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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

UC DAVIS SCHOOL OF LAW

■ **"Breaking the Web: Data Localization vs. the Global Internet"**

Emory Law Journal, Forthcoming

UC Davis Legal Studies Research Paper No. 378

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A BRICS Internet, the Euro Cloud, the Iranian Internet. Governments across the world eager to increase control over the World Wide Web are tearing it apart. Iran seeks to develop an Internet free of Western influences or domestic dissent. The Australian government places restrictions on health data leaving the country. South Korea requires mapping data to be stored domestically. Vietnam insists on a local copy of all Vietnamese data. The nations of the world are erecting Schengen zones for data, undermining the possibility of global services. The last

century's non-tariff barriers to goods have reappeared as firewalls blocking international data flows.

Data localization requirements threaten the major new advances in information technology — not only cloud computing, but also the promise of big data and the Internet of Things. Equally important, data localization requirements undermine social, economic and civil rights by eroding the ability of consumers and businesses to benefit from access to both knowledge and international markets and by giving governments greater control over local information. Legitimate global anxieties over surveillance and security are justifying governmental measures that break apart the World Wide Web, without enhancing either privacy or security.

"After Shelby County: Getting Section 2 of the VRA to Do the Work of Section 5"

UC Davis Legal Studies Research Paper No. 372

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Until the Supreme Court put an end to it in *Shelby County v. Holder*, Section 5 of the Voting Rights Act was widely regarded as an effective, low-cost tool for blocking potentially discriminatory changes in election law and administration. The provision the Supreme Court left standing, Section 2, is generally seen as expensive, cumbersome and almost wholly ineffective at blocking changes before they take effect. This paper argues that the courts, in partnership with the Department of Justice, could reform Section 2 so that it fills much of the gap left by the Supreme Court's evisceration of Section 5. The proposed reformation of Section 2 rests on two insights: first, that national survey data often contains as much or more information than precinct-level vote margins about the core factual matters in Section 2 cases; second, that the courts have authority to create rebuttable presumptions to regularize Section 2 adjudication. Section 2 cases currently turn on costly, case-specific data and estimates. Judicial decisions provide little guidance about how future cases, relying on different data, are likely to be resolved. By creating evidentiary presumptions whose application in any given case would be determined using national survey data and statistical models, the courts could greatly reduce the cost and uncertainty of Section 2 litigation. This would also end the dependence of vote-dilution claims on often-unreliable techniques of ecological inference, and would make coalitional claims brought jointly by two or more minority groups much easier to litigate.

"Sargon Enterprises V. U.S.C. - A Different Perspective"

California Litigation (Forthcoming)

UC Davis Legal Studies Research Paper No. 376

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Sargon Enterprises v. U.S.C., 55 Cal.4th 747 (2012) is easily the most important expert testimony case rendered by the California Supreme Court in years. The commentary on the case is growing rapidly. To date, most of the commentaries have either generalized that Sargon commits California to the Daubert camp or that Sargon leaves a good deal of uncertainty in its wake. This article addresses both generalizations.

The article contends that procedurally, Sargon does not go as far as Daubert. In Daubert, Justice Blackmun explicitly stated that in applying the new empirical validation test, the trial judge should follow the procedures prescribed by Federal Rule of Evidence 104(a). That statement is significant because under Rule 104(a), the trial judge acts as a factfinder and can consider the credibility of the proffered foundational testimony. In contrast, Sargon does not even mention California Evidence Code section 405, the California analogue to Rule 104(a). Moreover, Justice Chin's opinion relies heavily on a law review article that proposed empowering California trial judges to conduct a circumscribed, sufficiency inquiry, determining only whether, as a matter of logic, the empirical data and reasoning cited support the hypothesis that the expert's general theory or technique is valid. The California Supreme Court may eventually grant state trial judges the power to assess the credibility of the proponent's foundational testimony, but the court has not done so yet.

The article also argues that the Sargon court's approving treatment of two other United States Supreme Court decisions, *Kumho* and *Joiner*, lends clarity to the substantive scope of the holding in Sargon. In *Kumho*, the U.S. Supreme Court announced that its reliability test applies across the board to all types of expert testimony, not only purportedly scientific testimony. In his opinion in Sargon, Justice Chin did not differentiate among the various species of expertise. The parallel between Sargon and *Joiner* is even more striking. In *Joiner*, the plaintiffs' experts extrapolated an opinion about human causation from animal studies. The trial judge excluded the opinion for the stated reason that there were several marked dissimilarities between the facts in the pending case and the circumstances obtaining in the animal studies. The Supreme Court upheld the trial judge ruling and emphasized that the trial judge has the power to assess the aptness of the analogy between the data the expert relies on and the facts of the pending case. Likewise, in Sargon, the trial judge excluded the plaintiff's lost profits opinion because, in the judge's mind, there were significant differences between Sargon and the "Big Six" dental implant companies the expert analogized to. Thus, under Sargon as under *Joiner*, the trial judge has discretion to critically

evaluate the expert's analogical reasoning connecting the facts of the pending case to the empirical data cited as the basis for the expert's opinion.

"Presumed Incompetent: Important Lessons for University Leaders on the Professional Lives of Women Faculty of Color"

Berkeley Journal of Gender, Law & Justice, Forthcoming
UC Davis Legal Studies Research Paper No. 375

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Academics have long known that the experiences of women faculty members of color differ in important respects from those of any other faculty members. Adding significantly to that body of knowledge, *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* edited by Professors Angela P. Harris and Carmen Gonzalez in a collection of essays of different voices offers important lessons for scholars, university administrators and leaders, faculty members, and, for that matter, students interested in the experiences of women of color in academia. People of good faith who want to "do the right thing" may find it difficult to read the unsettling stories and pleas for empathy, internalize the lessons as based on common occurrences rather than outlier experiences, and consider how to address and redress the issues. Still, we as a collective have the obligation and responsibility to think about what might be done to improve the day-to-day lives of the next generation of women faculty of color.

To that end, this review essay directs attention at one chapter of the volume, which offers invaluable commentary and perspective on the other chapters and provides many lessons for university leaders hoping to make a positive difference. This is terrain where one might expect two minority law school deans (and faculty members) to feel most comfortable. In addition, as people of color with real life experience with these issues, we hope to provide insights that help university leaders to better appreciate, grapple with, and attempt to effectively address the concerns of women faculty of color.

In *Lessons from the Experiences of Women of Color Working in Academia*, Professor Yolanda Flores Niemann ably distills valuable lessons from the preceding chapters of the book (p. 446). She cogently analyzes, synthesizes, and elaborates upon the lessons from the experiences of the diverse group of faculty women of color, who offer different perspectives on the challenges that they have encountered in academia. In this essay, we by necessity narrow our focus to just a few of Professor Flores Niemann's many insights. In so doing, our hope is to highlight, and expand upon, ten important lessons from her rich chapter. Building on these lessons, we offer relevant experiences both as minority faculty members ourselves and law school deans.

The pursuit of equity for women of color faculty members obviously requires consideration of a wide array of academic personnel matters and issues of general university and faculty governance. This short essay, of course, cannot do justice in the analysis of those issues in their entirety. What we instead hope to do is to briefly explain how and why university leaders should be sensitive to the possible diversity consequences of just about every decision that he or she makes and take preliminary steps toward beginning a process that can improve the experiences of faculty members of color.

As discussed in this review essay, devotion to a transparent process of decision-making has proven critically important to our success and happiness, as well as to that of many other influential university leaders. In addition, awareness, sensitivity, and commitment are important ingredients to any process aimed at ensuring that the academic workplace is fair, safe, and hospitable to all faculty members. The next steps for academic leaders include concrete and practical action on a variety of fronts.

We currently live in a time of considerable tumult in American law schools, with falling numbers of applications, a challenging legal job market, and rising tuitions. Many of the same trends are evident in higher education generally. The pressing concern in the minds of many university leaders involves financial viability, which unquestionably deserves attention. Concerns with the diversity of faculties and student bodies, as well as the experiences of minorities in academia, are secondary at best to most university leaders and not nearly as high a current priority as one would hope.

The crisis mentality about the economic trends at many universities makes it all the more important to take to heart the lessons of *Presumed Incompetent*. We collectively must strive to avoid allowing the turbulent times in modern academia to drown out the voices of women faculty members of color and ultimately distract us from the goals of diversity and social justice in academia.

"The Restatement of Gay(?)"

79 Brooklyn Law Review, 2014, Forthcoming
UC Davis Legal Studies Research Paper No. 344

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This Article is forthcoming in a symposium issue of the Brooklyn Law Review examining the American Law Institute's Restatements. This Article considers whether there should be a Restatement devoted to legal issues affecting lesbian, gay, bisexual, and transgender (LGBT) people. Ultimately, the Article argues for inclusion of and engagement with LGBT issues in the Restatements, but against the creation of a stand-alone Restatement devoted to LGBT issues. Part I of this Article develops why we think it is critical for the ALI to consider and address LGBT issues. Part II explains why we advocate an inclusive rather than an exclusive approach for such consideration. We use an ALI publication – the Model Penal Code (MPC) – to help illustrate some of the benefits of an inclusive approach. Part III provides concrete examples of how this approach could be implemented. We start by offering guidance as to what types of provisions are most likely in need of reconsideration and possible revision. Such provisions include those that turn on the existence of a legally recognized relationship. Other provisions that may be in need of reconsideration are ones that relate to discriminatory conduct. To provide more clarity about what we advocate, we offer one example of an ALI publication that already does a good job incorporating LGBT issues – the Principles of the Law of Family Dissolution, as well as one example of an ALI publication that needs further revision – the Third Restatement of Torts.

"Revitalizing Local Political Economy Through Modernizing the Property Tax"

Tax Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 374

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As the Great Recession dramatically illustrated, state and local governments need a more stable revenue source. Accordingly, states and localities as diverse as Texas and San Francisco, are experimenting with new kinds of taxes. However, there has been essentially no experimentation with the oldest and most traditional local tax, namely the tax on real property.

This blindness to the property tax is unfortunate for many reasons, including that the property tax is both relatively efficient and stable compared to the other taxes available to states and localities. Of course, it is possible that the property tax has been ignored because, despite its merits, it has structural weaknesses that cannot be reformed. For instance, property tax liability is based on the value of the property and not on the income of the owner, which means that property taxes can impose great burdens on taxpayers on a fixed income. Furthermore, property taxes are typically collected once or twice a year, which imposes a significant obligation on taxpayers to budget correctly.

Yet there is no reason that the property tax needs to continue to be collected in much the same way as it was in the nineteenth century. Property taxes could be withheld from income just like income taxes, thereby making them easier to budget for. Furthermore withholding the property tax as part of a larger income tax system allows for the property tax to respond effectively to the cogent concern that taxpayers may not always have the income in a given year to pay their property taxes. Since the property tax and income tax systems would be integrated under my reform proposal, property tax liability could also be deferred (and perhaps forgiven) when the property tax liability grows to be too high as a percentage of income. Such a regime of incorporating income tax elements into the property tax would allow local taxpayers to respond directly to the relative merits of proposed public projects and services without concern for insuring themselves against future liquidity problems.

"Probability, Professionalism, and Protecting Taxpayers"

Tax Lawyer, Vol. 68, No. 3, 2014

UC Davis Legal Studies Research Paper No. 377

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Lawyers are not mathematicians. Nor are they statisticians or economists. Yet they regularly make probability assessments pertaining to the outcome of pleadings, motions, hearings, litigation strategies, written and oral opinions, and business transactions. Moreover, they make these predictions in a sea of uncertainty, subject to conditions and interdependent variables largely beyond their ken or control. Even more daunting, while some lawyers render these estimates without tangible fear of negative professional implications or discipline thanks to ethical rules that tolerate debased levels of confidence (e.g., not frivolous and colorable), others within the profession must meet considerably higher standards of care while suffering harsher and more palpable penalties, including monetary fines, censure, suspension, and disbarment. These tremulous souls are known as tax lawyers.

This Article analyzes the affirmative and disciplinary duties imposed on tax lawyers that require them to make probability assessments about the merits of a client's tax position or tax-favored transaction, and to reflect those estimates with numerical precision. It describes how the Treasury Department, Congress, and the American Bar

Association (often in concert, occasionally at odds) forged this obligatory standard of care over the last three decades with the shared goal of facilitating accurate advice, accurate tax returns, and compliance with the law. The resulting regulatory standard of care for tax lawyers (which swept aside the old regime of self-regulation) monitors flawed methodological processes, while also minimizing psychological biases and misaligned incentives that can distort professional judgment. In this way, the standard of care for tax lawyers - particularly its emphasis on improving accuracy and reducing errors by updating subjective beliefs with new, relevant information - reflects a branch of probabilistic decision theory known as Bayesian reasoning.

"Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States"

Villanova Law Review, Vol. 59, No. 3, 2014

UC Davis Legal Studies Research Paper No. 373

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This Article examines the successes and failures of current tax whistleblower regimes, with particular emphasis on the states. It considers and then refutes several popular arguments against permitting whistleblowers to submit tax claims, under either a state's False Claims Act (FCA) or standalone statute, including: (i) whistleblower statutes have historically been used to uncover and prosecute fraudulent behavior, not mere noncompliance with the law; (ii) the "knowing" standard of liability under FCAs creates new liability on taxpayers in jurisdictions permitting false claims pertaining to tax; and (iii) tax law is more complex and uncertain than other areas of the law and therefore off limits to whistleblower actions.

The Article also makes the positive case for tax whistleblowers. It demonstrates how informant insiders can assist outgunned tax agencies combat two persistent problems in tax administration, namely the information gap and the tax gap. At the same time, it makes specific recommendations to address widely shared concerns in the tax whistleblower arena, including (i) the proliferation of frivolous and harassing claims, (ii) unnecessary disclosure of tax return information, and (iii) creating a tax enforcement mechanism that bypasses traditional administrative procedures and expert review. In addition, the Article offers alternative tax whistleblower policies for states to consider. It concludes that a properly drafted and implemented tax whistleblower program can reinforce and improve existing tax enforcement efforts, and yield significant increases in revenue.

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