ARIZONA
LAW
REVIEW

VOLUME 38 | 1996 | NUMBER 4

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Articles

PIRATES, DRAGONS AND U.S. INTELLECTUAL PROPERTY RIGHTS IN CHINA: PROBLEMS AND PROSPECTS OF CHINESE ENFORCEMENT ..... *Glenn R. Butterton* 1081

This Article assesses the present crisis in Sino-American intellectual property relations in historical, legal and economic terms. The author observes that the United States, by negotiating several intellectual property agreements in the Deng Xiaoping era, has sought to develop a Western-style Rule of Law in China. While taking account of the still substantial inadequacies in Chinese enforcement of U.S. intellectual property rights, the author is dissatisfied with the view that U.S. efforts are doomed because they are based on a set of "Western" assumptions about law and culture that cannot be effectively adopted in the Chinese context. Alternatively, he suggests that other concepts, particularly economic ones, may be more useful in explaining non-enforcement and in designing new policies and practices which may ultimately enhance the protection of such rights in China.

THE FIRST AMENDMENT AND THE METAPHOR OF FREE TRADE ..... *Ronald W. Adelman* 1125

In the last few years, a body of legal scholarship has developed which argues that content-specific regulation of speech "markets" is permissible in the same way that regulation of economic markets is permissible. The best known advocates of this view are Professors Cass Sunstein and Owen Fiss. The implicit corollary to their argument is that the principle of governmental noninterference with speech rights, which governs most current First Amendment cases, is little more worthy of adherence than *Lochner* was at the beginning of the New Deal. This paper is an effort to explore and rebut that argument. It asserts that the "market" metaphor is nothing more than that, and does not justify regulation to "improve" the content of speech in society. It further asserts that the noninterference principle is as vital in the media environments of the present and future as it was when the First Amendment was drafted, and details the basis for that assertion. In the course of doing so, it addresses the consequences of deviation from that principle in the past.

TORTIOUS INTERFERENCE: HOW IT IS ENGULFING COMMERCIAL LAW, WHY THIS IS NOT ENTIRELY BAD, AND A PRUDENTIAL RESPONSE ..... *Mark P. Gergen* 1175

Professor Gergen demonstrates that claims of tortious interference with business relations often are used in what seems like ordinary commercial litigation to avoid limitations on rights or remedies under contract law or commercial law. He defends this surprising use of the tort by proposing a new history for it, arguing the tort is rooted in Holmes' and Pollock's theory of prima facie tort. Under this view, the interference tort is doing precisely what it should be doing by opening the door to claims regarding arguably improper commercial behavior that fall through cracks in other bodies of law. However, he advises that judges should exercise greater prudence in applying the interference tort by taking the issue of impropriety away from the jury and deciding it with due regard for the primary body of law governing the case.

BEYOND THE 100:1 RATIO: TOWARDS A RATIONAL COCAINE SENTENCING POLICY ..... *William Spade, Jr.* 1233

Is there a logical basis for the 100:1 crack/powder cocaine sentencing ratio, by which an offender must distribute one hundred times as much powder cocaine as a similar crack offender to receive the same base sentence? William Spade argues that, although crack is more addictive and more easily marketable than powder cocaine, the 100:1 ratio unjustly overstates these differences and is politically untenable, given that most of the penological burden falls on African-American offenders. He concludes that a 20:1 ratio, which conservatively estimates the difference in amounts that mid-level crack and powder dealers distribute, as well as crack's greater addictiveness, would adequately account for the real differences between crack and powder without unfairly punishing crack offenders.

SACRED STANDARDS: HONORING THE ESTABLISHMENT CLAUSE IN PROTECING NATIVE AMERICAN SACRED SITES ..... *Anastasia P. Winslow* 1291

This Article reevaluates whether laws protecting Native American sacred sites are violative of the Establishment Clause. Both traditional rules and emerging theories of a modified Establishment Clause standard are addressed. The author concludes that modified Establishment Clause rules are inappropriate for analyzing the constitutionality of sacred site protection. Instead, the author advocates application of traditional Establishment Clause rules, which if applied consistently, should pose no barrier in protecting Native American sacred sites.

Notes

DO THE STATES HAVE AN ACE IN THE HOLE OR SHOULD THE INDIANS CALL THEIR BLUFF? TRIBES CAUGHT IN THE POWER STRUGGLE BETWEEN THE FEDERAL GOVERNMENT AND THE STATES ..... *Jason Kalish* 1345

Although they are considered sovereign states, Indian tribes have, throughout American history, been under the broad plenary power of Congress. Unhappy with this federal control, the states have consistently tried to enforce their laws on the reservations. This Note examines the states' attempt to regulate and forbid casinos on Indian land, and discusses the struggle of the tribes to exist as true sovereign nations.

PROHIBITING CASINOS FROM ADVERTISING: THE IRRATIONAL APPLICATION OF 18 U.S.C. § 1304 ..... *Richard Shawn Oliphant* 1373

Many gaming establishments are allowed to advertise their product freely to prospective customers just as any other owner of a product may. However, privately owned casinos are not permitted to broadcast information about their gambling establishments because of laws which were formulated in the early 1800s. This Note traces the history of those laws and states why they should not apply to privately owned casinos. The Note then analyzes modern cases addressing the constitutionality of the speech prohibitions, including two cases currently being litigated, *Valley Broadcasting Co. v. United States* and *Greater New Orleans Broadcasting Ass'n v. United States.*