called because it was developed by, and limited to, members of the Stationers' Company (the printers, bookbinders, and booksellers of London)—created in England more than a century before.

Thus, to understand the Founders' copyright as they themselves understood it in 1791, we consider the context from which that understanding arose. We examine the beginnings of copyright, insofar as they are relevant to the American experience, at a time and place half a millennium and an ocean removed from our own experience today: England in the sixteenth century. This complex history—the story of English and then American attempts to overcome copyright's beginnings as an instrument of market monopoly and press suppression—explains why, in the end, the Founders viewed the *913 Copyright Clause and the Free Press Clause not as contradictory dictates, but as complementary components of a coherent schema for fostering the creation and dissemination of learning throughout the new nation.

II. The Beginnings of Anglo-American Copyright Law

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Article

*63 ROMANTIC COMMON LAW, ENLIGHTENED CIVIL LAW: LEGAL UNIFORMITY AND THE HOMOGENIZATION OF THE EUROPEAN UNION

Vivian Grosswald Curran [FN1]

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[L'a grandeur du génie ne consisterait-elle pas ... à savoir dans quel cas il faut l'uniformité et dans quel cas il faut des différences?
- Montesquieu [FN1]

INTRODUCTION

The main thrust of this article is to suggest why the European Union may succeed in its objective of legal uniformity despite encompassing the two highly distinct legal traditions of the common law and the civil law. My theory is that the defining characteristics of the civil-law legal culture, although in stark and profound contrast with those of the common-law legal system, nevertheless appear prominently and pervasively in the non-legal spheres of common-law nations; and vice versa, such that common-law legal characteristics correspond closely to elements often excluded from civil-law legal cultures, but which are included in the non-legal domains of the civil-law European Union Member States.

Conversely, the defining characteristics of civil-law legal culture not only are largely absent from common-law legal systems, but, as Peter Goodrich has demonstrated, they consciously and repeatedly were rejected by England. [FN2] Nevertheless, *64 they are prominently and pervasively present in the non-legal spheres of common-law European Union Member States. Consequently, lawyers from all of the Member States have an intimate understanding of the fundamentals of both the common-law and civil-law mentalities, although they have learned to apply only one of those mentalities to legal discourse and analysis.

The progression towards legal uniformity is spawning a hybrid, homogenized legal culture from the systems of the civil and the common law that encounter each other in the new Europe. The resulting homogenization in turn fortifies uniformity, as the two distinct legal cultures are altered by their mutual encounters, adapting to the imperatives of coexistence and coalescence, and in turn reinforcing homogenization, as their acquired adaptive characteristics contribute to a further breakdown of distinctive legal attributes by processes of reciprocal influence and blending. [FN3]

I propose to support this thesis by signaling the striking resemblances between the common-law mentality and Romanticism; and between the civil-law mentality and the Enlightenment. The renditions of Romanticism and the Enlightenment that I apply to the common and civil law in these pages are based principally on Isaiah Berlin's analysis and discussion of Romanticism and the Enlightenment throughout the course of his life's work. [FN4] This article both analyzes Berlin's discussion of Romanticism and the Enlightenment in terms of the common and civil-law legal methodologies and mentalities, and explores the implications of this analysis within the context of the European Union.

Because all of the European Union's Member States were influenced by both Romanticism and the Enlightenment, lawyers from both the common-law and civil-law legal systems are adept at both conceptions of the world and of life that underlie the legal systems. Thus, the process of Europeanization is reduced to re-learning to apply the "other," "un-learned" system's tenets and methodology to the legal sphere of reasoning, thinking, arguing and conceptualizing. This process of skill re-acquisition for European lawyers and judges is greatly facilitated by their preexisting intimacy of acquaintance with the
other" perspective in the non-legal domains of their lives.

Before I proceed with this analysis, I want to be very clear that I am not suggesting that Romanticism was itself a cause of the common-law legal system, or the Enlightenment a cause of the civil-law legal system. Both legal systems predate Romanticism and the Enlightenment by many centuries. Rather, Romanticism and the Enlightenment are useful to my argument to the extent that they are emblematic of different modes of intellectual discourses, outlook, thought and focus that have long coexisted in western society. For complex reasons, one or the other of those discourses dominates the legal institutions of Europe's Member States.

The last two sections of this essay discuss the challenges to Europe's future posed by the fusing of legal cultures and by the coalescence of a wider range of cultural characteristics in Europe, not all of which are attributable solely to the effects or acts of the European Union. The European Union's increasing unicity and univocality may threaten some of its most cherished goals. The very means by which the European Union increasingly becomes capable of effectuating its goals paradoxically also may undermine the ideals it seeks to promote. My conclusion is that economic and legal uniformity simultaneously may be both necessary to the European Union and destructive of it inasmuch as economic and legal uniformity may be incompatible and irreconcilable with cultural pluralism. Unmasking and lucidly examining this fundamental incompatibility lodged in the innermost structures and objectives of the European Union is called for, even if it may entail the burden of recasting institutional aspirations. Conscious recognition of the paradox embedded within the depths of the European Union should be undertaken as part of a reassessment as to which steps will be likeliest to realize the most desirable progression possible of the European Union into the future.

CHALLENGES TO UNIFORMITY OF LEGAL INTERPRETATION

From the perspective of legal uniformity, the European Union's judicial system would seem to invite comparison with federalist systems such as the one that exists in the United States. Like the European Union's Member States, each of the United States' fifty states has its own legal system. For each state in the United States, however, a state supreme court has the final word on issues of state law, and even within the federal court system, lack of legal uniformity persists among the federal circuit courts where the United States Supreme Court has declined to hear issues appealed from the circuits. [FN5]

A still greater incommensurability between the European Union and the United States persists in that the European Union's judicial system encompasses the very different traditions of the common and civil law. [FN6] With this problematic in mind, a more fruitful comparison in terms of the European Union's judicial challenges might be with an international convention, such as the U.N. Convention on Contracts for the International Sale of Goods (hereinafter, the "CISG"), whose Article 7 (1) mandates that, "[i]n the interpretation of this Convention, regard is to be had to ... the need to promote uniformity in its application ..." [FN7] Similarly to the situation in the European Union, the national courts of the CISG signatory States must apply the convention in a uniform manner, and even, if necessary, "against their own statal public authorities." [FN8]

Legal uniformity of application seems destined to remain unrealized for the CISG. Briefly, the numerous courts in the CISG's over fifty signatory States encounter manifold impediments to uniformity of application. [FN9] First, there are inevitable problems of judicial interpretation itself. Even within a given legal system, legal uniformity may be said to remain an unrealized ideal rather than an achievable practice. Second, tensions often exist between what judges may perceive to be an objective interpretation of the CISG text, and what they consider fairness and justice to require in a pending case. Third, problems surround the mythology that the CISG itself is a single text, when in fact in all of its versions it is a translated text, published in more than one official and unofficial language translations, with both intentional and unintentional substantive disparities appearing in its different language versions. [FN10] Fourth, differences in legal traditions, cultures and practices are such that concepts of legal phenomena as basic as "trials" and "contracts" fail to denote the same concepts in different languages, despite the ease with which a translator may pick an allegedly equivalent word in a different language. [FN11] Finally, differences abound in what the national courts consider to be primary and secondary sources of legal authority. These differences are particularly vivid between civil-law and common-law legal systems.

For example, where a U.S. judge striving to apply the CISG uniformly would be prepared to consult prior CISG case law, a French judge would expect to consult scholarly commentary rather than the judicial decisions themselves. Moreover, a U.S. judge would be perplexed by a French judicial application of the CISG, because the French court opinion might well consist of one sentence without any clear description of the case's underlying factual scenario, and essentially be inaccessible without the explanatory scholarly commentary that French lawyers seek when trying to understand French judicial decisions.
NOTE

CITY OF INDIANAPOLIS V. EDMOND: THE SUPREME COURT TAKES A DETOUR TO AVOID ROADBLOCK PRECEDENT

TABLE OF CONTENTS

I. INTRODUCTION .......................................................... 578

II. CASE RECITATION ....................................................... 579
   A. Facts ................................................................. 579
   B. Prior Case History ............................................... 580
   C. The Supreme Court Opinion ..................................... 581
      1. The Majority Opinion .......................................... 581
      2. Chief Justice Rehnquist's Dissenting Opinion .......... 587
      3. Justice Thomas's Dissenting Opinion ..................... 591

III. ANALYSIS .............................................................. 591
    A. Development of Roadblock Jurisprudence .................... 591
       1. United States v. Ortiz ...................................... 591
       2. United States v. Martinez-Fuerte ......................... 593
       3. Delaware v. Prouse ......................................... 593
       4. Brown v. Texas ................................................ 595
       5. Michigan Department of State Police v. Sitz ............ 595
    B. Lower Court Decisions .......................................... 597
       1. Decisions Rejecting Drug Interdiction Checkpoints .... 597
       2. Decisions Upholding Drug Interdiction Checkpoints .... 598
    C. The Inconsistency in Lower Court Decisions Is Not Due to the Failure of the Brown Test ............... 600
    D. The Majority's Reliance on the "Special Needs" Test Is Misplaced ........................................ 601

577
I. INTRODUCTION

Since the events of September 11, 2001, the parameters of constitutional searches and seizures have become a hotly debated topic in the legal arena.¹ In response to the terrorist attacks on our nation, Congress and the Bush Administration have responded swiftly with legislation intended to defeat the threat of global terrorism.² Some fear that individual liberties will be an unfortunate casualty of this new war on terrorism.³ The real and ever-present threat of additional terrorist attacks will bring law enforcement techniques and civil liberties into contention more than ever.⁴

The debate over the parameters of the Fourth Amendment,⁵ is not new. A recent U.S. Supreme Court decision will have serious effects on the law enforcement techniques officials can employ in conducting seizures.

This Note analyzes the U.S. Supreme Court’s decision in City of Indianapolis v. Edmond.⁶ In this decision, the Court held that the City of Indianapolis’s drug checkpoint program violated the Fourth Amendment because the primary purpose of the program was ultimately indistinguishable from the city’s general interest in crime control.⁷


2. Id. (noting that President George W. Bush signed the PATRIOT Act (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act) on October 26, 2001, giving the government considerably more power to combat terrorism).

3. Id. (arguing that the Bush Administration “has gone beyond the legitimate needs of national security and is infringing on constitutional freedoms in the name of patriotism and security”).


5. The Fourth Amendment states in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .” U.S. CONST. amend. IV.


7. Id. at 41–42.
Part II of this Note presents an overview of the case, detailing the majority and dissenting opinions. Part III outlines the prior Supreme Court roadblock cases and discusses some of the lower courts' interpretations of these cases. This Note then argues that the Edmond majority's reliance on the special needs doctrine is misplaced. Part III also criticizes the special needs doctrine, describing it as an inadequate and ill-defined test. The Note then offers a hypothetical that reveals the deficiencies in the Court's new test. Finally, this Note concludes that the balancing test formulated in Brown v. Texas is the appropriate methodology that should have been used in the Edmond case and demonstrates how proper application of precedent would have resulted in the roadblocks being upheld.

II. CASE RECITATION

A. Facts

In 1998, the City of Indianapolis began operating vehicle checkpoints on Indianapolis roads in an effort to interdict unlawful drugs. Between August and November 1998, the city set up six such roadblocks. During these roadblocks the police officers stopped 1161 vehicles and arrested 104 motorists. Of the arrests, 55 were for drug-related crimes.

At the six checkpoints, each consisting of approximately thirty officers, the police stopped a predetermined number of vehicles. Written directives issued by the chief of police mandated that at least one officer would approach the vehicle, inform the driver that she was being stopped briefly at a drug checkpoint, and ask the driver to produce a license and registration. The officer then looked for signs of impairment and conducted an "open-view" examination of the vehicle. Additionally, another officer walked a narcotics-detection dog around the outside of each stopped vehicle.

The written directives limited the officers to conduct a