ANNOTATED LEGAL BIBLIOGRAPHY

HEALTHCARE

Rohan Keith Andresen, Article, We All Bleed Red: Dismantling The Discriminatory Gay Blood Ban In The Era Of Bostock, 53 LOY. U. CHI. L. J. 233 (2021).

Since its enaction during the AIDS/HIV epidemic, there has been criticism over the discriminatory practice of the Blood Ban (BB), which prohibited homosexual men from donating blood. The FDA feared gay men transmitting AIDS/HIV to others through blood transfusions. In the years since the BB was imposed, it has been shortened to one year of abstinence, for the year 2015, followed by three months of abstinence, in 2020. During this same period, many milestones have reduced the discrimination of homosexuals in the court system. These include unconstitutional voting exclusions in Romer, homosexual men's ability to engage in private sexual acts in Lawrence, the recognition of a fundamental right to marry in Obergefell, the protection of sexual orientation in employment in Bostock, and the repeal of "Don't Ask Don't Tell." Yet, the Ban remains. The author proposes that if the BB were reviewed by the Court, it would be unconstitutional under the rational basis of review and intermediate scrutiny. With today's new technology, medication, screening, testing of blood for diseases, and the realization that other people, namely heterosexuals and drug users, can also contract AIDS/HIV, the Ban is not rationally related to any purpose. The Ban harms a group, homosexuals, more than it protects the public. The author is confident that intermediate review would be met, as in Bostock, and the Ban would be abolished. Its elimination would have far-reaching positive effects such as a larger supply of available blood and would treat all individuals, no matter their sexual orientation, equally.

Annotated by: Bailey Appel

Frank Griffin, Article, Liberty and Health, 20 U. Ark. Little Rock L. Rev. 1 (2021).

Health and liberty, both integral rights provided to citizens of America, were compromised as a result of the government's efforts to control the COVID-19 pandemic and resulted in significant side effects on physical and mental health. Restrictions effected active liberty; the freedom to act, and passive liberty; the freedom not to be acted against. Active liberties such as going out socially, going to work, or going to the doctor were revoked under the stay-at-home-order during the pandemic. Restricting activities such as these can cause side effects related to social isolation, financial distress, and medical distancing. Passive liberties such as granting governmental power to confine, restrain, and discriminate through quarantines, mask mandates, and gathering size restrictions led to similar side effects as well as more harmful outcomes. Passive liberties are critical in promoting the health and well-being of individuals are they foster respect, dignity, autonomy, and self-worth which in turn reinforce the health benefits provided by active liberties. While these restrictions were put in place to "flatten the curve" and avoid overpowering hospitals and medical resources with the physical ailments caused by COVID-19, the government in turn created an environment in which the benefits of the restrictions did not outweigh the major side effects to physical and mental health. In the future, those who invoke public health policy should remember to weigh the advantages and disadvantages of each potential action to ensure the pros of restricting a United States citizen's liberty outweighs the negative health outcome that is sure to follow.

Annotated by: Samantha Berger

Colleen Reider, Note, June Medical Services L.L.C v. Russo: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion, 55 UIC L. Rev. 120 (2022).

A person's autonomy has been a central theme in society as the world navigates how to address the deadly pandemic and the recent discussions surrounding abortion and a woman's right to choose. Despite not specifically enumerated in the Constitution, the right to privacy is regarded as an implied fundamental right. The Roe v. Wade decision included abortion in the right to privacy, which is thus owed heightened protection against governmental intrusion. Planned Parenthood v. Casey narrowed the Roe decision and instead applied an "undue burden standard" which was defined in Whole Women's Health v. Hellerstedt. The 2020 case of June Medical Services L.L.C v. Russo mirrored the claims in Hellerstedt and while the abortion right was ultimately protected, the decision left vulnerable the future of that protection. The decision essentially notified the states that the Court will likely uphold abortion regulations if written differently than Act 620 (the law at issue in Russo). The struggle for absolute autonomy in the realm of abortion derives from the stigmatization that women are not men's equals. The Russo decision did not further protect women's rights but essentially stuck with the status quo, postponing the inevitable overturning of Roe. To break the ongoing cycle, the conversation must shift from the necessity in upholding precedent to one about women's rights and essentially basic human rights.

Annotated by: Danielle Bluth

Gowri Krishna, Kelly Pfeifer, Dana Thompson, Note, Caring for the Souls of Our Students: The Evolution of a Community Economic Development Clinic During Turbulent Times, 28 Clinical Law Review 243, (2021).

Michigan Law School hosts the Community Economic Development Clinic ("CED") and is run by the authors Gowri Krishna, Kelly Pfeifer, and Dana Thomspon. These three professors reflect on how the pandemic affected students in the clinic in their article. The Clinic provides transactional legal services to local programs in order to promote diverse and equitable community growth. Spanning over one semester, the CED is divided into two parts: the classroom seminar and client representation. The Clinic focuses predominately on conversations surrounding systemic racism and trains Clinic members on the history of racially discriminatory practices in Detroit. The Covid-19 Pandemic added a level of difficulty that the professors worked hard to overcome. Even through remote learning, the Clinic strived to help students learn how to become more vulnerable with one another; an especially important lesson when dealing with tough subjects. Students were asked to consider how the Pandemic laid bare inequities in Detroit and how community outreach could help. However, students were also reminded of the importance of remaining realistic when considering ways to close the racial wealth gap through non-profit work, a harsh lesson learned through speaking with clients. Although it was more difficult to build trust over Zoom, the Clinic organizers felt that students had all the right tools to take the lessons learned and apply them to communities and the world.

Annotated by: Hillary Borker

Maayan Sudai, Article, Not Dying Alone: The Need to Democratize Hospital Visitation Policies During Covid- 19, 24 (4) Med. L. Rev. 613 (2021).

Restrictive hospital visitation policies during the ongoing Covid-19 pandemic have resulted in patients 'dying alone,' isolated from their loved ones. In the US, numerous hospitals have enforced strict no-visitation policies, and while some hospitals had end-of-life exceptions in place, exceptions often did not apply to those who were affected by Covid- 19. There is a perception that hospitals, because of their epidemiological expertise, are in the best position to draft such policies. However, the author proposes that more perspectives should be included in the decision-making process (thus democratizing the policies) and that drafting such policies should be conceptualized as a task of balancing the harms and benefits to distinct groups. The social and psychological costs such as anxiety and sorrow stemming from the fear of dying alone, as well as the effects on the family and friends of those who died alone, and the doctors who have had to witness people die alone should be included in this cost-benefit analysis. The democratizing of visitation policies can be fostered with the use of legal strategies such as using federal regulation and state law as possible sources of legal action and filing complaints with the Department of the HHS Office of Civil Rights. These strict visitation policies can be challenged using legal frameworks in order to redistribute the wide discretion of power given to hospitals and allow more peoples' perspectives to be considered in the drafting of such policies.

Annotated by: Salisha Kayum

Katie Raitz, Note, Public Health and Racial Inequality: Why the Opportunity Zone Program Fails Low-Income Communities and Costs Lives, 12 U.C. IRVINE L. REV. 315 (2021).

The Covid-19 pandemic underscores a long-standing concern for public health experts: the link between poor health and wealth disparities in the United States, especially for people of color. Although these trends are not new, past reforms have failed to remedy these inequalities. The Opportunity Zone (OZ) tax program was enacted in 2017 and promoted by Trump to help alleviate disparities. It utilized tax benefits to incentivize investments in low-income communities, or "Opportunity Zones." But despite its popularity, the program is flawed. The author argues that redistribution measures, including universal basic income and reparations, is the best way to repair these inequalities. The author begins her argument with a history of "Black Capitalism," a Nixon-led effort that has continued throughout administrations yet fails to meet its economic and social goals. She then discusses the relationship between low health outcomes and poor communities, and its predominant effect on communities of color. She concludes with an overview of the OZ program and its shortcomings. The author addresses the program's failure to create jobs and community development programs, and discusses the lack of regulatory requirements. Instead, the author calls on the new administration to raise incomes and provide reparations to the communities most in need to reduce race-based economic disparities.

Annotated by: Hannah Kramer

Julia Puaschunder & Martin Gelter, Article, *The Law, Economics, and Governance of Generation COVID19 Long-Haul*, 19 Indiana Health L. Rev 47 (2022).

The COVID-19 pandemic has created a new era in global health care and has dramatically changed the way society operates. There are estimates that about 80% of the world's population will be infected with the virus at some point and many people who have contracted COVID-19 have also experienced long-term symptoms, which are still misunderstood by scientists. The average recovery period of COVID-19 lasts fourteen days, but those with long-haul symptoms, experience symptoms for weeks and months after the initial infection. Due to the long effects of COVID-19, there will be an unprecedented change to society. The authors propose that future individual, political, and corporate decisions will be impacted due to long-haul COVID-19, and as a result, the virus has the power to change regular decision-making society is generally accustomed to. The economy was and continues to be impacted by the trends of infection rates. Corporate and political powers must adjust to create a healthy work environment for employees and can face rising tort liability for the failure to do so. Artificial intelligence has allowed lay citizens to take control of their health and in turn become "citizen scientists", while also helping scientists and health experts gain more knowledge about COVID-19. These citizens are essentially conducting experiments and analyses on themselves by observing what effects COVID has on them. Long-haul COVID-19 partially being recognized as a disability may create pressures for overall healthcare reform and furthermore, the creation of economic policies that reflect society's needs.

Annotated by: Niara Morrison

John C. Mubangizi, Article, P*oor Lives Matter: COVID-19 and the Plight of Vulnerable Groups with Specific Reference to Poverty and Inequality in South Africa*, 65 J. of Afr. L. 237 (2021).

While the COVID-19 pandemic has affected the entire world, it has had the most detrimental effects on those who live in poverty, as it has broadened the already wide wealth inequality gap. South Africa is the most unequal country in the world, and its most impoverished population is young Black females. However, South Africa also has one of the most seemingly democratic constitutions, which preserves its citizens human rights, social justice, and rights to equality, privacy, security, access to information, healthcare, and freedom of movement. The COVID-19 restrictions put in place by the South African government have infringed on these protected rights but have most significantly affected the rights of those living in poverty, prompting extreme socio-economic difficulties. For example, the COVID-19 lockdown made it incredibly difficult for low-income workers to earn a living, since many of their jobs rely on the sale of goods on foot or going to and from others' homes as domestic workers. To conform with the rights promised to citizens by its constitution, the South African government needs to take significant steps to fix the disproportionate human rights issues the pandemic has highlighted. Such actions and laws should include ensuring all people have access to and receive proper healthcare, making information about the pandemic accessible for all citizens, regardless of electricity access, and providing affordable housing. If South Africa continues to not treat the effects of COVID-19 as a human rights issue, it will continue to violate its constitution and widen the wealth inequality gap.

Annotated by: Emily Silverman

Patricia P. Zuloaga, Article, *Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?*, 21 Hum. Rts. L. Rev., 899 (2021).

The author of this article tackles the issue of access to abortion in Latin America. Zuloaga conducts a comparative analysis of the trajectory of abortion rights in the United States and Latin America and argues that although the privacy doctrine of abortion has legalized certain forms of abortion in the United States, there is a current pushback against this doctrine from both "pro-life" and certain feminist groups. As stated by Zuloaga, this privacy doctrine is not effective within the Latin American context, due in part to the influence of the Catholic Church and authoritarian regimes. This context requires a different discourse for abortion rights, focused on the broader scope of reproductive justice rooted in human rights and the right to dignity. Zuloaga asserts that the Inter-American system can provide a jurisprudential lens to frame the discourse around human rights. The author then presents cases in the Inter-American Court which, although "lacks case law that affirms abortion rights per se…has copious jurisprudence on the rights violated by abortion bans that, when considered together, make a strong case for decriminalization." These cases include outright denial of forced sterilization, recognize structural oppression based on gender, and conceptualize the right to integrity as based on individual suffering. Zuloaga concludes that if advocates intend to broaden access to abortion across the region, they must frame claims in terms of human rights compromised by abortion bans. The author argues that the Inter-American system is likely to support such a claim.

Annotated by: Anda Totoreanu

Daniel G. Orenstein, Article, Nowhere to Now, Where? Reconciling Public Cannabis Use in a Public Health Legal Framework, 126 PENN ST. L. REV. 59 (2021).

With the jurisdictional trend towards the legalization of marijuana for adults, the question of how to go about actually implementing a workable regulatory framework that considers the equitable wellbeing of society as well as the protection of public health, has shown to be one of ambiguity for legislatures. Most prominently, among the states moving towards legalization, most have taken varying approaches regarding where consumption should take place. Ranging from complete private consumption to unrestricted public use, the two most common methods utilized by legalizing states remain analogous with the models already in place for the regulation of tobacco and alcohol. While cannabis use possesses similar qualities as those associated with the consumption of tobacco and alcohol, including second-hand smoke exposure and intoxicating effects, it is unique in considerations of a regulatory framework as it exhibits only selective qualities from each. Due to this distinctiveness, cannabis use regulation cannot be one of complete adoption, but rather adaptation. Through a public health lens however, an analysis of these two schemes evidence that the tobacco model, which prohibits public indoor use and restricts outdoor use, is the approach that is least likely to frustrate public health goals or add to negative social outcomes. Alternatively, as public health dangers posed by cannabis use compels immediate action, a private property restricted model serves as an effective, yet amendable, short-term approach to balance these concerns with those associated with the normalization and negative stigma surrounding cannabis legalization.

Annotated by: Brooke Hodgins

FIRST AMENDMENT

Joel M. Gora, Article, *Free Speech Matters: The Roberts Court and the First Amendmen*t, 25 J. L. & Pol'y (2016).

The First Amendment's protection of free speech and how far its protection extends has long been an area of contention. Consequently, when Justice Scalia passed away in 2016, many feared that the once speech protective Supreme Court would be no more. During its ten-year run, the Roberts Court proved to be a staunch supporter of free speech, affirming, and reviving some of the most powerful First Amendment precedents and principles from earlier eras. However, dissenting Justices, prominent legal scholars, and others were quick to rebuke the Court's free speech decisions asserting that the Court had overstepped in overprotecting freedom of speech. Such critics demanded that the Court adopt a more "liberal" view or "more willingness to balance government interests against free speech." The issue, as the author articulates, is that without the Court's powerful voice for free speech, the already pervasive derogation of free speech in everyday life will worsen. Ad hoc balancing by the Court will ultimately herald ill for free speech and the values it serves. As the author is quick to point out, our society has grown accustomed to trying to punish or silence those whose views we find offensive or disagree with; a dangerous precedent to set. Consequently, the author argues that it is essential that at least where the law is concerned the Supreme Court continue to emphasize that free speech must be the rule and government censorship an anomaly. The legacy of the Roberts Court must not be forgotten or dismissed if we are to prevent everyday censorship from becoming the norm.

Annotated by: Paloma Bloch

Laura P. Graham, Article, *"Safe Spaces" and "Brave Spaces": The Case for Creating Classrooms That Are Both*, 76 U. Miami L. Rev. 84 (Nov. 2021).

While the demand for "safe spaces" in school has risen with Generation Z ("Gen Z"), it is also crucial to recognize that law students are being trained amidst unprecedented societal challenges and political polarization, and they will be called on to use their legal training to effect social change. The meaning of safe spaces has morphed into being a place where marginalized students can be free from any discomfort, and this umbrella protection has impeded the essential critical thought and intellectual growth that accompanies challenging and sensitive material in legal education. In and out of the classroom, law schools must balance the need to have true safe spaces- where marginalized students can be safe from the threats and demands that come from their identity, with the need for "brave spaces"- where students can productively discuss and process challenging new ideas and difficult issues. Here, the author suggests that law schools should consciously work to create classrooms that are both safe and brave by encouraging students to engage respectfully and honestly with each other over controversial topics. To do so, professors must be brave, open the door to such dialogue, intentionally plan for constructive in-class lessons and interactions that promote feelings of safety for all students, and participate in cross-cultural training as professional development. These practices will enable law students to safely learn to be impactful and educated agents of change.

Annotated by: Emma Bruder

Olivier Sylvain, Essay, Platform Realism, Informational Inequality, and Section 230 Reform, 131 Yale L.J.F. 475 (2021).

Using Section 230 of the Communications Decency Act, online intermediaries are escaping liability for the hateful and violent content third parties post on their sites, and these intermediaries constantly amplify the negative content to achieve their main goal–to keep consumers attention while collecting data for advertisers. Section 230 is read broadly to avoid a restrictive effect and this is apparent from courts barring cases that deal with online intermediaries' designs dealing with anonymity, notifications, recommendations, and location tracking. However, there is an emerging view by judges that lessens the bar for plaintiffs to bring suit and has held sites like Amazon and Snapchat liable for their design. The author proposes that online intermediaries should be held liable when their designs produce harmful results that target members of historically marginalized backgrounds. Only Congress, with new legislation, can change the interpretation of Section 230, and some proposals are: (1) to exempt Section 230 immunization where online material that infringes on civil rights is amplified, (2) to create civil rights violations including other informational harms targeted at a protected class, and (3) to require online services to remove material that a court adjudicates as unlawful within four days of the order. Correction of the twisted interpretation of Section 230 is long overdue; this interpretation has created a law that goes beyond the protections the First Amendment and general third party liability affords while providing no redress to the vulnerable public.

Annotated by: Payten Slaughter

Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 Yale L.J. 427 (2021).

With the advent of the Internet, American democracy—and particularly the legal regime around the First Amendment—has struggled to adapt, modernize, and successfully digitize its conception of the public square. Franks's solution is ultimately to the conceptualize and redesign the ways in which our digital platforms (e.g., Twitter, Facebook, YouTube) engage and encourage public discourse; specifically in order to foster what she identifies as "radically democratic and inclusive dialogue." Examining these digital spaces, Franks identifies the conflict existing with these corporate for-profit entities wielding such unregulated power in controlling online political discourse and the inherent danger for democracy writ large. While these privately-owned and for-profit corporations wield immense, unchecked influence over the public discourse, Franks notes that under modern First Amendment and state-action doctrine, these private non-state actors have enormous power to design these digital public forums in such a way that may help create more discursive and open communities online; democratizing the political discourse on their platforms to be more open and inclusive. Franks examines how online harassment particularly towards women, LGBTQIA+ folks, and people of color—and digital anonymity—hinders democracy's flourishing, with the tech industry's unwillingness to adequately address these issues. In moving beyond the model of the public square—physical spaces which have historically upheld oppressive racial and economic hierarchies of power—Franks offers the possibility of a digital future which promotes reflective and intellectual spaces designed for democracy.

Annotated by: Davis Villano

OTHER

Michael Allan Wolf, *Zoning Reformed*, 70 U. Kan. L. Rev. 171 (2021).

The COVID-19 pandemic has presented the United States government with an opportunity to reevaluate its zoning laws, not solely in terms of directives to take in response to this crisis, but also in anticipation of future crises. The original underlying reason behind zoning and public land use laws was not necessarily to reduce the spread of disease, but rather to prevent overpopulation and congestion, which resulted in the reduction of the spread of contagion for some, particularly around the time of the 1918-1919 Spanish Influenza. However, these laws also resulted in the exclusion of communities such as African Americans from perceived desirable neighborhoods and exposed these communities to hazards including "environmental racism." These issues exist today just as they did one hundred years ago, and data has shown a connection between life in a congested area and exposure to diseases such as COVID-19, resulting in environmental racism. There are many available remedies that the government may implement to address these issues such as altering or abolishing ordinances that define "home occupations and professions allowable in residential districts," permitting a range of "accessory dwelling units in single-family residential zones," and amending zoning ordinances so commercial users may submit plans ahead of time for "contact-free or-reduced customer contact." These proposed solutions, as well as others, should be considered by the government to address the existing weaknesses in the country's zoning laws.

Annotated by: Lindsay Brocki

Brian Boggs, Note, *Expression of LGBTQ Student Sexual Orientation and Gender Identity in the K-12 Educational System*, 43 Mitchell Hamline L.J. Pub. Pol'y & Prac. 64 (2022).

The Constitution is silent when it comes to regulating student speech and expression. While the Supreme Court has ruled on several cases involving student speech, the Court has yet to hear a case involving student speech and expression involving LGBTQ students expressing their sexual orientation and gender identity in K-12 schools. In this note, the author analyzes several appellant court decisions, like Fricke and McMillen and attempts to establish a framework for future cases that may arise in this context. Fricke and McMillen similarly held that a student may not be prohibited from taking a person of the same-sex to a school-sponsored event. In reaching these decisions, the courts used tests established in Supreme Court cases like Tinker, Bethel, and O'Brien, which guide courts to consider whether the specific speech/expression "substantially interferes" with the educational process. After reviewing the rules established by the various Supreme Court and appellant court decisions, the author lays out a theory intended on guiding future courts through an analysis when faced with a First Amendment claim brought by an LGTBQ student against a school's speech/expression prohibition. First, the author suggests that a court must determine whether the speech was expressive conduct or pure speech, and whether the speaker had an intent to convey a particular message. Next, the author writes, a court should look to the school itself, and potentially apply the "substantial-disruption test." However, as held in the Massachusetts case Doe v. Yunits, a substantial disruption must be something more than disapproval from the student body and faculty.

Annotated by: Justin Danzinger

Kimberly A. Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 Wm. & Mary L. Rev. 497 (2021).

When it comes to gender equality in the United States, we can trace the lack of progress back to when the U.S. government was founded. While countries in the European Union (EU) have moved forward to advance the interest of women in economic seats of power through gender-based initiatives such as Board Gender Diversity (BGD), the U.S. has not. Women in the U.S are still paid less than men for the same jobs and continue to be kept out of important economic and political decision-making roles. When evaluating eight countries in the EU with BGD mandates, the author found that among the three most successful in their equality initiatives had three characteristics in common: (1) constitutional amendments that support positive actions such as laws with the goal of achieving substantive equality between women and men; (2) BGD legislation, which included sanctions for failure to comply; and (3) a significant enough time to comply with the mandate (five years). While BGD requirements have shown to be a promising path to gender equality in the EU, given the deeply rooted cultural subordination of women and resistance to legally required gender mandates in the U.S., BGD efforts, like the one in California, will not survive. To promote gender equality in the U.S. to succeed, the author proposes a newly crafted Substantive Equality Amendment to the U.S. Constitution. This positive approach focuses on systemic change that requires the government and companies to take affirmative measures to reduce discrimination against women.

Annotated by: Katherine Dunayevich

Article: Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM LAW REV. 335 (2021).

Since the 2000 contest between Bush and Gore, presidential elections have been characterized by what Goldfeder calls "excessive judicialization" and "an avalanche of lawsuits as a common, even integral, component of electoral strategy." Goldfeder predicts that this will continue, and as such, details four key ways in which the courts were used and abused in the 2020 election–the most severe stress test on our electoral process in 150 years. First, the election saw excessive litigation restricting access to the ballot. COVID-19 exacerbated the difficulties of satisfying state requirements for candidacy. Nevertheless, the courts deferred to stringent state laws, and as such, some candidates were kept off the ballot. Next, once ballots had been set, many actors attempted to change voting procedures in response to the pandemic. States saw litigation challenging policies restricting the use of mail-in ballots, which had been touted as a safe method to vote without risking one's health during the pandemic. This was most contentious in battleground states, some of which ultimately invalidated mail-in ballots. Third, 2020 saw an exceptional number of cases challenging the counting of the vote, aligned with the aggressive Trump campaign to maintain his incumbency. Finally, when all else failed, the Trump campaign moved to its fourth strategy: contesting the outcome of the election and asking courts to overturn the result. This failed, leading to the Insurrection and the ongoing narrative that the election was stolen.

Annotated by: Peri Feldstein

Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster Care*, 136 Yale L.J. F. 246 (2021).

The author in The Case for Creative Pluralism in Adoption and Foster Care, approaches a question that has been at the center of political and cultural debate for the last quarter century; whether divergent beliefs about marriage, family, gender, and sexuality can be aligned. In answering this question, the author critiques countervailing viewpoints regarding religious and secular beliefs about marriage and sexuality and proposes a creative pluralistic model relying on Obergefell's stated commitment to pluralism. The author stresses that a pluralist model would invoke mutual respect and dignity and does not necessarily involve assent to the other side's ideology. Additionally, the author purports that there needs to be a negotiated understanding that protects LGBQT civil rights as well as longstanding religious beliefs. Specifically, the author focuses on the conflict of divergent ideologies in the area of adoption and foster care, and advocates for the adopting of a pluralistic model aimed at the coexistence of LGBQT civil rights and traditional religious beliefs. The pluralist model seeks to avoid harm to vulnerable foster children that stems from a delay in reaching settlement. This harm could be significantly alleviated by the absence of religious barriers to same-sex couple seeking to adopt. The author is optimistic that policymakers will seek reasonable accommodations for both sides. Lastly, the author reasserts that pluralistic solutions are available to balance competing interests and are a favorable alternative to winner-take-all measures which exacerbate conflict.

Annotated by: Steven Kaufman

Scott Skinner-Thompson, Article, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454 (2021).

The author argues that legal privacy protections are a crucial element in countering the negative impacts of government surveillance, which often include unnecessary incarceration, injury to mental health, and restrictions on personal liberties. Thus, bolstering our privacy protections should be a priority as we look to reformation of the operation of public life in both digital and physical contexts. Marginalized communities such as LGBTQ+, racial minorities, and immigrants, are particularly vulnerable to the harms of such forms of surveillance, and therefore, implementing vigorous privacy protections stand to make an even greater difference on behalf of these groups. One harm with an effect so broad that it is difficult to demarcate, is the suppression of heterogeneous thought in public spaces, rendering the public sphere a sort of conformist echo chamber. This only serves to exacerbate political polarization between the dominant sphere and other spheres which have ideological value to offer but are marginalized. The author proposes, as a solution to such destructive homogeneity, leveraging privacy protections in order to create what he refers to as "controlled visibility" for marginalized groups, which is essentially the ability to appear and participate in public life on one's owns terms and without the fear of violence or harassment that many experience in our current state of surveillance. This will empower and encourage members of marginalized groups to partake in and ultimately shape the public sphere, which is key in our pursuit of a more equitable democracy.

Annotated by: Sean Murphy

Stella B. Elias, Article, *Law as a Tool of Terror*, 107 Iowa L. Rev. 1 (2021).

While the Trump Administration is known for its anti-immigrant animus, the roots of masquerading anti-terrorism objectives as immigration laws began in the early 2000s. However, the Trump Administration laid out the tools, including rhetoric targeting groups based on identifying factors, Executive Orders, and Presidential Proclamations in the form of travel bans, to effectively terrorize immigrants living in the United States. In the wake of the Trump Administration lies individuals and communities in a constant state of fear and terror. As a result, future administrations and lawmakers must work hand in hand to rectify the harms done by the Trump Administration by amending immigration laws and reassessing the administrative agencies that are responsible for immigration decisions and enforcement. Reverting to the pre-Trump Administration status quo by repealing legislation is not enough to achieve this goal. Rather, the author suggests the Biden Administration must engage in concrete lawmaking that cannot be repealed from administration to administration, change the deeply seeded philosophy of the Department of Homeland Security and how it addresses immigration matters, reduce reliance on the political sphere, and provide greater protections for the privacy and civil freedoms and liberties of citizens and immigrants. Most importantly, the Biden administration must make a concerted effort to rebuild the trust between the public and the government's immigration operations. These are necessary steps to ensure that comprehensive immigration reform is permanent instead of subject to change with each subsequent administration.

Annotated by: Olivia Nevola

Mitchell N. Berman & Guha Krishnamurthi, Article, *BOSTOCK WAS BOGUS: TEXTUALISM, PLURALISM, AND TITLE VII*, 97 Notre Dame L. Rev. 67 (2021).

The landmark Supreme Court decision in Bostock v. Clayton County in 2019 interpreted Title VII's provision prohibiting employment discrimination based on "sex" as extending to sexual orientation and gender identity as well. Justice Neil Gorsuch based the majority opinion on a textualist approach to statutory interpretation, meaning the terms used in the statute are given their plain and public meaning. However, the authors believe that the textualist approach employed and the results attained in the case are inherently at odds. While the outcome is probably substantively and morally correct, the use of textualism to achieve this result was mechanically flawed. Crucially, Justice Gorsuch analyzed the statutory phrase, "because of such individual's sex" as requiring sex to be a "but-for" cause of the employment discrimination. Justice Gorsuch reasoned that because the employer did not object to women that were sexually attracted to men but changing the sex to a man attracted to other men became objectionable, Bostock's sex was a "but-for" cause of his termination. According to the authors, this analysis misconstrues the textualist meaning of "because of," since discrimination based on sexual orientation and gender identity does not require knowledge of the person's sex at all. For instance, an employer could be told that an anonymous applicant identifies as gay. The employer knows nothing about the sex of the applicant, yet they can still form a negative bias and reject the person's application. So, even though being a man was a "but-for" cause of the rejection, it was not because he was a man. Hence, Bostock did not use the plain and public meaning of the phrase "because of such individual's sex." Thus, the decision's grounding in textualist principles is flawed, even if the outcome is correct.

Annotated by: Julia Patz

Mario Patrono, Issue in Honour of Professor John Prebble: International Law: *International Law and Global Politics in a Post-Pandemic World: Homo Sapiens?*, 52 Victoria U. Wellington L. Rev. 897 (2021).

Considering the massive changes that global COVID-19 pandemic conditions have required, the world must reevaluate global politics and international relations. The author argues that, as other pandemics have before it, the COVID-19 pandemic is a driver of global transformation and critical innovation. In response, the international community finds itself on the brink of a new "New World Order." First, the author visits the introduction of international bodies, international agreements, and various regional and international conventions and courts around the world. The author explores the power these bodies and systems have been granted, along with the inherent limitations to this power, such as the weakening of the United Nations system. Next, the author explores the concept of the globalized world, wherein borders become less easily defined, and the ways in which the international community presently lacks the proper framework and political foresight to enable individual growth and development in a globalized setting, thus leading to "global disorder." Then, the author dives into what this all means for the post-pandemic future, pointing to different inter-and-intranational global actors and their responsibilities along the road ahead. A "business as usual" approach would lead to certain economic, social, and climate disaster, particularly as the devastating effects of climate change are exacerbated by nationalism, neoliberalism, and Western capitalist essentialism. The author concludes that the way forward is to protect peace among nations, as well as sustainable development and civil co-existence at an individualistic scale. This can be achieved through a supranational government, wherein member states cede authority and grant jurisdiction to a larger multinational system. It may fall into the traps of idealism but could ultimately promote State solidarity and strengthen the international systems already in place.

Annotated by: Heidi Sandomir

Guha Krishnamurthi, Essay, *Not the Standard You're Looking For: But-For Causation in Anti-Discrimination Law*, 108 Va. L. Rev. 1 (2022).

The decision of Bostock v. Clayton County ushered in a new era of anti-discrimination law. It prohibited employment discrimination on the grounds of sexual orientation and gender identity, but its reasoning used textualist principles to achieve that end. As a result, the Bostok decision changed the landscape for anti-discrimination suits, establishing but-for causation standard. In Bostock, this approach required the Court to change one factor, the plaintiff's sex, and determine if a potentially discriminatory policy would lead to a different outcome. If the court finds a person was fired "because of" their sex, there is but-for causation. Some legal scholars embraced this approach and hope to apply it to other civil rights causes. However, the author highlights the flawed application of the but-for cause standard in Bostock; she also identifies areas where the but-for cause test could lead to unfavorable outcomes. Particularly, the but-for test could be underinclusive. For example, bisexual and pansexual people, whose attraction is not limited to one gender, would have a harder time satisfying the but-for test since their sexual preferences would not necessarily change in response to their own sex. The but-for standard would also be impotent against discriminatory policies, neutral on their face, that seek to exclude trans individuals. There is also a threat over inclusivity when majority groups use but-for test to dismantle anti-bigotry policies like affirmative action hiring. The author concludes by offering a pluralist interpretation of Title VII to replace the but-for causation standard. This approach focuses on a wider set of factors that avoids the mechanistic rules but-for and in turn but-for's erroneous outcomes.

Annotated by: William Seguin

Elizabeth B. Cooper, Marcy L. Karin & Margaret E. Johnson, Article, *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1 (2021).

In 2020, online controversy arose over policies vis-à-vis menstruation and the bar exam. Two concerns were expressed: (1) the ability to access menstrual products or even go to the bathroom if one began bleeding during the exam, and (2) the requirement that all personal property brought into the test site often needs to be in a clear plastic bag, causing privacy issues for anyone menstruating. This can negatively impact both the physical and the mental state of menstruating test-takers, and consequently their test scores. The authors find these policies in violation of the Equal Protection Clause, as well as state laws regarding non-discrimination and human rights. An advocacy organization called Menstrual Products and the Bar was created in July 2020 by the authors, which sent out letters demanding a change in bar exam policies; in February 2021, the American Bar Association's Resolution 105 recommended that test-takers be permitted to bring personal menstrual products to the exam and grant dignified access to these products during the exam. The goal is that all bar exam policymakers set permanent regulations to ensure that menstruating test-takers have dignity, privacy, and fair treatment, with policies such as allowing personal menstrual products to be brought in, granting access to bathrooms as-needed, and providing accommodations such as seating near the exit. Further, the authors advocate for all exam staff to be trained in how to properly administer the bar exam without discrimination and for transparency in policy for test-takers.

Annotated by: Elka Blonder

Jody Freeman & Sharon Jacobs, Article, *ARTICLE: STRUCTURAL DEREGULATION*, 135 HARV. L. REV. 585 (Dec. 2021).

Structural deregulation encompasses how presidential administrations can control administrative states and disable an agency's ability to execute its congressional statutory mandate. For example, the Trump Administration repealed and weakened regulations within agencies dealing with environmental protection, civil rights, education, healthcare, immigration, etc., and impaired agencies through structural deregulation. Structural deregulation and "good governance" are difficult to distinguish, but there is a difference in changing regulations for overall efficiency than pursuing actions to immobilize agencies. The Supreme Court such enabling deregulation and administrations undermining an agency's capacity to accomplish statutory tasks led to encouragement for the adverse effects of structural deregulation to transpire. Because structural deregulation is susceptive to political regimes, most notably during Republican Administrations, powerful administrative actions may lead to detrimental effects. Structural deregulation can understaff agencies aiding in the marginalization of programs/operations, allow for a reduction in budget and resources halting abilities to collect and produce vital information, provide agencies with a lack of expertise and unqualified individuals, and negatively affect an agency's overall reputation. These components can potentially force agencies to compromise their ability to perform essential functions. The best option to halt the undermining of agencies is through the political realm, including limits on administration discretion, budget limitations, stronger oversight from Congress, and implementing various administrative laws and regulatory reforms.

Annotated by: Calli Schmitt