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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES UC DAVIS SCHOOL OF LAW

- **"Business and Human Rights Litigation in U.S. Courts Before and after Kiobel"** 
UC Davis Legal Studies Research Paper No. 440

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This Chapter examines the landscape for business and human rights cases in U.S. courts under the Alien Tort Statute (ATS) both before and after the U.S. Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.* It concludes that such cases today face a series of challenges, including personal jurisdiction, the question of corporate liability, the standard for aiding and abetting liability, and satisfying *Kiobel's* "touch and concern" test.

"Employment Arbitration after the Revolution"

DePaul Law Review, Vol. 65, 2016 Forthcoming
UC Davis Legal Studies Research Paper No. 443

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This invited contribution to the DePaul Law Review's Clifford Symposium on Tort Law and Social Policy examines 5,883 cases initiated by employees in the American Arbitration Association between July 1, 2009 and December 31, 2013. Its goal is to shed light on the state of employment arbitration after the U.S. Supreme Court's watershed opinions in *Rent-A-Center West, Inc. v. Jackson* and *AT&T Mobility LLC v. Concepcion*.

It finds that employees have filed fewer cases since *Concepcion*. It also determines that employees "win" — defined as recovering an award of \$1 or more — 18% of matters. Finally, it performs logit regressions to investigate the impact of several variables on case outcomes. It concludes that employees are less likely to be victorious when they face a "high-level" or "super" repeat playing employer. Conversely, fact that a case involves a "repeat pairing" — an employer that has appeared at least once before the same arbitrator — does not influence win rates.

"The Ambivalence in the American Law Governing the Admissibility of Uncharged Misconduct Evidence"

Proceedings of the Fifth International Conference on Evidence Law and Forensic Science, Forthcoming
UC Davis Legal Studies Research Paper No. 438

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The English common-law courts gave birth to the character evidence prohibition and helped spread the prohibition throughout the common-law world. Under the prohibition, a prosecutor may not introduce testimony about an accused's uncharged misconduct on the theory that the uncharged misconduct shows the accused's propensity to commit crimes and that in turn, the propensity increases the probability that the accused committed the charged offense. According to the orthodox version of the prohibition, the government may introduce the testimony only if the prosecutor can demonstrate that the evidence is logically relevant on a non-character theory, that is, a theory that does not entail an assumption about the accused's personal, subjective bad character.

Today, though, in much of the common-law world, by virtue of case law and legislation the prohibition is no longer in effect as a rigid, categorical rule. Rather, the courts may admit uncharged misconduct as character evidence when, in their view, the character trait has special relevance or there is striking similarity between the charged and uncharged offenses. In contrast, in the United States the prohibition survives largely intact as a categorical rule. Indeed, the general prohibition is codified in Federal Rule of Evidence 404(b); and the vast majority of states have a statute or court rule modeled after 404(b). Yet, today there is an ambivalence in the American law governing the admissibility of uncharged misconduct:

In federal practice and three handfuls of states, the prohibition has been selectively abolished. For example, Federal Rules 413-14 abolish the prohibition in prosecutions for sexual assault and child molestation. Congress enacted the rules over the vocal opposition of both the Judicial Conference and the A.B.A. and despite empirical data indicating that recidivism rates for those crimes are lower than the rates for many other offenses such as property crimes.

At the same time, in other types of prosecutions there is a marked trend to toughen the standards for admitting uncharged misconduct evidence. Substantively, a number of American jurisdictions have tightened the requirements for both the plan and "res gestae" theories for introducing uncharged misconduct. Procedurally, several jurisdictions have imposed new pretrial notice requirements, demanded that the prosecution explicitly articulate a complete, non-character theory of relevance on the record, and forbidden trial judges from giving "shotgun" jury instructions which do not specify the particular non-character theory that the prosecution is relying on. The distinction between character and non-character theories can be a thin line, and all these steps have been taken to ensure that any uncharged misconduct admitted possesses genuine non-character relevance and is used for only that purpose during deliberations.

Some find the current ambivalence of American law dissatisfying and urge that American jurisdictions resolve the tension by following the example of other common-law jurisdictions that have abandoned a general, rigid prohibition. However, doing so would be at best premature. There has yet to be a comprehensive investigation of the trial-level impact of Rules 413-14. Moreover, the most recent psychological research calls into question the validity of inferring a person's character or disposition from a single act or a few instances of conduct—which is

what Rules 413-14 authorize a jury to do. Finally, American courts should be especially solicitous of the policy protecting accused from being punished for their bad character. In the United States, that policy has special importance; the Supreme Court has held that the Eighth Amendment ban on cruel and unusual punishment forbids status offenses. If an American jury succumbed to the temptation to punish an accused for his or her past – notwithstanding a reasonable doubt about their guilt of the charged offense – the conviction would impinge on a policy with constitutional underpinning.

"The Myth of Arrestee DNA Expungement"

University of Pennsylvania Law Review Online, 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 447

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Building on a trend that began with collecting DNA from convicted offenders, most states and the federal government now collect DNA from felony arrestees. The national DNA database now contains information on more than 2 million arrestees. While some of these arrests will result in guilty pleas or convictions, a substantial number will not. In fact, in many cases arrests lead to dismissed criminal charges or no charges at all. Should these arrestees forfeit their genetic information nevertheless? Every jurisdiction that collects arrestee DNA permits eligible arrestees to seek the expungement of their genetic profiles. While formal expungement is the law, it turns out that arrestee DNA expungement is largely a myth. In most states that collect arrestee DNA, the initial decision by the police to arrest that person turns out in most cases to lead to the permanent collection and retention of the arrestee's genetic information, regardless of whether charges are dismissed or never brought at all. This essay is the first to provide preliminary data on actual arrestee DNA expungement, and argues for quick, efficient, and state-initiated expungement procedures.

"Race-Based Law Enforcement: The Racially Disparate Impacts of Crimmigration Law"

Case Western Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 437

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This Essay was prepared for the Case Western Law Review's symposium on the 20th anniversary of the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). Racially-charged encounters with the police regularly make the national news. Local law enforcement officers also have at various times victimized immigrants of color. For example, New York City Department (NYPD) officers in 1999 killed Amadou Diallo, an unarmed immigrant from Guinea, in a hail of gunfire; two years earlier, officers had tortured Haitian immigrant Abner Louima at a NYPD police station. Both victims were Black, which no doubt contributed to the violence. In less spectacular fashion, police on the beat by many accounts regularly engage in racial profiling in traffic stops of U.S. citizens and noncitizens of color.

Removals of "criminal aliens" have been the cornerstone of the Obama administration's immigration enforcement strategy. Well-publicized increases in the number of removals of immigrants also have been the centerpiece of President Obama's political efforts to persuade Congress to pass a comprehensive immigration reform package. The hope behind the aggressive enforcement strategy has been to convince Congress that this is the time to enact comprehensive immigration reform.

In the last few years, a body of what has been denominated "crimmigration" scholarship has emerged that critically examines the growing confluence of the criminal justice system and the immigration removal machinery in the United States. That body of work tends to direct attention to the unfairness to immigrants, as well as their families, of the increasing criminalization of immigration law and its enforcement. This Essay agrees with the general thrust of the crimmigration criticism, but contends that it does not go far enough. Namely, the emerging scholarship in this genre fails to critically assess the dominant role that race plays in modern law enforcement and how its racial impacts are exacerbated by the operation of a federal immigration removal process that consciously targets "criminal aliens."

Part I of this Essay considers parallel developments in the law: (1) the Supreme Court's implicit sanctioning of race-conscious law enforcement in the United States, with the centerpiece of this symposium, *Whren v. United States*, the most well-known example; and (2) the trend over at least the last twenty years toward increased cooperation between state and local law enforcement agencies and federal immigration authorities. Part II specifically demonstrates how criminal prosecutions influenced by police reliance on race necessarily lead to the racially disparate removal rates experienced in the modern United States. Part III discusses how some state and local governments have pushed back on cooperation with federal immigration authorities, with effective community police practices being an important policy rationale invoked by local law enforcement for that resistance. Part III of this Essay further contends that more attention should be paid to the racially disparate impacts of linking immigration removals to the outcomes of a racially-tainted criminal justice system. It further sketches some modest reforms to the U.S. immigration laws that might tend to blunt, rather than magnify, some of these racial impacts.

"Corporate Speech and the Rights of Others"

30 *Constitutional Commentary* 335 (2015)

UC Davis Legal Studies Research Paper No. 442

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The Supreme Court is often erroneously criticized for giving business corporations the constitutional rights of human persons. In fact, constitutional decisions protecting corporations tend to be based not on the rights of corporate "persons," but on the rights of other persons: human individuals such as shareholders or persons who listen to the content of corporate speech. Shareholders' property and privacy interests have been invoked to protect corporations from regulatory takings and from unreasonable searches, for example.

In the First Amendment context, *Citizens United* and other opinions have invoked the rights of others in a different way, invalidating corporate speech regulations on the ground that they infringe upon the public's right to hear corporate messages. These "rights of others," however, can conflict with the rights of other others: corporate shareholders who might not want corporate assets used to express such messages.

The Court has dismissed this concern with the inaccurate assertion that shareholders control a corporation's messages through "corporate democracy." This contention, and not corporate constitutional "personhood," is the true fallacy of corporate speech jurisprudence. Corporate governance is not democratic. In the interests of money-making efficiency, the law concentrates power in professional managers. As intended, this arrangement is likely to benefit shareholders financially. But it does not give them meaningful input into corporate decision-making, leaving them open to the misuse of corporate property. Thus the "rights of others" may justify the regulation of corporate speech.

"Remembrance of Early Days: Anchors for My Transactional Teaching"

UC Davis Bus. L.J. 107, 2014

UC Davis Legal Studies Research Paper No. 444

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This essay discusses teaching transactional skills as part of traditional non-clinical, substantive law classes. It offers a very personal perspective gleaned from the author's 40 years of combined experience as a San Francisco transactional law practitioner and law professor. Of necessity, due to length constraints, the author offers only a few selected opinions about what she thinks works in teaching transactional skills in substantive law classes. Despite this limited focus, the author weighs in, at least a bit, on a myriad of subjects, including the current push for law graduates to be more "practice ready," the importance of skin-in-the-game type mentoring both pre- and post-law school graduation, the different challenges in training transactional lawyers versus litigators, the merits of using multifaceted large drafting projects versus more discrete problems, course advising needs, the teacher as recruiter, balancing desires for breath versus depth of exposure, and using what the author calls factual "side-bars" as accommodation of traditional casebooks to the transactional perspective. The author hopes these offerings of her matured discernment from longevity in the field of transactional law skills training, in the various iterations she notes in the essay, provide some helpful insights to current teachers of transactional law skills, both clinical and non-clinical.

"A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime"

Georgetown Immigration Law Journal, Vol. 29, 2015

UC Davis Legal Studies Research Paper No. 439

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This Article examines the legal concept of "substantial physical or mental abuse" suffered by immigrant victims of crime in the workplace, particularly as it relates to the ability to qualify for U non-immigrant status (commonly referred to as a "U visa"). Enacted for the dual purposes of strengthening law enforcement capacity and providing humanitarian relief to victims of crime, the U visa allows non-citizen victims of crime who are helpful in a crime's detection, investigation, or prosecution to remain in the United States, obtain employment authorization, and attain lawful permanent residency. To qualify for the visa, victims must demonstrate that they have suffered "substantial physical or mental abuse" as a result of the criminal activity.

Although legal scholars, medical and mental health experts, and government agencies have more robustly explored the concept of "substantial physical or mental abuse" in the context of domestic violence and sexual assault against immigrant women, there has been no focused exploration of this concept in relation to abuse of immigrant

workers. In recent years, labor and civil rights enforcement agencies have increasingly certified U visa petitions in cases involving victims of workplace crime, but greater clarity is needed on the concept of substantial abuse in this context.

This Article provides for the first time a comprehensive framework to evaluate abuse suffered by victims of workplace crime in the U visa context. Based on a multi-disciplinary analysis, the Article argues that adjudicators have erroneously conflated the U visa's "substantial physical or mental abuse" standard with the standard of "extreme cruelty" developed in the context of immigration remedies for victims of domestic violence. The Article also argues that U visa adjudicators and advocates must account for the specific dynamics of abuse experienced by immigrant victims of workplace-based criminal activity, which are distinct from abuse displayed in more familiar cases of domestic violence, and examines particular forms of harm and vulnerabilities experienced by victims of workplace crime. The Article finally provides examples to assist adjudicators, policy-makers, and practitioners in the identification and assessment of workplace based U visa cases envisioned by the U visa statute and regulations.

"The Implications of Alabama Department of Revenue v. CSX Transportation Inc. and Direct Marketing Association v. Brohl"

State Tax Notes, Vol. 76, No. 6, 2015

UC Berkeley Public Law Research Paper No. 2616561

UC Davis Legal Studies Research Paper No. 441

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This essay analyzes the implications of two recent Supreme Court cases on state and local taxation: Alabama Department of Revenue v. CSX Transportation Inc. and Direct Marketing Association v. Brohl. We argue that both of these decisions not only fail to resolve major issues in state and local taxation, but actually unsettle these issues.

"The Last Preference: Refugees and the 1965 Immigration Act"

Forthcoming in The Immigration and Nationality Act of 1965: Legislating a New America (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

UC Davis Legal Studies Research Paper No. 446

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The 1965 Immigration Act is remembered — and celebrated — for having replaced an immigration system driven by national origins with a preference system privileging family ties and occupational skills. But while the rest of the 1965 Act, in President Johnson's words, welcomed immigrants "because of what they are, and not because of the land from which they sprung," the last of its preferences, given to refugees, emphatically did not. Not only did the 1965 Act fail to embrace the 1951 U.N. Refugee Convention's protection for refugees persecuted because of their nationality, the Act *itself* discriminated on the basis of refugees' nationality. To qualify, those persecuted had to hail from a "Communist or Communist-dominated country" or "the general area of the Middle East." A separate provision allowed for entry of those "uprooted by catastrophic natural calamity as defined by the President."

By tying refugees' status to "the land from which they sprung," to America's anti-Communist foreign policy and national security interests, and, importantly, to the discretion of the President, the 1965 Act's refugee provision suggests a counter-narrative to descriptions of the Act as part the domestic anti-discrimination agenda of the mid-1960s, or as a reassertion of Congressional control over immigration. The 1965 Act turned refugee policy into another weapon of the Cold War, to be deployed largely as the President chose. It would be another fifteen years before Congress again attempted (or at least purported) to do for refugees what the 1965 Act did for most other immigrants: end national origin discrimination and formalize the criteria and procedures governing admission to the United States.

"Chae Chan Ping v. United States: Immigration as Property"

Oklahoma Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 445

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In this symposium Essay, I explore an overlooked aspect of Chae Chan Ping v. United States: Ping's argument that his exclusion from the United States under the Chinese Exclusion Act violated his property right to re-enter the United States. In particular, Ping contended that the government-issued certificate that he acquired prior to leaving the United States gave him the right to return to the United States. Such right was based on "title or right to be in [the United States] when the writ issued." Importantly, Ping claimed that this right could not be "taken away by mere legislation" because it was "a valuable right like an estate in lands." Similar to his other claims, the

Supreme Court rejected this property argument. The Court's treatment of his property claim is understandable because Ping's contention may perhaps be described as "new property," which did not become legible to courts until several decades later.

In reconsidering Ping's property arguments, I aim to achieve two goals. First, as a thought piece, this Essay aims to show what the plenary power doctrine might have looked like had Ping succeeded in convincing the Court that his right to return constituted a property right. Second, this Essay highlights the intersections between property law and immigration law and the ways in which individual property rights might serve as limiting principles to the Supreme Court's formulation of the nation's absolute right to exclude non-citizens from the United States.

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