ANNOTATED LEGAL BIBLIOGRAPHY

TABLE OF CONTENTS

LGBTQ+ RIGHTS

J. Shahar Dillbary & Griffin Edwards*, An Empirical Analysis of Sexual Orientation Discrimination,* 86 U. CHI. L. REV. 1 (2019).

The Fair Housing Act, aimed at residential real estate transactions, and the Equal Credit Opportunity Act, aimed at any credit transaction, are the two main federal statutes that prohibit mortgage lending discriminated based on an applicant's race color, religion, national origin or sex. However, discrimination in mortgage lending based on an applicant's sexual orientation is not prohibited by the federal government and the majority of states; the Equal Access Rule prohibits this discrimination in one category of loans—Federal Housing Administration loan (FHA-loan)—but the rule has proved to be limited in effect. Through an empirical study using data from over five million mortgage applications, Dillbary and Edwards sought to analyze patterns of sexual orientation discrimination in the American home mortgage lending market from 2010 to 2015. To avoid mistaking legitimate risk considerations for discrimination, the authors controlled for certain factors—they focused only on FHA-loans, compared applicants with the same level of income, and compared loan acceptance within the same neighborhood by the same bank. The authors found that despite being identical in all respects, same-sex male co-applicants are less likely to have their loan application accepted compared to white heterosexual co-applicants, while same-sex female co-applicants are either just as likely or more likely to get their loan application accepted compared to white heterosexual co-applicants. Furthermore, the authors discovered evidence to support the intersectionality theory—when sex and race unite, a new form of discrimination emerges; the support for this theory comes from the authors' finding that black male co-applicants and black female co-applicants face the most discrimination. Because applicants with the same level of risk to the lender were compared, the authors concluded that it is more likely that discrimination is motivated by bigotry rather than by attempts to minimize risk and that the most promising method to reduce discrimination to same-sex couples is through local laws to reduce such discrimination.

Annotated by: Andrea Barrientos

Adam Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 ALCRCLLR 35 (2019).

A growing body of research suggests the existence of a wage gap, caused by the denial of promotions and career advancement to LGBT individuals exists across the United States, likely as the result of discrimination. The Equal Pay Act of 1963 was propounded by Congress in order to ensure that discrimination on the basis of sex would not artificially depress wages, but the law fails to specifically enumerate sexual orientation or gender identity as prohibited bases. The author explores whether the term "sex" in the Equal Pay Act could be construed as applicable to discrimination on the basis of sexual orientation or gender identity, which the author contends ins the correct reading of the law. While other landmark federal anti-discrimination statutes such as Title VII and Title IX have been interpreted to prohibit discrimination on the basis of gender identity or sexual orientation, the Equal Pay Act uniquely includes the limiting and problematic term "opposite sex," suggesting a strictly binary conception of gender identity, seemingly excluding all but the cisgendered and ultimately raising the ominous specter of a more difficult battle before the law's protections will be universally recognized as extending to LGBT individuals because some still argue that the legislature did not intend to extend protection to these groups. While federal laws prohibiting discrimination on the basis of sex are robust, the issue arises of whether these legal protections are recognized as extending to gender identity and sexual orientation, which has been found to vary based on jurisdiction and found to be difficult to predict. The author proposes that reading the Equal Pay Act as protecting LGBT individuals is legally and morally necessary, and there is an issue which citizens and lawyers concerned with equitable civil rights protection should seek to aggressively litigate. Ultimately, while a credible case that the Equal Pay Act of 1963 can be read to prohibit discrimination on the basis of gender identity or sexual orientation, a compelling need still exists for the legislature to enact comprehensive protections beyond the point of those already enshrined into law in order to ensure that all individuals are protected.

Annotated by: David Belmont

Devon Sherrell, Comment, *"A Fresh Look": Title VII's New Promise For LGBT Discrimination Protection Post-Hively*, 68 EMORY L. J. 1101 (2019).

While LGBT people have succeeded in gaining marriage equality and certain other basic rights, they still face issues of employment discrimination due to their sexual orientation. Although some states have passed laws that protect against discrimination based on sexual orientation, others have failed to do so, thereby leaving LGBT people vulnerable to discrimination in the workplace for their identity. In Hively v. Ivy Tech Community College, the Seventh Circuit expanded Title VII's sex discrimination clause to include a prohibition against discrimination based on sexual orientation. This decision can lead to national protection for LGBT individuals in employment. However, the Supreme Court's holding in Burwell v. Hobby Lobby granted private employers an exemption under Title VII's sexual orientation protections based on religious grounds. More specifically, private employers could argue that their religious beliefs are substantially burdened by the LGBT sex discrimination protection and that pursuant to the Religious Freedom Restoration Act of 1993 (RFRA) they should be exempted from Title VII's sex discrimination prohibition. In accord with RFRA, to succeed the claimant must prove that his freedom to exercise religion is substantially burdened. To follow, the government must then show that the policy serves a compelling governmental interest and is applied in the least restrictive manner. The author argues that the Seventh Circuit's holding is the prime defense against sexual orientation discrimination even after Hobby Lobby's decision because it can withstand the high scrutiny test of RFRA. Specifically, Title VII's sexual orientation protection would not be a substantial burden on an employers' free exercise of religion. Even if it was a substantial burden, it would still surpass the strict scrutiny test under RFRA as Title VII serves the critical purpose of eradicating sexual discrimination in a targeted manner. Ultimately, while Hobby Lobby threatens that private employers can circumvent Title VII's protections by exerting religious objection to hiring LGBT individuals, the Author highlights that Title VII's protections satisfy the strict scrutiny standard under RFRA, and thus private employers cannot avail themselves. The Author suggests that the expansion of Title VII to include sexual orientation discrimination is the best mechanism to secure nationwide protection for LGBT people since it can withstand religious objections. To ensure the protection of LGBT individuals in employment in the face of religious objections, Hively's rationales should be expanded to other federal circuits precedents so a uniform decision in favor of LGBT rights can be declared.

Annotated by: Tziona Breitbart

Praatika Prasad, Note, *More Color More Pride: Addressing Structural Barriers to Interracial LGBTQ Loving*, 87 FORDHAM L. REV. ONLINE 89 (2019).

Although the U.S. Supreme Court's decisions in Loving v. Virginia and Obergefell v. Hodges have legalized interracial and same-sex marriage respectively, structural barriers are still limiting the possibility for LGBTQ people of different races to meet and form intimate relationships. Multiple structural barriers to interracial LBGTQ loving include marginalization of LGBTQ people of color in both the LGBTQ community and society at large, and unequal racial disparities in society such as housing, education, employment prospects, criminal justice policies, and access to health care. Structural barriers to interracial LGBTQ loving have rooted in unequal racialized structures in society created and continuingly supported by the State. First, both marriage equality advocates' debate and the Supreme Court's decision in Obergefell omitted Loving's antisubordination principle, completely casting the history of racial subordination and bias out of Loving. This "whitewashed version of marriage and dignity" has contributed to de facto white supremacy in the society, and further divided the LGBTQ community among racial lines, thus creating barriers to interracial intimacy. Second, the State's social infrastructure shaped by United States' history of exclusionary practices has also led to barriers to interracial interactions. For example, segregated housing patterns created through a long history of public policies and private practices have substantially limited intergroup contact—living or working where one race predominates makes it difficult for people to connect romantically with people of different races. Also, because of their multiple minority status, LGBTQ people of color face additional inequalities in education, employment, socioeconomic status, and accessing social services. The relative poverty, low education, poor job prospects of LGBTQ people of color have then served as a hindrance in the dating market, as people usually base their dating preferences off of these markers.

Dismantling these structural barriers to interracial LGBTQ loving will take a long time. In the author's opinion, the first step should be dismantling residential segregation. Real residential desegregation can directly increase cross-racial contact, dispel negative stereotypes, help form positive racial attitudes from a young age, and positively affect the formation and maintenance of interracial LGBTQ relationships. The author also suggests that LGBTQ movement today should create more welcoming environments for people of color in public spaces, educate its white members about racial issues, and prove more support to LGBTQ youth of color. Overall, the author proposes that increasing cross-racial contact is an effective device to dismantle barriers to interracial intimacy,

which could be positively promoted by truly integrated housing and a change in how race is perceived within the LGBTQ community.

Annotated by: Yifan Li

Bryanna Jenkins, Note, *Birth Certificate with a Benefit: Using LGBTQ Jurisprudence to Make the Argument for a Transgender Person's Constitutional Right to Amended Identity Documents*, 22 CUNY L. REV. 78 (2019).

Currently, the process of changing gender markers on identity documents, such as birth certificates, is conducted by the state government rather than the federal government, which causes inconsistencies throughout our country. For example, Maryland, a more liberal state, allows transgender people to amend the gender on their birth certificate by submitting a letter from a medical professional that asserts the individual received medical treatment for gender transition—regardless of whether or not that person has undergone gender-affirming surgery—while the more conservative state of Kansas is notorious for not altering birth certificates for transgender people. The complicated issue is that certain states do not recognize a gender change unless a gender affirming surgery occurs which in turn means that those states will not update gender markers on identity documents. The antiquated gender marker laws have led to greater oppression and marginalization within the transgender community by either forcing transgenders to undergo gender affirming surgery so that they can amend their birth certificate or by not allowing transgenders to amend their birth certificates in its entirety. The author provides a comparison of the constitutional struggles, such as the Equal Protection and Due Process Clauses, that the transgender community faces to those faced by the homosexual community prior to Obergefell v. Hodgens, which legalized same-sex marriage and Pavan v. Smith, which gave same-sex couples the constitutional right to be listed on their child's birth certificate, in order to suggest that courts should allow transgenders the right to constitutionally amend their gender markers on identity documents, regardless of the state they reside in. Using those cases as precedent and based on public policy, the federal government should enforce a nationwide law permitting transgender people a right to amend the gender markers on their identity documents, with or without having received gender affirming surgery, to prevent further barricades that the transgender community faces.

Annotated by: Amanda Povman

Dyllan Moreno Taxman, Article, *What About Bob? The Continuing Problem of Federally-Subsidized LGB Discrimination in Higher Education*, 34 WIS. J. L. GENDER & SOC'Y 39 (2019).

Widespread discrimination against lesbian, gay, and bisexual (LGB) students and applicants in higher education requires reconsideration of whether discriminating institutions should be entitled to receive federal tax benefits. Colleges and universities in the United States, while receiving Title IX tax exemptions, practice discrimination based on sexual orientation by denying the same-sex spouses access to married housing, expelling gay and bisexual students, and implementing discriminatory codes of conduct. In Bob Jones University v. United States, the United States Supreme Court held that the higher education institutions discriminating on the basis of race are not considered "charities" under the Internal Revenue Code and therefore are not entitled to tax exemptions accorded to other charities. In holding so the Supreme Court relied on the common law notion that the charitable organization is entitled to tax benefits if its purpose is not against the law or public policy. In addition, the Bob Jones Court in its decision twenty-five years ago acknowledged the power of the Internal Revenue Service to grant or deny tax exemptions and its duty to interpret the Internal Revenue Code in accordance with changing conditions of society and evolving public policy. Here, the author argues for extension of principles laid out by the Supreme Court in Bob Jones to contemporary practices of discrimination based on sexual orientation and thus, for denial of tax exemptions to universities and colleges who adhere to such discriminatory practices. To support this argument, the author, as did the Supreme Court in Bob Jones, examines and delineates contributions of judicial opinions, legislative and executive actions to the present-day public policy prohibiting discrimination against LGB communities. Thus, the author articulates that although Bob Jones' holding was limited to discrimination based on race, the society and public policy has evolved since then so as to recognize protections against discrimination based on sexual orientation. Such developments call for revocation of tax benefits currently claimed by the discriminating higher education institutions.

Annotated by: Valeriia Golubchik

Allison Fetter-Harrott, *Janet R. Decker, & Suzanne Eckes, Sex Discrimination in Schools: Has Change in Administration Meant Change in Protections for Transgender Students and Educators?*, 44 U. DAYTON L. REV. 455 (2019).

Rapid changes in the legal status of transgender students and employees since President Trump assumed office have created confusion about this area of the law. During the Obama Administration, several federal agencies issued guidance which clarified that both Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964 prohibit discrimination of transgender employees and students. The Trump Administration rescinded this guidance, leaving the matter of transgender student and employee rights to local and state governance. The author argues that despite efforts by the Trump Administration to limit the federal definition of sex discrimination, courts have still held that transgender students' rights are protected under Title IX. The author hypothesizes that if school employees are illiterate in the law, they may not recognize that federal guidance does not have the legal authority of case law, and therefore make false assumptions about legal protections for transgender students. The author makes several recommendations for school employees to combat this issue, including crafting policy that acknowledges transgender students' presence, permitting access to restrooms designated for a student's identity, as well as creating pathways for open communication. The author also proposes that both passage of the Equality Act by Congress and a holding in favor of the transgender plaintiff in the Supreme Court's upcoming decision in R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission would create a unified interpretation of Title VII and afford greater protections for transgender employees. While there are more protections that can be afforded to the transgender community, school officials should monitor the changes in caselaw and statutes in order to prevent legal violations and protect their students and colleagues.

Annotated by: Jennifer Russnow

Pamuela Halliwell, *The Psychological and Emotional Effects of Discrimination within LGBTQ, Transgender and Non-Binary Communities*, 41 T. JEFFERSON L. REV. 222 (2019).

The presence of discrimination against members of the transgender community is a longstanding issue that has been exacerbated by a lack of information regarding the medical needs and necessary social support of transgender people; as a result, those who identify as transgender, gender nonbinary, or gender non-conforming face higher rates of depression, anxiety, suicide, police brutality, and healthcare mistreatment, with rates being even higher for transgender people of color. One persistent problem that the transgender community faces today is unequal protections from the police. Here, the author depicts several cases of transgender women who were murdered (likely for their gender performance) only to be deadnamed, misgendered, and disregarded by the police departments after their death. Furthermore, the prevalence of uneducated healthcare providers and an inaccessible healthcare system has continued to burden the transgender community by placing barriers in the way of access to mental healthcare, medically necessary gender reassignments, and primary care, effectively and systematically stacking the odds against transgender individuals. The author brings to light various issues that she has experienced in her own life and the life of her community, issues that are often missed due to blind privilege and a lack of awareness. Societal inclusion requires the aforementioned equal rights issues to be addressed, and one way to push society in the right direction is by sharing life stories and experiences of the people who are affected, much like these, which raise awareness to everyday issues faced by transgender individuals.

Annotated by: Joshua Weisenfeld

RACIAL JUSTICE

Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L. J. 1045 (2019).

Progressing from older algorithm models that utilize simple data input to calculate a probabilistic result, machine-learning algorithms are being employed more and more commonly. While still in its inception and mainly being applied in the context of policing, such deep-learning model of algorithms means that the computer will constantly reanalyze huge amounts of data and dynamically readjust the connection between each data point, unsupervised; soon, it will be able to process the raw data by itself on personal and criminal history information and come out with a decision not only allocating police resources, but on bail, sentencing, and/or parole. However, as that new era dawn upon us, there appears to be no appropriate analytical framework under which the racial equity in applying such algorithm can be evaluated. The author argues that, because the existing constitutional framework for analyzing racial effects in criminal justice was designed for humanistic decisions, neither of its two prongs—intentional discrimination and Equal Protection—is up for the task of evaluating algorithms/models that were formulated from statistical data. Instead, the author turned to computer science literature; however, although the author was able to identify various benchmarks in assessing the fairness of an algorithm, it is statistically impossible to satisfy all of them at once. The article then presents that, by applying different cut-offs scores to different crimes—for serious crimes, same threshold across racial groups; for minor crimes, different thresholds for different racial groups—the computer model(s) will be able to minimize the potential of racial stratification, particularly because the spillover costs of state coercion for black people are disproportionately higher than that for white people. In sum, the author opines that a new analytical framework under the statistical and computer science regimes (rather than a constitutional one) should be employed to ensure minimal racial inequity in algorithmic criminal justice in its inception, which may lead to indelible consequences if improperly established.

Annotated by: Chi-Hsin Esther Engelhart

David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033 (2019).

Although the primary goals of Title VII of the 1964 Civil Rights Act are to improve the working conditions of racial minorities, specifically black Americans, and to ensure equal opportunities in the workplace for such minorities, it has contributed to an asymmetry in employment discrimination law, in particular to workers of color. For decades now employment discrimination cases have been the most frequently litigated cases, yet they have been notoriously difficult for plaintiffs of color to win, despite them providing strong evidence of such discrimination. This asymmetry has been found to be the result of federal judges as a group judging and interpreting the doctrine in favor of the maintenance of group-based hierarchies because most judges are from dominant groups, and individuals in the dominate group behave in ways that are more beneficial to themselves. Also, individuals in dominate groups have high levels of Social Dominance Orientation (SDO). Individuals with higher SDO perceive less inequality in society, have a perception that great racial progress has been achieved, and that gains for minorities must involve loss for whites. SDO is conceptualized under a social psychology theory, Social Dominance Theory (SDT). According to SDT, individuals have basic human psychological preference for societies to be structured as group-based (including racial) hierarchies in which one or more social groups are dominant, and one or more social groups are subordinated, which plays a role in decision-making in employment discrimination cases. The federal judiciary has interpreted the doctrine in ways that makes it easy, for litigants, whose interest is to preserve existing racial hierarchy (white workers and employers) in the workplace to prevail, and as a result has made it difficult for litigants whose interest is to reduce existing hierarchy to achieve their goals (i.e. employers who pursue affirmative action and workers of color). The author purposes that the most effective and lasting solution is to push for a judiciary that is more explicitly motivated to attenuate existing racial hierarchies by having a robust background circumstance test to be applied to white reverse discrimination plaintiffs. This would push for a mandatory finding of liability when a plaintiff, who is either a worker of color or a white worker, proves a prima facie case and discredits the employer's asserted reason(s) for a challenged employment action. Therefore, as a result of human tendency to create and maintain group-based hierarchies, Title VII doctrine must be viewed as asymmetrical to the detriment of workers of color, and, in order to move towards a society that is racially egalitarian, it is important to take a hierarchy centered view to help uncover negative consequences that may result from various law reforms proposals that

have been suggested to fix the disparate treatment mess.

Annotated by: Lyudmila Gilyadova

CRIMINAL JUSTICE

Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L. J. 791 (2019).

The First Step Act, passed by Congress and signed into law in 2018, was a paradigmatic shift in the way Congress has acted on criminal justice reform, and reduces the number of inmates held in federal prisons via several rehabilitation-focused policy mechanisms. Although the author identifies this legislation as reform-laden, he does couch it in the context of decades-long, consistently harsher federal criminal justice laws in order to highlight how striking the shift in priorities is. The author attributes this change to the increasing popular concern regarding mass incarceration by pointing to authors and publishers producing materials that have highlighted this issue, long-established groups such as the American Civil Liberties Union, and more recent reform organizations like FAMM. By placing focus of conservative groups increasingly interested in criminal justice reform, the author describes the formation over time of the bipartisan consensus that led to the First Step Act. Following this analysis, the author identifies certain concerns regarding the possibilities for future reform in criminal justice, namely: (1) elevation of party politics over effective policymaking; (2) misplaced faith in federal prosecutors as agents of change (citing former Deputy Attorney General Sally Yates's briefly-iconic status as a champion of the rule of law, despite her hardline opposition to concrete policies that would ameliorate mass incarceration); and (3) reformers holding out for sweeping, rather than incremental change. The author lists his criteria that ultimately led him to support the First Step Act, all of which he says the legislation fulfills. First, the proposal's goals as they relate to the balance of fairness, public safety, and reduction of the use of incarceration as the primary means of systemic action, then the degree of reduction in racial prejudice in criminal justice, followed by directly-affected parties' support for the bill, and finally the likelihood of further reforms occurring in the near and continuing future. The author concludes by again voicing his support for the First Step Act, and predicts that the law will both reenergize the criminal justice reform movement and accomplish the fundamental goal of providing concrete relief for people adversely affected by mass incarceration.

Annotated by: Patrick Keogh

Mirko Bargaric & Daniel McCord, Article, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227 (2019).

Although sentencing reforms with the goal of decarceration have been implemented across the country, the United States still suffers from massive incarceration that disproportionately affects African American and Hispanic communities. Moreover, three strike rules and mandatory sentencing, policies that were implemented during the Nixon administration and The War on Drugs, which impact individuals who commit low-level offenses, results in a high financial burden on the public and mass incarceration, both of which do not offer a countervailing advantage. Here, the authors propose a new system of sentencing that focuses on the principle of proportionality and provides an alternative to imprisonment for low-level drug, property, and immigration offenses. Instead of minimum sentencing, offenders of these crimes will be placed on probation or, a more fiscally conservative option, under a 24-hour monitoring system, which will track offenders on probation in live time and keep authorities updated on the offender's location. Conversely, offenders convicted of crimes that endanger people's physical or sexual autonomy will continue to face prison time. The authors propose setting prison times in equal proportions to the effect the crime had on the victim of the crime. In support of this proposition, the authors rely on data that proves that community awareness of the problems that mass incarceration causes, such as damage to families of offenders, creates support for sentencing reform. The authors propose a system that takes the crime that was committed into account and then base the punishment on extenuating conditions that would either increase or decrease the penalty. Thus, the authors conclude that mass incarceration is no longer sustainable and does not, in fact, make communities safe, and therefore, in order to reduce incarceration rates and lessen the financial burden mass incarceration creates, sentencing reform must be introduced and implemented.

Annotated by: Melissa Koppel

Elana M. Stern, *Accessing Accountability: Exploring Criminal Prosecution of Male Guards for Sexually Assaulting Female Inmates in U.S. Prisons*, 167 U. PA. L. REV. 733 (2019).

Despite recent societal advances that allow women to speak up and seek recourse against perpetrators of sexual assault, female inmates in the United States who are victimized by prison guards are often denied their chance to seek justice. A disturbing trend shows an increase in the number of claims of sexual assault in prisons and a large portion of these claims involve causes of actions by female inmates victimized by guards. Survivors wishing to come forward face a vast array of encumbrances, these of which their non-incarcerated counterparts are not forced to tackle, including: reports not remaining confidential, fear of retaliation, no opportunity to relocate, unreasonable statutes of limitation, and ineffective or detrimental legislation such as the Prison Rape Elimination Act and the Prison Litigation Reform Act. The author explores potential outcomes of various reforms, such as, increased focus on criminal complaints as they face fewer obstacles than pursuits of civil litigation, changes to current statutes, decriminalization of non-violent offenses, and ending prisons; though the author acknowledges the latter is an improbable outcome. Special importance is given by the author to policies aimed at ending mass incarceration of women; while the author concedes this cannot be the only solution, as some portion of the population will always be incarcerated, fewer non-violent offenders in prison in conjunction with "restorative justice programs" and statutory reform regarding how sexual assault accusations are investigated present a more holistic solution to the dilemma. The author explains how predatory guards use their imbalanced position to scare female inmates into not reporting and those who do speak out are put into a system that very rarely concludes in their favor. In light of this inherent power imbalance ending mass incarceration poses the most potential to protect these women, with the hope that fewer women in prison would result in fewer opportunities for predators, and fewer sexual assaults committed by prison officials. Thus, the solutions needed to protect these vulnerable members of society must allow guards fewer opportunities to commit sexual assault and allow current victims a route to peruse their claims with a fair likelihood of success.

Annotated by: Caroline Kutschera

Christian B. Sundquist, Article, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 310 (2019).

Although the prevalence of overt racism has decreased in modern society, implicit racial bias continues to permeate jurors and impact verdicts, and as a result, judges need more guidance to combat this issue. Until Pena-Rodriguez v. Colorado was decided in 2017, there was no definitive right to post-verdict review of evidence for either kind of bias available to criminal defendants, due to a common law "no-impeachment" rule which states that jury verdicts could not be impeached by extrinsic evidence, although some jurisdictions considered this kind of evidence as an exception to the "no-impeachment" rule. The Pena-Rodriguez rule requires a defendant to (1) "produce evidence that a juror or jurors made a clear statement of racial bias," and to show (2) "that said statement was a significant motivating factor in that juror's decision to convict." In Pena-Rodriguez, the connection of a juror's statements to a preconceived notion of guilt based on race is clear, but in many other cases the bias and possible impact on the verdict is ambiguous and these cases should be reviewed post-verdict due to the high prevalence of implicit bias and impact on decisions to convict, to ensure that this implicit bias does not impact verdicts. Trial safeguards, such as updated voir dire questioning, jury orientation tools, jury instructions, observation of juror demeanor and actions during trial, have not been effective enough according to the majority in Pena-Rodriguez, and so the author argues that the best way to guarantee an impartial jury under Pena-Rodriguez is to use sociological and psychological research to implement a post-verdict hearing that considers both juror testimony and scientific evidence, which requires the judge to consider particular questions that the sociological and psychological literature suggests should be asked to analyze claims of juror racial bias, which, due to the variety and complexity in which implicit racial bias manifests, is necessary for the judge to accurately spot implicit racial bias and prevent it from impacting the decision to convict.In order to determine whether or not a juror's statement could be interpreted as "race neutral," all that should be necessary before a post-verdict review is triggered is a "clear" insinuation of racial bias, since racial bias could be present. If a juror made a statement related to racial bias during deliberation or as a way to sway other jurors, trial courts should find that this "significantly motivated" a vote to convict and thus, should grant post-verdict review. In conclusion, eliminating racial bias from juries based on the Pena-Rodriguez standard can be quickened by incorporating sociological and psychological research and by comprehensive evidentiary hearings when there is a possibility of juror racial bias.

Annotated by: Christina Giordanella

Wayne A. Logan, Note, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 620 (2019).

Advances in technological capabilities on the one hand, allow police greater power to engage in database policing, and the process of finding "hits", which on the other hand, cause issues regarding identity privacy. Although legal doctrine exists that protects unlawful seizure of sensitive information, these statutes focus on the collection and use of data, as opposed to regulating the "behind the scenes" work police can do to find a "hit". Due to the government's desire to collect information, combined with storing capabilities that minimize cost and maximize efficiency, unlawful police access to highly secure information is a major problem with potentially devastating consequences, such as an invasion of an individual's privacy. The author argues that identity information is an "evidentiary fruit" that police cannot unlawfully take, and as a result, the search and seizure doctrine has to be revised to take into account the critical practical significance of police seizing such data, that more individuals will be subject to increased police scrutiny and a diminished expectation of personal privacy. The author, a proponent of personal privacy, concludes that technological innovation has wildly outpaced the constitutional regulation of police power to secure highly personal identity information for strategic gain on patrol; Police can literally pull up a person's file in a matter of seconds and in certain situations, arrest that person and accumulate "hits". In today's progressively information-based society, personal identity has played an even greater role and it is conceivable that if measures are not addressed, police will have the autonomy to use identity information to stop, arrest, search, and question individuals they confront on street patrol.

Annotated by: Eli Well

Angel E. Sanchez, Essay, *Developments in the Law: In Spite of Prison,* 132 HARV. L. REV. 1650 (2019).

The effectiveness of the prison system in the United States has been a topic of debate for decades; some call for its abolishment while others voice support for the institution. The author argues that the system is fundamentally flawed, as it does not provide an adequate environment for the rehabilitation of the incarcerated, nor does it encourage the further education to inmates in order to prepare them for a smoother transition back into society as functioning individuals. The problem is further compounded by the unfavorable policies and practices of other institutions, such as the probation and the educational system, toward those who have committed crimes. For example, the author argues that, in the educational system, the schools' policies of turning misbehaving students over to police greatly increase the possibility of future incarceration of those children; in the probation system, officers are merely part of the surveillance bureaucracy, and the lack of support from them is detrimental to the reentry process. Realizing the importance to provide the public with a different perspective, the author recounts his experience as an accomplished law student who spent most of his teenage life in prison. The essay focuses on three main topics: (1) the seemingly predetermined path to incarceration of youths in certain neighborhoods, where children from poor areas are bound to attend subpar schools which lead them down the "school-to-prison pipeline," (2) the high tension among prison inmates and the preexisting environment against self-improvements created a vicious cycle within the prison system, and (3) the injustice and frustration faced by those reentering society after serving their sentences due to the inadequacy of government assistances and the social stigma of criminal records. Through telling his story, the author does not seek to answer the looming question of what changes are necessary to improve the American prison system, but rather his aim is to invoke the minds of the audience to allow them to arrive at their own conclusions as to the measures that should be taken.

Annotated by: Jack Yeh

SOCIAL JUSTICE

Kate Miceli, *Life, Liberty, and the Pursuit of Paid Parental Leave: How the United States has Disadvantaged Working Families*, 53 U. RICH. L. REV. 33 (2019).

As the only industrialized nation without a paid federal parental leave policy, the United States should pass one that is gender neutral and covers parental, family, and medical leave for all employees. While some employees have access to paid leave through their employers, this benefit is usually only available to employees at high-level positions at larger companies; the people who need it most, employees such as low-wage service workers, are unlikely to receive the paid leave that is critical to support the financial and caregiving needs of families and eliminate workplace gender bias. The current federal plan, the Family and Medical Leave Act (FMLA), allows employees to take up to twelve weeks of leave without the threat of losing their jobs. However, the leave is unpaid, and it is difficult to meet the eligibility requirements, and so millions of workers are excluded from any benefit of the FMLA. The author stresses that an ideal policy would pay all employees equally, as the low-wage workers need the paid leave the most, as well as be gender-neutral, as it would give members of the LGBTQ community access to paid leave as new parents, prevent gender hiring discrimination, and encourage fathers to share child-caring responsibilities. In the past, both Bush presidents have vetoed the FMLA, but the republican attitude has been drastically changing; today, as voters and politicians from both major parties express their interest in a federal paid leave policy, a new plan will likely be passed within the next decade. The author believes that the proposed FAMILY Act, which mirrors parts of different successful state paid leave policies, is currently the best option for the 116th Congress to pass as law. Nevertheless, the United States is in critical need of a new federal paid leave policy as it would alleviate the financial burden on families, shorten the wage gap, provide job security, and be healthful for the nation.

Annotated by: Hee Jae Song