ANNOTATED LEGAL BIBLIOGRAPHY

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I. ME TOO MOVEMENT

Osamudia R. James, Essay, *Identity: Obstacles and Openings*, 73 SMU L. REV. F. 156 (2020).

While the role of social identity in the pursuit of equality has risen in recent decades, it has concomitantly experienced challenges from a number of different spheres. The author identifies three key challenges to social identity equality: (1) the legal system; (2) status-based societal hierarchies of which white and cis-gendered people still maintain dominance, and; (3) the responsive rise of white-based social identity. Despite important victories during the civil rights era, the Supreme Court has refused in recent decades to further equal protection jurisprudence and has, conversely, limited it in areas such as desegregation and voting rights. Additionally, while the white-centered #MeToo movement has received large-scale support, the Black Lives Matter movement, which has consistently maintained queer women and women of color at the forefront, has failed to achieve similar support and has been deemed as "extremists" by the FBI. Finally, a rise in white racial identity has been accompanied by white supremacism and race-based violence. The author offers a number of methods to counteract these issues and create a more positive societal and legal view of minority identity, including a willingness by the courts to acknowledge race in equality jurisprudence and confronting the social hierarchies that have allowed those who dominate them to overwhelm and marginalize the attempts at equality made by minority groups. Thus, the author expresses that while gains have been made by minority groups in regards to social identity, true strides can be made through confronting the suppression of minority identity within the courts and social movements, and encouraging a dialogue within groups in spite of any opposition they may face.

Annotated by: Evan Garfinkel

Benedetta Faedi Duramy, Article, *#Metoo and The Pursuit of Women's International Human Rights*, 54 University of San Francisco L. Rev. 215 (2020).

The #MeToo movement, spurred by various factors including the international fame of victim's abusers, the effect of social media activism, and growing public outrage, has internationally changed the conversation about how countries should tackle sexual harassment and gender-based discrimination. While some countries—such as the United States and India—used the #MeToo movement to instigate more public outcry and start a movement to oust public figures accused of sexual harassment, other countries populations like Japan, France, and Italy were more ambivalent to change; refusing to believe there was a sexual harassment problem, and seeing more pushback on the idea of reform. The author notes that the widespread #MeToo movement gained momentum based on a few factors including, but not limited to: Donald Trump's election kindling women activist to stop "accepting the unacceptable," and start organizing—leading to the Women's March and other activist groups forming; that the accusers and victims were famous white actors or public figures; and the success of social media activism. However, as the author states, the movement will not actually lead to much change unless the movement expands to include more underrepresented groups, and State's institute new human rights violations in order to correct how these actions are approached internationally, as well as have State's be held accountable for not following the international human rights violation. Based on previous Universal Declaration of Human Rights declarations and General Recommendation orders, States are obligated to protect women from any acts of discrimination and gender-based violence and can be held accountable to address these issues by having communication procedures and make recommendations. As a result of #MeToo, some States have started the process of changing their policies and how these issues are handled. For example, the United Kingdom's government has promised to improve regulations around nondisclosure agreements, stopping companies from misusing the agreements to prevent victims from discussing allegations of sexual harassment and assault in return for financial payouts. Other countries, such as Sweden and India, have also pushed for more bills to protect against harassment, as well as other programs to have the complaints filed anonymously. However, to enact more coordinated responses, there should be a holistic human rights-based approach to contest gender-based violence, as well as meet the need for a legal and governmental framework to combat these issues.

Annotated by: Jessica Friedman

Cynthia Godsoe, Note, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 Ohio St. J. Crim. L. 335, (2020).

The Criminal Legal System is ineffective when it comes to sexual offenses, in that it overlooks the systematic and root problems that underlie sexual offenses, and in turn seeks to penalize and criminalize those offenses, by focusing on holding the offender accountable, and failing to meaningfully redress the victim's harm as well as address both the offenders' and victim's rehabilitation. By analyzing the Criminal Legal System's treatment of juvenile sex offenders three issues with the broader criminal legal system come to light which are: (1) rather than focusing on multiple causes that underlie sex offenses, i.e. racial, gender and economic inequality, the system relies exclusively on punishment and criminalization of an individual actor to address the societal problem, (2) the system is extremely costly but yet is for the most part ineffective, (3) the criminal treatment of sex crimes reinforces gender hierarchies and stereotypes. Here, the author advances two alternatives (1) bystander interventions and (2) restorative justice. These alternatives take a public health approach to the incarceration of sex offenders and the requirement to register on a sex offender registration, which will work to address the larger structural and societal issues that underlie sexual offenses and gender violence. The author argues that both proposed alternatives not only prevent sexual violence and offenses, but also allow for a more comprehensive and effective rehabilitation for both the victim and the offender. Furthermore, the author notes that restorative justice does not occur without the victim's consent, and once given the program works by holding the offender accountable, however it allows him/her the opportunity to make reparations, focusing on the root causes, rather than mere punishment. Thus, the author urges for a re-analyzation of the patriatichial carceral state which seeks to penalize and incarcerate, rather than rehabilitate and heal by holding the offender accountable, while also addressing the root and structural causes which led to sexual offenses. Furthermore, the author calls for a re-examination of the #MeToo movement, finding that the movement has been distorted from its' original mission. By focusing on offender accountability and highlighting the gendered stereotypes of sexual violence the movement fails to address the larger societal issues that underlie sexual offenses and gendered violence. Therefore, in order to better embody the mission of the #MeToo movement, it is important to call for a more comprehensive and intersectional approach to sexual harms, one that promotes equality across economic, gendered and racial lines.

Annotated by: Raquel A. Levy

Taylor J. Freeman Peshehonoff, Note, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA L. REV. 479 (2020).

Title VII of the Civil Rights Act of 1964 does not adequately protect transgender individuals and unpaid interns from discrimination, while the mandatory arbitration provisions in employment contracts further exacerbate the problem. Though certain courts held in favor of transgender individuals battling against sex-based employment discrimination under claims of gender non-conformity discrimination or discrimination of sexual orientation, not all courts agree that such categories fall under the scope protected by the Equal Protection Clause. The author urges the Supreme Court to expressly decide, once and for all, that both claims are protected by Title VII since they constitute sex-based discrimination. The author also points to the ambiguity of the term, "employee" under the Act, leaving unpaid interns vulnerable to work-place harassment and discrimination. Under the benefits analysis test that courts typically apply to determine if an individual is an employee, some courts have found that unpaid interns are not "employees" and are not protected under the Act on the basis that they do not receive remuneration. The author argues that unpaid interns do satisfy the remuneration requirement because internships are a necessary qualification for full-time positions in our modern economy. Mandatory arbitration clauses in employment contracts only make matters worse since they do not allow the unprotected class of individuals to file suit in federal courts. At the least, employers should not be able to contract around sexual harassment and discrimination claims under Title VII through a mandatory arbitration clause.

Annotated by: Laura Song

II. TITLE IX

Kathleen B. Havener, *Feature, Rape Culture on Campus and the Demise of Title IX*, 32 GPSOLO 8, Mar./Apr. 2020.

The Trump administration rescinded policy guidelines which instructed institutions, that fall within the scope of Title IX, on how to proceed when sexual harassment is suspected within the institution. The guidelines, including a "start by believing" initiative, as well as a change from a "clear and convincing" standard to a "preponderance of the evidence" standard, were put in place by the Obama administration and were intended to make reporting a sexual violence crime, as well as getting the case to trial, easier for the victims. The author articulates the severity of this problem by providing statics of how often women experience sexual abuse versus how often their abusers are prosecuted and convicted. In addition, the author exemplifies the lack of accountability perpetrators have to face and the lack of belief victims have to face through the story of Larry Nassar and his victims. Although Larry Nassar committed thousands of acts of sexual assault against about 500 young women while working in his capacity as a trainer, physician, and team doctor, he continued to prosper despite the hundreds of reports of abuse. Reissuing the policy guidelines, which the Trump administration rescinded, would help victims overcome some of the obstacles they face when trying to receive justice for the wrongdoing they were subjected to. The most important change required to stop the ongoing perpetuation of rape culture in the United States is to reinforce the "start by believing" initiative. This initiative promotes universities to train their employees to begin their investigation with the assumption that the complainant is telling the truth in order to avoid several unreported, or uninvestigated, instances of sexual abuse. The "start by believing" initiative, as well as applying a "preponderance of the evidence" standard in sex abuse cases, would help avoid the lack of accountability that perpetrators of sexual violence, like Larry Nassar, often experience.

Annotated by: Dana Gambardella

Joshua Aaron Jones, Article: *Title IX's Substantive Equity Mandate For Transgender Persons In American Law Schools: A Call For Disaggregated Sogi Data,* 44 N.Y.U REV. L. & SOC. CHANGE 339 (2020).

In order to achieve the substantive equity guaranteed by Title IX, law schools must start disaggregating sexual orientation and gender identity data (SOGI data). Without disaggregation, schools are unable to create and adapt appropriate policies to ensure fair treatment of transgender and gender nonconforming students. Title IX prohibits gender discrimination in education institutions that receive federal funding. However, SOGI data collection typically includes a wide array of distinct categories, relating to both gender identity and sexual orientation, that get grouped together under this umbrella term. As a result, school policies geared towards LGBTQI(A) students often do not properly address the specific experiences of the different subgroups, most notably transgender and gender nonconforming individuals. The author identifies the dangers of looking at SOGI data in such a broad way, such as continued marginalization and hindered success in the legal world. The author also details examples of successful SOGI disaggregation practices in federal agencies, states and municipalities. For example, the Office of Budget Management under the Obama administration developed federal surveys that collect SOGI data using gender identity, sexual orientation, and sexual behavior as three separate categories. In addition, the author offers a four-pronged approach to policy development which includes engaging in organization self-evaluation, developing neutral policies, implementing those policies, and monitoring outcomes. Until SOGI data is disaggregated, law schools will not be adequately equipped to cater to the needs of transgender students and best prepare them for success in the legal world.

Annotated by: Rachel Gold

III. BLACK LIVES MATTER

Zahra N. Mian, Article, *"Black Identity Extremist" or Black Dissident?: How* United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, From COINTELPRO to Black Lives Matter*, 21 RUTGERS RACE & L. REV. 53 (2020).

The success of the Black Lives Matter movement and similar civil rights groups on issues of systemic racism and police brutality has made them a target of discriminatory surveillance by the Federal Bureau of Investigation ("FBI"). The FBI has a long history of silencing Black dissent by targeting activists and groups engaged in peaceful protest and framing them as violent radicals to justify illicit surveillance of them in violation of First Amendment protections of free speech. The effect has been the criminalization of Black dissent of law enforcement, an effort which peaked in the mid-twentieth century with the FBI's notorious Counter Intelligence Program ("COINTELPRO"), which conducted thousands of unconstitutional surveillance operations that resulted in arrests, deportations, and assassinations of Black activist frontrunners and the delegitimization of their messages for social equality. Now in the age of BLM, the FBI is once again attempting to criminalize dissent by characterizing Black activism in response to "*alleged* police brutality" as a domestic terror threat under the designation "Black Identity Extremism" ("BIE"). In so doing, the FBI has once again opened the door to unfettered infringements on otherwise protected activities and placed the public at risk by focusing its resources at targets of racially-biased policing rather than valid security threats. To reign in the FBI's unrestricted investigations of these "threats" to law enforcement, the author recommends that (1) domestic terrorism investigations be based on evidence of criminal wrongdoing, and (2) that acts of civil disobedience stop being treated as acts of terrorism. Requiring a showing of probable cause that an individual or group presents a threat to law enforcement *prior* to commencing domestic terror investigations would prevent pretextual FBI investigations that target Black activists and groups over genuine threats to national security, while employing equitable standards of policing groups would increase trust in law enforcement and improve efficiency of domestic terror threat investigations. Eliminating the BIE classification and implementing the recommended restraints on the FBI's currently unencumbered ability to surveil Black dissent of law enforcement will assist in discontinuing problematic surveillance methods and help safeguard more racially-neutral FBI investigations in the future.

By: Maegan Gorman

Jonathan C. Augustine, Note, *And When Does the Black Church Get Political?: Responding in the Era of Trump and Making the Black Church Great Again?*, 17 HASTINGS RACE & POVERTY L.J. 88 (2020).

The Black Church, a longtime pillar of leadership in Black communities, is working to best serve its congregants as the Trump administration institutes policies that alienate marginalized groups. During the Civil Rights Movement, the Church, in response to the intensity of societal circumstances, took action to be a voice for social justice. The author argues that since sociopolitical events motivate the Church to become politically engaged, the Church should become political now in response to Trump- era policies, in resemblance of its role during the Civil Rights Movement. In responding to President Trump's infamous campaign slogan "Make America Great Again", the author makes an argument to "Make the Black Church Great Again". Through taking actions such as following in the footsteps of bishops who used theology to inspire political engagement among congregants during the Civil Rights Movement, and continuing to publicly denounce policies that negatively affect its congregants while inadvertently supporting political candidates who share its views, the Black Church can be a politically influential body again. Furthermore, since engaging in resistance movements is integral to the Church's identity and traditions, doing so is essential to successfully exerting political influence. Because the Church plays such an active role in Black life, it is not only necessary, but expected, for it to be politically active, especially in today's hostile political climate.

Annotated by: Gabriella Javaheria

Brandon Hasbrouck, Note, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200 (2020).

Modern-day policing perpetuates structures of slavery through racist policing and the false narrative of black criminality. Policing in America was birthed by white supremacy, which is evident through the fact that policing in the South developed as slave patrols designed to terrorize, capture and discipline slaves and policing in the North was created to control freed slaves. This Note argues that modern-day policing's history leads to the narrative of false black criminality today, which views black people as a threat to white people because they are black. Since the 13th Amendment outlawed slavery, many laws and political movements have arisen to target black people and continue racist policing. The author suggests that congress should use the 13th Amendment's power to eliminate the "badges and incidents" of slavery to abolish the police. Abolishing the police does not mean disbanding the police overnight. Instead there are a number of common-sense legislative measures congress has the authority to use to transform policing into an institution that is less likely to perpetuate violence against black bodies. Abolishing the police should be implemented through the creation of civilian commissions, decriminalizing all federal drug possession offenses, encouraging states to end armed enforcement of traffic and quality of life violations, and create a new division in the Department of Justice (DOJ) that would be dedicated to investigating and protecting civil rights violations by the police, to replace the Community Oriented Policing Services (COPS).

Annotated by: Abigail Reid

Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L.REV. 139 (2020).

Racist policies and modes of governance pervade American society in ways that traditional conceptions of racism cannot adequately address. Specifically, traditional conceptions of racist policies as those in which racism is the motivating force don't account for ways in which ostensibly race-blind policies can have disparate impacts on communities of color. The author therefore proposes a new framework for conceptualizing policies which have a disparate impact on race. This framework identifies the four pillars of white supremacy: Race-motivated impairments, such as slavery and Jim Crow; race-motivated benefits, such as the G. I. bill and the Fair Housing Administration; colorblind impairments such as policing; and colorblind benefits such as regressive taxation and uniform school funding. The government policies that embody these pillars intersect and compound each other. For example, the Fair Housing Administration approved loans based on a mix of criteria which indicated that majority-Black areas or areas where races mixed were "high-risk" investments—accordingly, vanishingly few loans were issued for properties in those areas, driving down the average property value. These same neighborhoods, almost a century later, are required to fund their schools out of taxes primarily based on property values, leading to disproportionately underfunded schools in Black neighborhoods under a race-neutral property tax policy. The author laments that the Supreme Court's decisions in *Regents Board of California v. Bakke* and *Parents Involved In Community Schools v. Seattle School District No. 1* indicate to him that the Court is uninterested in taking necessary steps to end racial discrimination, and that because of this doctrine efforts at litigation may be doomed to failure. In reaching this conclusion, he points to language used by the majority that finds fault with the idea of using policy to counteract systemic racism in the context of school admissions decisions. By way of highlighting this thinking, he notes the court's position that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Finally, though, the author sounds a hopeful note by offering a case study in the ways in which the Four Pillars framework can inform equitable solutions to racially disadvantageous policies. The author analyzes two student advocacy organizations' approach to New York City's school segregation issue and commends them for proposing solutions that are not merely equal but equitable.

Annotated by: Andrew Reisman

IV. COVID-19

Samuel R. Bagenstos, Article, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 Yale L.J F. 1 (2020).

Scarcity of medical resources has led to discrimination against individuals with disabilities, resulting in violations of The Americans with Disabilities Act, the Rehabilitation Act and the Affordable Care Act. The Institute of Medicine urged states in advance of a pandemic to adopt "crisis standards of care," following the H1N1 outbreak in 2009. These crisis standards adopted by hospitals and agencies, often employ explicit disability-based distinctions resulting in discrimination through the denial of treatment to patients with pre-existing medical conditions. The author proposes that only under narrow circumstances medical providers may be permitted to use disability as a basis for rationing decision where an individual's underlying disability makes the individual unable to benefit from treatment – either because that disability interferes with the treatment, or because the underlying disability will kill the individual in the very near term regardless of the treatment's success. This proposition is feasible, however, this it hinges on the interpretation of the related laws in order to rule out protocols which put disabled people at the back of the line because of pre-existing conditions that do not make them unable to benefit from the treatment they seek. Therefore, under a different interpretation of the related laws, patients with pre-existing conditions would be protected from discriminatory practices and would benefit from desired treatments, allowing only narrow circumstances for denial to be justified.

Annotated by: Rajan Kambo

V. CRIMINAL JUSTICE

John Rappaport, Note, *Some Doubts About "Democratizing" Criminal Justice*, 87, U. CHI. L. REV. 711 (2020).

While policing and the criminal justice system are at a dire need for reform, democratizers, an influential group of experts, propose a community-based solution of neighborhood participation with politicians, police officers, judges and jurors to mitigate implicit biases across the judicial field and mold a new egalitarian democracy. The author interprets this proposal as fools' gold because the conflation of ideological premises is fundamentally inaccurate. The reality is: (1) lay citizens have stricter attitudes towards criminal punishment than do judges, (2) numerous citizens do not want to make political decisions and provide input to those in power, (3) most people do not want to serve on juries, (4) people vote for politicians that favor more punitive systems, and (5) diversity of police officers will not change the African American experience as black officers harbor the same implicit biases as white officers and are more apt to shoot unarmed blacks than their white colleagues. The author presents three alternatives to this community-based approach, preferring the latter: (1) the radical left vision of community control, abolition, and a Black People's Grand Jury, (2) a public-health system whereby rehabilitation is emphasized, and (3) an evidence-based approach through improving quality of evidence and supplying technology for police officers to better understand in field operations. Echoing President Lyndon B. Johnson's 1967 "need to know" motto through reactivating national research committees, crime is best understood by scrutinizing what does and does not work. This evidence-based approach will mitigate incarceration rates as well as improve data for criminal justice strategies. While layman participation will provide experts with an encompassing framework, ultimately, through an administrative law model led by criminal law experts refining decision-making, these doyens will increase public safety and save human lives.

Annotated by: Jacob Diamond

Zachary Stoner, Comment, *What You Rhyme Could Be Used against You: A Call for Review of the True Threat Standard,* 44 NOVA L. REV. 225 (2020).

The author explores the question how a court can determine a speech is a threatening speech or a speech protected under the First Amendment, particularly when such speech is communicated through art forms that can be negatively perceived by the general public, such as rap hip-hop. The Supreme Court has been ambiguous on this issue, which results in circuit splits with some number of courts apply subject analysis, and a majority apply objective analysis. Under the subjective analysis, the Government has the burden to prove beyond a reasonable doubt that the speaker has a criminally wrongful intent, instead of simply sharing their thoughts. Under the objective analysis, a reasonable speaker or reasonable recipient test will be used and the possibility of being misinterpreted is extremely high, particularly if the speaker uses art form predominated by minorities. To strike a balance, the author proposes a two-prong test which supposedly can protect the freedom of artistic expression while punish those impose speech a true threat. Specifically, under the two-prong test analysis, a true threat would be a specific intent crime and the court requires (1) a showing of the specific intent of the speaker, and (2) will consider "any relevant factors related to the threat and its context." Under this test, if a speaker threatens a specific person and identify such person with detailed information, such as name, address, the speaker will mostly like be regarded as a true threat; if a speaker makes a general statement without identifying any specific person, the speaker will mostly be regarded as protected speech under the First Amendment.

Annotated by: Jianyuan Hua

Robert Size, Article, *Publishing Fake News For Profit Should Be Prosecuted As Wire Fraud*, 60 SANTA CLARA L. REV. 29 (2020).

In the article, the author tells of the ongoing issue where people buy a domain name similar to a real news domain name, then post a fake news story, and profit off of it due to deceiving readers by making them believe they were reading a true news article. Under these pretenses, it should be prosecuted as wire fraud because the fake news publisher profits off of deceiving its readers and receives money through ad revenue. Readers of these articles are most negatively affected because readers who believe these false stories can be influenced to act in different ways due to their belief in the false story. The author proposes that publishing fake news for profit should be prosecuted as wire fraud under 18 U.S.C. § 1343. However, the interpretation of the mail fraud statute in *Cleveland v. United State*s precludes prosecution of this type of fraud and according to the author, it should be overruled so as to extend the reach of the statute and include this type of fraud. The author argues that the Supreme Court misinterpreted the legislative intent rather than following the plain meaning of the statute and further argues that there was an inconsistency in the interpretation of certain statutes relating to fraud, such as wire fraud. Furthermore, there was an inconsistency in the interpretation of the mail and wire fraud statutes. In conclusion, without fake news publishers being prosecuted, readers will continue to be exploited and a culture with an economic incentive to be dishonest will continue to thrive.

Annotated by: Fatima C. Ouedraogo

VI. LGBTQ IDENTITY

Ryan T. Anderson, Note, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of Discrimination*, 43 HARV. J.L. & PUB. POL'Y 387 (2020).

Discrimination on the basis of sex has been protected by Title VII of the Civil Rights Act of 1964, and since then has defined "sex" as referring to the male or female. Now, the Supreme Court is being asked whether employment discrimination on the basis of sex extends to include "sexual orientation" and "transgender status." However, there will be negative consequences if the court redefines "sex" to include the word "sexual orientation" and "gender identity." The definition of "sex" has never attempted to include "sexual orientation" and "gender identity" as a protective class until April 2017, when a federal appellate court ruled that "sexual orientation" is a protective class under the Civil Rights Act of 1964. The author believes that "sexual orientation" and "gender identity" should not be a protected class under the Civil Rights Act of 1964 because if these classes become protected, there will be too many repercussions that will affect citizens' privacy and safety in terms of how employment, schools, and faith-based institutions are structured. The author asserts that it is up to the legislature to address the policy needs of the people and it is not up to the Supreme Court to change the definition of "sex" to include "sexual orientation" and "gender identity." Thus, the author proposes that Title VII of the Civil Rights Act of 1964 already adequately protects employment discrimination on the basis of sex and should not change.

Annotated by: Morgan Berenbaum

Marie-Amélie George, Article, *Queering Reproductive Justice*, 54 U. RICH. L. REV. 671 (2020).

Reproductive rights as a whole might best be advanced by first advocating for the reproductive rights of LGBTQ community members, and subsequently having those rights trickle-up to the rest of the non-marginalized community. Despite the queer agenda promoting the same fundamental interests as the collective reproductive justice movement, including dignity, autonomy, privacy, and equality, the LGBTQ perspective is often undermined as it does not serve as the most prominent perspective throughout society. Here, the author describes several different facets of the queer reproductive movement which exemplify the feasibility of how advocating for LGBTQ reproductive justice can impact the reproductive justice movement as a whole, including (1) family formation, (2), sexual education curriculum, and (3) medical decision-making. The overarching consideration in all reproductive justice reform is to achieve the ability to form a family by one's own terms, and throughout history, queer rights advocacy has led to more equality in terms of both nonbiological parenthood and child custody generally, which has a streamlined impact on non-queer individuals as well. States across the nation either severely limit or completely exclude sex education topics such as abortion and contraception, which has led them to institute a curriculum focused on abstinence being the only option in practicing safe sex, which impacts both the queer and non-queer reproductive justice agenda. In attempting to preserve autonomy in medical-decision making, specifically in regards to gender normalization surgeries and insurance coverage for transitioning transgender individuals, the LGBTQ reproductive movement has elicited arguments based on equality, dignity, and privacy which could be applicable to the reproductive movement as a whole. Thus, the author indicates that the reproductive justice movement might best be served by targeting the issues through a LGBTQ specific lens and subsequently using those strategies to further the pursuit of reproductive justice for all.

Annotated by: Sara Gruber

Cynthia Lee, Article, *Symposium: Women's Rights In The Criminal Justice System: Article: The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411 (2020).

Violence against the transgender community is a serious problem in the United States today, and research shows that the reported number of transgender homicide victims has dramatically increased within the last four years. Transgender women of color—specifically Black and Latina women—are overwhelmingly the target of this violence and it is hypothesized that these homicide numbers are inaccurate, a reflection of systemic barriers that incorrectly report transgender women victims by their biological sex rather than their gender identity. When a cisgender man kills a transgender woman, as is often the situation in the aforementioned cases of violence, a "trans panic" defense is often employed on the basis that his discovery of the victim being biologically male was so upsetting that he was provoked into killing her. While originally a proponent of juror education through salient discussion of prejudice against transgender victims in the courtroom, as what is often done in the case of racial discrimination against Black victims, the author now advocates for a legislative ban of the trans panic defense and proposes her own model legislation banning "trans panic" and "gay panic" defenses that mirror the legislative bans passed in Rhode Island, Connecticut, and Maine. The author's proposed legislation echoes the recommendations of the American Bar Association's 2013 resolution on banning both "gay panic" and "trans panic" defenses in the United States, of which ten states passed legislation on as of early 2020 (California, Illinois, Rhode Island, Nevada, New York, Hawaii, Connecticut, Maine, New York, New Jersey, and Washington). While the author acknowledges public concern regarding a trans panic defense ban being seen as a way to legislate social attitudes, in her conclusion she emphasizes how similar methods were employed by feminists to better adjust rape laws to no longer place an undue burden on female victims when societal opinions regarding rape were mixed. In showing how societal viewpoints can—and should—be modified through legislative discourse, the author thusly advocates for an exhaustive overhaul of "trans panic" defenses throughout the entire nation.

Annotated by: Miles Taylor

Ronald Turner, Article, *Title VII And The Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L.J. 227 (2020).

The circumstances behind the enactment of Title VII in 1964 make clear that anti-LGTBQ discrimination was not a subject foreseen nor considered by the legislature at that time, leaving courts to grapple with whether such discrimination is unlawful under the statute. There has been a circuit split on the issue, which only a decision by the Supreme Court can solve. The author, looking to both the Seventh Circuit case *Hively v. Ivy Tech Community College of Indiana* and the Second Circuit case *Zarda v. Altitude Express, Inc*. for support, argues that discrimination on the basis of sexual orientation is indeed a form of sex discrimination. The author utilizes both majority opinions' examination of past EEOC cases, deference to the Supreme Court's analysis of gender norms in *Price Waterhouse v. Hopkins*, endorsement of the association discrimination theory, and approval of the view that Congress, in 1964, may not have realized nor understood the full scope of the wording of the statute. The argument that the original or central meaning of "sex" in 1964 remains the unchanged meaning of sex today, raised in both the *Hively* and *Zarda* dissents, is deemed unpersuasive. Secondly, the author argues that transgender discrimination is discrimination due to sex, looking to *EEOC v. R.G. & G.R. Harris Funeral Homes Inc*. for support, where the majority held that such discrimination constitutes sex stereotyping that would not have occurred but-for the employee's sex. Judge Ho's arguments against such a recognition in the Fifth Circuit case *Wittmer v. Phillips 66 Company* are regarded as unavailing. The author articulates that sexual orientation and transgender discrimination fall under Title VII's "because of sex" proscription, because such an understanding best comports with the language of the sex discrimination provision previously construed by the Supreme Court, lower courts, and the EEOC; furthermore, such an understanding accurately accounts for the legal, contextual and societal changes that occurred in the half century following the statute's enactment.

Annotated by: Taylor Tesher

Annotation: Christen Price, Note, *Women's Spaces, Women's Rights: Feminism and the Transgender Rights Movement*, 103 MARQ. L. REV. 1509 (2020).

This article is focused on examining the ways that the modern expansion of feminism to include gender and sexuality is purportedly at odds with more the more traditional feminist focus on women's rights. The author argues that this focus being incorporated into federal sex discrimination protections represents a potential for subversion of women's identity and status, resulting in decreased safety for women and the blurring of legal distinctions necessary for the protection of their rights. The author advocates for a trans-exclusionary approach to women's rights, and the inclusion of transgender identities is presented as counteractive to legal efforts, because the nature of the classifications is overinclusive, and gender as a concept is "subjective." This subjectivity, the author claims, is effectively individuals "choosing" their gender: a concept the author links to men being able to subvert the boundaries of women's spaces and legal protections, and is damaging to the idea of womanhood as a psychosocial identity.

The author sees expanding federal legal protections by including "gender identity" to federal bans on discrimination in public accommodations by redefining "sex" to include "gender-related identity, appearance, mannerisms, or characteristics" as detrimental overall to the ability of those laws to fulfill one of their express purposes: preventing discrimination by men against women. Feminists cannot provide a "limiting principle," on how broadly this classification is to be interpreted, and the author posits that this redefinition is effectively a kind of "erasure" of sex discrimination purely based on being a (cisgender) woman. This broad inclusion of varying gender identities change is claimed to impose adversity on cisgender women in traditionally women's spaces, women's prisons (ex: *R (on the application of B) v. Secretary of State for Justice*), and women's restrooms and sanitation facilities (ex.: *Board of Education of the Highland Local School District v. United States Department of Education*); results in adverse legal outcomes dependent upon membership in protected classes; and subverts entirely discussion and action regarding women's oppression and liberation.

The author concludes by stating that in advocating for the redefining of previously strictly-defined classes in anti-sex discrimination laws to include gender identity and expression, the transgender rights movement actually subverts women's rights and minimizes their struggle for equality by consequently subjecting women to increased discrimination and violence at the hands of individuals claiming membership in those same protected classes on the basis of gender identity.

Annotated by: Alexander Toke

Jared Ham & Chan Tov McNamarah, Note, *Queer Eyes Don't Sympathize: An Empirical Investigation of LGB Identity and Judicial Decision Making*, 105 CORNELL L. REV. 589 (2020).

Traditionally the judiciary was thought to make decisions based solely on logic, beginning with *The Common Law*; prior literature has shown that judicial decision-making results from an individual's experience. Previous empirical studies have shown that race and gender affect judicial decision-making in certain circumstances; in contrast, other studies have established that religion impacts a broader spectrum of issues. The authors analyzed judicial voting in employment discrimination suits employing an empirical study using data from the Southern and Eastern Districts of New York. The analysis concluded that no statistically significant difference existed between the judicial decision of LGB judges and their non-LGB colleagues; the lack of difference was attributed to the notion that LGB judges are hyperaware in their decision making when disposing of a case. Given the limited sample of LGB judges, the authors recommend future research include: a larger sample of LGB judges, years, and judicial districts, as well as broader types of discrimination cases and judicial decisions. Ham and McNamarah argue that the judiciary would benefit from a larger number of LGBTQ+ decision-makers because of their unique perspective and ability to correct homophobic viewpoints.

Annotated by: Elliott Williams

VI. CIVIL RIGHTS

Gurjot Kaur & Dana Sussman, Article, *Unlocking the Power and Possibility of Local Enforcement of Human and Civil Rights: Lessons Learned from the NYC Commission on Human Rights*, 51 COLUM. HUMAN RIGHTS L. REV. 584 (2020).

When it comes to civil rights, the United States federal government had played a significant part in extending protections to those wrongfully discriminated against until the Trump administration took power and caused an increase in discrimination, bias incidents, and violence throughout the country due to new policies, orders, and regulations. With the lack of governmental protections, the authors state how local and state human rights agencies have the ability to step up and combat the discrimination their citizens experience through legislation changes, policy-making, enforcement, and education just as the New York City Commission on Human Rights (the "Commission") did as they turned into a national leader in the fight against discrimination. In November 2014, Mayor Bill de Blasio appointed Carmelyn P. Malasis, a nationally recognized employment lawyer, to lead the Commission. Under the leadership of Commissioner Malalsis, the then under-resourced and understaffed Commission was reconstructed to include law enforcement, community outreach, and education all in which created a credible venue of justice for individuals to enforce their rights under the New York City Human Rights Law ("NYCHRL"). The Commission, which is made up of individuals who look and sound like the diverse community of New York City, succeeds in its purpose of combating discrimination by employing many different practices. Through implementing restorative justice practices, the Commission is able to educate, instead of punish, and offer people a new understanding of different discriminated communities in order to deconstruct biases and prejudices. By drafting legislation, the Commission is able to fill in the gaps of the NYCHRL to include, asexuality, pansexuality, and gender non-conformity into the definition of sexual orientation and gender. Other practices that the Commission engages in include issuing legal enforcement guidance documents which interprets the NYCHRL, holding public hearings and issuing reports for critical issues, and focusing specifically on different types of discrimination in order to address the misjustices. The authors articulate how the Commission, a limited resource local human rights agency, rose up to the occasion to combat discrimination by utilizing a systematic and holistic approach which affords individuals a mode to receive assistance and address discrimination.

Annotated by: Laurenne Ferber-Kaufman

Vanessa Wright, Comment, *Voter Identification and the Forgotten Civil Rights Amendment: Why the Court Should Revive the Twenty-Fourth Amendment*, 67 UCLA L. REV. 472 (2020).

The Supreme Court decision in *Harper v. Virginia State Board of Elections* placed the Twenty-Fourth Amendment, banning poll taxes in federal elections, into hibernation and consequently led to the modern-day poll tax: voter identification requirements. The Supreme Court forked how poll taxes and other burdens on voting are analyzed. The Court invoked the Twenty-Fourth Amendment just once to review a federal voting law; later, it exclusively utilized The Fourteenth Amendment to prevent poll taxes at state level. In their most recent voter case, *Crawford v. Marion County*, the Court iterated a three-part test, balancing state interests with the burden on the right of an individual to vote. Ultimately, the Court determined an Indiana law requiring photo identification to vote in person did not violate the Fourteenth Amendment. The author suggests that the Twenty-Fourth Amendment, incorporated through the Seventeenth Amendment and the Qualifications Clause, would find this unconstitutional because it acts as a modern-day poll tax under the guise of protecting "voter fraud", an often exaggerated and unfounded claim. This modern-day poll tax prevents Americans from voting because obtaining a state identification, even if "free", will incur transportation costs, childcare expenses, loss of work, and fees for obtaining the underlying paperwork. The author concludes that voter identification laws are better reviewed under the Twenty-Fourth Amendment because it expressly protects voter interests, hence creating greater access to the polls and a more inclusive democracy.

Annotated by: Marie Simpson

VII. OTHER

Nancy E. Dowd, Article, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 Cardozo L. Rev. 1367 (2020).

Children are born into unequal environments that create unfair economic, racial, and gender hierarchies and limit their developmental ability, which is an infringement on their constitutional equality rights and ultimately provides for a claim of positive rights. Despite past attempts to bring equality to children's lives, like *Brown v. Board of Education*, there are still numerous factors like "absence of social support" and other "roadblocks" creating inequality in children's ability to develop that children are unable to change because of their dependency on adults. The author argues that hierarchies and other inequalities created by government policies need to be replaced with new policies that include supports for equality for all children despite the circumstances they are born into in order for all children to be afforded an equal development. The state needs to create better supports that prioritize "equality, equity, and dignity" to promote full developmental capacity and support the affirmative needs of children, because when all children are able to develop to their full capacity, they enjoy personal benefits and society at large is benefitted. Although there has been a historical hesitancy to legislate because of the notion of difference between adults and children under constitutional law, affirmative judicial action is needed in order to dismantle structural and racial discrimination since children have a place in democracy. Ensuring developmental equality is a private family responsibility as well as a state responsibility, which, if achieved, will contribute to creating an inclusive world for every child and everyone.

Annotated by: Annslee Renee Perego

Lawrence O. Gostin & Eric A. Friedman, Article, *Imagining Global Health With Justice: Transformative Ideas for Health and Well-Being While Leaving No One Behind*, 108 Geo. L.J. 1535 (2020)

The authors set forth global health initiatives in order to address inequity in global health and to affirm the universal human right to health. The global poor struggle to have affordable accessible healthcare even amidst generalized increases in global health because global health improvements have not been distributed equally - the poor and marginalized remain underserved. Notably, even in the United States communities of color or indigenous communities suffer under an inequitable healthcare system that is unaffordable, inaccessible and provides inadequate care.

The authors believe that the solution to disparate health is to create a new global health system that will provide adequate healthcare as broadly and equitably as possible. The goal is to reaffirm the fundamental human right to health by providing five necessities of that right: (1) universal healthcare coverage, (2) public health services, (3) improved social and economic determinants of health, (4) holding governments accountable to the people over economic or political concerns, and (5) an international framework for the advancement of health and government accountability, to support those with disparate needs. The three initiatives the authors put forth are: (1) A Framework Convention on Global Health (a global treaty specifying the previously generic human rights standards of health in order to create international accountability for health using specified metrics), (2) A Right to Health Capacity Fund (to provide financing for advocacy groups supporting marginalized communities) and (3) health equity programs of action (to improve domestic national and local health disparities).

The three proposals implemented together would ensure better global health that is also equitably distributed towards the poorest countries and marginalized communities who are the most vulnerable when it comes to health.

Annotated by: Dario Rabak