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LATCRIT SYMPOSIUM TOWARD EQUAL JUSTICE IN LAW, EDUCATION AND SOCIETY

FOREWORD

LATCRIT PRAXIS @ XX:

TOWARD EQUAL JUSTICE IN LAW,
EDUCATION AND SOCIETY

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& *Francisco Valdes*

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This article tries to address the problem of a corrupt and broken electoral system that has been captured by special interests through big money spending in political campaigns, while at the same time preserving the spirit of the Free Speech Clause of our Constitution. In doing so, this article first reviews and summarizes the different alternatives proposed as potential fixes for the campaign finance problem. It then explains why none of the proposed alternatives can accomplish the dual goals set out above. Finally, the article briefly sketches a proposal for a fundamental reworking of our representative democracy by substituting legislative elections with a system for randomly choosing our legislators from the general population.

TIERED PERSONHOOD AND THE
EXCLUDED VOTER

Atiba R. Ellis 463

The modern discourse critiquing vote denial policies in the United States has taken two distinct paths. The first and more recent path has been to critique the effects of legislation like voter identification laws, narrowed early voting opportunities, and similar enactments to hyper-regulate the voting process, effecting, as some argue, the ability for the poor, the elderly, and minorities to vote. The second strain of this voter suppression discourse relates to the express exclusion of persons who have been convicted of felonies from the exercise of the franchise. While both vote denial by effect or by express disenfranchisement have raised numerous civil rights concerns, few scholars have treated these issues in tandem or examined the ideological interconnections between these doctrinally distinct voter suppression doctrines. This essay will use the lens of “tiered personhood” to conceptualize the dual aspects of the voter denial problem as a unified phenomenon

of political subordination intended to exclude certain persons from the political community. This essay argues that this voter suppression dynamic creates statuses as between persons based upon the ability to exercise complete or less than complete constitutional rights driven by an ideology of exclusion of those deemed “unworthy” of full membership in the political community, thus excluding those persons from full citizenship. With the problem framed in this way, the essay will briefly use this lens to analyze the disparate treatment of convicted felons and the disparate impact of voter suppression legislation as parallel mechanisms that serve the same end—the maintenance of an American political underclass. The essay will then propose a sketch of a new model for subverting this underclass dynamic—a communitarian re-conception of American political community based on a premise of inclusion within that community rather than a dynamic of exclusion.

EVOLVING STANDARDS OF DOMINATION:
ABANDONING A FLAWED LEGAL
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This article critiques the evolving standards of decency doctrine as a form of Social Darwinism. It argues that evolving standards of decency provided a system of review that was tailor-made for Civil Rights opponents to scale back racial progress. Although as a doctrinal matter, evolving standards sought to tie punishment practices to social mores, prison sentencing became subject to political agendas that determined the course of punishment more than the benevolence of a maturing society. Indeed, rather than the fierce competition that is supposed to guide social development, the criminal justice system was consciously deployed as a means of social control. This evolutionary model was thus betrayed by Court opinions that allowed states nearly unfettered authority over prison sentencing and use of solitary confinement, a self-fulfilling prophecy—a deep irony in the expanded incarceration of poor, uneducated, minorities—the very population that might be expected under an evolutionary frame.

The article urges the Supreme Court to abandon evolving standards as a flawed and pernicious concept, and, simultaneously, accept the duty to reinterpret the Eighth Amendment for prison sentencing and solitary confinement. Looking forward, the article advances a blueprint for employing research and science as a means of reimagining the scale of imprisonment. It challenges the Court to do something never done before in American penal history—justify the length of prison sentences with more than just random and arbitrary figures. The Court has been trying to implement objective standards to guide punishment practices for decades, but has constantly fallen prey to its own subjective inclinations. This article suggests that the objectivity the Court has been seeking all along is there for the taking, provided it abandons the sociological myth of “survival of the fittest” along with the idea that American society is ever-progressing in humane decency. The Court must move beyond its obsessive tinkering with the death penalty and focus on the realities of “doing time” in America.

CITIZENSHIP FOR THE GUEST WORKERS
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This essay explores an underexamined yet compelling immigration issue: whether Congress should confer to long-term guest workers in the Commonwealth of the Northern Mariana Islands (CNMI) a path to lawful permanent residence and citizenship. The issue has led to contentious debates between groups arguing for a fair and equitable result for the guest workers and groups advocating for the indigenous peoples of the CNMI who fear loss of political power. Contending that both arguments raise important anti-subordination claims, this essay argues that resolution of the issue requires a close examination of the historical, cultural and economic factors that led to this issue. Ultimately, this essay argues that Congress should provide the guest workers with a path to become permanent

members of the American polity. Yet, in doing so, Congress must be mindful of the political needs of the CNMI's indigenous populations.

ADAPTIVE LAW IN THE ANTHROPOCENE *Shalanda H. Baker* 563

The sky has fallen. We are now firmly rooted in a new epoch scientists have named the Anthropocene, where the activities of humans will most certainly negatively impact the trajectory of Earth and its inhabitants. What the Anthropocene fully holds is uncertain, but there are a few clues. The global ecology is shifting. The oceans are dying. The planet is getting hotter and drier, and its storms increasingly volatile.

Amidst this changing climate is evidence of a failed approach to economic development in the Global South. Globally, the poor are becoming poorer. Inequality reigns as the global economy shrinks. This thought piece and essay explores these twin issues—human-created climate change and neoliberal economic development—and argues that they are linked in ways not fully addressed by the emerging discourse on climate change adaptation. In particular, this essay argues that reliance on neoliberal economic development institutions and methodologies to engage in the climate change adaptation project will render states in the Global South even more vulnerable and less resilient in the face of climate change. This essay offers a preliminary agenda and suggested starting points for scholars seeking to apply adaptive legal principles to international development.

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CRISIS AND TRIGGER WARNINGS:
REFLECTIONS ON LEGAL EDUCATION
AND THE SOCIAL VALUE OF THE LAW *Kim D. Chanbonpin* 615

In the same moment that law schools are embracing neoliberal strategies in response to the economic crisis caused by declining admissions, students in the classroom have begun to agitate for advance content notices (or “trigger warnings”) to alert them to any potentially trauma-inducing course materials. For faculty who have already adopted a defensive posture in response to threats to eliminate tenure, this demand feels like an additional assault on academic freedom; one that reflects a distressing student-as-consumer mentality. From this vantage point, students are too easily cast as another group of adversaries when, in actuality, students are straw targets who have little power compared to the real threat—the unchecked corporatization of legal education. This essay attempts to redirect faculty outrage back to the proper mark by decoupling the trigger-warning movement from the broader phenomenon of the neoliberal law school. It presents an alternate reading of trigger-warning mandates: as a student critique of legal pedagogy that demands access and opportunity for all students to fully engage in classroom discussions that can be difficult and are often painful. Trigger warnings give lie to the myth that law is based on dispassionate and objective legal analysis. Seen this way, trigger warnings invite students to become partners in the

production of knowledge, while allowing faculty to maintain intellectually rigorous classroom environments. Faculty cannot afford to view students as antagonists. Instead, students should be enlisted as allies in our efforts to challenge the orthodoxy of market-based solutions to the legal education crisis.

AFTERWORD

*HABEAS DATA: COMPARATIVE
CONSTITUTIONAL INTERVENTIONS FROM
LATIN AMERICA AGAINST NEOLIBERAL
STATES OF INSECURITY AND
SURVEILLANCE*

Marc-Tizoc González 641

To cultivate the next twenty years of LatCrit theory, praxis, and community, the afterword looks back to LatCrit's Critical Global Classroom (2003–04) (CGC), an ABA-accredited summer study-abroad program. The CGC invited U.S. law students to study comparative constitutionalism, law and society, and truth and reconciliation movements while sojourning Chile, Argentina, and South Africa under the question: "Shall the recent history of the Global South become the imminent fate of the Global North?" While enrolled in the 2004 CGC, the author learned about the extraordinary constitutional writ of *habeas data*, which various Latin American countries adopted as they reconstituted their democracies from the wreckage of the fascist military dictatorships that terrorized their peoples in the second half of the twentieth century.

Habeas data enables individuals to petition their government, and certain private entities, to learn what information has been kept on them and for what purposes, as well as to challenge, rectify, and even delete such information. With the recent revelations of the National Security Agency's massive electronic surveillance of people throughout and beyond the United States, learning about *habeas data* could constitute a vital intervention for the discourse of U.S.-based legal scholars writing in English, as well as for the community of critical socio-legal scholars who affiliate with LatCrit. To both constituencies, the afterword urges attending carefully to the terrible histories that birthed *habeas data*, while being cognizant of their continuities with today's "neoliberal states of insecurity and surveillance," in order to fashion a strategic alliance capable of grounding *habeas data* rights within the United States Constitution.

STUDENT NOTES

*THE CONFLICT BETWEEN FORUM-SELECTION
CLAUSES AND STATE CONSUMER PROTECTION LAWS:
WHY ILLINOIS GOT IT RIGHT IN
JANE DOE V. MATCH.COM*

Marty Gould 671

To what extent can companies "contract out" of state consumer protection statutes through the use of choice of law and forum selection clauses in standard form adhesion contracts? The only court in Illinois to rule on the issue, a state court case dealing with Match.com, held that the Illinois Dating Referral Services Act (IDRSA) voids forum-selection clauses contrary to stated Illinois public policy, as declared by Illinois statutes. Outside of Illinois, however, federal courts have held that the exact same Match.com forum-selection clause was valid and enforceable despite being in direct conflict with similar statutes in other states. These cases represent a split in decision and analysis, pitting the values of individual autonomy and economic efficiency against federalism and a state's right to choose how it protects its citizens.

This article takes the position that the Illinois case arrives at the correct result. Part I of this article discusses *Jane Doe v. Match.com*—the Illinois case at issue. Part II discusses *Brodsky v. Match.com*, one of the main Match.com cases at odds with the Illinois decision. Part III discusses why the Illinois case is correct,

highlighting the legal reasons under both Illinois and federal law. Specifically, Part III argues that the Illinois court had the authority to, and did, refuse to enforce Match.com's forum selection clause pursuant to the public policy exception outlined in *M/S Bremen v. Zapata Off-Shore Co.* Finally, Part IV discusses why public policy reasons justify and support the conclusion reached by the Illinois court. To preempt state consumer protection laws and any associated anti-waiver provisions, Congress must pass legislation to that end and clarify the existing uncertainty in the law. However, without Congress stepping in, federal courts should respect the principles of federalism and not enforce forum selection clauses that are in conflict with state consumer protection laws—at least in personal injury cases involving contracts of adhesion.

MORE THAN A PIECE OF PAPER: SAME-SEX
PARENTS AND THEIR ADOPTED CHILDREN
ARE ENTITLED TO EQUAL PROTECTION IN
THE REALM OF BIRTH CERTIFICATES

Shohreh Davoodi 703

In *Adar v. Smith*, the Fifth Circuit held that Louisiana's policy of refusing to issue accurate birth certificates to the children of out-of-state, same-sex adoptive parents does not deny those families equal protection of the law. This comment demonstrates that Louisiana's policy does in fact violate the Equal Protection Clause. There are two ways Louisiana's policy infringes on the rights of these families. First, the policy burdens fundamental rights stemming from the family autonomy of both parents and children. Second, the policy discriminates against out-of-state same-sex parents, treating them like second-class citizens. These concerns are strong enough that the policy should be subject to some form of heightened scrutiny. Louisiana's failure to issue accurate birth certificates revisits valid parentage determinations made by other states and undermines the strength of those parent-child relationships. Louisiana lacks a legitimate interest in denying these out-of-state families fundamental rights and discriminating against them on the basis of sexual orientation. Consequently, the policy is unconstitutional.

THE SCRAMBLE TO PROMOTE EGG DONATION
THROUGH A MORE PROTECTIVE
REGULATORY REGIME

Jacob Radecki 729

Egg "donation" is a burgeoning industry in the United States. Fertility clinics capitalize on financially needy college students by advertising substantial financial benefits; particularly gifted women may receive thousands of dollars for selling their eggs. Rosy advertisements portray a well-paying procedure that also helps bring a child to a loving parent. Yet these descriptions mask significant potential harms. With respect to known problems, hormone regimens may cause ovarian hyper-stimulation syndrome, which in the most severe cases can lead to infertility. In terms of unknown risks, anecdotal evidence suggests that the long-term side effects of egg extraction may include cancer. The fundamental issue with egg donation lies in a patchwork regulatory system. Federally, there are no regulations, and while some states limit compensation, others only require that clinics distribute certain information. Some propose that the United States follow other countries by banning or limiting compensation. Instead, the United States should enact a comprehensive regulatory regime to protect donors while respecting their bodily autonomy. First, states should adopt informed consent requirements for clinics and risk disclosure requirements for advertisements. Second, clinics performing extractions should be required to pay for health care in the event of negative effects. Finally, a federal reporting requirement should be created to document the long-term health effects of egg donation.

WHEN IS A PATENT EXHAUSTED?
LICENSING PATENTS ON A CLAIM-BY-CLAIM
BASIS

Lucas Dahlin 757

The patent exhaustion doctrine is meant to protect legitimate purchasers of patented items from post-sale restrictions imposed by patent owners. The courts, however, have recently expanded the doctrine of patent exhaustion by holding that the sale of a device which “partially” practices a patent exhausts that patent in its entirety. This holding essentially precludes patent owners from licensing their patents on a claim-by-claim basis. As inventions become more complex and require more parties working in concert to bring an idea to market, the inability to license patents on a claim-by-claim basis will lead to inventors being unable to fully monetize their inventions, licensees over-paying for licenses, and market hold-ups where ideas languish in conception. Further, the expansion of the patent exhaustion defense affords legitimate purchasers no additional protections, conflicting with the original purpose behind the doctrine.

As a matter of policy, courts must allow patent owners to license their patents on a claim-by-claim basis by replacing the current test to determine whether a patent has been exhausted. This Note makes two main arguments. First, the patent exhaustion defense should only be available to legitimate purchasers of patented products—those who have directly or indirectly contributed economically to the patent owner. Second, patents should only be exhausted in cases where normal or expected use of the product by the authorized purchaser would result in infringement, not simply when the product “partially” practices a patent. This proposal would solve the problems created by the recent rulings while also aligning with prior case law and the historical reasoning behind the patent exhaustion doctrine.

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