

## PREFACE TO THE NINTH CIRCUIT SURVEY

I now present the Ninth Circuit Survey issue of the Golden Gate University Law Review Journal. The Golden Gate University Law Review is the only law review in the country to have a Ninth Circuit Survey that publishes case notes exploring recent decisions in the United States Court of Appeals for the Ninth Circuit – the Nation’s largest and most controversial jurisdiction, as well as one of the most revered. The writers who have contributed to the Ninth Circuit Survey have analyzed decisions of the Ninth Circuit and applied their unique perception of law to the issues presented in each case.

Reid Miller reviews the Ninth Circuit decision in *Newton v. Diamond*, in which the court concluded that the Beastie Boys’ use of a six-second sample of James Newton’s jazz flute composition was de minimis and therefore not actionable. In reaching this conclusion the court applied the average-audience test, which states that an unauthorized use of a composition will be considered so trivial as to avoid legal consequences if an average audience would not recognize that a copying has taken place. Miller argues that the Ninth Circuit should have adopted the intended-audience test employed by other circuits, because it more truly reflects the fundamental purpose of copyright law: the protection of the creator’s market.

Reuben Hart examines the Ninth Circuit’s decision in *Alperin v. Vatican Bank*. In this decision, a divided panel reversed in part a Northern District of California decision dismissing claims by Holocaust Survivors against the Vatican Bank on the basis of the political question doctrine. The Ninth Circuit held that the Holocaust Survivors’ property claims were not political questions, while the war objectives claims were nonjusticiable political questions. Hart argues that the Ninth Circuit should have included the Holocaust Survivors’ slave labor claims within the property claims, rather than within the war objectives claims.

Megan Kelly addresses the Ninth Circuit’s decision in *Jespersen v. Harrah’s Operating Co., Inc.* The court held that a mandatory makeup requirement for female beverage servers did not constitute sex discrimination under Title VII. The Ninth Circuit uses the unequal burdens test to evaluate appearance and grooming standards. The court evaluated the potential economic and time burdens imposed by the makeup policy, finding that requiring female beverage servers to wear

makeup imposed no heavier burden. Kelly argues that, based on the decision in *Jespersen*, the unequal burdens test provides insufficient protection for employees. Courts must look beyond tangible considerations of time and money, including considerations of gender stereotyping and job-relatedness in weighing the burdens imposed by appearance policies and grooming standards.

Finally, Roxana Smith explores the Ninth Circuit's decision in *Zhang v. Gonzales*, where the court held that an unaccompanied child of a forcibly sterilized parent who sought asylum is not automatically eligible for asylum. Smith argues that despite Zhang's inability to claim derivative asylum, the court should have considered more carefully Zhang's individual claims for asylum based on imputed political opinion, political opinion, and social group membership.

I hope that the readers of this volume of the Ninth Circuit Survey find the articles as engaging as I do. It has been a pleasure to work with and learn from these outstanding editors and student-writers. In particular, I extend special recognition to Ninth Circuit Survey Journal Editor Karen Minor.

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*Editor-in-Chief*