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T A B L E  O F  C O N T E N T S



"Punish or Surveil"
Transnational Law and Contemporary Problems, Vol. 16, p.873, 2007
UC Davis Legal Studies Research Paper No. 119

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ABSTRACT: This Article endeavors to paint a fuller picture of previous practice and present options than is often present in debates about the United States' antiterrorism measures. It begins by describing practices in place before the campaign launched after September 11, 2001. The Article focuses on punishment, the first prong of the policy long used to combat threats against the United States. Ordinary civilian and military courts stood ready to punish persons found guilty at public trials that adhered to fairness standards, and national security interests not infrequently were advanced through such courts. That is not to say that courts were the government's only option. When it deemed judicial mechanisms unable to protect state security - on account, for example, of its unwillingness to disclose secrets of state - the Executive resorted to surveillance, the second prong of established policy. As for present options, the Article shows the error in the premise that the attacks of September 11 exposed elemental defects in this policy - called here, with a nod to Foucault, "punish or surveil." The government's post-September 11 third-prong option, moreover, is no improvement. The Article demonstrates that reinforcement of the established, two-pronged policy is the present option that promises best to protect both individual and national security.

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"Whatever Happened to the Market for Partners' Desks? The Milberg Indictment as an Inquiry into Accountability"
Journal of Business & Technology Law, Forthcoming
UC Davis Legal Studies Research Paper No. 120

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ABSTRACT: The article places the indictment of the Milberg Weiss law in the context of recent changes in partnership law that have diminished the accountability of partners in professional services firms for the misconduct of their colleagues.

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"The Case Against Abandoning the Search for Substantive Accuracy"
Seton Hall Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 117

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ABSTRACT: (This paper will be the basis for the author's remarks at the 2008 meeting of the Evidence Section at the A.A.L.S. meeting. It will later be published in SETON HALL LAW REVIEW.)

Professor Christopher Slobogin's new book, PROVING THE UNPROVABLE (2007), is one of the most provocative Evidence texts released in recent years. In the book, he argues in favor of a more relaxed standard for admitting psychologists' and psychiatrists' testimony about a person's prior mental state. He contends that a person's earlier mental state is essentially unprovable and that it is impossible to gauge the validity of such testimony in the sense of its substantive accuracy. He concludes that the nature of such testimony precludes the application of the normal expert testimony standards prescribed by Daubert and Kumho.

Instead, Professor Slobogin proposes generally accepted content validity as the standard for admissibility. His proposal is a step in the right direction. The proposal would at least ensure that the expert's opinion represents something more than the expert's personal ipse dixit. Moreover, his analysis is balanced. While he states that "scientifically verified evidence" is "usually" unavailable as a basis for expert testimony about past mental state, he adds the qualification that "[i]n those few instances when scientifically reliable information material to [the] issue [of past mental state] is available, the expert should rely on it."

My fear, though, is that some may not read PROVING THE UNPROVABLE closely enough and will lose sight of the important qualifications Professor Slobogin adds. The book is argued so forcefully that readers may instead focus on the broad language suggesting that the very nature of the topic precludes policing the substantive accuracy of the relevant expert testimony.

I have grave doubts about the wisdom of a general call to abandon the search for substantive accuracy in psychological and psychiatric testimony. The purpose of this short article is to explain the source of those doubts. The first part of this article is a descriptive survey of the state of the art of determining malingering by subjects of psychological and psychiatric interviews. The second part of the article is a critical evaluation of the state of that art. The third and final part of the articles inquires what light the state of the art of malingering detection sheds on the question of whether it is necessary to abandon the attempt to ensure the substantive accuracy of testimony by psychologists and psychiatrists about a person's prior mental state.

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"Virtual Consumption: A Second Life for Earth?"
Brigham Young University Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 118

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ABSTRACT: Consumption is at the root of many of the world's greatest environmental challenges, yet laws or policies that directly address consumption are rare. Virtual worlds such as Second Life offer the intriguing prospect of displacing a substantial amount of real-world consumption without running afoul of the political and economic obstacles that proposals to reduce consumption often face. In the interactive online reality of virtual worlds, players adopt an ?avatar? and participate in an electronic world that mirrors the real world in striking ways.
As this Article explains, virtual worlds offer opportunities, experiences, and pleasures that satisfy many of the basic motivations that drive modern consumption. Yet while ?virtual consumption? may be a promising substitute for real consumption, virtual worlds also present dangers that require careful reflection before we wholeheartedly embrace them as a tool for protecting the environment.

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