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

- **"Legal Transplants in the Law of the Deal: M&A Agreements in India"**   
*Research Handbook on Mergers and Acquisitions, Elgar Publishing, S. Davidoff Solomon & C. Hill, eds., Forthcoming UC Davis Legal Studies Research Paper No. 469*

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This chapter reviews the transformation of merger and acquisition (M&A) transactions in India. Due to globalization and economic liberalization, India has experienced a significant wave of cross-border M&A deals. The explosion of cross-border M&A transactions has affected the makeup of the legal profession in India, as well as the norms and

practices of transactional lawyers in India. The practice of Indian corporate law firms, including the way Indian lawyers document M&A transactions, now often resembles those of US firms in the negotiation and drafting of acquisition agreements. This chapter identifies the salient features of Indian M&A deal-making and contracting that have become increasingly influenced by US-style M&A transactions. This chapter uses representation and warranties provisions, indemnification provisions and earn-out arrangements to illustrate transplants in the law of the deal.

### "The Democratic First Amendment"

*Northwestern University Law Review, Forthcoming*  
*UC Davis Legal Studies Research Paper No. 474*

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Over the past several decades, the Supreme Court has repeatedly taken the position that the primary – albeit not necessarily the only – reason why the First Amendment protects freedom of speech is to advance democratic self-governance. Moreover, there is also a broad consensus among First Amendment scholars supporting this view. In this essay, I will argue that this position, while surely correct insofar as it goes, is also radically incomplete.

The Court's ruminations about the purpose of the Free Speech Clause fail to answer three overlapping questions. First, what is the relevance of the fact the Free Speech Clause does not stand alone, but rather is accompanied by other, equally important provisions? Second, how exactly does the Free Speech Clause, in combination with those other provisions, advance self-governance? And third, what role does the First Amendment as a whole envision for citizens in a democracy? These are important questions, requiring careful consideration that heretofore they have not received.

The problem starts with the Supreme Court. One noteworthy feature of the Supreme Court's modern First Amendment jurisprudence is that it is not truly a First Amendment jurisprudence at all; rather, it is series of decisions interpreting the Religions Clauses and the Free Speech Clause. The rest of the First Amendment – the Press, Assembly, and Petition Clauses – might as well not exist. The Press Clause has been entirely subsumed by the Free Speech Clause. The Assembly Clause has not been cited in over thirty years. And the Petition Clause's relevance has been limited to the peripheral issue of access to courts. Even the nontextual right of association, which has not been entirely abandoned, has been made subservient to free speech, even though historically the right clearly derived from the Assembly Clause.

The topic of this essay, then, is those five rights – speech, press, association, assembly, and petition – what I call the Democratic First Amendment. I will argue that the Democratic First Amendment, in toto, is best read to adopt a particular vision of citizenship, one associated with the Democratic Republican philosophy of Thomas Jefferson and his allies. Citizens, on this view, are meant to be active in a myriad ways, to engage with and even challenge their elected representatives, and to develop and communicate their values and opinions jointly, through assemblies and associations. It stands in sharp contrast to the passive form of citizenship, limited to biennial voting, favored by Jefferson's Federalist adversaries. Each of the rights of the Democratic First Amendment advance this vision of citizenship, both individually, and in combination. The First Amendment, in short, is not just democratic, it is also kaleidoscopic.

### "Robots, the Internet of Things, and the Future of Trade"

*UC Davis Legal Studies Research Paper No. 465*

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Will robots and the Internet of Things falter at national borders?

If the Internet of Things offers eyes and ears and robots add arms and legs, both these revolutionary technologies often depend on brains and memories located far away. This is the nature of the remote sensor/server architecture utilized by both the Internet of Things and cloud robotics. Thus, both the Internet of Things and robots rely on the free flow of information across national borders. But this global free flow of data is increasingly at risk to claims that such flows jeopardize privacy and security. Increasingly, national laws restrict the transfer of information outside the home country. A Dropcam, a Fitbit, a Nest thermometer and even a Google car all depend on the flow of data to the home country of their creators. The Internet of Things and cloud robotics may thus find themselves foiled by national borders, victim to a new privacy-based non-tariff barrier to trade.

Can international trade law, which after all seeks to liberalize trade in both goods and services, help stave off attempts to erect border barriers to this new type of trade? The smart objects of the 21st century consist of both goods and information services, and thus are subject to multiple means of government protectionism, but also trade liberalization. This paper is the first effort to locate and analyze the Internet of Things and modern robotics within the international trade framework.

### "Fred Korematsu: All American Hero"

Fred Korematsu: *All American Hero*, Carolina Academic Press, 2011  
UC Davis Legal Studies Research Paper No. 471

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Can the life of a Japanese American interned in World War II be relevant to a young girl today? This graphic novel tells the story of Fred Korematsu, a young man who was imprisoned by the United States along with a hundred and twenty thousand other Japanese Americans, young and old, in the wake of the attack on Pearl Harbor. The text of the graphic novel is drawn from the historical records and reports on the debates both in the Japanese American community and in the courts. The novel carries the story from the 1940s internment and court challenges to the 1980s, when Fred, now in his sixties, reopened his case based on evidence that the government had withheld crucial information from the courts when Fred had been convicted of violating the internment orders. The story shows a young girl struggling with her identity as an American learning a key lesson from Fred's life: If you have the feeling that something is wrong, don't be afraid to speak up.

### "International Comity in American Law"

*115 Columbia Law Review, Forthcoming*  
UC Davis Legal Studies Research Paper No. 470

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International comity is one of the principal foundations of U.S. foreign relations law. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity — from the conflict of laws to the presumption against extraterritoriality; from the recognition of foreign judgments to doctrines limiting adjudicative jurisdiction in international cases; and from a foreign government's privilege of bringing suit in the U.S. courts to the doctrines of foreign sovereign immunity. Yet international comity remains poorly understood. This article provides the first comprehensive account of international comity in American law. It has three goals: (1) to offer a better definition of international comity and an analytic framework for thinking about its manifestations in American law; (2) to explain the relationship between international comity and international law; and (3) to challenge two widespread myths — that international comity doctrines must take the form of standards rather than rules and that international comity determinations should be left to the executive branch.

### "The Case for the Present Sense Impression Hearsay Exception: The Relevance of the Original Version of Federal Rule of Evidence 8-03 to Judge Posner's Criticism of the Exception"

*Brandeis University Law Journal (Forthcoming)*  
UC Davis Legal Studies Research Paper No. 468

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It has been said that the hearsay doctrine is the "most characteristic" exclusionary rule in Anglo-American Evidence law. The hearsay rule is a preferential doctrine, generally favoring live courtroom testimony rather than testimony about the declarant's out-of-court statement. For various historical reasons, when the early English courts formulated the doctrine, they were primarily concerned about the sincerity of the out-of-court statement; they believed that ordinarily the opponent should have the opportunity to cross-examine the declarant to expose latent weaknesses in sincerity. Given that belief, they tended to admit hearsay only when there was a strong inference that the out-of-court statement was sincere and truthful. By way of example, they admitted startled utterances because they assumed that the declarant's nervous excitement would "still" the declarant's ability to reflect on his or her self-interest.

Over the decades many commentators, including psychologists, have sharply criticized the common-law stress on the sincerity factor. There is a large body of psychological research indicating that shock can grossly distort perception. Thus, in the case of excited utterances, we may lose more in inaccurate perception than we gain in enhanced sincerity. Some commentators contend that excited utterances are "[t]he most unreliable type of evidence admitted under [the recognized] hearsay exceptions . . . ."

Moreover, the same commentators have argued that misrecollection — not insincerity — is the primary cause of testimonial error at trial. While criticizing the rationale for the excited utterance exception, these commentators champion the recognition of the present sense impression exception. If the declarant makes the statement while or shortly after observing a fact or event, there is little or no risk of misrecollection. This doctrine has been characterized as an "ideal" hearsay exception. This argument persuaded the drafters of the Federal Rules of Evidence. Although the exception was a distinct minority view at common law, the drafters not only codified the exception; they also made the doctrine the very first provision in Rule 803 enumerating most of the hearsay exceptions.

Nevertheless, the common law's inordinate stress on sincerity is so ingrained that excessive concern about that factor often resurfaces. In his concurrence in a recent case, *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2014), one of the most respected American jurists, Judge Richard Posner, expressed "profound doubt" whether it is justifiable to recognize the present sense impression exception. While he also criticized the excited utterance exception, he devoted most of his discussion to present sense impressions. He pointed to psychological research finding that most lies are spontaneous and that "less than one second is required to fabricate a lie." He suggested abandoning reliance on specific hearsay exceptions and instead employing the general criteria set out in Rule 807, the residual hearsay exception.

The thesis of the enclosed article is that while Judge Posner's criticism of the excited utterance exception is warranted, his attack on the present sense impression exception is misguided. The first part of the article describes the traditional justifications for such exceptions as excited utterance and present sense impression. The second part details Judge Posner's concurrence in *Boyce*. The third part is evaluative. Initially, the third part explains why it would be a mistake to rely on the current wording of Rule 807. Unlike the original draft of Federal Rule 8-03, Rule 807 misses the mark because it does not directly address the essential preferential question of whether the reliability of the out-of-court statement is likely to be superior to that of the declarant's trial testimony. Analyzing that question, the third part then argues that in terms of the testimonial qualities of perception, memory, and sincerity, a present sense impression is frequently more reliable than the declarant's potential trial testimony.

### "The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing"

*Harvard Law & Policy Review*, \_\_\_, 2015 Forthcoming

*UC Davis Legal Studies Research Paper No. 473*

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"Big data" tools produce dramatically different ways of identifying suspects. By applying computer analytics to very large collections of digitized data, law enforcement agencies can identify suspicious persons and activities on a massive scale. Whether the police identify a person and choose to investigate him for suspected criminal activity is a decision largely left up to the police. The decision to focus police attention on a particular person or persons rather than others — what I'll call "surveillance discretion" — is a widely accepted means of investigation. Law enforcement would be unimaginable without it.

This task of filtering — identifying suspects from the general population — exemplifies traditional police work. The exercise of surveillance discretion in traditional policing attracts little attention from judges or legal scholars. Why? The answer is likely because 1) we assume that the police should possess such powers, and 2) even if theoretically worrisome, surveillance discretion is a power greatly limited in practice. After all, police typically only focus on a limited number of persons to investigate because of practical limitations imposed by resources and technology. But those assumptions will become outdated when the police possess the tools to exercise automated surveillance discretion on a massive scale. There is no question that these powers are on the cusp of wider adoption, and they raise key questions about fundamental issues of police discretion and accountability.

### "The Mediterranean Migration Crisis: A Clash of the Titans' Obligations?"

*22 Brown J. of World Affairs*, Fall/Winter 2015 (Forthcoming)

*UC Davis Legal Studies Research Paper No. 476*

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Nearly 670,000 migrants crossed the Mediterranean to reach European shores in the first ten months of 2015. The influx has been characterized as the greatest migration crisis since World War II. The associated death toll is equally alarming. In April alone, over 800 migrants died in the largest maritime refugee disaster on record, provoking calls for an immediate response. Following an emergency summit, EU leaders reacted by launching new criminal anti-smuggling measures and an intensive maritime surveillance program in the Mediterranean, among other measures. The response has been criticized for its emphasis on militarized border control strategies at the expense of humanitarian protection measures in relation to maritime rescue and asylum screening. Certainly, such an enforcement-oriented approach to border controls is not new, but it is legally problematic. This article examines the latest European response to the Mediterranean migration crisis from an international legal standpoint. It considers aspects of the proposal with regard to the roles and conduct of individual member states, as well as those of the EU border control agency Frontex. The article examines recent jurisprudential developments, both within and beyond the European sphere, to highlight new and emerging legal limitations on state actors at sea.

### "Who's Afraid of White Class Migrants? On Denial, Discrediting, and Disdain (and Toward a Richer Conception of Diversity)"

*Columbia Journal of Gender and Law*, Vol. 31, 2015

*UC Davis Legal Studies Research Paper No. 450*

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This Article describes and theorizes the legal academy's denial of both class disadvantage and class migration, with particular attention to how those phenomena are manifest in relation to white faculty. The Article observes that a general disdain for poor and working-class whites evolves into the denial and distancing of class migrants, those who move into the professoriate from lower socioeconomic stations ("SES"). Further, the academy simultaneously discredits and disciplines these class migrants when they run afoul of narrow norms regarding credentials, scholarship, and culture. The author employs storytelling as methodology, drawing on her own experiences as a white class migrant to illustrate some of these phenomena.

This Article, one in a series that takes up poor whites and the white working class as critical race projects, makes several theoretical contributions. First, it theorizes why white poverty, the white working class, and thus the phenomenon of white class migration, are so taboo among legal scholars. Closely related to this taboo are the reasons white class migrants are not viewed and valued as representing the diversity held so dear by the professoriate. Among other things, the Article begins the work of thinking about the phenomenon of white class migration as one that is as much about race as about class. It does so, however, in ways that go beyond Critical Race Theory's ("CRT") typical engagement with whiteness as monolithic abstraction. The Article suggests that the persistent race-vs.-class debate — regarding whether race or class is a bigger culprit in relation to various social problems and injustices — has proved an attractive distraction that has deterred robust scholarly engagement with many potent intersections of race with class, including that between white-skin privilege and socioeconomic disadvantage. Indeed, the academy is deterred from taking up just this intersection of whiteness with socioeconomic disadvantage for fear that doing so will detract from the very grave problems of racial disadvantage and racial discrimination experienced by nonwhites. Yet when we ignore class-based disadvantage — as when we ignore race-based disadvantage — we avoid an uncomfortable but critical conversation about authentic meritocracy. Ignoring the intersection of class disadvantage with white privilege also permits us to avoid confronting long-standing, intra-racial elite biases against poor and working-class whites.

The second theoretical contribution of the Article — written for a collection about the persistence of gender discrimination in the academy — regards the ways in which gender mediates the white class migration experience in the context of legal academia. In particular, the author discusses three junctures when the intersection of gender and class have particular implications for academic careers. These are mentoring, physical appearance, and life partnerships.

Finally, the author identifies several reasons why the legal academy needs the distinctive perspectives of class migrants. First, class migrants have become rarer among the professoriate in recent years because of heightened elitism in law faculty hiring during an era when low-income students are in shorter supply than ever in the prestigious colleges, universities, and law schools that bestow the requisite credentials. Second, the wider trend of diminishing upward mobility not only weighs on our national psyche, it has serious implications for our nation's economic well-being due to this failure to optimize raw human capital of all colors. This situation renders the perspectives and insights of all class migrants more valuable than ever because they have first-hand experience with the upward mobility journey that we should be fostering, and which we support in principle. Furthermore, class migrants can serve as role models and mentors for students in the midst of that process. Third, the author argues that poor and working-class whites are both key stakeholders and key informants in our quest for racial progress, although their perspectives are seldom heard in the academy. We rarely talk about low-SES whites; we talk to them even less frequently.

One way to begin to draw in those particular white perspectives is through the inclusion of class migrants in the law professoriate. That inclusion should also endow future generations of lawyers with a greater class consciousness that will serve the interests of all races and ethnicities in wider society. In faculty composition as in myriad other contexts, the author implores us to move beyond the impasse of thinking we must address only racial disadvantage or only class disadvantage and to grapple with both at their myriad intersections.

**"Local Government Finance as Integrated System: The Uneasy Case for Using Special Districts in Real Estate Finance (A Response to Odinet's Super-Liens to the Rescue? A Case Against Special Districts in Real Estate Finance)"** 

*Washington and Lee Law Review Online, Vol. 72, No. 191, 2015*  
*UC Davis Legal Studies Research Paper No. 475*

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Local governments have long used special financing districts to build infrastructure. If a local project, say building a pocket park, is likely to increase the values of properties very close to the park, then why should those properties not pay for the park in the first place? Though efficient and fair in many cases, the use of these districts can also be problematic. For instance, it seems likely that wealthier residents, with higher property values to leverage, are especially likely to use these districts effectively. It has also been the case that developers have used these districts speculatively, which had serious repercussions during the last recession. Christopher Odinet develops an additional, and important, critique of these districts. Odinet observes that these districts obtain a lien on benefiting properties, and that this lien takes priority over the liens of conventional lenders. Odinet then argues that this super-priority should only be honored if the district has served some substantial public purpose.

In this short Response, I agree with Odinet that these districts are problematic, but wonder whether his solution is the best one. This is because traditional lenders will generally know about these districts before lending. Furthermore, his solution only kicks in if there is an event of default, which is unusual, and thus this solution does not do much to counter the run of the mill socio-economic stratification that these districts often enable. I argue that an ex ante approach limiting the use of these districts therefore seems preferable. I conclude with the argument that, despite all their flaws, these districts should not be abolished outright. Local government finance is a dynamic system and the absence of any tool, even one prone to abuse, can have severe consequences, as illustrated by the recent history of California.

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