ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Samuel J. McLure, *Absent Biological Fathers in Adoption: Noticing the Nuance of Notice*, 6 FAULKNER L. REV. 305 (2015).

The rights of biological fathers in contested adoption cases have been at the center of intense litigation in some states. Laws have been created that biological fathers must follow to avoid a high risk of losing their child to a family wishing to adopt. Further, there are laws that do not give biological fathers the chance to stop adoptions. In Utah, the current adoption laws allow mothers to secretly give their children up for adoption. The law does not require biological fathers to receive any notice; as a result, the father often becomes unable to do anything to stop the adoption from occurring. This process can have negative emotional effects on both the child and the father, which can last for many years. The author discusses the issue and analyzes different cases, from various states, which involve a biological father attempting to stop his child from being adopted. The different states have different requirements, which lead to varying results as to whether or not the father may stop an adoption from occurring. The author suggests that states should require biological fathers be given notice of an impending adoption of their child in order to allow them enough time and opportunity to avoid losing their child.

CHILDREN AND TEENAGERS

Gloria Ann Whittico, *10th Annual Wells Conference on Adoption Law: If "Past Is Prologue": Toward the Development of a New "Freedom Suit" for the Remediation of Foster Care Disproportionalities Among African-American Children*, 43 CAP. U. L. REV. 407 (2015).

African-American children are heavily overrepresented in the foster care system; in 2004 their ratio was double that of their general population. The author proposes that the problem of disproportionate numbers of African-American children in the child welfare system may be addressed by legislative solutions as well as better organization of attorneys working in the foster care and adoption system. An examination of "freedom suits," which were used to reunite freed slaves with their still enslaved family members, may guide a potential solution towards the over-representation of African-American children in the foster care system. In a freedom suit, slaves could sue for emancipation when taken to a state prohibiting slavery; freed slaves could sue in free state courts for the emancipation of their still enslaved children in slave states. A cause of action similar to a freedom suit may be helpful in ameliorating the problem of disproportional number of African-American children in the foster care system. Additionally, foster care practicing attorneys could form organizations similar to the "Virginia Lawyers

Helping Families" initiative, which provides attorneys, compensated by training and continuing legal education credits, at no charge to poor litigants in custody and childcare disputes. In the past, community organizations such as churches, women's clubs, and benevolent societies took care of children when their parents were unable to meet their needs. These networks could be a modern version of these organizations to help African-American children out of the system and into stable family environments.

FAMILY

Dawn J. Post et al., *Are You Still My Family: Post-Adoption Sibling Visitation?*, 43 CAP. U. L. REV. 2 (2015).

Currently, there exists a significant discrepancy between the ways in which the child welfare system deals with sibling relationships subsequent to being transitioned from the foster care system into new adopting families. Typically, when siblings are in the foster care system, their relationships are encouraged and cultivated, yet when one of the siblings is adopted, the nurturing treatment of the relationship immediately ceases. The purported rationale underlying the varied treatment is that the adopted child will have an increased degree of permanency in his new home and that the adopting foster parents are given autonomy over the child. The Note's authors argue that the breakdown of the sibling relationship post-adoption is harmful to both siblings and has a considerably negative impact on their psychological well-being. The authors suggest that the solution to the problem lies in a change of approach to post adoption sibling contact taken by various stakeholders—judges, lawyers, caseworkers, social workers, mental health professionals, and adoptive parents. This shift in approach must include a greater emphasis placed on the wishes of the adopted child, and a foster care agency that acknowledges and internalizes the importance of sibling contact post-adoption. Although the policy trend towards post-adoption "permanency" is well intentioned and motivated, at least in part, by the need for stability of the adopted child and autonomy for the adopting parents, the breakdown in sibling relationship post-adoption has serious consequences that can no longer remain unrecognized.

HUMAN RIGHTS

Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001 (2015).

Many asylum applicants in the U.S. have faced various impediments because of the flaws in the system, such as the shortage of legal representation due to

Congressional cutting of immigrant legal services and the lack of awareness of cross-cultural and psychological needs. Many asylum seekers suffer trauma and language barriers, which in turn significantly affect their ability to recount their past experiences in clarity as required by the U.S. adjudicators. In an effort to allow the asylum applicants to be best informed, treated, understood, and represented, the author suggests that the United States Asylum system needs to adopt a holistic approach to asylum representation, such as a multidisciplinary representation competent in various disciplines. Specifically, the author suggests a three-part solution to address the problem. First, although the U.S. Supreme Court decided that (1) indigent criminal defendants could exercise their constitutional right to counsel under *Gideon v. Wainwright*; (2) such right does not extend to immigration cases; and (3) Congress has enacted law to cut funding for immigrant legal services, appointing counsel for the asylum applicants not only removes the barrier of facing the complexity of the U.S. asylum system but also ensures fundamental fairness safeguarding against errors and prejudice. Second, asylum seekers should have access to medical providers; they are often traumatized and face difficulty in telling their stories coherently in front of the U.S. adjudicators, and the professional can even offer invaluable expert testimony to further aid the asylum seeker. Third, human rights experts, academics, and anthropologists can provide a context for the applicant's story, helping U.S. adjudicators to understand their plight. In sum, this three-part approach allows the asylum seekers to be understood sufficiently and further allows for better representation.

Paul Finkelman, *Human Liberty, Property in Human Beings, and the Pennsylvania Supreme Court*, 53 DUQ. L. REV. 453 (2015).

The Commonwealth of Pennsylvania was the first openly, antislavery state in the United States. Unlike other U.S. colonies or states, Pennsylvania actively debated as public policy the end to slavery throughout the 1680s, through the U.S. Revolution, and until the eve of the Civil War. In 1780, Pennsylvania officially ended slavery with the "Act for the Gradual Abolition of Slavery" by ensuring that children of all slave women were born free and that no new slaves could be brought into the state. The Note's author argues the Pennsylvania's 1780 Act was the first law of its kind, in the history of the world, in its approach to abolishing slavery. Unlike Great Britain, who ended slavery in *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772), Pennsylvania ended slavery during a period when the practice was still legal throughout the remainder of the United States. This long-standing antislavery tradition, particularly as codified in the 1780 Act, establishes Pennsylvania as the home to the first antislavery society in the newly created United States, as well as a society that is uniquely committed to antislavery ideals in the white Western world. Nonetheless, the author recognizes that in the years leading up to the Civil War, the Pennsylvania Supreme Court wavered in the

State's dedication to antislavery ideals by feebly defending emancipated blacks in Fugitive Slave Act litigation as well as denying free blacks a role in the State's political process. Despite encouraging antislavery principles and ideals, the Pennsylvania Supreme Court struggled with enforcing the law because of neighboring state and federal policies.

Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 U. MICH. J.L. REFORM 967 (2015).

Racial profiling, the war on drugs, and immigration law all come together when racial profiling is used to define individuals that may be involved in drug trafficking. Immigration law provides the framework for prosecuting these individuals and contributes to the increased removal of non-citizens. Both federal and state laws work to convict high numbers of black and Latino non-citizens for minor charges, heightening the impact of race on the criminal justice system. This article analyzes the disparity between race, arrests, and removal through the case of *Moncrieffe v. Holder* where a black man's traffic stop led to removal proceedings. The author dissects the police report taken from the night of Moncrieffe's arrest to show how a stop for a window tint violation ultimately led to a drug conviction and removal proceedings. The frequency of these sorts of stops reinforces the need for either legislative or executive action to shift the current removal process away from relying on the racial profiling that stems from our criminal justice system.

Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915 (2015).

The federal government considers fear of deportation among the most significant factors that prevent unauthorized immigrants from reporting violent crimes to law enforcement. The U Visa program, the government's current solution to this problem, offers up to 10,000 visas per year to unauthorized immigrants, often female victims of domestic violence, so long as two conditions are met. The victim must first, upon reasonable request, assist law enforcement during the investigation and prosecution of a reported crime; and second, obtain certification from a law enforcement official that she was the victim of the type of crime that qualifies her for a U Visa. The author discusses how the current U Visa program is not only ineffective because it does not offer enough visas to match the need, but more critically, unfair because it effectively forces unauthorized immigrants to help law enforcement in exchange for the same protections citizens and authorized immigrants receive unconditionally. Furthermore, since the victim receives a substantial benefit in exchange for reporting a crime, the author is concerned that a U Visa can improperly motivate unauthorized immigrants to

falsely report or fabricate claims. Those accused are often immigrants themselves, and are now at risk of deportation regardless of their immigration status. To resolve this tension within the U Visa program, the author suggests a system that offers the immigration benefits of a U Visa without compelling the victim to participate in the investigation and prosecution of an alleged attacker. By separating the needs of a victim from the responsibilities of an accuser, unauthorized immigrants can hope to enjoy the same protection from crime as citizens.

William P. MacNeil, *From Rites to Realities (and Back Again): The Spectacle of Human Rights in* The Hunger Games, 5 U.C. IRVINE L. REV. 483 (2015).

At approximately the same time that *The Hunger Games* was released in Australia, an Australian critical legal feminist presented a lecture criticizing the United Nation's Universal Periodic Review as one of empty ritualism. The Review was established by the United Nations to evaluate member States' treatment of human rights; its effectiveness is questionable. This system of review is problematic because member nations evaluate each other and, rather than using this opportunity for the betterment of all involved members, participate in quid pro quo behavior, making behind the scenes deals to ensure that they have favorable records, rather than actually trying to protect human rights. The system is analogized to the plot of the dystopian fantasy novel *The Hunger Games*. The member nations are likened to the contestants of the Hunger Games, each competing against each other for favorable reports, oftentimes at the expense of the rights the review is meant to protect. The author suggests that instead of this self-serving behavior, nations should engage in critical reflection, perhaps at the expense of their clean record, and seek out insufficiencies to remedy. Similar to how the heroes of *The Hunger Games* had to be willing to commit suicide to win, nations should be willing to expose their inadequacies so that human rights prevail.

Naji'a Tameez, Note, *Road to Recovery: Pakistan's Human Rights Crisis in the FATA*, 42 SYRACUSE J. INT'L L. & COM. 445 (2015).

The Note author discusses Pakistan's oppression of the 3.9 million tribal people that live within its borders. The tribal lands, known as the Federally Administered Tribal Areas ("FATA"), have been engrained in a human rights crisis for years, but since 2004, conditions in the region have greatly deteriorated. Most of the residents of the FATA are Pashtun Muslims. Due to the U.S. led efforts against Afghanistan, the Taliban, and Al-Qaeda, there has been an insurgency in Pakistan's tribal lands and thousands of people in the tribal lands have been subject to inhumane treatment. Tens of thousands more have died and millions of people have been displaced from their homes. The Pakistani government has not only

made nominal effort to fix this humanitarian crisis and help its citizens, but has also contributed to the worsening of the poor conditions in the tribal lands. The author argues that Pakistan must remedy these severe conditions in order to meet its international legal obligations (Pakistan violates international human rights law, international humanitarian law, and customary international law) and heed its own constitution as it applies to the rest of the country. The author suggests Pakistan must fully incorporate the tribal lands into the national parliament, set up proper mechanisms for representation, provide adequate education and healthcare, ensure equal treatment of women before the law, and, finally, hold violators of human rights accountable.

Phillip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J.L. REFORM 879 (2015).

Detaining immigrants is an issue that needs to be immediately addressed. A particular immigration law known as the Mandatory Detention statute is responsible for record-breaking numbers of immigrants in detention. The Department of Homeland Security currently interprets the statute to require the detention of any non-citizen, in removal proceedings, who falls into a broad list of categories stipulated in the statute. In this article, the author argues that the term "shall take into custody," in the Mandatory Detention statute, should be more broadly interpreted. Currently, many immigrants are being held in harsh detention disproportionate to their actions since, despite its characterization as civil confinement, a closer look at immigration detention reveals that it is often harsher than criminal detention. The author maintains that a broader reading of the statute will allow for more humane and less costly alternatives to detention that can still prevent non-citizens from skipping out on immigration orders, such as electronic monitoring, home visits, and telephonic check-ins.

LGBTQ RIGHTS

Bari Nadworny, *Homosexuality in High School: Recognizing a Student's Right to Privacy*, 88 ST. JOHN'S L. REV. 1103 (2014).

Despite social changes that aim to reduce stigma thereby encouraging children and adolescents to explore their sexuality free from scrutiny, the boundaries that define their privacy right to this information remains unclear in the United States Constitution. The author argues that disclosure of a minor's sexual orientation by educational officials violates his or her right to informational privacy. The Third Circuit Court of Appeals recognized that revealing this information to parents may not always be in the best interest of the minor—and have reaffirmed this belief in matters pertaining to homosexuality, as held in

Sterling v. Borough of Minersville. The Fifth Circuit, on the other hand, believes that school officials are allowed to discuss a student's private information with the student's parents or guardians and are not violating the Fourteenth Amendment when doing so. These contradictory holdings have not been reviewed by the Supreme Court. The author discusses various contexts in which the Supreme Court applied the Fourteenth Amendment to sexual matters for high school students, including procreation, contraception, and abortion. This examination reveals how a student is protected from parental involvement or notification in these contexts, which may hold higher health risks to him or her, in comparison to the dangers associated with revealing information about a student's sexual orientation. The author implies that the students should be protected more in their privacy rights regarding their sexual orientation than in regards to other sexual matters. The student's desire to reveal his or her sexual orientation in the school setting may differ from that of the home setting, and therefore, school officials are violating the student's constitutional rights upon disclosing this information to parents without his or her consent.

MARRIAGE AND DIVORCE

Michael Virga, Note, *Marrying Up: The Unsettled Law of Immigration Marriage Fraud and the Need for Statutory Guidelines*, 88 ST. JOHN'S L. REV. 1137 (2014).

Many illegal immigrants use marriage rights to gain preferential treatment and get around the usual process of entry into the United States. Illegal aliens who have spouses that are American citizens are given more lenient treatment under the pretense of trying to keep families intact. In response to the fraud, the government enacted 8 U.S.C. § 1325(c) which made it a federal crime to enter into a marriage with the intent of evading American immigration law. This statute has been interpreted in different ways by the Circuit Courts: the "build a life" interpretation, which accounts for other factors immigrants may consider when entering into marriages and the "evade the law" interpretation, which finds a marriage is fraudulent regardless of motivation. The author argues for stricter enforcement of section 1325(c), i.e., that it is applicable to anyone entering into a marriage even when gaining citizenship is not the main goal. The problem is in the preferential treatment of alien spouses allowing them to bypass immigration quotas and certain procedural hurdles. The Ninth Circuit uses the "build a life" interpretation on the basis that arranged marriages are still considered genuine, so a marriage with an ulterior motive is not necessarily void. The Sixth Circuit has supported the "evade the law" interpretation by using a strict statutory interpretation, and stating that the intent part of the statute does not reference anything about building a good life.

PARENTING

Ashley N. Moscarello, Note, *Because I Said So: An Examination of Parental Naming Rights*, 90 CHI.-KENT L. REV. 1125 (2015).

This Note examines a parent's constitutional right to name his or her child. While many names are unique, state courts and legislatures often regulate the names that parents can give to their children. By exploring the background of the First and Fourteenth Amendments, along with analyzing surname case law, the author argues that the law supports parents' fundamental right to name their children. Specifically, this fundamental right to name is supported by a parent's basic childrearing rights, as well as freedom of speech. States must have a compelling interest in regulating the names that parents can give their children. The author argues, however, that most state interests fail to be compelling enough to justify infringing on a parent's fundamental right to name his or her child. The right to name should only be subject to regulation if it puts the child's welfare at risk.

SEX OFFENSES

Alex Duncan, Note, *Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post*-Starkey, 67 OKLA. L. REV. 323 (2015).

The Oklahoma Supreme Court's decision in *Starkey v. Oklahoma Department of Corrections* marked a change in the State's judicial attitude toward legislative regulation of its sex offender registry. The Department of Corrections relied on a 2004 amendment to Oklahoma's sex offender law to extend retroactively the duration of James M. Starkey, Sr.'s obligatory offender registration period from ten years to the remainder of his life. The *Starkey* Court held that because sex offense statutes are punitive in purpose and effect, the amendment was an invalid violation of the constitutional ban on *ex post facto* lawmaking. This decision is contrary to the Supreme Court's ruling in *Smith v. Doe* and to the beliefs held by the majority of states, which opine that sex offender legislation is not punishment, but rather falls within the civil regulatory scheme. The Note author discusses several possible *Starkey* implications: the removal of offenders from the registry may cause a spike in public safety concerns; the legislature may suffer diminished power to control retroactively sex offender policy, litigation and judicial scrutiny of this issue may increase, and an offender (particularly a juvenile) may be entitled to challenge the laws on the cruel and unusual punishment grounds under the Eighth Amendment. Despite these potential setbacks, *Starkey* ultimately provides Oklahoma with a more reasonable regulatory

scheme for policing sex offender registration. The author encourages other states to emulate Oklahoma, arguing that *Starkey*'s rule protects the public while simultaneously reducing the onerous burden previously faced by low-level offenders with low risk of repeating their crimes.