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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"Liberty's Refuge or the Refuge of Scoundrels?: The Limits of the Right of Assembly"

Washington University Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 292

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This essay was written for a symposium celebrating the publication of Professor John Inazu's book, Liberty's Refuge The Forgotten Freedom of Assembly, held at the Washington University School of Law on March 2, 2012. Liberty's Refuge presents a fascinating and eye-opening examination of the history of the Assembly Clause of the First Amendment, and argues in favor of the continuing significance of the assembly right. In this essay, I primarily explore an issue that Professor Inazu only touches upon lightly in Liberty's Refuge, but which I think is likely to play a central role in future debates: the limits of the Freedom of Assembly. In particular, I ask at what point a private group becomes sufficiently threatening to the social order that it falls outside the right of assembly (and the related First Amendment right of Freedom of Association). I discuss three different types of potentially threatening assemblies: violent assemblies, which engage in or plot explicit violence; subversive assemblies, which though they do not themselves act violently, inculcate values in their members or others which might result in violence; and non-conformist assemblies which threaten the social order in ways other than outright violence. I explain how each of these types of assemblies of citizens poses challenges to the general theory of Freedom of Assembly (and indeed, to First Amendment theory generally), because such groups can simultaneously make important contributions to political dialogue and self-governance, but also threaten great social harm, including at their limits undermining the broader social cohesion which is the necessary framework within which a system of popular governance must operate. I close with some preliminary thoughts on how these competing values might be reconciled, consistent with the underlying principles of the First Amendment.

"The Need for Truly Systemic Analysis of Proposals for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in 'Litigation' Reform"

Review of Litigation, 2012
UC Davis Legal Studies Research Paper No. 290

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It is a commonplace observation that human actions often have unintended consequences. That observation applies to changes in the law. New statutes and statutory amendments frequently have unforeseen impacts. Those impacts can be negative effects that outweigh any good achieved by the change in the law.

The thesis of this article is that in many instances of litigation reform, there is an identifiable reason for the untoward consequences: the failure of the policymaker or drafter to subject the proposal to a truly systemic cost/benefit analysis. The proponents of changes in pretrial practice sometimes neglect to advert to the potential impact on trial evidence, and for their part the advocates of changes in evidence law may fail to address the possible effects on pretrial practice. Section III of the article uses the enactment of Federal Rule of Evidence 612 and the 1993 amendment to Federal Rule of Civil Procedure 26 as illustrations of this phenomenon.

In contrast, Section IV points to the recent discussion leading to the adoption of Federal Rule of Evidence 502 as an example of a preferable systemic mode of analysis. The article urges that in the future proponents of changes in both pretrial practice and evidence law should engage in this type of systemic analysis. There is a dynamic relationship between the pretrial and trial phases of the litigation process, and a reformer's failure to address the other stage of the litigation process exponentially increases the risk that the law of unintended consequences will come into play. The article emphasizes that it is especially vital that evidentiary reformers conduct such an analysis, since today the importance of the pretrial phase dwarfs that of the trial. Even a minor negative impact on the 98% of the cases terminated without trial can outweigh a seemingly significant improvement in the evidence rules applied in the 2% of the cases that go to trial.

"Immigration and Civil Rights: State and Local Efforts to Regulate Immigration"

Georgia Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 293

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This essay, part of a civil rights symposium, considers how the current legal challenges to the constitutionality of the spate of state and local immigration measures often focuses on federal preemption and the Supremacy Clause — a relatively dry, if not altogether juiceless, body of law. The legal analysis in the courts of such measures often fails to directly address the civil rights impacts on minority communities. Part II begins by looking generally at the law surrounding federal primacy over immigration. Part III reviews the Supreme Court's decision in Chamber of Commerce v. Whiting, which interpreted a narrow provision of the U.S. immigration laws to reject a federal preemption challenge to Arizona's effort to regulate immigration through a business licensing law. Part IV considers the impact of the Whiting decision on the Court of Appeal's invalidation of core immigration provisions of Arizona's S.B. 10708 in United States v. Arizona, perhaps the most controversial state immigration regulation measure in a time in which state and local legislatures have passed a veritable avalanche of such measures. Last but not least, Part V analyzes the civil rights concerns at the core of state and local efforts to regulate immigration. This essay considers how immigration enforcement by any level of government raises civil rights concerns but, given the greater likelihood of nativist sentiment prevailing at the regional level, contends that the potential civil rights impacts are greater with state and local immigration enforcement measures than national ones.

"Transcending the Tacit Dimension: Patents, Relationships, and the Industrial Organization of Technology Transfer"

California Law Review, Vol. 100, 2012
UC Davis Legal Studies Research Paper No. 287

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As a key driver of innovation and economic growth, university-industry technology transfer has attracted significant attention. Formal technology transfer, which encompasses patenting and licensing university inventions, is often characterized as proceeding according to market principles. According to this dominant conception, patents help commodify academic inventions, which universities then advertise and transfer to private firms in licensing markets.

This Article challenges and refines this market-oriented view of technology transfer. Drawing from empirical studies, it shows that effective technology transfer often involves long-term personal relationships rather than discrete market exchanges. In particular, it explores the significant role of tacit, uncodified knowledge in effectively exploiting patented academic inventions. Markets, patents, and licenses are ill-suited to transferring such tacit

knowledge, leading licensees to seek direct relationships with academic inventors themselves.

Drawing on the theory of the firm, this Article then explores the role of organizational integration in transferring patented technologies and associated tacit knowledge to private companies. Presenting a descriptive theory of university-industry technology transfer, it argues that the difficulties of conveying tacit knowledge encourage various forms of organizational integration by which licensees directly absorb academic human capital. From consulting arrangements to seats on boards of directors, licensees are bringing faculty inventors (and their tacit knowledge) “in house” to aid in commercialization. Turning from the descriptive to the normative, this Article provides prescriptions for enhancing tacit knowledge transmission and technology transfer. It concludes by exploring the implications of tacit knowledge for patent theory and the organization of technology commercialization efforts.

"The 'Ethical' Surplus of the War on Illegal Immigration"
Iowa Journal on Gender, Race and Justice, 2012, Forthcoming
UC Davis Legal Studies Research Paper No. 291

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The Aristotelian philosopher, Gene Garver, suggests that rhetorical claims have an "ethical surplus" that extends beyond the specific claim being advanced at the moment. This follows from the fact that rhetoric includes not only logos, but also pathos and ethos. We adopt the thesis of "ethical surplus," but in a negative context. The "war on illegal immigration" has generated an ethical surplus that leads its promoters beyond the specific claim of securing borders against unlawful entry. After demonstrating that there is an express rhetoric of "war" used in connection with Arizona's adoption of recent anti-immigrant legislation, we explore the implication of this rhetoric in the more recent effort to eliminate race-conscious education programs focused on Mexican Americans in the public schools of Tucson. We conclude that the war on illegal immigration has generated its ethical surplus in a manner that betrays the true character of this war. It is not a war against undocumented border crossing; rather, it is a war against the perceived threat posed by Mexicans living in the United States. As the ethical surplus of the anti-immigrant hyperbole becomes manifest, it reveals clearly the immoral and discriminatory nature of the rhetoric at work.

"The Fake Third Rail of Tax Reform"
135 Tax Notes 181 (April 9, 2012)
UC Davis Legal Studies Research Paper No. 289

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This article condemns the mortgage interest deduction for its inequities, inefficiencies, ineffectiveness, and cost. In the process, it exposes the deduction as the fake third rail of tax reform, and provides policymakers ample justification for putting the tax code’s sacred cow out to pasture and replacing it with a tax credit for homeownership.

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