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

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"Corporate Governance and the Indian Private Equity Model"

National Law School of India Review, Volume 27, Issue 1
UC Davis Legal Studies Research Paper No. 484

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Private Equity (PE) firms have long invested in Western firms using a leveraged buyout (LBO) model, whereby they

acquire a company that they can grow with the ultimate goal of either selling it to a strategic buyer or taking it public. Unable to undertake the traditional LBO model in India, PE investors in Indian firms have developed a new model. Under this Indian PE Model, PE firms typically acquire minority interests in controlled companies using a structure that is both hybridized from other Western investment models and customized for India's complex legal environment. As minority shareholders in controlled firms, PE investors in India have developed several strategies to address their governance concerns. In particular, PE investors in India have focused on solutions to address local problems through the use of agreements that govern (i) the structuring of minority investments, (ii) investor control rights, and (iii) exit strategies. Nevertheless, recent governance and regulatory difficulties highlight the continuing uncertainty surrounding the Indian PE model.

"National Data Governance in a Global Economy"
Columbia School of International and Public Affairs Issues Brief, April 2016
UC Davis Legal Studies Research Paper No. 495

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Global data flows are the lifeblood of the global economy today and of the technologies of the future. Yet, the regulation of how data is to be handled remains largely the province of national laws. How we resolve the dilemmas of global flows within a nation-state structure will impact the digital economy, free expression, privacy, security, consumer protection, and taxation. Just as we once built an architecture for cross-border flow of goods, we need to build an architecture for cross-border flow of information.

"The Charming Betsy and the Paquete Habana"
UC Davis Legal Studies Research Paper No. 485

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This chapter for the book "Landmark Cases in Public International Law" discusses two famous U.S. Supreme Court decisions — The Charming Betsy (1804) and The Paquete Habana (1900). Although written nearly one hundred years apart, each decision appears to stand for similar propositions — that international law has an important place in the law of the United States, but that U.S. domestic law should prevail in the event of conflict. What often goes unnoticed is that the Supreme Court decided these cases against the backdrop of very different understandings about international law and its relationship to U.S. domestic law.

In addition to discussing the background and significance of each case, this chapter describes three shifts in U.S. thinking about customary international law during the nineteenth century. First, the theoretical foundations of customary international law shifted away from natural law towards positivism. Second, the consent requirement for making customary international law shifted from the individual consent of each state to the consent of states generally. And third, the U.S. understanding of the relationship between international law and domestic law shifted away from monism towards dualism — away from an understanding that international law was part of U.S. law unless displaced, towards an understanding that international law was not part of U.S. law unless adopted. The Charming Betsy and The Paquete Habana are landmark cases not because they changed the course of international law in the United States but because they reveal changes in the landscape.

"Probate Lending"
Yale Law Journal, Vol. 126, 2016
UC Davis Legal Studies Research Paper No. 492

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One of the most controversial trends in American civil justice is litigation lending: corporations paying plaintiffs a lump sum in return for a stake in a pending lawsuit. Although causes of action were once inalienable, many jurisdictions have abandoned this bright-line prohibition, opening the door for businesses to invest in other parties' claims. Although some courts, lawmakers, and scholars applaud litigation lenders for helping wronged individuals obtain relief, others accuse them of exploiting low-income plaintiffs and increasing court congestion.

This Article reveals that a similar phenomenon has quietly emerged in the probate system. Recently, companies have started to make "probate loans": advancing funds to heirs or beneficiaries to be repaid from their interest in a court-supervised estate. The Article sheds light on this shadowy practice by empirically analyzing 594 probate administrations from a major California county. It finds that probate lending is a lucrative business. Nevertheless, it also concludes that some of the strongest rationales for banning the sale of causes of action — concerns about abusive transactions and the corrosive effect of outsiders on judicial processes — apply to transfers of inheritance rights. The Article thus suggests several ways to regulate this nascent industry.

"The Social Transmission of Racism"

Tulsa Law Review, Vol. 51, 2016
UC Davis Legal Studies Research Paper No. 489

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This essay reviews two books, Robert Wald Sussman, The Myth of Race: The Troubling Persistence of an Unscientific Idea (Harvard University Press 2014) and Osagie K. Obasogie, Blinded by Sight: Seeing Race Through the Eyes of the Blind (Stanford University Press 2014). Sussman is an anthropologist who brings his expertise to bear in tracing scientific racism through history. Obasogie is a legal scholar and sociologist who uses both qualitative data gathered through interviews with blind and sighted people and Critical Race Theory to explore racialization's dependence on the idea that race is visually obvious. Each book examines an idea that has sustained racism despite social, political and geographic change. The essay assesses each account and links the authors' analyses to judicial and legislative framings of reproductive rights and to postmodernist scholarship on race, gender and the human body.

"Computer Source Code: A Source of the Growing Controversy Over the Reliability of Automated Forensic Techniques"

DePaul Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 487

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The article deals with two legal issues posed by the growing trend in the United States to automate forensic analyses.

Since World War II, we have had alarming insights into the unreliability of both eyewitness testimony and confession evidence. Those insights have prompted the criminal justice system to place greater reliance on forensic evidence. In one Rand study, the researchers found that expert testimony was presented at 86% of the trials examined. This shift to greater use of expert testimony has placed growing demands on crime laboratories. For example, the backlog of unanalyzed DNA samples has become such an acute problem that Congress was impelled to enact the DNA Backlog Elimination Act to provide funding to reduce the backlog of untested rape kits.

In both the public and private sectors, the typical response to the development of a backlog is technological automation. That has certainly held true for forensic analysis. There is now widespread automation in such areas as fingerprint examination, breath testing, and DNA analysis. The argument runs that automation holds the promise of both enhancing efficiency and improving the accuracy of the analyses proffered in court.

That promise turns on the accuracy of the source code controlling the software governing the automated techniques. The source code embeds the instructions determining which tasks the program performs, how the program performs them, and the order in which it performs the tasks. The validity of a program's source code is the most fundamental guarantee of a software program's reliability. Defense counsel have sometimes challenged the software for automated forensic techniques. Early in this century, the defense counsel attacked the software controlling automated infrared breath testing devices. Today they are challenging the software for the TrueAllele program analyzing mixed DNA samples. Those waves of cases have posed two issues: (1) whether the prosecution can lay a sufficient foundation for evidence based on an automated technique without presenting testimony about the computer source code; and (2) whether the defense has any discovery right to access to the code. Almost all the courts have answered the first question in the affirmative and the second question in the negative. In responding to the second question, the courts have reasoned that the existence of validation studies for the technique eliminates any need to scrutinize the source code and that in any event, manufacturers have an evidentiary privilege protecting the code as a trade secret. The purpose of this short article is to critically evaluate the judicial response to both questions.

On the one hand, the article argues that the courts have correctly answered the first question. More specifically, the prosecution may lay an adequate foundation by presenting testimony describing validation studies for the automated technique even if the testimony does not touch on the source code. On the other hand, the article contends that in some cases, the courts ought to accord the defense a pretrial discovery limit. The article explains the limited utility of validation studies and notes that the evidentiary privilege for trade secrets is a qualified one that can be surmounted when the party seeking discovery has a significant need for the information. The article proposes a procedure that judges can employ to resolve the tension between the defendant's need for access to the source code and the manufacturer's legitimate interest in safeguarding its valuable proprietary information.

"Beyond Surveillance: Data Control and Body Cameras"

__ Surveillance & Society __ (2016) Forthcoming
UC Davis Legal Studies Research Paper No. 494

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Body cameras collect video data - lots of it - and thus many have raised questions about increased government surveillance. But if understood primarily as data collection, surveillance represents only one concern. In our big data age, “seeing, monitoring, and recording the digital footprints is quite different from sharing, releasing, revealing or publicizing the data.” Body camera policies must address not only concerns about surveillance, but also data control.

"Some Thoughts on the Future of Legal Education: Why Diversity and Student Wellness Should Matter in a Time of 'Crisis'"

Buffalo Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 488

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Some vocal critics have loudly proclaimed that the challenges of law school economic have reached “crisis” proportions. They point to the well-known facts about recent developments in the market for law schools. Law schools have experienced a precipitous drop in applications. The global recession decimated the legal job market. To make matters worse, rising tuition has resulted in increasing debt loads for law graduates.

In light of the changes in the legal marketplace, stabilization of the budgetary picture is currently the first priority of virtually every American law school. Faculty members have been let go. Staffs reduced. Enrollment of students — and the collection of tuition revenues — have critical budgetary consequences.

Linked to the economic “crisis” facing law schools and students was deep concern with each school’s relative placement in the much-watched U.S. News and World Report law school rankings. These rankings, among other things, affect admissions and enrollment, and thus budgetary bottom lines for law schools.

Much less publicized concerns with legal education involve non-financial issues. The lack of racial and other diversity of students attending law school, and ultimately entering the legal profession, and faculty, has long been a problem. In addition, today’s students demand a more humane legal education and are asking for additional academic support, career and mental health counseling, experiential learning opportunities, and more. The costs of the additional services and programs have further added to budgetary pressures on law schools.

This Essay contends that law schools should strive to address the noneconomic as well as the economic problems with modern legal education. In a time of considerable change, this is a most opportune time to consider and implement deep and enduring improvements that benefit students as well as the entire legal profession.

"Welfare Queens and White Trash"

25 Southern California Interdisciplinary Law Journal 289 (2016)
UC Davis Legal Studies Research Paper No. 486

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The “welfare queen” is widely recognized as a racialized construct deployed by politicians to undermine support for public benefits and the wider social safety net. Less often recognized or discussed is the flip side of the welfare queen’s conflation of blackness with dependency and poverty: the conflation of whiteness with self-sufficiency, autonomy, and affluence. The welfare queen trope, along with media and scholarly depictions of socioeconomic disadvantage as a nonwhite phenomenon, deflects attention from white poverty. Yet data indicate that a majority of poor people in the United States self-identify as white.

This essay, written for the “Reframing the Welfare Queen” symposium, (re)surfaces the existence of white poverty and ponders its (in)visibility, meaning, and significance in relation to the welfare queen construct. Among other things, Pruitt suggests that the welfare queen stigmatype is not just bad for blacks, it is bad for poor whites. First, it obscures white poverty, rendering poor whites and their plight invisible. Second, to the extent we are aware of white poverty, the widespread conflation of whiteness with affluence suggests that poor whites have only themselves to blame, given the benefits widely associated with white-skin privilege.

Given the welfare queen’s potency as a racialized construct, we might assume that greater awareness of white poverty would enhance public support for safety net programs because middle and upper income whites would (so the story goes) want to ameliorate white poverty, even if racial animus discourages their support for poor blacks. But Pruitt questions the soundness of this line of reasoning, which discounts the existence and potency of intraracial discrimination in assuming that society feels greater empathy with or concern for the fate of poor whites than for poor nonwhites. In fact, we have several reasons — including empirical studies — to believe that such a well of empathy is missing. A further reason for skepticism is found in a second racialized construct explored in this article: white trash.

"Tax Cannibalization and Fiscal Federalism in the United States"
Northwestern University Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 491
UC Berkeley Public Law Research Paper No. 2750933

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The current structure of U.S. federal tax law incentivizes state governments to adopt tax policies that inflict costs on the federal government, at the expense of national welfare. We label this the “tax cannibalization problem.”

This article introduces the tax cannibalization problem to the law and policy literatures for the first time. This article also explains how U.S. federal tax law might be restructured so as to alleviate the tax cannibalization problem — to counteract the perverse incentives currently leading U.S. state governments to design their tax systems so as to, in effect, wastefully devour federal tax revenues.

"Stitches for Snitches: Lawyers as Whistleblowers"
UC Davis Law Review, Forthcoming (2017)
UC Davis Legal Studies Research Paper No. 493

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This Article challenges the prevailing wisdom that ethics rules forbid lawyers from blowing the whistle on a client’s illegal conduct. While a lawyer is not free to disclose confidential information in every jurisdiction for every legal violation, the ethics rules in all jurisdictions permit disclosure of confidential information pertaining to a client’s illegal activities under certain conditions. Proving the lie of the prevailing wisdom, this Article examines a high profile case in the state of New York that ruled a lawyer whistleblower violated the state’s ethics rules by revealing confidential information to stop his employer-client from engaging in a tax fraud of epic proportions. The Article argues that the court undertook a deficient analysis of New York ethics rules pertaining to permissive disclosure of confidential client information. Even if the whistleblower had violated his ethical obligations, the New York False Claims Act (the statute under which he brought his action) expressly protects disclosure of confidential employer information made in furtherance of the statute. In addition to New York’s statutory shield, federal courts across the country have developed a public policy exception safeguarding whistleblowers for disclosing confidential information that detects and exposes an employer’s illegal conduct.

While challenging the previously unchallenged criticism of lawyer whistleblowers, this Article acknowledges the intrinsic appeal of that position. The idea of a lawyer revealing a client’s transgressions — particularly for monetary awards paid under various federal and state whistleblower programs — seems unsavory and a threat to the attorney-client relationship. Nonetheless, lawyers have always had the discretion to disclose confidential information to prevent a client from committing a crime or fraud. And although the addition of financial incentives complicates the analysis, modern ethics rules extend to lawyers considerable discretion in revealing confidential client information, even if disclosure makes a lawyer eligible for financial awards.

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