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KEVIN R. JOHNSON, EDITOR

Associate Dean for Academic Affairs, School of Law, and Mabie/Apallas Professor of Public Interest Law and Chicana/o Studies, University of California, Davis

krjohnson@ucdavis.edu

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

Many environmental policy decisions have vital scientific dimensions; they cannot effectively achieve societal goals unless the best available scientific information is accurately gathered and appropriately taken into account. In recent years growing numbers of critics have complained about the misuse or non-use of scientific information in environmental regulation and natural resource management. In this article, through close examination of several recent controversies, I show that shortcomings in the effective use of science can usefully be separated into two categories: problems of scientific integrity and problems of political integrity. Scientific integrity requires that data be gathered, interpreted, and expressed in ways that accord with the relevant norms of scientific practice, the most important of which for this purpose are objectivity and skepticism. Political integrity requires that decisions about what action to take in light of the available scientific information be consistent with relevant legal mandates, and that judgments about where the boundaries of those mandates fall and what action to take within those boundaries be revealed. Scientific and political integrity are linked in three important respects: both require the recognition and observance of role boundaries and limitations; both impose limitations on the role of personal biases and desires; and shortfalls or even perceived shortfalls in one can increase pressures to ignore the other. They are distinct, however, in the identities of the actors responsible for them, and in the nature of the measures that might be taken to ensure them. Political integrity can be addressed through increased oversight of the executive branch, including a variety of measures designed to enhance the role of career employees relative to political appointees in regulatory decisionmaking. Scientific integrity is more difficult to address through regulatory measures. It is best encouraged through increasing awareness of the boundaries of scientific and political judgments and reducing incentives for those acting in the professional role of scientists to overstep those boundaries.

"Rethinking the Limits of the Interpretive Maxim of Constitutional Avoidance: The Case Study of the Corroboration Requirement for Inculpatory Declarations Against Penal Interest (Federal Rule of Evidence 804(B)(3))"

Gonzaga Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 136

EDWARD J. IMWINKELREID, University of California, Davis - School of Law
Email: EJIMWINKELRIED@ucdavis.edu

Federal Rule of Evidence 804(b)(3) codifies the hearsay exception for declarations against penal interest. The statute expressly provides that when the defense offers a third party's declaration exculpating the accused, the defense must present corroboration for the declaration. The statutory language does not purport to impose a similar requirement when the prosecution offers a third party's declaration inculpating the accused.

The differential treatment of prosecution and defense hearsay under Rule 804(b)(3) seems at odds with the adversary system's commitment to evenhandedness. Shortly after the enactment of the statute in 1975, defense counsel began urging the courts to extend the

corroboration requirement to prosecution hearsay. With few exceptions, the courts have heeded that urging and applied the requirement to prosecution hearsay as well as defense hearsay proffered under the statute. Defense counsel and commentators had argued that the disparity violated the Equal Protection Clause and that the lack of corroboration for prosecution hearsay ran afoul of the Confrontation Clause. Invoking the interpretive maxim of constitutional avoidance, most courts read a corroboration requirement for prosecution hearsay into the statute in order to moot the doubt about the constitutionality of the legislation under the latter Clause.

However, two developments necessitate a rethinking of this line of authority. To begin with, the Supreme Court's recent Sixth Amendment decisions, Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006), have undermined the argument that the lack of a corroboration requirement renders the statute unconstitutional under the Confrontation Clause. Under Crawford, if the prosecution hearsay is testimonial, the prosecution must demonstrate that the accused had a prior opportunity to question the declarant and that the declarant is unavailable at the time of trial. Under Davis, when the prosecution hearsay is nontestimonial, it is seemingly exempt from Confrontation Clause scrutiny. In either event, the existence of corroboration is irrelevant.

The second development is the emergence of textualism as the dominant modern approach to statutory interpretation. One of the conditions for invoking the constitutional avoidance maxim is that the alternative interpretation, mooting the constitutional doubt, be a plausible reading of the statutory language. Under the earlier legal process school of statutory construction, many courts felt free to distort and strain statutory text. However, out of respect for separation of powers, textualism places renewed emphasis on the importance of the statutory language formally approved by the legislature. From a textualist perspective, the judicial gloss to Rule 804(b)(3) is indefensible. The statutory language simply will not support the interpretation that there is a corroboration requirement for prosecution hearsay that otherwise qualifies under 804(b)(3). In some cases, moderate textualists will rest an interpretation on extrinsic legislative history material. However, in the case of the statutory corroboration requirement, those materials do not justify the extension of the requirement to prosecution hearsay.

The purpose of this article is two-fold. One is to critique the line of authority that has added the judicial gloss to the statute. That topic is relatively narrow and may soon be moot-in May, the Advisory Committee will take up a proposal to amend Rule 804(b)(3) to expressly incorporate a corroboration requirement for prosecution hearsay. The second purpose, though, is to explore the broader question of the impact of textualism on the constitutional avoidance maxim. The Supreme Court frequently invokes that maxim, and this article contends that textualism raises the bar for the plausible, alternative interpretation mooting the constitutional doubt.

"The Revolutionary American Jury: A Case Study of the 1778-1779 Philadelphia Treason Trials"

UC Davis Legal Studies Research Paper No. 134

CARLTON F. W. LARSON, University of California, Davis - School of Law
Email: clarson@ucdavis.edu

Between September 1778 and April 1779, twenty-three men were tried in Philadelphia for high treason against the state of Pennsylvania. These trials were aggressively prosecuted by the state in an atmosphere of widespread popular hostility to opponents of the American Revolution. Philadelphia juries, however, convicted only four of these men, a low conviction rate even in an age of widespread jury lenity; moreover, in three of these four cases, the

juries petitioned Pennsylvania's executive authority for clemency. Since it is unlikely that most of the defendants were factually innocent, these low conviction rates are a mystery that has never been adequately explained.

This Article offers such an explanation, and, in the process, uses these trials as a case study of jury service in late eighteenth-century America. We know surprisingly little about this important subject, as legal historians have focused almost exclusively on the more visible role of judges. Drawing on a wide variety of sources, this Article seeks to remedy this imbalance by providing the most thorough study yet written of a group of eighteenth-century American jurors.

The Article demonstrates, for the first time, how eighteenth-century American defense counsel creatively used peremptory challenges, deployed along religious, political, and economic lines, to create favorable juries, composed almost entirely of men who had previously served in treason cases. Through careful study of demographic records, this Article reconstructs the Philadelphia jury box and allows us to identify not only the social status of the jurors, but also the intricate network of connections linking the grand jurors, the trial jurors, and the defendants. It explains how Philadelphia jurors repeatedly balked at the death penalty, effectively nullifying Pennsylvania's capital law of treason. It also examines the subsequent attacks on jury independence triggered by these acquittals, ranging from strident newspaper criticism to a deadly militia attack on the home of James Wilson, signatory to the Declaration of Independence and defense counsel in many of the treason trials. By examining the actions of juries in a convulsive, violent civil war, the Article also illuminates the jury's historical role in balancing liberty and national security, an issue that continues to confront America today.

"The Evolution of Intellectual Infrastructure"

Washington Law Review, Vol. 83, p. 39, 2008
UC Davis Legal Studies Research Paper No. 137

PETER LEE, University of California, Davis School of Law
Email: ptrlee@ucdavis.edu

This Article explores the concept of intellectual infrastructure in intellectual property law. It makes three principal contributions. First, it builds upon prior work to elaborate an infrastructure-based theory of productivity that encompasses trademark, copyright, and patent law. It is well-recognized that intellectual property law promotes productivity through allowing exclusive rights on refined intellectual creations such as source-identifying marks, particularized expressions, and specific inventions. Somewhat less appreciated, these bodies of law also promote productivity through ensuring wide access to productivity-enabling intellectual infrastructure, such as generic words, ideas, and natural principles, by making these assets ineligible for exclusive rights. This Article argues that this distinction between refined applications, which are eligible for exclusive rights, and foundational infrastructure, which remains subject to liberal access, is critical to promoting commercial, creative, and inventive activity throughout intellectual property law.

Second, this Article offers a social account of the definition and evolution of intellectual infrastructure. Infrastructure is a dynamic entity, and intellectual creations subject to exclusive rights can evolve into infrastructure through widespread social appropriation. For example, trademarks can evolve into generic words, particularized expressions can develop into stock literary devices, and inventions can become standard platforms for technological development. This Article argues that trademark and copyright law employ social feedback mechanisms to relax exclusive rights on assets that become intellectual infrastructure and further contends that the absence of such mechanisms in patent law may inhibit

technological progress. Trademark and copyright doctrines such as genericide, the idea-expression dichotomy, and the scenes a faire doctrine dynamically relegate refined intellectual creations to the public domain as they achieve infrastructural status. Patent law lacks an analogous mechanism for liberalizing access to patented inventions that achieve this status, such as isolated, purified human embryonic stem cells and information technology standards. While patent law's relatively short term of protection mitigates the harshness of exclusive rights on foundational technologies, this one-size-fits-all approach ignores the reality that certain inventions can become infrastructure well before expiration of the patent term, particularly in rapidly advancing industries such as biotechnology and information technology.

Third, this Article draws on the Supreme Court's recent decision in eBay Inc. v. MercExchange, L.L.C. to propose a social feedback mechanism for liberalizing access to patented infrastructure. Specifically, it argues that courts in patent infringement cases should deny injunctions and allow liability rule protection for patented inventions used as infrastructure. Rather than simply relegating these foundational technologies to the public domain, this approach enhances access to patented infrastructure while maintaining incentives to invent.

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