

1st Yale – Humboldt Consumer Law Lecture

June 6, 2014, Humboldt University Berlin, Senatssaal

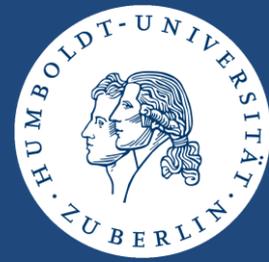
- 2.00 p.m. Welcome by the Vice President for Research of Humboldt University, Professor Dr. *Peter A. Frensch* and Professor Dr. *Susanne Augenhofer*
- 2.10 p.m. Welcome by the State Secretary for Consumer Protection at the Federal Ministry of Justice and Consumer Protection, Mr. *Gerd Billen*
- 2.20 p.m. **The Rationality Assumption in Consumer Law**
Professor *Alan Schwartz*, Sterling Professor of Law, Yale Law School
- 3.05 p.m. discussion
- 3.30 p.m. coffee break
- 4.00 p.m. **The Consumer Financial Protection Bureau and the Iron Law of Financial Regulation**
Professor *Roberta Romano*, Sterling Professor of Law and Director at the Center for the Study of Corporate Law, Yale Law School
- 4.45 p.m. discussion
- 5.15 p.m. break
- 5.30 p.m. **Sharing Ex Ante and Sharing Ex Post**
Professor *Daniel Markovits*, Guido Calabresi Professor of Law, Yale Law School
- 6.15 p.m. discussion
- 7.00 p.m. closing remarks

The event will be followed by a reception.

Prof. Dr. Susanne Augenhofer, LL.M. (Yale)

Lehrstuhl für Bürgerliches Recht und Europäisches Privatrecht, Rechtsvergleichung und Marktregulierung durch Verbraucher- und Wettbewerbsrecht

The event is free of charge. For registration please send an E-Mail to yhcll@rewi.hu-berlin.de.



Sharing Ex Ante and Sharing Ex Post

Prof. Daniel Markovits

The Restatement (Second) of Contracts observes, among other banalities of contract law, that expectation damages constitute the preferred remedy for breach of contract. As every first year law student learns, this remedy at least permits and perhaps encourages “efficient breach” of contract. By contrast, restitutionary disgorgement of the breacher’s gain constitutes a common remedy for the breach of a fiduciary obligation. The law thus rejects a practice of efficient breach of fiduciary duties. Perhaps slightly less familiarly, contract law establishes the mandatory duty of good faith in performance as the earnest of contract obligation. By contrast, the fiduciary’s central duties involve not contractual good faith, but rather loyalty and care.

These two interconnected differences place contract partners and fiduciaries in distinct deliberative postures and constitute contract and fiduciary relations according to distinct models of sharing. Contract-partners share ex ante; fiduciaries share ex post.

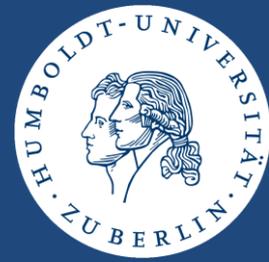
These different styles of sharing, in turn, entail that fiduciary relations and the obligations that they involve cannot inhabit a contractual form. The current vogue of approaching fiduciary law on the model of contract may aid efforts to reform the substantive rules that govern fiduciary obligations in order to make them better serve the interests of beneficiaries. But the contract model sows only confusion concerning the nature of fiduciary relations and the formal juridical structure of fiduciary law. Contract sharing and fiduciary sharing proceed qualitatively differently; and contract and fiduciary relations display distinct structures. Fiduciary law thus cannot be understood on the contractarian model.

Understanding fiduciary law requires a model besides contract. This lecture will draw a contrast between contract and fiduciary relations and, out of that contrast, introduce a new model of fiduciary law.

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The Consumer Financial Protection Bureau and the Iron Law of Financial Regulation

Prof. Roberta Romano

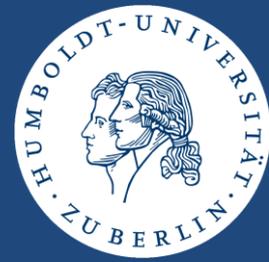
Foundational financial legislation in the United States is typically adopted in the midst or aftermath of financial crises, when an informed understanding of the causes of the crisis is quite often not yet available. One common response is to create new regulatory agencies, reshuffling regulatory boxes, on a view that the pre-crisis regulatory architecture contributed to the crisis, even though evidence to that effect is lacking. Indeed, a crisis opens a window in which policy entrepreneurs repackage their preexisting preferred policies as "solutions" to the problem at hand, however unrelated they may be to the crisis' cause, and often successfully maneuver for the adoption of policies that, if subjected to conventional legislative deliberation, would not be enacted. Yet it is a daunting task to reverse legislation, given the organization of government, no less to shut down an agency, even when a compelling case can be made that it is not fulfilling or has outlived its purpose, or that the intended purpose was a policy mistake.

The creation of the U.S. Consumer Financial Products Bureau is paradigmatic of crisis-driven legislation. A mechanism for ensuring that ostensible solutions enacted in crisis-driven legislation do not result in far greater problems than those they are intended to redress is (1) to sunset legislation, such that all provisions, including new agencies, must be reviewed and reenacted after a fixed time period, and (2) to encourage, where feasible, small scale experimentation and flexibility in implementation. While it would have been most desirable had Congress adopted the former approach to the CFPB, the latter approach has been applied by the CFPB in fashioning regulation although the experimentation has not been of the "gold standard" variety. The agency should expand this approach by adopting more rigorous experimentally-based rulemaking throughout its regulatory domain, and by undertaking an adaptive rulemaking process, which is informed by outcomes and experimental evidence of how rules are functioning. Further, Congress should enact a sunset regulatory review mechanism which would require a comprehensive periodic reevaluation of regulatory agencies and their rulemaking, to facilitate efficient administration of government.

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The Rationality Assumption in Consumer Law

Prof. Alan Schwartz

Traditional consumer law responds with various forms of disclosure to market imperfections that are the consequence of consumers being imperfectly informed or unsophisticated. This regulation assumes that consumers can rationally act on the information that it is disclosure's goal to produce. Recent experimental results in psychology and behavioral economics question this rationality premise. The numerous reasoning defects consumers exhibit in the experiments would vitiate disclosure solutions if those defects also presented in markets. This Essay argues that regulators should retain the rationality premise. The basis for this claim is that the contracting choices of rational and irrational consumers often are observationally equivalent: both consumer types can prefer the same contracts. Hence, the regulator cannot infer from the existence of a questioned contract that reasoning errors produced it. Rather, the regulator needs a theory that would permit him to know when laboratory results are likely to translate into market results: that is, when the contracts he sees are the product of bias rather than rational choice. There is no general psychological theory so cognitive based regulatory interventions seldom are well grounded. The Lecture then makes two further claims. First, disclosure regulation can retain efficacy even when some consumers make reasoning errors. Hence, abandoning disclosure strategies is premature. Second, when the social science of the issue is so unclear regulators should default to a rationality premise because it is autonomy preserving.

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