ANNOTATED LEGAL BIBLIOGRAPHY

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GENDER BIAS AND DISCRIMINATION IN THE WORKPLACE

Claudia Flores, *Beyond the Bad Apple—Transforming the American Workplace for Women After #MeToo*, 2019 U. OF CHICAGO LEGAL F. 85 (2019).

Title VII of the Civil Rights Act of 1964 primarily prohibits discrimination in hiring, firing, and compensation on the basis of race, color, religion, sex or national origin. Courts began to recognize workplace sexual harassment as a form of discrimination under Title VII in the mid-1980s, but have since struggled to implement Title VII's original goals of improving the economic and social conditions for minorities and women. When adjudicating a sexual harassment claim, a court completes a subjective analysis, where it determines whether the plaintiff perceived the work environment to be abusive, and an objective analysis, where it assesses whether the conduct was severe or prevalent enough to create a hostile or abusive work environment; courts have struggled to create "reasonable person" standards and to establish whether certain conduct was welcomed by the plaintiff, and as a result limiting the anti-discriminatory intent of Title VII. The author argues that by focusing on the bad actors that abuse their authority, the legal approach to sexual harassment fails to recognize forms of abuse as sexual harassment. Studies have identified that male-dominated workplaces, low-wage workplaces populated by women, and industries where workers are excluded from labor law protections tend to have higher levels of sexual harassment. The author suggests that sexual harassment should focus on bullying and abuse and less on sex, thus enabling society and the legal system to better address sexual harassment; such strategy would require development of a model workplace as a healthy, productive, and positive setting. Reforms focused on better protecting worker's rights, a duty of care for employers, and extra-discrimination remedies would help establish a foundation for workplace standards and expectations.

Annotated by: Andrea Barrientos

Nicolena Farias-Eisner, *Gender Diversity in Corporate Boardrooms: DO Equal Seats Mean Equal Voices?*, 13 (1) J. BUS., ENTREPRENEURSHIP & L. (2020).

In the United States, corporations have been slow to incorporate gender diversity in its boardrooms, which constitutes the crux of a corporation, mainly because the United States continues to employ a "soft regulatory approach." This approach mandates companies to only disclose the presence or absence of a diversity policy at the company, and investors are only given a brief disclosure of the diversity policy. Recently, there has been public advocacy for gender diversity and studies have begun to demonstrate that gender diversity in a boardroom improves a company's performance and reputation, fosters revenue growth and represents an avenue for shareholder engagement. As a result of this data, investors' attention for gender diversity has increased, which resulted in corporations taking some efforts to increase female representation by methods such as reforming their corporate governance standards and improving their methods of recruiting female directors. Largely, corporations have begun to appoint a female to their boardroom. While some efforts and recourses have been made to increase gender diversity, the author claims that much progress remains to truly achieve equal treatment of genders within boardrooms. The author argues that boards are so focused on obtaining a certain number of female representatives, suggested in that they only contact women for their diverse demographic and not because of their unique qualifications and perspectives. Thus, boards fail to allow women to actually make an impact on the boards, which inhibits their ability to earn creditability and respect. The author purposes that to have adequate gender diversity in boardrooms, efforts need to be made at hiring qualified directors, rather than hiring based on quotas. Gender diversity and equal treatment in boardrooms could be achieved if corporations are held accountable for their policies, and if investors increase pressure on the corporation to not just appoint female directors, but to listen and respect them.

Annotated by: Lyudmila Gilyadova

Taylor J. Freeman Peshehonoff, *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).

As the #MeToo movement reshapes the way our society views sexual harassment and sexual assault, deficiencies in current protections, like Title VII, begin to appear for overlooked groups, including transgender employees, interns, and mandatory arbitration provisions. Title VII protections were originally created with the hope to guard African Americans against discrimination in the workplace, but overtime the legislation grew to include any employees' "race, color, religion, sex, or national origin" to be protected from such discrimination. As our society has become more inclusive of disenfranchised groups, cracks in Title VII begin to show; examples like circuit splits on whether sexual orientation counts as a protected class, show Title VII should be revisited by Congress to include these vulnerable groups. In addition to vagueness in the statute and hindering protections for transgender and sexual orientation claims, mandatory arbitration provisions in employee contracts, which allow offending employers to force non-disclosure agreements and arbitrators who are paid by the company they are supposed to be reviewing for misconduct, further erode the purpose of Title VII. The author argues at a minimum, companies should be unable to force arbitration provisions on sexual harassment and discrimination claims and articulates that as long as courts uphold these wide-sweeping arbitration clauses bad actors will continue their wrongdoing in secrecy. In October 2019, the Supreme Court heard oral arguments for EEOC v. R.G. & G.R. Harris Funeral Homes where the Sixth Circuit held that a male-to-female transitioning employee of a funeral home could sue for sex-based discrimination. This upcoming decision is an opportunity for the expansion or deprivation of transgender protections across the country. Changes to the Title VII statute - whether from Congress or the courts - are necessary to remedy modern problems that arise from a more diverse workforce facing transgressing employers who have found modern channels to avoid once historic discrimination protections.

Annotated by: Caroline Kutschera

Robert L. Nelson, et al., *Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workspace*, 44 LAW & SOC. INQUIRY 1051 (2019).

Although the legal community in the United States has expressed widespread support for diversity and inclusion of different races, gender, and sexual orientation, there have nevertheless been very few studies attempting to determine the prevalence and character of discrimination in the legal sector. Although women and persons of color currently represent a significant minority in the demographic makeup of the legal profession, racial and gender inequalities persist. In an attempt to explain this phenomenon, the authors of this article performed an empirical study on perceived workplace discrimination by conducting three waves of survey on 5,399 practicing attorneys. The study incorporated several independent variables that allowed the authors to analyze perceived discrimination by practicing attorneys, such as ascription status, marital and family status, social backgrounds, professional status, status in work organization, and characteristics of work organization. The results from the surveys indicate that women of color have the highest odds of perceiving discrimination at about 4 times greater than white men, followed by white women at about 3 times, then by men of color at about 2 times, and members of the LGBTQ community at about 1.5 times. While the authors of the article recognize that the self-reports of respondents are subject to attribution error, the differences in the occurrence of perceived discrimination are too striking to be ignored, especially when the pattern holds through all stages of survey and across various social contexts. The authors, in an attempt to raise awareness of this systemic problem in the legal profession, refute the narrative purporting that discriminations are always subtle and unintentional, and that individuals should focus their energy on creating a system of accountability to ensure a discrimination-free workspace.

Annotated by: Jack Yeh

Joseph A. Seiner, *Harassment, Technology, and the Modern Worker*, 23 EMP. RTS. & EMP. POL'Y J. 85 (2019).

In the technology sector, there appears to be a disproportionate level of discrimination when compared to other industries; the Author focuses on the widespread gender-based discrimination in this sector. Sexual harassment, gender discrimination, and sexual assault are often rampant at companies within the technology industry, which has led to a definitive presence of hostile working environments. The Author aims to begin a dialogue on why this problem exists, and various factors have contributed to the current problem, such as discriminatory academic setting, lower levels of female-based employment opportunities, gender-biased capital investors, anonymity and a lack of transparency, the absence of regulation and oversight and less reported violations. The Author also advocates a number of different approaches to create a more gender-friendly working environment in the technology industry. The approaches include breaking down educational stereotypes; recruiting and retention from a diversity of backgrounds; instituting regular and frequent training to raise awareness; creating more avenues for reporting potential claims and establishing aggressive means of responding; as well as soliciting diverse funding. The Author also suggests that state and local governments should quickly step in to protect technology workers from hostile working environments, including categorizing workers in the technology sector as employees afforded Title VII protections. What is more, there are many other possible approaches to addressing hostile work environments that exist in the technology sector, such as decency pledges, usage of technology, transparent gender employment statistics and pay, more females in the management positions. Gender-based discrimination is an ongoing and undeniable problem in the technology sector, but, as suggested by the Author, there are solutions to the present problem.

Annotated by: Yifan Li

Arianne Renan Barzilay, *The Technologies of Discrimination: How Platforms Cultivate Gender Inequality*, 13 L. & ETHICS HUM. RTS. 179 (2019).

The gig economy, a labor market characterized by short-term contracts rather than permanent work, relies on digital platforms to connect approximately forty-five million people in the United States—both work seekers and employers—and encompasses a broad range of sectors, tasks and services. Both men and women participate in the gig economy, but gender discrimination is present in the online labor context. The author argues that although social and legal disadvantages take place outside of platforms in the traditional labor market, platforms' architecture, design, algorithms, affordances, and codes affect the ability of users to utilize the platform in ways conducive to gender equality. Processes like data mining can reproduce existing patterns of discrimination inherent in the biases of decision makers, or make correlations that are not indicative of job performance. The author argues that the lack of legislation and case law addressing gender inequality in platform-facilitated labor is the result of several factors. First, platforms treat their workers as entrepreneurs or independent contractors rather than employees, so in order to bring suit based on Title VII protections, an employment relationship would first have to be asserted, litigated, and proven. Second, the Supreme Court in Wal-Mart v. Dukes held that 1.5 million female Wal-Mart employees could not challenge discriminatory pay as a national class action because they had failed to prove sufficient "commonality." Commonality is even harder to prove in the realm of platform-facilitated labor, where different workers perform different tasks for different parties. Rather than accepting the laissez-faire attitude afforded to platforms, legal policy should articulate affirmative duties for platforms to adhere to in order to enhance gender equality through the use of their services.

Annotated by: Jennifer Russnow

DIVERSITY AND DISCRIMINATION IN EDUCATION

Vinay Harpalani, *Race-Conscious Admissions, Diversity, Academic Freedom*, PA. J. CONST. L. ONLINE 101 (2019).

Race-conscious admissions policies exhibit academic freedom in two ways: universities have freedom in choosing which students to admit, and they enhance student learning by expanding the "marketplace of ideas" on campus. Race-conscious admissions policies have been intensely litigated, with opinions to reach the Supreme Court focusing on both Fourteenth and First Amendment rationales, where the First Amendment comes to play with regards to academic freedom. Originating from Justice Frankfurter's concurrence in Sweezy v. New Hampshire, the Supreme Court has discussed the "essential freedom" to choose "who may be admitted to study" in the context of academic freedom. Essentially, courts have held that this "essential freedom" is limited judicial deference based on the First Amendment. A successful "marketplace of ideas" requires diversity, and the author argues that the purpose is to expose students to a variety of ideas rather than a specific idea of "truth." In response to critiques of scholars that experts actually narrow ideas, the author argues that this only applies to "expertise and advancement of disciplinary knowledge," and so a wide range of ideas therefore promotes the goal of student learning. Additionally, students can form new ideas when exposed to different perspectives, which also forms new experiences. The author concludes that challenges to race-conscious admissions policies challenge academic freedoms and therefore courts should consider them so.

Annotated by: Christina Giordanella

T. L. Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315 (2019).

Legacy admissions policies are hindering universities' ability to become more diverse by systematically advancing students who traditionally come from wealthier, white families through prestigious academic programs. The issue presented by legacy preference admissions policies has never been addressed by the Supreme Court, however legal scholars believe that a challenge to a legacy-based university admissions policy could be brought under the Equal Protections Clause. If the constitutionality of legacy admissions policies were under review, the level of scrutiny that is applied to the matter would have to be determined. Murphy argues that while significant issues of both law and fact would have to be addressed, the greatest likelihood that a court would strike down legacy admissions policies exists under a strict scrutiny standard of review; however, for this standard to be applied, plaintiffs would have to establish discrimination on the basis of ancestry or race. Conversely, it would be unlikely for a court to strike down legacy admissions policies under either intermediate scrutiny or rational basis review standards due to the complexity of admissions policies and the variety of individuals that benefit from these policies. Although the fairness of legacy admissions policies is not in question, the structure of the Equal Protection jurisprudence would likely force the outcome of a constitutionality determination to be based on the level of scrutiny the court applies, and the judge's decision on the degree of scrutiny will largely turn on the facts. However, a decision that strikes down legacy preference policies could greatly benefit students from non-white, non-wealthy, and diverse backgrounds, attend the nation's most prestigious universities.

Annotated by: Joshua Weisenfeld

Priscilla A. Consolo, *A Single Score No More: Rethinking the Admissions System for New York City's Specialized High Schools to Preserve Academic Excellence and Promote Student Diversity*, 94 N.Y.U.L. REV. 1244 (2019).

The discussion of diversity in the educational arena continues to be an intensely debated topic that has resulted in many legal challenges, specifically with regards to the Fourteenth Amendment. In New York City, the City's eight "testing" Specialized High Schools (SHSs") have faced great criticism for the lack of diversity, as there has been an unreasonably low number of Black and Latino/Hispanic students admitted into the schools. Currently, the admission process for SHSs is an opt-in process for NYC students where students are solely assessed for admission by their score on the Specialized High Schools Admission Test ("SHSAT"). The Author argues that the admission process should be amended to a multi-factor assessment that reviews an applicant on five factors: 1) SHSAT score 2) grade point average 3) rank upon graduating from eighth grade 4) rank among eighth graders throughout the city; and 5) diversity, a plus factor in determining the student's admission. Unlike Mayor de Blasio's alternative admission plan to provide automatic admission to the SHSs for students who fall within the top seven percent of their graduating class and top twenty-five percent of the eighth-grade graduating classes across the city, the Author's plan will ensure that the students who are accepted into SHSs are qualified and can succeed in such rigorous schooling. Furthermore, although the Constitution does not require schools to choose diversity, such affirmative action policies receive strict scrutiny review. The diversity element of the Author's admission plan should survive the strict scrutiny test because the government has a legitimate interest in diversity being used to improve discussions and learning opportunities in schools and it will be tailored narrowly so that each applicant will be evaluated by many factors and not just based on their racial identity. By implementing the Author's admission plan, New York City's SHSs will be able to admit a larger number of underrepresented minorities while maintaining their academic excellence.

Annotated by: Tziona Breitbart

IMMIGRATION AND DISCRIMINATION

Nicole Hallett, *Immigrant Women in the Shadow of #MeToo*, 49 U. BALT. L. REV. 59 (2019).

While the #MeToo movement and the anti-immigration policy are two of the major storylines of the past few years, the two have curiously not intersected despite the high rate of gender-based violence within immigrant women. In addition to the language barrier, cultural background, and the fear of deportation, the Author posits that immigrant women are even more prejudiced by the anti-immigration policies. For example, by treating domestic violence as individual cases in his decision in Matter of A-B-, Attorney General Jeff Sessions' ignores the unequal power dynamic between men and women which supports viewing domestic violence as a systemic and political problem. Similarly, the policies such as prohibiting abortions for rape victims in the government's custody and forcing asylees to await in Mexico pending their immigration status both fail to recognize the unique vulnerabilities that immigrant women face. Furthermore, policies such as courthouse arrests by ICE, the resolution to initiate deportation proceedings upon denial of visas designed for certain crime victims, the potential disqualification of immigration after accessing public welfare, and workplace enforcement by ICE pursuant to DOL reports—all have a chilling effect on victims' participation in the fight against gender-based violence. In sum, the Author urges that there is great potential for immigrant women to benefit from the momentum that #MeToo has garnished in the past two years; yet at present, the movement is not addressing the political aspect of gender-based violence inclusively enough by failing to recognize its connection with the anti-immigration policies.

Annotated by: Chi-Hsin Esther Engelhart

Clara Mora, *"Shoot Them!" The Trump Administration's Immigration Policy and Its Effect on LGBTI Migrants and Asylum Seekers*, 34 GEO. IMMIGR. L. J. 121 (2020).

LGBTI individuals face unique challenges in seeking asylum at the United States border, and specifically, individuals coming from the Northern Triangle of Guatemala, El Salvador, and Honduras, as well as Mexico face an especially dire situation as migrants fleeing persecution in their home countries. The author begins with the story of Roxsana Hernandez Rodriguez, a transgender Honduran woman seeking asylum in the U.S. who died while in Immigration and Customs Enforcement custody from dehydration and complications from HIV, with fellow migrants stating that her acute symptoms were left ignored and her autopsy indicating that she may have suffered from physical abuse before she died. The note's conclusion is that there is an urgent need to overturn the Trump Administration's immigration policy regime. In making the argument, the author draws attention to the manners in which certain legal actors have pushed back against the new status quo, pointing to the ways in which the American Civil Liberties Union and other advocacy groups have sued the government over specific policy enactments and lack of due process at the border. The author proposes several broad policies, including increased clarity over immigrants' legal rights, lifting the requirement of forced detention in the vast majority of cases, and elevated institutional attention to the plight of LGBTI asylum seekers. Doing so, the note argues, would prevent the tragedy of Roxsana Hernandez Rodriguez from being repeated.

Annotated by: Patrick Keogh

Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 UC DAVIS L. REV. 121 (2019).

As the Trump administration introduces new policies regarding immigration, plaintiffs have turned to the court system to challenge the constitutionality of said policies. The author provides an update to the ongoing litigation concerning the "Muslim Ban," the asylum ban, Deferred Action for Childhood Arrivals, and Trump's proposed border wall. These policies affect the ability to travel to the United States and have an impact on those who wish to visit family members, foreign students seeking an education, and asylum seekers who are attempting to flee violence in their countries of origin. The author describes four themes that have emerged from litigation in the time of President Trump. These themes focus on the litigation that ensues from the Trump administration's policies, including a political party's challenge of the policies and the legislature's role in setting limits, the court's ability to issue injunctions, the Trump administration's attempt to circumvent the appellate division by asking the Supreme Court to hear the case, and the administration's ability to implement policies through executive discretion. The author concludes that the courts are unable to interfere with legislation based on bad policy or an overexertion of executive power. For example, the Supreme Court reversed the preliminary injunction of President Trump's Muslim Ban, which blocks nationals from certain countries from receiving a visa and entering the United States, and found that the President has great deference in suspending the entry of any noncitizen or class of noncitizens.

Annotated by: Melissa Koppel

DISCRIMINATION

JoAnn Kamuf Ward and Catherine Coleman Flowers, *How the Trump Administration's Efforts to Redefine Human Rights Threaten Economic, Social and Racial Justice*, 4 COLUM. HUM. RTS. L. REV. ONLINE 1 (2019).

In July, 2019, the Trump Administration established the Unalienable Rights Commission, a federal advisory committee with no pre-existing analogue, which was charged with the task of providing new insight and fresh thinking to extant human rights discourse in the United States. The Commission's leadership has repeatedly propounded a view of human rights which emphasizes protection from religious persecution, genocide, torture, discrimination and sexual violence, while declining to embrace a more sweeping interpretation of this concept which would include economic and explicitly race-conscious social policies. The authors articulate a concern that the creation of a novel, high-level advisory committee by President Trump will be viewed by other world leaders as indicative of this administration's views on foreign policy issues, which may then lead representatives of these nations to conform their voting behavior in bodies like the United Nations to the otherwise non-binding statements issued by the Unalienable Rights Commission. The article speculates that disproportionate harm will likely be endured by non-white populations, at home and abroad, and points out that the distribution of wealth and access to public services between racial groups in the United States remains far from uniform. By adverting to examples of civil rights advocates' ability to coerce governments into abandoning discriminatory social policies through an articulation of economic policy as an inherent aspect of full human rights protection, from both American and world history, the authors suggest that the Unalienable Rights Commission may ultimately retard positive social reform. The continuation of political opposition to the current administration's policies by journalists, scholars and the public is counseled by the authors.

Annotated by: David Belmont

Erin E. Clawson, *I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN STATE L. REV. 247 (2019)

There is currently no federal law that prevents misgendering nor grants protection for transgender people in the workplace. Misgendering, which can be mentally damaging to a transgender person, is when a person intentionally or unintentionally refers to a transgender person with names, pronouns, or other words that do not align nor accurately reflect the person's affirmed gender identity. In the past, multiple proposed transgender acts have failed to pass into law due to opponents' argument that the act infringes on the First Amendment right of free speech. However, the right of free speech is not an absolute right, and there are certain areas of speech that the government is able to regulate, which has enabled states like New York and California to pass laws regarding the use of preferred pronouns that in turn make the use of misgendering illegal. Proponents have argued that transgender people should be protected under Title VII of the Civil Rights Act created to protect employees from discrimination "because of sex," especially because according to the Equal Employment Opportunity Commission (EEOC), the misuse of an employee's incorrect name and pronouns could constitute as harassment and sex-based discrimination. The author emphasizes that the implementation of a narrow law protecting transgender people in the work place while simultaneously balancing the First Amendment right of free speech is necessary in ending the issue of systematic misgendering. Congress should therefore pass the Gender Expression in Employment Act, which aims to protect transgender people in the workplace from transgender identity discrimination.

Annotated by: Amanda Povman

Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: The Equality Amendment*, 129 YALE L.J. 343 (2019).

Inequality has been historically rooted in the United States, but a constitutional amendment, specifically, the Equality Amendment, might be the solution to the nation's need for equality. Since the day our country was founded, equality has been a major issue and remains an issue today. While past amendments and legislation have pushed the nation to a more equal society, these changes were always met with some resistance, and real equality in our nation has yet to be seen. For example, the Fourteenth Amendment was passed to guarantee the equal protection of the law to all people, but the Court has historically imposed limitations on the Equal Protection Clause such as requiring discriminatory intent to find a violation. Despite the nation's long list of sex and gender inequality issues such as not recognizing pregnancy as sex based and the unequal pay for women, the authors remain confident that equality is possible. The authors offer a draft of the proposed Equality Amendment and its provisions that provide both affirmative equal rights to all women and additionally, negative rights that prohibit states from denying equal rights to anyone on the basis of an expansive definition of sex, race, or "like grounds of subordination." The Equality Amendment contains adaptable provisions, moves away from past discriminatory common law interpretations, and requires Congress and state legislatures to actively implement the amendment. The United States needs the Equality Amendment, as true democracy depends on it.

Annotated by: Lion Song

Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, Vol. 113, NORTHWESTERN UNIV. L. REV. NO. 5 (2019).

The common approach to detecting discrimination in both law and social science looks at racial discrimination through a generalized conception of comparing the status of otherwise identical units, such as a person or school. This faulty approach manipulates the first instant of communication or judgement between two people, and all but certainly leads to a sense of prejudice one way or another. An act of discrimination is based on social meanings and practices that govern the issue at hand, as well as a moral theory of what is fair at the time and place the of act. The author believes a strong ethical concept should be attached to discrimination, so that people can identify an act as discriminatory only by relying on the reasoning of the act's individual wrongfulness. The author dives into a skit performed by Eddie Murphy on Saturday Night Live, where he, a black man, plays a white man with white face makeup to see how he would be treated as a white man. This goes against what the purpose of the article is, that discrimination of race should not be based on competing statuses of an individual group or category, but rather, discrimination is to be evaluated on a moral as well as ethical standard. Something can only be deemed an act of discrimination if it implicates social meanings in a way that constitutes some social kinds as disfavored or not desired. At the end of the day, a view of discrimination as being an ethical and moral battle, as opposed to simply more than just a preconceived standard that has been applied for decades to preset categories should be applied.

Annotated by: Eli Well

CRIMINAL JUSTICE:

Elizabeth G. Janskzy, *Defining "Local" in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318 (2019).

The state of our nation's criminal justice system has attracted criticism from a broad swathe of legal commentators and scholars, focused particularly on alleged racial inequities, conflicts of interest which inhere in the largely privatized correctional system of the United States and the dangerous conditions endured by inmates. The article traces the emergence of two distinct philosophical strands which advocates of American criminal justice reform have supported, including, the democratizer and localizer movements, and elucidates their similarities and differences. Broadly, democratizers seek to enact criminal justice reforms by increasing public participation and awareness, while localizers believe effective change will only be achieved when legislative power to propound judicial reforms, currently wielded almost exclusively by Congress or federal bureaucracies, is shifted to the state or local level. While both groups of scholars have generated ideas which the author speaks approvingly of, the localizer movement suffers from unique weaknesses primarily stemming from its inability to perfectly conceptualize the ideal geographic unit to which power to enact judicial reforms should devolve. The author proposes that our representative democracy does not adequately respond to the political needs of various demographic groups, particularly ethnic and racial minorities, which compounds the failure of the localizers to describe practical, coherent and achievable reforms as effectively as their counterparts in the democratizer cohort have been able to. The author recommends that members of the legal community seriously consider the proposals offered by criminal justice democratizers, whose proposals would obviate the need for ineffective and inhumane practices like unduly harsh sentencing for nonviolent offenders, while bearing in mind that the policy recommendations they advocate for are distinct from those of localizers, despite any superficial similarities between the two groups.

Annotated by: David Belmont

Molly Griffard, *Bias-Free Predictive Policing Tool?: An Evaluation of the NYPD's Patternizr*, 47 FORDHAM URB. L.J. 43.

Since the rise of utilizing statistics in the criminal justice system, the NYPD has developed the tool, Patternizr, which connects crimes into patterns to assist in efficient law enforcement. However, the author argues that, while the developers of Patternizr claim that it is an unbiased tool, whether it would result in similar disparate treatment as the other algorithms remains unclear. Specifically, although Patternizr attempts to "blind the data" by keeping out the sensitive attributes (e.g., race, gender), keeping vague the proxy of such information, and having human experts for quality control, it is not immune from having trained on already biased data that permeates the criminal justice system. Additionally, data management errors and implicit biases may further compound the biased data, resulting in algorithmic recommendations that may questionably inform police's decision-making process (which contains yet another layer of cognitive bias) on probable cause, implicating Fourth Amendment concerns. Overall, the author argues that predictive policing tools such as Patternizr should be subject to public debate with much more transparency. Before their neutrality can be substantiated, such tools should not be allowed to inform probable cause determination and their use should be disclosed to the defense attorneys. Until the harms of predictive policing tools are limited by policy makers, requesting Brady disclosure of their use on the basis of potential alternate suspects may be an option for defense attorneys to control the damages.

Annotated by: Esther Engelhart

Kent Scheidegger, *Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism*, OHIO STATE J. OF CRIM. L. (forthcoming).

Since the 1958 case Trop v. Dulles, the Supreme Court has used the standard of "evolving standards" with reference to the Eighth Amendment's Cruel and Unusual Punishment Clause in evaluating death penalty cases. Although this standard was meant to bring death penalty sentencing law into alignment with nationwide understanding of what is an acceptable punishment to impose in murder cases, the jurisprudence developed over time by the Supreme Court has lacked coherence and as a result complicated the debate over the death penalty both on the Court and in society ever since. In this article, the author traces the trajectory of a litany of capital punishment cases and finds shifting coalitions at fault for the dissonance existing between various tests and factors of consideration that now exist in the hodgepodge that is Cruel and Unusual Punishment doctrine. Reflecting on both the historical understanding of "cruel and unusual" as it gave rise to the Eighth Amendment, as well as a near-exhaustive, contemporary, textual jurisprudential analysis, the author concludes that our current understanding of the death penalty is a Court-created mess owing itself to different Justices imprinting their own ideological predispositions and moral convictions onto the litmus paper that, at the end of the day, is used to determine if a death penalty sentence passes constitutional muster. As a proscriptive matter, the author proposes a pragmatic approach that would open up the full facts of the crime to a jury, putting all evidence in front of them from the guilt phase of the trial for evaluation, and additionally, use of a statutory restriction taken from the Model Penal Code, where only the factors of 1) lack of significant criminal record and 2) youth, can be taken into consideration by a jury, due to their easily-stated objectivity simplifying the analysis. Finally, the author believes that the democratic process is the ideal manner for determining what other factors are to be considered in capital punishment cases, shifting the decision-making process from the inherently incoherent Supreme Court precedential development process back to the people themselves.

Annotated by: Patrick Keogh

Meghan Racklin, *Title IX and Criminal Law on Campus: Against Mandatory Police Involvement in Campus Sexual Assault Cases*, 94 N.Y.U. L. REV. 982 (2019).

Mandatory law enforcement involvement in campus sexual assault cases are inconsistent with the objectives of Title IX of the Education Amendments of 1972 ("Title IX"), in which provisions regarding civil rights in education prohibits exclusion from educational programs or activities on basis of sex. As a response to the failure of many school systems to adequately address sexual violence on campus, some activists have advocated for subjecting campus sexual assault cases to the criminal process by involving police officers in review committees for allegations of sexual assault or forwarding a report of sexual violence to law enforcement. Further, these mandatory law enforcement proposals foreclose the survivor's ability to use internal, school-based processes. The author argues that such proposals deter survivors from reporting to avoid police involvement due to the police's reputation for dismissing, ignoring, disbelieving, and underreporting rape cases, in addition to the survivor's reluctance to re-traumatize themselves, belief that the rapist is unlikely to be fairly penalized, and complex feelings towards their rapist. Moreover, survivors in over-policed communities face additional hurdles to reporting, including biases on basis of race, sexual orientation, gender identity, and citizenship status. Due to the lack of reporting created by law enforcement involvement, Title IX's goal of deterring sexual violence will not be achieved, survivors will be unable to access resources and support services, and statistics will over represent some groups while underrepresenting others. For these reasons, the author proposes that campus-based adjudication for allegations of sexual assault must be strengthened, reforms to deter sexual violence must be reasonable and proportionate to the Title IX violation, and schools should adopt anonymous reporting options. These viable alternatives better serve Title IX's gender equality goals, as sexual violence statistics will be more accurate and survivors' reporting options will be expanded.

Annotated by: Jenny Lam

Heather Zaykowski, Lena M. Campagna, & Erin Cournoyer Allain, *Examining The Paradox Of Crime Reporting: Are Disadvantaged Victims More Likely To Report To The Police?*, 53 LAW AND SOCIETY REVIEW 1305 (2019).

Although police reporting varies based on factors such as race and socioeconomic status, research examining income and education levels have also yielded inconsistent findings regarding such factors influencing the tendency to report crimes to the police. While some studies report that racial minorities and individuals from low-socio-economic backgrounds are less likely to call the police in order to report crimes, other studies report the contrary. To solve this problem, the author suggests looking at social identities as a matter that intersect and are created through the combination of power and privilege within society. By comparing the distinct police responses to varying groups based on essential factors such as race and socio-economic background, the author explains the existing differences in police reporting behavior based on race and socioeconomic status. The author further explains that using an intersectional lens will allow the disparities in the findings regarding police reporting based on race and class to be reconciled. Addressing race, class, and sex/gender will provide a more lucid view regarding the crime reporting behavior.

Annotated by: Miriam Azizi

Salaam Bhatti, *The Appeal of a Repeal: Analyzing Virginia's Self-Sabotage of Successful Re-entry for Drug Felons*, 22 RICH. PUB. INT. L. REV. 1 (2019).

Poverty and disparate treatment of communities of color dates back to 1607, Virginia. Since then, Virginia has imposed a felony drug ban on individuals convicted of felony drug offenses. Once an individual is convicted of such an offense, the individual is subjected to a lifetime ban from receiving necessary government aid, such as Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) benefits. Although Virginia has made an attempt to eradicate some of these economic injustices by repealing the ban for SNAP benefits, Virginia is one of forty-seven states that still has a full ban on TANF benefits. Individuals who are desperately at need are deprived of these essential benefits, and are often forced to recidivate. Virginia must repeal the felony drug ban entirely; a blanket repeal of the ban can provide essential benefits to as many as 467 people. Thus, a blanket repeal of the felony drug ban is necessary to provide for struggling and vulnerable individuals who are most at need for these benefits. Without the repeal, Virginia will continue to add to the "monstrous cycle of never-ending poverty."

Annotated by: Brigette Merzel

WRONGFUL CONVICTIONS

Meridith J. Heneage, *Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming*, 19 WYO. L. REV. 305 (2019).

After being wrongfully convicted of rape and imprisoned for over twenty years in Wyoming, the Rocky Mountain Innocence Center successfully advocated for Andrew Johnson's exoneration. Upon his exoneration, he did not receive any needed financial support or relief from the state. The State of Wyoming is one of seventeen states that does not have legislation requiring compensation for exonerees of wrongful convictions. Generally, an exoneree can receive compensation through civil litigation, private legislation, or statutory compensation. However, all three avenues are limited and not guaranteed, as they either require a statue or political connections, and are quite expensive. To solve this problem, the Author suggests that Wyoming adopt a holistic compensation statute to ensure that exonerees receive the appropriate financial support and other non-financial services. While Wyoming has enacted certain laws that have benefitted the wrongfully convicted, such as a post-conviction DNA statute and the Post-Conviction Determination of Factual Innocence Act, it failed to fully compensate and support exonerees. In order to provide adequate support to exonerees, Wyoming's statute should provide holistic services as well as generous funds that are based on the individual's needs to compensate for the financial losses suffered as well as the loss of liberty. Furthermore, the process and burden of receiving compensation should be placed on the government, and the claimant's burden should be minimized. By passing this statute, Wyoming would be signaling to society that it refuses to allow the innocent to be mistreated by the criminal justice system and are deserving of state support.

Annotated by: Tziona Breitbart

Jason M. Chin, *Open Forensic Science*, 6 (1) J. LAW J. L. BIOSCI. 255 (2019).

Open forensic science allows for improved reliability and evaluation of expert forensic evidence, and in turn results in fairer legal outcomes because parties are better able to gauge the strength of their claims. Forensic practices have historically not included scientific practices such as "the empirical testing of claims, blinding, randomization, and measuring error" since they arose from criminal investigations rather than scientific academia. A report by the National Research Council Committee of the National Academy of Sciences (the 'NAS Report') pointed out multiple deficiencies in forensic science, such as in the education and training of the scientists, standards and protocols for reliability, and methods; in turn, misleading forensic evidence has led to wrongful convictions. A current challenge of forensic evidence is showing the validity of the methodologies used, which can be done by large studies which measure how often the examiners come to the right answer. Another concern is the need for objective methods; this is achieved through making expansive databases openly available – such as, DNA profiles which can be used to corroborate DNA analysis software. Openness and transparency in forensic science can also be improved by disclosing analytic choices, documenting conversations between analysists, and more objectively determining the probative value of forensic evidence. There are also hurdles in making forensic science open, such as admitting mistakes, funding, and privacy concerns associated with making data more widely available. In analogizing this to the legal field generally, the author concludes that "open justice," achieved through transparency and the use of the media and publishing decisions will improve the public's confidence in forensic science.

Annotated by: Christina Giordanella

Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. OF CRIM. L. & CRIMINOLOGY 43 (2020).

While criminal confessions are powerful pieces of evidence, they also lead to the problem of false confessions. People make false confessions because of situational factors such as lengthy interrogations, the use of false evidence, and minimization tactics, and dispositional factors such as juvenile status and mental impairment. Moreover, people's own innocence makes them susceptible to being open with the police, which can facilitate false confessions as well. The author rejects the notion that only credibility deficits—when the testifier is given less credibility than deserved—cause testimonial injustice; instead, she argues that credibility excess—when the testifier is given more credibility than deserved—can cause testimonial injustice as well. This can be seen in the way that an accused's confession is given more weight than the accused's recanting of the confession. The author also discusses what she calls the agential testimonial injustice, a type of testimonial injustice where an individual's testimony is given excess credibility even though the individual testified while deprived of his or her epistemic agency. Finally, the author also discusses why confessions are often privileged, arguing that the unlikeliness that people would believe someone would confess to a crime they did not commit, and the fact that confessions change others' perspectives that can give rise to more misleading evidence in the future, play a role in privileging confessions. All in all, our criminal justice system should take another look at the way they view confessions from a perspective that includes the agential testimonial injustice.

Annotated by: Lion Song

JUNVENILES AND THE JUVENILE JUSTICE SYSTEM

Hilary Wilkerson, *Special Needs, Special Solutions: Using Title II of the ADA and Behavioral Supports to Protect Students with Disabilities from Arrest*, 44 N.Y.U. REV. L. & SOC. CHANGE 98 (2019).

Students with disabilities face a variety of difficulties while attending school, and with the growing presence of School Resource Officers, there has been an increase in traumatizing experiences where these students are unnecessarily arrested. Typically, students with disabilities are granted protections through the ADA or IDEA act, but unfortunately, both acts in combination with relevant judicial decisions have written out protections and reasonable accommodations for students with disabilities during the arrest process. Thus, changes to the ADA and IDEA act, alongside increased training of Resource Officers and the introduction of Memorandums of Understanding between officers and their school districts, would provide relief for students with disabilities in the school setting. Changes to Title II of the ADA that would further incorporate law enforcement activities, including arrests on campuses, could reduce the number of traumatic experiences students with disabilities face in school; this would require officers to provide reasonable accommodations for students with disabilities even when making an arrest. Further, Wilkerson argues that even if Title II of the ADA did not apply to arrests outside of the school setting, arrests that take place in the school setting are fundamentally different because the arresting officer typically will have full knowledge of both the situation and the student who is at issue, and can appropriately act with this knowledge in conducting the arrest. In conclusion, Wilkerson's proposed amendments would include an earlier requirement for behavioral supports, enhanced school policies and procedures in the event of misbehavior, and a requirement for schools and law enforcement agencies to have Memorandums of Understanding in relation to these procedures, enforce that these accommodations would be reasonable, but more importantly lessen the burden on students with disabilities and reduce the risk of unnecessary and potentially unlawful arrests by School Resource Offices in the academic setting.

Annotated by: Joshua Weisenfeld

Elisse Newey*, More Than a Chronological Fact: Roper v. Simmons as an Argument for Moving Away from Zero-Tolerance Discipline and Toward Restorative Justice*, B.Y.U. EDUC. & L.J. 227 (2019).

Historically, the public education system has used punitive measures, such as the zero-tolerance policy, in handling juveniles in schools, which has led to a greater number of students facing the possibility of being categorized as a delinquent, ending up in the juvenile justice system, and as a result ending up in the criminal justice system. Additionally, courts became able to order students to attend school, and impose detention measures for failing to do so, which has resulted in these students further engaging in criminal behavior. Research suggests that zero-tolerance policies have not only been ineffective in handling students, but have also led to discriminatory practices within schools, where blacks and Latinos have had disciplinary measures taken against them more often than their white counterparts, and additionally, have impacted the number of students entering the juvenile justice system, and as a result, the amount of students re-offending in the future. In Roper v. Simons, the Supreme Court argued three reasons why capital punishment for juveniles is not permitted: 1) juveniles are still developing; 2) juveniles are more susceptible to outside pressures; and 3) the character of juveniles is transitory and more open to reformation, all of which the author articulates to support his argument that restorative justice may be more beneficial than punitive measures. The author proposes that the educational systems should focus on a restorative approach rather than a punitive approach, and as a result should implement community measures to create environments for students to support each other and correct student behavior. Therefore, the educational system should focus on building a community of peers to handle issues of youth development and misbehavior.

Annotated by: Samantha Balanevsky

Lauren Knoke, *See No Evil, Hear No Evil: Applying the Sight and Sound Separation Protection to All Youths Who Are Tried as Adults in the Criminal Justice System*, 88 FORDHAM L. R. 791 (2019).

In the United States, there are an estimated 32,000 youths detained in adult facilities each year. Youths incarcerated with adults are at a heightened risk of dangers such as sexual assault and suicide. To mitigate this risk of violence against youths in adult facilities, Congress introduced the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) which mandates sight and sound separation to increase the level of safety for youths who are incarcerated with adults. In 2018, the JJDPA was reauthorized through the Juvenile Justice Reform Act of 2018 which amended sight and sound separation protection by doing away with blanket protection for all youths held in adult facilities and allowing for judicial discretion in determining whether such protection is in the interest of justice. In deciding whether a youth should be covered by sight and sound protection, a judge may consider certain factors—the youth's age, the youth's mental and physical maturity level, the youth's current mental state, the nature and circumstances of the offense for which the youth is being tried, the youth's history of any previous delinquent behavior, the availability of detention facilities to meet the needs of the youth and protect the safety of the public, and any other relevant factors. The author argues that to preserve the JJDPA's mission of setting exemplary practices for the protection of youth, the application of sight and sound separation should be made more comprehensive by providing for the inclusion of all youths who are charged as adults within the criminal justice system. The author disputes the arguments that are typically given against a blanket policy; namely that the potential increases in costs associated with sight and sound protection, structural hardships a facility may face when imposing an expanded version of sight and sound separation, that youths who are transferred to adult facilities are the worst of the worst offenders and should not be afforded the protection, and increased state noncompliance with an increased demand for sight and sound separation. As a result, the author concludes that taking away blanket protection allows for inconsistent sentencing practices and exposes youth to inappropriate placements and harms, both physical and psychological, that can occur as a result of exposure to adult inmates.

Annotated by: Andrea Barrientos

Hilary Wilkerson, *Special Needs, Special Solutions: Using Title II Of The ADA and Behavioral Supports To Protect Students With Disabilities From Arrest*, 44 N.Y.U. REV. OF L. & SOC. CHANGE (2014).

Students with disabilities, besides dealing with many physical, emotional, and intellectual challenges each day, face an alarmingly high risk of arrest in K-12 public schools due to a misdiagnosis of misbehavior that would alternatively be better addressed with reasonable accommodations and behavioral support. The author takes the position that Title II of the American Disabilities Act ("ADA"), which prevents discrimination by mandating individuals with disabilities be benefited from and participate in integrated programs and activities in community settings, also be applied to arrests in school settings. Further, schools are required under the Individuals with Disabilities Education Act ("IDEA") to provide each student with an individualized education plan tailored to each student in order to achieve behavioral progress and improvement. With this application in school settings, the author firmly believes misbehavior would be reduced, law enforcement involvement would be eliminated, and the number of arrests on school campuses would decrease. The article performs a case study of a 10-year-old child with autism and how he was arrested in school by officers, pinned against the ground, and handcuffed. The school sided with the officer, stating he followed protocol, and ignored helping the child who needed behavioral support. Data from schools, and the ADA shows that 26% of students are arrested, and 75% of those students restrained have a disability. Title II of the ADA should be extended to schools, to allow for reasonable accommodations to students with disabilities that would reduce arrests and positively impact these students to help them fight, and overcome the tall challenges they face on a daily basis.

Annotated by: Eli Well

Bryce Anderson, *The Costs of Youth: Voluntary Searches and the Law's Failure to Meaningfully Account for Age*, 62 ARIZ. L. REV. 241 (2020).

Juveniles in the United States often consent to searches of their persons by authority figures because they do not believe refusal in an option, which poses a serious problem because juveniles now have diminished Fourth Amendment rights as compared to their adult counterpart. However, juveniles should instead be afforded greater Fourth Amendment protections because they are constitutionally different from adults, according to the Supreme Court's Eighth Amendment jurisprudence on sentencing. In Roper v. Simmons, the Court ruled that the use of death penalty against minors is unconstitutional because minors have an underdeveloped sense of responsibility, are more susceptible to peer pressure, and have more flexible character traits. The ruling in Roper was further extended in Graham v. Florida, disallowing a sentence of life-without-parole against minors involved in non-homicidal crimes, and in Miller v. Alabama extended even if a minor commits a homicide offense. The author argues that the line of reasoning the Court employed in its Eighth Amendment analysis should apply in equal force in the Fourth Amendment context as well. Since the Court recognized in Miller that "children are constitutionally different from adults for sentencing," they should be different for search purposes also. Additionally, the author also argues that because states already recognize the uniqueness of juveniles in statutory-rape laws, marriage laws, and contract laws among others, state legislation should likewise enact laws to afford more protections to juveniles against Fourth Amendment searches.

Annotated by: Jack Yeh

Sue Burrell and Ji Seon Song, *Ending "Solitary Confinement" of Youth in California*, 39 CHILD. LEGAL RTS. J. 42 (2019).

Despite existing as a key form of punishment in the United States juvenile justice system, solitary confinement has been found to have particularly adverse effects on the youth in the United States juvenile system. While solitary confinement is used widely in both adult and juvenile detention centers, California is a state which has sought to limit the use of such punishment in its justice system. Through these efforts, California Senators and the Inspector General stepped in to promote legislative changes to juvenile justice reform by helping implement campaigns such as "Books Not Bars" and issuing reports on the hardships created by long term isolation. The addition of national measures by Congress and President Obama to combat the use of solitary confinement has also contributed to reform promulgated in California. Moreover, California passed legislation in 2016 that provides strict rules for future use of confinement practices, employing four-hour limitations and less restrictive options. The author advises that moving away from solitary confinement and locked room practices is just the first step and argues that juvenile justice centers should continue to move toward non-confinement behavior management programs that focus on positive reinforcement. Shifting the system away from the use of confinement as a means of discipline requires that judges, advocates, legislative bodies, justice commissions, and family members be vigilant and involved in carrying out these changes. Such efforts will be necessary in order to rectify the current situation in the juvenile justice system.

Annotated by: Sophia Temis

Brittany Cicirello, *Raising the Age of Juvenile Delinquency: What Science Says About the Age of Maturity and Legal Culpability*, 53-Oct PROSECUTOR 4, October 2019.

Proponents of neurodevelopment science propose that the juvenile system be reformed to include "emerging adults" within the category of individuals who are considered "juveniles." Emerging adults are individuals between the ages of eighteen and thirty-five. Neurodevelopment science supports treating emerging adults as juveniles by showing that an individual's brain development continues until he or she reaches the age of thirty-five. The author finds this evidence insufficient to justify a "wholesale" reform of the juvenile justice system and sees no legally meaningful reason to move away from an age-based threshold when defining juvenile delinquency. Moreover, experts have warned against an increase in crime rates which may result from the overall perception that the proposed reform carries lenient legal consequences. Furthermore, the legislature and the courts may be inadequately equipped to reform the juvenile system based on neurodevelopment science, because there is no consensus within the scientific community as a whole about how the evidence should change our understanding of when an individual reaches adulthood. The author concludes that while current scientific findings may support using age as a mitigating factor for sentencing purposes, any further reform to the juvenile system, as to emerging adults, is unsupported at this time.

Annotated by: Michele T. Rozier

Andrienne C. Walters, *The Forgotten Children: Victims of Domestic Violence, Victims of the System*, 12 ALB. GOV'T L. REV. 286 (2018-2019).

Each year, there are over five million children who witness domestic violence and suffer from untreated trauma. When these children do not receive appropriate treatment to address their trauma, they enter into a cycle of violence, particularly delinquency, gang membership, and parental battering, which ultimately manifests into future domestic violence. The genesis of the problem is that the American juvenile justice system has effectively ignored child witnesses of domestic violence by focusing on restorative and punitive approaches, such that they concentrate largely on the victim and community, rather than rehabilitation to address the root causes of the child's trauma. Following contemporary community collaboration models of juvenile intervention, the author suggests that therapeutic jurisprudence in juvenile cases will provide more holistic and promising intervention techniques that screen for the presence of domestic violence in the home and inquire about a juvenile delinquent's childhood to identify unaddressed trauma. Once identified, these children would be matched with appropriate treatment to address the trauma long term, and require that perpetuators of domestic violence pay for the services, to the extent possible, to help them overcome the trauma they caused and prevent future delinquency. These practices will not only recognize that domestic abuse is a manifestation of a child's untreated trauma from witnessing domestic violence, but also treat their trauma and end the cycle of violence.

Annotated by: Johnny Thach

POLICING

John O. Haley, *Punish or Prevent: The Night & Day of Criminal Justice*, 7 VA. J. CRIM. L. 116 (2019).

The American prison system, which focuses on retribution and is heavily influenced by the decision by police to arrest, prosecutors to charge, judges to convict, and prison guards to manage jails, is in deep contrast with the Japanese prison system, which has an apology culture and is more inclined to drop charges if the police and legal system determine that the wrongdoer has shown remorse for his actions. The author argues that America's prison system is in the dark and is comprised of a high crime rate, mysterious arrests, and unfair prosecution, while the Japanese system, the "Day", has a low crime rate, a transparent prison system, and its citizens are full of repentance for their actions. The author notes that aside for the different criminal justice regimes in the United States and Japan, there is also a stark contrast in their crime rates—America holding an unusually high number and Japan holding the lowest number, which the author suggests is due to differences in outlook. The American retributionist outlook leads way to incarceration, while the Japanese view which believes in the offender's remorse leaves room for the offender to mend his ways through alternative alleys. Ultimately, to depart from the present "Night" in the American justice system, less focus must be placed on retribution and more faith must be placed in the offender's remorse and wiliness to make right his previous wrongdoings.

Annotated by: Melissa Koppel

Brittain McClurg, *Reducing the Impact of Racial Discrimination in Policing*, 2019 J. DISP. RESOL. 201 (2019).

The United States's history of racially discriminatory policies continues to be reflected today in the over-policing of minority communities in urban areas. Historically over the twentieth century these policies have ranged from formal housing segregation, restrictive covenants in property, and redlining by federal agencies. Minority communities today face lasting impacts of these policies with police targeting them as pedestrians and at traffic stops at a much higher rate than their white counter-parts. Recent protests of the deaths of unarmed black men, such as, Freddie Gray and Michael Brown, have made the Department of Justice investigate and enter into consent decrees with cities to improve this problem and stop cities from using over-policing of minorities as a source of revenue for the township. The author focuses on mediation between officer and community member, implicit bias training, and community policing as the main strategies to combat this issue. The effectiveness of these solutions relies on the officer accepting they have biases for implicit bias training (the author notes the statistical support for the effect of implicit bias training is not concrete), copying the New Orleans method for mediation, and clear guidelines and goals for community policing to be effective. After the explosive protests in Ferguson and Baltimore city leaders have a vested interest in reducing the biases and prejudices community members and police officers have held against each other; when the three strategies discussed in the article are performed correctly relationships can be built between citizens and officers, and decades of discriminatory policies can begin to be undone.

Annotated by: Caroline Kutschera

Christopher Logel, *Cracking Graham: Police Department Policy and Excessive Force*, 20 BERKELEY J. AFR.-AM. L. & POL'Y (2019).

In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court specified that the Fourth Amendment's "objective reasonableness" requirement governs police use of force during the seizures, however, the Supreme Court's decision have left circuit courts with no clear guidance on what considerations are relevant to the determination of objective reasonableness. Five circuits (the First, Second, Third, Eighth, and Ninth) have held that police department policy is relevant to use of force analysis, while four circuits (the Fourth, Seventh, Tenth, and D.C.) take the opposite view. Whether police department policy is relevant to excessive force analysis will have a wide-ranging effect—since most police departments and municipalities closely follow and adapt to developments in constitutional police law, even a minor change in the law could have significant street level effects. The Author agrees with the minority of circuits that an officer's compliance or non-compliance with individual police department use of force policy is not relevant to constitutional use of force analysis. The Author discusses three arguments against the relevancy of police department policy in Fourth Amendment use of force analysis. First, according to the analytically salient features of Graham's test for objective reasonableness, including individual police department policy in the test would be clearly inconsistent with Graham's mandate. Second, because police departments are part of the executive branch, incorporation of police department policy into use of force jurisprudence runs afoul of the principle of separation of powers. Finally, there are significant practical considerations that caution against allowing police departments to interject their own policies into the Fourth Amendment's objective reasonableness requirement. If the relevancy of police department policy in excessive force analysis becomes widely accepted, then police departments will try to craft more permissive use of force policies so that they can later cite an officer's compliance with such policies as a defense to civil liability and damages claims, which will both be harmful to police and society at large.

Annotated by: Yifan Li

INEQUALITY: SOCIOECONOMIC STATUS AND ITS IMPLICATIONS

Anjaleck Flowers, *The Implied Promise of a Guaranteed Education in the United States and How the Failure to Deliver It Equitably Perpetuates Generational Poverty*, 45 MITCHELL HAMLINE LAW REVIEW 1 (2019).

The United States education system perpetuates poverty beginning in the earliest stages of life, especially for those who are minorities, impoverished, and disabled. Education is compulsory under all state laws, yet the national educational system is underfunded, unfair, and ignores the realities of being an impoverished and minority student. Plyer v. Doe and anti-discrimination laws attempt to provide equal education to all students, but they fall short. The federal and state constitutions also do not provide adequate safeguards to ensure equal opportunities and education for children, and education is not a fundamental right as stated by the Supreme Court. However, legislation implies that education is a right, therefore leaving society at odds with the harsh reality of having enormous physical and financial obstacles yet being legally compelled to attend education. The Author cites to a 2014 Education Commission report to propose solutions to educational inequities in the U.S., pointing to 11 factors that create successful schools. The Author also uses certain states as case studies to argue that state-fund education task forces may be a good idea or simply combatting systematic poverty. Integrating support systems into schools may be another solution. Ultimately, the Author concludes by asserting that the education system must tackle these issues with intention and mindfulness.

Annotated by: Julia Wald

Katelyn P. Dembowski, *The Case for Socioeconomic Affirmative Action: A Jurisprudential Examination at the Disparity Between Privilege and Poverty in Higher Education Admissions*, 31 HASTINGS WOMEN'S L.J. 129 (2020).

Current affirmative action programs are insufficient in bridging the gap between students of low-income and affluent backgrounds in higher education admissions. Affirmative action programs began after the signing of the Civil Rights Act of 1964, where Lyndon B. Johnson began fighting to bridge inequality gaps between minority groups. While the Supreme Court has identified that higher education institutions are in need of diversity, universities have yet to truly reevaluate their policies to ensure they have legitimate reasons for their admissions decisions which are not directly related to the applicants race or wealth. Although the court has attempted to remedy these inequalities by amending their race policies, low income groups are facing the same struggles and haven't seen the same type of modification. The author argues that socio-economic based affirmative action programs, focusing on economic circumstances of applicants from underprivileged areas, are needed in order to combat the economic disparities that have been ongoing in the higher education system for centuries. State and federal governments need to invest resources in underprivileged and impoverished areas, equipping students with the tools and knowledge of how the education system is run and how they can succeed, both in the application process as well as once they arrive on campus. The socio-economically disadvantaged are facing the same disadvantages and educational barriers as racial minorities when applying to college. Implementing socioeconomic-based admissions strategies will not only promote economic diversity on campus, but will also bring a racially diverse student body to universities as well.

Annotated by: Emily Ingall

Marylyn Harrell, *Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color*, 11 GEO. J. L. & MOD. CRIT. RACE PERSP. 139 (2019).

The "War on Drugs," initiated by Richard Nixon in the 1970s and reinvigorated in the 1980s by Ronald Reagan, has been criticized for decades as being racially charged and unduly punitive against individuals of color—this Note explores how the "War's" policies are also unduly punitive against so-called "women of circumstance." A woman of circumstance is defined in the Note as someone charged with conspiracy to commit a drug-related crime based on her association, familial or romantic, with someone who is active in the drug trade. These women tend to be women of color and are usually the wives, girlfriends, mothers, daughters, or sisters of men active in the drug trade; they often continue their association with these men due to financial reliance, fear, or emotional attachment. This Note argues that the combination of the lenient definition of "conspiracy" provided by the Supreme Court in Pinkerton v. United States in combination with mandatory minimum sentences proffered by the United States Sentencing Commission makes it so that women of circumstance, who often have only an ancillary role in the drug trade, are faced with severe sentences.

Annotated by: Kara Nowakowski

TRANSGENDER RIGHTS

Daliah Silver, *Transforming America's Perspective: How Recognizing the Rights of transgender Youth Will Empower the Next Generation*, 39 CHILD. LEGAL RTS J. 233 (2019).

International human rights groups and the American media have undeniably improved in their representation and support of transgender rights. Nontheless, transgender children in American are often irrevocably damaged by their parents' lack of acceptance. Parents who cause long-term damage to their children's well-being are often considered protected by the constitutional fundamental right of parental control. Since parental support is critical to the safety of transgender children, the author argues that it is essential that children be protected against transphobia from parents. Accordingly, there should be legal recognition of gender identity and rights to transition for transgender children.

Annotated by: Claire Mooney

Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246 (2019).

Recently schools have been grappling with how to provide equal opportunities to transgender and intersex students in team sports in a way that is safe and fair for them and their cisgender teammates. While at the university level the NCAA has adopted rules based on hormone levels, K-12 schools have tended to take one of two approaches: (1) students can play on the team that matches their gender identity, or (2) students must play on the team that matches the gender on their birth certificate. Both of these policies have led to unfortunate outcomes, namely a transgender boy being forced to wrestle a cisgender girl at a high school wrestling match and transgender girls dominating girls' state track competitions. Considering both Title IX and Equal Protection, the author proposes two additional approaches: (3) allow students to play on the team that matches their gender identity, but adopt NCAA hormone rules if there is a bona fide safety concern or there is an elite competition where, for example, college scholarships may be on the line; or (4) do away with gender binary teams altogether and compose teams based on alternative physical characteristics, such as "skill, height, weight, strength, or testosterone level." Since these characteristics are proxies for gender, the teams will likely still be primarily gender-binary, however the teams would be more inclusive of those students on the margins: low-testosterone, small, moderately-talented cisgender boys; high-testosterone, large, exceptionally-talented cisgender girls, transgender students taking hormones to match their gender identities, intersex girls with high testosterone, etc. Aside from comporting with Equal Protection and Title IX, these latter two approaches have the added benefits of instilling tolerance and confidence in both cisgender and transgender students.

Annotated by: Ashley Dylenski

ME TOO MOVEMENT

D. Andrew Rondeau, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. (2019).

Sexual harassment nondisclosure agreements ("NDAs") enable wealthy parties to utilize their resources in order to take advantage of the dependent party's weakness and to perpetuate patterns of sexual harassment and abuse. The vast majority of NDA's occur as components of three sources: settlements, employment contracts, and arbitration agreements that arise from those contracts. The main judicial solution to the threat posed by sexual harassment NDAs is the public policy doctrine, which states that the terms of the contract are unenforceable if either (1) legislation provides that it is unenforceable or (2) the interest in its enforcement is clearly outweighs in the circumstances by a public policy against the enforcement of such terms. The author discusses two possible statutory reforms: 1) a law enacted in California that prohibits the enforcement of any contract that prevents a victim or a witness from coming forward in a civil claim, which will allow the victim to personally recover damages by means of civil claim, and 2) a law enacted in New York that prevents employers from independently establishing NDAs that would prevent their employees from disclosing information about sexual harassment in a civil suit, but the employee still has the option to enforce the NDAs. While these two legislations are quite recent, from the time of their enactment, there has been a decrease in sexual harassment NDAs. The author states that when a state has a law that restricts sexual harassment NDAs a court can be more confident in refusing to enforce sexual harassment NDAs. To successfully remedy the current system which perpetuates harassment, such measures should continue to be adopted and embraced.

Annotated by: Lyudmila Gilyadova

Javo Johnson*, An Epidemic of Workplace Sexual Misconduct: The Birth of the Weinstein Clause in Merger and Acquisition Agreements*, 52 TEX. TECH L. REV. 377 (2020)

With the increase of sexual assault allegations in the workforce came the "Weinstein clause," which began appearing in merger and acquisition contracts in early 2018. The clause exists in various forms, but mainly asks target companies to make legal representation regarding their executives' behavior in the workplace and whether those senior employees have been subject to allegations of sexual harassment within a particular time span. The introduction of the "Weinstein clause" was largely due to the increase of subordinate employees who were sexually harassed and too afraid to report the sexual misconduct in the workplace. This Comment addresses how the legal trend of adding the "Weinstein clause" and asking executives to disclose past sexual misconduct in the workplace affects future merger and acquisition agreements. Often, societal norms and the unwritten rules of social acceptability apply to and dictate workplace ethics and behavior. As the Me-Too movement has aimed to push for safer workplaces and for the empowerment of victims, workplaces have responded by introducing the "Weinstein clause" to promote transparency when assessing the risk of acquiring a company. Buyers must perform their "social due diligence" and seek out all, if any, executives' sexual misconduct in the workplace while conducting merger and acquisitions. The author emphasizes that companies are under public pressure to expand their due diligence efforts by having attorneys draft merger and acquisition agreements that implement a "Weinstein clause" in response to societal workplace norms. While this step will not completely eradiate harassment, it will allow for the fostering of a safer workplace enviorment for all.

Annotated by: Amanda Povman

Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273 (2019).

The #MeToo movement began in October 2017 when the media reported allegations of sexual assault and harassment against numerous high-profile men. Coverage quickly grew to encompass a wide array of industries and institutions. Although much of the general public considered this to be new information, survivors had been reporting their abuse through large decentralized networks for years, by sharing accounts of sexual violation with one another in person, or by sharing strategies to avoid harassers in the workplace. Through expanding technologies, #MeToo has created new channels for reporting sexual misconduct without directly invoking the legal system or law-adjacent institutional structures. The author argues that the normative implications of this new sexual misconduct reporting should be considered by those committed to improving societal response to allegations of sexual assault and harassment. The author classifies informal avenues of complaint into four distinct categories: The Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New court of Public Opinion. The characteristics of these unofficial channels for reporting sexual misconduct are classified based on two key features: whether the accuser is anonymous, and whether access to the channel is restricted or open to the public. Issues arise, when victims report anonymously through unofficial channels, the recipients of the report are not in positions of power over the abuser, leading to limited accountability. Additionally, complaints through unofficial channels raise concern about bypassing mechanisms of formal investigation, leading to resistance or backlash which discredit the #MeToo movement as a whole. Ultimately, the author argues, the way to manage the risks associated with informal accusation is to simultaneously advance formal mechanisms of accountability.

Annotated by: Jennifer Russnow