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Public Land and Resources Law Review, Vol. 26, p. 1, 2005
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School of Law
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Illinois Institute of Technology

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Santa Clara Computer and High Technology Law Journal, Vol. 21, p. 783, 2005
LESLIE A. KURTZ
University of California, Davis

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W O R K I N G P A P E R Abstracts

"An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances"

BY: EDWARD J. IMWINKELRIED
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ABSTRACT:
In the past 35 years, the doctrine of objective chances has emerged as one of the most important non-character theories of logical relevance. When a person suffers a particular type of loss with extraordinary frequency, the coincidence is circumstantial evidence that one or some of the incidents were not accidents. The courts accept the evidence because the relevance of the evidence arguably rests on the objective improbability of so many accidents rather than any assumptions about the defendant's personal, subjective bad character. When a civil rights plaintiff wants to prove discriminatory animus, she frequently offers evidence of other allegedly discriminatory acts by the defendant. When an accused denies any knowledge of drugs found in an automobile he was driving, the prosecutor often presents testimony about other occasions when the accused was arrested with drugs in his possession. Perhaps most importantly, in a child abuse prosecution in which the accused claims that the child's injury was accidental, the prosecutor typically offers testimony about other injuries sustained by

that child or other children in the accused's custody. The probative value of the evidence seems so obvious that many would regard it as an affront to common sense to exclude the evidence.

However, in the past ten years, there has been growing criticism that the doctrine of chances lacks legitimate non-character relevance. The thrust of the criticism is that evidence admitted under the doctrine is irrelevant unless one assumes that the defendant has a constant, unchanging propensity over time. If based on that criticism the courts begin to exclude the evidence admitted in the past under the doctrine, that development will increase the pressure to abolish what remains of the character evidence prohibition. Within the past decade, Congress has selectively abolished the prohibition in sexual assault and child molestation cases; and 10 states have followed suit. If the courts begin to routinely exclude this highly probative evidence in child abuse prosecutions and civil rights actions, as a backlash the character evidence prohibition itself might be abolished.

The thesis of this article is that the criticisms of the doctrine of chances are mistaken. The article argues that evidence admitted under the doctrine possesses genuine non-character relevance. The criticisms rest on a simplistic, determinist view of human behavior. Doctrine of chances reasoning enables the trier of fact to negatively reject the hypothesis that random chance accounts for all the outcomes. By allowing the trier to reject that hypothesis, the evidence affirmatively increases the probability that one or some of the incidents are the product of situational choice, not prompted by the person's character traits. There may be a case for abolishing the character evidence prohibition, but that case cannot be premised on the argument that the doctrine of chances is a spurious non-character theory.

N E W and F O R T H C O M I N G Articles

"Debt Abides"
American Bankruptcy Law Journal, Vol. 78, p. 427, 2004

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ABSTRACT:
This paper attempts to give an account of the development of modern finance theory and the ways in which it has changed bankruptcy practice.

"Recusal and the Supreme Court"
Hastings Law Journal, Vol. 56, p. 657, 2005

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ABSTRACT:
From Laird v. Tatum to Bush v. Gore, the refusal of some Supreme

Court Justices to recuse themselves in controversial cases has caused reactions ranging from confusion to disgust. The latest "duck hunting" recusal controversy, and the Court's seemingly callous response to the public outcry, seemed to suggest a deliberate indifference to the recusal standard. This Article examines the recusal provisions applicable to the Supreme Court. Although there is little doubt that Congress drafted the federal recusal statute broadly, interesting questions surround recusal in the Supreme Court due to the unique position the Court holds, which raises potential separation of powers and enforcement issues. The Article concludes that rather than an insistence upon actual recusal, a more valuable approach at the Supreme Court level might involve the institution of additional disclosures, in the form of "statements of interest" accompanying participation.

"Science, Judgment, and Controversy in Natural Resource Regulation"
Public Land and Resources Law Review, Vol. 26, p. 1, 2005

BY: HOLLY DOREMUS
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ABSTRACT:
Natural resource regulation is heavily "scientized," by which we mean both that the current regulatory structure requires the use of science in a wide range of decisions, and that decisionmakers generally emphasize the role of science in those decisions. Nonetheless, critics on all sides of the political spectrum claim to believe that regulatory decisions remain too political and insufficiently scientific.

Administration of the Endangered Species Act (ESA) in the Klamath Basin illustrates the challenges of scientifically managing nature. A series of science-based decisions are needed, from species listing to consultation on federal actions. Those decisions carry substantial costs for the people who share the landscape with protected species. Unless science can provide some level of confidence that management actions are both necessary and effective, those decisions will be widely perceived as unfair. The key question, not yet answered, is just how much confidence should be expected.

There may well be points in the decisionmaking process at which greater objectivity would be desirable. As we argue in more detail below, however, science can never provide the perfect rationality we have been conditioned to expect from it.
Therefore, simplistic generalized demands for objective rationality are not a useful reform strategy. Typically, the disputes are fundamentally about how incomplete data are interpreted and applied, rather than about what the data are or how they have been gathered. Agency judgments, in other words, are the real issue. It is impossible to entirely prevent the exercise of judgment, influenced by the subjective values and biases of the decisionmaker, from creeping into decisions. A more useful inquiry would take a closer look at the role of judgment, asking at what stage and through what mechanisms it factors into resource management decisions, whether the effect of those judgment steps is to advance or retard the identification and achievement of societal goals, and, when correction is needed, how judgments might be more closely constrained.

"Cry Me A River: The Limits of 'A Systemic Analysis of Affirmative Action in American Law Schools'"

African-American Law & Policy Report, Vol. 7, 2005

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ABSTRACT:
This article is a response to Richard H. Sander's article, A Systemic Analysis of Affirmative Action in American Law Schools, which recently appeared in the Stanford Law Review. In his article, Professor Sander argues that affirmative action in law schools harms, rather than helps, African American law students by setting up African American students, who are out-matched by their white peers in terms of undergraduate grade point average and LSAT scores, for failure. Specifically, Professor Sander contends that because affirmative action enables African Americans to attend law schools for which they are unqualified, they are more likely to perform poorly in law school, drop out, fail the bar examination, and never become lawyers.

In this brief response, we contend that Professor Sander's analysis is misdirected and narrow, and we highlight two shortcomings of the article. First, noting other studies that maintain that Professor Sander's empirical work does not support his conclusions about the effects of affirmative action on African American law students, we

raise the important issue of maintaining racial diversity in law schools, a key point relevant to affirmative action, which Professor Sander ignores throughout his article. In so doing, we examine Professor Sander's failure to offer alternatives of what policies might more fully diversify law schools and ensure educational opportunity for all. We also explore Professor Sander's charges of a lack of candor by law schools about the salience of race in admissions decisions, charges that not only mischaracterize the admission process at many law schools but also fail to encourage an open and honest dialogue about the problem of minority underrepresentation in law schools. Second, we critically examine Professor Sander's assumption that relatively lower undergraduate GPAs and LSAT scores explain why African-American students fail to fare as well academically in law school as their white peers. In so doing, we highlight Professor Sander's neglect of other significant factors likely to correlate with poor performance, in particular the well-documented hostile environment faced by African American, and other minority, students in law schools and the manner in which such an environment may adversely affect their academic performance. Finally, this article explores steps that law schools may take to improve the experiences of African American and other minority students within their corridors.

"Digital Actors and Copyright - From 'The Polar Express' to 'Simone'"
Santa Clara Computer and High Technology Law Journal, Vol. 21, p. 783, 2005

BY: LESLIE A. KURTZ
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ABSTRACT:

Digital technology is revolutionizing our ability to manipulate, change and recreate images. We can create new images digitally and we can scan existing film and photographs and record them in digital form. Sound can also be digitized. Once digitally captured material exists, whatever its source, it can be manipulated in ways not achievable in an analog world. This makes it possible to create digitally created human actors. Digital actors are useful today, and will become more so with the passage of time and the continued development of technology. Films can be populated with legions of digital extras. Filmmakers can use a few extras, changing eye color, hair tint, skin tone, and clothing, and create what appears to be a vast crowd with apparently infinite variations. Digital actors can perform stunts that would be dangerous or impossible for a live actor, perhaps eliminating the need for stuntmen and women. Digital technology can take viewers to places no real actor, or camera setup, could go.

This brief article looks at digitally created human actors in terms of three paradigms, derived from recent films. The first is "The Polar Express," which used a technique called motion or performance capture for all its characters. The second includes two films, "Spider Man 2," which created digital doubles for Tobey Maguire and Alfred Molina, and "Lemony Snickets' A Series of Unfortunate Events," which created a digital double for the baby, Sunny. The third is the film "Simone," in which a fictional director creates (fictionally) a digital actress.

Using these paradigms, I consider the effect of copyright on the creation and protection of these hybrid creatures, derived in part from human beings, and created in part by those employing digital technology. I conclude that, in dealing with the protection of digital actors, we need a more contemporary, flexible, and workable approach than the ones (purportedly) used in protecting fictional characters and that, in dealing with the creation of digital actors, infringement and fair use should be interpreted with some liberality, so that new technology and creation are not unduly inhibited.

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