# ANNOTATED LEGAL BIBLIOGRAPHY

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# CONSTITUTIONAL LAW

Joel K. Goldstein, *Teaching Constitutional Law After The Trump Presidency*, 66 ST. LOUIS U. L.J. 409 (2002).

Joel K. Goldstein discusses how Constitutional Law should be viewed differently after Donald Trump's presidency. While law schools have always significantly impacted the scholarly understanding of the Constitution, there is a special need now for schools to recommit to a clear constitutional foundation for the country. The author elaborates on how President Trump's administration challenged pre-existing norms regarding how Constitutional Law should be taught in law schools. He argues that one reason for the proposed change is because of President Trump's potentially undemocratic presidential actions, which interacted with the Constitution in many forms unlike his predecessors. This is also due to how Trump pushed the Supreme Court to write new doctrine and utilize obscure constitutional provisions in unprecedented ways in connection with the Court's assessments of his behavior. Goldstein further adds that significant historic events and national movements that occurred throughout the duration of the Trump administration are other motivators for the need for change. He explains how law schools should teach core constitutional provisions and how individuals should act when these principles conflict with their own personal or partisan beliefs. Law schools have the responsibility to restore constitutional values that might have been neglected during the time President Trump was in office, by teaching in the classrooms, clinics, and courses open to the public.

**Annotated by:** Hailey Dobin Reichel

Anthony M. Ciolli & Dana M. Hrelic, *Third-Class Citizens: Unequal Protection Within United States Territories*, 55 SUFFOLK U. L. REV. 179 (2022).

Residents of the United States territories are often described as second-class citizens because the federal government deprives these individuals of certain fundamental rights afforded the citizens of the fifty states. This second-class treatment is lawful under the *Insular Cases*—a group of early twentieth-century Supreme Court decisions which held that residents of United States territories do not automatically enjoy all of the rights protected by the Constitution. Territorial governments rely on the *Insular Cases* to further deprive certain individuals, often classified as third-class citizens, of fundamental rights—such as the right to own land or participate in elections—due to their gender, national origin, sexual orientation, religion, and other immutable characteristics. To prevent territorial governments from withholding rights from these third-class citizens, some limitations and rules need to be in place to prevent governments from using cultural preservation as an excuse to effectuate a tyranny of the majority. In this article, Ciolli and Hrelic propose six principles to guide courts in balancing individual rights with the need for cultural preservation in United States territories. They assert that such a balancing will effectively maintain territories' unique cultures while also respecting the American ideal of equal protection under the law, thereby preventing the existence of third-class citizens.

**Annotated by**: Zoe Zingale

# CRIMINAL LAW

Michael Buchhandler-Raphael, *Overmedicalization of Domestic Violence in the Noncarceral State,* 94 TEMP. L. REV. 589 (2022).

Until recently, domestic violence has been viewed as a gendered crime with a single, common motivation wherein men abuse women to exert patriarchal control. However, research shows that domestic violence is a multifaceted issue with co-mingling root causes, such as poverty, substance abuse, and poor mental health. Thus, scholars and advocates have called for the decriminalization of domestic violence, suggesting instead that perpetrators of these crimes should be diverted to rehabilitative healthcare programs. However, Michael Buchhandler-Raphael argues that alternative mandatory treatment programs are often just as punitive and coercive as the carceral system—without providing defendants the same due process protections. To remedy this problem, Buchhandler-Raphael suggests that only those batterers who have legitimate mental health problems should be diverted to healthcare programs. Additionally, he argues that mandatory legal representation and adversarial proceedings should be required before employing involuntary medical interventions.

**Annotated by**: Zachary Verbit

Ariba Ahmad, *The Next Step in Civil Rights: Abolish Absolute Prosecutorial Immunity so Prosecutors Cannot Use Their Power to Violate Others' Constitutional Rights*, 72, CASE W. RSRV. L. REV. 839 (2022).

Ariba Ahmad argues that absolute prosecutorial immunity from suits alleging prosecutorial misconduct must be prohibited to hold district attorneys accountable and deter such misconduct. Prosecutorial misconduct arises when a prosecutor breaks a law or a code of professional ethics in a case, such as withholding exculpatory evidence. Prosecutorial misconduct is often unknown to defendants, and the adversarial system incentivizes prosecutors to win every case they try at the expense of a just trial. Absolute prosecutorial immunity must be abolished because professional disciplinary measures and criminal and civil liability can effectively deter such misconduct. Ahmad argues that individuals should be able hold prosecutors accountable under § 1983 because this statute was designed to hold state actors accountable for their constitutional violations; despite precedent in *Imbler v. Pachtman* which found that common-law holds prosecutors immune from § 1983 suits, which he sees as erroneously decided. Section 1983 was created to combat the oppression of newly freed Black individuals during the Civil War, however the inability to bring § 1983 suits against prosecutors disproportionately disadvantages people of color, specifically Black people. Furthermore, the concern that holding prosecutors accountable under § 1983 will increase frivolous litigation is unwarranted because there are safeguards and rigorous pleading standards designed to prevent this.

**Annotated by**: Tabatha Cortes

Deena Keilany, *Precedents Ignored: Erroneous Application of Due Process Precedents Lead to Unjust Consequences for Pretrial Detainees and A Lack of Accountability for Jailers—*Whitney v. City of St. Louis*, 887 F.3D 857 (8th Cir. 2018)*, 100 NEB. L. REV. 762 (2022).

In *Whitney v. City of St. Louis*, Whitney Jr. committed suicide in custody while detained pre-trial. His father sued under 42 U.S.C. § 1983, alleging that he died because of the officer's deliberate indifference by failing to monitor him, not getting medical care quickly, and failing to timely intervene. The court held that the proper standard of review for reviewing an officer's deliberate indifference was both subjective and objective, disposing of the *Kinsley* precedent, which would have only reviewed objectively, as inapplicable to a case involving indifference. Deena Keilany argues that the Court erred in *Whitney* by failing to follow *Kinsley.* However, there exists a circuit split over whether *Kinsley* applies to all pretrial claims or only those dealing with use of force. Keilany argues that an objective standard of review is preferred because it honors the intent of the Due Process Clause to protect against deprivation of liberty, protect detainees from punishment, and shield jailers from liability when they act in good faith.

**Annotated by**: Maleah Bradley

Amy F. Kimpel, *Criminal Law: Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439 (2022).

A nation-wide attempt to make the criminal justice system more equitable by decreasing criminal records has, in fact, caused the opposite effect; deepening racial disparities and legitimizing a system in which race and class are indisputably intertwined with criminal record status. The two most prominent strategies to prevent defendants from facing the obstacles that arise from having a criminal record are diversion and expungement. In practice, these methods, though different in application, both leave a person who has previously been accused or convicted of a crime without a criminal record. Diversion provides one charged with a crime the opportunity to avoid a conviction by agreeing to participate in a rehabilitative program, while expungement essentially erases a criminal record. Though on the surface these plans appear to be beneficial, the effects favor wealthy white defendants, and disproportionately burden low-income Black individuals. The prohibitively high cost of diversion programs undermines the goal of the program by greatly limiting who can participate. Denying low-income and indigent people access to a program intended to alleviate the burdens of a criminal record perpetuates a class divide. Similarly, expungement frequently involves hefty legal fees, creating the same unfortunate effect. In order for these well-intentioned plans to achieve their desired outcome of greater equity, they must be made more widely accessible and be accompanied by a change in the societal opinion of those with criminal records.

**Annotated by**: Jessica Waldman

# CULTURAL PROPERTY

Roopa Bala Singh, *Yoga As Property: A Century of United States Yoga Copyrights, 1937-2021*, 99 DENV. L. REV. 725 (2022).

It has been contended that no one owns yoga. However, yoga copyright owners have been able to overtake the practice from Indian culture where it originated. As yoga has become more of a public movement, nations such as the United States, have molded it into something that can be sold and exclusively owned, through books, magazines, and public spectacles. Yoga copyright first became prominent in the U.S. in the mid-twentieth century, in which the copyright owners were predominantly Indian. However, as yoga practice continued to rise in the United States, its ownership transformed and became overpowered by whiteness. This American obsession with the practice of yoga has thus amounted to appropriation of the tradition. As a result, the healing practices of yoga have now become shaped by western civilization's white wellness. To decolonize yoga, an important step is to create it as "real" property in land, to break away from the abstract Intellectual Property regimes that have held yoga hostage. To physically practice yoga in any moment or environment helps to push back on its copyright ownership. In addition, the practice of yoga can be observed in other ways, by means of Indian classical music, meditation, and medicinal foods. Engaging in all of these practices allows for yoga to be better accessed and implemented worldwide.

**Annotated by**: Julia Maxman

# DRUG POLICY

Michele I. Naples, *Estimating The Savings From Decriminalizing Drug Consumption: The Case of New Jersey*, 19 RUTGERS J. L. & PUB. 353 (2022).

The War on Drugs has been ineffective at reducing crime and has been disproportionately enforced against Black and Latinx communities. Over the last decade, New Jersey has made efforts to de-escalate its War on Drugs including: investing more in the Department of Health, implementing a Drug Court Program, reducing sentences for those charged with selling drugs near schools, eliminating cash bail for some low level offenses, and introducing COVID-related early releases. Although this has been partly successful, inertia from the "Drug War prison-industrial complex" continues to be an economic drain on the state's budget. Many of the state's drug-related arrests appear to be a result of police training and habit, rather than a goal of preventing serious drug use. By decriminalizing drug consumption, funds traditionally reserved for drug enforcement could be reallocated more effectively towards treatment programs and minority communities historically disadvantaged by the War on Drugs. In addition, it would reduce overall arrests by half because it would reduce the number of crimes committed to fuel drug addiction. By decriminalizing drug consumption, it is estimated that New Jersey could save over one billion dollars a year. These savings would result from the reduction of police budgets, judiciary costs, a reduction of carceral populations, and long term related health savings.

**Annotated by**: William Fox

# EMPLOYMENT LAW

Catherine Engelmann, *Who's an Employee Now? Classifying Workers in the Age of the "Gig" Economy*, 49 FORDHAM URB. L.J. 959 (May 2022).

Courts have misclassified gig workers as independent contractors within the current structure of employment law, and employers have taken advantage of this misclassification by affording less protections and benefits to those workers. Although these gig workers often perform work akin to that of traditional employees, the courts employ various tests that examine the structure of the employment agreement rather than the substantive work of the employee to determine these independent contractor classifications. When these gig workers are classified as independent contractors, they are barred from accessing important employment rights such as minimum compensation for work performed and protections against discrimination. From a legal standpoint, this misclassification brings into question the viability of this binary classification system of employees and contracted workers. Looking at the judicial tests applied in these cases and a suggested approach to employment classification by scholars Goldman and Weil, Engelmann concludes the binary classification is workable when some baseline employment rights are guaranteed to all workers, regardless of status.

**Annotated by**: Samantha Woods

Bridget J. Crawford, Emily Gold Waldman, Naomi R. Cahn, *Working Through Menopause*, 99 WASH. U. L. REV. 1531 (2022).

While U.S. law addresses some forms of menopause-related discrimination in employment, it does not address all of them. Women going through menopause—or perceived menopause—face challenges that, individually or in combination, can limit their ability to succeed at work or even drive them to leave. By drawing on a range of jurisprudential theories and methods, ideas from contemporary social movements that have yet to find full expression in the law, and the UK's growing example, Crawford proposes multiple overlapping potential legal and regulatory approaches available to achieve menopause equity. These include lowering the threshold for what counts as a legally actionable hostile work environment under Title VII, general workplace modifications that make the workplace more amenable to everyone, proposing an Act modeled after the Pregnant Workers Fairness Act ("PWFA"), explicitly incorporating menstruation into the PWFA, shifting the ADA's approach, and the U.S. Equal Employment Opportunity Commission issuing a best practice guideline. The author concludes that menopause policy requires an intersectional approach along axes of sex and age, and other factors such as disability, race, gender identity, and gender expression.

**Annotated by**: Emma Guggenheimer

# ENVIRONMENTAL JUSTICE

Sasha Kahn, *It Takes a Village: Repurposing Takings Doctrine to Address Melting Permafrost in Alaska Native Towns*, 39 ALASKA L. REV. 105 (Jun. 2022).

Melting permafrost and soil erosion in Alaska is destroying dozens of Native Alaskan villages. Increased extraction of oil spurred by the state has contributed to a rise in global temperatures, leading to permafrost melt and a degradation of soil and in the habitability of villages built on it. Sasha Kahn points to the enormous effort and costs villages have taken on to relocate only a fraction of their residents to safe ground, and proposes using takings doctrine to enable villages to receive state funding to adapt to this rapid change in climate. She proposes using inverse condemnations claims against the state to fund the relocation and retrofitting of Native Alaskan villages. The Alaskan government has invested in oil extraction directly through land leases to major U.S. oil companies and indirectly by providing permits for private construction of pipelines to carry oil out of state. These investments in oil extraction prove a nexus through which villages can claim that the Alaskan government has severely restricted the economic use of their land. Khan notes challenges faced in takings doctrine to reapportion liability for global climate change as it affects Native Alaskans. An inverse condemnation claim is unlikely to succeed in American courts today, and even a successful claim would provide only a partial solution for Alaskan villages, but the development of this doctrine could be broadly applicable to developing legal strategies for environmental restitution beyond Alaska.

**Annotated by**: Gabriela Amaral

# GENDER

Miranda Hatch, *Is Trade Sexist? How "Pink" Tariff Policies' Harmful Effects Can Be Curtailed Through Litigation and Legislation*, 47 B.Y.U. L. REV. 651 (2022).

Throughout the United States' extensive tariff schedule, there are seventy-eight provisions that impose disparate rates on goods depending on the gender of the intended user. While some rates are higher for male goods than their female counterparts, the overall tariff burden is twice as high on women than men. Hundreds of companies have filed Equal Protection claims in the U.S. Court of International Trade ("C.I.T".) to challenge these discriminatory rates, but only two cases have ever made it past the pleading stage, and both ultimately failed. The C.I.T. and Federal Circuit rejected the plaintiffs' facial discrimination and disparate impact analyses, claiming that plaintiffs needed to show the government had a discriminatory impact *and* intent. In the eight years since these rulings, however, the composition of the C.I.T. has changed, and if similar claims were to be brought now, they may yield more favorable results. However, the legislative track may prove to be a more effective means of ameliorating the issue of "pink" tariffs. While the proposed Pink Tax Repeal Act has been offered as a partial fix, the most comprehensive solution would be the passage of the Equal Rights Amendment—which would provide constitutional protections for gender equality and prohibit any such discriminatory laws.

**Annotated by**: Cassidy Moon

# HOUSING JUSTICE

Erica V. Rodarte Costa, *Reframing the "Deserving" Tenant: The Abolition Of A Policed Public Housing*, 170 U. PA. J. REV. 811 (2022).

Black low-income families are prejudicially policed throughout public housing and public housing assistance programs due to the preconceived notion that they are criminals. State legislatures allowed tenants to either be denied admission or evicted due to criminal activity on or near the premise, suspected criminal activity, or drug related activity. To enforce this, public housing organizations would conduct background searches and evict tenants at the first sign of distress, in accordance with their One Strike policy. Some individuals were permanently banned from public housing, leaving them unhoused, and others were forced to exclude family members from the premises to remain in public housing. Worse, tenants in eviction proceedings are typically without counsel. Erica V. Rodarte Costa suggests that these housing injustices create a modern-day Jim Crow regime, and that the entire federal housing model should be rethought. Rodarte Costa suggests beginning by abolishing the policing of public housing policies. By ending the One Strike policy, defunding the police forces, and providing tenants counsel throughout the eviction process, it is possible to create a more humane system free from oppression.

**Annotated by**: Jane Weiss

Chad Hughes, *The Road to Affordable Housing: How to Replace Highways with Homes in New York City*, 42 PACE L. REV. 68 (2021).

Urban highways degrade the environment and disproportionately harm low-income and non-white individuals, as residents near highways are traditionally low-income and non-white. As many highways in New York City reach the end of their natural life, officials ponder what to do about them. The three main approaches similarly situated cities have taken are replacing, decking over, or tearing down highways and turning them into recreational spaces. Unfortunately, however, these improvements drive up prices and force current residents out. To combat this phenomenon, Hughes advocates for a variation of the third approach. He proposes that the city decommission state highways and convert them into affordable housing developments. Hughes reasons that highway revival projects drive out residents as the area becomes more desirable, which raises property values that long-term residents can no longer afford. Bringing this project into action would implicate various federal, state, and local laws. Uniquely, the Governor of New York has the power to decommission and redevelop state-owned, state highways without external legislative, city, or federal approval. This would allow the city to redevelop highways without going through the red tape of zoning and other local regulations. In sum, highway revival projects present the risk of gentrification, but Hughes offers a solution that would ameliorate the risk by turning decommissioned highways into affordable housing for long-term residents of highway-adjacent neighborhoods.

**Annotated by**: Madison Dougherty

Norrinda Brown Hayat, *Housing the Decarcerated: Covid-19, Abolition & the Right to Housing*, 110 CAL. L. REV. 639 (2022).

Norrinda Brown Hayat examines the relationship between prison abolition and the human right to housing. The author stresses that to achieve prison abolition and housing justice, the decarcerated must be eligible to receive vouchers and move into subsidized housing. However, current "one strike" laws such as the Anti-Drug Abuse Act and rulings such as the Supreme Court's in *Department of Housing and Urban Development v. Rucker* create barriers for decarcerated persons to reach full citizenship by frustrating efforts which could house many decarcerated persons. Historically, public housing authorities ("PHAs") have used the discretion granted by these laws to deny prospective tenants' applications and exclude actual tenants from subsidized housing based on their contact with the criminal legal system, even when such contact is minimal. Assuming that repeal of these laws is prefigurative at this stage, the author prescribes three transformative policy changes that can immediately solve these shortcomings: (1) transcending the caste system created by the fictitious narrative of innocence; (2) redirecting PHAs' broad discretion towards admission, instead of exclusion; and (3) enlarging civil rights protections for subsidized tenants to include a pathway for decarcerated persons to reside in federally subsidized properties after release.

**Annotated by**: Rachell E. Henriquez

# LEGAL PROFESSION

Scott Budlow, *The (Law) School to (Private) Prison Pipeline: Explaining Big Law's Race Problem*, 40 QUINNIPIAC L. REV 170 (2022).

While Big Law firms present themselves as committed to ending structural and systemic racism, they fail to do so within their own hiring practices. Scott Budlow illustrates the lack of diversity in Big Law: in 2019, just 3.45% of all lawyers in Big Law firms were Black, and barely over 2% of all partners were Black. These numbers are extremely low given that law schools typically have a Black student population between seven and eight percent. The lack of diverse representation in Big Law is directly linked to firms' insistence on representing for-profit prisons, a $4 billion industry that capitalizes off the mass incarceration of people of color. Budlow suggests that if Big Law firms had more diverse attorneys as partners, they would view the private prison industry more critically, as data shows that Black people recognize the racially disproportionate impacts the criminal justice system has more than white people. To solve this problem, Big Law firms should take advantage of the newly created Law Firm Anti-Racism Alliance ("LFAA"), a group of law firms whose purpose is to amplify minority voices, to hold each other accountable in rejecting the practice of representing for-profit prisons. Further, firms should also commit to interviewing at least one Black candidate per hiring opening to increase representation of Black lawyers and partners in Big Law. A more diverse group of attorneys in Big Law would be beneficial to both the firms and society, and would help finally address Big Law's racial inequities.

**Annotated by**: Sean Dalton

# PRO SE PARTIES

Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. Rich. L. Rev. 1075 (2022).

Although rules of evidence are designed to create a truth-seeking process that is fair, they were created under the assumption that attorneys will overcome the rule-based requirements to evidence admissibility. However, in the context of pro se litigants, the rules impose unduly burdensome requirements that hinder the pro se litigant's ability to fairly present their case, and thus operates to undermine the underlying goals of evidence law. For example, the rules require that evidence meet stringent reliability requirements in order to be admissible, but since pro se litigants often lack the legal know-how to meet these requirements, evidence that is relevant, probative, and reliable is often excluded. Budzinksi argues that rules of evidence for pro se litigants should be reexamined and simplified so that the burden imposed is decreased, leading to outcomes based on merit, not evidence rule technicalities. Judges should take a more active role in developing the factual record to decide whether evidence is admissible. To counter judges' greater discretionary authority in making evidentiary rulings, the rules must also implement a system that overcomes implicit biases of judges, and requires them to sufficiently explain their rulings in light of the inequality of resources that disadvantages pro se litigants.

**Annotated by**: Nick Cinquina

Katharine L. Manning, *Protecting the Constitution While Protecting Victims: Challenges to Pro Se Cross-Examination*, 87 BROOK. L. REV. 1197 (2022).

Although defendants have the constitutional right to proceed pro-se—to represent themselves in a criminal proceeding and cross examine victims—this right can create a detrimental environment for victims. Retraumatization often occurs when a victim is personally confronted by the defendant during their cross examination and leads to distorted, and sometimes even inadmissible testimony. Manning suggests that counsel, the courts, and legislatures must take necessary steps to ensure that victims and witnesses are safeguarded from harassment, bullying, and retraumatization during testimony. Balancing the need to protect victims from the significant effects of trauma and harassment with the defendant's constitutional right to proceed pro se, this note proposes employing standby counsel. Katharine L. Manning looks to *Maryland v. Craig*, noting that the right to self-representation is not absolute and suggests that standby counsel would help further state interest by ensuring reliability and adversariness. The use of standby counsel would allow the defendants to remain in control of their own representation, while also protecting victims from experiencing the trauma and distress of facing their aggressors during the already nerve-wracking procedure of cross examination.

**Annotated by**: Alexandra DeBenedictis

# QUEER RIGHTS

Courtney Vice, *The Rainbow Connection: Revisiting the Mixed-Motive Summary Judgment Standard in Bostock's Afterglow*, 49 FORDHAM URB. L.J. 915 (2022).

Courney Vice examines the standards governing mixed-motive employment discrimination cases in the context of anti-LGBTQ* discrimination following the Supreme Court's judgment in *Bostock v. Clayton County*. The present standard for evaluating these anti-LGBTQ* discrimination claims is found within § 2000e-2(m) of the 1991 Civil Rights Act. This provision holds that in order to have a valid claim, an employee must prove that their protected identity was a motivating factor in the employer's decision against them. Vice argues there are two major obstacles in succeeding past the summary judgment stage for a mixed-motive employment discrimination claim: the misplaced application of the more onerous standard created in *McDonnell Douglas Corp. v. Green*; and courts' reticence to consider implicit bias when evaluating a plaintiff's claim. In *McDonnell Douglas*, the Court held that if an employer can prove there was a nondiscriminatory reason for their adverse employment action, the plaintiff holds the burden of proof to demonstrate that the employer's reasoning is pretextual for a discriminatory action. Vice argues in favor of abandoning the *McDonnell Douglas* analysis in mixed-motive employment discrimination cases, and to instead encourage an implicit bias analysis when reviewing employees' prima facie mixed-motive claims and an employers' affirmative defenses.

**Annotated by**: Sarah Brody

Rachel Eric Johnson, *Discrimination Because of Sex[ual Orientation and Gender Identity]: The Necessity of the Equality Act in the Wake of* Bostock v. Clayton County, 47 B.Y.U. L. REV. 685 (2022).

*Bostock* is a monumental decision that greatly increased LGBTQIA+ rights, but it is limited in its application. The holding in *Bostock* leaves the LGBTQIA+ community vulnerable to discrimination because it fails to incorporate a *Price Waterhouse* analysis. *Price Waterhouse* demonstrated how stereotyping based on gender constitutes sex discrimination in the workplace. It represents a very important precedent because it is about *perceived* sex, which is one of the factors that led lower courts to determine that sex discrimination includes gender identity, not just assigned gender. By failing to include a *Price Waterhouse* analysis around perceived sex, SCOTUS left room for states to interpret the *Bostock* holding narrowly, leading to the approval of less obvious forms of discrimination. Johnson argues that Congress should pass the Equality Act, which amends the Civil Rights Act by adding protections for sexual orientation and sexual identity, should be passed to expand LGBTQIA+ rights beyond the reach of *Bostock*, prevent circuit splits, and even prevent the overturning of *Bostock*. The Equality Act would prevent a narrow interpretation of *Price Waterhouse* that excludes some subsets of the LGBTQIA+ community such as bisexual, pansexual, asexual, and transgender folk.

**Annotated by**: Lily Leib

# RACIAL JUSTICE

Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH. L. REV. 1291 (2022).

Serafin explores the complexities of the "badges" metaphor that originated in Section 2 of the Thirteenth Amendment, which authorized Congress to "enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents." Specifically, Serafin focuses on how the ambiguity of the phrase's definition can lend itself to both restrictive and expansive interpretations that in turn may impact the scope of application of Section 2. Serafin makes a distinction between two camps of legal scholars: those who apply the badges metaphor broadly to contemporary legal issues, and those who hold a narrower view of Section 2's Congressional authority grounded in the history of the badges metaphor. While Serafin acknowledges the strong arguments for a restrictive interpretation of the badges metaphor, he notes a lack of sufficient engagement with the history of the metaphor and champions a broader interpretation of the metaphor through an in-depth analysis of its history. In doing so, he argues that the badges metaphor was not meant to encompass a single term, but was instead intended as a reference to state actions or social customs that denigrated subordinate social groups. Serafin advocates for this broad, anti-subordination interpretation to be applied to contemporary issues, and reasons that Section 2 protections can be expanded to any group singled out for status-based deprivations of rights, liberties, or privileges.

**Annotated by**: Marcy Pineda

Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive 4th Amendment Right and Protesting While Black*, 120 MICH L. REV. 1581 (2022).

In the wake of the murder of George Floyd, protestors, especially Black protestors, were arrested because courts have ignored Fourth Amendment protections for expressive conduct. Arrests made at the protests highlighted the expansive police power of arresting protestors engaged in First Amendment political expression and treating them as persons suspected of criminal activity. Currently, officers have multiple legal bases for arrests allowing them to make warrantless arrests on the reasonable belief that a crime is being committed and probable cause. The Expressive Fourth Amendment Doctrine provides that protestors should not be treated the same as persons suspected of criminal conduct and should have more protections. Courts have previously applied a "scrupulous exactitude" standard in similar cases involving expressive materials, where they have excluded police officers' judgment. To protect protestors, courts must follow the framework of the Expressive Fourth Amendment and distinguish expressive conduct from regular conduct as well as limit the crimes where warrantless arrests can be made, specifically for nonviolent misdemeanors. Courts must curtail deference to officers' judgment and review if the conduct was reasonable in light of freedom of expression because of the public interest in protecting First Amendment Freedoms.

**Annotated by**: Arisha Andha

Alexandra L. Raleigh, *We Can't Breathe: Reimagining Equal Protection as a Collective Right*, 72 CASE W. RSRV. L. REV. 785 (2022).

Alexandra Raleigh posits that racial justice for the Black community in the context of state-sponsored violence can only be realized when the judicial system embraces an equal protections claim under a collective right to be free from undue policing. Framing rights in the collective functions to shed light on structural forms of oppression impacting a marginalized group, and curate legal protections for the harms specific to a vulnerable population. The author highlights the concept of gratuitous violence, senseless violence against Black people embedded in the construction of white identity—as exemplified by the murder of George Floyd by Minneapolis police for merely using a counterfeit check—to categorize the collective, state-sponsored violence propagated against the Black community. When police brutality is framed in isolation from gratuitous violence against Black individuals, the discourse on state-inflicted violence is directed away from racialized structures. Police violence inflicts collective trauma on Black people, consequently deteriorating social cohesion within the community and estranging Black identities from the political process. An individual rights framing of police violence that overlooks gratuitous state violence is insufficient to capture the historical traumatization of the Black community. By re-framing the Equal Protection Clause as a collective right to be free from gratuitous violence, the Fourteenth Amendment may function as an avenue to redress systemic police brutality and the structural racism marginalizing the Black community.

**Annotated by**: Arifa Abrahim

Isaiah Strong, *Surveillance of Black Lives as Injury-in-Fact,* 122 COLUM. L. REV. 1019 (2022).

The new age of technology and social media activism has created a surge in government funded surveillance programs which monitor, harass, and intimidate marginalized communities. Specifically, these programs have led to the overcriminalization and political prosecution of Black people. For example, Jelani, a teenager from Harlem was arrested for two counts of attempted murder and added to a gang database just because he was social media friends (and had a few interactions) with known gang members. After being held at Rikers for two years, Jelani's case was dismissed but, was left with no way to remedy the wrong caused. Isaiah Strong focuses on a racial-historical framework which provides solutions to limiting the scope and reach of law enforcement's surveillance power. He further proposes analyzing social media surveillance through the lens of a Critical Race Theory ("CRT") as a vehicle to narrow the gaps in the legal system with regards to digital government surveillance. Judicial standing is one of the biggest obstacles to challenging government surveillance programs due to the difficulty of establishing concrete injury prior to any harm being inflicted. The CRT approach centers the "substantial likelihood of harm" that would result if law enforcement agencies are left to continue their blatant lack of social media surveillance policies. This would provide plaintiffs with a foundation to justify the impending harm constituting injury in fact. Thus, allowing them to successfully bring constitutional claims limiting the surveillance of Black communities.

**Annotated by**: Isabel Ortega-Romero

I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 (2022).

Current criminal law scholarship notes the disparities experienced by Black defendants, and presents prosecutors, especially progressive prosecutors, as key to advancing meaningful criminal justice reform. However, prosecutors are limited in their role as representative of the People or of the State by societal presumptions about punitiveness and power. Scholars have failed to sufficiently consider the racial privileges afforded to prosecutors, most of whom are white and male. Thusi employs self-developed algorithms to examine thousands of online mentions of progressive prosecution and high-profile progressive prosecutors. For example, her analysis found that Black women prosecutors endure a disproportionate number of incidents of insubordination while attempting to use their position to support decarceration in comparison to their white male counterparts whose power to punish is embedded in white supremacy and patriarchy. Thusi therefore calls on criminal law scholars to investigate how patriarchy and racism constrain prosecutors' power. Further, she presses advocates of criminal justice reform to reflect on the fact that her data suggest that progressive advocates contribute to white supremacy and patriarchy. Ultimately, in identifying progressive prosecution as an inherently limited reform in a criminal legal system designed to punish, Thusi invites reformers to pursue more extensive and profound changes to the criminal justice system.

**Annotated by**: Noa Gutow-Ellis

Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 N.Y.U. L. REV. 1 (2022).

Because the Internal Revenue Service ("IRS") does not ask for a taxpayers' race or ethnicity, the IRS claims that its subsequent actions are not motivated by racial bias. However, Bearer-Friend argues that each of the IRS' major enforcement mechanisms operate to produce racially disparate tax enforcement outcomes. Racial biases in tax enforcement exist in summonses, civil penalties, appeals, offers in compromise, collection due process hearings, innocent spouse relief, and criminal tax referrals to the Department of Justice. Racial animus, implicit bias, and transmitted bias from non-tax policies create racially disparate outcomes. In guarding against racial bias, we should not omit race and ethnicity from tax data. IRS internal controls in combination with external oversight would provide the best protections against racial bias in tax enforcement. This includes both formal oversight mechanisms by other federal institutions, and informal oversight mechanisms through better data practices within the IRS. Formally, the National Taxpayer Advocate could include analysis by race in its annual reports to Congress. Informally, entities working outside the government such as the media or legal scholars could shed light on the false promise of racial equality in colorblind tax enforcement. IRS claims of colorblindness along with status quo data practices prevent the public from determining the full scope of racial bias in tax enforcement under current law, which further entrenches racial discrimination.

**Annotated by**: Grace Ouyang

# REGULATING SEX

Dipika Jain & Kimberly Rhoten, *A Queer-Feminist Analysis of BDSM Jurisprudence in Common Law Courts*, 87 BERKELEY J. OF CRIM. L., 88 (2022).

Although the practice of bondage, discipline, and domination, and submission and sadomasochism ("BDSM") is becoming increasingly accepted in mainstream culture, common law in the U.S., Canada, and the U.K. still indirectly criminalizes consensual acts of BDSM. An examination of court decisions in these countries shows that courts in all three tend to view the recipient of physical force in BDSM activities as a passive victim to the dominant partner's abuse, and legal censure through the unanimous denial of a participant's right to consent. These judicial biases around BDSM activities can lead to prosecution of dominant BDSM participants as criminal assaulters, as well as limitations on child custody and visitation in family law decisions for both dominant and submissive participants. The judicial reaction does not meet the reality wherein people can and often do consent to physical force and violence in sexual interactions. Judicial stigma towards the BDSM community could be combated by following an egalitarian approach to sexual diversity in our legal standard in line with queer theory. Queer theory is a critical method that rejects heteronormativity and instead views BDSM activities as one of many types of sexual activities on a large spectrum, without qualifying the practice as inherently good or bad. A queer approach would alleviate discrimination as judges would be forced to uncover biases that favor heteronormative sexual activity.

**Annotated by**: Adeline Beattie

Chance Carter, *Reflections on Revenge Porn: Illustrating Why the Legal System Should Adopt a Comprehensive Response to Nonconsensual Pornography in the U.S.*, 83 MONT. L. REV. 293 (2022).

Chance Carter argues for the implementation of a multifaceted approach to combat nonconsensual pornography. He points to four cases in which the current system failed to dispense justice to victims of nonconsensual pornography, each story highlighting a different weakness in the legal system's response. Carter also identifies four factors that have inhibited the development of an adequate response to this issue: (1) nonconsensual pornography is a relatively new problem, exacerbated by the ease of distributing content provided by social media; (2) existing state laws are ineffective and inconsistent, and civil courses of action do not effectively hold perpetrators accountable; (3) First Amendment concerns have been raised regarding the regulation of nonconsensual pornography; and (4) Section 230 shields social content sites from liability, which prevents victims from seeking relief from those parties. Carter considers three reforms that have been proposed by legal scholars to rectify the current shortcomings: copyright recognition for victims, federal criminalization of nonconsensual pornography, and a Section 230 amendment that would carve out nonconsensual pornography from immunity. After evaluating the advantages and pitfalls of each, Carter concludes that while each strategy would improve the current response, only by implementing all three in a comprehensive approach can we ensure that all victims are made whole and all perpetrators held accountable.

**Annotated by**: Sarit Perl