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"Undue Burdens on Voter Participation (Is the Right to Vote Like the Right to an Abortion?)"

UC Davis Legal Studies Research Paper No. 128
Hastings Constitutional Law Quarterly, Forthcoming

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During October Term 2007, the Supreme Court will hear its first case in more than thirty years in which the plaintiffs maintain that the state has unconstitutionally hindered eligible voters' access to the polls. The case, Crawford v. Marion County Election Board, presents a facial challenge to Indiana's recently enacted photo ID requirement for voting. Relying in part on the Court's recent

abortion jurisprudence, the U.S. Solicitor General has filed an amicus brief arguing that the Court should reject the Crawford plaintiffs' facial claim while inviting future as-applied challenges by individual voters or precisely defined classes of voters for whom the ID requirement may operate as a severe impediment to voting. This essay argues the SG's abortion/as-applied model for voter participation claims is a Siren's song: enormously appealing and, if followed, sure to lead the federal courts to a place they will no doubt regret: mired in a bog of politically fraught questions about the details of the voting process, and bereft of manageable rules for decision. The best hope for avoiding the bog, I argue, is to treat the right to vote as a right whose doctrinal content derives from the citizenry's collective interest in being governed by representatives who are accountable to the people, pursuant to Article I and the Seventeenth Amendment. But this will require abandoning the nominal status of the right to vote as right that is merely or primarily individual and personal in nature.

"Client Choice, Contractual Restraints, and the Market for Legal Services"

Hofstra Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 125

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The freedom of clients to discharge their lawyers at any time, with or without cause, greatly facilitates competition among lawyers. An era of lawyer mobility that has destabilized law firms and rewarded lawyers able to command the loyalty of their clients rests on the simple and largely unquestioned premise that clients should be free to discharge their lawyers, with or without cause and even, under most circumstances, in contravention of contract. This Article explores the norm of client choice and its impact on the market for legal services. It discusses the historical foundations of the norm, the policy reasons for and against the freedom accorded to clients to change their lawyers at any time, and ways in which the exercise of client choice is limited by application of other principles of law and ethics. For a comparative perspective, it also looks to standards of medical ethics to see the relative roles of consumer choice over service providers in the two professions.

"'This is Like Deja Vu All Over Again': The Third, Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases"

UC Davis Legal Studies Research Paper No. 126

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It is a commonplace observation that expert testimony is offered extensively at modern trials. This generalization holds true for criminal as well as civil trials. However, crime laboratory experts rarely testify at criminal trials. Crime laboratories are overburdened; and if the courts required such experts to personally appear, their testimony would place an additional strain on the laboratories' resources. Consequently, at trial, the prosecutor ordinarily uses certificates or

the laboratory supervisor's testimony to lay the foundation for the expert's report. The courts admit the report as a business entry or an official record.

Over the years the defense bar has mounted three waves of attack on the introduction of crime laboratory reports. In the first wave, defense counsel argued that the reliability of these reports is so suspect that they do not fall within the business entry or official record exception to the hearsay rule. The vast majority of state and federal courts rejected that attack. Next, after the enactment of the Federal Rules of Evidence, counsel contended that the admission of the report ran afoul of restrictions set out in Rule 803(8), codifying the official record doctrine. Again, most courts brushed aside the attack. During both waves, the courts relied primarily on arguments based on the assumption that these reports are substantively accurate and trustworthy.

In 2004, the United States Supreme Court handed down its decision in Crawford v. Washington, 541 U.S. 36 (2004). The Court had previously held that the Confrontation Clause permitted the introduction of prosecution hearsay so long as the hearsay was demonstrably reliable; the prosecution had to demonstrate that the hearsay statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. In Crawford, the Court abandoned the reliability test. Writing for the majority, Justice Scalia announced that the Confrontation Clause forbids the prosecution from introducing testimonial hearsay unless the accused had a prior opportunity to question the declarant and the declarant is unavailable at the time of trial.

Given Crawford, it was predictable that the defense bar would renew its attack on the admissibility of police laboratory reports. The argument runs that since the laboratory analyst realizes that his or her report will be used in plea bargaining or at trial, the analyst is in effect providing testimony against the accused. As in the case of the earlier common-law and statutory attacks, the majority of the most recent decisions reject the defense attack. However, in doing so, for the most part the courts have merely resurrected the prior arguments developed to meet the common-law and statutory attacks. In short, although Crawford makes it clear that reliability is no longer the litmus test, the lower courts still rely heavily on arguments premised on the reliability of crime laboratory reports.

The enclosed article contends that recycling the prior arguments is an inadequate response to the new, constitutional attack on the introduction of police laboratory reports. The thesis of the article is that a finding in a crime laboratory report should be deemed testimonial at least when the expert relied on an interpretive standard with a significant element of subjectivity. In that situation, the defense counsel could conduct meaningful, valuable cross-examination of the analyst. Neither the submission of a certificate nor the appearance by the analyst's supervisor satisfies either the defense need to cross-examine the analyst or the dictates of Crawford.

"Opening the Floodgates: Why America Needs to Rethink its Borders and Immigration Laws"

UC Davis Legal Studies Research Paper No. 127

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This is an abstract for a book published by NYU Press in October 2007. Seeking to re-imagine

the meaning and significance of the international border, Opening the Floodgates makes a case for eliminating the border as a legal construct that impedes the movement of people into this country.

Open migration policies deserve fuller analysis, particularly on the eve of a presidential election. In this book, Kevin R. Johnson offers an alternative vision of how U.S. borders might be reconfigured, grounded in moral, economic, and policy arguments for open borders. Importantly, liberalizing migration through an open borders policy would recognize that the enforcement of closed borders cannot stifle the strong, perhaps irresistible, economic, social, and political pressures that fuel international migration.

Controversially, the book suggests that open borders are entirely consistent with efforts to prevent terrorism that have dominated immigration enforcement since the events of September 11, 2001. More liberal migration, he suggests, would allow for full attention to be paid to the true dangers to public safety and national security.
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