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## Table of Contents

### **The One Woman Director Mandate: History and Trajectory**

[Afra Afsharipour](#), University of California, Davis - School of Law

### **In Defense of Content Regulation**

[Ashutosh Avinash Bhagwat](#), University of California, Davis - School of Law

### **Information Goes Global: Protecting Privacy, Security, and the New Economy in a World of Cross-Border Data Flows**

[Usman Ahmed](#), eBay Inc.

[Anupam Chander](#), University of California, Davis - School of Law

### **Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, Untruthful Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws**

[Edward J. Imwinkelried](#), University of California, Davis - School of Law

### **Back to the Future? Returning Discretion to Crime-Based Removal Decisions**

[Kevin R. Johnson](#), University of California, Davis - School of Law

### **The Law of Look and Feel**

[Peter Lee](#), University of California, Davis - School of Law

[Madhavi Sunder](#), University of California, Davis - School of Law

### **Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It**

[Lisa R. Pruitt](#), University of California, Davis - School of Law

[J. Cliff McKinney](#), Quattlebaum, Grooms & Tull PLLC

[Bart Calhoun](#), McDaniel, Richardson & Calhoun

### **How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study**

[Donna Shestowsky](#), University of California, Davis - School of Law

[^top](#)

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### UC DAVIS SCHOOL OF LAW

#### **"The One Woman Director Mandate: History and Trajectory"**

*CORPORATE GOVERNANCE IN INDIA: CHANGE AND CONTINUITY* (ed. Indian Institute of Corporate Affairs) (Oxford University Press, Forthcoming)

*UC Davis Legal Studies Research Paper No. 472*

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In 2013, India passed historic legislation mandating that boards of publicly listed and certain other large companies must include one woman director. The mandate, which came into effect on April 1, 2015, has the potential to vastly change the profile of Indian boards and board members. This chapter examines the history and trajectory of India's board diversity requirement. It seeks to understand the genesis and goals of this requirement, and explores some of the challenges that India has already faced and may continue to face with respect to the possible effectiveness of this requirement. The chapter then considers for the Indian context the implications of business

and social science literature on gender diversity on corporate boards.

### "In Defense of Content Regulation"

*UC Davis Legal Studies Research Paper No. 483*

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Since at least 1972, the central tenet of free speech doctrine has been that if a law regulates speech based on its content, and the speech is not unprotected or "low value," then the law is subject to strict scrutiny and presumptively unconstitutional. Few commentators have seriously questioned this rule, on the assumption that any deviation from it threatens to unleash censorship, and is in any event unnecessary. This article questions that consensus, and identifies specific circumstances in which, it argues, the government should be permitted to discriminate based on content.

The article begins by identifying a variety of situations in which courts have regularly evaded the general presumption against content regulation, even though the speech at issue was in principle fully protected. The core insight of this article is that these evasions make sense. The corollary of the rule against content discrimination is a presumption that all (fully protected) speech should be treated as equally valuable. But this presumption itself conflicts with the Supreme Court's repeated assertions that the First Amendment values certain speech – speech relevant to democratic self-governance – above all other forms of speech. So, all speech is not equal. Moreover, there are specific circumstances in which it is profoundly irrational to treat all speech as equally valuable. The core example is physical scarcity of speech opportunities. Here, some speech must be allowed, at the expense of other speech. Why not, then, favor more over less valuable speech? Yet current doctrine forbids this choice. The article goes on to identify other specific, objectively definable situations where the presumption against content regulation should be reconsidered. It concludes by exploring, and rejecting counterarguments.

### "Information Goes Global: Protecting Privacy, Security, and the New Economy in a World of Cross-Border Data Flows"

*E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.*

*UC Davis Legal Studies Research Paper No. 480*

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This paper addresses the question of whether it is possible to balance the need for a free flow of information across borders with legitimate government concerns related to public order, consumer privacy, and security. The paper begins by highlighting the risks associated with limitations on free information flows and the policy concerns that lead to these limitations. The paper then provides an analysis of the current international regime on cross-border information flows. The authors argue that specific binding trade language promoting cross-border flows — combined with continued international cooperation — will enhance, rather than undermine, public order, national security, and privacy.

### "Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, Untruthful Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws"

*Pacific Law Journal, Forthcoming*

*UC Davis Legal Studies Research Paper No. 478*

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Traditionally, the common law enforced a general ban on character evidence. More specifically, the common law prohibited a proponent from introducing evidence of a person's other conduct as proof of the person's character trait and then using the trait as proof that on a particular relevant occasion, the person acted consistently with the trait. The prohibition applied to both sides in criminal as well as civil cases. Federal Rules 404-05 extend the prohibition to evidence on the historical merits, and to an extent Rules 608-09 apply the ban to evidence offered on a credibility theory. Rule 608(b) deviates from the ban by permitting cross-examination about a witness's other untruthful acts but bars extrinsic evidence of the acts.

In 1995 Congress enacted the "rape sword" statutes, Rules 413-14. The statutes carve out an exception to the traditional prohibition and allow the prosecution to introduce evidence of an accused's other sexual assaults or child molestations on a character theory to prove the accused's commission of the charged offense. The available psychological research does not warrant drawing a character inference when there is only one or a few other instances of similar conduct. However, the proponents of the statutes contend that the statutes are defensible because these prosecutions often devolve into swearing contests and the prosecution has a legitimate need for evidence to break the credibility tie by corroborating the victim's testimony that the offense occurred.

Especially since 1995, in these prosecutions the defense has attempted to introduce evidence, including extrinsic testimony, of similar, untruthful accusations by the complainant. However, the prosecution has objected that such evidence runs afoul of the prohibitions in Rules 404-05, 608, and 412, the rape shield statute. A few jurisdictions have construed these statutes as banning the defense evidence. However, many jurisdictions allow defense cross-examination about similar, untruthful accusations. Even in these jurisdictions, though, the courts ordinarily exclude extrinsic proof.

The first thesis of this article is that the courts should permit cross-examination when the defense has sufficient proof that the prior accusation was untruthful. Like prosecution evidence proffered under Rules 413-14, this evidence is logically relevant on a character reasoning theory.

Moreover, if the proponents of the rape sword statutes are correct, like the government the defense has an acute need for evidence to prevail in the swearing contest. Just as evidence of other offenses by the accused corroborates the complainant's testimony that the accused attacked him or her, evidence of the complainant's prior, untruthful accusations corroborates the accused's testimony that the complainant has fabricated the charge against the accused.

The second thesis of this article is that as a matter of policy, extrinsic evidence of the prior similar accusations should be admissible. Admittedly, Rule 608(b) purports to enunciate an absolute ban on extrinsic evidence of prior untruthful acts. However, Rule 608(b) is the only impeachment technique subject to a rigid, absolute prohibition of extrinsic evidence; and the wisdom of singling out 608(b) impeachment is questionable. Furthermore, the accused has an extraordinary need for extrinsic evidence in 413-14 cases. Women and children who are the alleged victims of these offenses are exceptionally sympathetic figures on the witness stand; and if the defense cannot disprove the alleged victim's denial on cross-examination, the cross-examination is likely to be counterproductive – the jurors may conclude that the cross-examination was a second, cruel victimization of the complainant. At least in this context, if the law is going to permit inquiry about prior, untruthful accusations, the defense ought to have the right to resort to extrinsic evidence.

The rape sword statutes impact the balance of the criminal justice system in Rule 413-14 prosecutions. To maintain the essential balance of the adversary system in these cases, Evidence law should permit the defense to introduce extrinsic evidence of the complainant's prior, similar, untruthful accusations.

## "Back to the Future? Returning Discretion to Crime-Based Removal Decisions"

*New York University Law Review Online, Vol. 90, 2016, Forthcoming*  
*UC Davis Legal Studies Research Paper No. 479*

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Jason A. Cade has powerfully advocated for returning greater discretion to the courts and agencies in making and reviewing Executive Branch decisions to remove noncitizens from the United States. His latest article, *Return of the JRAD*, 90 NYU L. REV. ONLINE 36 (2015), calls for a revival of a now-discarded procedural device of allowing courts sentencing noncitizen criminal defendants to make a "Judicial Recommendation Against Deportation" (JRAD) that would bar the Executive Branch from removing a noncitizen from the United States.

Congress eliminated the JRAD from the immigration laws in 1990. In calling for its comeback, Cade points to a ruling by respected federal district court judge Jack Weinstein. In *United States v. Aguilar*, the judge issued a sentencing order that, despite the fact that Congress abolished the JRAD a quarter century ago, resembled the old recommendations against deportation. The court thus went beyond the law on the books to advocate against the removal from the United States of a one-time, non-violent criminal offender with U.S. citizen children.

One might dismiss Judge Weinstein's recommendation as mere dicta. However, Jason Cade views the order as a much-needed sign of judicial resistance to the harsh criminal removal provisions of the immigration laws. He seeks to return discretionary authority to the courts to ensure greater proportionality and reasonableness to contemporary removal decisions.

Part I expresses full agreement with Jason Cade's conclusion in *Return of the JRAD* that the modern criminal removal system fails to protect against unfair removals of immigrants.

Part II adds a powerful justification to the call for the reform of the modern criminal removal system – namely, the serious concerns with the overwhelming modern racial disparities in removals, which directly flow from racial disparities in the operation of the modern criminal justice system in the United States. The contemporary criminal removal regime has disparate impacts on Latina/o immigrants, who today comprise the overwhelming majority of the persons deported from the United States. In fact, the modern removal system might accurately be characterized as a Latina/o removal system. The racial impacts of contemporary criminal removals alone warrant a wholesale reconsideration of criminal removals under current American immigration law.

Part III considers separation of powers concerns in the administration of the immigration laws. Jason Cade

indirectly raises a critically important question concerning the branch of the federal government that is best equipped — constitutionally and politically — to curb the excesses of the modern criminal removal system. Fundamental separation of powers principles suggest that Congress should be the focus of reforms.

The challenging political question posed to reformers is how to convince Congress to dismantle the mandatory criminal removal regime that it built. As politicians frequently employ anti-immigrant themes for political gain, noncitizens with criminal convictions continue to be among the most reviled of all immigrants in American politics. Only through a political change of heart can Congress begin to restore discretion to removal decisions and better ensure that respect is afforded to the weighty human interests of immigrants, their families, and communities.

### "The Law of Look and Feel"

*UC Davis Legal Studies Research Paper No. 482*

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Design is the currency of corporations, and increasingly, under the Demsetzian logic, the subject of property claims by them. The world's biggest company owes its value largely to design. Where once Apple's claim to own its popular graphical user interface was rebuffed readily by courts, today, design-related claims lead to billion dollar judgments in Apple's favor. Today design — which includes everything from shape, color, and packaging to user interface, consumer experience, and organizational structure — plays a central role in the modern economy and is increasingly the subject of intellectual property law's attention.

But the law of design is confused and confusing. It is splintered among various doctrines in copyright, trademark and trade dress, and patent law. Indeed, while nearly every area of modern IP law has been marshalled in the service of design protection, the law has taken a siloed approach, with separate disciplines developing ad hoc rules and exceptions to design protection. To make matters worse, different disciplines within IP use similar terms and concepts — functionality, consumer confusion — but apply them in wholly different, even contradictory ways.

This Article provides the first comprehensive assessment of the regulation of consumers' aesthetic experiences in copyright, trade dress, and patent law — what we call "the law of look and feel." We canvas the diverse ways that parties have utilized (and stretched) intellectual property law to protect design in a broad range of products and services, from Pac-Man to Louboutin shoes to the iPhone, from the "feel of the '70s" captured in Marvin Gaye's music, the scantily clad employees of Abercrombie & Fitch, and the décor of Mexican restaurants, to Apple's technologies of "pinch to zoom," "bounce-back" and "rubberbanding." In so doing, we identify an emergent "law of look and feel" that finds unity among the diversity of IP laws protecting aesthetic experience. Going further, we argue that the new enclosure movement of design, if not comprehensively reformed and grounded in theory, can in fact erode innovation, competition, and cultural cohesion itself.

### "Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It"

*University of Arkansas at Little Rock Law Review, Vol. 37, 2015*

*UC Davis Legal Studies Research Paper No. 481*

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In recent years, state high courts, legislatures, bar associations, and other justice system stakeholders have become aware that a shortage of lawyers afflicts many rural communities across the nation and that this dearth of lawyers has implications for access to justice. A lack of systematically collected data about precisely where lawyers are — and are not — in any given state is an obstacle to solving the problem. Another impediment is a lack of information about why lawyers are choosing not to practice in rural locales and about the sorts of incentives that might entice them to do so.

A principal aim of this article and the empirical work that informs it is to begin to develop evidence that will inform solutions to the rural lawyer shortage. In that regard, the article, written for the UALR Bowen "Access to Justice" symposium, makes two significant contributions. The first is to literally map where Arkansas lawyers are and then to look for trends and patterns regarding the least-served communities. The second is to survey law students and attorneys to determine their attitudes toward rural practice and rural living more generally, while also assessing openness to specific opportunities and incentives aimed at attracting lawyers to underserved communities.

We focused our analysis on Arkansas's 25 least populous counties, which we refer to as the "Rural Counties." All except one of these counties has a population of less than 15,000. Collectively, the Rural Counties are home to

some 255,000 residents but fewer than 200 total lawyers, less than half of whom accept clients for representation, as signified by having an IOLTA Account. Representing a third of the state's 75 counties, the Rural Counties lie in clusters in each of the state's four quadrants, and most are relatively distant from state and regional population centers. Among these counties, we found no clear correlation between high poverty and low ratios of attorneys to population. As a general rule, the Rural Counties that are farthest from a metropolitan area have the most acute attorney shortages, although several counties in the Mississippi Delta stood out as exceptions. Not surprisingly, the attorney population in Arkansas's Rural Counties is an aging one. We also found that many other nonmetropolitan counties — those with populations somewhat larger than the Rural Counties — have poor attorney-to-population ratios, suggesting that attorney shortages are on the horizon there, too.

Meanwhile, Arkansas's attorneys tend to be highly concentrated in the state's population centers, with particular overrepresentation in Pulaski County (the state's most populous county and home to state capital Little Rock) and two contiguous central Arkansas counties: 48% of the state's attorneys are a mismatch for just 21% of the state's population in those three counties. The state's second and third most populous counties, Benton and Washington, in the state's booming northwest corridor, have attorney populations more commensurate with their populations.

Our survey of students at the state's two law schools revealed few student respondents who grew up in or had spent much time in Arkansas's Rural Counties or in similarly low-population counties in other states. Further, only a handful of students indicate that they plan to practice in the state's nonmetropolitan areas, let alone the Rural Counties specifically. Nevertheless, many students — particularly among those who grew up in the Rural Counties — expressed openness to working in these counties if given specific opportunities and incentives to do so. When asked about what deterred them from pursuing rural practice, the most dominant theme was concern about economic viability; a lack of cultural and other amenities associated with urban living was a close second. Some students also expressed concern about the greater challenge of finding a life partner in rural places. A number of students expressed very negative attitudes toward rural people, places and practice. Recurring themes included an expectation of rural bias toward racial and sexual minorities and women; concerns about lack of anonymity in the community and lack of professionalism in the justice system; and a shortage of clients able to afford an attorney's services. Still, a critical mass — certainly enough to meet the need in Arkansas's rural communities — indicated willingness to practice in a rural locale if provided fiscal and professional supports, e.g., student loan repayment assistance, mentoring, training in law practice management. When the few students who indicated their intent to practice in a rural area were asked about what they found appealing about such a prospect, the most common theme was autonomy — the ability to have one's own practice and to develop and maintain local clientele.

Respondents to the lawyer survey were generally less negative about rural practice than their law student counterparts. On the whole, most attorneys expressed contentment with their practice location, whether rural or urban. One surprise among the lawyer survey results was that employment opportunities for spouses were less important than we anticipated, perhaps because urban lawyers — the vast majority of survey respondents — take these for granted.

We close with suggested reforms for Arkansas's institutional stakeholders. Among other actions, we suggest that Arkansas follow the lead of South Dakota and offer loan repayment assistance to attorneys who are willing to make a multi-year commitment to practice in an underserved rural area. This incentive has proved popular in South Dakota, which has doubled the size of its program in just two years in response to a high degree of attorney interest. Our survey results give us every reason to believe that such a program, as well as other interventions to bolster the rural lawyer population in Arkansas, could be just as successful. In any event, we anticipate that our efforts to document in detail the rural attorney shortage in Arkansas will provide an incentive — and, we hope, a model — for other states wishing to better understand and alleviate their rural access-to-justice deficits.

## "How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study"

*UC Davis Law Review, Vol. 49, 2016*

*UC Davis Legal Studies Research Paper No. 477*

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This Article presents findings from the first multi-court field study examining how civil litigants evaluate the characteristics of legal procedures shortly after their cases are filed in state court. Analyses revealed that litigants evaluated the characteristics in terms of control — i.e., whether the characteristics granted relative control to the litigants themselves or to third parties (e.g., mediators, judges). Although the litigants indicated a desire to be present for the resolution process, they preferred third-party control to litigant control. They also wanted third parties to control the process more than the outcome. Gender, age group, and case-type significantly predicted attraction to third-party control, whereas attraction to litigant control was predicted by whether litigants had a pre-existing relationship with each other, how much they valued a future relationship with the opposing party, party type, the type of opposing party, and court location. Implications for legal policy and lawyering are discussed.

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