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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
UC DAVIS SCHOOL OF LAW

Vol. 15, No. 4: Aug 30, 2013

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"Unshackling Foreign Corporations: Kiobel's Unexpected Legacy"

107 AM. J. INT'L L., 2013, Forthcoming
UC Davis Legal Studies Research Paper No. 342

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Kiobel v. Royal Dutch Petroleum disfavors American corporations. While largely unshackling foreign corporations from the risk of being haled before an American court to answer for human rights abuses abroad, the decision keeps American corporations constrained by human rights law. This is because application of the Alien Tort Statute, as announced in Kiobel, turns on whether a corporation's actions "touch and concern" the United States. American corporations are simply far more likely to satisfy that standard than foreign corporations.

The argument proceeds as follows. First, this paper shows that American corporations are, for practical purposes, still bound by human rights law, enforceable in U.S. courts. Second, it demonstrates that foreign corporations, however, are largely freed by Kiobel from similar obligations enforceable in U.S. courts. After describing this differential treatment and why it matters, the paper concludes by delineating possible ways to resolve Kiobel's asymmetrical effects. Perhaps most promisingly, Congress could level the playing field by declaring the Alien Tort

Statute to have extraterritorial effect, against foreign and domestic concern alike.

"The Lost Brown v. Board of Education of Immigration Law"

North Carolina Law Review, Vol. 91, No. 5, 1657 (2013)
UC Davis Legal Studies Research Paper No. 346

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This Article proposes that in 1957, the Supreme Court came close to applying Brown v. Board of Education to immigration law. In Brown, the Supreme Court held that school segregation was unconstitutional. Ultimately, Brown came to be understood as prohibiting almost all racial classifications. Meanwhile, in a line of cases exemplified by Chae Chan Ping v. United States and Fong Yue Ting v. United States, the Supreme Court held that Congress enjoyed plenary power to discriminate on any ground, including race, in immigration law. These holdings have never been formally overruled. Immigration, then, is said to be an exception to the general rule of Brown and Bolling v. Sharpe.

In 1957, however, the Supreme Court granted certiorari in United States ex rel Lee Kum Hoy v. Murff, to resolve the question of the permissibility of race discrimination in the immigration context. The case involved a policy under which immigration officials tested the blood of Chinese people immigrating as children of U.S. citizens to determine whether they were related to their claimed parents, but not the blood of similarly situated members of other races. The Second Circuit, over the dissent of Judge Jerome Frank, upheld the discriminatory policy, so the Court had no reason to take the case unless it thought the decision was incorrect. While the Supreme Court ultimately granted the petitioners relief on other grounds, records of the Court and the short per curiam opinion suggest that the Court may have been prepared to hold at least this form of discrimination in immigration unconstitutional.

"Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction"

California Law Review, Vol. 101, December 2013
UC Davis Legal Studies Research Paper No. 350

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If there is one point about tribal status that the Supreme Court has stressed for decades if not centuries, it is the notion that tribes as political entities are utterly one of a kind. This is to some extent reasonable; tribes, unlike other governments, have suffered the painful history of colonial conquest, making some distinctive treatment eminently justifiable. But recent developments have demonstrated to many tribes that uniqueness has its disadvantages. In the past few decades, the Supreme Court has undertaken a near-complete dismantling of tribal civil jurisdiction over nonmembers. Under current law, tribes have virtually no authority to permit nonmembers to be haled into tribal courts – even when nonmembers have significant ties to the tribe and have come onto the reservation for personal gain. In this project of limiting tribal power, as with so much of the Court's Indian law jurisprudence, the Supreme Court has emphasized tribes' distinctive status, notably failing to consider the relevance of more generally applicable doctrines such as personal jurisdiction. Tribal uniqueness has thus come to include tribes' singular inability to exercise jurisdiction over nonmembers, despite the reality that people and commerce move freely across tribal and non-tribal land.

This is a mistake. Tribal court jurisdiction has much in common with broader notions of personal jurisdiction, and treating it in any other way limits and distorts courts' analysis. Indeed, the field of jurisdiction presents a striking disparity between the absence of factors actually unique to the tribal context and the extreme idiosyncrasy of the Court's doctrine. No good reason exists why existing personal jurisdiction doctrines could not be adapted to encompass the issues that tribal court jurisdiction presents; that is true even if one concedes various premises of the Court's opinions, such as the idea that it is inherently burdensome in most cases for nonmembers to defend in tribal court. Further, because minimum contacts analysis allows courts to take a nuanced, flexible view of the degree of connection between the defendant and the forum, personal jurisdiction doctrine is perfectly suited to addressing the often-complex fact patterns that characterize modern disputes involving Indian country. For these reasons, the Article argues, limitations on tribal court jurisdiction over nonmembers should be recharacterized as limits on personal jurisdiction. This would both harmonize tribal courts' jurisdiction with that of state courts, and do a better job than current doctrine in balancing the legitimate interests of both tribes and nonmember defendants.

"Indescendibility"

California Law Review, Vol. 102, 2014
UC Davis Legal Studies Research Paper No. 345

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Supposedly, one of the most important sticks in the bundle of property rights is the power to transfer an asset after death. This Article explores objects and entitlements that defy this norm. Indescendibility — property that cannot be passed by will, trust, or intestacy — lurks throughout the legal system, from constitutional provisions barring hereditary privileges, to statutes that prohibit decedents from bequeathing their valuable body parts, to the ancient but misty doctrine that certain claims do not survive the plaintiff, to more prosaic matters such as season tickets, taxi cab medallions, frequent flier miles, and social media accounts. The Article first identifies the common policy underpinnings of these diverse rules. It compares the related issue of market inalienability — property that can be given away but not sold — and concludes that indescendibility often serves unique objectives. In particular, forbidding posthumous transfer can avoid administrative costs. The Article then uses these insights to propose reforms to the descendibility of body parts, causes of action, and items made non-inheritable by contract.

"Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion"

Arizona Law Review, Vol. 55, No. 4, (2013), Forthcoming
UC Davis Legal Studies Research Paper No. 349

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The police tend to think that those who evade surveillance are criminals. Yet the evasion may only be a protest against the surveillance itself. Faced with the growing surveillance capacities of the government, some people object. They buy "burners" (prepaid phones) or "freedom phones" from Asia that have had all tracking devices removed, or they hide their smartphones in ad hoc Faraday cages that block their signals. They use Tor to surf the internet. They identify tracking devices with GPS detectors. They avoid credit cards and choose cash, prepaid debit cards, or bitcoins. They burn their garbage. At the extreme end, some "live off the grid" and cut off all contact with the modern world.

These are all examples of what I call privacy protests: actions individuals take to block or to thwart government surveillance for reasons that are unrelated to criminal wrongdoing. Those engaged in privacy protests do so primarily because they object to the presence of perceived or potential government surveillance in their lives. How do we tell the difference between privacy protests and criminal evasions, and why does it matter? Surprisingly scant attention has been given to these questions, in part because Fourth Amendment law makes little distinction between ordinary criminal evasions and privacy protests. This article discusses the importance of these ordinary acts of resistance, their place in constitutional criminal procedure, and their potential social value in the struggle over the meaning of privacy.

"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.

"Harnessing Private Regulation"

UC Davis Legal Studies Research Paper No. 347

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In private regulation, private actors make, implement and enforce rules that serve traditional public goals. While private safety standards have a long history, private social and environmental regulation in the forms of self-regulation, supply chain contracting, and voluntary certification and labeling programs have proliferated in the past

couple decades. This expansion of private regulation raises the question of how it might be harnessed by public actors to build better regulatory regimes. The Article tackles this question first by identifying three forms of strong harnessing: public incorporation of private standards, public endorsement of self-regulation, and third-party verification. It then analyzes eight third-party verification programs established by six federal regulatory agencies to derive lessons about what makes a program successful and to develop recommendations to federal agencies about when and how they should use third-party verification.

"The Tax Consequences of Partnership Break-Ups: A Primer on Partnership Sales and Liquidations"
Tax Lawyer, Vol. 66, No. 3, 2013
UC Davis Legal Studies Research Paper No. 343

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This Article is a practical exploration of the tax consequences of the alternatives for reducing a partner's interest: by sale or by a liquidation distribution. Partnerships and limited liability companies do not last forever. Indeed, there comes a point in the life of many partnerships when it is time to retire or to eliminate the interest of one or more partners. There are essentially two forms of transactions for reducing or terminating the interest of a partner: a sale of the partner's interest to another partner or a third party or a distribution from the partnership in liquidation of the partner's interest. In some cases the economic effect of a sale or distribution will be the same. The binary nature of this choice, however, is deceptively simple. The variable tax consequences inherent in sales and liquidations of a partner's interest raise some of the most complex issues in tax law that involve both technical and numerical challenges. In addition, although these issues arise at the reduction or termination of an interest, planning at the formation of a partnership is critical to resolution of questions about the termination of a partner's interest. With examples, the Article is an attempt to guide the practitioner through an analysis of the statutory and regulatory rules affecting the taxation of sales and liquidation of a partner's interest looking at the tax consequences to both the partners and the partnership. Although the Article is not an attempt to achieve the impossible — simplifying the excruciatingly complex analysis — the article tries to provide an analytical foundation for the myriad of difficult questions that arise on the context of removing a partner's interest.

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