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ARTICLES

Brougham's Ghost

Michael Ariens 263

In defending Queen Caroline in the House of Lords, Henry Brougham declared, "[a]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other." Brougham's ethic of advocacy has been cited repeatedly as stating the American lawyer's duty of zealous representation of a client. It has often been called the "classic statement" of zealous representation and representing the "traditional view of the lawyer's role."

This essay challenges these conclusions. Brougham's rhetoric was neither a classic statement of the duty of loyalty to a client, nor did it represent a traditional view within the American legal profession. It was consciously rejected in nearly all writings of American lawyers for most of American history, and was not explicitly embraced until the 1970s. Reminding lawyers of the duty of zealous representation was promoted in the 1960s in part to solidify the Supreme Court's Constitutional Criminal Procedure revolution, for only zealous lawyers could protect the rights of the criminally accused. Brougham's ethic of advocacy was used to provide a historical justification for a revived zeal in criminal defense practice, an effort to make those lawyers more professional. This justification was transformed in the 1970s by two events: first, the American legal profession became enmeshed in a professionalism crisis as a consequence of the Watergate affair. Second, that professionalism crisis was exacerbated by a fear of diminishing economic prospects for American lawyers.

This essay is divided into three parts. First, it offers a full assessment of Brougham's representation of Queen Caroline. Second, it traces the published and negative reaction of American lawyers to Brougham's statement of the duty of zealous representation from the 1840s on. Third, the essay explains why the consistent rejection of Brougham by American lawyers became the "classic statement" of the duty of the advocate beginning in the 1970s.

No Excuses: Protecting the Vulnerable After <i>Brown v. Buhman</i>	
Amos Guiora	317

This Article responds to the December 2013 federal court ruling striking down a criminal ban on polygamous cohabitation in Utah. In its decision, the court chided the state for its failure to present “competent” evidence of the harms associated with polygamous practice. Moreover, the court asserted that its ruling would in fact aid in preventing harm by forcing the state to focus on prosecuting collateral crimes of polygamy. This Article is a response to the court’s December ruling in four important ways. First, it responds to the state’s failure to document harms associated with polygamous practice by presenting evidence of harm and abuse emanating from polygamous practice in insular communities. Second, and relatedly, it responds with a call to action for states to ensure that criminal laws against child rape, child abuse and abandonment, and other crimes of sexual abuse are vigorously prosecuted within insular polygamous communities where there are critical break downs in accountability and neutral law enforcement. Lastly, in documenting the harm and making a call to action this piece makes theoretical observations about the characteristics of closed polygamous communities that lead to critical break downs in accountability and a corresponding increase in abuse, crime, and turning a blind eye to persistent harm. In the final section, these theoretical observations are applied to a variety of other contexts to show that the harm and related call to action outlined in this piece have broader application to multiple contexts in society including other insular religious communities and even prestigious sports programs.

If You Move, You Lose: The Interstate Medicaid Obligation to Special Needs Adopted Children	
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Sharon McCartney, Victoria Blohm, and Daniel Pollack	347
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*This Article presents the history of the adoption assistance programs of the United States and analyzes state Medicaid practice related to the federal statutory provisions that established the benefit and the Constitutional guarantees of the freedom of travel. It argues that the state practice of denying Medicaid to a child based on the state from which the child is adopted clashes with the Supreme Court’s decision in *Saenz v. Roe* which held that the Equal Protection Clause “does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence.” This Article posits that children adopted with special needs who have been found to be Medicaid eligible remain Medicaid eligible regardless of the state from which they were adopted and the state in which they presently reside.*

Catch 22: The Rising Concern of Faith Being Removed from Counseling and the First Amendment Concerns Associated

Curtis Schube..... 375

This article addresses a growing concern for a religious counselor. State statutes in California and New Jersey have been passed, banning the practice of sexual orientation change efforts for minors. Counseling students are being discharged from their programs for “discriminating,” leading some to believe that this is the future for licensed counselors. This article examines the recent statutory enactments, recent case law, the ACA Code of Ethics, and an analysis of the issue moving forward.

NOTE AND COMMENT

Every Consumer Knows How to Run a Business: The Dangerous Assumptions Made When a Prior Possession Conviction is Admitted as Evidence in a Case Involving Commercial Drug Activity

Ashley Hinkle..... 401

This Comment provides a discussion on Federal Rule of Evidence 404(b), which for the past few decades has allowed federal prosecutors to use instances of prior possession to fulfill elements of a different crime involving commercial drug activity. This evidence has been allowed in a variety of circumstances among the federal circuits, regardless of proximity in time, relatedness, or similarity between the previous instance of possession and the new commercial drug charge at hand. This Comment contains an in-depth analysis of the evidentiary rule, procedural requirements, case law, and the present circuit split on this issue. A recent decision by the Third Circuit has shed light on this problem and has provided a framework that suggests stricter guidelines should be used when instances of prior possession are presented as evidence to fulfill elements of a commercial drug crime. Lastly, this Comment presents an argument that emphasizes the need for a uniform approach by either requiring a greater standard of relevancy or by excluding evidence of prior possession in cases concerning commercial drug activity when the events are substantially unrelated.

Playing Hide and Seek with Big Brother: Law Enforcement’s Use of Historical and Real Time Mobile Device Data

Ryan Merkel429

Cell phones and smartphones are everywhere. Today the majority of Americans own one of these mobile devices. Because these devices are only useful when within arm’s reach, they are almost always in the same location as their owner. Even when not in use, these devices are in contact with the towers which allow them to function. Via this contact, the device’s location, and as a byproduct the owner’s location, is recorded by the service provider. In addition, smartphones are equipped with GPS technology which allows

for precise real-time and historical tracking of the device. Law enforcement agencies across the country are obtaining this mobile device location data from providers to aid them in a variety of investigations. This data has proven to be an invaluable resource to law enforcement. Currently federal law enforcement agencies can obtain this data without first seeking a warrant based upon probable cause. Section 2703 of the Stored Communications Act allows law enforcement to obtain this data pursuant to a court order upon establishing that there are “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” This is a lesser standard than probable cause. This Comment argues that pursuant to the Fourth Amendment law enforcement should be required to obtain a warrant based upon probable cause prior to receiving this data from service providers. This data can reveal sensitive and intimate details about an individual’s activities and whereabouts otherwise unknowable. It is the position of this Comment that these details should be afforded the minimal protection of a probable cause showing before they are disclosed. To be clear, this Comment recognizes the invaluable resource of mobile data as a crime-fighting tool and in no way suggests that law enforcement should be barred from using this data. Rather, law enforcement should simply have to obtain a warrant before being granted access to the data.