

## Issue 2 - Law & Social Change Preface

I am pleased to present Volume 35 of the Law and Social Change issue of the *Golden Gate University Law Review*. The idea behind the Law and Social Change Journal is to bring forward topics that are of interest to people both in and out of the field of law. The topics are intended to stimulate discussion and debate regarding problems faced by everyone. This issue accomplishes this principle through a variety of avenues; each of which impacts various facets of society. The authors not only bring the problems to light, but also offer solutions or alternatives. The purpose of the Law and Social Change Journal is to encourage critical and lively debate of the status quo. The authors in Volume 35 have fulfilled this goal. It is our hope that once you have read this issue you will have a different perspective on some part of your society.

Analisa Pratt explores the history of appellate court rules forbidding the citation of unpublished opinions, the current debate among the circuits about whether to allow citation to unpublished opinions, and the implications of proposed Appellate Rule 32.1. She suggests that the proposed rule should incorporate a requirement that courts apply persuasive value to unpublished opinions when cited. Such a rule would increase uniformity among the circuits regarding citability and ensure that appellate courts provide all people their Fifth Amendment rights to due process of law.

Dominic Porrino criticizes the California court's decision in *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court*, in which the court concluded that the statutory inspection and disclosure duties of residential real estate brokers did not impose on the broker a duty of care toward a minor. He analyzes the statutory standard the court used to establish duty and, when considering the circumstances of the case, argues that it was read too strictly. As an alternative, he provides that the common law balancing test to establish duty in which the court could have analyzed the broker's duty to the minor child could have been incorporated into the language of the statute and that this approach would have ultimately come to a more equitable result.

Attorneys Scott Cole and Matthew Bainer address a hot debate in California wage and hour law. Under the California Labor Code, employees are provided meal and rest periods. Violations of the meal and rest period requirements result in employers owing their aggrieved employees an hour of pay at their regular hourly rate. The classification of this recovery as a wage or a penalty controls the applicable statute of limitations, making this a hot topic for plaintiffs and defendants engaged in litigation over meal and rest period violations. Mr. Cole's and Mr. Bainer's article challenges the analysis of the Department of Labor Standards Enforcement, which it provided as part of its efforts to promulgate new regulations defining the recovery provided by the California Labor Code Section 226.7 as a penalty. Through the tenets of statutory interpretation, Mr. Cole and Mr. Bainer, argue that the pay provided for under Labor Code Section 226.7 is in fact a wage.

Michael Rosen looks at the doctrine of qualified immunity as it applies to the constitutional tort of excessive force. Mr. Rosen's article addresses several criticisms of

the qualified immunity doctrine, namely that conduct cannot be "reasonably unreasonable," that qualified immunity is ill-suited for summary adjudication, and that the doctrine's requirement that law be clearly established to be actionable is anything but clear. Mr. Rosen defends the doctrine, through an examination of the key cases and commentary thereon, as a reasonably coherent and effective mechanism of sorting out worthy from unworthy litigation. Mr. Rosen also identifies some important shortcomings in the doctrine and suggests improvements that would increase the doctrine's functionality.

Professor Daniel Gordon reviews Justice Scalia's dissent and the Texas Court of Appeals' opinion in *Lawrence v. Texas* through the lens of Matti Bunzl's recent publication, *Symptoms of Modernity: Jews and Queers in Late Twentieth Century Vienna*, and urban religion sociologists to expose the symbolic meaning of Justice Scalia's and the Texas Appellate Court's negativism toward gays and lesbians. Professor Gordon argues that for Justice Scalia and the Texas legal system, gays and lesbians served as symptoms of modernity and modern urban growth. Professor Gordon closes his article looking towards a brighter tomorrow where he projects that globalization will help to end the animus directed at American gays and lesbians.

Zhichong Gu looks at the trial proceeding of a patent case, *MercExchange, L.L.C. v. eBay, Inc. et al.*, where the United States District Court, Eastern District of Virginia, ruled that a posting in an internet newsgroup did not qualify as a printed publication within the meaning of section 102(b) of the patent statutes. As this ruling was inconsistent with the trend of the Federal Circuit cases on the issue of printed publications, examining unique factors associated with internet newsgroups, Zhichong argues, however, that courts should consider a newsgroup posting a printed publication under the relevant patent statutes.

This issue would not have been possible without the tireless and professional work of its editor, Debra Dyson. Debra guided the authors of this issue from thesis to finished paper and we owe her a great deal of gratitude. Great editors do more than reshape an author's paper through technical editing; they teach an author the skills necessary to be an excellent writer for the rest of their careers. Debra Dyson is a great editor.

Michael Patrick Williams  
Managing Editor