UNIVERSITY OF BALTIMORE
School of Law
1420 N. Charles St.
Baltimore, MD 21201-5779
T: 410.837.4468
F: 410.837.4450
law.ubalt.edu

12th FEMINIST LEGAL THEORY CONFERENCE

APPLIED FEMINISM AND PRIVACY

Kendra Albert

Abstract:

TRANSGENDER LIFE

Transgender life is full of privacy concerns, and so is the law made by trans litigants. Motions to seal a name change, arguments to allow gender marker changes on identifications, anti-discrimination claims, defamation claims all implicate privacy interests. In fact, many types of legal claims brought by transgender people, even those that have no privacy interest in their face, seek to remedy harms from information disclosure against the trans person's will. Unfortunately, rulings in privacy cases, even when they comes out in a trans litigant's favor, reinforce the social dynamics that exceptionalize and pathologize trans experiences.

Privacy cases involving transgender people demonstrate an essential double bind – trans litigants are caught between cisnormative legal regimes and trans-normative narratives, often forced to reaffirm transphobic tropes or erase others' (or their own) experiences in order to recover. In this work, I examine a variety of cases that implicate privacy involving trans litigants, showing that this double bind between cisnormativity and transnormativity holds across subject matter areas and time periods, even after the lauded "trans tipping point." On a hopeful note, recent moves towards broader systemic advocacy focusing on the needs of trans people of color hold promising results for evading this dynamic.

Cynthia Conti-Cook

Abstract:

SURVEILLING THE DIGITAL ABORTION DIARY

Pregnant people are subjected daily to scrutiny of their decisions regarding where they go, what they do, what they ingest, and how they regard their pregnancy, by co-workers, bosses, relatives, doctors and politicians. For decades, prosecutors have also weighed in; overreaching by interpreting existing laws to prosecute pregnant people for assault, child abuse, drug-related offenses, and other crimes.

Prosecutions of pregnant people for decisions they make during pregnancy, including termination, are likely to increase in the future, as will prosecutions of providers. Recent anti-abortion bills passed at the state level go beyond restricting access, long under attack *since Roe v.*

Wade, to overtly criminalize abortion providers, pregnant people and those that assist them. This new zealousness for legislation that criminalizes abortion indicates that anti-choice advocates now see the Roe decision as vulnerable since Justice Kennedy's retirement resulted in a new conservative majority on the Supreme Court. If Roe is overturned, and states again criminalize abortion, investigations and prosecutions will also increase.

It is in this potential future that technology can exponentially accelerate the criminal exposure of pregnant people, their providers, and anyone who assists them. In the decades since Roe, smartphone and other surveillance technology has been introduced and is available to individuals, anti-abortion advocates, employers, and the government, making pregnant people vulnerable to surveillance of their whereabouts, their physical health, and their decision-making process regarding their bodies in multiple new ways. Many have no choice but to consult their digital devices. Restriction of access to clinical abortion providers, for example, pushes more people seeking information about abortions online.

Unlike clinical providers, the online environment does not provide the confidentiality or privileges of communicating, creating unprotected data trails from which law enforcement can extract evidence. In addition to online search histories, additional voluminous data is generated through engagement with various apps (especially menstrual tracking apps), wearable technology, home devices connected to the internet, purchasing history, government agencies' routine data collection and social media activity. This data is discover-able to law enforcement through sophisticated digital forensic tools that help prosecutors cultivate digital evidence they then take to support allegations of criminal motives behind various decisions people make during pregnancy.

This paper aspires to help build connective tissue between movements for reproductive justice, digital privacy, anti-surveillance, and decriminalization of all decisions related to bodily-autonomy.

Lynn M. Daggett

Abstract

FEMALE STUDENT PATIENT "PRIVACY" AT CAMPUS HEALTH CLINICS: REALITIES AND CONSEQUENCES

Since the early 21st century, HIPAA's Privacy Rule has protected patient privacy. The HIPAA Privacy Rule singles out only the medical records of students for full exclusion. The HIPAA Privacy Rule leaves regulation of student medical records to FERPA, the 1970's federal student education records statute. FERPA's protection of student medical privacy has been aptly characterized by one commentator as "cheesecloth" coverage.

FERPA has a general consent requirement for disclosure of records that is modified by a long list of provisions allowing schools in their discretion to non-consensually disclose student medical

and other information. These provisions govern student information generally; there are no different rules for student patient or other medical information. And this is FERPA's approach despite the modern reality that schools create and maintain extensive medical information about their students. Most significantly, many K-12 schools, and most colleges, choose to take on a health care provider role and operate campus health clinics offering mental and physical health care to all students. Among other scenarios, FERPA allows schools to share student patient records from campus health clinics internally for "legitimate *educational* reasons," allows schools to externally share an entire student patient file with a new school in which the student enrolls or seeks to enroll, and allows schools to share student patient information of financial dependent adult students with parents.

FERPA's cheesecloth protection of student patient privacy is unfair to all students, but it uniquely burdens female student patients at the campus health clinics. Female students disproportionately use both K-12 and college campus health clinics. Female students also disproportionately use campus health clinics for intimate and sensitive care. For example, female students access counseling services at a higher rate than men, and of course gynecological and prescription contraceptive care is almost exclusively provided to women. Accessing health care at FERPA-regulated campus health clinics thus has special consequences for female students, including the potential to limit decisional autonomy regarding reproductive decisions. For example, while minor females have constitutional rights to make their own reproductive decisions, including a right to bypass state law parent notice or consent requirements if they convince a judge that they are mature enough to make their own decision to terminate a pregnancy, one court has held that once a school is aware a student is pregnant, the parents have a right to know under FERPA.

Victims of the national epidemic of higher education campus sexual assault, who are mostly women, often seek care at campus health clinics. In fact, both the Clery Act and Title IX require schools to make free counseling and other services available to victims of campus sexual misconduct. But FERPA allows schools to seize campus medical and other records to defend Title IX lawsuits by students. In fact, FERPA's treatment records provision allows schools to do so even though the victim student herself is unable to access her own records, as one student victim recently found out. New Title IX regulations add an important protection for student treatment records, providing that schools shall not access or use them in school hearings without voluntary written consent. However, the new provision's scope is narrow; for example, it does not apply to Title IX litigation where the school is the defendant. Moreover, the new regulations provide that the parties to school Title IX hearings will see all evidence gathered by the school, including student medical records consensually shared with the school. The new regulations may thus contribute to the reluctance of victims of campus sexual assault to make a complaint, and thus enable the campus sexual assault epidemic to continue.

In addition to limiting decisional autonomy and failing to helpfully respond to the campus sexual assault epidemic, current regulation of student patient records has other consequences for female students. For example, invasion of privacy and similar tort claims turn on disclosure of "confidential" information usually defined by reference to external law such as the HIPAA Privacy Rule or FERPA. Hence, disclosures permitted by FERPA are likely not actionable, such

as recent school seizures of student patient records of rape victims who sue their schools under Title IX.

FERPA needs to be amended to provide real medical privacy for all students. In the meantime, students and their advocates need to be informed about the extent of privacy protection so that they can make informed decisions, and work with schools and state legislatures to enhance student privacy through enactment of school policies and state statutes.

Jenny-Brooke Condon

Abstract:

UNCAGING POWER AND PRIVACY: A *ME TOO* MOVEMENT IN PRISONS & JAILS

Privacy is an elusive source of protection for people who are incarcerated. In spite of its promise as a source of dignity and power, privacy for incarcerated persons is severely diminished. Courts accept as a premise of incarceration that privacy is sacrificed as part of the criminal penalty—or, at the very least, diminished privacy is an unavoidable component of prison security that prisoners bear by necessity. Prisons are constructed around the perceived imperative of continual surveillance and the Supreme Court greatly defers to prison officials' professed needs to infringe privacy in light of security. The crisis of sexual violence in our nation's prison and jails has long challenged privacy's futile and precarious role in protecting prisoners' dignity, autonomy, and bodily integrity. Still, privacy influences discussions about dismantling prison sexual violence and coercion in sometimes conflicting ways. Many scholars fixate on cross-gender searches by correctional officers as a driving force of sexual abuse of women in U.S. prisons and urge greater privacy protections for people who are incarcerated.

The federal government's response to the crisis, the Prison Rape Elimination Act ("PREA"), diminishes prisoner privacy even further by inviting greater surveillance of people who are incarcerated through video and visual monitoring. These greater privacy infringements may do little to protect people held in prisons and jails. Indeed, women at a prison in New Jersey recently revealed a shocking record of sexual assault and coercion by male guards, even though the prison was deemed PREA-complaint after an inspection.

The post-PREA experience at Edna Mahan Prison in New Jersey—which is echoed at jails and prisons across the nation—shows that institutions cannot legislate or train their way out of the sexual violence crisis. Unspoken tolerance for sexual abuse and exploitation as a fact of life within correctional institutions and extreme power imbalance between perpetrators (most often male correctional officer) and their victims undermines those efforts. Seventeen years after PREA and during a period of broader attention fueled by the *Me Too* movement to sexual violence and power, now is a critical time to reevaluate privacy's role in combatting sexual violence in prison.

This article argues that the lessons, ongoing challenges, and necessary cultural changes made visible by *Me Too*—should be applied to the prison setting. It urges a #MeToo moment to

eradicate sexual violence in the correctional setting and argues that change must be rooted in an intersectional understanding of the underlying power structures that permit the epidemic of sexual violence in correctional facilities to continue.

Michelle Ewert

Abstract:

THEIR HOME IS NOT THEIR CASTLE: SUBSIDIZED HOUSING'S INTRUSION INTO FAMILY PRIVACY AND DECISIONAL AUTONOMY

The anti-Black racism that has permeated public benefits programs and federal housing policy for over a century persists in subsidized rental housing. Public housing authorities (PHAs) impede the ability of tenants—who are disproportionately Black women—to change household composition as their family situations change. PHAs routinely take months or longer to approve requests to add or remove household members and often require tenants to produce inaccessible third-party verification of a former household member's new address before removing them from official records. In failing to grant these requests promptly, PHAs infringe on tenants' fundamental right to privacy and family autonomy, impose a financial burden on tenants who have limited resources, and put tenants at risk of eviction if former household members are arrested for criminal activity.

This article proposes workable solutions to these problems. First, PHA failure to timely respond to a request to adjust household composition should be treated as a constructive denial, as is done in fair housing law and other areas of administrative law. This strategy would allow tenants to pursue administrative and judicial review rights that already exist in public housing and the housing choice voucher program. Second, the statutory or regulatory schemes governing subsidized housing should be amended to include subpoena powers such as exist in the Administrative Procedure Act to allow tenants to access needed third-party records. These changes would protect the substantive and due process rights of vulnerable tenants and help dismantle systemic racism that continues to plague public benefits programs.

Susan Hazeldean

Abstract:

PRIVACY AS PRETEXT

The terms of the debate over LGBT rights have shifted in recent years, particularly since the Supreme Court made marriage equality the law of the land in *Obergefell v. Hodges*. Today, people against LGBT equality argue that curtailing LGBT rights is necessary to protect the rights of others. One potent rhetorical weapon used to oppose LGBT rights is the claim that

antidiscrimination protections for LGBT people undermine privacy because they permit transgender people to use facilities that accord with their gender identity. This Article uses legal privacy theory to show that allowing transgender people into gendered facilities does not undermine privacy in any legally cognizable sense.

In making this argument, I engage with the work of scholars who have developed various philosophical understandings of privacy thought to justify a legal right to its protection. Privacy has been conceptualized as: a "right to be let alone"; a means to limit access to the self; a safeguard of intimacy; a right to control information; a defense for personhood; and protection for social networks. But none of these conceptions of privacy support a right for cisgender objectors to exclude transgender people from facilities that accord with their gender identity. Indeed, examining the issue through these privacy theories shows that excluded transgender people are the ones whose privacy is violated.

Opponents' privacy claims are just a pretext to justify rolling back antidiscrimination protections for LGBT people. I also show that accepting a privacy right to exclude transgender people from gendered facilities would harm all women and girls. The privacy arguments being made to oppose LGBT rights echo a troubling history of using privacy concerns to justify unequal treatment of women.

Deborah L. Brake and Joanna L. Grossman

Abstract:

REPRODUCING INEQUALITY

This article elaborates on and critiques the law's separation of pregnancy, with rights grounded in sex equality under Title IX, from reproductive control, which the law treats as a matter of privacy, a species of liberty under the due process clause. While pregnancy is the subject of Title IX protection, reproductive control is parceled off into a separate legal framework grounded in privacy, rather than recognized as a matter that directly implicates educational equality. The law's division between educational equality and liberty in two non-intersecting sets of legal rights has done no favors to the reproductive rights movement either. By giving a formal "right" to stay in school and the right to equal treatment with temporarily disabled students, Title IX may be strategically deployed by proponents of restricting abortion rights to minimize the educational consequences of involuntary motherhood. The hard realities of how pregnancy and parenting impact schooling are obscured

The article explores the legal divide between pregnancy discrimination and reproductive rights in relation to education in three parts. Part I discusses the rights included in, and omitted from, Title IX relating to pregnancy and reproduction. Part II surveys the liberty-based reproductive rights framework for pregnancy prevention and termination and discusses its limits in protecting young women from the educational effects of unwanted pregnancy and motherhood. Part III concludes by discussing the implications of separating out pregnancy discrimination from the broader set of

reproductive rights and elaborating on the harms that flow from the law's failure to recognize the educational equality dimensions of the denial of reproductive rights.

Laura T. Kessler

Abstract:

MISCARRIAGE OF JUSTICE: EARLY PREGNANCY LOSS AND THE LIMITS OF U.S. EMPLOYMENT DISCRIMINATION LAW

This article explores judicial responses to miscarriage under U.S. federal employment discrimination law. Miscarriage is a very common experience. Of confirmed pregnancies, about fifteen to twenty-five percent will end in miscarriage. Most miscarriages occur early in pregnancy and are generally invisible to all but the closest family members. Yet miscarriage is a complex biological and psychological event with significant impacts. For many women, it may represent the loss of a desired future child. It is generally unexpected, and its exact cause is often unclear, which challenges a person's sense of control and trust in procreative ability. It may involve considerable physical pain, potentially disturbing images of blood and tissue, hospitalization, and surgery. Fetal demise may occur weeks before the expulsion, which may evoke uncertainty and stress. New studies have found that non-pregnant partners grieve over a miscarriage more than once thought.

The major federal employment discrimination laws in the United States would seem to protect employees who suffer adverse employment actions as a result of the experience of miscarriage. The Pregnancy Discrimination Act of 1978, for example, defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. The Family and Medical Leave Act of 1993 requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness. The Americans with Disabilities Act of 1990 mandates both nondiscrimination and reasonable accommodations for employees with disabilities. However, none of these laws clearly addresses the experience of miscarriage. Moreover, courts and agencies often refuse to interpret these statutes in obvious and reasonable ways to provide meaningful equality to workers when they suffer the common experience of miscarriage.

Many scholars have examined the limitations of employment law with regard to pregnancy. This Article is the first to comprehensively examine this problem as it specifically relates to miscarriage. In addition to bringing attention to this important issue, which silently affects so many workers, this Article provides an opportunity to challenge the artificial categories embedded in antidiscrimination law and consider the problem of pregnancy discrimination through the broader lens of reproductive justice.

Lynn D. Lu

Abstract:

RESTORATIVE RELATIONSHIPS AND "RADICAL HELP": REIMAGINING WELFARE-TO-WORK BEYOND THE MARKET-FAMILY DIVIDE

This article examines two experimental models—restorative justice and "radical help"— that seek to reform welfare administration explicitly to weave people back into the fabric of the social safety net. These social welfare innovations foreground human relationships as an underutilized resource to highlight the power of meaningful social connections to help those experiencing everything from disability or discrimination to bad luck not just avoid disaster but actually thrive and flourish in strong communities.

Each model emphasizes human relationships to help poor people benefit voluntarily from social supports and community engagement, instead of punishing them for noncompliance with paternalistic and exploitative government program work mandates. Such relationships can center poor people's lived experiences and combine collaborative, localized, and responsive community support with technology to facilitate social networking and, ideally, increased economic security and empowerment. At the same time, without appropriate safeguards or oversight, overreliance on private relationships for social welfare provision risks replicating existing forms of disempowerment. In practice, both models risk reinscribing a private, marginalized sphere, neither restorative nor radical, in which those who perform the work of nurturing relationships remain subject to the will of those with the power to offer or withhold assistance.

Cautious optimism must be combined with meaningful protections to preserve the most promising aspects of new models while preventing the worst harms of what could be in effect a return to private, discretionary provision—or deprivation—of social support. Informed by feminist and antiracist theories critical of both market relations mediated by the state and private family relations entirely insulated from oversight, this Article concludes that we must continue to explore and adapt new models of welfare provision that truly protect and promote all human potential.

Aníbal Rosario Lebrón

Abstract:

WEAPONIZING CIVIL LIBERTIES: A CRISIS LENS ANALYSIS TO SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION EQUALITY

In his reflections about fascism's unanticipated triumph, Antonio Gramsci coined the term *interregnum* to explain what happens when a counter group challenges the established order but has not yet solidified itself as the new majority. Gramsci described the *interregnum* as a crisis period in which the old is dying and the new cannot yet be born while a great variety of morbid symptoms appear.

This article uses the crisis lens of the *interregnum* to analyze and understand the current juncture in women's reproductive liberties and LGBTQ+ anti-discrimination protections. Under this theory, we are living an *interregnum* of sex, gender, and sexual (SGS) rights in which a challenge and a change in SGS norms is slowly being translated into the recognition of rights to women and LGTBQ+ individuals that is followed by a backlash. Currently, this backlash is manifested by conservative groups arguing that legislative measures enacted to promote SGS equality violate their constitutional liberties.

In weaponizing personal liberties in this way, conservatives have adopted litigation strategies and constitutional frameworks formerly deployed by the marginalized groups they wish to disenfranchise, have portrayed themselves as nascent minorities while deconstructing their depictions as bigots, have multiplied their control over courts, and have amplified statutorily constitutional protections to cover discriminatory behavior once thought outside the Constitution. This article argues that these are part of the morbid symptoms Gramsci associated with the *interregnum*. Then, it asks what can be done to surpass this phase of instability and uncertainty and transition to period of further SGS equality.