ANNOTATED LEGAL BIBLIOGRAPHY

CIVIL RIGHTS

Jakob Feltham, Comment, *The Limits of the Law: Tipping, Employment Discrimination, and Legal Theories for Plaintiffs Under Title VII*, 32 WIS. J.L. GENDER & SOC'Y 65 (2017).

Tipping facilitates racial discrimination, wage disparity, and sexual harassment in the workplace, primarily for women and people of color. Some employers in the restaurant industry have an interest in keeping wages low by relying on customers to make up the majority of their minimum wage obligations through tipping. The move towards tip-based compensation leads to a disparate impact on women who are, as objective studies have shown, largely tipped based on their physical appearance. Title VII of the Civil Rights Act of 1964 provides a way for employees who experience such discrimination to hold employers liable for maintaining tipping policies. To show employment discrimination under a tipping policy, an employee would first have to identify tipping as a discriminatory practice and show that it has a disparate impact based on sex and race. Employees can prove disparate impact by providing objective evidence of increased rates of sexual harassment and racial discrimination, such as (1) the amount customers tip women or people of color in comparison to Caucasian males and (2) the fact that the employer instituted a tipping policy. Employees may also attempt to demonstrate that alternative practices that would have a less adverse impact either exist or are conceivable, thus proving tipping as a discriminatory practice.

Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

Partisanship is not a lawful, constitutional justification of gerrymandering within the legislative districting process, despite its presence within the process. A new approach is needed to correct this misguided legal norm and prevent this form of governmental discrimination. With the Supreme Court's split decision in *Vieth v. Jubilerer*, the already unsettled law of partisan gerrymandering became even less clear. A popular method developed according to Justice Scalia's suggested approach of evaluating whether the partisan motivations behind the districting were excessive and developing a standard to determine "how much is too much." This approach is based on the premise that there is a legally permissible amount of partisanship. However, in truth, government partisanship is prohibited by our Constitution and this prohibition is seen in multiple contexts within the Constitution, including the First Amendment, the Equal Protection Clause, election administration, and even as applied to redistricting.

Therefore, instead of focusing on extremes as J. Scalia suggested, the author suggests a purpose-based approach like that which J. Stevens and J. Breyer put forth in *Vieth*; determining if the state has legitimate purpose behind its redistricting or if its motivations were purely partisan-based. The importance of rectifying and solidifying the Constitutional prohibition against partisanship is of special relevance given the upcoming 2021 redistricting cycle and the current atmosphere of extreme hyperpolarization between the nation's major parties.

Deborah A. Widiss, Note, *Intimate Liberties and Antidiscrimination Law*, 97 B.U.L. REV. 2083 (2017).

Intimate rights legislation has historically drawn artificial lines between sexual "conduct" and sexual "status." This artificial line is used by courts to "justify not only discrimination against the lesbian and gay community, but also discrimination against heterosexual couples who engage in non-marital intimacy or non-marital childrearing." Such justifications for sexual discrimination are often too heavily based in religious liberty claims lack appropriate consideration of liberty interests. This article proposes that intimate Constitutional liberties should be weighed more heavily when compared to the interests of the government in restrictive intimate rights legislation. If such liberties are given more weight, antidiscrimination laws could be interpreted to protect "fundamentally important choices that are central to personal dignity and autonomy" and further protect against sexual discrimination.

Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. FORUM 799 (2018).

After the Supreme Court's 2013 decision in Shelby County v. Holder effectively eliminated the federal preclearance protections of Section 5 of the Voting Rights Act of 1965, which had helped voting rights activists combat voter suppression and denial, advocates have now turned to the vote denial liabilities provided for in Section 2 of the Act. Since 2014, there have been a number of lawsuits brought under Section 2 to combat State efforts to restrict voter access and redraw district lines to affect the weight of votes. These cases have been split in their outcomes but all of the circuits that have heard these cases have adopted in some form a 2-part test for vote denial liability that was first enumerated in a decision by the Sixth Circuit in 2014. Part one of the test requires that the challenged practice must "impose a discriminatory burden on members of a protected class" under the Voting Rights Act and limit the opportunity of that group to vote. Part two requires the discriminatory burden to be linked to "social and historical conditions" that breed discrimination against members of the protected class. The Sixth Circuit test was adopted verbatim by the Fourth, Fifth, and Ninth Circuits, and tentatively embraced by the Seventh Circuit. However, the Seventh Circuit, and the Sixth Circuit in a later decision, added in two additional levels of evidentiary proof— (1) proof of reduced voter turnout, and (2) discriminatory intent on the part of the legislature—that the author believes are not supported by the text and legislative history of the Voting Rights Act. However, the author remains hopeful about the state of voting rights, with new cases pending in the Sixth and Seventh Circuits, there is even a chance of the Supreme Court weighing in as these cases become more common.

Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards For School Discipline Reform*, 69 HASTINGS L.J. 583 (2018).

Strict school disciplinary policies hurt the development of American school children. Many school policies prescribe automatic and mandatory suspension, expulsion, and arrest for infractions ranging from minor to serious. The effects of these policies are especially felt by low-income, minority children. In fact, these policies are correlated with poor academic performance high drop-out rates, and greater contact with the criminal justice system facilitating the "School-to-Prison Pipeline." School-to-Prison Pipeline is where students are funneled of public school into the criminal justice system. In response to this issue, reform advocates and lawmakers have tried to institute a restorative justice regime. Restorative justice is a broad philosophy that centers on repairing harm instead of exacting retribution for rule-breaking. School-based restorative justice, coined as the "whole school approach," utilizes an array of non-hierarchical, consensus-based practices - dialogues, circles, conferences, and mediations. However, the legal directives employed thus far are ambiguous and hard to apply. The author proposes a jurisprudential theory that formalizes school-based restorative practices with a collection of legal rules and standards.

Marc Edelman, *Standing to Kneel: Analyzing NFL Players' Freedom to Protest During the Playing of the U.S. National Anthem*, 86 FORDHAM L. REV. ONLINE 1 (2018).

Players who are fired or not hired for engaging in political protests during the national anthem played at NFL football games may have possible legal redress in the form of bringing lawsuits alleging violation of their right to free speech protected by the First Amendment and filing grievances under the NFL Collective Bargaining Agreement. Most sporting events in the United States begin with the playing of the Star-Spangled Banner. Beginning in 2016, some NFL players started kneeling during the playing of the national anthem at the start of the games. Players cited social inequality as the reason for their protests and wanting to bring awareness to the issue of police brutality in America, particularly against Black Americans. As evidence of how highly controversial the protests became, free agent Colin Kaepernick, the first player to kneel during the national anthem in 2016, has still not been signed by any NFL team. The author concludes that the potential remedies for players like Kaepernick, have been either fired or not hired because of their protesting, are lawsuits alleging violations of First Amendment rights and labor grievances or grievances based on collusion among the 32 NFL teams under the Collective Bargaining Agreement. The article analyzes the legal challenges for each of these remedies: for a First Amendment claim, alleging state action; for a labor grievance under the Collective Bargaining Agreement, arguing that failure to stand during the anthem is not detrimental to the NFL or that firing for failure to stand is outside the sanctions allowed under the Collective Bargaining Agreement; and for a collusion-based grievance under the Collective Bargaining Agreement, the difficulty in proving an actual collusive agreement among the teams.

Jordan Laris Cohen, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706 (2018).

The Fair Labor Standards Act (FLSA) has failed to adequately protect minimum wage workers from wage theft. By instituting private injunctive relief, the FLSA would in a better position to insure wage protection for these workers. The only relief available to a plaintiff under the FLSA is money damages for back or front pay. Unlike Title VII, a court cannot also issue an injunctive relief, on behalf of the wronged worker, enjoining the employer's practice of paying workers less than the minimum wage. FLSA also fails to adequately protect minimum wage workers because it lacks an opt-out class mechanism which forces every potential plaintiff to actively opt-into a class action or be left out of the proceeding. These failures of FLSA result in billions of dollars in wage violations which causes a greater stress on society by increasing the need for welfare programs and governmental subsides. The author argues that this, private injunctive relief, amendment is necessary to the FLSA because the current mechanism for obtaining injunctive relief, relying on agency enforcement, is wholly inadequate. Amending the FLSA to include private injunctive relief will insure that when plaintiffs successfully bring a wage violation against an employer the court can enjoin the employer from perpetuating the illegal practice and provide wage security for future employers. Agency actions to enforce the FLSA are inadequate because the agency is too small to represent all the minimum wage workers and with the decline in unions employees must rely on themselves individually to enforce wage laws.

Anna E. Carpenter, Article, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017).

As pro se litigation in state civil courts over matters involving small claims, family, housing, and foreclosure have reached a new height, so too does the phenomenon, known to legal scholars as, "active judging." Pro se legal representation is defined as plaintiffs opting out of legal representation by lawyers in favor of representing themselves in a court of law. When judges cast aside the traditional judicial passivity and neutrality in favor of judicial intervention to assist litigants without counsel, they engage in "active judging." For example, pro se parties are often challenged by procedural requirements due to their complexity and unfamiliarity. Judges often see this moment as appropriate for "acting judging." With a focus on a study of unemployment insurance cases, this Note explores how judges engage in a managerial role balanced against the duty of impartiality and an inquiry as to whether judicial activism has any beneficial effect on parties. The Note concludes that all legal scholars, judges, and policymakers must continue supporting the judiciary by working toward the ideal of equal justice under the law—a concept that is not yet been attained by American courts.

Robert Colton, Note, *Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering*, 86 FORDHAM L. REV. 1303 (2017).

The Supreme Court has yet to resolve the significant problem of partisan gerrymandering of political districts. Gerrymandering is the practice of state legislatures either "packing" or "cracking" districts in order to ensure a win for their political group. Packing involves concentrating voters in the same district in order to reduce their influence in other districts while cracking involves spreading voters across multiple districts to ensure they remain a minority. While the Supreme Court has ruled that racial gerrymandering is justiciable and unconstitutional in light of the equal protection clause and illegal in light of the Voting Rights Act of 1965. The Supreme Court has not afforded partisan gerrymandering the same status of justiciability nor a workable standard to combat it. Although the court has addressed the issue on multiple occasions, there was never a majority view taken and justices disagree whether the constitution prohibits discrimination based on political affiliation. In many cases, Justice Kennedy purports that partisan gerrymandering is justiciable, and a workable solution can be fashioned out of the First Amendment. When a state legislature uses gerrymandering for both the purpose and effect of discriminating against voters based on their viewpoint, First Amendment concerns arise. The author believes that this issue can be resolved in an upcoming Supreme Court decision and that voting should be characterized as speech, not an immutable characteristic akin to race, so that partisan gerrymandering is justiciable, and the court can play a more active role.

Robert Corn-Revere, *Certainty and the Censor's Dilemma*, 45 HASTINGS CONST. L.Q. 301 (2018).

Modern day censors in media, politics, and education attempt to restrict various forms of speech and expression based on their individual moral ideals. Censoring speech and expression is an issue both liberals and conservatives support in similar ways. Both sides see the value in censoring their "opponents" yet emphasize their freedom of speech when subject to censorship. Both liberals and conservatives advocate for legally imposed censorship of ideas contrary to their own. Generally, social conservatives want to censor sexual content and anything contrary to religious beliefs (like information about abortions). Liberals want to censor speech and depictions that they deem degrading to protected classes like race or gender. However, neither side considers themselves "censors", and each condemns the other for their attempts to censor expression. This article highlights the internal conflict censors face in simultaneously claiming moral superiority while arguing the same censorship invoked by those with different preferences in unconstitutional. Ultimately, the author argues that censorship is an unconstitutional restriction of individual's freedom of speech regardless of whether the content espouses liberal or conservative ideas.

Shawn E. Fields, *Is it Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273 (2018).

This article addresses how courts should review speech made by candidates during campaigns when reviewing a challenged government action for discriminatory intent. The examination of this dichotomy was partly inspired by President Donald Trump's rhetoric regarding a ban on Muslim immigration. Specifically, the legal question is whether to take the words of a candidate and use it to evince intent or to keep it to the four corners in *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017). It is considered that while politicians often do operate off their campaign promises, there is an understood dichotomy where they will "play to the base" and say anything to get elected. There is a circuit split. There is no consistent answer as to whether campaign speech can be used to determine that there is discriminatory intent behind a government action once they a politician is in office. The Ninth Circuit holds that the "four corners" of a document governing the questioned government action is what should drive the decision, and that outside evidence should be ignored. The Fourth Circuit, however, holds that outside evidence can be considered to find discriminatory intent. The author suggests that the best course of action is to not follow either bright-line rule, but instead consider statements made on the campaign on a fact-specific basis that is guided by traditional notions of evidence because both extremes are too extreme and cannot be reconciled in all cases.

Kate Sablosky Elengold, Article, *Clustered Bias*, 96 N.C.L. REV. 457 (2018).

Many plaintiffs who experience intersectional discrimination are failed by the courts, federal agencies tasked with implementing antidiscrimination statutes, and advocates. The reason being that the courts, federal agencies, and advocates have not effectively embraced intersectionality theory, which seeks to explain and analyze the experience of individuals with more than one traditionally subordinated personal identity trait. The author proposes a "cluster framework" as a way to remedy intersectional discrimination and better ensure these plaintiffs' civil rights are vindicated. The proposed framework suggests, from a race-sex discrimination lens, that intersectional discrimination be wholly situated within sex discrimination. Three specific solutions are provided: treating discrimination against a subset of women has "pure" sex discrimination, utilizing the power of individualized storytelling and avoiding stock stories, and agencies like the Equal Employment Opportunity Commission should eliminate check boxes with respect to the reason for the complainants claim of discrimination. These solutions are just a few ways in which the cluster framework can provide guidance for people of all colors to fight against intersectional discrimination.

Michael Kagan, *The Public Defender's Pin: Untangling Free Speech Regulation in the Courtroom*, 111 NW. U. L. REV. ONLINE 125 (2018).

The right to absolute free speech in the courtrooms is a subject that has confused courts for decades. Recently, Ericka Ballou, a deputy public defender in Clark County, Nevada wore a Black Lives Matter pin in the courtroom. This occurrence, and the court's response, thrust the issue of free speech viewpoint discrimination in the courtrooms of America into the forefront. Political statements and symbolism have long been a debated topic on the issue of the right to free speech in court. The courts, however, are divided on the issue of whether there is an absolute or limited right to free speech in court. There is concern that limiting the right to wear a pin or use inflammatory language might individuals from expressing particular viewpoints – not because the view is inappropriate for the forum – but because the view is unpopular with the audience. The author argues that courtrooms are limited public fora, and therefore the government—often a judge —, should have the discretion to regulate subject matter in courtrooms in a way that does not discriminate based on viewpoint alone. This is difficult because allowing some form of political expression such as a pin, but not others, can end up being a nightmare situation for judges and may have great constitutional implications. In conclusion, there needs to be some sort of balancing test for speech in courtrooms. The author proposes that visually or sonically disturbing things be disallowed; but maybe a pin that is nondescript and solely expresses a viewpoint should be allowed.

CRIMINAL JUSTICE

Sandra G. Mayson, Article, *Dangerous Defendants*, 127 YALE L. J. 490 (2018).

At the pretrial stage, a defendant is brought into a court where a judge determines whether to release the individual on bail or to restrain him or her in order to prevent speculative future crimes. Increasingly, jurisdictions are using actuarial risk-assessment to determine whether or not to order pretrial restraint. The objectivity of this actuarial tool, in comparison to subjective decision-making imposing monetary bail, has led to a need to clarify the requisite level of risk required to trigger pretrial restraint of defendants. This author argues that a person's risk assessment measuring their likelihood of engaging in a future crime should not be influenced by the mere fact that the person is an arrested individual, as opposed to a non-defendant. The author proposes the implementation of a normative principle identified as "parity of preventative authority." Holding that "the state has no greater authority to preventively restrain a defendant than it does a non-defendant who poses an equal risk," "the parity principle" aspires to strike up a conversation among governmental officials as they grapple with determining what risk level triggers pretrial restraint. This author-made concept requires the judge to only impose pretrial restraint if the likelihood that the defendant will commit a future crime is the same or greater than that of a non-accused person. The author asserts the implementation of a standard where preventative restraint occurs only when the individual, whether arrested or non-accused, poses a substantial risk of serious violent harm in a six-month span.

Kathryn E. Miller, Article, *The Attorneys are Bound and the Witnesses are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CAL. L. REV. 135 (2018).

Post-conviction proceedings face several problems that implicate the fundamental fairness notion of the due process clause. Post-conviction, the only way to see whether there were nonlegal issues during the proceedings is through habeas corpus proceedings which are not confined to the appeal record. Instead, the post-conviction proceedings can look at other misconduct in a trial concerning: jurors, victims, and state witnesses. Local state courts and individual judges, however, impose different restrictions on these individuals. These restrictions both protect these individuals from harassment or re-traumatization, but they also prevent unencumbered investigations to gain valuable information and the truth. An alternative to the variety of local restrictive rules across states and counties, is to recognize a constitutional right of investigation in post-conviction proceedings under the notion of fundamental fairness from the due process clause. Instead of restrictive rules, there would be an opportunity for consensual interviews and investigations that will elucidate any constitutional errors that occurred in the original trial and guarantee that post-conviction proceedings are not inadequate.

Michael L. Perlin and Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her At All": Seeking To Bring Dignity To Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79 (2018).

Juveniles are regularly subject to shame and humiliation in all phases of the justice system starting from arrest to institutionalization. These concerns are often heightened in cases involving racial minorities and those who are economically impoverished. This note looks at this issue through the lens of therapeutic jurisprudence (TJ)—a school of thought that focuses on the law's influence on emotional life and psychological well-being—and international human rights laws. Specifically, juveniles are shackled during many state criminal proceedings; courts permit the admittance of a wide array of legally irrelevant but embarrassing information; juveniles are not allowed to raise insanity defenses; and many detention facilities transfer policies are not tailored towards juveniles. The author argues that some of these policies violate established principles in TJ and international law. Specifically, the core concepts in TJ that allow for a juvenile's dignity to be recognized and the UN Convention on the Rights of Persons with Disabilities (CRPD), which is a legally binding instrument devoted to the comprehensive protection of individuals with disabilities—a category that many juveniles in the criminal justice system fall into.

Devin T. Driscoll, *Solving the Problem of Problem-Solving Justice: Rebalancing Federal Court Investment in Reentry and Pretrial Diversion Programs*, 102 MINN. L. REV. 1381 (2018).

State problem-solving courts were created as a new technique for combating addiction-related recidivism by help convicted drug offenders, while avoiding the high cost of incarceration and the permanent consequences of having a criminal conviction. These so-called drug courts are an ex-ante approach to treat drug addicted criminals as opposed to sending them to jail without proper treatment. Drug courts, in addition to other problem-solving courts including DUI courts, veterans' courts, and domestic violence courts, have been created in all 50 states and Washington D.C. to combat the remarkably high rates of recidivism among previously incarcerated drug offenders (three-quarters of recently released inmates were rearrested within 5 years). Problem-solving courts have controversially not been adopted at a federal level despite having helped reduce recidivism rates by an average of 8-14%, with the best being between 35% and 80%. Since traditional threats of punishment are not persuasive to the majority of drug addicted criminals, the drug courts combine treatment, judicial supervision, sanctions, and incentives. The federal court system concentrates instead on "reentry courts" which help recently released inmates properly reintegrate into society. In 2016, the Senate did negotiate a bipartisan bill supporting the implementation of problem-solving courts at the federal level but in the face of strong opposition, the bill was ultimately not brought up for a vote and no further legislation has been introduced. This Note argues that drug courts, unlike reentry courts, aim to attack the real issue of addiction before incarceration, so that the problem does not persist and does not lead to recidivism. The author calls for adoption of problem-solving courts at the federal level and an increased focus on addressing the problems of drug-addicted criminals as opposed to just incarcerating them.

Jordan Benson, Note, *Stricken: The Need for Positive Statutory Law to Prevent Discrimination Peremptory Strikes of Disabled Jurors*, 103 CORNELL L. REV. 437 (2018).

Disabled jurors should be protected from discriminatory use of peremptory strikes through statutory law instead of depending on constitutional equal protection principles. Disabled individuals can be excluded from serving on juries depending on the state-specific juror requirements of their state. Some states may choose jurors from jury lists that under-represent the disabled, while other states may grant the dismissal of certain disabled jurors with for-cause strikes. Even with the existence of legislative acts protecting the rights of disabled jurors, the discriminatory use of peremptory strikes against disabled Americans still prevent them from participating on juries. The author highlights the case, *Batson v. Kentucky*, 476 U.S. 79 (1986) which provides a three-step test that assists in establishing a prima facie case of discriminatory peremptory strikes against jurors based on race. However, Batson does not indicate if Courts would follow the same procedure for other juror attributes and qualities. The Note suggests several possible solutions to the problem including a rational basis test that is independent from the Batson regime and state codification of peremptory strike protections. However, these solutions cannot be effective unless they can be practically implemented. Judges should be more sensitive to preemptory strikes against disabled jurors and carefully consider the motives of the striking attorney. Meanwhile, states should have some consistency in when and how attorneys can exercise peremptory strikes against disabled jurors. In short, to ensure that disabled jurors have greater opportunities to serve on juries, peremptory strike reform is needed as an essential component to the broader legislative strategy.

Josh Gupta-Kagan, Article, *The School to Prison Pipeline's Legal Architecture: Lessons From the Spring Valley Incident and its Aftermath*, 45 FORDHAM URB. L.J. 83 (2018).

Charging children with criminal or delinquent acts for school misbehavior is an overly punitive and harmful law enforcement response to situations that would be better handled through school discipline. The school-to-prison pipeline refers to a series of choices involving educators allowing School Resource Officers ("SRO") to be involved in the disciplining of students by making arrests. Four legal elements promulgate the school-to-prison pipeline's legal architecture: broad criminal law; an SRO's prominent role in school discipline; youth-focused diversion programs are largely operated through law enforcement agencies or prosecution offices, and prosecutorial discretion too often deemphasizes determination of whether prosecuting children is necessary to protect the public or to rehabilitate children. The author argues for reform efforts, including narrowing criminal law, reforming the role of SROs and the enactment of reporting statutes requiring schools to report to law enforcement incidents posing a "serious threat of injury." Additionally, reforms should result from legislative reform of criminal statutes, statewide rules limiting schools' ability to make law enforcement referrals, stronger memoranda of agreement between schools and law enforcement agencies, and various authorities that may influence relevant points of law. These reforms have great promise for preventing future incidents, and significantly narrow the school-to-prison pipeline.

Thalia Gonzalez, Article, *Juvenile (In)Justice: Youth Incarceration, Health, And Length of Stay*, 45 FORDHAM URB. L.J. 45 (2017).

This article aims to widen the juvenile justice reform movement's discourse and approach on how to address the adverse effects of lengthy incarcerations that youth from marginalized communities often experience. Currently, there is little discussion on how the stress and trauma that stem from the length of institutionalization for an incarcerated youth can negatively affect his or her physical and mental health as an adult. Reform only goes as far as looking at costs and recidivism. However, lengths of institutionalization often exceed evidence-based timelines as well, which do not help to reduce costs or recidivism. There must be state-level innovation and reform, particularly in the area of indeterminate youth sentencing in order to adequately address structural issues such as the lack of statutory language providing guidance for objective determinations of length of institutionalization. These reforms include the creation of streamlined systems, development of guidance and criteria, implementation of staff training, and reorganization of decision-making to eliminate ad hoc and arbitrary determinations. The author believes that for serious reform regarding youth length of stay, we must advance policy changes at the state level to protect the health and wellbeing of incarcerated youth.

Prescott Loveland, Essay, *Acknowledging and Protecting Against Judicial Bias At Fact-Finding In Juvenile Court*, 45 FORDHAM URB. L.J. 283 (2018).

Juvenile court judges are susceptible to various forms of bias that can impair fact-finding; judicial bias can and should be reduced by allowing access to jury trials or alternatively through other forms of procedural safeguards. In McKeiver v. Pennsylvania the Supreme Court, in a plurality decision, held that a jury trial is not constitutionally required in a juvenile court's adjudicative stage. However, the author argues that access to jury trials would protect against various forms of judicial bias, such as bias from exposure to inadmissible information, political bias, and racial bias, due to features of group-decision making, voir dire, and jury instructions. Further, McKeiver left open the option for states to provide offer the protection of a jury trial. In fact, the Kansas Supreme Court did just that, and although judicial bias was not part of the Court's reasoning, the decision provides justification that could be utilized by other states. Alternatively, policy-makers could use other methods in jurisdictions that have not provided for jury trials, such as having different judges hear separate portions of the case, use of advisory juries, and through trainings and workshops on implicit bias. In conclusion, reducing judicial bias at fact-finding is important for the protection of juveniles and to renew faith in the fairness of the juvenile justice system.

Daniela Mondragón, Comment, *Finality of a Conviction: A Noncitizen's Right to Procedural Due Process*, 49 ST. MARY'S L.J. 519 (2018).

The "finality" principle refers to the finality of a conviction ordered by the trial court, following exhaustion of appeals processes. Congressional silence as to the existence of finality of a conviction for immigration purposes under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") has led to a split among the circuit courts. The author posits that the Ninth Circuit, in not reading in a finality requirement to the definition of a conviction under IIRIRA, denies a noncitizen the full extent of their procedural due process rights granted by the Constitution, regardless of their status, because of their stake in this country. The Ninth and Third Circuits disagree as to whether IIRIRA § 101(a)(48)(A) imposes a "finality" rule. Additional circuit splits exist among the circuits regarding discretionary and collateral attacks. Most circuit courts agree on two key points: (1) the finality rule does not reach appeals based on collateral attacks, and (2) a deferred adjudication constitutes a conviction for immigration purposes. The author argues that the finality rule should survive the enactment of IIRIRA and is part of the definition of a conviction within the meaning of § 101(a)(48)(A), allowing procedural safeguards for noncitizens facing deportation.

Grace E. Leeper, Note, *Conditional Spending and The Need For Data On Lethal Use of Police Power*, 92 N.Y.U. L. REV. 2053 (2017).

The Federal Government should act to incentivize states to collect comprehensive data on police officers use of deadly force to ensure transparency and accountability. Recent events show the need for this type of data collection, such as news coverage that has raised awareness of incidents of police violence against young black men, like Trayvon Martin, Michael Brown, and Eric Garner. The obstacles in instituting a federal data collection program exist in federalism concerns, specifically in the context of police enforcement, and in the Supreme Court's unclear conditional spending jurisprudence, highlighted by the decision on the Affordable Care Act in National Federation of Independent Businesses v. Sebelius (NFIB) case. The author argues, however, that the conclusion in the NFIB case, on what is constitutionally permissive coercion relating to conditional spending, can be used as a guide to frame legislation that would encourage uniform state data collection. Further, that legislation should employ a "carrot-and-stick" approach and should focus on issues of methodology to guarantee uniformity. In conclusion, regardless of concerns, there are available methods for legislating and encouraging collection of important deadly force data.

Nicholas C. Soltman, Comment, *What About "Me (Too)"? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875 (2009).

The admissibility under the Federal Rules of Evidence of "me too" evidence of discrimination against nonparties in Title VII suits has been hotly debated by federal courts. At least four difference stances have been taken by the federal circuits, which have found the evidence to be always inadmissible, sometimes admissible, usually admissible, or admissible under very specific facts. The Supreme Court, meanwhile, has largely avoided the issue, only stating that a per se rule would be inappropriate. The primary issues with "me too" evidence relate to Rules 401 and 403, which govern relevancy and prejudice. In this Comment, the author argues that such evidence often not only may be admitted but should be admitted. The author points to the unique character of employment discrimination, which typically affects a large group of people, rather than one individual, making the evidence highly relevant. Further, the author argues that in hostile workplace and reduction of force cases (but not in individual discrimination cases), the evidence is unlikely to be more prejudicial than probative, because demonstrating that it affects multiple people is a key part of demonstrating discriminatory animus.

John F. Pfaff, Essay, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571 (2018).

Traditionally, in the United States the focal points of crime are: who committed it and what punishment that person deserves. This view highlights the weakness of current reform efforts that fail to target geographical issues of criminal prosecution that underlie mass incarceration. The author provides a compelling narrative through analyzing the current politics of punishment and related data, including incarceration rates and demographics, which support how important considering place is in addressing the rural placement of prisons. This essay instead focuses on where crimes are committed, where criminal justice actors are, and how that influences the politics of punishment, subsequently, shaping what sorts of reforms should be enacted. More specifically, focusing on how the decisions to elect prosecutors at the county level and place prisons in rural communities are central to "thinking carefully about where criminal justice actors are when deciding what reforms to adopt."

Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).

Since the 1970's the rate of incarceration has increased significantly and prisoners' rights have been consistently violated by correctional policies and by correctional staff. Courts exercise very limited judicial oversight in evaluating prisoners' rights cases. Typically, courts have looked at the subjective motivation and intent of jailers rather than the impact of unconstitutional treatment on the prisoner. This standard makes it very difficult for prisoners to get remedies for the violation of their constitutional rights. Correctional officers often aren't trained and educated as to prisoners' constitutional rights and therefore prisoners are subject to many violations with very limited access to any remedy. However, in Kingsley v. Hendrickson a 2015 case, the Supreme Court addressed the liability standard for use of force against prisoners. The Supreme Court rejected the idea that the officer must use force "maliciously" to have violated the prisoner's rights. Kingsley held that officers and prison staff may be liable for using unconstitutional, excessive force against prisoners even without intent to violate the prisoners' rights. This article argues that courts should follow the standard in Kingsley for governmental liability for violating prisoners' rights in a variety of prisoners' constitutional claims. Courts should evaluate all prisoners' rights claims using the Kingsley standard and impose liability based on the objective experience of prisoners rather than the motivation of government actors. Use of the objective standard for governmental liability in prisoners' rights claims is an important step towards shining light on unreasonable conditions of confinement and better serving the interest of justice in the criminal justice system.

Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365 (2018).

States vary in their levels of strictness relating to the confidentiality of juvenile records, which causes inconsistent results for juveniles. Some states offer robust protections, while others offer minimal protections, such as making records publicly accessible until cases are closed. These differing approaches mean that a juvenile's chances of future employment, attending college, and military service can all be affected by where they live. The author's position is that it would behoove us to wipe evidence away and seal the records of juvenile offenders because the worry about juvenile recidivism is not well documented enough to negate such protections. The author suggests that states should therefore take a more uniform approach by looking to the ABA's recently adopted model juvenile record protection statute, which aims to limit the collateral consequences of juvenile arrests and adjudications. Focusing on confidentiality, expungement of records, and creating non-disclosure statutes will all help to decrease the issues faced by many juveniles who have the potential to become productive adults yet are haunted by unsealed juvenile delinquency records.

GENDER BIAS AND DISCRIMINATION

Jessica Fink; Note; *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN L. & POL'Y REV 57 (2018).

Women have a different workplace experience than their male peers because of deeply engrained gender biases that results in gender sidelining. Courts define gender sidelining as indisputable, but nonetheless innocuous, differences in the ways men and women routinely interact in professional settings. Although the differences in the way men and women are treated at work are clear, legislation, such as Title VII, which was designed to redress gender discrimination in the workplace, fails to provide relief for gender sidelining because of the strict requirements set out under the laws that result in issues that are not legally actionable. The author believes that gender sidelining leads to silencing female voices, and everyone ultimately losing access to female input and perspectives. The author recommends that employers use tools beyond Title VII to address gender sidelining. The author suggests that employers do things like put women into positions of authority and encourage stronger relationships between people of different genders.

Article, *Sixth Amendment Challenge to Courthouse Dress Codes*, 131 HARV. L. REV. 850 (2018).

Courthouse dress codes limit the ability of the public to access the court, are often biased against specific sections of the populace, and improperly assign power to security officers concerning who to exclude from court that should instead belong with the judge. The Supreme Court has previously ruled in Waller v. Georgia that in the context of the speedy trial right granted by the Sixth Amendment, a courtroom may only be closed based on factors listed as "requiring an overriding interest, narrow tailoring, consideration of alternatives, and on-the-record findings." First Amendment claims are also possible, but the benefit of advancing a Sixth Amendment claim is that defendants have an incentive to pursue such a claim, where a member of the public who is excluded may have less interest, particularly if it would involve the expense of a First Amendment based suit against a court officer. Application of Waller as a standard for determining appropriateness of dress has been limited, as courts have worried about limiting the population's right to First Amendment freedom of expression for de minimis violations of court protocol. The author points out that this is a baseless fear because Waller is a relatively flexible standard, but even if this was the case, having a rule is better than having a subjective standard which is decided by court officers (and thus unreviewable) rather than a judge. There is an argument discussed that the ability to exclude individuals from the courtroom may be necessary, such as in *In re Contempt of Dudzinski* where exclusion was warranted based on defendant's contempt of court tied to his manner of dress. But it is also mentioned that the ability for judges to determine an overriding interest as established in Waller allows for the swift ejection of these individuals, while still allowing for a more liberal standard of inclusion than exists under the current regime.

Alexandra N. Phillips, Comment, *Promulgating Parity: An Argument for a States-Based Approach to Valuing Women's Work and Ensuring Pay Equity in The United States*, 92 TUL. L. REV. 719 (2018).

Despite legislative action taken by Congress in the 1960s, women today continue to experience a gender wage gap in which they earn substantially less than their male counterparts, and state legislatures should step in to address this problem. Gender income disparity is a result of systemic biases towards women, some of which are still prevalent today despite origins dating back to when women initially entered the American workforce in the 1800s. Federal legislation passed in the 1960s, namely the Equal Protection Act of 1963 and Title VII of the Civil Rights Act of 1964, currently provide the only legal remedies available for women who experience workplace discrimination despite some serious limitations in their effectiveness. For example, both acts include an available affirmative defense whereupon if the employer can explain the alleged discrimination by any neutral factor, the employer escapes liability and the case cannot proceed. Although there are a few federal bills proposed which would correct these limitations and reduce gender income disparity, these proposals will not become effective legislation any time soon. The federal laws designed to ensure income equality between men and women are insufficient as seen by the prevalent and substantial gender wage gap, and new laws are needed to correct these limitations to ensure equality for American women in the workplace. Rather than idly waiting for new federal laws, the author suggests that state legislatures step in to address the gender pay gap issue by passing mandatory wage disclosure laws and paid family leave acts.

Naomi Cahn et al., *Gender and the Tournament: Reinventing Antidiscrimination Law in and Age of Inequality*, 96 TEX. L. REV. 425 (2017).

Title VII is an antidiscrimination law implemented after the civil rights movement. This law was promoted at its inception as a means of combating discrimination and promoting economic growth. However, gender disparities in the workplace did not disappear with the creation of Title VII, and this law has done very little to help women break the glass ceiling. For example, the law has failed to address pregnancy accommodations and sexual harassment, which are significant obstacles to the ability of women to succeed in the workplace. Also, workplace cultures have changed from cooperative, company-focused environments to individualized, competitive, tier-based schemes, which has created an atmosphere that focuses on short-term gratification rather than long-term gain. This change has also done very little to alleviate the gender wage gap at the top of the wage ladder, where women CEOs continue to earn less than their male colleagues. The author's position is that antidiscrimination laws need to be reformed to address these issues, greater judicial scrutiny is necessary, and a structural equality approach should be undertaken to combat the gaps in Title VII. The author states that less focus should be devoted to individualized discrimination and instead systemic changes should be prioritized, which would be a significant step towards true equality in the workforce and the achievement of the goals set out by Title VII.

Maura Douglas, Note, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. PA. L. REV. 745 (2018).

American Indian women face the highest rates of sexual assault of any group in the United States. More than 80% of these crimes are committed by a non-Indian perpetrator, but until a recent added provision in Title IX of the Violence Against Women Act of 2013, tribes could not exercise jurisdiction over the non-Indian defendants committing these crimes. The Violence Against Women Act (VAWA) is a piece of legislation enacted to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault and stalking in the United States. The VAWA enables special domestic violence criminal jurisdiction for tribes over non-Indians who voluntarily and knowingly established significant ties to the tribe, but this exception is narrow and leaves a heavy burden upon the tribe to prove that the perpetrator had "sufficient ties" to the tribe. Tribal jurisdiction over these crimes is beneficial in the author's eyes because it would result in perpetrators being liable to the tribe for their crimes and subsequently function as a deterrent against these crimes being committed in the first place. The author concludes that this jurisdiction over non-Indian perpetrators who commit crimes in Indian country should be extended beyond what is seen in VAWA. Finally, the author proposes amendments to Title IX of VAWA which would expand the law on special tribal criminal jurisdiction to include the crimes of sexual assault, rape, dating violence, domestic violence, and concurrent crimes such as child or elder abuse.

LGBTQ RIGHTS

Peter Dunne, *Transgender Sterilization Requirements in Europe*, 25 (4) MED. L. REV. 554 (2017).

This article explores the issues surrounding transgendered individuals procreating post-transition. In 1972, Sweden became the first European jurisdiction to formally acknowledge preferred gender. Under existing Swedish law, applicants for gender recognition were required to provide an incapacity to reproduce either through natural infertility or through sterilization. Across Europe, 20 countries continue to enforce a sterilization requirement. The author critiques the rationales for transgender sterilization in Europe—legal certainty, child welfare, and natural reproduction and ultimately argues that sterilization should not be a pre-condition for legal recognition. Pregnant men and begetting women are certainly uncommon, however neither group represent a threat to society and the families that they raise. European policymakers have failed to provide a compelling rationale for this requirement within the transgender community and therefore should be eliminated from Europe's gender recognition rules.

William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017).

Almost since Title VII's enactment in 1964, attorneys, judges, and scholars have questioned whether it could be used by gay and lesbian people to challenge workplace discrimination. Looking to the statutory history and the broader American culture over the years, the author argues that extending Title VII to sexual minorities is squarely within the intended meaning of the law. In addition, several landmark court decisions over the past half-century, from Loving v. Virginia to Obergefell v. Hodges, have markedly changed the way adult relationships are treated in American law and society. Finally, Eskridge argues that Title VII should be viewed as establishing classification-based, rather than class-based, schemes. The former is a broader interpretation which protects all employees, rather than just a particular group of them. All of this, when combined with the original meaning, make it clear that Title VII is applicable when the discrimination is based on the gender of a person's spouse, rather than on their own gender.

Adam K. Hersh, Note, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265 (2018).

Balancing religious freedom under the Establishment Clause of the First Amendment with nondiscrimination laws meant to protect people from religious discrimination, gender or sexual orientation-based discrimination, or other types of discrimination is an issue that courts and legislators are actively grappling with. Since the landmark decision in Obergefell v. Hodges which legalized same sex marriage, religious accommodations exempting people from aspects of nondiscrimination law, specifically those concerning the LGBT community, have become more prevalent in legislative and judicial action on a state and local level. These religious exemptions function as a license to discriminate against others within the law and result in harm to third parties such as LGBT persons. This note equates nondiscrimination protections to being government benefits that are provided to all people. Further, it considers religious accommodations to be the allowance of religious actors to deprive protected parties (such as LGBT people) from realizing the benefits of nondiscrimination protections. Under this analysis, the accommodations for religious actors allow those actors to dictate who receives the government benefit of nondiscrimination protection as opposed to the government. The author concludes that this is unconstitutional, and his structural interpretation of the Establishment Clause is the lens through which to consider this problem of nondiscrimination law exemption.

Max Isaacs, *LGBT Rights and the Administrative State*, 92 N.Y.U. L. REV. 2012 (2017).

Administrative agencies are increasingly more involved in protecting constitutional rights—a phenomenon dubbed "administration constitutionalism"—especially for the LGBT community. Suspect classes in jurisprudence protect classes of people with immutable characteristics—such as race, gender, nationality, etc.—and are typically afforded strict scrutiny by courts when evaluating legislation or rules that impact the constitutional rights of these classes. The author argues that the courts typically underenforce equal protection rights for LGBT plaintiffs and have been unclear as to the level of scrutiny to apply to equal protection challenges based on sexual orientation—or whether sexual orientation is a suspect class, even in the Supreme Court's most recent LGBT decision, *Obergefell v. Hodges*. Agencies (tasked with upholding the Constitution and statutes passed by Congress) have thus begun to pick up the slack by interpreting statutes in ways that uphold equal protection rights. Agencies, on the other hand, protect constitutional rights through their interpretation of statutes, implementation of agency policies, and promulgation of rules. Some critics argue that agencies should not interpret statutes in a manner inconsistent with courts because agencies are comprised of unelected administrators. Here, however, the author argues that agencies are well within their authority to interpret statutes and implement policies in a way that they see fit to uphold constitutional values, especially regarding LGBT rights because the judicial and legislative branches have thus far been inconsistent and hesitant to protect equal protection rights of the LGBT community.

Alison Gash and Judith Raiskin, Article, *Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood*, 43 LAW & SOC. INQUIRY 82 (2018).

Lesbian and gay parents face significant risks and challenges in the face of legal status ambiguity in the United States and little has been written about the consequences of and conditions of legal status ambiguity. Legal status ambiguity means that these parents lack state-legitimized family structures. Despite the decision in Obergefell v. Hodges in 2015 which ruled that the fundamental right to marry is guaranteed to same-sex couples, lesbian and gay parents still face legal and social skepticism about their familial claims in matters such as parental status, custody status, and marital status. This discrepancy can infiltrate all aspects of lesbian and gay familial life. The author discusses a series of interviews that were conducted of gay and lesbian parents to highlight the difficult experiences they face due to legal status ambiguity in the hopes of bringing awareness to the issue. As it stands, law and society can act as gatekeepers, which impede on gay and lesbian parents' rights to full familial equality. To combat these issues, legal security must be developed using second-parent adoption, birth certificate, or custody agreements.

PARENTING AND FAMILY LAW

Adam J. Hirsch, Article, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235 (2018).

This article explores the inheritance rights of individuals situated at the fringes of marital relationships, such as fiancés, permanently separated spouses, and spouses who are in the process of divorcing. The author examines whether these stated categories of individuals have the right to forced shares of an estate comparable to that of a conventional spouse. In determining whether decedents would wish to provide at their death for these individuals, the author conducts an empirical internet study regarding the above-named categories of on the fringe marital relationships. The author proposes changes in the law of implied bequests, intestacy law and implied revocation of bequests based on the results of said survey. Concluding that lawmakers must plot out doctrinal lines that take account of the fact that persons enter and exit our lives at time distinct from pinnacle acts and must create legislative as close as possible to probable donative intent.

Safia Fasah, Note, *Pat-Downs But No Hugs: Why Prison Visitation Protocol Should be Changed to Help Keep Familiar Structures Intact*, 56 FAM. CT. REV. 135 (2018).

The incarceration of a parent negatively impacts a child's emotional, social, and educational development. Prison visitation protocol exacerbates the pain and confusion a child already feels regarding the separation from a parent in prison. While visiting a parent in prison, children are subject to the same security requirements as adults. This experience makes a child feel like they are being punished while visiting their parent. The impersonal, invasive nature of such visits denies children the opportunity to reconnect with their incarcerated parent. Incarcerated individuals typically live in facilities that are hours away from their homes, thus family members incur high costs and travel time to see them. The combination of travel, costs, and the emotional toll of a prison visit on a child often prompts the child's other parent or guardian to forgo future visits. The author proposes a model statute that would improve the visitation experience for children while ensuring that prisons can maintain their security interests. The statute would require prisons to ban pat-downs and cavity searches for children; to allow children to bring soft toys (such as stuffed animals or blankets), and unopened snacks and drinks into their visits; to allow children the ability to hug and connect physically with their parent throughout the visit; to create a visitation area meant specifically for inmates and their children, which would be staffed by corrections officers trained on monitoring family visits; and to allow children to enter the visiting space through a separate door after passing through security. The author does not propose that security measures be altered in any way for the guardian accompanying the child, and states that aside from the one-time cost of installing a separate door, the remaining components of the statute could be implemented easily and at little to no cost, as the separate visitation space could be section of the current visiting area delineated by a movable partition.

RACE AND IMMIGRATION ISSUES

Nancy E. Dowd, Note, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47 (2016).

The American Dream of financial and career success, bounded only by one's own drive and talent, does not extend to black boys. The first step to dismantle the structural racial discrimination that affects young black boys is to identify developmental inequalities. The author particularly seeks to examine how public education system, the state juvenile justice system, and state-created poverty affect black males from birth to the age of 18. By identifying these developmental systems that perpetuate inequality, the author hopes to create a metric to hold the state accountable for racial barriers among children. If this metric is established, discrimination against children will be mitigated through not only change in culture but change in legal policies and social structures as well.

Stephen Meili, Article, *The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?*, 41 FORDHAM INT'L L.J. 383 (2018).

The systems in place for handling refugees is insufficient to tackle the problem of refugee crises in the modern world, as shown by the inability of countries to process the refugees of the recent crisis in Syria. The author suggests that implementing constitutional rights to asylum would be beneficial, in that they would allow for protections not provided under current statutory regimes. Traditionally legal protection is provided to refugees under the Refugee Convention, but it fails to address refugees not fleeing a conflict based on persecution, who as a result have no legal protection. Additionally, terminology within the convention is sufficiently vague that it can be manipulated by state actors with self interest in avoiding dealing with refugees. There has been an increase in the tendency for countries to protect the right to asylum in their constitutions as part of a general trend towards constitutional guarantees of human rights. One successful example of this is in Ecuador where a traditionally nonindependent judiciary was willing to run counter to the will of the executive branch and strike down a law's limitations concerning asylum. European countries generally prefer to provide local constitutional guarantees for the protection of refugees, but this has provided relatively limited assistance in recent years due to the rise of nativist politics in many countries. The author recommends the institution of a constitutionally guaranteed right to asylum in France and Italy, two countries which currently do not have such guarantees in place, as these countries have strong legal traditions which would ensure that any such constitutional changes are likely to be enforced. However, there is the admission that further research is necessary to prove the benefits of constitutionally granted asylum, so lawyers can have the evidentiary support to push for these constitutional changes in an organized fashion.

Gideon Sapir and Mark Goldfeder, Article, *Law, Religion, and Immigration: Building Bridges with Express Lanes*, 32 EMORY INT'L L. REV. 201 (2018).

Israel's Law of Return highlights the moral and legal issues of using nationality and religion as factors in immigration policy. Israel's Law of Return uses nationality and religion to create an "expressway" for people of Jewish heritage to come back into the state of Israel (versus using these factors to exclude people from Israel), thereby protecting Jewish culture. Furthermore, the Law of Return, by providing an avenue for Jewish people to escape anti-Semitism and persecution, protects Jewish people's inherent right to safety and life, rather than functioning as a means to deny people rights. Israel's Law of Return (as it exists today) is not contingent upon blood or race—anyone may seek admittance under the Law of Return if they convert. The author also debunks the argument that Israel's immigration policies discriminate against non-Jewish people by noting that the Law of Return is not the only method of immigration into Israel—non-Jewish people may seek admittance and a right to settle under other Israeli laws; the Law of Return merely provides one route into Israel. The author concludes that the use of race and/or nationality is permissible in the instance of Israel's Law of Return because it seeks to protect Jewish people from persecution and does not harm overall "global justice" because international law permits the use of culture and nationality in immigration policies, and because non-Jewish people are allowed to immigrate under other laws.

Breanne J. Palmer, *The Crossroads: Being Black, Immigrant, and Undocumented in the Era of #BlackLivesMatter*, 9 GEO J. L. & MOD. CRIT. RACE PERP. 99 (2017).

Black immigrants—black individuals living in the United States that did not have slave ancestors in the United States—are routinely forgotten by other Black activist groups and failed by criminal, immigration, and labor laws. The problem with this is that while Black Americans are also placed into the criminal justice system at unfair rates, Black immigrants face more dire consequences such as higher rates of detention and removal from the country. This issue is often not included in the Black Lives narrative. The author suggests that a possible solution to this issue is for black activist groups – in particular the Black Alliance for Just Immigration and the UndocuBlack Network – to collaborate and work with one another to advocate not only for documented and ancestral Black Americans, but also for the Black immigrants who have been typically left out of the narrative of equality for Black Americans. The movement for Black Lives will only become stronger by including Black immigrants and undocumented Black people because it will give a fuller, more contextualized picture of how Black Americans, but also Black immigrants, face an uphill battle against criminal and immigration reform.

Julie A. Ebenstein, Article: *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323 (2018).

Currently prison populations are counted towards the legislative apportionment of the areas in which they are located, even though these areas often are not representative of the demographics or interests of the prisoners. Often, prisoners are racial minorities from urban communities. In contrast, prisons are in areas where the population is mostly comprised of white, rural residents who often vote to elect politicians that do not have urban and minority residents' interests in mind. The author suggests one way to solve this problem is by counting prisoners as part of the population in their home community and not where they reside while in prison. The Supreme Court has created precedent to do this in Franklin v. Massachusetts where the Court held that it is constitutional for federal employees temporarily stationed overseas to be counted as residents of the states of their "usual residence" because of the ties they have developed there. The author reasoned that this can apply to prisoners too since they are unlikely to develop ties to the area in which they are involuntarily imprisoned. In Burns v. Richardson, the Supreme Court held that states can properly exclude temporary residents such as military base residents or individuals with convictions from legislative apportionment. The author cites several district and circuit court cases that have held that students can be counted as residents in their home districts or the areas in which they live while attending school based on factors such as their connection to either location. The author suggests that it is appropriate to consider similar factors for prisoners, especially since they did not choose where they would reside during their imprisonment.

Cara Cunningham Warren, *Sanctuary Lost? Exposing the Reality of the "Sanctuary-City" Debate & Liberal States-Rights' Litigation*, 63 WAYNE L. REV. 155 (2018).

As evidenced by the flurry of pending litigation by states in direct conflict with President Trump's orders on sanctuary cities, which has led to a significantly higher non-criminal higher arrest rate for undocumented immigrants who would otherwise be free from this fear in a sanctuary city, it is clear the current system is not working and should be balanced out with a strong counter-narrative and focus on using lawsuits as a method to spur meaningful debate on the topic. A sanctuary city does not have a specific definition but is a city that limits its cooperation with federal immigration enforcement to protect undocumented immigrants in their borders. The sanctuary city problem is seen differently from the two main sides: there are serious border security concerns on the side against it, and on the other side, it deteriorates police-community relationships, burdens already limited law enforcement resources, and unfairly targets immigrants. The author argues that the litigation focused on federal funding limitations on Sanctuary Cities by the Federal Government is not the best course of action for liberals trying to preserve Sanctuary Cities. Specifically, they propose a three-pronged approach should be taken: using funding-focused litigation when needed, a significant effort to present an alternative immigration narrative through publicity efforts and using litigation as a form of non-cooperation to spark debate from both sides.

Josh Gupta-Kagan, Article, *The School to Prison Pipeline's Legal Architecture: Lessons From the Spring Valley Incident and its Aftermath*, 45 FORDHAM URB. L.J. 83 (2018).

Charging children with criminal or delinquent acts for school misbehavior is an overly punitive and harmful law enforcement response to situations that would be better handled through school discipline. The school-to-prison pipeline refers to a series of choices involving educators allowing School Resource Officers ("SRO") to be involved in the disciplining of students by making arrests. Four legal elements promulgate the school-to-prison pipeline's legal architecture: broad criminal law; an SRO's prominent role in school discipline; youth-focused diversion programs are largely operated through law enforcement agencies or prosecution offices, and prosecutorial discretion too often deemphasizes determination of whether prosecuting children is necessary to protect the public or to rehabilitate children. The author argues for reform efforts, including narrowing criminal law, reforming the role of SROs and the enactment of reporting statutes requiring schools to report to law enforcement incidents posing a "serious threat of injury." Additionally, reforms should result from legislative reform of criminal statutes, statewide rules limiting schools' ability to make law enforcement referrals, stronger memoranda of agreement between schools and law enforcement agencies, and various authorities that may influence relevant points of law. These reforms have great promise for preventing future incidents, and significantly narrow the school-to-prison pipeline.

Christine Kown & Marissa Roy, *Local Action, National Impact: Standing up for Sanctuary Cities*, 127 YALE L.J. FORUM 715 (2018).

Sanctuary cites should take advantage of the Tenth Amendment's federalist protection, insuring state sovereignty, and resist intrusion of the federal government on its individual rights. Attempting to fulfill a promise to end sanctuary cites, President Trump issued Executive Order 13,768, "Enhancing Public Safety in the Interior of the United States" which sought to withhold all federal funding from sanctuary jurisdictions if they did not assist the federal government in the enforcement of federal immigration law. San Francisco sued challenged the constitutionality of the order, claiming that it was an abuse of federal power and requested injunctive relief. A U.S. District court found in favor of San Francisco and issued a nationwide preliminary injunction. This case obtained an injunction by demonstrating the city's sovereignty through a federalism argument and by showing how the order would undermine the local interests through its decrease in federal funding. The Author believes that these cities should maintain its autonomy, because individual cities are best equipped to serve the interests and needs of its city's residents.

Maureen Johnson, Note, *Separate but (Un)equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH L. REV. 327 (2018).

Since the Supreme Court's decision in *Plessy v Ferguson*, America continues to revert to the practice of alienating those who are considered different while simultaneously following the Plessy rationale that those deemed by society to be inferior can constitutionally be treated as such. In 1896, the Plessy court upheld the constitutionality of racial segregation laws for public train cars if both facilities were equal in quality. The decision was influenced by white agrarian farmers who blamed African-Americans for their economic strife. This method of scapegoating was continued by American immigrants from places like Ireland and Poland, who, even having felt the sting of bigotry themselves when they first arrived in American, turned their backs on future immigrants once they obtained relative equality for their own groups.

Although Plessey is no longer good law, the author draws an analogy of this type of thinking to modern times; in 2016, working-class voters were encouraged to scapegoat people of color through governmental candidate's xenophobic rhetoric that echoed the same white supremacy seen a hundred years ago. The author concludes racism is not going to disappear by itself, and instead proposes that America must work towards evolving racism by countering institutionalized racism using institutionalized anti-racism. The author further suggests that the use of psychology and neuroscience may be the key to understanding how prejudice is formed, and ultimately stopping it from continuing in future generations.

Kimani Paul-Emile, Article, *Blackness as Disability*, 196 GEO L. J. 293 (2018).

The black population in the United States faces an increased risk of a wide variety of disabling effects - many of which are distinct from socioeconomic status. The author explains the ineffectiveness of race-focused civil rights laws and the jurisprudence of the Supreme Court regarding equal protection (referred to by the author as "race law") in addressing these risks, resulting from race law's intent doctrine and colorblindness. Considering the requirement of proving malicious intent and the dilution of all race-based distinctions as equally harmful, the author discusses the inability of the disparate impact cause of action to effectively reach today's dominant forms of race discrimination. In reference to unsuccessful attempts at correcting racial disparities, the author considers the possibility of incorporating "blackness" as within disability laws, such as the Americans with Disabilities Act, and the Rehabilitation Act of 1973. In arguing for a natural migration of race into a classification as a disability, the author points out that "many traits understood as disabling do not necessarily arise from a medical condition," but rather are "simply traits that create disadvantage when combined with an inhospitable social or physical environment." The author identifies key attributes of disability law that are ideally suited to combating racial inequality. In addition, the author highlights the ability of disability law to fight against discrimination based on unacknowledged bias. Despite the potential of unsettled reactions to treating race as a disability, the author encourages considering the category of disability as encompassing a wide breadth of traits, as opposed to the category being limited to extreme impairments. As evidence of the meaningful structural reform that could result from the inclusion of race into disability, the author discusses the of extensive reach of remedial innovations found in Title II of the ADA and Section 506 of the Rehabilitation Act.

Stephanie Bornstein, Article, *Reckless Discrimination*, 105 CAL. L. REV. 1055 (2017).

Employers' implicit biases play a critical role in making decisions about whether to hire potential new employees. This subconscious often goes unchecked and leads to disproportionate employment outcomes based on race or gender. A potential employee who faces such discrimination may in turn hold an employer accountable under Title VII of the Civil Rights Act of 1964. Title VII requires a showing that the employer acted with discriminatory intent, however, which can be difficult to discern. To overcome this challenge, the potential employee should argue that an employer who (1) knows about the risks of implicit biases, (2) has evidence that such biases may be impacting its decision-making structures, and (3) fails to act to prevent it is acting with such recklessness that a court may infer its discriminatory intent. By arguing that the employer was not only negligent but, in fact, reckless about the operation of implicit biases in the employment decision-making process, plaintiffs are more likely to persuade a court to infer intentional discrimination.

SEX OFFENSES

Sonja Arndt, Article, *Street Harassment: The Need for Criminal Remedies*, 29 HASTINGS WOMEN'S L.J. 81 (2018).

The current definition of street harassment – defined as when one or multiple unfamiliar men accosts one or more women in a public place or intrude upon her space - is limiting both in terms of what qualifies as street harassment and who qualifies as victims of street harassment, especially for individuals who are women, persons of color, and members of the LGBT community. The lack of uniformity regarding what is considered street harassment can affect how victims are perceived and how offenders are treated under the law. The author asserts that the definition of street harassment should be an inclusive definition that acknowledges the various victims, the various forms of harassment, and the varying degrees of such harassment as seen through victim impact. One solution proposes legislative language that defines and distinguishes between the acts of public sexual harassment and acts of public sexual assault. The proposed legislative language requires the harasser's action to be intentional. If the harasser's action is intentional, then a six-part harassment test is applied to determine whether that action counts as public sexual harassment or as public sexual assault. The six-part test considers elements like the harasser's tone when making a statement, the harasser's body language, harasser's physical movements, use of derogatory phrase, where the act took place, and the actual statements made by the harasser. However, challenges continue to exist in creating and implementing a comprehensive street harassment law, including difficulties in objectively interpreting a harasser's words or actions for finding intent. For example, the harassee's racial attitude can influence how they interpret a harasser's words or actions. As other nations move forward in criminalizing street harassment, U.S. legislators should also adopt laws to stop street harassment and help its citizens move in public without fear of being sexually harassed.

Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

Criminal laws have historically been skeptical of rape accusers, containing corroboration requirements, "prompt outcry" rules, and cautionary jury instructions. While many of these laws have changed, skepticism still pervades the criminal process. The author refers to this skepticism as "credibility discounting." Credibility discounting is the phenomenon of discrediting a rape accuser's trustworthiness and the plausibility of her story based on one's own prejudices. Credibility discounting is pervasive among law enforcement officers and prosecutors, which results in a failure to prosecute rape cases. The article proposes that accusers, whose cases have been subject to the extensive failure to investigate and prosecute rape cases, bring equal protection claims on the theory that credibility discounting amounts to discrimination. The equal protection claim would be based on the theory that law enforcement officials' skepticism of and failure to adequately investigate allegations of sexual assault constitutes discrimination based on sex, which is prohibited by federal law.