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

Vol. 10, No. 6: Nov 26, 2008

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"The Course of True Human Rights Progress Never Did Run Smooth"

Harvard Human Rights Journal, Vol. 21, 2008
UC Davis Legal Studies Research Paper No. 141

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As the United States moves toward the inauguration in January 2009 of a new President, greater attention is paid to what the country might do to restore and reinforce its traditional role as a leader in the promotion of human rights. This essay warns against any assumption that innovation alone will assure greater enforcement of rights; its points of reference are not only the current administration, but also one long past, that of President John F. Kennedy. Rather than jump to embrace new, global concepts like responsibility to protect, therefore, it argues for careful pursuit of local change. It then turns analysis on the locality of the United States, calling for genuine efforts to address rights issues already acute at home, for example: violence, disparities in education, economic disadvantages, the crisis in health and health care. Mid-20th century U.S. human rights discourse - the American Law Institute's Statement of Essential Human Rights and President Franklin D. Roosevelt's Four Freedoms speech - are cited as foundations for this domestic emphasis. The sources likewise invite consideration of means for promoting rights other than judicial enforcement. The essay ends with a hope that should the United States alleviate some of these problems, and so protect the liberty and security of persons within its jurisdiction, it would eschew American exceptionalist boasts and instead let the power of its deeds bespeak its restored role as a promoter of human rights.

"Place Matters: Domestic Violence and Rural Difference"

Wisconsin Journal of Law, Gender & Society, Volume 23, p. 347 2008
UC Davis Legal Studies Research Paper No. 149

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This Article considers the phenomenon of domestic violence in relation to the rural-urban axis. Written for a symposium commemorating the 25th anniversary of the Feminism and Legal Theory Project at the University of Wisconsin, it assesses the difference that rurality makes to the occurrence, investigation, prosecution, and judicial decision-making regarding this crime. Among the factors analyzed are spatial or geographic isolation, along with the social isolation and lack of anonymity it fosters; severe economic disadvantage; the entrenched nature of rural patriarchy; and legal actors who are often ill-informed about domestic violence and constrained by limited resources. These rural differences are presented through the lens of critical geography, using space, place and scale as analytical tools.

The Article thus provides an illustration of rurality as difference - difference from what has become the implicit urban norm in legal scholarship and in a great deal of law- and policy-making. It concludes by arguing for place-specific responses aimed at diminishing the obstacles to justice that confront rural victims of domestic violence. It further asserts that the solutions to this social problem must be multi-scalar (or multi-jurisdictional), using local know-how that is informed by universal norms that establish women's rights and dignity.

"The Forgotten Fifth: Rural Youth and Substance Abuse"

Stanford Law & Policy Review, Vol. 20, p. 259, 2009
UC Davis Legal Studies Research Paper No. 150

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In this article, Professor Pruitt seeks to raise the visibility of the roughly twenty percent of our population who live in rural America - an often forgotten fifth - in relation to the particular challenges presented by adolescent substance abuse. Despite popular notions that substance abuse is essentially an urban phenomenon, recent data demonstrate that it is also a significant problem in rural America. Rural youth now abuse most substances, including alcohol and tobacco, at higher rates and at younger ages than their urban peers.

Written for a symposium on drug policy, Pruitt assesses the social, economic and spatial milieu in which rural adolescent substance abuse has burgeoned. Some features of rural communities, such as a tolerance for youth and lenient and informal law enforcement responses, appear to be beneficial to youth there. Indeed, these are consistent with juvenile justice trends, such as diversion programs. Yet other characteristics of rural communities, such as limited social service and healthcare infrastructures, undermine the efficacy of such programs. Additional challenges are posed by the depressed socioeconomic conditions in many rural areas.

Arguing that national drug policies often reflect urban agendas and leave rural communities disserved, Pruitt calls for policies that are more sensitive to rural contexts and that will respond more effectively to this social problem there. She advocates nuanced empirical research that will provide a more comprehensive understanding of rural risk factors and, in turn, inform rural prevention, treatment, and diversion programs. Finally, she argues that federal, state and local responses to adolescent substance abuse must tackle deficiencies in rural infrastructure, while keeping in mind factors that differentiate rural places from what has become the implicit urban norm in law- and policy-making.

"An Assessment of Latcrit Theory Ten Years after"

Indiana Law Journal, No. 83, 2008
UC Davis Legal Studies Research Paper No. 151

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This article is published in a symposium issue on Latina/os and the Law. This essay assesses LatCrit theory a decade after Latina/o Critical Legal Studies (LatCrit) began publishing symposia that attempted to gather and organize a diverse group of scholars working on diverse scholarly projects using a diverse set of methodologies. This essay recognizes both LatCrit's achievements and shortcomings. LatCrit has articulated an anti-essentialist and anti-subordination agenda, creating an important social network for young scholars of color at the annual LatCrit Conference. However, LatCrit theory, as represented by the annual publication of papers solicited at the Conference, has been uneven and this essay considers reasons why this is and what might be done to address this unevenness.

LatCrit theorists, through an organized institutional structure, have instrumentally built a community of scholars

and fostered a collective commitment to issues of social justice. Moreover, to its credit, LatCrit theory in little over a decade has produced a considerable body of scholarship analyzing race and racism, as well as other forms of subordination, in the United States and globally. It has, for example, made important contributions to the analysis of the Black/white paradigm of civil rights, which historically has marginalized Latina/o civil rights concerns. LatCrit theory has also shed fresh new insights on deep, enduring, and complex issues of Latina/o identity, as well as criminal justice, immigration enforcement, and the building of mulitiracial coalitions for social justice.

From its outset, LatCrit has stood firmly committed to anti-essentialism - the acknowledgment of the great diversity in the Latina/o community - and anti-subordination. These two foundational principles are now so embedded in the critical literature that they are difficult to seriously dispute today.

However, one vitally important-and unquestionably fundamental-question inevitably nags at virtually any scholar in evaluating critical Latina/o theory at this time in its history: beyond some original insights at the movement's inception, what has LatCrit come to affirmatively stand for today as a scholarly movement? Given the current state of LatCrit scholarship, one would be hard pressed to answer this question with any degree of certainty. A review of LatCrit's sprawling body of work reveals that the unifying themes and common threads are difficult to identify with specificity.

In 2006, LatCrit theory published a symposium issue commemorating its tenth annual conference, an important milestone. In this essay, we hope to use this historical moment as an opportune time to assess both LatCrit theory's scholarly achievements as well as its future trajectory. In so doing, we bring to print issues that have been discussed extensively inside and outside of LatCrit circles for many years. These sensitive issues, however, have largely escaped commentary in LatCrit scholarship-effectively sacrificed to the goal of inclusion and to the concerted efforts to construct a lasting scholarly community. In our estimation, the prolonged silence about the unevenness of LatCrit scholarship jeopardizes the intellectual component of the burgeoning movement.

"Poetic Justice in Punishing the Evidentiary Misdeed of Knowingly Proffering Inadmissible Evidence"

International Commentaries on Evidence, 2008
UC Davis Legal Studies Research Paper No. 152

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Beginning in the late 1980s, reformers began developing new strategies for dealing with pretrial discovery misconduct. There was a consensus that such misconduct was widespread and often prevented litigants from successfully prosecuting meritorious claims.

Legislatures and courts adopted a much more aggressive attitude to combat such misconduct. For example, sanctions were imposed more frequently; and Federal Rule of Civil Procedure 37 was amended to permit the aggrieved party to introduce evidence of the opponent's pretrial discovery misconduct at trial as proof of the opponent's consciousness of the weakness of their position in the litigation.

The downside of this development, though, was that pretrial hearings over such misconduct became commonplace and expensive. When the parties became mired down in such hearings, they were sometimes distracted from their primary task of litigating the merits of the case.

There is now mounting pressure to deal more vigorously with evidentiary misconduct at trial. While such misconduct may not be as widespread as pretrial discovery misconduct, in at least one respect trial misconduct is arguably a more serious concern. When the misconduct occurs before trial, the judge has time - and numerous options - to prevent the misconduct from tainting the outcome of the trial. In contrast, if the misconduct occurs midtrial, there is less time, there are fewer viable options.

When a litigant engages in the misconduct of knowingly exposing the jury to inadmissible evidence, many of the existing remedial options available to the trial judge are unsatisfactory. The judge may grant a curative instruction directing the jury to disregard the inadmissible evidence, but empirical research raises grave questions about the effectiveness of such instructions. To be sure, in an extreme case the judge can declare a mistrial. However, the aggrieved litigant may have limited financial resources; and if he or she cannot afford a second trial, he or she may be compelled to settle on unfavorable terms.

This article proposes a new remedy for this evidentiary misconduct; analogizing to Rule 37, the article urges the courts to allow the innocent party to treat the misconduct as evidence of the opposition's consciousness of the weakness of their position in the litigation. On the one hand, the adoption of this proposal would provide a powerful disincentive to this species of misconduct. On the other hand, like pretrial discovery misconduct hearings, midtrial hearings devoted to this issue could potentially be both expensive and distracting. For that reason, the remedy should be granted only in extraordinary cases. The aggrieved party should have the burden of proving to the judge that the misconduct was intentional, and the measure of the burden ought to be clear and convincing evidence. Moreover, the judge should permit the aggrieved party to introduce the evidence only when the judge finds that any other available remedy would be ineffective.

"Contracting to Preserve Open Science: Consideration-Based Regulation in Patent Law"
57 Emory L.J. 889 (2009)
UC Davis Legal Studies Research Paper No. 153

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Patents on biomedical research tools - technological inputs to experimentation - may inhibit scientific inquiry and the development of life-enhancing therapies. Various "public law" approaches to address this challenge, such as a common law experimental use exception to patent infringement, have achieved limited success. In the wake of these shortcomings, this Article argues that institutions that fund and support biomedical research are resorting to an underappreciated model of private ordering to resolve research holdup. Increasingly, federal and state agencies, universities, non-profits, and disease advocacy groups are conditioning vital research support on requirements that recipients of this support make resulting patented inventions widely available for noncommercial research purposes. In essence, these institutions are contractually constructing a biomedical research commons.

These efforts represent a significant shift towards "privatizing" patent regulation. Through a new model of "consideration-based patent regulation," public institutions are embedding policy objectives in contractual quid pro quos with individual recipients of research support. This model provides public institutions with considerable freedom to effectuate norms favoring wide dissemination of research technologies. This Article greets this development with cautious optimism, providing prescriptions for how public institutions may effectively manage the contractual construction of a biomedical research commons. It concludes by exploring the significant ramifications of this development for patent law, institutions, and theory.

"Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court"
William & Mary Bill of Rights, Vol. 17, 2008
UC Davis Legal Studies Research Paper No. 154

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This Essay examines the methodological upheaval created by the quartet of constitutional election law cases decided during October Term 2007. Prior to this Term, the ascendant analytic approach called for a threshold characterization of the burden on the plaintiff's rights, which characterization determined whether the court would apply strict scrutiny or lax, rational-basis-like review. The characterization was generally formal in nature. But in light of the Supreme Court's latest decisions, it is now open to a lower court adjudicating a First Amendment or Equal Protection challenge to an election law - absent a Supreme Court precedent squarely on point - (1) to engage in unmediated, all-things-considered balancing, focusing either on the overall reasonableness of the challenged law or on the reasonableness of exempting or otherwise accommodating the plaintiff or plaintiff-class; (2) to apply strict scrutiny after determining that the law (relative to some practicable alternative) has a large, demonstrable adverse impact on voting, political association, or the competitiveness of campaigns; (3) to apply strict scrutiny after identifying a facial attribute of the law itself that renders it suspect in the judge's eye; (4) to apply extremely deferential review because the law does not have attributes that the judge deems facially suspect and because the judge is leery of getting bogged down in empirical debates or indulging in the guesswork of open-ended balancing; or (5) to reject the claim after positing that it raises questions about democratic fairness concerning which there is no discernable historical consensus. During October Term 2007, the Court vacillated among these approaches, while providing precious little guidance to lower courts about the circumstances that warrant one or another methodology. We suggest that the methodological pluralism in these decisions, coupled with a lack of explicit normative direction, may indicate that most Justices are approaching constitutional election law thinking less about doctrinal coherence or interpretive principle than about the instrumental consequences of their rulings for the system of government as a whole.

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