



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

June 28, 2020

Dear friends and colleagues,

Welcome to the June 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 assistants, Berkeley students Talia Harris and Yolanda Ye.

This issue was edited by Sara Benedi Lahuerta and Anton Kok, with assistance from Berkeley students Talia Harris and Yolanda Ye. Thank you.

David B. Oppenheimer
Clinical Professor of Law
Director, Berkeley Center on Comparative Equality & Anti-Discrimination Law
Faculty Co-Director, Pro Bono Program
Berkeley Law
doppenheimer@law.berkeley.edu
510/326-3865 (cell)



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Amos, Timothy D.: ["Contested liberation: the Japanese Communist Party, human rights groups, and the new anti-discrimination law."](#) Japan Forum. Vol. 32. No. 2. Routledge, 2020.

The 2016 Law for the Promotion of the Elimination of Buraku Discrimination (LPEBD) was a significant development in the history of postwar Buraku liberation politics. Why then was there such strong opposition to it by the Japan Communist Party and JCP-affiliated groups? This article explains this opposition to the new law by placing it within a larger postwar historical context. Once the content and meaning of the strong opposition to the law's passing is placed in historical perspective, and the reasons for and motivations behind the law's pronouncement are contextually clarified, the importance of the critiques provided by these groups becomes more readily apparent. The concerns raised about the possible negative impact the law might have upon individuals and communities identified as belonging to the contemporary Buraku liberation movement are cogent and worthy of close consideration, particularly in light of the murky circumstances and distinct lack of political debate that actually surrounded the passing of the bill. The article, however, also concludes by discussing some of the problems with the JCP interpretative framework, and suggests the need for new interpretative paradigms to envisage the twenty-first century Buraku liberation movement.

Adenitire, John. ["Protecting Solitary Beliefs Against Indirect Discrimination."](#) Industrial Law Journal (2020).

This article argues that the requirement of group disadvantage in indirect belief discrimination is incompatible with the human right to freedom of thought, conscience and religion. The latter protects sincerely held beliefs even if they are not shared by others or part of group orthodoxy. Consequently, the group disadvantage requirement in indirect belief discrimination ought to be interpreted away under section 3 HRA. Doing so, it is argued, does not give an unfair advantage to beliefs over other aspects of personal identity and complies with the legal injunction against judicial involvement in theological or philosophical disputes. The article concludes by arguing that, in light of the UK case law, imposing a requirement of group disadvantage is likely to pose a more significant barrier to secular philosophical beliefs than to religious ones. In light of an understanding of secularism that requires equal treatment of religious and deeply held secular beliefs, it is imperative that such a barrier be dispensed with.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Baldwin-Ravagen, Laurel: [“Social Dimensions of COVID-19 in South Africa: A Neglected Element of the Treatment Plan”](#). Wits Journal of Clinical Medicine, Volume 2 Number Si1, Apr 2020, p. 33 - 38.

Notwithstanding moments of shared elation – Nelson Mandela's triumphant release from prison 30 years ago, those halcyon weeks in 2010 when we were hosts to the Soccer World Cup, or more recently Siya Kolisi's diverse team of players overcoming enormous odds to achieve a global rugby victory – the unity and transcendence of the rainbow nation largely have eluded us. While a pandemic is not the occasion to point fingers, it does expose the structural fault lines that undermine social cohesion. In “normal” times, these fissures are mostly tucked away safely in the recesses of our national collective consciousness. It is as if the virus, anthropomorphised, has pulled back the veil, baring the naked truth of our imperfect realities. There is no place to hide; and, to be totally honest, we are afraid.

Benedí Lahuerta, Sara; Ingi Iusmen: [EU nationals' vulnerability in the context of Brexit: the case of Polish nationals](#). Journal of Ethnic and Migration Studies 2020

Since the late 1990s, populist discourse based on anti-immigration sentiments has been on the rise in Britain. This phenomenon reached a peak during the EU Referendum (ER) campaign and shortly thereafter. The ER has been linked to the upsurge in racially and religiously aggravated offences recorded post-July 2016. Polish nationals, who constitute the largest group of EU nationals in the UK, were targeted by many of these incidents. It could therefore be argued that, in the last years, and particularly, since the ER, EU nationals living in the UK have become more ‘vulnerable’. To test this hypothesis, this contribution is based on an interdisciplinary project that collected socio-legal evidence to compare the vulnerability of the Polish community in Southampton before and after the ER. The paper draws on vulnerability and psychology literature to differentiate between ‘objective’ and ‘subjective’ vulnerability. Our study deploys mixed methods (qualitative and quantitative) to test changes in objective and subjective vulnerability among Southampton-based Poles before and after the ER. Our findings suggest that, following the ER, Poles felt significantly more vulnerable, especially in terms of subjective vulnerability, even if they had never experienced overt hate incidents or discrimination (objective vulnerability) before.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Briddick, Catherine: ["Precarious workers and probationary wives: how immigration law discriminates against women."](#) *Social & Legal Studies* 29.2 (2020): 201-224.

Immigration law prescribes a range of statuses into one of which individuals must try to fit to be allowed entry. This range establishes a hierarchy from highly advantageous forms of permission to enter or remain in the United Kingdom to ones to which few rights accrue, which create dependency or are precarious. Against the backdrop of this hierarchy, I make two claims: that women are disadvantaged by immigration law's distribution of migration statuses; and, that this disadvantage is the result of rules which indirectly discriminate against women, discrimination which may be unlawful under Article 14 ECHR. As it is well-established that indirect discrimination may be revealed by statistical information, I rely on data from over 10 years to demonstrate that certain migration opportunities are distributed differently to women and men. This distribution is then subjected to scrutiny, potential 'justifications' for it, including those premised on sexed/gendered stereotypes, being analysed and refuted. Finally, an understanding of women's disadvantageous and discriminatory treatment in relation to the family and labour migration routes considered, is combined with a broader consideration of gendered patterns of migration and the statuses that such patterns produce, to found the normative claim that immigration law as whole disadvantages women.

Brown, Jeffrey M.: ["What Makes Disability Discrimination Wrong?."](#) (2020) *Law and Philosophy*

No abstract available.

Bunt, Danielle, et al.: ["Quotas, and Anti-discrimination Policies Relating to Autism in the EU: Scoping Review and Policy Mapping in Germany, France, Netherlands, United Kingdom, Slovakia, Poland, and Romania."](#) *Autism Research* (2020).

The low employment rates of persons with Autism Spectrum Conditions in the European Union (EU) are partly due to discrimination. Member States have taken different approaches to increase the employment rate in the recent decades, including quota and anti-discrimination legislation, however, the implications for people with autism are unknown. The purpose of this scoping review was to provide a comprehensive overview of the history of these employment policies, from seven EU Member States (Germany, France, the Netherlands, the United Kingdom [prior to exit], Slovakia, Poland, and



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Romania), exploring the interdependence on international and EU policies, using a path dependency analysis. The results indicate that internationally a shift in focus has taken place in the direction of anti-discrimination law, though employment quotas remained in place in six out of the seven Member States as a means to address employment of people with disability in combination with the new anti-discrimination laws. Lay summary Discrimination is partially responsible for the low employment of people with autism. Several approaches have been taken in recent years, such as anti-discrimination laws and setting a mandatory number of people with disabilities that need to be employed. This study finds that, internationally and in the European Union, the focus was initially on the use of quotas and gradually moved to anti-discrimination, with both being used simultaneously.

Butterfield, Nicole: ["The Limits of Legal Discourse: Discrimination against LGBTI Persons in Croatia."](#) GLQ: A Journal of Lesbian and Gay Studies 26.2 (2020): 303-331.

Based on fieldwork interviews conducted in 2015–16 with lesbian, gay, bisexual, and queer-identified individuals who are from or living in small towns and rural communities in Croatia, this article draws from the personal experiences of these individuals and the ways in which they describe negotiating sexual difference, discrimination, and homophobia in their communities. This analysis reflects on the importance of locating antidiscrimination legal mechanisms in local contexts to assess the degree to which such an approach can address institutional and systemic discrimination based on sexual difference. The article explores how small town and rural contexts can raise specific concerns about the efficacy of antidiscrimination legislation as it has been developed in the EU and Croatia, and calls into question the neoliberal, individualist, and reactive legislative approach to the protection of sexual human rights. Finally, the article analyzes a recent survey/ research on discrimination in the workplace that was conducted as a collaborative effort between several LGBTI and human rights organizations in Croatia and how these strategies can (re)produce neoliberal discourses of market incentives and diversity management in the workplace rather than address the structural inequalities that produce and enable discrimination.

Díaz Rodríguez, Begoña: [Mission Impossible? Preventing discrimination on grounds of disability of fetuses with Down syndrome in Spain after the emergence of non-invasive prenatal testing.](#) International Journal of Discrimination and the Law 2020



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

This article analyses the current situation of discrimination towards foetuses with Down syndrome (DS) in Spain, both legally and through the medical practice, pointing out how this discrimination breaches the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by Spain, according to the Committee of the CRPD. This work argues that an eventual modification of the Spanish abortion legislation (in appeal before the Constitutional Court) might not be enough to prevent the said discrimination due to the emergence of the non-invasive prenatal testing (NIPT). It explores the challenges introduced by the NIPT and the relationship between a prenatal diagnose of a disability (DS in particular) and termination of pregnancy rates. Health practitioners, mainly through the communication of the diagnose, play a significant role in the bias against the DS population that leads to discrimination. Consequently, this article suggests the need for a different approach towards a DS diagnose, more accurate, positive and based on the actual experience of individuals with DS and their families.

Eyer, Katie R.: ["Claiming Disability"](#). Boston University Law Review, 2021 Forthcoming

We stand at the cusp of a potentially transformative moment for disability rights. For decades, the disability rights movement has been burdened by a profound obstacle: many of its potential constituents do not self-identify as disabled. Disability has long been constructed in our society as quintessentially associated with intrinsic limitation, and especially an inability to work. Although modern disability civil rights law includes no such requirement, it has not yet transformed entrenched colloquial understandings. As such, many people who qualify as disabled under contemporary civil rights law nevertheless do not self-identify in that way.

But numerous factors make this a uniquely opportune moment to transform this state of affairs. The ADA Amendments Act, enacted in 2008, for the first time has provided a definition of disability that is broad, inclusive, and untethered to functional limitation. So too the growth of disability pride movements, social media, and the development of new academic ideas in disability theory all hold promise for encouraging a mass movement of disability identity. If only a fraction of those who qualify as disabled under the ADAAA were to "claim disability" and embrace a disabled identity, millions of Americans would identify as disabled for the first time.

Such "claiming" of disability has the potential to be transformational for disability rights. As scholars have long observed, the disability movement has struggled to dislodge bias against people with disabilities, even as the law has formally afforded them with rights.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Even in a time where bias against other stigmatized groups has rapidly decreased, disability bias has remained unyielding. This Article suggests that “claiming disability” holds the potential to radically disrupt this state of affairs, by vastly expanding the scope of who people think of as “disabled,” including, potentially, themselves.

In addition to its benefits for disability rights, this Article argues that “claiming disability” may also be individually transformational. For too many people, the experience of medical or mental health impairment is one of enforced silence; of closeting and covering; of hiding pain and difficulty; and of not taking pride in identity. Moreover, it is too often the case that societal tropes of deficiency and limitation associated with impairment can be internalized in the absence of a positive disability frame. Claiming disability thus holds the potential to offer a liberatory alternative to the current experience of impairment, even as it paves the way for broader transformations in disability rights.

Fisher, Bianca; Mduduzi Biyase; Frederich Kirsten; September Rooderick: [“Gender Wage Discrimination in South Africa within the Affirmative Action Framework.”](#) EDWRG Working Paper Number 01-20.

The issue of gender wage discrimination and women empowerment has gained a greater deal of international attention. However, gender-based discrimination persists worldwide, depriving women of their basic rights and opportunities. Affirmative action policies have been adopted by many countries around the world as a means to address these inequalities in employment and education while promoting diversity, and redressing historical wrongdoings. Despite some progress made worldwide, however, gender wage disparities remain particularly high in South Africa. Hence, the question remains about whether these affirmative action measures have yet to achieve their intended effects. This study investigates the trends in gender wage disparities by occupation before and after the introduction of affirmative action measures. By conducting an empirical analysis within the South African context, we examine gender wage discrimination within the Affirmative Action Framework by employing a Blinder-Oaxaca decomposition model for the years 1997 and 2015, the period for which data are available. The results of the kernel density function, OLS regression and Blinder-Oaxaca decomposition analyses show that the current gender wage gap present between males and females at different occupational levels in South Africa has declined. This surprising result should, however, not entirely be interpreted as a decline in discrimination per se, but also an increase in the productive characteristics of females over time. Although we cannot pin it down to the affirmative action policy entirely, there are some signs to suggest that the affirmative action policy



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

might have played a role in narrowing the gender wage gap by increasing the productive characteristics of women in specific ways.

Huda, Taqbir: ["Beyond Criminal Justice: Towards Tort Liability for Sexual Violence Against Women"](#). 17: 1 & 2 (2017) Bangladesh Journal of Law 201

Contrasting the increasing rates of rape, sexual assault and sexual harassment of women with the decreasing rate of convictions evinces the inefficacy of the criminal justice system in curbing the sexual violence epidemic in Bangladesh and the need to search for an alternate remedy. It is in this context that I propose it is imperative for victims of sexual violence to have a tenable recourse in civil law, more specifically an action for damages in tort against both: the perpetrator and relevant third parties. While there have been some judicial and legislative attempts to compensate victims of sexual violence monetarily, these have tended to restrict themselves to the realm of criminal law. As such, the central argument of this article is that the move towards compensating and redressing victims of sexual violence has to shift away from the periphery of criminal law to remedies under tort law since the latter is arguably more apt in responding to the diverse harms and losses faced by sexual violence victims.

Jacquot, Sophie: ["Small decisions? The European Commission and the transformation of the role of legal expert groups: the case of gender equality and non-discrimination."](#) JCMS: Journal of Common Market Studies 58.3 (2020): 545-561.

The European Equality Law Network (EELN) was founded in 2014. It resulted from the merger of two gender equality and non-discrimination expert groups. The creation of the EELN may appear as a simple decision made to rationalize the landscape of EU expert groups. The objective of this article is to show that this merger indicates there have been important transformations in the role of expert groups and legal expertise in the field of EU equality policy. This seemingly small decision participates in a larger process of change. The legal experts and the Commission are no longer partners who are developing equality policy together: members of the EELN are seen merely as service providers. The article isolates three main explanations for this: the roles of the policy sector, the regulatory and enforcement politics of the Commission and policy instruments in the framework of the Commission's managerial turn during the 2010s.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Khaitan, Tarunabh; Jane Calderwood Norton: [The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions](#). *International Journal of Constitutional Law* (Forthcoming 2019)

This article argues that while they are often conflated, the right to freedom of religion and the right against religious discrimination are in fact distinct human rights. Religious freedom is best understood as protecting our interest in religious adherence (and non-adherence), understood from the committed perspective of the (non)adherent. This internal, committed, perspective generates a capacious and realistic conception of religious adherence, which reflects the staggering plurality of forms of religiosity (or lack thereof) as extant in contemporary societies. The right against religious discrimination is best understood as protecting our non-committal interest in the unsaddled membership of our religious group. Thus understood, the two rights have distinct normative rationales. Religious freedom is justified by the need to respect our decisional autonomy in matters of religious adherence. The prohibition on religious discrimination is justified by the need to reduce any significant (political, sociocultural, or material) advantage gaps between different religious groups. These differences reveal a complex map of two overlapping, but conceptually distinct, human rights which are not necessarily breached simultaneously.

Koshan, Jennifer; Janet Eaton Mosher; Wanda Anne Wiegers: ["The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy"](#). In Trevor Farrow & Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver, UBC Press, 2020)

Domestic violence cases in Canada present unique access to justice challenges due to complex power dynamics, structural inequality, and the reality that victims, offenders, and children must often navigate multiple legal systems to resolve multiple issues. The complexity of these cases has both personal and systemic impacts, and because women are the primary victims of domestic violence, these impacts are gendered and are heightened for marginalized women. Issues may also differ across Canadian provinces and territories and on First Nations reserves given the application of different laws, policies, and dispute resolution models. This paper explores how the access to justice crisis in Canada manifests in domestic violence cases. After reviewing the literature on access to justice and domestic violence, we map out and compare laws, government policies and justice system components affecting the parties in domestic violence cases across Canadian jurisdictions, highlighting the barriers in seeking justice that women and their children confront. We then use a hypothetical case study to explore how the complex



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

interaction of these laws, policies, and processes may impact domestic violence victims. Our analysis is a first step towards identifying the systemic reforms necessary to enhance access to justice in domestic violence cases.

Lazar, Ruthy Lowenstein: ["Me Too? The Invisible Older Victims of Sexual Violence"](#)

Michigan Journal of Gender & Law, Vol. 26, No. 2, 2020

A review of legal research on violence against women and elder abuse reveals a disturbing picture. There is hardly any American legal research examining sexual abuse of older women and its conceptualization in legal literature and treatment in the legal system.

This Article attempts to fill the abovementioned gap and to bring the hidden issue of sexual violence against older women to light. Scholars writing on rape, violence against women, and elder abuse tend to analyze age and gendered sexual violence separately from each other, without accounting for their interplay. This Article proposes a conceptual framework of sexual abuse of older women that integrates age and gender in the analysis.

To achieve this end, this Article examines 109 publicly available American cases involving sexual violence against women over the age of 60, between the years 2000 and 2018, which are based on a search of 1,308 American cases. Based on this new empirical database, this Article offers an opportunity for analyzing the social and legal "taboo" regarding sexual abuse of older women.

Despite findings indicating that sexual abuse of older women (and older people in general) is a significant issue creating serious consequences for victims, the Article shows that legal actors, social workers, health professionals, family members, and society miss its signs. Sexual abuse of older women is being noticed and treated by the criminal justice system only when it reflects a "real rape" scenario. The obstacles to effective prosecution and to full access to the criminal justice system are distinctive in the case of older victims because of the effect of age, the way age shapes the experience of older victims of sexual violence, the effects of sexual violence on the victims, and its interplay with gender.

Although sexual violence against older women is a form of elder abuse, it should be viewed separately from other forms of elder abuse and should be understood as part of a wider context of gender-based violence. There is a need for a holistic approach to sexual violence of older women, which perceives the sexual violence as a unique phenomenon



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

and provides older women with legal and social mechanisms that fit their needs and experience both as women and elderly people

Magalhães de Souza, Ionara; Gail Denise Hughes; Brian Eduard van Wyk; Verona Mathews; Edna Maria de Araújo: [“Comparative Analysis of the Constitution and Implementation of Race/Skin Color Field in Health Information Systems: Brazil and South Africa.”](#) J. Racial and Ethnic Health Disparities (2020).

The inclusion of race/skin color in Health Information Systems makes it possible to measure health inequities. Brazil and South Africa correspond to countries marked by profound inequalities, multiracial constituted that suffered from the historical process of colonization, and had racism legitimized as a structuring model of state development. The objective is to compare the information systems of Brazil and South Africa regarding the configuration and implementation of the item race/skin color. This is a qualitative, descriptive study, based on the content analysis proposed by Bardin. A survey on race/skin color was carried out in health department documents and ministerial sites in both countries. The collected material was processed and analyzed utilizing the IRAMUTEQ R software, version 0.7 alpha 2, with a test $\chi^2 > 3.80$ ($p < 0.05$), and by the TABNET application version 4.14 and Excel software, version 2016. In Brazil and Africa South, several health information systems did not include race/skin color. In both countries, health information systems were boosted in the mid-1990s. In Brazil, of the systems that provide data by race/skin color, the inclusion occurred after claims by the black movement. In South Africa, through the creation of the respective systems. The historical configuration of the question of race/skin color in both countries was guided by political and ideological references. In multiracial and unequal countries, race/skin color is a central political category to promote health equity.

Magill, Severyna: [The Right to Privacy and Access to Abortion in a Post-Puttaswamy World](#) (2020) 3 University of Oxford Human Rights Hub Journal, 160-194

In August 2017 India's Supreme Court ruled that a Constitutional right to privacy exists in *KS Puttaswamy v Union of India*. Whilst considering how the right to privacy has evolved the Supreme Court referenced international case law charting the right to use contraception and to access abortion. Indian jurisprudence already has a wealth of case law on reproductive rights, often referencing the same principles of liberty, autonomy, and dignity that the Puttaswamy judgment refers to. After Puttaswamy there has been much



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

talk about the scope of reproductive rights in India being broadened. This article contributes and builds upon this discourse as it seeks to predict how the Supreme Court will respond to future challenges using the new constitutional right to privacy. It maps the legal framework under the Medical Termination of Pregnancy Act, which regulates access to abortion within India and considers issues relating to access to abortion, the continuing practise of sex-determination and sex-preferred abortions, and debates surrounding access to abortion where foetuses have been diagnosed with medical conditions likely to affect their quality of life, and/or survival. This article examines liberty, autonomy, and dignity as they are articulated within the Puttaswamy decision and how they are represented within existing reproductive rights jurisprudence and academic debates with reference to access to abortion. This approach aims to predict how any future challenge to the Medical Termination of Pregnancy Act's provisions using the new constitutional right to privacy will be responded to by the Supreme Court of India.

Marnell, John; Elsa Oliveira; Gabriel Hoosain Kahn: ["It's about being safe and free to be who you are': Exploring the lived experiences of queer migrants, refugees and asylum seekers in South Africa."](#)

This article presents findings from three arts-based studies conducted by the African Centre for Migration and Society, in partnerships with Gay and Lesbian Memory in Action and the Sisonke National Sex Worker Movement. Drawing on participant-created visual and narrative artefacts, the article offers insights into the complex ways in which queer migrants, refugees and asylum seekers living in South Africa negotiate their identities, resist oppression and confront stereotypes. It reveals the dynamic ways in which queer migrants, refugees and asylum seekers forge a sense of belonging in spite of concurrent vulnerabilities and structural discrimination. It also reflects on the benefits and limitations of using participatory arts-based research with marginalised groups

McAllister, LaCrisha: [Quarters in the Court: How the Gender Pay Gap Affects Black Women in Law](#)

Women constitute almost half of the national workforce. For half of American families, they are the sole source of income or they are a co-breadwinner. They earn more degrees than men. They work in a broad spectrum of professions and industries and they serve in a multitude of capacities, from administrators to upper management to laborers and everything between. Despite these things, women are paid significantly less than their



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

male counterparts. Efforts to address this have been fodder for discussion for some time. Currently, less than 1% of elected prosecutors are Black women, less than 8% of judges are Black Women in State Trial Courts and State Appellate courts respectively, and a report from the National Association for Law Placement found that Black Women make up about 1.73% of all attorneys included in their survey. This paper seeks to address the ways that the Gender Pay Gap affects Black women in the legal field and how the legal profession can place equity in pay at the base of its mission.

Nottingham, Emma: ["LGBT teaching in primary school: equality, discrimination and freedom of expression."](#) *Journal of Social Welfare and Family Law* (2020): 1-3.

No abstract available.

Numhauser-Henning, Ann: [Elder law and its subject: The contextualised ageing individual.](#) *Ageing and Society*, 1-20

Elder law is often approached in terms of a 'body' of law. In this article, I argue for a contextualised and externalised perspective on the ageing individual as the subject of elder law. Elder law relates to the implications of law as an institutionalisation of society seen through the lens of older persons. The aged subject is a contested and differentiated social construct to be studied in relation to an externalised social 'problem' and properly contextualised. Whereas the ageing individual in the context of labour law and anti-discrimination regulation turns out to be remarkably young, the specific history of LGBT persons in society comes to the fore in cases where age intersects with a ground such as sexual orientation. The 'ageing' worker must thus be understood in relation to work as the dominant distributive order in society, and in relation to institutions and developments associated with work. Due to the role of age as a traditional social stratifier, the prohibition against age discrimination has been given a weaker format than have prohibitions against other kinds of discrimination, and the ban on ageism has failed to achieve a clear legal status. Deficiencies in the measures taken against age discrimination are also evident in their incapacity to address situations where age intersects with other grounds, resulting in a compartmentalised application and interpretation of discrimination bans, leaving vulnerable sub-groups without protection. In sum, elder law is very much a field in process and – although arguing for the added value of a contextualised perspective – it may for the time being suffice to say that 'elder law is what elder law researchers do'.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

O'Connor, Lindsey Trimble, and Julie A. Kmec: ["Is It Discrimination, or Fair and Deserved? How Beliefs about Work, Family, and Gender Shape Recognition of Family Responsibilities Discrimination."](#) *Social Currents* 7.3 (2020): 212-230.

Why do some label employers' actions discrimination, while others do not? We explore whether beliefs about work, family, and gender are associated with labeling an employer's denial of a promotion because of parental leave-taking—an illegal form of family responsibilities discrimination—discriminatory. Data from 702 respondents who evaluated a fictitious transcript of a supervisor-employee conversation show that the stronger one's beliefs that good workers prioritize work over family, that employers do not owe workers job security, and that men are best-suited to work and women to care-taking, the less discriminatory one finds the supervisor's promotion denial. Mediation analyses reveal that these relationships are primarily due to the association between these beliefs about gender, work, and family and perceptions that the supervisor's promotion denial is deserved and, to a lesser extent, fair. Findings hold net of respondent knowledge of discrimination law, gender, and caregiver status.

Pantelic, Marija; Marisa Casale; Lucie Cluver; Elona Toska; Mosa Moshabela: ["Multiple forms of discrimination and internalized stigma compromise retention in HIV care among adolescents: findings from a South African cohort."](#) *J Int AIDS Soc.* 2020; 23(5):e25488.

Efficacious antiretroviral treatment (ART) enables people to live long and healthy lives with HIV but young people are dying from AIDS-related causes more than ever before. Qualitative evidence suggest that various forms of HIV-related discrimination and resulting shame act as profound barriers to young people's engagement with HIV services. However, the impact of these risks on adolescent retention in HIV care has not been quantified. This study has two aims: (1) to examine whether and how different types of discrimination compromise retention in care among adolescents living with HIV in South Africa; and (2) to test whether internalized stigma mediates these relationships.

Porter, Jack: ["Transgender Rights in Sport: Redrafting Section 49 of the Human Rights Act"](#). Victoria University of Wellington Legal Research Paper No. 30/2020



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

This paper addresses the Human Rights Act and the sports exception contained in s 49. After a discussion of the current judicial and legislative climate surrounding the definition of sex, this paper concludes that it is unclear whether sex includes gender for the purposes of the Human Rights Act. This creates the potential for transgender and transsexual individuals to face legal discrimination when attempting to compete in sport. Thus, this paper addresses some of the current issues in sport (namely, safety and fair competition) to determine the scope of the proposed provision. Models from foreign jurisdictions and sporting bodies are discussed and discarded due to a lack of scientific evidence and high levels of subjectivity. This paper concludes that the optimal solution when redrafting s 49 is to focus on a combined objective and subjective model. A provision, loosely based on multiple of the previously discarded models, is drafted, which attempts to limit subjectivity through the creation of an objective baseline. To ensure inclusivity, this paper proposes that gender identity be added as a prohibited ground of discrimination in the Human Rights Act. In doing so, a provision which focuses on safety, fair competition and inclusivity is drafted.

Prince, Anya ER, and Daniel Schwarcz: ["Proxy discrimination in the age of artificial intelligence and big data."](#) *Iowa L. Rev.* 105 (2019-2020): 1257.

Big data and Artificial Intelligence ("AI") are revolutionizing the ways in which firms, governments, and employers classify individuals. Surprisingly, however, one of the most important threats to antidiscrimination regimes posed by this revolution is largely unexplored or misunderstood in the extant literature. This is the risk that modern algorithms will result in "proxy discrimination." Proxy discrimination is a particularly pernicious subset of disparate impact. Like all forms of disparate impact, it involves a facially neutral practice that disproportionately harms members of a protected class.

Reed, Alex: ["NAFTA 2.0 and LGBTQ Employment Discrimination."](#) *American Business Law Journal* 57.1 (2020): 5-44.

Because federal law does not expressly prohibit employment discrimination on the basis of sexual orientation or gender identity, LGBTQ Americans were thrilled to learn that a preliminary draft of the United States–Mexico–Canada Agreement (USMCA) included a provision (the Provision) requiring each nation to enact LGBTQ-inclusive nondiscrimination laws. That excitement promptly turned to despair, however, after the Trump administration insisted on the addition of a footnote (the Footnote) designed to



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

exempt the United States from the Provision. To date, the Footnote has been derided by scholars and trade experts alike as a transparent attempt to evade the Provision's LGBTQ-inclusive mandate. Yet, by focusing only on what the USMCA does not do, these analyses overlook what the agreement does do, even if unintended, to benefit LGBTQ Americans. This article provides the first comprehensive analysis of the USMCA's implications for federal antidiscrimination law and demonstrates that—regardless of how the Supreme Court rules in a trio of LGBTQ employment cases—the Footnote actually stands to help, not hinder, the cause of LGBTQ equality.

Ruiters, Michele; Ailie Charteris: [“Gender equality in labour force participation, economic growth and development in South Africa.”](#) *Development Southern Africa* 26 June 2020.

Studies in feminist literature have found that development effects gender equality in labour force participation, but gender equality has also been found to effect economic growth. These two streams of literature, however, lie largely distinct with few studies directly investigating the inter-relationships between development, growth and gender equality, and as such, this lack of knowledge curtails the development of appropriate policy. This study explores the effect of development on gender equality in labour force participation and the effect of this gender equality on economic growth in South Africa on a quarterly basis from 2008 to 18 using Autoregressive Distributive Lag models. Economic development is found to have a positive effect on gender equality in the long run while greater female participation in the labour market is found to have no effect on growth. These results suggest that further development should be prioritised to support gender parity in economic opportunities in South Africa.

Ruszkowski, Kelsey R: [Defining sex-based discrimination among strife between the Justice Department and the EEOC.](#) *International Journal of Discrimination and the Law* 2020

In the last few decades, US Supreme Court rulings have made strides for the advancement of the LGBT community. However, this community has yet to enjoy equality in the workplace due to its exclusion from Title VII protection. This article details the recent conflict between the Equal Employment Opportunity Commission (EEOC) and the Department of Justice in interpreting Title VII and how this conflict may make it difficult for the Supreme Court to reach a broad ruling concerning sex discrimination under Title VII.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

The EEOC relies on Supreme Court precedent concerning sex stereotyping to extend Title VII protection to sexual orientation while the Justice Department employs a textualist argument to support a narrow interpretation of sex. However, changing societal norms and advancing neuroscientific research support the conclusion that sexual orientation, gender identity, and expression is included under “sex” even when using textualism to interpret Title VII. Given that the Supreme Court is unlikely to defer to the EEOC’s interpretation, these arguments stemming from the social sciences may provide the support the Court needs to justify a decision to end employment discrimination against the LGBT community and gender nonconformists in a way that is consistent with the positions of both the EEOC and the Justice Department.

Siegel, Reva: ["The Pregnant Citizen, from Suffrage to the Present"](#). Georgetown Law Journal, Forthcoming

This Article examines how courts have responded to the equal protection claims of pregnant citizens over the century women were enfranchised. The lost history it recovers shows how equal protection changed—initially allowing government to enforce traditional family roles by exempting laws regulating pregnancy from close review, then over time subjecting laws regulating pregnancy to heightened equal protection scrutiny.

It is generally assumed that the Supreme Court’s 1974 decision in *Geduldig v. Aiello* insulates the regulation of pregnancy from equal protection scrutiny. The Article documents the traditional sex-role understandings *Geduldig* preserved and then demonstrates how the Supreme Court itself has limited the decision’s authority.

In particular, I show that the Rehnquist Court integrated laws regulating pregnancy into the equal protection sex-discrimination framework. In *United States v. Virginia*, the Supreme Court analyzed a law mandating the accommodation of pregnancy as classifying on the basis of sex and subject to heightened scrutiny; *Virginia* directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws regulating pregnancy are not “used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.” In *Nevada Department of Human Resources v. Hibbs*, the Court then applied the antistereotyping principle to laws regulating pregnancy, as a growing number of commentators and courts have observed.

I conclude the Article by considering how courts and Congress might enforce the rights in *Virginia* and *Hibbs* in cases involving pregnancy under both the Fourteenth and the



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Nineteenth Amendments. To remedy law-driven sex-role stereotyping that has shaped the workplace, the household, and politics, the Article proposes that Congress adopt legislation mandating the reasonable accommodation of pregnant employees, such as the Pregnant Workers Fairness Act. These sex-role stereotypes affect all workers, but exact the greatest toll on low-wage workers and workers of color who are subject to rigid managerial supervision.

When we locate equal protection cases in history, we can see how an appeal to biology can enforce traditional sex roles as it did in *Geduldig*—and see why a court invoking *Geduldig* today to insulate the regulation of pregnancy from scrutiny under *Virginia* and *Hibbs* would not respect *stare decisis*, but instead retreat from core principles of the equal protection sex-discrimination case law.

Sriraam, Sangeetha: ["Uniform Civil Code: An Instrument for Gender Justice"](#)

The constitutional tenet of equality is firmly etched not only in the Preamble but also in the Equality Code (Arts. 14 – 18) of Part III of the Constitution. Even after seven decades of the Constitution coming into force, our Republic is far from achieving it. In particular, India lags behind in gender justice. India was placed in the 112th place out of 153 countries by the World Economic Forum in the Global Gender Gap Report 2020, four ranks below her 2018 position. While the Index only measures economic participation, educational attainment, health and survival, and political empowerment, a factor that has major impact on the enjoyment of all other rights by women is equal civil rights. In India, the right to marry, divorce, adopt, inherent property, and other ancillary rights are vastly determined by personal laws and thereby are inherently arbitrary. Efforts on part of the judiciary to streamline these laws on the lines of equality and non-discrimination have been few and fleeting. In several situations, the Courts have adopted the “bull in china shop” attitude. Even in situations where the courts have intervened, legislative overturn has grossly affected gender justice in India.

The Uniform Civil Code is a legal pursuit that is unique to the diverse and multicultural nation that India is. The talk about implementing the Uniform Civil Code, which is a Directive Principle of State Policy enshrined in Art. 44 of the Constitution of India, has often made circles in both the legal as well as the political corridor. Today, we are closer to the goal than ever before. The India socio-legal scene is past the debate on whether the Uniform Civil Code is desirable. The true question before jurists, law-makers, and lawyers alike is what should form a part of the Code so enacted.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

The author contends that the Code is the way forward to ensuring gender justice in the context of family law not only for women, but also for gender minorities. While the enactment of the Code alone cannot ensure the attainment of gender justice, without it, no gender equity is attainable. To this end, the paper analyses some of the gross arbitrary provisions in personal laws to highlight the need for uniform civil code. The paper will go on to establish how Uniform Civil Code could act as an instrument of gender justice by bringing into life provisions for marriage, divorce, succession, inheritance, adoption, amongst others that apply to all irrespective of religion and without distinction of gender.

Stephens, Angeline; Floretta Boonzaier: [“Black lesbian women in South Africa: Citizenship and the coloniality of power.”](#)

Current conceptualisations of citizenship in South Africa are embedded in the egalitarian discourse of the Constitution, lauded for its recognition of historically marginalised groups, including sexually and gender diverse people. Within the paradox of progressive legal advancements and the legacy of colonialism and apartheid, we use a decolonial feminist lens to critically engage with the notion of citizenship for black lesbian women in contemporary South Africa. We adopt a social-psychological perspective of citizenship as an active practice, embedded within the dynamic intersections of historical, structural and discursive patterns of power-knowledge relations in everyday life. We draw from five focus group discussions that were part of a study that explored the intersections of identity, power and violence in the lives of black lesbian women in South Africa. Focusing on the enactments of citizenship in public spaces, we contend that black lesbian women’s lived experiences of citizenship point to the enduring manifestations of the coloniality of power, in which the centrality of race underpins the intersections of class, gender and sexuality. We conclude by arguing that current conceptualisations of full citizenship in contemporary South Africa require a reframing that recognises the coloniality of power and the heterogeneity of marginalised and invisibilised subjectivities.

Weinberg, Jill D.; Nielsen, Laura Beth; Albrecht, Kathryn: [“The Deserving Worker: Decisions About Workplace Accommodation by Judges and Laypeople”](#). Law & Policy, Vol. 41, Issue 3, pp. 286-309, 2019

Employment civil rights laws require employers to make reasonable accommodations for certain workers so that they can perform their jobs. The “reasonableness” of an



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

accommodation request should be based largely on the cost of the accommodation relative to the company's resources, but how do people really evaluate such requests? This study examines determinations of the reasonableness of workplace accommodation requests made by trial judges and ordinary people. Using a $2 \times 3 \times 3$ between-subjects factorial design, we test the effect of worker identity (nursing-mother worker, transgender worker, and Muslim worker) and cost on determinations of reasonableness. We find that (1) the identity category of the requesting worker impacts determinations of reasonableness by both judges and laypeople, (2) the cost of the accommodation impacts determinations of reasonableness, (3) judges are more likely to think that accommodation requests are reasonable than are laypeople, (4) there is a complicated relationship between accommodation cost and employee identity, and (5) the cost of the requested accommodation mitigates the effect of identity significantly for judges but less so for ordinary citizens. While judges are less influenced by the identity category of the employee-requestor than are their lay-counterparts, social status plays a role in determining what constitutes "reasonable accommodation."

White, R. M., Juan Bornman, Ensa Johnson, Karen Tewson, & Joan Van Niekerk: [Transformative equality: Court accommodations for South African citizens with severe communication disabilities.](#) (2020) *African Journal of Disability* (Online), 9, 1-12.

Background

Persons with disabilities are generally at greater risk of experiencing violence than their peers without a disability. Within the sphere of disability, individuals with severe communication disabilities are particularly vulnerable and have an increased risk of being a victim of abuse or violence and typically turn to their country's criminal justice system to seek justice. Unfortunately, victims with disabilities are often denied fair and equal treatment before the court. Transformative equality should be pursued when identifying accommodations in court for persons with communication disabilities, as the aim should be to enable such individuals to participate equally in court, without barriers and discrimination.

Objectives

This research aimed to identify court accommodations recommended by legal experts, which could assist individuals with severe communication disabilities in the South African court.

Method



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

A qualitative design was used to conduct a discussion with a panel of legal experts.

Results

Using Article 13 (Access to Justice) of the Convention on the Rights of Persons with Disabilities (CRPD) as a human rights framework, four themes were identified: equality, accommodations, participation and training of professionals.

Conclusion

Foreign and national law clearly prohibits discrimination against persons with communication disabilities because of their disability and state that they should be given fair and equal access to the court system. For transformative equality to be achieved, certain rules and laws need to be changed to include specific accommodations for persons with communication disabilities so that they may be enabled to participate effectively in court in the criminal justice system.

Williams, Jamillah: [Maximizing #MeToo: Intersectionality and the Movement.](#)

Although women of color experience high rates of harassment and assault, they have largely been left at the margins of the #MeToo movement, in terms of (1) the online conversation; (2) traditional social movement activity occurring offline; and (3) resulting legal activity. This article analyzes how race shapes experiences of harassment and how seemingly positive legal strides continue to fail women of color thirty years beyond Kimberlé Crenshaw's initial framing of intersectionality theory. I discuss the weaknesses of the reform efforts and argue for more tailored strategies that take into account the ineffectiveness of our current Title VII framework, and more specifically, the continuing failure of the law to properly deal with intersectionality. This analysis and the resulting proposal will demonstrate how #MeToo can be leveraged as an opportunity to reshape law and our organizations in a way that better protects all women, and particularly women of color.

Updegrove, Alexander H., Joshua T. Shadwick, Eryn Nicole O'Neal, and Alex R. Piquero: [If They Notice I'm Mexican": Narratives of Perceived Discrimination from Individuals Who Crossed the US-Mexico Border at Ports of Entry.](#) *Deviant Behavior* 41.4 (2020): 458-482.



BERKELEY CENTER ON COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW

Volume 1: Number 6, June 2020

Understanding individuals' encounters with Customs and Border Protection (CBP), the largest law enforcement agency in the United States, is an important theoretical and policy-relevant issue. Travelers entering the U.S. through ports of entry may generalize their experiences with border officials to local law enforcement, and thus, negative experiences at ports of entry may reduce travelers' willingness to cooperate with police and report victimization. Existing studies, however, have primarily examined unauthorized border crossings rather than travelers' port of entry experiences. This study uses grounded theory and qualitative data to explore the perceptions and experiences of 191 young adults who discussed how individuals are treated when crossing the U.S.-Mexico border at land ports of entry. Findings show that participants reported perceptions and experiences of discrimination based on physical appearances, language differences, and nationality. Participants also described border officials engaging in routine law enforcement behaviors, including poor policing practices.

Zuiderveen Borgesius, Frederik J.: ["Strengthening legal protection against discrimination by algorithms and artificial intelligence."](#) *The International Journal of Human Rights* (2020): 1-22.

Algorithmic decision-making and other types of artificial intelligence (AI) can be used to predict who will commit crime, who will be a good employee, who will default on a loan, etc. However, algorithmic decision-making can also threaten human rights, such as the right to non-discrimination. The paper evaluates current legal protection in Europe against discriminatory algorithmic decisions. The paper shows that non-discrimination law, in particular through the concept of indirect discrimination, prohibits many types of algorithmic discrimination. Data protection law could also help to defend people against discrimination. Proper enforcement of non-discrimination law and data protection law could help to protect people. However, the paper shows that both legal instruments have severe weaknesses when applied to artificial intelligence. The paper suggests how enforcement of current rules can be improved. The paper also explores whether additional rules are needed. The paper argues for sector-specific – rather than general – rules, and outlines an approach to regulate algorithmic decision-making.



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

Volume 1: Number 6, June 2020

If you have a new paper in the field of comparative equality and anti-discrimination law, please contact David Oppenheimer to include the link and abstract in our journal.

Also, the Berkeley Center on Comparative Equality & Anti-Discrimination Law website includes a [***Recent Books***](#) section that showcases books by our members and others in our field. If you have a new book in the field, please contact David Oppenheimer and we will list it on the website.

David Oppenheimer
doppenheimer@law.berkeley.edu

Talia Harris
Yolanda Ye