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Charles F. Walker and Colin D. Forbes
Issuers faced with a short attack—short selling of the issuer’s stock combined with the spread of negative rumors—may contemplate defensive strategies such as litigation and contacting government regulators, in addition to the investor and public relations efforts that are typically utilized in the wake of negative media coverage. Precedent calls for caution in these circumstances, as the record shows that the results of such strategies are mixed, with the SEC often turning its investigative focus to the issuer, and with costly litigation frequently resulting in compromise. This article begins with a discussion of the recent history of regulatory and legislative efforts to address concerns around short attacks and “naked” short selling. It then turns to a discussion of the SEC enforcement cases and private litigation relating to short attacks, and concludes that the SEC has appropriately brought enforcement cases only in clear-cut instances of fraud, while policing the margins through enforcement of the technical requirements of Regulation SHO. The article shows that the SEC enforcement record in this area, and the proof issues generally attendant to these cases, present important considerations for issuers who perceive themselves under siege in a short attack.

739 Trademark Licensing in the Shadow of Bankruptcy
James M. Wilton and Andrew G. Devore
When a business licenses a trademark, transactional lawyers regularly advise that if the trademark licensor files for bankruptcy, the licensee could be left without a right to use the mark and with only a bankruptcy claim for money damages against the licensor. Indeed, the ability of a trademark licensor to reject a trademark license and to limit a licensee’s remedies to a dischargeable claim for money damages has been a significant risk for licensees for twenty-five years based on the Fourth Circuit case, Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. This result is grounded in the Bankruptcy Code prohibition on remedies of specific performance for non-debtor parties to rejected contracts and is in accord with Bankruptcy Code policy of affording debtors an opportunity to reorganize free of burdensome contracts. In the summer of 2012, however, the Seventh Circuit, in its decision Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC, held that a non-debtor trademark licensee retains rights to use licensed trademarks following rejection of the contract by the debtor-licensor. The decision, derived from a pre-Bankruptcy Code paradigm for understanding the rights of non-debtors under rejected executory contracts that convey interests in property, creates a circuit split over the implications of trademark license rejection. This article asserts that the Sunbeam Products case misconstrues the rights of a trademark licensee as a vested property right and is therefore incorrect under both the holding of the Lubrizol case and the pre-Bankruptcy Code paradigm on which the Sunbeam Products case relies.
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PROTECTING THE LIBERTY OF INDIGENT CIVIL CONTEMNORS IN THE ABSENCE OF A RIGHT TO APPOINTED COUNSEL

In 2011, the United States Supreme Court held in Turner v. Rogers that the Due Process Clause of the Fourteenth Amendment does not require the government to provide appointed counsel in civil contempt actions — despite the possibility that a contemnor can be jailed indefinitely for continuing failure to obey a court order. This Note asserts that in civil contempt cases against indigent defendants, many of the protections that appointed counsel would have provided can and should be captured through additional cost-effective procedural changes beyond the minimal procedure the Court required in Turner. This Note begins, in Part II, by outlining existing procedural due process jurisprudence of civil contempt and briefly tracking the historical development of the constitutional right to appointed counsel. Part III describes possible errors a court can make that may lead to improper confinement for civil contempt and explores how the presence of a defense attorney can guard against these errors. Finally, Part IV proposes a procedural framework that attempts to encapsulate the benefits of an appointed attorney and examines both the costs and the effects of these proposals. The Note concludes with a discussion of how these changes can be implemented in order to effectively protect the due process rights of indigent accused contemnors.

"UNLUCKY ENOUGH TO BE INNOCENT": BURDEN-SHIFTING AND THE FATE OF THE MODERN DRUG MULE UNDER THE 18 U.S.C. § 3553(F) STATUTORY SAFETY VALVE

Congress enacted 18 U.S.C. § 3553(f) as a statutory safety-valve provision to prevent low-level narcotics offenders from receiving the harshest sentences under the federal mandatory minimum narcotics sentencing regime. Unfortunately, the majority of federal circuits allocate the burden of proof of the statute to the defendant, thereby rendering the safety valve ineffective for many narcotics offenders. This Note analyzes the history of the statute, as well as the majority and minority judicial practices in allocating the burden of proof under the statute, and argues that the government should shoulder the burden of proof in safety-valve eligibility hearings in order to effectuate the intent of Congress.
STRUCTURING PUBLIC-PRIVATE PARTNERSHIPS: IMPLICATIONS FROM THE “PUBLIC-PRIVATE INVESTMENT PROGRAM FOR LEGACY SECURITIES”

This Note draws upon the experiences of participants in the U.S. Department of Treasury's Public-Private Investment Program (“PPIP”) to provide insight on structuring public-private partnerships (“PPPs”) going forward. PPPs enable the government to leverage private sector capital and expertise with public resources to deliver social goods. Drawing upon anecdotal interviews with PPIP fund managers, Treasury officials, and legal practitioners, this Note provides an empirical analysis of the challenges that can arise in a public-private context and potential solutions in response. The experiences of PPIP participants reveal that the fear of political risk coupled with limited legal recourse are significant concerns for the private sector, but can be addressed by sufficiently attractive market-based incentives as well as extra-legal mechanisms. Moreover, PPIP demonstrates that these extra-legal mechanisms can also help reduce the financial cost of PPPs. Concurrently, building a process whereby private parties compete for participation in a PPP through an auction-like mechanism can help government actors accurately gauge the level of private sector risk-aversion ex ante and calibrate the optimal amount of financial incentive needed to attract private sector participation.

REFORMING POLICE USE-OF-FORCE PRACTICES: A CASE STUDY OF THE CINCINNATI POLICE DEPARTMENT

When Congress enacted the Violent Crime Control & Law Enforcement Act of 1994, it gave the Department of Justice (DOJ) a powerful tool for correcting unconstitutional practices in state and local police agencies. Over the last twenty years, the DOJ has used this power to investigate, sue, and enter into contractual agreements with police agencies as a means of reforming unconstitutional police practices, such as excessive use of force, racial profiling, and unconstitutional stop-and-frisk practices. These agreements often fail to achieve their stated goals, however, because they lack effective enforcement mechanisms. Additionally, the DOJ has repeatedly failed to combat problems in the implementation process such as officer circumvention, fleeting political support, and intractable command management. In contrast to these failures, the Cincinnati Police Department achieved measurable progress in reducing use-of-force incidents, officer injuries, and improving citizen satisfaction while under an agreement with the DOJ and various private parties. This Note argues that Cincinnati Police Department's success can be explained by the innovative design of its agreement, which stresses the principles of democratic experimentalism — including a flexible and goal-oriented approach, stakeholder deliberation, regulatory transparency, and enforcement mechanisms governing the implementation of the agreement’s terms. It then identifies some methods implemented in Cincinnati that may prove useful in reforming police agencies in other cities.
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The Modern Trial and Evidence Law: Has the “Rambling Altercation” Become a Pedantic Joust?
Daniel D. Blinka 665

This Article places the relationship between evidence rules and the modern trial in a historical context. The trial’s foundation is in popular culture—lay witnesses testifying before a lay jury. Eighteenth-century trials were a “rambling altercation” between the defendant and his accusers—unruly (literally), unstructured, very brief, and less concerned with the “truth” than a socially acceptable judgment. The modern trial’s emergence in the nineteenth century coincided with the professionalization of law, the active involvement of lawyers as advocates, and the sprouting of evidence rules to regulate both lawyers and lay juries. Nonetheless, evidence law accommodated prevailing lay culture in order to foster legitimacy. Trials now searched for the truth, but did so in nineteenth-century terms.

The problem today is that many of the key epistemological assumptions of modern evidence law, especially credibility and character, draw from those nineteenth-century roots. Dissatisfaction with some rules has triggered several troubling trends. One fixates on esoteric rules that beget inscrutable, often nonsensical, distinctions. A second embraces psychology and social science as a means of factfinding and the polestar for the rules themselves. Examples of both trends are drawn from character evidence, expert testimony, and credibility doctrine.

Together, these trends reveal the law’s discomfort with, and occasional contempt for, contemporary lay thinking. Trials are fast becoming a pedantic joust, inaccessible to the lay public. Neither sophistic rules nor the latest styling of social science are the answer. Yet it may well be that current evidence law poorly reflects modern popular thinking as well. The trial’s legitimacy demands that evidence law effectively mediate between legal institutions and prevailing social and cultural thought about credibility and human contact.

The Withering Away of Evidence Law:
Notes on Theory and Practice
Robert P. Burns 691

The plausibility of evidentiary regimes depends on more basic understandings of the nature of the trial. “Tough-minded” evidence scholars may sometimes be reluctant to concede the importance of more “tender-minded” normative inquiries into the trial. Some implicit ideals of evidence law, such as factual accuracy, are relatively constant among theories of the trial, while others, such as materiality, are significantly affected by the choice among competing theories. This Article identifies the dominant theory of the trial and then suggests an alternative. It then offers a number of grounds for further relaxing the exclusionary force of evidence law and for strengthening its “parliamentary” function of imposing order and discipline on the trial. Finally, it offers some concrete examples of what an evidence law that performed a parliamentary, but not an exclusionary, function would look like.
Judicial Gatekeeping of Suspect Evidence:
Due Process and Evidentiary Rules in the Age of Innocence
Keith A. Findley 723

The growing number of wrongful convictions exposed over the past two-and-a-half decades, and the research that points to a few recurring types of flawed evidence in those cases, raise questions about the effectiveness of the rules of evidence and the constitutional admissibility standards that are designed to guard against unreliable evidence. Drawing on emerging empirical data, this Article concludes that the system can and should be adjusted to do a better job of guarding against undue reliance on flawed evidence. The Article first considers the role of reliability screening as a constitutional concern. The wrongful convictions data identify what might be called “suspect evidentiary categories”—a few types of evidence (eyewitness identifications, confessions, forensic science, and snitch testimony) that are both recurring features of wrongful convictions and not otherwise susceptible to correction through traditional trial mechanisms and that, therefore, can and should be subjected to heightened scrutiny for reliability under the Due Process Clause.

Recognizing, however, that the Supreme Court is moving away from using constitutional doctrine to screen for reliability, this Article considers other mechanisms for better ensuring reliable evidence and accurate trial outcomes. First, current trends in Supreme Court jurisprudence suggest a due process framework that focuses upstream of the trial process on regulating the police and prosecutorial conduct that generates some of the most suspect trial evidence. Second, the Article assesses new applications of nonconstitutional evidence law that offer promise for filling the void in reliability review of such suspect types of evidence. Finally, the Article considers remedies in addition to exclusion that might aid in the enterprise of mitigating the harm from flawed evidence. Principal among these are broader use of expert witnesses and jury instructions to educate factfinders about the counterintuitive but scientifically established qualities of these categories of suspect evidence. And because courts have proven reluctant to apply reliability-based exclusionary rules rigorously, the Article concludes by exploring partial exclusion—excluding the most objectionable parts of the evidence while permitting other parts—as a remedy that courts might be more likely to actually enforce.
SYMPHOSIUM ON EVIDENCE REFORM

The Degrading Character Rule in American Criminal Trials .................................... Paul S. Milich 775

The rule prohibiting evidence of the accused’s bad character is steadily degrading as courts and legislatures expand existing exceptions and add new ones. In Georgia, we saw the rule almost disappear as trial courts blithely admitted a defendant’s past crimes to prove his or her “bent of mind” to commit the crime charged. This Article examines why the character rule is losing ground.

The thesis is that a rule requiring as much careful balancing as the character rule needs a clear, strong justification to hold its own when faced with competing claims to admit the evidence in the search for truth. The most widespread justifications offered for the character rule are neither clear nor strong. They rely heavily on a claim that the rule prohibiting character evidence improves accuracy and the search for truth—a claim that is difficult to defend. The character rule is best viewed as a moral position rather than an epistemic tool. The rule defends the presumption of innocence and a moral preference to err on the side of acquittal—even if that means “the truth” is unrevealed in some instances. Unless this moral justification for the character rule is revived and replaces the current weak, epistemic justification in the minds of judges and legislators, the rule will continue to degrade.

Searching for Truth in the American Law of Evidence and Proof ................................ D. Michael Risinger 801

The ideology of the trial process puts discovery of truth at center stage. This is made clear by the language of Federal Rule of Evidence 102, upon which New Georgia Rule of Evidence 24-1-1 is obviously based. Both of these rules make the ascertainment of truth one of the two goals of the trial (just determination being the other). However, the term “truth” has been used in many ways in many different contexts and traditions. What notion of truth did the drafters have in mind?

This Article answers that question by reference to what has come to be known as the “standard model” of the trial, which is almost certainly what the drafters had in mind when invoking truth. In the tradition of the standard model, that truth is truth about “facts,” usually conceived of as details of the physical world provable by empirical evidence. However, even restricting the notion of truth to factual truth, many issues remain, particularly since there are many varieties of such facts that stand as ultimate issues under various substantive law doctrines. In the second half of this Article, I put forth a preliminary approach to a taxonomy of the law’s facts.
The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial ......................................... Ronald L. Carlson 837

An expert's testimony at a pretrial Daubert hearing is frequently supported by professional writings. Technical literature is employed by litigants to buttress controversial scientific theories and research. By way of example, a plaintiff's attorney may urge that an alleged toxic substance caused his or her client's cancer. The objective in providing the court with learned texts and articles is to convince the trial judge to admit expert opinions that support causation. This Article reports appellate opinions that strongly encourage production of professional writings in the pretrial context. Indeed, in several cases the absence of published research resulted in defeat of a party's case. The Article then turns to the trial stage of the process. Scientific literature that was of central importance in the pretrial stages takes on a diminished role. The Article identifies factors that may account for this phenomenon. It concludes by positing the observation that pretrial practice is the center of gravity of modern litigation. Summoning corroborative scientific literature can be the key to success in the vital arena of pretrial advocacy.


The thesis of this Article is that we are moving toward a fundamentally epistemological approach to determining the admissibility of expert testimony. The first part of the Article notes that while many Frye jurisdictions exempted soft science and nonscientific expertise, the Daubert line of authority mandates that like an epistemologist, a trial judge examine knowledge claims by any expert. The second part addresses the question of the breadth of the judge's analysis. The second part points out that under the marketplace and general acceptance tests, courts sometimes conducted a global analysis and inquired generally whether the discipline itself was recognized and possessed some valid knowledge. The second part demonstrates that in contrast, under Daubert the judge must test the reliability of the specific theory or technique the expert proposes to rely on. Like an epistemologist, the judge must challenge the particular knowledge claim advanced by the expert. The third and final part of the Article concerns the depth of the judge's scrutiny. The third part explains that by employing acceptance tests, the marketplace and Frye standards effectively delegated the decision to the required acceptors—either market actors or members of the relevant specialty field. Thus, under these standards, the judge was obliged to accept ipse dixit assertions by the acceptors. Instead, Daubert and its progeny such as Joiner forbid the judge from accepting such assertions at face value. Like a skeptical epistemologist, the judge must demand that the proponent establish sufficient warrant for the expert's knowledge claim. The upshot of the new Daubert approach is that contemporary judges must engage in an analysis that is at once broader, narrower, and deeper than the analyses they conducted under the marketplace and general acceptance tests.
A Tale of Two Dauberts ........................................... Julie A. Seaman 889

Under the Federal Rules of Evidence and Supreme Court precedent, a single standard ostensibly governs the admissibility of scientific and other expert evidence in criminal and civil cases. Although Georgia has recently become the forty-fourth state to adopt the Federal Rules of Evidence, it has declined to adopt Daubert for criminal cases and has retained the prior, more lenient, standard. While many commentators view this approach as perverse, this Article considers the possible virtues not only of explicitly applying a separate rule to scientific evidence in criminal cases but also of applying a less stringent rule to such evidence. Based on the experience of the federal courts, even a seemingly unitary standard will, in practice, be disparately applied. Because courts are unlikely to exclude forensic evidence of longstanding admissibility even where its reliability has been called into question, an explicitly non-Daubert approach would at least allow courts to be more honest about the reliability of such evidence while still admitting it. This Article proposes that other states follow Georgia's lead and consider the virtues of rejecting a (falsely) uniform standard for evaluating the reliability of scientific evidence in criminal and civil cases.

NOTES

Much Ado About Nothing: How the Securities SRO State Actor Circuit Split Has Been Misinterpreted and What It Means for Due Process at FINRA ................................................ Jerrod M. Lukacs 923

Traditionally, the U.S. securities exchanges were self-regulated, governing trading, setting rules, and carrying out disciplinary procedures against member trader-brokers. In the past five decades, however, the SEC has divested the exchanges of their regulatory authority, transferring it to independent, private bodies. Concomitantly, the SEC's ability to control the rule-making and enforcement powers of these private bodies has increased. Recently, this process culminated in the creation of FINRA, a monopolized, private self-regulatory organization (SRO) under comprehensive SEC control responsible for regulating the entire U.S. secondary securities market. The SEC's ever-growing control over securities SROs has called into question whether the regulation of U.S. securities professionals remains a private enterprise free from the constitutional constraints on public actors.

This question—whether SROs are private or public actors—has generated a circuit split so convoluted that many courts have misinterpreted it, as the Eleventh Circuit's recent opinion in Busacca reveals. Properly understood, however, this Note argues that the pre-FINRA SRO state action cases signal very little about whether FINRA should be deemed a public actor. Yet these cases speak volumes about what effect a state actor determination would have on disciplinary procedures at FINRA. Combined with the statutory framework of the Exchange Act, these decisions strongly support the conclusion that constitutionally adequate process is already guaranteed (and is usually provided) in FINRA's disciplinary actions. As a result, securities professionals may find a judicial ruling requiring constitutional due process difficult to obtain and ultimately ineffective to secure member trader-brokers additional protections in FINRA's disciplinary actions.
Constructive Upheaval: Railway Labor Executives' Ass'n v. Gibbons and the "Choice of Clause" Challenge to Traditions of Statutory Construction

When confronted with constitutional challenges to Congress's legislative authority, courts must build their analyses on an interpretation of the statute's language. Such cases implicate principles of statutory construction that lay the groundwork for the rulings that follow. Throughout American judicial history, courts have favored flexible interpretation to protect Congress's enactments from constitutional attack. The Supreme Court's decision in Railway Labor Executives' Association v. Gibbons dramatically departed from that tradition, suggesting instead that legislation should be categorized as a particular type of law to ensure that Congress does not overstep the boundaries of its enumerated powers. Although its shift in perspective took time to register, Gibbons's novel approach, here referred to as a "choice of clause" analysis, introduced an alternative to flexible construction with the potential to shake the foundations of future constitutional cases. Inspired by a recent cycle of cases that confronted Gibbons's reasoning, this Note examines the choice of clause analysis and attempts to understand its place among the canons of statutory construction. Building on the fundamental differences between the choice of clause analysis and a long-followed principle of construction, this Note argues that the choice of clause analysis should not be given a role in the process of statutory construction because of the potential for Gibbons's approach to dramatically reshape the outcomes of constitutional cases.

Stemming the Federal Tort Fountain:
Why Federal Courts Should Maintain Implied Certification Limitations on Qui Tam Suits Against Nonclaimant Defendants

Qui tam suits in the health-care industry increasingly target pharmaceutical and medical-device manufacturers rather than the medical providers who directly make claims to federal health-insurance programs. These suits commonly argue that the manufacturer induced the provider to falsely certify compliance with federal and state antifraud laws, such as the Anti-Kickback Statute. This Note shows that suits based on such "implied certification" of adherence to laws should not be permitted under the Federal False Claims Act unless the nonsubmitting defendant is first convicted of providing a kickback. First, this Note analyzes recent amendments to the Anti-Kickback Statute in the Affordable Care Act and explains how these amendments lower two bars to False Claims Act suits in the health-care context that commonly protect nonsubmitting defendants. The Affordable Care Act also indicates that a kickback may be a basis for a false or fraudulent claim, but the statute's language limits this to qui tam suits brought after a criminal conviction. Second, this Note shows that qui tam suits against defendants who make no direct claim for payment to the government interfere with other antifraud initiatives and that this interference supports constraining a private party's ability to sue on the government's behalf when the claim is only based on inducing a false implied certification of complying with the law.
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