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March Issue of Boston College Law Review Now Available

Boston College Law School

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March Issue of Boston College Law Review Now Available

2014 NEWS ARCHIVE

03/31/14

Newton, MA--The March issue of the *Boston College Law Review* recently went to press and can be found on the BCLR website at <http://bclawreview.org>. The issue features five outside author articles and three student notes.

The new Washington & Lee journal rankings, released last month, placed the *Boston College Law Review* at #25 nationally, up one spot from a revised 2013 ranking of #26.

Issue summaries:

Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*

The slowness with which the Supreme Court adjusts its antitrust doctrine to conform with modern economic theories often confounds watchers of antitrust law. Yet in her Article, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, Rebecca Haw argues that the Court's use of delay has a salutatory effect on judicial rulemaking, particularly in the antitrust arena, because it allows the Court to wait until clear and reliable scientific consensus has emerged. Moreover, Haw argues that delay is consistent with the traditions of the common law. Haw concludes by contrasting antitrust rulemaking with toxic tort litigation, an area of law where delay is impractical or undesirable. She explains that although toxic tort litigation's goals of deterrence and compensation preclude the use of delay in the face of new scientific arguments, the law pays the price in uncertainty and error.

Shu-Yi Oei, *Taxing Bankrupts*

The bankruptcy system demands equal treatment of creditors, but some creditors are more equal than others. In her Article, *Taxing Bankrupts*, Shu-Yi Oei argues that government creditors deserve a priority share of estate payout in bankruptcy. While some scholars have argued against tax priority due to the government's greater ability to diversify against debtor default risk, Oei explains that government's diversification potential has been overestimated. Furthermore, government requires effective tax collection procedures to ensure the continuation of its myriad important functions, including social insurance. Tax priority is thus an important structural limit on the government's risk burden in bankruptcy.

Andrew S. Pollis, *The Death of Inference*

In recent years, judges have arrogated to themselves the authority to weigh circumstantial evidence. In his Article, *The Death of Inference*, Andrew Pollis examines this trend, specifically focusing on the ways that the judiciary has encroached upon the jury's traditional prerogative to draw inferences. Judges' increasing willingness to grant motions for summary judgment and motions to dismiss undermines some of our justice system's fundamental principles and is burdensome to plaintiffs, especially in cases involving a defendant's subjective state of mind. Pollis proposes a three-tiered solution that would (1) preclude pretrial disposition of cases that turn on a party's mental state; (2) implement a fee-shifting procedure to protect prevailing defendants in cases that involve extremely weak factual inferences; and (3) make liberal use of the judicial power to grant new trials in cases where the jury has drawn questionable factual inferences. Pollis's approach would protect the jury's role while remaining mindful of the costs

of the jury system.

W. Nicholson Price II, *Making Do in Making Drugs: Innovation Policy and Pharmaceutical Manufacturing*

Despite rising incidences of drug recalls, contamination events, and shortages, most pharmaceutical companies continue to rely on outdated manufacturing processes and plants. In his Article, *Making Do in Making Drugs: Innovation Policy and Pharmaceutical Manufacturing*, W. Nicholson Price II explains that improved manufacturing techniques and equipment could save countless lives and billions of dollars. Price shows how high regulatory barriers from the FDA and ineffective government and market incentives are the primary inhibitors of pharmaceutical manufacturing innovation. To spur development, Price suggests several direct regulatory reforms, such as creating a period of market exclusivity for process innovations as well as mandatory process disclosures. Although focused on the pharmaceutical industry, many of Price's suggestions could be applied to other regulated industries to encourage broader manufacturing innovation.

Anna Roberts, *Impeachment by Unreliable Conviction*

In her Article, *Impeachment by Unreliable Conviction*, Anna Roberts examines the use and misuse of Federal Rule of Evidence 609—impeachment by prior conviction. After providing an extremely thorough analysis of courts' interpretations of the Rule as well as the Rule's prior critiques, Professor Roberts argues that the modern application of the Rule fails to account properly for conviction reliability or lack thereof. In addition to providing solutions involving altering the Rule's text, Professor Roberts suggests ways to address the problem under the Rule's current wording. Quite pragmatically and all without changing a word of the Rule, Professor Roberts contends that judges have the authority and means to explore reliability before admitting prior convictions to impeach and that prosecutors should view their ethical responsibilities as preventing them from employing such dubious evidence.

Nicholas Macri '14, Note, *Missing God in Some Things: The NLRB's Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities*

In his Note, *Missing God in Some Things: The NLRB's Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities*, Nicholas Macri examines the flaws in the National Labor Relations Board's substantial religious character test. The NLRB uses the substantial religious character test to determine whether it is authorized to exercise jurisdiction over the faculty labor relations at religiously affiliated colleges and universities. Under the NLRB's test, a college is not considered religious unless it makes religious indoctrination one of its primary purposes, denies faculty members academic freedom, and discriminates based on religion when hiring faculty and admitting students. Such an approach fails to recognize the religious nature of Catholic colleges and universities, which carry out their religious missions precisely by avoiding religious indoctrination, granting faculty academic freedom, and welcoming faculty and students of all faiths. Underlying the NLRB's test is the understanding that church-state entanglement concerns are not present when faculty members do not play a role in carrying out their school's religious mission. Macri thus proposes a new jurisdictional test that evaluates whether faculty members are tasked with carrying out their school's religious mission without asking how the school chooses to carry out that mission.

Caitlin Sawyer '14, Note, *Don't Dissolve the "Nerve Center": A Status Linked Citizenship Test for "Principal Place of Business"*

The 2010 U.S. Supreme Court case *Hertz Corp. v. Friend* adopted the "nerve center" test as the exclusive test for determining a corporation's "principal place of business" under 28 U.S.C. § 1332. Although the *Hertz* Court provided some clarity regarding the appropriate location of a corporation's principal place of business, it remains unclear whether and to what extent the nerve center test applies to dissolved and inactive corporations. In her Note, *Don't Dissolve the "Nerve Center": A Status Linked Citizenship Test for "Principal Place of Business,"* Caitlin Sawyer examines this jurisdictional question. Through an analysis of *Hertz's* impact on a longstanding circuit split, Sawyer demonstrates that the nerve center test applies to such corporations. Given the difficulties posed by atypical corporations, Sawyer proposes a status-linked citizenship test that is consistent with both § 1332 and *Hertz*. Sawyer thus concludes

that the nerve center of dissolved and inactive corporations should be the location from which its litigation and wind up activities are conducted.

Rachel Weisblatt '14, Note, *Uncharitable Hospitals: Why the IRS Needs Intermediate Sanctions to Regulate Tax-Exempt Hospitals*

In her Note, *Uncharitable Hospitals: Why the IRS Needs Intermediate Sanctions to Regulate Tax-Exempt Hospitals*, Rachel Weisblatt examines why the IRS has been unsuccessful in regulating tax-exempt hospitals' activities. Although tax-exempt hospitals receive millions of dollars in tax breaks each year, there is little evidence that they significantly benefit their communities. When a hospital does not meet the federal standard for exemption, the IRS may choose to either do nothing or move to revoke a hospital's tax-exempt status. Because revocation is a harsh option not appropriate for every circumstance, many tax-exempt hospitals fail to meet the exemption standard but are not subjected to revocation. Weisblatt thus proposes that Congress give the IRS statutory authority to impose excise tax intermediate sanctions on underperforming hospitals as an enforcement tool short of revocation. Intermediate sanctions would provide the IRS with flexibility to regulate the boundaries of tax-exempt status while ensuring that communities continue to benefit from the services of tax-exempt hospitals.

More: <http://bclawreview.org>