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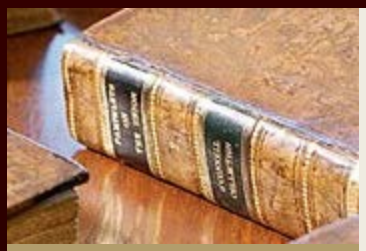
November Issue of *Boston College Law Review* Now Available

Boston College Law School



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2015 NEWS ARCHIVE

12/04/15

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

Abstracts

1. David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*

In *Constitutional Evasion and the Confrontation Puzzle*, Professor David Noll of Rutgers School of Law-Newark argues that the Supreme Court's 2004 decision in *Crawford v. Washington*, holding that "testimonial" evidence triggers a right to confront the responsible "witness," is best understood as an attempt to regulate governmental evasion of the basic right to be confronted with witnesses who give live testimony in a legal proceeding. The Court, however, did not acknowledge the need to regulate evasion of the confrontation right, nor did it grapple with important questions a legal policymaker regulating evasion of the law must address. This account suggests a reorientation of confrontation doctrine that would permit the Court to overcome the divisions and theoretical uncertainty that plagues post-*Crawford* jurisprudence.

2. Brooke Coleman, *The Efficiency Norm*

In *The Efficiency Norm*, Professor Brooke Coleman of the Seattle University School of Law argues that the civil litigation system is dominated by a problematic efficiency norm that confuses cost with efficiency. Professor Coleman examines how this efficiency norm has profoundly shifted two key presumptions underlying civil litigation. There has been a shift from a merits-based trial to non-trial adjudication, and a shift from plaintiff receptivity to plaintiff skepticism. Professor Coleman argues that under a real efficiency analysis—one that weighs both the benefits and costs of litigation—these now-dominant civil litigation presumptions are dangerous. Professor Coleman concludes that the efficiency norm must be reclaimed and proposes a reframed definition of efficiency that incorporates other non-monetary costs of litigation.

3. Katharine K. Baker, *Legitimate Families and Equal Protection*

In *Legitimate Families and Equal Protection*, Professor Katharine K. Baker of IIT Chicago-Kent College of Law questions whether and why it should be unconstitutional to treat legitimate and illegitimate children differently. Professor Baker contends that illegitimacy doctrine is rooted in a biological essentialism at odds with contemporary efforts to expand legal recognition of non-traditional parenting practices, such as same-sex parenting. Professor Baker uses her extensive analysis of the legitimacy cases to argue that liberal justices, in trying to dismantle marriage—a legal construct—as the arbiter of legitimate parenthood, presumed that a biological construct—genetics—was a superior arbiter. Baker contends that this presumption actually undermines a more progressive family law doctrine. The article examines how validating non-traditional family structures requires an embrace of law, not blood, as the arbiter of parenthood, and thus requires a very tempered reading of the legitimacy cases. The article ultimately argues that

the power to define parenthood is best kept with the state, so that the law is able to break free from heteronormative family forms.

4. Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*

In *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, Professor Chad DeVeaux of Concordia University School of Law, and Anne Mostad-Jensen, Head of Faculty Services at the University of North Dakota School of Law, assert that states may invoke the Supreme Court's original jurisdiction to challenge marijuana legalization in Colorado. Instead of seeking to enforce the Supremacy Clause of the U.S. Constitution as Nebraska and Oklahoma argued in their complaint with the Supreme Court, Professors DeVeaux and Mostad-Jensen instead assert that the Court should award damages to a prevailing state, using the Coase Theorem of market efficiency as its guide. By imposing a legal rule charging the nuisance with the damages it causes, the market will determine the success or failure of Colorado's venture and will serve as a guide to other states in deciding whether it is worth emulating.

5. Kathleen Clark and Nancy Moore, *Financial Rewards for Whistleblowing Lawyers*

In *Financial Rewards for Whistleblowing Lawyers*, Professors Kathleen Clark of Washington University in St. Louis and Nancy Moore of Boston University School of Law explore the complex issue of whether lawyers may serve as whistleblowers under the False Claims Act and Dodd-Frank Wall Street Reform and Consumer Protection Act. The article explores in-depth the key questions for determining whether a lawyer may seek a federal whistleblower award: 1) When may a lawyer disclose a client's confidential information? 2) When does a lawyer's obligation of loyalty preclude seeking a personal benefit by disclosing a crime or fraud? 3) Do federal whistleblower laws preempt state ethics standards? 4) Which state's ethics law applies when several states have significant contacts with the matter? It is the authors' contention that addressing these issues is the first step toward answering the normative question of whether lawyers occupy a role significantly different from other company insiders, who also owe obligations of confidentiality and loyalty to the company, such that they should not be permitted to seek financial rewards for blowing the whistle on their clients.

6. William Clark, Note, *Protecting the Privacies of Digital Life:* Riley v. California*, the Fourth Amendment's Particularity Requirement, and Search Protocols for Cell Phone Search Warrants*

In his note *Protecting the Privacies of Digital Life: Riley v. California, the Fourth Amendment's Particularity Requirement, and Search Protocols for Cell Phone Search Warrants*, William Clark discusses how in 2014, in *Riley v. California*, the U.S. Supreme Court held that the police must obtain a warrant before searching a cell phone. Since then, lower courts have struggled to determine how to properly structure cell phone warrants. Clark argues that the Fourth Amendment's particularity requirement mandates that the government submit search protocols, technical documents that explain the search methods the government will use on the seized device, for cell phone search warrants. Detailed search protocols will ensure that the people's privacies of life receive the same level of protection in the digital age.

7. Christian Vareika, Note, *Further and Further, Amen: Expanded National Labor Relations Board Jurisdiction over Religious Schools*

In his note *Further and Further, Amen: Expanded National Labor Relations Board Jurisdiction over Religious Schools*, Christian Vareika discusses how for many years, due to First Amendment concerns, parochial schools have been considered beyond the reach of the National Labor Relations Board (NLRB). But recent Board decisions suggest that this longstanding de facto moratorium may be in jeopardy. Vareika argues that despite the NLRB's important mission of protecting workers' rights, the Board's recently expanded jurisdiction over religious colleges and universities is both inappropriate and likely unconstitutional. Ultimately, his note recommends voluntary bargaining outside the NLRB framework as a way for the NLRB to avoid unconstitutional entanglement with religious schools and for religious educators to practice what they preach.

8. Erika Schutzman, Note, *We Need Professional Help: Advocating for a Consistent Standard of*

Review When Regulations of Professional Speech Implicate the First Amendment

In her note *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, Erika Schutzman examines a circuit split concerning what level of scrutiny should be applied to challenged regulations of professional speech. The Third, Fourth, and Eleventh Circuits have applied intermediate scrutiny. The Ninth Circuit has applied rational basis review, and the Eleventh Circuit first applied rational basis review before altering its approach. Schutzman argues for the adoption of intermediate scrutiny for professional speech because it effectively balances the government's interest in protecting the safety and welfare of its citizens against the First Amendment rights of professionals.

9. Alice Huang, Note, *Reaching Within Silk Road: The Need for a New Subpoena Power That Targets Illegal Bitcoin Transactions*

In her note *Reaching Within Silk Road: The Need for a New Subpoena Power That Targets Illegal Bitcoin Transactions*, Alice Huang discusses the rise of Bitcoin and other virtual currencies, and demonstrates that is crucial for government regulatory bodies to catch up. Black market sites like the now-defunct Silk Road have continued to exploit the anonymity of Bitcoin to engage in illegal transactions. In order to identify criminal Bitcoin users, Huang argues the government must adapt existing e-discovery rules to create a criminal subpoena standard that addresses virtual currencies.

More: http://bclawreview.org