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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"How Law Made Silicon Valley"

Emory Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 355

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Explanations for the success of Silicon Valley focus on the confluence of capital and education. In this article, I put forward a new explanation, one that better elucidates the rise of Silicon Valley as a global trader. Just as nineteenth century American judges altered the common law in order to subsidize industrial development, American judges and legislators altered the law at the turn of the Millennium to promote the development of Internet enterprise. Europe and Asia, by contrast, imposed strict intermediary liability regimes, inflexible intellectual property rules, and strong privacy constraints, impeding local Internet entrepreneurs. The study challenges the conventional wisdom that holds that strong intellectual property rights undergird innovation. While American law favored both commerce and speech enabled by this new medium, European and Asian jurisdictions attended more to the risks to intellectual property rights-holders and, to a lesser extent, ordinary individuals. Innovations that might be celebrated in the United States could lead to jail in Japan. I show how American companies leveraged their liberal home base to become global leaders in cyberspace. Nations seeking to incubate their own Silicon Valley must focus not only on money and education, but also a law that embraces innovation.

"Preliminary Thoughts on an Attorney-Client Privilege For Law Firms: When a Current Client Threatens to Sue the Firm for Malpractice, Does the Privilege Apply to the Firm's Consultation with In-House Counsel About the Potential Claim?"

UC Davis Legal Studies Research Paper No. 352

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This article deals with a significant, timely problem facing the legal profession. The problem is significant because the number of malpractice claims filed against attorneys is steadily increasing. The article cites a 2012 American Bar Association study finding more than a 30% increase in the number of claims reported between 2007 and 2011. The problem is also timely because of two 2013 state supreme court decisions. Until recently, the majority view was that if a current outside client threatened its firm with a malpractice claim, the attorney-client privilege did not apply to the consultations between the firm members representing the client and in-house counsel responsible for issues such as ethics and risk management. Thus, in any subsequent malpractice litigation, the former client could discover any written records of the internal consultations and depose firm members about related oral communications. However, on July 10, 2013, the Supreme Judicial Court of Massachusetts decided to recognize an intra-firm privilege; and on the very next day, July 11, 2013, the Georgia Supreme Court arrived at the same conclusion.

The thesis of the enclosed article is that the Georgia and Massachusetts courts arguably reached the right result. The first part of this article is descriptive, surveying the current split of authority. The second and third parts are evaluative. The second part addresses the threshold question of whether the courts should recognize an intra-firm privilege in any circumstances. The second part criticizes the majority view and, in particular, challenges traditionalists' reliance on the so-called fiduciary exception to the attorney-client privilege. The third part attempts to identify the circumstances in which the courts ought to uphold an infra-firm privilege. Initially, the third party reviews the internal procedures that the firm ought to put in place to establish its status as the client of the in-house counsel. The third party then turns to the thorny question of whether the firm may engage in such internal consultations even without the outside client's consent. The article suggests that the argument for requiring the client's consent misconceives an evidentiary issues as an ethics question.

Given the paucity of authority in point and the recency of the Georgia and Massachusetts decisions, the article does not purport to offer a definitive analysis of these issues. However, legal malpractice claims are so common and the interests of the bar and its clientele are so vital that the current split of authority is unsatisfactory. The intent of this article is to prompt a deeper, more robust debate over these issues.

"Windsor, Federalism, and Family Equality"

Columbia Law Review Sidebar, Vol. 113, 2013
UC Davis Legal Studies Research Paper No. 354

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In a 5-4 decision authored by Justice Kennedy, the Court held in Windsor v. United States that section 3 of the Federal Defense of Marriage Act (DOMA) is unconstitutional. Advocates had attacked section 3 on two primary grounds. The principal argument leveled at section 3 was that it violated principles of equal protection by denying one class of married spouses — lesbian and gay spouses — all federal marital benefits.

Section 3 was also attacked on a number of federalism-based grounds. Some advocates pushed a particularly strong federalism variant, arguing that DOMA was unconstitutional because Congress lacked the authority to define or determine family status. I call this the categorical family status federalism argument. Others endorsed a more moderated claim. Under this theory, the fact that a law — here section 3 of DOMA — deviated from the historic allocation of power as between the federal government and the states was simply a basis for applying a more careful level of equal protection scrutiny. Under this theory, the federalism-based concerns were not an independent basis for striking down the law.

This Essay argues that civil rights advocates dodged a bullet when the Windsor Court declined to embrace the categorical family status federalism theory. While its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA, it also would have curtailed the ability of federal officials to protect same-sex couples and other families.

"Local Fiscal Autonomy Requires Constraints: The Case for Fiscal Menus"

Stanford Law & Policy Review, Forthcoming
UC Davis Legal Studies Research Paper No. 356

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In this paper, I argue that we should replace poorly designed fiscal rules constraining cities and other local governments. For example, instead of requiring a local supermajority to issue debt, localities should only be able to issue relatively safe forms of debt. Abolishing the old rule enhances local autonomy, while instituting the new rule channels localities away from the poor outcomes that reasonably motivated the (ineffective) old rule. The ultimate rationale for the shift is that localities should not have their fiscal autonomy hamstrung because there are specific issues, such as the design of financial instruments, over which they are at a comparative disadvantage. The specific limitations governing localities should be – and can be – designed to address specifically the limitations

that local governments actually have. It is not a coincidence that many of the crude rules to be replaced date from the nineteenth century. I conclude by applying this reasoning to another area in which localities are constrained by poorly designed and overbroad fiscal rules: taxation. On taxation, I arrive at a similar conclusion. Localities should be much freer to raise taxes, particularly property taxes, but they should be constrained in their design of taxes, particularly tax bases.

"Perceived Homosexuals: Looking Gay Enough for Title VII"

American University Law Review, Vol. 63, 2014
UC Davis Legal Studies Research Paper No. 353

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The conventional view of Title VII holds that gay and lesbian workers can bring discrimination claims based on gender stereotyping but not sexual orientation. Analyzing over 240 federal court cases on gender stereotyping in the workplace, this Article shows that the conventional view is wrong. In cases brought by "perceived homosexuals," courts distinguish not between gender stereotyping and sexual orientation claims, but between two ways that violations of gender norms can be perceived: either as something literally seen or as something cognitively understood. This Article shows that plaintiffs who look "gay" often find protection under Title VII, while plaintiffs thought to violate gender norms (through known or suspected sexual activity, friendships, hobbies, or choice of partner) almost never win.

By privileging appearances over identity, these cases run counter to the theories of antidiscrimination law that privilege blindness and assimilation. They reverse courts' usual tendency under Title VII to accept claims based on activities (like child-rearing) known to take place outside of work, but to reject appearance claims, especially challenges to makeup and grooming requirements. And they upend the accounts of "covering" that have been widely accepted in discussions of law and sexuality. Meanwhile, on a practical level, these cases threaten to increase the salience of sexual orientation in the workplace, help entrench the stereotypes they are meant to proscribe, and isolate the claims of successful Title VII litigants from the more assimilationist demands made by gay plaintiffs in areas like marriage, adoption, and military service. As courts have quietly begun granting protection to only the visible subset of gay workers, this Article asks: at what cost, both to LBGT workers, and to ongoing debates over the protection those workers should receive under federal law?

"The Undocumented Closet"

North Carolina Law Review, Vol. 1, 2013
UC Davis Legal Studies Research Paper No. 357

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The phrase "coming out of the closet" traditionally refers to moments when lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals decide to reveal their sexual orientation or gender identity to their families, friends, and communities.In the last few years, many immigrants, particularly those who were brought to the U.S. illegally when they were very young, have invoked the narrative of "coming out."Specifically, they have publicly "outed" themselves by disclosing their unauthorized immigration status despite the threat of deportation laws.In so doing, they have revealed their own closet — "the undocumented closet" — in which they have been forced to hide their identity as "undocumented Americans." Notably, by choosing to become visible, these undocumented Americans are slowly yet powerfully reforming immigration policy by demanding that they are recognized as lawful members of the American polity.

This Article explores the roles that the closet metaphor and the act of "coming out" play in the immigration justice movement. Drawing on scholarship examining the "closet" as the symbol for the oppression of LGBTQ persons, this Article theorizes the "undocumented closet" and argues that this analytical framework facilitates a deeper understanding of the lived experiences of undocumented immigrants in the United States. First, the "undocumented closet" reveals the extent to which immigration and other laws that are designed to exclude unauthorized immigrants both literally and figuratively from the United States have compelled them to become invisible in society. Second, the "undocumented closet" framework underscores that public disclosures about one's undocumented status, despite the risk of deportation, constitute acts of resistance against legal subordination and, importantly, claims for legal membership in the American polity. Finally, the "undocumented closet" facilitates a critical lens for reviewing immigration reform. Importantly, it calls for a rethinking of immigration law that would prevent the further "closeting" and subordination of immigrants and their families.

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