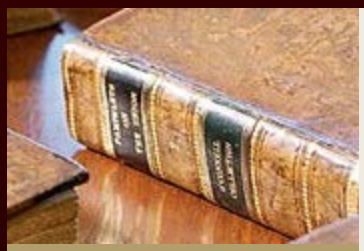
4-4-2016

March Issue of *Boston College Law Review* Now Available

Boston College Law School



March Issue of *Boston College Law Review* Now Available

2016 NEWS ARCHIVE

04/04/16

The March issue of *Boston College Law Review* is now available. This is the fourth of five issues of the *Review* to be published in the 2015-2016 academic year. The March issue features five articles by outside authors, as well as three student notes. Summaries of the eight pieces are included below. The full articles are available at the BCLR website.

Abstracts

1. *RATs, TRAPs, and Trade Secrets* by Elizabeth A. Rowe

In her article *RATs, TRAPs, and Trade Secrets*, Professor Elizabeth A. Rowe of the University of Florida Levin College of Law argues that the electronic storage of trade secrets along with the rise of cyber intrusions has created a perfect storm of economic espionage. Professor Rowe's article addresses and places trade secret misappropriation within the larger backdrop of cybersecurity. Professor Rowe first argues that systemic issues related to technology have rendered legislative and judicial remedies a suboptimal solution for cyber misappropriation. Professor Rowe then explores how the rhetoric of war has infiltrated the national discourse on cybersecurity and cyber misappropriation, as well as examines the controversy surrounding active defense counterstrike techniques. Professor Rowe also introduces and coins the acronym TRAP, or "technologically responsive active protection," to serve as a guiding principle to further refine the reasonable efforts requirement for the protection of trade secrets.

2. *Modifying At-Will Employment Contracts* by Rachel Arnow-Richman

In her article *Modifying At-Will Employment Contracts*, Professor Rachel Arnow-Richman of the University of Denver, Sturm College of Law, addresses the problem of "mid-term" modification of employment: the common employer practice of introducing adverse changes in incumbent employees' terms of employment on penalty of termination. Professor Arnow-Richman rejects retrograde judicial approaches to mid-term modifications that turn on the presence or absence of consideration and overlook the risk of coercion. Instead, Professor Arnow-Richman calls for a universal reasonable notice rule under which courts would enforce mid-term modifications only where the worker received reasonable advance notice of the change. Professor Arnow-Richman concludes that such a rule restores bargaining power to employees by giving them time to meaningfully consider proposed changes and, if necessary, secure alternate work.

3. *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* by Kevin Barry et al.

In their article *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, Professors Kevin Barry of Quinnipiac University School of Law and Jennifer Levi of Western New England University School of Law, along with Attorneys Brian Farrell and Neelima Vanguri of Sidney L. Gold & Associates, argue that transgender people are a "suspect" or "quasi-suspect" class; therefore, federal statutes that exclude transgender people from coverage are entitled to heightened scrutiny under the Fourteenth Amendment. The authors further argue that the ADA's transgender exclusions are unconstitutional no matter what level of scrutiny applies because moral animus against transgender people is not a legitimate basis for lawmaking. They

argue that this would extend protection beyond disability rights laws to all laws that single out transgender people for disparate treatment. The authors conclude that this marks a new break for equality law and also informs the broader theoretical debate over the relationship between identity and impairment, and diagnosis and discrimination.

4. *Regulating Unicorns: Disclosure and the New Private Economy* by Professor Jennifer S. Fan

In her article *Regulating Unicorns: Disclosure and the New Private Economy*, Professor Jennifer S. Fan of the University of Washington School of Law argues that current securities regulations are insufficient to handle the surge of private companies with valuations of a billion dollars or more, known in the industry as "unicorns." Professor Fan examines how there has been no expansion or recalibration of securities regulations in response to this new blessing of unicorns even though these unicorns have similar effects in the marketplace as publicly-held corporations, due to their size and influence. Professor Fan critiques the unicorn phenomenon within the securities regulation framework and proposes rethinking the current regulatory regime. Professor Fan argues that enhanced disclosure requirements are necessary because the fate of unicorns affects stockholders, employees, and regional and national economies. Professor Fan concludes by suggesting what types of disclosure are necessary, how such information should be disclosed, and when it should be disclosed so as to alleviate the risks of unicorns without restraining their innovation.

5. *Transfer Pricing Challenges in the Cloud* by Orly Mazur

In her article *Transfer Pricing Challenges in the Cloud*, Professor Orly Mazur of SMU Dedman School of Law argues that due to the nature of cloud computing, the current transfer pricing rules give U.S. multinational enterprises substantial freedom to shift profits to low-tax jurisdictions and avoid tax in the United States, in a practice commonly referred to as base erosion and profit shifting (BEPS). The Organisation for Economic Co-operation and Development (OECD) launched an action plan to address the BEPS problem. Although an important first step, the OECD's work falls short of coming up with an innovative solution that will restore taxation on stateless income. In response, Professor Mazur recommends that, given the features of this new business environment, an international tax reform solution that adopts formulary apportionment or the profit-split methodology on a coordinated global basis would better address BEPS and minimize the undesirable policy results of our current transfer pricing rules.

6. *Unpacking the Dirtbox: Confronting Cell Phone Location Tracking with the Fourth Amendment* by Yoni Bard

In his note *Unpacking the Dirtbox: Confronting Cell Phone Location Tracking with the Fourth Amendment*, Yoni Bard explores law enforcement's use of the Dirtbox, an airborne device that sweeps entire cities, mimicking a cellular tower and causing cell phones to reveal their location information within an accuracy of ten feet. Although the U.S. Supreme Court has failed to provide clear guidance on wireless location tracking, Bard argues that the government's use of the Dirtbox, and other cell-site simulators, amounts to a Fourth Amendment search. Bard concludes by advocating that, until the Court accepts the opportunity to modernize the Fourth Amendment, Congress should enact legislation requiring all law enforcement agents to obtain a warrant before using the Dirtbox and other cell-site simulators.

7. *Where to Point the Finger:* Omnicare*'s Attempt to Rectify the Collective Scienter Debate* by Michael Jones

In his note *Where to Point the Finger:* Omnicare*'s Attempt to Rectify the Collective Scienter Debate*, Michael Jones examines the ongoing divergence throughout the federal circuits regarding corporate scienter in section 10(b) cases. Because a corporation can only act through its agents, courts have struggled to determine which agents' mental states can be imputed against a corporation. In 2014, in*In re Omnicare, Inc. Securities Litigation*, the U.S. Court of Appeals for the Sixth Circuit attempted to create a new middle-ground approach to address pleading scienter against a corporation in securities fraud cases. Jones argues that although *Omnicare* adopted the best approach yet, it must be further refined in order to

establish a conclusive and widely applicable pleading standard for corporate scienter.

8. *Nothing New, Man! – The Second Circuit's Clarification of Insider Trading Liability in United States v. Newman Comes at a Critical Juncture in the Evolution of Insider Trading* by Reed Harasimowicz

In his note *Nothing New, Man!–The Second Circuit's Clarification of Insider Trading Liability in* United States v. Newman *Comes at a Critical Juncture in the Evolution of Insider Trading*, Reed Harasimowicz discusses how in December 2014, in *United States v. Newman*, the Second Circuit clarified what is required for remote tippees to be liable in insider-trading cases. The government has argued that the *Newman* decision was unprecedented and would have the negative consequence of making its prosecution of insider-trading defendants more difficult. Harasimowicz argues that the *Newman* decision is consistent with precedent and the principles of criminal law and comes at a critical juncture in the evolution of insider trading where the SEC's prosecutorial tactics do not square with the common law. Harasimowicz concludes that *Newman* will hopefully rein in prosecutorial overreaching aimed at those who are least culpable and will shift the government's focus to the crux of the problem: corporate insiders who tip material, nonpublic information for a personal benefit.