George Mason Law Review

NEWSLETTER

Fall Newsletter **November 2012**

George Mason Law Review
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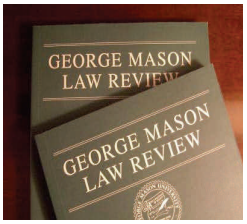


We are delighted to update you on the Law Review's accomplishments of the second half of 2012. In August, we published our fifth issue in Volume 19. The Antitrust Symposium issue featured articles by several prominent scholars, including Herbert Hovenkamp, Daniel Crane, and Christopher Yoo. This achievement of publishing five issues is attributable to the dedication and diligence of our current members and the prior Board of Editors, led by Catherine Schmierer and Matthew McGuire. In November, we published the first issue in Volume 20. It includes four professional articles, three student pieces, and two short essays. The two essays are the first products of a project launched this year, which focuses on topical developments in the law and publishes essays on a short production schedule. Issue 20:1 features an essay by Professor Craig Lerner analyzing the criminal procedure case of *Miller v. Alabama* and an essay by Professor Michael Krauss discussing the free speech case of *United States v. Alvarez*; the Supreme Court issued both decisions in June 2012. During the coming months, we hope to turn this project into an independent, online supplement to the *George Mason Law Review*, called *Developments*. Additionally, we are now planning the 16th Annual Symposium on Antitrust Law, which will be held in January 2013 in partnership with the Law & Economics Center. We are very excited to carry on this tradition in scholarship and hope to see many of you at the symposium.

As always, we appreciate hearing from our alumni, so please feel free to drop by the website (www://georgemasonlawreview.org) or contact us at any time.

Sean Clerget Wins the Burton Foundation's Legal Writing Award

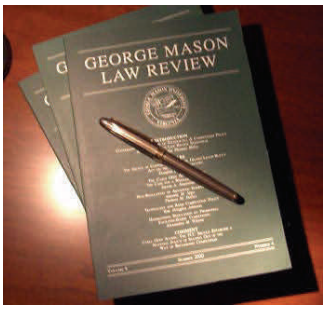
The George Mason Law Review would like to congratulate former member Sean Clerget. Sean is the recipient of the prestigious Burton Award for excellence in legal writing for his student comment, "Timing Is of the Essence: Reviving the Neutral Law of General Applicability Standard and Applying it to Restrictions Against Religious Face Coverings Worn While Testifying in Court." Sean is the sixth consecutive Mason Law student to receive the Burton Award, which honors law firm partners and students whose legal writing demonstrates superior clarity and effectiveness. The Burton Awards Program was founded in 1999 and is run in association with the Library of Congress. Law school deans and managing partners from the 1,000 largest U.S. firms make nominations for the award every year. The program recognizes fifteen winners annually from schools across the country.

Clerget's comment analyzes a Muslim woman's right to wear a veil while testifying. The comment provides an overview of the relevant "free exercise" jurisprudence and advocates for the revival of the framework set forth by the Supreme Court in *Church of Lukumi Babalu Aye v. City of Hialeah*. As the comment describes, the *Church of Lukumi* test provides a framework for determining the neutrality and the general applicability of laws that affect religious practice. The comment recommends an additional prong for the *Church of Lukumi* test, which would ask "whether the context and the timing surrounding the law's passage indicate that the law targeted a particular religious practice." This, Clerget suggests, would help courts better apply the test, and would elevate the importance of legislative timing in the court's analysis. In applying the *Church of Lukumi* test, the comment ultimately concludes that while discretionary government actions and state court face-covering restrictions were not neutral laws of general applicability, the Confrontation Clause is both neutral and generally applicable. As a result, Muslim women testifying in court should not receive an exception to the Confrontation Clause's face-to-face requirement.

Preview of the Fall Issue

This fall, the *Law Review* published an exciting array of articles in Vol. 20, No. 1, currently online. The following is a preview of what to look forward to this fall.

Patent Law as Public Law, written by Megan M. La Belle, Assistant Professor at Catholic University of America, Columbus School of Law, examines the difficulties plaintiffs face when bringing private actions for patent validity, as the Federal Circuit tends to narrowly apply the requirements for standing and personal jurisdiction. Professor La Belle argues that patent validity should be properly categorized as public law rather than private law, as the primary beneficiary of the patent system should be the public, rather than specific individuals. The article suggests that the Federal Circuit consider patent validity cases through a public law lens, focusing less on individual litigants when determining standing and removing the exemption of cease-and-desist letter from the minimum contacts analysis for personal jurisdiction. If the Federal Circuit applies the standing and personal jurisdiction requirements for patent law like other public law issues, plaintiffs will be able to successfully bring patent validity suits, increasing the worth of the patent system for all.



In *Jurisdictional Incentives*, Dustin E. Buehler, Assistant Professor of Law at the University of Arkansas School of Law, argues for personal jurisdiction reform for foreign defendants in stream of commerce cases. Professor Buehler advocates abandoning the "minimum contacts" test instituted in *International Shoe* in favor of a "rationality-plus-fair-hearing test" based on guidance from *Nicastro*. This test would simultaneously protect defendants' basic due process rights, increase plaintiffs' incentives to file suit, shift costs back to the manufacturer (the least-cost avoider), and bring personal jurisdiction into the Internet age. To implement this test, Professor Buehler proposes that state legislatures, rather than the Supreme Court, adopt more detailed personal jurisdiction rules that realign private and social litigation incentives. In the likely event that the Supreme Court continues to adhere to the *International Shoe* test, Professor Buehler suggests that Congress grant federal courts nationwide personal jurisdiction over foreign defendants in stream of commerce cases, based on an aggregation of the defendant's national contacts with the United States.

Yvette Joy Liebesman is an Assistant Professor of Law at Saint Louis University School of Law, and Benjamin Wilson is a Law Clerk for the Honorable William D. Stiehl of the U.S. District Court for the Southern District of Illinois. Together, in *The Mark of a Resold Good*, they examine the resale of genuine goods on the internet and how trademark holders dominate online resellers by aggressively pursuing trademark infringement claims on the subjective basis of consumer confusion. They argue that courts' muddled application of normative fair use and likelihood of consumer confusion adversely affects online resellers' ability to truthfully describe their goods. Professor Liebesman and Wilson further argue that Congress should amend the Lanham Act to eliminate initial interest confusion as a cause of action and create clear first-sale and nominative fair-use doctrines.

In *Closing the Inventory Loophole: Developing a New Standard for Civilian Inventory Searches from the Military Rules of Evidence*, Associate Professor of Law at the South Texas College of Law Sharon Finegan argues that the recent Supreme Court decision in *Arizona v. Gant* expanded the availability of the inventory exception for police investigations. Whereas the inventory exception was originally created to insure against theft and could not be used when the basis of the search was suspicion that the police will find evidence, police after *Gant* are now more likely to arrest an individual for the purpose of inventorying his vehicle and searching for evidence of a crime. To address this problem, Finegan suggests adopting the inspection rule found in the military rules of evidence. Finegan posits that the military inspection rule would ensure that the prosecuting party does not use the exception inappropriately and effectively protect civilians' Fourth Amendment rights.

Issue 20:1 also features two essays by George Mason faculty members. Craig S. Lerner, Associate Dean for Academic Affairs and Professor of Law, wrote *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*. His essay argues that the individualized sentencing requirement of *Miller v. Alabama* will create confusion in the lower courts and could be expanded to cases involving adults. Michael I. Krauss, Professor of Law, wrote *A Marine's Honor: The Supreme Court from* Snyder *to* Alvarez. Professor Krauss argues that *Snyder v. Phelps* was wrong to hold that the First Amendment protects defamatory speech from private civil actions. Additionally, Krauss criticizes *United States v. Alvarez*, which deemed the Stolen Valor Act unconstitutional. He argues that true Medal of Honor recipients suffer reputational loss from false medal claims similar to the goodwill loss that trademark holders experience from counterfeit acts.

In *Juvenile Justice and Piracy: Prosecutions of Juvenile Pirates in the United States*, Articles Editor Lauren Hahn explores the emergence of juvenile piracy cases both domestically and internationally. She argues that the current United States piracy statute is unconstitutional as applied to juveniles in light of the recent Supreme Court decision in *Graham v. Florida*, which prohibits sentences of life imprisonment without parole for juvenile non-homicide offenders. Thus, amongst other recommendations, Hahn proposes that juvenile pirates be prosecuted under the Violence Against Maritime Navigation Act—a federal statute which better defines criminal acts involved in the majority of piratical operations and mandates sentences less than life imprisonment.

"Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity under Section 230 of the Communications Decency Act, by Associate Editor

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among industry leaders, and a chilling effect on the development of the internet. Quist surveys the evolution of Section 230 and the federal circuits' divergent interpretations, and concludes that the Fourth Circuit's holding in *Zeran v. America Online* best exemplifies the policy aims of the law while keeping with the plain language of the statute.

In *The Janus-Faced Supreme Court: The Decision in* Janus Capital Group *and Implications of the Court's Third Look at Secondary Liability for Securities Fraud*, Associate Editor Lisa P. Goldstein discusses the Supreme Court's 2011 decision, as well as other recent Supreme Court decisions regarding secondary liability in securities fraud. Goldstein argues that in *Janus Capital Group*, the Supreme Court correctly shifted from focusing on reliance to focusing on conduct when determining secondary liability in securities fraud. Goldstein counters other scholars' criticism of *Janus* by pointing out that the holding in *Janus* sets reasonable limits that should only be narrowly applied to mutual fund cases.

Review of the Antitrust Symposium Issue

The George Mason Law Review recently published their summer issue in August 2012, which featured a review of the Fifteenth Annual Symposium on Antitrust Law, in addition to several articles and comments concerning antitrust law. The recent summer issue also included several comments from other Law Review members on a host of topics. The full articles and comments are now available online on the George Mason Law Review website.

In the Symposium Conference Report, *Antitrust in High Industries*, Law Review Editors, Lisa Goldstein, Michael Mortorano, Scott Stemetzki, and Wesley Weeks summarized the lectures given by distinguished antitrust practitioners and scholars at the Fifteenth Annual Symposium on Antitrust Law, which was recently held at the George Mason University School of Law in January 2012.

The summer issue's first article was written by Professor and former FTC Commissioner William E. Kovacic. Prior to serving as the FTC Commissioner under the appointment of former President George W. Bush, Professor Kovacic was a Foundation Professor at the George Mason University School of Law. Professor Kovacic currently teaches law at the George Washington University School of Law, in addition to serving as an adviser on antitrust and consumer protection issues to various foreign governments including Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe.

Professor Kovacic's article, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, argues that enhancing U.S. institutional structures would largely help to improve federal antitrust policy. In analyzing the current institutional structure for federal antitrust policy in the United States, Professor Kovacic proposes various solutions to remove the inefficiencies between the two federal antitrust agencies, the DOJ and the FTC.

In *Antitrust and the Movement of Technology*, Professor Herbert Hovenkamp discusses antitrust concerns amidst the often conflicting roles of antitrust law and intellectual property law. In analyzing the collaborative development of technology and the "IP commons," Professor Hovenkamp argues that patents create strong incentives for collaborative development. Once named as one of the primary shapers of antitrust legal interpretation in the US Courts, Professor Hovenkamp currently holds the Ben and Dorothy Willie Chair at the University of Iowa College of Law. In 2008, Professor Hovenkamp was also a recipient of the John Sherman Award from the Antitrust Division of the Department of Justice.

In *When Antitrust Met Facebook*, Professor Christopher S. Yoo discusses the recent trends in emerging private antitrust cases involving social networking websites. Professor Yoo analyzes whether petitioners in recent monopolization cases concerning social networking websites, such as Facebook, successfully demonstrated that the social networking website satisfied the two elements of being engaged in exclusionary conduct and having market power. In analyzing antitrust claims for cases involving social networking websites, Professor Yoo argues that it is important for courts to rigorously uphold these elements to avoid teetering toward anti-competitive tendencies. As one of the nation's leading antitrust scholars, Professor Yoo is a Professor of Law at the University of Pennsylvania Law School. He is one of the leading scholars in the nation on law and technology, and he frequently testifies before Congress, the Federal Communications Commission, and the Federal Trade Commission on such issues.

The Summer 2012 Issue also features an article by George Mason School of Law Professor, Joshua D. Wright, entitled *Moving Beyond Naïve Foreclosure Analysis*. Professor Wright analyzes the economics of foreclosure and discusses the foreclosure analysis utilized by courts in modern exclusion claims. By considering foreclosure analysis as applied to antitrust claims concerning Google, Professor Wright explains that courts routinely adopt a naïve measure that contains outdated assumptions about the economics of exclusion and argues that courts ought to employ more sophisticated analysis accounting for counterfactual situations. In addition to holding a courtesy appointment in George Mason University's Department of Economics, President Barack Obama recently nominated Professor Wright to serve as a Commissioner of the Federal Trade Commission.

In *Search Neutrality as an Antitrust Principle*, University of Michigan Law School Professor Daniel A. Crane discusses the emerging concern in antitrust law for Internet search engines to utilize search neutrality. In analyzing search neutrality Professor Crane argues, that a policy requiring search engines to utilize a neutral algorithm for search results, rather than one that favors their own search engine, would threaten the growth of Internet search features. Pro-

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fessor Crane currently teaches contracts and antitrust law at the University of Michigan Law School, and is the author of several books on antitrust law, in addition to numerous articles on antitrust and economic regulation.

In the Issue's final scholarly article, *Social Networks, Advertising, and Antitrust,* co-authors Catherine Tucker and Alexander Marthews analyze potential antitrust implications of rapidly expanding social advertising. In considering advertising on social network websites and network effects in social media advertising, Professors Tucker and Marthews conclude that antitrust issues have not become a critical issue in social advertising as some may have expected. Catherine Tucker is a current Associate Professor of Marketing at MIT Sloan School of Management, and she is also a Faculty Research Fellow at the National Bureau of Economic Research. Alexander Marthews currently serves as the Economic Director of the Economics of Data Privacy Research Institute.

In addition to the numerous articles on antitrust, the Summer issue also features several student comments. In particular, the issue features the article, *The State Giveth and the State Taketh: Constitutional Pension Protections and the Retroactive Removal of Public Pension Tax Exemptions,* by Notes Editor Raven Merlau. Ms. Merlau's comment analyzes whether it is constitutional for states to repeal tax exemptions where the state has constitutional amendments that treat pension benefits as contractual obligations. In reviewing the Michigan Supreme Court's advisory opinion, and the Ohio Supreme Court's opinion in *Herrick*, Ms. Merlau argues that other states considering similar issues should not follow Michigan or *Herrick*, but should consider the issue anew and give proper credence to the constitutional amendments. Ms. Merlau is the winner of the 2012 Adrian S. Fisher Casenote Award for the work on her comment. Page five of this Newsletter contains a more in depth analysis of Ms. Merlau's article.

Additionally, in *Picking Up the Tab for your Competitors: Innovator Liability After* Pliva, Inc. v. Mensing, Articles Editor Wesley Weeks discusses the varying liability of brand-name drug manufacturers for faulty drug innovation with regard to brand name drugs in comparison to the drug's generic form. By analyzing the Supreme Court's decision in *Pliva, Inc. v. Mensing*, Mr. Weeks argues that generic brands should be able to supplement their warning labels, and that brand-name drug manufacturers should be held liable for failing to provide adequate warnings on the generic form of their drug.

Preview of the 16th Annual Antitrust Symposium

On Thursday, January 17th, the George Mason Law Review will host its 16th Annual Symposium featuring antitrust law. The topic for this year is Privacy Regulation and Antitrust. We will once again be working in partnership with the Law and Economics Center to put on this exciting event, which is likely to feature key FTC officials, high profile academics, and practitioners. The Symposium will be hosted in Founders Hall.

In addition to opening remarks by Professor Henry Butler, the Symposium's four panel discussions will consist of an "Overview of Privacy Regulation in the United States," "Privacy Regulation Costs and Benefits," "Antitrust and Privacy," and the "European Union Perspective on Privacy." These panels will explore the market for privacy protection, the effect of privacy regulation on competition and business, the current state of privacy regulations, and will look at privacy protection in Europe as a point of comparison. We look forward to providing an academic forum for discussing this novel aspect of antitrust law. As in past years, we anticipate another large turnout of State Attorneys General and hope that you will be able to join us as well!

More information regarding the Symposium's agenda, speakers, and registration will be available in the coming weeks on the Symposium's website (www.georgemasonlawreview.org/symposium/). We anticipate that CLE credit will again be made available for attendees. If you have any questions or would like additional information on tickets, CLE credits, etc., please e-mail this year's Symposium Editor, Melinda Meade, at gmusymposium@gmail.com.

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Upon receipt of your request, we will mail you an invoice for the upcoming volume. Subscribe today and you will be invoiced for Volume 20 and be sent your first issue in either late Novem ber or early December 2012.

Martin Desjardins Wins the Arthur E. Schmalz Write-On Award

The Law Review congratulates second-year Candidate Member Martin Desjardins for winning the 2012 Arthur E. Schmalz Award. Every year, the editors of the Law Review select the best entry from all of the Write-On Competition submissions to win the Schmalz Award. Mr. Desjardins received the highest score among this year's entries.

Candidate Member Martin Desjardins

The Write-On Competition this year focused on issues concerning off-campus student speech and whether it is protected under the First Amendment. The materials included a selection of cases concerning issues such as cyber-bullying and blog posts. Desjardins examined the cases provided and found it interesting that the courts in recent cyber-bullying cases have struggled with free speech issues against the backdrop of hurting others. In examining the primary Supreme Court school speech case of *Tinker v. Des Moines Independent Community School District*, Desjardins noted that the Supreme Court recognized the issue of student speech as potentially hurtful to other students, but that this part of the decision has gone largely unreviewed since *Tinker* was decided in 1969. Desjardins argued in his submission that courts should return to this core principal in *Tinker*, and use it as a metric in cyber-bullying cases.

Arthur E. Schmalz served as Editor-in-Chief of the Law Review from 1992 to 1993. When law school administration sought to bring the Law Review under faculty supervision in 1992, Schmalz and the Student Bar Association President Christian Curtis created the George Mason Independent Law Review. Thanks to the efforts of Mr. Schmalz and Mr. Curtis, Dean Henry Manne recognized the need for a fully circulated publication with students as the sole editors and managers. Thus, the George Mason Independent Law Review became George Mason's official law review. Mr. Schmalz is now a part ner in the Litigation and Intellectual Property practice at Hunton & Williams in McLean, Virginia.

Raven Merlau Wins the Adrian S. Fisher Casenote Award

The George Mason Law Review congratulates Notes Editor Raven Merlau for winning the 2012 Adrian S. Fisher Award, which is presented to the candidate member who authored the best Note or Comment selected for publication.

Ms. Merlau's Comment, *The State Giveth and the State Taketh: Constitutional Pension Protections and the Retroactive Removal of Public Pension Tax Exemptions*, explores the constitutionality of repealing tax exemptions for public pensions in states with constitutional amendments classifying public pension benefits as contractual obligations. Those contractual rights are protected by both the applicable state constitution and the Contracts Clause of the U.S. Constitution. Public sector employees accept lower wages than private sector employees in reliance on the deferred compensation provided in their pensions.

Notes Editor Raven Merlau

In 2011, Michigan passed a law that gradually eliminates the tax exemption for public employees' pensions. In an advisory opinion, the Michigan Supreme Court held that the law did not violate Michigan's constitutional pension guarantee, because taxing benefits does not reduce the amount of funds disbursed to each employee's pension account. Ms. Merlau argues that such a change violates the bargained-for exchange of the pension guarantee. She cautions other states not to follow Michigan's lead by unilaterally modifying constitutionally-protected pension benefits. Eight states besides Michigan offer constitutional protections for public employees' pensions. Those protections were designed to withstand political pressure to reduce pension benefits by guaranteeing that the deferred compensation promised to public employees would be available when they retire. The present economic downturn has nevertheless led other states to consider modifying or eliminating tax exemptions for their constitutionally-protected public pensions as well.

The crux of Ms. Merlau's argument is how illogical it is "to deny a state legislature the right to diminish pension benefits for fear of allowing it to interfere with vested contractual rights, but then to permit the legislature to accomplish the exact same outcome through the tax code." Relying on such "wooden reasoning" to tax benefits when reducing them outright would violate the state and federal Constitutions is a "sleight of hand." Ms. Merlau indicates that many states could distinguish the Michigan holding on the basis of differences in their constitutional language. The Michigan decision relied on the specific terms of Michigan's constitutional pension protection, which only applies to the "accrued financial benefit of each pension plan," and is therefore narrower than many other states' protections.

Ms. Merlau received her Bachelor's Degree in Philosophy from Duke University in 2003. She developed her Comment topic based on her work for the AARP Foundation Litigation. Ms. Merlau currently works as a research assistant for GMU Law Dean Emeri tus Henry Manne, and plans to practice tax law in Indiana after graduating in May 2013.

Announcing the Law Review's 2012-2013 Candidate Members

This summer, the Law Review welcomed a new batch of Candidate Members. Please join us in congratulating the following Candidate Members:

William Bang
Sean Batson
Scott Brooks
Catherine Burke
Michelle Caton
Martin Desjardins
Lauren Fredericksen
Timothy Geverd
Joseph Guyton
Erin Hoffert
Jeffrey Jennings
Monica Judkins
Emily Kornfeld
Jared McClain
James McMahon
Alexa McMillan
Stephen Meli
Daniel Miktus
Elizabeth Monahan
Melissa Ngo
Rebecca Nielsen
Nathaniel Pettine
Robert Ratcliffe III
Marissa Reeves
Alexandra Rhodes
Kristin Stitcher
Lorhel Stokes
Kristin Stortini
Corinne Stuart
Catherine Wauters
Matthew Wheatley
Kelsey Wilbanks

Announcements

Upcoming Events

Alumni Reception
Date and Location TBA

The Sixteenth Annual Antitrust Symposium
January 17, 2012
George Mason University School of Law
Founders Auditorium

Special thanks to Catherine Burke, Marissa Reeves, Alexandra Rhodes, Lorhel Stokes, Corinne Stuart, and Catherine Wauters for their help in creating and publishing this newsletter!