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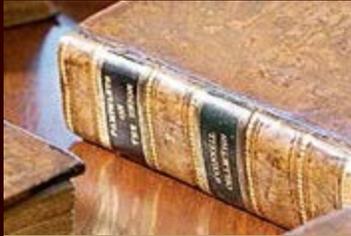


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BC Law Review January Issue Now Available

2013 NEWS ARCHIVE

02/01/13

Newton, MA--The January issue of the *Boston College Law Review* recently went to press.

The issue is available on the BC Law website at <http://bclawreview.org/>. This issue contains four articles by outside authors and five student notes written by current 3Ls. Brief summaries of each piece are included below.

Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*

There has been much debate over the extent to which communications over social networking sites, such as Facebook, are entitled to Fourth Amendment protection. Although the Supreme Court has not directly answered this question, communications over social networking sites would most likely lose Fourth Amendment protection under the Third Party Doctrine, as such communications are disclosed to third parties. In his Article, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, Monu Bedi, Assistant Professor of Law at DePaul University School of Law, argues that because social scientists have recognized that social networking relationships share the same qualitative structure and can be as "real" as their face-to-face counterparts, the concept of interpersonal privacy should be applied. Under that framework, Bedi asserts that communications over social networking sites that are constituent of those social networking relationships should be afforded Fourth Amendment protection.

Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*

In their Article, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, Bruce A. Green, the Louis Stein Professor at Fordham Law School, and Ellen S. Podgor, the Gary R. Trombley Family White-Collar Crime Research Professor at Stetson University College of Law, focus on the relationship between corporations and their employee constituents in the context of corporate internal investigations. Green and Podgor contrast the classic approach in the 1981 Supreme Court opinion, *Upjohn v. United States*, with the reality of modern-day internal investigations that may exploit individuals to achieve a corporate benefit with the government. Attorney-client privilege becomes an issue when corporate constituents believe that corporate counsel represents their interests, when in fact these internal investigators are gathering information for the corporation to barter with the government. Legal precedent and ethics rules provide little relief to these corporate employees. Green and Podgor suggest that courts need to move beyond the *Upjohn* decision and recognize this new landscape. They advocate corporate fair dealing, provide a multifaceted approach to assessing when privilege protects employee communications in internal investigations, and argue that courts should shift the burden of proof to achieve equity between employees and corporations in internal investigations.

Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*

Although the Fifth Amendment requires just compensation when the government takes private property, the courts have consistently recognized an exception to the compensation requirement when destruction of private property was necessary to prevent a disaster. In her

timely article, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, Susan S. Kuo, Associate Professor of Law at University of South Carolina School of Law, argues against the public necessity defense in such circumstances. Kuo provides a detailed historical review of the takings law and argues that exigencies of disaster should not absolve the government from responsibility when it destroys private property. This is because disaster harm typically reflects prior government choices in planning for disasters and mitigating vulnerability. Kuo further argues that deliberate infliction of harm remains wrongful, even if all available alternatives are worse and the situation could not have been averted through proper advance planning. She concludes that a just compensation rule would preserve the government's emergency powers while reaffirming the rule of law and ensuring that disaster tradeoffs maximize aggregated welfare, not just protect powerful constituents.

Margaret B. Kwoka, *Deferring to Secrecy*

Although most decisions by federal agencies are entitled to significant deference, the Freedom of Information Act (FOIA) provides that agencies' decisions to withhold requested information under FOIA are subject to de novo review by courts. Despite this clear mandate from Congress, empirical studies demonstrate that agencies' FOIA decisions are upheld at a significantly higher rate than other agency actions subject to more deferential review. In her article, *Deferring to Secrecy*, Margaret B. Kwoka, Assistant Professor at the John Marshall Law School, demonstrates that courts reviewing FOIA determinations have created a unique set of practices which result in substantial judicial deference to agencies' FOIA decisions. These practices, Kwoka argues, hide the true nature of agency actions, make it difficult for the political branches of government to respond, and diminish confidence in the judiciary.

Lauren Behr, Note, *Trademarks for the Cure: Why Nonprofits Need Their Own Set of Trademark Rules*

In 2011, Susan G. Komen for the Cure, one of the world's most recognizable and respected nonprofits, was widely criticized when it sent "cease and desist" letters to many smaller charities who also used "for the cure" in their group names. Komen was labeled a trademark bully, although the organization insisted it was simply trying to safeguard its reputation and prevent public confusion that could lead to misdirected donations. Further muddying the water for Komen and other charities with recognizable trademarks is the fact that there are no special trademark rules for nonprofits. Federal trademark law, designed with the commercial sector in mind, does not consider large nonprofits that operate remarkably like businesses, but with vastly different goals. As a result, nonprofit trademark owners must navigate a confusing intellectual property landscape, never entirely sure whether or not the law does or should apply to them. In her Note, *Trademarks for the Cure: Why Nonprofits Need Their Own Set of Trademark Rules*, Lauren Behr examines trademark battles involving nonprofits. Behr argues that a few small changes to the Lanham Trademark Act will not only allow charitable organizations to better protect their marks, but will also provide these groups with some much-needed clarity.

Michael Coutu, Note, *Check Fraud and the Variation of Section 4-401: Why Banks Should Not Be Able to Vary the UCC's Standard Risk Allocation Scheme*

Article 4 of the Uniform Commercial Code governs both a bank's duties in collecting checks for payment as well as its duties to its depositors. Section 4-401 provides that a bank can charge an item to a customer's account only if it is properly payable. Michael Coutu, in his Note, *Check Fraud and the Variation of Section 4-401: Why Banks Should Not Be Able to Vary the UCC's Standard Risk Allocation Scheme*, argues that courts should not endorse recent attempts by commercial banks to insulate themselves from check-fraud losses via deposit provisions. Coutu notes the history of pre-Code common law, prior bank collection code, and the writing of Article 4 itself to advance the argument that the Article was written with bank collection—not the depositor-bank relationship—in mind. Consequently, the drafters did not think through the ramifications of how section 4-103 would affect a bank's duties to its depositor. Since a bank's lone duty to its depositor is to repay its debt on demand, variations of this duty lead into a quandary of what the depositor-bank relationship actually entails. To resolve this problem, Coutu argues that courts should look unfavorably at these deposit provisions, recognizing the historical duties of a bank to its customer as well as the failings of

Paul Easton, Note, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigration Status*

In recent years, efforts in state legislatures to enact comprehensive immigration regulations have become increasingly pervasive. When Alabama enacted its comprehensive immigration law in 2011, it became only the third state ever to require public school personnel to inquire into schoolchildren's immigration status. Although Alabama's law, like its two more restrictive predecessors, was recently invalidated on equal protection grounds, state legislatures are unlikely to cease testing the constitutional boundaries of immigration regulation in public schools. In his Note, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigration Status*, Paul Easton argues that the differences between Alabama's provision and its predecessors may allow similar state laws to survive constitutional scrutiny in the future. Easton maintains that federal regulations promulgated under Title VI of the Civil Rights Act of 1964, which prohibit actions by recipients of federal funding that have a disparate impact on the basis of individuals' race, color, or national origin, provide a more promising avenue for the federal government to challenge state laws, such as Alabama's, that tend to chill educational opportunity for Hispanic schoolchildren.

Nicholas Matteson, Note, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*

For prisoners who want to challenge the federal conviction or sentence that led to their imprisonment, the interpretation of twenty words may stand between that prisoner and freedom. Often, the only means for federal prisoners to challenge their conviction or sentence is the process set out in 28 U.S.C. § 2255. Because legislation has restricted the scope of § 2255 review, some federal prisoners have been left with a claim against their conviction or sentence, but without the ability to obtain a hearing on their claim. In those cases, the prisoner's fate hangs on the interpretation of the "savings clause" within § 2255, which allows prisoners to file a petition for habeas corpus and obtain a hearing. Despite its importance, U.S. Courts of Appeals have not been uniform in their interpretation of the savings clause. In his Note, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, Nicholas Matteson examines the Courts of Appeals' attempts to interpret the savings clause and finds them all to be problematic. Matteson then proposes a new interpretation, which defines the scope of the savings clause in a way that better balances the competing considerations involved.

Irina Sivachenko, Note, *Corporate Victims of "Victimless Crimes": How the FCPA's Statutory Ambiguity, Coupled With Strict Liability, Hurts Businesses and Discourages Compliance*

In her Note, *Corporate Victims of "Victimless Crimes": How the FCPA's Statutory Ambiguity, Coupled With Strict Liability, Hurts Businesses and Discourages Compliance*, Irina Sivachenko explores the unexpected effects of the Foreign Corrupt Practices Act (FCPA) on U.S. businesses. Criminal enforcement of the FCPA, a federal law that outlaws corporate bribery of foreign officials, has risen sharply in recent years. For a multinational business, the consequences of an indictment are enormous, immediate, and potentially lethal. Yet, the ambiguity of the FCPA and the unpredictability of its enforcement make it virtually impossible for companies to comply. Suggesting that imposition of strict liability on businesses actually reduces compliance, Sivachenko evaluates several proposed solutions that attempt to address the vagueness of the FCPA and its lack of an adequate compliance defense and advocates for a hybrid approach that would resolve the ambiguity and make compliance both feasible and economically viable.