



**BERKELEY CENTER ON
COMPARATIVE EQUALITY
& ANTI-DISCRIMINATION
LAW**

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Dear friends and colleagues,

Welcome to the February issue of the electronic journal of the [Berkeley Center on Comparative Equality & Anti-Discrimination Law](#). In January 2020 we began distributing abstracts and links to newly published papers ourselves, instead of engaging the Social Science Research Network to distribute them for us. We believe this will allow us to substantially expand the scope of the scholarly material we publicize and provide a more interesting journal. You are welcome to share this journal to anyone you believe would find it interesting.

The journal is intended to inform our members about interesting new papers in our field, by distributing abstracts and links to the papers. We will produce the journal here at Berkeley Law, with co-editors rotating each month, assisted by our editorial assistant, Berkeley student Talia Harris.

This issue was edited by Alice Margaria and Simon Rice. Thank you Alice and Simon.

Warm regards,

David

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Brems, Eva: [Hidden Under Headscarves? Women and Religion in the Case Law of the European Court of Human Rights](#). Forthcoming, *Religion & Human Rights*, 2020

The paper offers an analysis of the case law of the European Court of Human Rights at the intersection of women's rights and religious freedom. It maps different configurations of gender and religious interests across the corpus of case law, and analysis of the Court's intersectionality practice.

Bygren, Magnus; Anni Erlandsson; Michael Gähler: [Do Employers Prefer Fathers? Evidence from a Field Experiment Testing the Gender by Parenthood Interaction Effect on Callbacks to Job Applications](#). *European Sociological Review*, Volume 33, Issue 3, June 2017, Pages 337–348

In research on fatherhood premiums and motherhood penalties in career-related outcomes, employers' discriminatory behaviours are often argued to constitute a possible explanation for observed gender gaps. However, there is as yet no conclusive evidence of such discrimination. Utilizing a field experiment design, we test (i) whether job applicants are subject to recruitment discrimination on the basis of their gender and parenthood status, and (ii) whether discrimination by gender and parenthood is conditional on the qualifications required by the job applied for. We applied for 2,144 jobs in the Swedish labour market, randomly assigning gender and parenthood status to fictitious job applicants. Based on the rate of callbacks, we do not find that employers practise systematic recruitment discrimination on the basis of the job applicants' gender or parental status, neither in relation to less qualified nor more highly qualified jobs.

Cohen, I. Glenn: The Right(s) to Procreate and Assisted Reproductive Technologies in the United States. *The Oxford Handbook of Comparative Health Law* (Tamara K. Hervey and David Orentlicher eds., 2020, Forthcoming)

This chapter focuses on the right (or rights) to procreate in the United States, with a focus on reproductive technology use. The United States has been too often described as the "wild west" of reproductive technology use. When measured against many of its comparators — Canada, Australia, the UK, Germany, etc. — it is undoubtedly true that more forms of reproductive technology use are permitted in the United States than elsewhere. It is for this reason that the United States has been a frequent destination for "circumvention tourism" or "fertility tourism." At the same time, it would be wrong to think that reproductive medicine is unregulated in the United States. The chapter argues that it is just that the regulation is more fragmented, both in terms of the locus of control (federal



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vs. state authority, governmental vs. professional self-regulation, etc.) and also of the legal sources involved (more of a focus on tort law and family law than direct regulation at the statutory or constitutional level).

de Vries, Sybe A.: [The Bauer et al. and Max Planck judgments and EU citizens' fundamental rights: An outlook for harmony.](#) *European Equality Law Review*, January 2019 Issue 1

In this article the focus will lie on the impact of the Bauer et al. and Max Planck judgments on the direct effect and horizontal application of the EU Charter in general and on fundamental social rights in particular. Although the judgments do not directly concern gender equality and non-discrimination, they bring the Court's case law in relation to the horizontal applicability of the EU Charter, including Article 21 as set out in Egenberger, to a higher level. By enhancing the legal effects of fundamental social rights contained in the Charter and by clarifying the conditions under which Charter provisions have horizontal application, these judgments necessarily have repercussions for the principles of gender equality (contained in Art. 23 EU Charter) and non-discrimination (Art. 21 EU Charter) in the EU. This article thus provides a thorough analysis of these judgments and assesses their consequences for EU equality law.

di Torella, Eugenia Caracciolo: [An emerging right to care in the EU: a "New Start to Support Work-Life Balance for Parents and Carers"](#). *ERA Forum* 18, 187–198 (2017)

Reconciliation between work and family life has been a prominent feature of EU discourse, policy and legislation for some time now. Accordingly, an increasingly sophisticated array of measures has been implemented. This article focuses on the most recent EU initiative, namely the New Start to Support Work-Life Balance for Parents and Carers, which was announced on 26 April 2017. It entails a mixture of legislative and non-legislative measures aimed at modernising the regulation of this area. This article maintains that the New Start Initiative, although not flawless, is ground-breaking. In this proposal, the Commission is embracing a substantive and transformative approach to equality. The New Start Initiative has the potential to reconceptualise this area and to move from care as a mother-child issue to a wider one that sees care as an integral part of society.



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Dugardin, Fabien-Antoine; Edith Ginglinger: [Gender Pay Gap, Labor Unions and Firm Performance](#).

Using detailed employee-employer administrative data, we analyze the impact of the gender pay gap on the performance of firms and find that it depends on the presence of labor unions. When the firm is not unionized, the gender pay gap reduces profitability. In contrast, when unions are present, the gender gap has no effect on profitability in male-dominated firms and increases profitability in female-dominated firms. Our evidence suggests that when there is no union, giving priority to cohesion and pay equality is value-enhancing. In highly feminized firms, unions provide employees with the option of nonpecuniary benefits, with females opting for better work-life balance and males opting for higher salaries. Our findings indicate that in these firms, the gender pay gap may reflect the divergent interests of female and male employees and can positively affect firm value.

George, Marie-Amelie: [Queering Reproductive Justice](#) University of Richmond Law Review, Vol. 54, 2020

The Supreme Court has simultaneously retreated from its once-protective stance towards reproductive rights while recognizing and safeguarding LGBTQ rights. This jurisprudential disconnect affords advocates an opportunity. By focusing on the intersection of these two areas of law — queer reproductive justice — advocates may be able to forge useful precedent in the LGBTQ rights space to then apply to other reproductive justice issues, including abortion and contraception. This Essay highlights three queer reproductive justice spaces — family formation, sex education curricula, and medical decision-making — to demonstrate how LGBTQ rights advances may inure to the benefit of reproductive justice more generally.

This argument, while deeply practical in nature, implicitly challenges the conventional wisdom of social movement mobilization. Social movements are usually thought to promote the interests of their most privileged group members, whose rights are the least threatening to the status quo. Each incremental rights gain then trickles down to more marginalized individuals. For reproductive justice advocacy, the most effective approach may be one that “trickles up” from the most to the less marginalized.



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Goldblatt, Beth; Linda Steele: [Bloody Unfair: Inequality related to Menstruation — Considering the Role of Discrimination Law](#). The Sydney Law Review, September 2019, Volume 41 Number 3

Drawing on growing social awareness, activism and scholarship, this article examines menstruation as an equality issue and the implications for discrimination law in Australia. It discusses the complex nature of inequality that arises in relation to menstruation. It also considers intersectional discrimination (when a combination of attributes generates a new form of discrimination) that occurs in relation to menstruation facing different groups: women and girls with disabilities, incarcerated women, and transgender, gender-diverse and intersex people. The article considers how some forms of inequality related to menstruation might be addressed through discrimination law (workplace adjustments and provision of menstrual products in carceral settings) and points to limitations of discrimination law or its application, such as in relation to sterilisation of women and girls with disabilities and strip searching of incarcerated women. It concludes that Australian discrimination law can only have a limited impact in addressing menstrual inequality. This is because: (a) the structure of the law is attribute-based and thus cannot address the complex intersections of sex and other attributes; (b) it cannot address structural inequality; and (c) it cannot adequately contend with embodied and abjected legal subjects. These conclusions have radical implications beyond menstruation inequality in contributing to broader discussions of how law can re-imagine gender difference and advance equality.

Iordache, Romanita: [Matters of individual conscience or non-discriminatory access to public services and goods? Denial of access to public goods and services under the colours of religious ethos](#). JOUR 2019/07/29 ?

In the changing tides of illiberalism eroding the space of fundamental freedoms and liberties, religiously motivated individuals increasingly invoke their religious ethos, or claim to be conscientious objectors, in the attempt to be exempted from the non-discrimination principle, while effectively denying or limiting the rights of others. Whether it is the therapist working for a relationship counselling service who refuses his services; the owner of a bed and breakfast, or of the cake shop or photo shop denying services to same-sex families, believing that such services would condone homosexuality; the health care professionals refusing to provide particular health services; or pharmacists who refuse to sell properly prescribed legal drugs to women or to trans persons – there is a common thread: those denying services or goods felt that to provide the services requested would be incompatible with their religious beliefs and asked to be exempted



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from the general principle of non-discrimination. Conscientious objection was developed in relation to mandatory military service, articulating the obligation of states to guarantee the effective exercise of the right to freedom of conscience. It was further revisited in the context of health services. However, not all religiously motivated conduct is recognised as deserving protection. This article seeks to shed light on the standards emerging at ECHR and EU level, to assess the challenging task of balancing the expression of religious ethos with the prohibition of discrimination – including discrimination on grounds of sexual orientation and gender identity – or with women’s rights to personal integrity, life, health, and autonomy and concludes that, in spite of the conservative rhetoric, there is no emerging right to discriminate.

Kádár, Tamás: [The Legal Standing of Equality Bodies](#). European Equality Law Review, January 2019 Issue 1

Loper, Kelley: [The Courts, Public Opinion and the Rights of Lesbian, Gay, Bisexual and Transgender Persons: A Hong Kong Perspective](#). Australian Journal of Asian Law, Vol. 20, No. 1, Article 4, 2019

In recent years, courts in many jurisdictions have considered the relevance of societal consensus when judicially reviewing policies that affect the rights of sexual orientation and gender identity minorities. This article focuses on three landmark cases concerning transgender marriage and the rights of same-sex couples in Hong Kong, where the apex court has produced relatively progressive rights jurisprudence. A study of these decisions offers comparative insights about the role of public opinion when judges resolve potentially controversial claims involving the rights of lesbian, gay, bisexual and transgender (LGBT) persons. It examines the lower courts’ reliance on, and the Court of Final Appeal’s ultimate rejection of, consensus as a factor when justifying limitations on fundamental rights. At the same time, this analysis suggests that a more nuanced approach — entailing both resistance and responsiveness to public opinion — may be warranted. The Hong Kong jurisprudence sets the stage for developing alternative understandings of consensus which could enhance judicial contributions toward broader discussions in support of LGBT rights protection.



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Mutter, Diana Nicholls: [Crashing the Boards: A Comparative Analysis of the Boxing Out of Women on Boards in the United States and Canada](#). Diana C. Nicholls Mutter, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women On Boards in the United States and Canada*, 12 *J. Bus. Entrepreneurship & L.* 285 (2019)

Women are still severely under-represented on public corporations' boards of directors in both the US and Canada, despite both jurisdictions implementing diversity disclosure regimes years ago. This paper first discusses and compares the history of corporate governance in the US and Canada leading up to the implementation of each jurisdiction's diversity policy. Secondly, the debate surrounding the under-representation of women on boards and solutions to this issue are presented. The solutions to under-representation, normally expressed in business case and normative case rationales, and their respective pitfalls are examined. This paper advances the argument that securities regulators in both the US and Canada, while purporting to have implemented the diversity policies to better business and protect investors, were really advancing social justice goals. But because neither policy has had an impact on board gender diversity, neither policy is effective in advancing either business goals or normative goals. Finally, this work will be among the first to analyze California's recent Senate Bill mandating gender quotas and what this may mean for the US and Canada going forward.

Nieminen, Kati: [Eroding the protection against discrimination: The procedural and de-contextualized approach to S.A.S. v France](#). *International Journal of Discrimination and the Law*, vol. 19, no. 2, June 2019, pp. 69–88

Can human rights law adequately address implicit modes of racism and gender discrimination? This question is discussed in this article through the analysis of the European Court of Human Rights case *S.A.S. v. France* (2014) concerning the ban on the Islamic full-face veil. The so-called 'headscarf cases' have been thoroughly discussed by many scholars, yet they seem to offer an endless source of different points of view. Departing from the previous discussion on the headscarf and full-face veil cases, which have largely concentrated on the questions of personal autonomy, identity and subjectivity, this article approaches *S.A.S. v. France* from the point of view of discrimination. It is suggested that the Court's procedural and de-contextualized approach to rights results in eroding the protection against discrimination. Procedural approach refers to the Court's tendency to emphasize procedural aspects of the Convention rights and not to engage sufficiently with substantive analysis. The de-contextual approach to rights on the other hand refers to lack of sensitivity to empirical information concerning the facts of the case at hand. Together the procedural and de-contextual approaches



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inadvertently erode the protection against discrimination of vulnerable groups, such as Muslim immigrant women.

Petroglou, Panagiota: [Sexual harassment and harassment related to sex at work: time for a new directive building on the EU gender equality acquis](#). *European Equality Law Review*, February 2019 Issue 2

Ringelheim, Julie: [The Burden of Proof in Anti-Discrimination Proceedings. A Focus on Belgium, France and Ireland](#). *European Equality Law Review*, February 2019 Issue 2

SáCouto, Susana; Leila N. Sadat; Patricia Viseur Sellers: [Collective Criminality and Sexual Violence: Fixing a Failed Approach](#). *Leiden Journal of International Law*, final version of article published online by Cambridge University Press: 27 November 2019, DOI/10.1017/S092215651900061X.

International criminal tribunals have developed a number of legal theories designed to hold individuals responsible for their role in collective criminal conduct. These doctrines of criminal participation, known as modes of liability, are the subject of significant scholarly commentary. Yet missing from much of this debate, particularly as regards the International Criminal Court, has been an analysis of how current doctrine on modes of liability responds to the need to hold collective perpetrators criminally responsible for crimes of sexual and gender-based violence (SGBV). Indeed, many writings in this area of the law address perceived shortcomings in the theoretical underpinnings of modes of liability doctrine in the abstract but ignore the application of this doctrine in concreto. As a result, facially neutral writings on modes of liability may in fact be gendered in application, either because they fail to account for the specific characteristics of sexual and gender-based violence or because they are applied in a manner that requires higher thresholds for finding culpability for the commission of SGBV crimes. This article fills the gap between theory and practice, examining past and present doctrine, and suggesting ways in which the treatment of modes of liability by international criminal courts and tribunals can both properly respond to the need for personal culpability and the dangers of collective criminal activity, particularly as regards SGBV crimes.



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