ANNOTATED LEGAL BIBLIOGRAPHY

TABLE OF CONTENTS

QUEER RIGHTS

D. Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J. L. & GENDER 161 (Winter 2021).

The criminal legal system imposes disproportionate violence upon incarcerated trans people as compared to the general prison population. D Dangaran analyzes the exceptional circumstances which trans individuals face when incarcerated and concludes that alternatives to incarceration should be put in place for trans people who are convicted of crimes. This argument is grounded in the idea that the criminal legal system is irreparably transphobic, as evidenced in recent legislative actions and litigation efforts which the author puts forth and through empirical evidence which shows that trans people face more violence than the general population—especially in the prison context. These notions support the contention that trans people both need and are entitled to special protections while incarcerated. Therefore, using abolition as a framework to consider safe solutions for trans individuals, D considers carceral, non-carceral, de-carceral, and transformative alternatives to traditional incarceration, concluding that making carceral institutions irrelevant should guide trans activists and prison abolitionists in their efforts to better the lives of incarcerated trans people.

Annotated by: Samantha Woods

Marisa Gates, *Transgender Pregnancies and the PDA*, 2022 WIS. L. REV. 91 (2022).

The Pregnancy Discrimination Act (PDA) of 1978 was introduced in response to the women's liberation movement and the influx of women into the workforce, which forced the integration of pregnancy rights into employment law. Marisa Gates raises the question of whether the PDA protects *all* pregnant people, or just women. The PDA specifically mentions women affected by pregnancy, as opposed to more broadly mentioning people affected by pregnancy. Although the PDA has created a textual basis for federal pregnancy rights, it still fails to protect individuals from conditions arising from pregnancy, such as breast feeding or lactation, and fails to shield individuals from pregnancy-related discrimination. Additionally, trans and non-binary individuals were unable to use sex discrimination as a basis for employment discrimination until the court in *Bostock* concluded it impossible to discriminate against an individual due to gender or sexual orientation without discriminating based on sex. Gates argues that Congress should amend the PDA to be gender-neutral, adding that some other laws already recognize pregnancy as gender-neutral. The intent of the Pregnancy Discrimination Act is to protect pregnant individuals of all identities, but it can only be best implemented if it protects individuals of all identities.

Annotated by: Jane Weiss

Eden Sarid, *A Queer Analysis of Intellectual Property*, 31 TUL. L. & SEXUALITY 75 (2022).

Intellectual property (IP) is generally thought to be a morally neutral and economically rational body of law, but through a queer analytical lens, Eden Sarid argues that our current IP framework actually serves to perpetuate and protect heteronormative modes of cultural production, and thus a heteronormative social order. Common IP doctrines, like the idea-expression dichotomy, the proprietary-public domain distinction, and copyright subject matter, often work to guard mainstream cultural expression against queer and other "outsider" interpretations and adaptions of heteronormative works, while simultaneously refusing to provide queer proprietary works the same protections against heteronormative appropriation. For example, Disney can sue to prevent Mickey Mouse's likeness—an artistic product formally protected by IP law—from being used in a queer artistic work, but the queer, Black, and Latinx creators of the popular dancehall art form *Vogue*—an artistic product not formally protected by existing copyright law—are not afforded the same protection against heteronormative appropriation of their cultural product. Ultimately then, existing IP law serves to reinforce mainstream sexual and social hierarchies. Thus, Sarid argues, IP law should be re-evaluated through a queer lens to create more room for non-traditional modes of queer artistic expression and encourage critical queer engagement with existing cultural forms, so that IP law does not simply reproduce status-quo cultural products and attitudes about sexuality.

Annotated by: Zach Verbit

Marissa S. Fein, *An Inequitable Means to An Equitable End: Why Current Legal Processes Available to Non-Biological, LGBTQ+ Parents Fail to Live Up to* Obergefell v. Hodges, 14 DREXEL L. REV. 165 (2022).

In 2015, the Supreme Court recognized same-sex couples' right to marry, and along with it, their right to access the governmental benefits of marriage, including the right to start a family and have that family be legally recognized. However, states with martial presumptions based on traditional notions of marriage fail to fully grant same-sex married couples the benefit of having their families be legally recognized. Specifically, same-sex spouses who have used contemporary procreational means to start a family, thus resulting in only one parent having a biological connection to the child, must cope with the reality that the non-biological parent's legal parental status over their own child may not be accepted under state law. Marissa S. Fein argues that for state law to fully endorse the Court's holding in *Obergefell v. Hodges,* states' application of their marital presumption must turn on something other than a parent and child's biological connection. Fein sets forth a model statute that follows a multi-focal framework, which presumes parenthood where a person intends to bring about the birth of their child, functions as that child's parent, and the resulting parent-child relationship is such that it is in the best interest of the child to be legally recognized as the child of that parent. This allows states to retain their individual policy preferences while providing an equitable basis for assigning parental rights in line with the *Obergefell* decision.

Annotated by: Emma Guggenheimer

Jessica Matsuda, *Leave Them Kids Alone: State Constitutional Protections for Gender-Affirming Healthcare*, 79 WASH. & LEE L. REV. 1597 (2022).

The recent increase of bans on gender affirming healthcare threatens transgender youth's access to vitally important treatment. Although legislatures tend to justify these laws under the guise of "protecting public health," in actuality, gender affirming healthcare is critical to trans people's wellbeing, and particularly to alleviating the well-documented symptoms of gender dysphoria. Moreover, withholding treatment from trans children prolongs the physical and psychological harms they experience, because once puberty is completed, many of the bodily changes it causes are challenging or impossible to reverse. States have employed several tactics to block access to gender affirming healthcare, including imposing felony sanctions on doctors, threatening to revoke medical licenses, and allowing civil charges to be filed against healthcare providers. Although the ACLU was successful in getting a preliminary injunction in Arkansas to prevent the enforcement of one such law, long term solutions may be more difficult with an increasingly conservative Supreme Court. Although action is needed on multiple fronts, litigators should utilize judicial federalism to promote state constitutional protections relating to health. In cases where the federal constitution is unable to protect and ensure baseline individual rights relating to healthcare, state Constitutions can offer substantial additional protections, thus, bringing actions under state constitutions presents a feasible opportunity for litigators challenging the enforceability of such statutes.

Annotated by: William Fox

CRIMINAL LEGAL SYSTEM AND POLICE ACCOUNTABILITY

Katherine Macfarlane, *Section 1983 Dealmaking*, 97 TUL. L. REV. 1 (2022).

Despite the push-back by critics against settlements for cases arising under 42 U.S.C. §1983, this practice has led to police reform in Louisville and Kentucky among others, including stricter review of search warrants, disciplinary accountability for officers, and accessibility of medical assistance if a search was to result in injury of the individual. These anti-settlement scholars argue that real civil rights justice happens in the courtroom. According to these scholars, anytime a civil right case settles, the possibility for concrete change and precedent is stagnated because negotiation enables complacency rather than societal disruption to the status quo. Katherine Macfarlane analyzes the social and legal impact of settlements stemming from police brutality and racially motivated crimes, focusing specifically on Breonna Taylor and George Floyd's cases to illustrate how alternative dispute resolution can better advance social justice, in comparison to litigation which often revictimizes and invalidates Black victims and their grieving families. By invoking qualified immunity, government officials and police officers are often shielded from having to pay monetary damages to victims of police brutality unless they violated a clearly established constitutional right. In those cases, settlements could provide family members with some monetary relief to ease the financial burden of litigation, as well as push for societal change by including demands for police and structural reform.

Annotated by: Isabel Ortega-Romero

Matthew Spencer, *Restructuring Alternative Dispute Resolution Options to Improve Police Accountability*, 13 ALA. C.R. & C.L. L. REV. 145 (2022).

National public aggravation in the lack of accountability for police misconduct due to current police policies has created a movement calling to defund the police. Present policies and systems legally insulate officers at trial in consent decrees, and in police arbitration. Moreover, police violence is fortified by the "blue wall of silence," a concept in which police officers protect one another from discipline by not reporting and overlooking fellow officer misconduct and refuse to testify against each other. Public trust in the police has declined due to the common practice of officers engaging in disorderly and impudent discourse towards groups of political differences. Matthew Spencer suggests adapting Illinois's approach of localizing consent decrees under Attorney Generals, thereby giving the community the opportunity to provide commentary and suggestions. Additionally, the author draws comparisons between consent decrees and regulatory negotiations, and ultimately suggests adopting a system that involves the community in a more hands on manner to encourage transparency. Finally, Spencer argues that clearly defined laws providing strict limitations on the latitude of police arbitration are necessary to eliminate the exploitation of discretionary tactics commonly used by arbitrators. In order to hold police accountable for their actions, it is necessary to adopt an authoritative, community-based approach.

Annotated by: Alexandra DeBenedictis

Bradley R. Haywood, *Ending Race-Based Pretextual Stops: Strategies For Eliminating America's Most Egregious Police Practice*, 26 RICH. PUB. INT. L. REV. 47 (2023).

Pretextual traffic stops are a law-enforcement tactic stemming from an officer's mere hunch or discriminatory animus, whereby the officer exploits a minor traffic or pedestrian infraction as pretext to investigate a person for unrelated, more serious crimes, such as drug possession. The Supreme Court in *Whren v. United States* effectively endorsed this practice, holding that the subjective motivations for stopping a motorist or pedestrian were irrelevant where the officer could identify an initial traffic violation. This article highlights the immense racial disparity that resulted as police were permitted to use their own racial biases in choosing which citizens to stop and search. Comprehensive research studies presented in this article show that Black drivers were at least 20% more likely to be stopped by police and were subject to subsequent searches about twice as often, despite being less likely to possess illegal contraband than their white peers. Bradley Haywood argues that strategies for curtailing pretextual traffic enforcement that is racially discriminatory should focus on eliminating unnecessary encounters between the police and Black citizens. Strategies include prohibiting certain traffic infractions as a basis for police stops, amending states constitutions to include a constitutional right against pretextual stops, or passing a state statute. Finally, the author proposes a civil traffic enforcement unit, but acknowledges politics, costs, and complexity will be a significant obstacle.

Annotated by: Nicholas Cinquina

Alexander J. Lindvall, *The Jury's Role in Excessive-Force Cases*, 71 U. KAN. L. REV. 77 (2022).

It is well established precedent that juries decide *facts* and judges decide *law*. However, courts in several circuits have been leaving questions of law in the jury's hands. Federal judges have been allowing juries to decide cases arising under § 1983 to determine whether an officer's use of force was reasonable under the Fourth Amendment. There are several problems with juries making this decision: it leads to unpredictable verdicts, it confuses standards of review, and it undermines the qualified immunity doctrine. In considering this constitutional question, juries lack the necessary knowledge and expertise of judges. Instead of the proper criteria, verdicts made by these juries are based on factors such as who is on the jury, the publicity of the case, and the likeability of the parties involved. This creates inconsistent precedent for future § 1983 cases. Procedurally, a fact-based jury verdict is usually overturned only for abuse of discretion, whereas legal determinations are usually reviewed de novo. When juries consider legal questions, it muddies the water as to how courts should review these cases. Further, if juries are to regularly decide these cases, it will frustrate the qualified immunity defense. This defense is supposed to quickly dismiss meritless § 1983 cases. If these cases go to juries, quick dismissal will no longer be possible. It is a delicate responsibility for courts to interpret the Constitution, and therefore this task should only be left to judges to avoid inconsistent precedent and procedure.

Annotated by: Julia Maxman

Marissa Jackson Sow, *Protect and Serve*, 110 CALIF. L. REV. 743 (2022).

American police officers are charged with a duty to protect and serve, but this duty does not apply to Black citizens, who are excluded as participants from the contract formed between the State and law enforcement with white Americans. Black people are instead the object of the contract, the goal of which is to exploit Black American's labor, extract their resources and displace them from physical spaces to the benefit of white citizens. This purpose of policing is rooted in the historical context of American slavery, serving to safeguard white supremacy by protecting white control over economic resources, and has carried on to the current American police regime. To dismantle this system, the country should stop asking what Black people can do to prevent being killed by police, and instead consider what the state can do to keep from killing and abusing Black people. A critical contract theory, rooted in private law, requires under Constitutional guarantees that the State respect Black people's right to life, liberty, property, and due process. Sow concludes that policing as it currently exists may not even be necessary if the racial contract requiring white supremacy and control over resources were revoked.

Annotated by: Adeline Beattie

Alysia Lio, *Expert Testimony on False Confessions: An Old Psychological Problem with New Challenges in New York Courts*, 50 FORDHAM URB. L. J. 107 (2022).

The development of wrongful conviction scholarship highlights the common issue of false confessions—a leading cause of wrongful convictions—and details the challenges in obtaining the necessary expert testimony which could educate the jury on this counterintuitive phenomenon. Two New York Court of Appeals decisions create procedural barriers for defense counsel seeking admissible expert testimony about false confessions: *Bedessie* requires an expert's testimony be relevant to the particular defendant and their interrogation, and *Powell III* excludes an expert's testimony if there is a gap between the data and the expert's opinion. Limiting expert testimony about false confessions stands to harm people who are vulnerable to false confessions, especially juveniles and people with mental illnesses. Lio proposes three solutions to address the difficult task of procuring admissible expert testimony: (1) defense counsel should prepare experts to comport the presentation of their testimony with the requirements of *Bedessie* and *Powell III*; (2) trial judges should exercise favorable discretion in admitting expert testimony on false confessions; and (3) New York appellate courts should expand what constitutes a trial judge's abuse of discretion in excluding expert testimony. Maximizing the admissibility of an expert witness's testimony about false confessions will help New York jurors reach informed decisions given the fact that many innocent people falsely confess.

Annotated by: Noa Gutow-Ellis

IMMIGRATION JUSTICE

Pedro Gerson, *Embracing Crimmigration to Curtail Immigration Detention*, 12 U.C. IRVINE L. REV. 1209 (2022).

Litigation has historically been very limited in its ability to end the practice of immigration detention. Pedro Gerson introduces the concept of "crimmigration," or the "intertwinement of crime control and migration control," and argues that advocates opposing immigration detention should incorporate their agenda into decarceration efforts. Gerson observes that both forms of detention are extreme and cost-ineffective forms of social control, and both are used to marginalize or "otherize" entire communities and groups. While acknowledging that immigration detention is separate from any kind of criminal confinement, Gerson compares them by designating the two as "total institutions" which serve as government-mandated barriers blocking social intercourse with those outside. Gerson maintains that advocacy to end immigration detention should occur alongside broader efforts to decarcerate the nation. Gerson points out that normative concerns around criminal and immigration detention are identical, such that advocates of limiting carceral populations should be concerned with the position of immigrant detainees, and vice versa. Gerson concludes the article by suggesting reformers "lean into" the practice of crimmigration by attempting to end immigration detention through broader efforts to decarcerate the United States.

Annotated by: Sarah Brody

Youssef Mohamed, *Here's Your Number, Now Please Wait in Line: The Asylum Backlog, Federal Court Litigation, and Artificial Intelligence in Agency Adjudication*, 89 U. CHI. L. REV. 2013 (2022).

The passage of the Refugee Act was aimed at assisting individuals fleeing persecution in their home countries. However, vast numbers of applications and various reforms to the review process have culminated in a massive backlog of asylum seekers awaiting judgment. While some theorize that judicial interference is the best way to address the backlog, Youssef Mohamed disagrees. The judiciary is insufficient to address the problem as it is institutionally unprepared to review an agency's allocation of resources, and compelling adjudication in these applications would raise separation of powers concerns. Instead, the government should invest in the United States Customs and Immigration Services by implementing artificial intelligence ("AI") capabilities. Without suggesting a complete overhaul of the review procedure, the author posits that AI should be used to prioritize two groups of asylum seekers: (a) those requiring medical care but who need federal benefits to gain access; and (b) those wishing to be reunited in the U.S. with relatives who face threats of persecution in their home countries. Rather than making merit-based decisions, AI would assess whether there is a high probability the application fits into one of the groups warranting reprioritization, then arranging these applications for an agent to review. While this would not fix the entirety of the backlog, effectuating these technologies could provide a remedy to asylum seekers whose claims should be prioritized.

Annotated by: Sean Dalton

HOUSING JUSTICE

Ryan Schaitkin, *Domestic Violence and Eviction: Housing Protections for Survivors, and What We Can Learn From Eviction Diversion Programs*, 50 FORDHAM URB. L.J. 173 (2022).

Ryan Schaitkin highlights how the United States eviction crisis disproportionately impacts survivors of domestic violence, attributing this occurrence primarily to three eviction mechanisms: nuisance ordinances, one-strike eviction policies, and the covenant of quiet enjoyment. Though helpful, existing federal law and state and municipal housing protections fall short in mitigating the negative impact of these three factors. Federal, state, and local policies do not sufficiently protect housing for survivors of domestic violence because they are indifferent to the financial challenges imposed by these three mechanisms. Schaitkin proposes that the implementation of eviction diversion programs can fill in the statutory gaps left behind by federal law like the Violence Against Women Act and state and municipal housing protections like the Revised Landlord and Tenant Act. In particular, Schaitkin supports eviction diversion programs that provide rental assistance, access to legal counsel in housing courts, and alternatives to court proceedings to mediate housing issues. He argues that these programs could be especially effective in protecting the housing of survivors of domestic violence since they may help to eliminate the financial instability and lack of awareness of legal options survivors experience, two crucial problems Schaitkin stresses should be addressed to reach housing justice.

Annotated by: Marcy Pineda

Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1 (2022).

Summary eviction proceedings reflect a glaring injustice in landlord-tenant relations and race-based power dynamics by privileging landlords and upholding systemic racism. They were designed by legislatures composed of white male property owners during a time when Black people, women, and non-land-owning white men were not allowed to vote. What's more, since the inception of these proceedings in the eighteenth and nineteenth centuries, landlord-tenant relations have become even more racist through public policies that imposed segregation and kept Black people from owning homes, tying their economic fate to the state of landlord-tenant law. As a result of historical racism, Black people are more likely to be tenants and much more likely to be evicted. Eviction processes must have more protections for tenants, taking into account the adverse health effects, disruption of family life and stability, and the loss of community that eviction brings. Recent pushes by activists to secure a right to counsel in eviction proceedings does not solve every problem within the inherently unfair landlord-tenant relationship, but it is a positive step forward. Eviction should only be achieved through a judicial process that takes into account the importance of one's home, and, while the right to counsel is an essential step towards this and towards a more equal system, Andrew Scherer argues that summary proceedings must be eradicated completely.

Annotated by: Maleah Bradley

Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. PA. J. L. & PUB. AFF. 257 (2022).

A history of incarceration significantly increases one's chance being homeless, and the shortcomings of federal and state fair housing policies provide formerly incarcerated individuals with insurmountable obstacles to find housing upon reentry. The Federal Fair Housing Act (FHA) protects individuals from housing discrimination, but does not include criminal history as a protected class, leaving formerly incarcerated people vulnerable to the discretion of landlords. Because federal initiatives have shifted their focus from preventing homelessness to preventing crime, state and local initiatives offer more hope to combat the pervasive problem of homelessness for formerly incarcerated individuals. State legislation has included authorizing corrections departments to attest to the rehabilitation of ex-offenders and preventing courts from holding landlords liable for damages caused by tenants with criminal records. Though helpful, neither initiative directly impacts transactions in the housing market. City initiatives, especially those in Seattle, have been more effective in that regard. Seattle laws mandate that landlords must rent to the first qualified applicant and bars consideration of criminal history at any stage of the housing rental process – both of which have been upheld on appeal. To continue effectively combatting the cycle of incarceration to homelessness, other cities should adopt the Seattle model.

Annotated by: Jessica Waldman

EDUCATION

Mary Lindsay Krebs, *Can't Really Teach: CRT Bans Impose Upon Teachers' First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925 (2021).

The contours of First Amendment free speech protections are unclear in the legislative bans on teaching critical race theory in K-12 public education. The Supreme Court insists that K-12 schools are the nurseries of democracy, but does not define how teachers could preserve their pedagogical freedom to teach permissible concepts in light of increasingly intrusive restrictions on speech. Because lower courts pursued different lines of reasoning related to academic freedom in K-12 education after key Supreme Court decisions *Keyshian* and *Tinker*, two tests remain relevant yet non-dispositive of a K-12 teacher's right to free speech. Instead of those tests, Mary Lindsay Krebs suggests implementing a different test to assess the reasonableness of instructional speech. She argues that the Court should first ask whether the teacher's speech was instructional considering the location and audience of the speech. If the answer is no, then the existing tests for either citizen speech (*Keyishian*) or public employee speech (*Garcetti*) should be applied. If the answer is yes, the Court should instead ask whether the speech was reasonable in pursuit of instructional, legal, and factual student-based curricular goals. This would help the Court establish a practicable method of assessing a teacher's speech that reflects the interests of teachers, state legislators, parents, students, and democracy.

Annotated by: Grace Ouyang

Amanda D. Iocono, "*That's the Hate They're Giving us, Baby, a System Designed Against us*." *The Restorative Justice Solution to the School to Prison Pipeline*, 17 U. MASS. L. REV. 183 (Spring 2022).

The school-to-prison pipeline is a consolidation of national zero-tolerance policies and practices that target and disproportionately impact LGBTQIA+ students, students of color, and students with disabilities. Ioconos' note explores the history of the school to prison pipeline, explaining that these policies were designed to address safety and disciplinary issues in schools. Under the guise of increased protection, these policies led to an increase in school resource officers (SROS), random searches, security cameras, and student suspensions. Rather than reducing violence in schools, this approach continues to criminalize normal and trauma-induced student behavior. To combat this, restorative justice can create systemic change in public schools. Restorative justice is rooted in the transformative power of relationships, healing, and accountability. It has reduced documented incidents of school violence and expulsions. It also fosters positive relationships in schools and targets the source of students' educational trauma. If implemented correctly, restorative justice could produce results that zero-tolerance policies failed to provide.

Annotated by: Tabby Cortes

EMPLOYMENT LAW

R.J. (Randy) Stevenson & Sapphire M. Andersen, *Present and Future Impacts of the Covid-19 Pandemic on Employment Law in the United States*, 55 CREIGHTON L. REV. 397 (2022).

R.J. (Randy) Stevenson and Sapphire M. Andersen offer a review of the status of employment law following the COVID-19 pandemic, explaining how inaugural legal developments established during the pandemic have created new understandings surrounding the application of modern employment law and the role of the federal and state governments. For example, Congress passed many new bills that provided unprecedented benefits to employees to help their families with COVID-19 heath and financial burdens. Also, the federal government passed COVID-19 vaccine mandates that created confusion surrounding the policy standards employers were required to uphold. Further, executive orders enforced vaccine mandates among Medicare and Medicaid providers and general federal contractors that added to the uncertainty about the role of governmental authority in the workplace. The pandemic created new considerations about employment law and compliance, which include the option to work from home, vaccine exemptions, and policies regarding work with complications with long term COVID-19. The authors explain how many of the federal initiatives have resulted in state pushback and increased protections over individual autonomy. Stevenson and Andersen stress the importance of analyzing how COVID-19 changed previously conceptualized notions of employment law to suggest how it might look in the future.

Annotated by: Hailey Dobin Reichel

Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL'Y J. 13 (2021).

Black women continue to face unique difficulties when bringing claims under Title VII of the Civil Rights Act of 1964 because many courts fail to recognize that Black women face intersectional challenges that neither white women nor Black men experience. Jamillah Bowman Williams describes how intersectional discrimination and harassment shape the workplace experiences of Black women, and how circuit courts have inconsistently approached these claims. Though some courts require racial discrimination to be assessed separately from discrimination on the basis of sex, others employ a sex-plus approach in which a person's sex and another neutral trait together form the basis for their claim. Some courts acknowledge Black women as a protected class, and others use a broader "aggregate" framework. Williams argues that all of these approaches, albeit in varying degrees, miss the mark by centering the claim around sex and thereby forcing Black women to bifurcate their identities. She points to recent trends that may provide better solutions such as modifying the "objective" reasonable person standard to a particularized, reasonable Black woman standard and claims that the *Bostock* decision could be used to demonstrate the Court's understand of intersectional identities. She notes that structural changes, such as electing more Black female judges, must accompany legislative changes in order for there to be substantive reform to antidiscrimination laws in intersectional claims.

Annotated by: Madison Dougherty

THE LEGAL PROFESSION

Katlyn Martin, *The Three-Year Law Degree: Exclusive, Unaffordable, and Upheld by Law School Accreditation Standard 311*, 55 CREIGHTON L. REV. 515 (2022).

The American Bar Association's ("ABA") three-year length requirement for law school intentionally limits non-white and non-wealthy individuals from pursuing a legal education. ABA Standard 311 requires eighty-three credit hours over a minimum of twenty-four months to be completed by law students, leading to the three-year requirement seen in most law programs. Scholars have critiqued Standard 311 for its exclusive design. Law schools in the early days of the country's founding were more accessible to poor people, Black people, immigrants, and women, particularly through part-time programs than they are today. In the late 1800s and early 1900s, the ABA and the Association of American Law Schools justified the development of restrictive standards for law schools on the basis they would deter "overcrowding" by non-whites and immigrants, leaving the field open to wealthy white elites. Katlyn Martin proposes a two-year system requiring fewer credit hours as this would be less expensive and thus less exclusive. A two-year degree based on meeting a total number of credit hours by graduation would allow law schools to create programs that are longer or shorter than two years, so long as they meet the revised 311 standard by graduation. This flexibility in program length would restore access to those historically barred from the field.

Annotated by: Gabriela Amaral

HEALTH CARE RIGHTS

Delaney P. Bounds, *Fulfilling The* Olmstead *Decision's Right To Home-Based Care in 2022: Paying Spousal Caregivers*, 108 IOWA L. REV 379 (2022).

In the 1999 case *Olmstead v. L.C.*, the Supreme Court held that the Americans With Disabilities Act entitles people with disabilities to receive care in their homes or communities, rather than institutional settings. The federal government grants significant flexibility to states in deciding how to deliver such home and community-based services ("HCBS"), but every state has elected to implement some form of consumer-directed services. In 15 states, HCBS consumers are permitted to select their spouses or partners as their primary caregiver. Delaney P. Bounds argues that the remaining 35 states should allow spouses to be paid caregivers through consumer-directed HCBS programs, allowing 5.22 million spousal caregivers to be reimbursed for their typically unpaid labor. This would decrease the financial burdens imposed on individuals with disabilities and their caregivers, alleviate the country's shortage of home health care aides, and provide patients with more autonomy in directing their own care. While family caregivers may be more likely to perpetrate abuse, the author finds that the remedies currently employed in states like Colorado, Florida, and Louisiana sufficiently mitigate these risks, such that the benefits of permitting payment of spousal caregivers outweighs the costs.

Annotated by: Cassidy Moon

Simone Lieban Levine, *Not a Girl, Not Yet a Woman: The Legal Limbo of Becoming a Parent Before Becoming an Adult*, 37 BERKLEY J. GENDER, L. & JUST. 75 (2022).

Minors who are parents are subjected to a legal limbo whereby they can make certain decisions for their child but not for themselves. Simone Leiban Levine argues that this must be rectified so that young parents can properly take care of their children. Pregnancy rates for minors have seen a steady decline, but poverty increases the likelihood of pregnancy in minors and thus minors who do become pregnant are disproportionately disadvantaged economically, educationally, and in terms of medical care. States can require parental consent and/or notice regarding pregnancy decisions including abortions and prenatal care and require an adult to be part of the adoption process or consent from the minor's parents for adoption. Yet, many states allow minor parents to consent to medical decisions regarding their child, even where the procedure would require the minor parent to obtain parental permission for. The inconsistencies between laws, programs, and policies addressing minor parents and their children causes a legal limbo across states. The author recommends that the federal government should reinvigorate Children's Bureau and that states should aid pregnant or parenting minors. States should remove legal barriers in decision-making for minor parents in order to facilitate autonomy of all minors, resolve inconsistencies, and expand minor parents' access to vital health services without fear of punishment.

Annotated by: Arisha Andha

ANTI-COLONALISM, DEVELOPMENT, AND DISPLACEMENT

Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75 (2022).

In this 2022 article, Angela R. Riley expands her comprehensive 2005 study of tribal laws and programs protecting Indigenous cultural property. Indigenous advocacy groups have long fought against the harms of cultural appropriation. In recent years, advocacy has shifted to advancing the protection of Indigenous People's intangible and cultural property, such as their folklore and traditional knowledge. Riley proclaims that the world is currently witnessing a new jurisgenerative moment in which cultural property laws of Indigenous People are influencing decision-makers at all levels of governance, both internationally and nationally, in addressing long-suffered issues of cultural preservation and appropriation. She argues that tribal law is essential in addressing these harms because Western law does not embrace Indigenous People's unique, multifaceted conception of cultural property, which is deeply rooted in tribal-specific lifeways and belief systems. While Western law separates land and culture, tribal law ties cultural property to land, religion, creation, and design. Riley asserts that the development, implementation, and enforcement of tribal law are acts of Indigenous People's sovereignty and that cases such as *Chilkat Indian Village, IRA v. Johnson*, and the agreement to repatriate the Maaso Kova to the Yaqui people demonstrate that using tribal law makes a difference in cases involving indigenous rights to their sacred and valuable goods and resources.

Annotated by: Rachell E. Henriquez

Hannah P. Stephen, *Contracting with Communities: An Analysis of the Enforceability of Community Benefit Agreements*, 40 MINN. J. OF L. & INEQ. 281 (2022).

Hannah P. Stephen posits that Community Benefit Agreements ("CBAs") – private contracts between developers and community members to negotiate and collaborate on the terms of a new development – should generally be enforceable in court when executed in compliance with contract law. Touted by equitable development advocates, the enforcement of CBAs holds significant implications beyond the scope of land use. As a mechanism for active community engagement in land development decisions, enforcement of CBAs curtails gentrification, elevates marginalized voices, and pushes environmental justice to the forefront in the planning process. Nonetheless, enforcement of CBAs has encountered push-back, as experts have speculated that (1) communities merely agreeing not to bring a lawsuit against the developer nor disparage the project, is inadequate consideration for an enforceable contract; and (2) third-party community members may lack standing for enforcement. However, courts ordinarily do not assess the adequacy of consideration in a freely negotiated contract, as the value of such consideration is often subjective and intangible. Additionally, the success of third-party beneficiaries' claims are contingent on the language of the CBA, so enforcement ultimately turns on the terms of each private contract and its compliance with state laws. Stephen emphasizes that when enforceable, CBAs will continue to serve as a valuable tool for community power and engagement.

Annotated by: Arifa Abrahim

Bridgett Cecilia McCoy, *Critical Infrastructure, Environmental Racism, and Protest: A Case Study in Cancer Alley, Louisiana*, 53 COLUM. HUM. RTS. L. REV. 582 (2022).

Individuals from Black communities in a polluted industrial region in Louisiana known as "Cancer Alley" have protested the industrial infrastructure occupying their homes for decades. However, laws enacted in Louisiana, as well as those in over a dozen other states, have recently criminalized protesting on or near "critical infrastructure"—interpreted as including nearly all the industries that pollute Black communities in Cancer Alley. Because these communities are most likely to be subject to high concentrations of critical infrastructure throughout the country, these laws perpetuate environmental injustice and disproportionately limit Black individuals' freedom of speech. McCoy proposes two avenues where racial geography could be incorporated into constitutional law so that the critical infrastructure laws could be challenged as a denial of constitutionally protected rights. First, McCoy submits that the governing case *Arlington Heights* should be interpreted to allow the history of land-based discrimination in a racially divided area to be evidence of discriminatory intent, thereby allowing for Equal Protection Clause challenges. McCoy also suggests that the First Amendment's "time, place, and manner" doctrine should treat laws that disproportionately impact Black communities as regulations that are not neutral, not narrowly tailored, and do not provide meaningful alternatives for Black residents to voice their grievances in their communities.

Annotated by: Zoe Zingale