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Discrimination Under a Description ..... *Patrick S. Shin* 1

In debates about the permissibility of certain kinds of differential treatment, our judgments often seem to depend on how to conduct in question is described. For example, legal prohibitions on same-sex marriage seem clearly impermissible insofar as they can be described as a form of sex discrimination, less clearly so, at least under federal law, if described simply as sexual-orientation discrimination, and arguably not discriminatory at all insofar as they constitute a universally imposed disability on marrying within one's own sex. It seems, in other words, that the prohibition of same-sex marriage constitutes legally impersmissible discrimination under some descriptions but not under others. The problem, or so I will argue, is that none of the available descriptions seems to be uniquely correct. But if our judgments of permissibility depend on a choice among equally veridical descriptions, how can those judgments be justified? In this Article, I explore this "problem of description" and discuss how the law should choose between alternative characterizations of disputed conduct for the purpose of judging whether it constitutes impermissible discrimination. Drawing on case law and literature relating to sexual-orientation discrimination and the constitutionality of the prohibition of same-sex marriage, I attempt to disentangle the various issues embedded in disagreements about the proper description of ostensibly discriminatory conduct and to expose the substantive values that are truly at stake. I show how giving legal effect to one description to the exclusion of another always implies a principle governing the relative priority of the polices implicated by the competing alternative descriptions, and that the defensibility of the choice of description depends ultimately on the justifiability of that principle of priority.

Not So Obvious After All: Patent Law's Nonobviousness Requirement, *KSR*, and the Fear of Hindsight Bias ..... *Glynn S. Lunney, Jr.* *Christian T. Johnson* 41

Before the creation of the Federal Circuit in 1982, nonobviousness served as the primary gatekeeper for patents. When patent holders sued for infringement and lost, more than sixty percent of the time, they lost on the grounds that their patent was obvious. With the advent of the Federal Circuit, nonobviousness became a much less difficult hurdle to surmount. From 1982 until 2005, when patent holders sued for infringement and lost, obviousness was the reason in less than fifteen percent of the cases. While obviousness remained formally a requirement of patent protection, there can be little doubt that the Federal Circuit had substantially diminished the doctrine's once central role.

A potential turning point arose in 2007, however, with the Court's decision in KSR v. Teleflex. In its decision, the Court, with one hand, rejected some of the key restrictions the Federal Circuit had placed on the obviousness doctrine, and with the other, broadened the circumstances under which obviousness could be found. Taken at face value, the Court's decision seemed poised to reinvigorate the nonobviousness requirement. Yet an analysis of appellate patent decisions since 2007 reveals that the Court's decision has led to only a slightly increased role for the doctrine. By any measure, the nonobviousness requirement remains a pale shadow of its former self.

This Article presents this historical background and then turns to the fear of hindsight bias that seems to have motivated much of the desire to limit obviousness's reach. As articulated by the Federal Circuit, hindsight bias represents the fear that a judge or jury will use an inventor's own invention against her. Having been told of the inventor's solution, the judge or jury will use the inventor's own actions as a roadmap showing how to combine existing prior art elements to solve the problem at hand. With the benefit of hindsight, a judge or jury will too readily infer that the inventor's solution was obvious. In a pair of articles, Professor Gregory Mandel has

presented results from empirical tests that he believes demonstrate the potential for substantial hindsight bias in patent litigation. In this Article, the authors modify and extend Professor Mandel's empirical tests. Our results raise questions regarding Professor Mandel's conclusions and tend to refute the notion that hindsight bias is a serious problem in patent litigation.

On the Need for Public Boarding Schools ..... *Bret D. Asbury* 113
Kevin Woodson

Nowhere is the inadequacy of American public education more striking than in high-poverty, urban schools populated by disadvantaged minority students. Despite decades of legal, policy, and scholarly efforts aimed at addressing the challenges facing these schools, the academic prospects of poor students are currently as grim as they have been in recent memory. Reformers seeking to address this problem have largely focused on transforming public education from within by focusing on school conditions or teacher performance. These efforts have largely failed to bring about real progress: despite decades of litigation and reform, our nation's most disadvantaged children continue to lack access to meaningful educational opportunity.

This Article argues that prior reforms have enjoyed little success because they have failed to address head-on what we believe is the predominant factor in perpetuating educational inequality: the numerous challenges disadvantaged students must overcome in their home and neighborhood environments. These well-documented challenges include a lack of household resources, suboptimal parenting practices, and the prevalence of neighborhood crime, violence, and other risk factors, all of which inhibit poor children's ability to succeed academically.

Recognizing that the societal conditions that perpetuate these encumbrances are unlikely to change in the foreseeable future, this Article argues for the creation of voluntary, public boarding schools as an option for educating disadvantaged children from as early as Kindergarten. As the SEED Foundation and others have demonstrated, there is a significant demand for boarding

school education among members of poor communities and considerable private- and public-sector support for innovative education reform efforts. Recognizing that this proposal nonetheless will likely be met with resistance, this Article addresses a number of potential objections, including the suggestion that it is motivated by a desire to deprive underprivileged children of their cultural identity and that it is not financially feasible.

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Aggregation of Probabilities and Illogic ..... *Kevin M. Clermont* 165

Classical logic and probability theory produce in law the troublesome paradox of aggregation of claims: On the other hand, logic seems to tell us that the aggregated likelihood of alternative claims elevates in response to probability's rules; thus, if the plaintiff almost proves claim A and almost proves an alternative but independent claim B, then the plaintiff should win one. On the other hand, because the law requires each claim to meet the standard of proof, and thus refuses to apply the proof standard to the aggregation, the plaintiff loses in actuality; legal scholars despair in consequences—including Ariel Porat and Eric Posner in their new article Aggregation and Law.

Fuzzy Logic, however, eradicates the paradox, by showing that the claims' aggregate likelihood equals the most likely claim's likelihood. The law is correct in applying this approach.

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The federal diversity statute grants alienage jurisdiction to "foreign citizens" and "foreign statutes," allowing them

to bring state-law claims against U.S. citizens in federal court. When the European Community (EC), an intergovernmental organization of European states, sued an American corporation for state-law violations, for the first time a federal court had to determine whether the EC qualified as a foreign state. The EC argued that it was essentially a foreign state for the purposes of alienage jurisdiction. Relying on the definition of foreign state in the Foreign Sovereign Immunities Act of 1976 (FSIA), which the diversity statute references, the court determined that the EC was a supranational organization that was independent of its member states, yet it could not properly be considered a foreign state.

This Note argues that the definition of foreign state for alienage jurisdiction should be decoupled from the FSIA's definition because the FSIA's definition does not account for supranational organizations like the EC. The definition of foreign state in the diversity statute should provide a framework for federal courts to consider state-law claims of supranational organizations. This change would not only effectuate the policy justifications behind alienage jurisdiction, but it would also retain the definition of foreign state that Congress created for determining foreign sovereign immunity.

The Prisoners' Property Dilemma: The Proper Approach to Determine Prisoners' Protected Property Interests After *Sandin* and *Castle Rock* ..... *Corbin Robert Kennelly* 241

The Proper approach to determine when prisoners have property interests protected by the Due Process Clause is currently uncertain. The Supreme Court addressed prisoners' liberty interests in Sandin v. Conner, *but lower courts have split over whether to apply the* Sandin *test to prisoners' property interests. Further complicating matters, the Supreme Court recently addressed property interests generally in* Town of Castle Rock v. Gonzales. *There, the Court seemed to add additional hurdles to the finding of protected property interests: A statute must clearly indicate that it gives rise to an entitlement; the entitlement must have an ascertainable monetary value; and, the entitlement must not arise incidentally from a*

routine government function. As with Sandin, *whether* Castle Rock *applies to prisoners' property interests is unsettled.*

This Note examines the current uncertainty in the law and argues that courts should apply the Castle Rock *approach to determinations of prisoners' property interests. Doing so would recognize the fundamental difference between liberty and property interests and appropriately align the test for prisoners' property interests with the test for property interests generally. Additionally, applying the* Castle Rock *approach would sufficiently address prison-specific concerns the Supreme Court articled in* Sandin.

Runaway Usance: Limiting the Exercise of the Fugitive Disentitlement Doctrine in the Context of *Wenqin Sun v. Mukasey* and *Bright v. Holder* ..... *Lawrence Serkin Winsor* 273

The fugitive disentitlement doctrine prevents an evasive party from obtaining standing in the court whose authority is evaded. With its 2011 decision in Bright v. Holder, *the Fifth Circuit Court of Appeals created a circuit split regarding whether the fugitive disentitlement doctrine applies to an alien appealing an adverse immigration decision that maintained the same address throughout removal proceedings, this address was known to the Department of Homeland Security (DHS), and DHS made no attempt to locate or arrest the alien for failure to report for removal. Unlike the Ninth Circuit Court of Appeals' decision in* Wenqin Sun v. Mukasey, *the Fifth Circuit applied the fugitive disentitlement doctrine, dismissing* Holder's *appeal for lack of standing.*

On May 29, 2012, the Supreme Court denied certiorari on Bright v. Holder. *The circuit split therefore remains unresolved and potentially affects thousands of immigrants seeking appellate review of a removal order. This Note applies the rationales for the fugitive disentitlement doctrine articulated by the Court in* Ortega–Rodriguez *to the context of an alien appealing a removal order and proposes that the circuit split be resolved in favor of the Ninth Circuit's approach. When aliens defy a removal order but do not actively evade*

capture or custody, federal appellate courts should not dismiss their appeals under the fugitive disentitlement doctrine; instead, they should review their claims on the merits.

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