

**JOINT NEWSLETTER FOR AALS SECTIONS ON
LABOR RELATIONS AND EMPLOYMENT AND
EMPLOYMENT DISCRIMINATION**

2021

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This newsletter has been compiled by the secretaries of the sections:

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Special thanks to Katie Eyer for her discussion of the Bostock opinion.

AALS Section Events

Section Programs

Wednesday, January 6, 4:15 PM – 5:30 PM – *New and Emerging Voices in Labor and Employment Law*

Sections on Employment Discrimination Law and Labor Relations & Employment Law Joint Program

- Moderator:** Charlotte Garden, Seattle University School of Law
- Commentators:** Marcy Karin, University of the District of Columbia, David A. Clarke School of Law
Angela D. Morrison, Texas A&M University School of Law
Charles A. Sullivan, Seton Hall University School of Law
- Speakers:** Shirley Lin, New York University School of Law
Gali Racabi, Harvard Law School
Shayak Sarkar, UC Davis School of Law

This program showcases three works-in-progress by emerging workplace scholars with seven or fewer years of teaching experience. Each scholar will present a work-in-progress and receive comments from assigned commentators, after which attendee feedback is encouraged. Papers, selected from a call for papers, focus on emerging topics in labor, employment, and antidiscrimination law. Abstracts of the papers will be made available at the session.

Thursday, January 7, 11:00 AM – 12:15 PM – *How Trump’s Divisive & Derogatory Rhetoric Has Affected Workplace Anti-Discrimination Enforcement*

Employment Discrimination Law, Co-sponsored by Labor Relations and Employment Law, Civil Rights, and Poverty Law

- Moderator:** Stacy L. Hawkins, Rutgers Law School
- Speakers:** Sahar Aziz, Rutgers Law School
Ruth Colker, The Ohio State University, Michael E. Moritz College of Law
William Creeley, The Foundation for Individual Rights in Education (FIRE)
Katie Eyer, Rutgers Law School
Michael Z. Green, Texas A&M University School of Law

This program will explore how overtly racist and sexist discourse coming from the Trump administration infects workplaces, including a look at how such discourse has mobilized employers and employees to be more proactive in preventing pervasive sexism, racism, and religious bigotry that people bring to work. The program will also consider how this sociological phenomenon has affected the courts and case law in particular, including in the recently decided Supreme Court cases adjudicating the rights of LGBTQ+ persons under Title VII.

The Employment Discrimination Section's business meeting will be held over Zoom on Thursday, January 7th at 12:30 PM. To access the meeting, follow this link:
<https://tamu.zoom.us/j/98531440782>

Friday, January 8, 2020, 1:15 AM – 2:30 PM – *Responding to the Pandemic at Work: Organizing, Litigation, and Enforcement*

Labor Relations and Employment Law, Co-Sponsored by Employee Benefits and Executive Compensation

Moderator: Veena Dubal, University of California, Hastings College of the Law

Speakers: Veena Dubal, University of California, Hastings College of the Law
Michael C. Duff, University of Wyoming College of Law
Beth Lyon, Cornell Law School
David Michaels, The George Washington University
Emily A. Spieler, Northeastern University School of Law

In 2019, the Occupational Safety and Health Administration had the lowest number of workplace inspectors in its history. In 2020, the COVID-19 pandemic brought new challenges related to workplace safety, while also underscoring the relationship between workers' health and public health. This panel focuses on the range of worker-led and governmental responses to the pandemic, especially as they relate to workplace safety. Panelists will discuss legal and policy topics such as workers' collective action; work law enforcement by agencies and in courts; and the (in-)adequacy of congressional and administrative responses to COVID-19's devastating effects on workers and jobs.

Other AALS Programs of Interest

Tuesday, January 5

1:10 AM – 12:15 PM – *Federal Courts Employment Reforms*

Section on Federal Courts, Co-Sponsored by Employment Discrimination Law

Wednesday, January 6

1:15 – 2:30 PM – *White Terror, Then and Now: The Future of Race and Racism in Light of the Ku Klux Klan Act of 1871*

Minority Groups, Co-Sponsored by Civil Rights, Constitutional Law, Law & the Social Sciences, Legal History, National Security Law, and Socio-Economics

1:15 – 2:30 PM – *Gender and Intersectionality in Times of Crisis*

Section on Women in Legal Education

2:45 – 5:30 PM – *Politics, Pandemic, and the Future of Civil Rights and Poverty Law*

Section on Civil Rights and Poverty Law Joint Program, Co-Sponsored by Comparative Law

4:15 – 5:30 PM – *Works in Progress*

Section on Civil Rights

Thursday, January 7

2:45 – 4:00 PM – *Legal and Judicial Ethics in the Post-#MeToo World*

Section on Professional Responsibility, Co-Sponsored by Civil Rights, Employment Discrimination Law, Leadership, and Minority Groups

4:15 PM – 5:30 PM – *New Voices Panel*

Section on Civil Rights

4:30 PM – 5:30 PM – *New Voices on Sexual Orientation and Gender Identity Law*

Section on Sexual Orientation & Gender Identity Issues

Friday, January 8

11:00 AM – 12:15 PM – *Celebrating 30 Years of Intersectionality and the ADA*

Section on Disability Law, Co-Sponsored by Civil Rights, Law and Mental Disability, Minority Groups, Sexual Orientation and Gender Identity Issues, and Women in Legal Education

1:15 PM – 2:30 PM – *The Future of Plyer v. Doe on its 40th Anniversary*

Section on Education Law, Co-Sponsored by Immigration

1:15 PM – 4:00 PM – *AALS Workshop for Pretenured Law School Teachers of Color Reception*

2:45 PM – 4:00 PM – *AALS Hot Topic Program: Disability and COVID-19 - Lessons from Disability, Lessons from the Pandemic*

2:45 PM – 4:00 PM – *Working in a New World - Employee and Worker Benefits Re-examined in a Time of Crisis*

Section on Employee Benefits and Executive Compensation, Co-Sponsored by Labor Relations and Employment Law, and Law, Medicine and Health Care

Sunday, January 9

11:00 AM – 12:15 PM – *Implications of the 2020 Supreme Court Title VII Decision in Bostock v. Clayton County*

Section on Sexual Orientation and Gender Identity Issues

2:45 – 4:00 PM – *AALS Hot Topic Program: Actions Speak Louder than Words: Anti-Racism in Law Schools*

Faculty News

Bradley Areheart (Tennessee) was promoted to Professor of Law. Areheart was also awarded the Wilkinson Junior Research Professor at University of Tennessee College of Law, which is given to a faculty member in their first 10 years of teaching who has engaged in “prolific and outstanding scholarship.”

Rachel Arnow-Richman (Florida) joined the University of Florida Levin College of Law, where she is a Professor of Law & Gerald A. Rosenthal Chair in Labor & Employment Law.

Sam Bagenstos (Michigan) was appointed to serve as a member and chair of the Michigan Employment Relations Commission, the State's public sector labor relations authority, by the Governor of Michigan.

Scott Bauries (Kentucky) received the 2020 Robert M. and Joanne K. Duncan Law Faculty Teaching Award.

Susan Bisom-Rapp (California Western) was Distinguished Professor in Residence at California Western School of Law and Visiting Professor (teaching remotely) at the University of Modena and Bisom-Rapp is also the chair-elect of the AALS Section on Women in Legal Education and will work with her colleagues to put the final touches on the programming for the 2021 Annual Meeting. Her longtime British co-author Malcolm Sargeant (Middlesex University, UK) passed away on November 24, 2020. Together, they produced 1 book, 3 book chapters, and 4 law review articles on age discrimination and the gendered nature of aging. He will be missed.

Stephanie Bornstein (Florida) was recently awarded tenure and promoted to Professor at the University of Florida Levin College of Law. Her article, *Disclosing Discrimination* (forthcoming 2021 in the B.U. Law Review), was selected for presentation at the 2020 Stanford/Harvard/Yale Junior Faculty Forum. She is also delighted to report that, for its 10th edition forthcoming in Fall 2021, she will join as a co-author on Charles Sullivan and the late Michael Zimmer's casebook, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (Wolters Kluwer/Aspen).

Ronald Brown (Hawaii) presented *China's BRI in Central Eastern European Countries: "17+1": Connectivity, Divisiveness, or Pathway to EU-China?* and *Labor Law Adjustments for Workers in China and the U.S. during the Pandemic* during China Law Week 2020 at University of Helsinki Law School.

Chris Cameron (Southwestern) became the Chair of the Los Angeles County Employee Relations Commission, the agency responsible for administering the ordinance regulating labor relations between nearly 100,000 employees and the nation's second largest municipal government employer. Cameron also joined the board of Century Housing Corporation, a Community Development Financial Institution that finances, builds, and operates affordable housing throughout California. In August, Cameron delivered the keynote address at “Harry's Boot Camp,” the event launching the Judge Harry Pregerson Public Service Legacy Programs, which support law students who are following in the footsteps of the late Ninth Circuit jurist by pursuing careers in public interest law. In October, Cameron received the Legacy Award of the Mexican American Bar Foundation, a Section 501(c)(3) charitable corporation, for helping the Foundation award over \$2.3 million in the form of 404

scholarships given to 336 individual law students, plus create an endowment to sustain this high level of giving.

Michael Duff (University of Wyoming College of Law) was named the Winston S. Howard Distinguished Professor of Law at University of Wyoming College of Law.

Michael Z. Green (Texas A&M) has been named the next director of Chicago-Kent College of Law's Institute for Law and the Workplace. Green is currently professor of law and director of the Workplace Law Program at Texas A&M University School of Law. He will become the second director to lead the institute in fall 2021 following the retirement of ILW founder and director, Martin H. Malin. "We're excited to have Michael Green join us and carry on ILW's long tradition of academic excellence," says Chicago-Kent Dean Anita K. Krug. "He built a fantastic labor and employment program at his previous university, and our students will benefit from his scholarship and practical experience." "Michael Green is amazing. He is a highly regarded scholar and a beloved teacher. He is heavily involved with the bar and very professionally active," Malin says. "He bridges the two worlds between the academic world and the practicing professional world. He brings communities together. He is the perfect person to lead the program." On November 13, 2020, Professor Michael Green moderated and spoke on "Police Officer Discipline: Suggested 2020 Best Practices" at a plenary session of the ABA Section of Labor and Employment Law's virtual program held via Zoom. His presentations for 2020 include: "Selecting Diverse Arbitrators for Employment Discrimination Disputes" at the Tarrant County Bar Association's Labor and Employment Section's monthly meeting in Fort Worth, Texas; "Seeking Activist Police Arbitrators?" at the Fifteenth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) at the University of Louisville, Brandeis School of Law, as part of a virtual program held via Microsoft Teams, on October 10, 2020; "Post-Bostock Implications" as part of a virtual program sponsored by the TAMU Outlaw organization; "How Bostock Expands Intersectionality Employment Discrimination Law Jurisprudence" as part of a virtual program sponsored by the Southeastern Association of Law Schools (SEALS) Employment Law Workshop Discussion Group: LGBT Rights in the Workplace, as well as "Transitions to Virtual Teaching" as part of the virtual program held by the SEALS Labor and Employment Law Discussion Group on Pedagogical Trends and Techniques in Employment Law, Employment Discrimination, and Labor Law; "Selecting Diverse Arbitrators for Employment Discrimination Disputes" for a virtual Fort Worth Society Human Resources Webinar on June 25, 2020; servig as a moderator for the TAMU Law Answers Webinar Series: Legal Issues in the Age of the Coronavirus, "Workplace Implications after the Covid-19 Crisis," on May 12, 2020; and organizing, moderating, and presenting at the Workplace Law Conference, "Administrative Law and the Workplace Impact," held virtually on April 3, 2020 and co-sponsored by the Aggie Dispute Resolution Program.

D. Wendy Greene (Drexel) delivered four keynote lectures at the University of South Carolina, McGill University Faculty of Law (Montreal, Quebec), Howard University School of Law, and Virginia Commonwealth University School of Dentistry.

Jonathan Harris (NYU) co-organized a Dec. 3, 2020 conference with Sam Estreicher and the NYU Labor and Employment Law Center, [*Re-Training America for the Future of Work*](#). It was a conversation on worker re-training and up-skilling, evaluating and exploring policies to help today's and tomorrow's workers meet the labor demands of both automating and human-touch workplaces. The discussants also highlighted inequities and other problems with the workforce development system and proposed robust ideas for future action. It featured U.S. DOL Assistant Secretary for Employment and Training John Pallasch and other discussants.

Katie Eyer (Rutgers - Camden) has received significant attention for her advocacy work (in 2019, she co-authored an amicus brief with the Constitutional Accountability Center in *Bostock v. Clayton County*) and scholarship, including in this article in the [New Yorker](#).

Sharona Hoffman (Case Western Reserve) was awarded the 2020 Northeast Ohio Scholars Strategy Network Amplify & Apply Grant Program mini grant and the 2020 Jessica Melton Perry Award for Distinguished Teaching in Disciplinary and Professional Writing (awarded by Case Western Reserve University). Hoffman was also selected for the Nebraska Governance and Technology Center's Summer Grant Program.

Nicole Porter (University of Toledo) was selected for the Paul Steven Miller Memorial Award for "outstanding academic and public contributions to the field of labor and employment law scholarship."

David P. Oppenheimer (UC-Berkeley) is happy to announce that the Stanford [EdX webcourse that he teaches with Richard Ford](#) will be available for free after January 4, 2021. He is also happy to hear from colleagues interested in comparative anti-discrimination law and to offer them membership in the [Berkeley Center on Comparative Equality and Anti-Discrimination Law \(annual report\)](#).

Merrick T. (Rick) Rossein (CUNY) published a four-volume edition this year of his treatise EMPLOYMENT DISCRIMINATION LAW AND LITIGATION on its 30th anniversary. EMPLOYMENT DISCRIMINATION LAW AND LITIGATION has been cited by two United States Courts of Appeals, United States District Court, the Iowa Supreme Court (twice), the Ohio Supreme Court, and several state trial courts.

Seton Hall Law Review published an issue honoring the work of **Charlie Sullivan** in April 2020. The issue featured contributions from Tim Glynn, Sam Estreicher, Rachel Arnow-Richman, Matt Bodie, William Corbett, Sandra Sperino, Rebecca Hanner White, Michael Z. Green, Ann McGinley, Sachin Pandya, Tristin Green, Michael Selmi, and Steven Willborn.

Sandra Sperino (Cincinnati) was elected into the American Law Institute. Sperino and Suja Thomas were named co-recipients of the Pound Civil Justice Institute's 2021 Civil Justice Scholarship Award for their book *Unequal: How Courts Undermine Discrimination Law* (Oxford University Press) in which they examine the ways courts have impeded private enforcement of anti-discrimination laws through civil litigation.

Liz Tippett (University of Oregon) hosts a show on YouTube, which covers emerging employment law topics through interviews with scholars in our field. https://www.youtube.com/channel/UCNJNI5icpDfNbhq_A9aib9g/videos If you or your students have ideas for future topics or episodes, please reach out to her at tippettt@uoregon.edu.

Danielle Weatherby (Arkansas) and colleague, **Cynthia Nance**, dean emeritus and Nathan G. Gordon Professor of Law, were appointed to the Arkansas Advisory Committee for the U.S. Commission on Civil Rights to provide counsel and guidance on diversity, equity and inclusion-related issues.

Deborah A. Widiss (Indiana-Bloomington) is currently the Associate Dean for Research and Faculty Affairs at Indiana.

Ruqaiijah Yearby (Saint Louis University School of Law and Executive Director and Co-Founder, Institute for Healing Justice and Equity) received the University of Iowa College of Law Innovation, Business & Law Award (with Ana Santos Rutschman), served as an Investigator, Learning From COVID-19: Generating Actions to Achieve Health Equity, Missouri Foundation for Health, chaired the AALS Law, Medicine, and Health Care Section, served as a member of the Policy Committee of the American Public Health Association, Aging & Public Health Section and a member of the Health Equity Task Force, Satcher Health Leadership Institute, Morehouse School of Medicine (2020 – present). Yearby was a panelist for the [RAND Corporation Health Care Resource Allocation Decisionmaking During a Pandemic Report](#), served as co-sponsor and steering committee member for the Health Justice Engaging Critical Perspectives in Health Law and Policy Conference and Workshops, and served as a reviewer for the Journal of Racial and Ethnic Health Disparities, American Journal of Bioethics, Journal of Law, Medicine & Ethics, Medical Humanities, Yale Journal of Health Policy, Law & Ethics.

Yearby presented at the following meetings: *Applying the Justice Principle to Human Subjects Research*, PRIM&R Conference, December 9, 2020; *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, ABA and German Marshall Fund Conference, December 9, 2020; *Race Based Medicine, Colorblind Disease: How Racism in Medicine Harms Us All*, National Student Bioethics Association, December 4, 2020; *Direct Care Workers, Emergency Preparedness, and Disparities in COVID-19*, PHI New Jersey Direct Care Workforce Conference, November 10, 2020; *Now or Never: Eradicating Structural Racism in the Government's Pandemic Response*, Loyola University Chicago School of Law, October 30, 2020; *Mapping Structural Racism in the Intellectual Property Ecosystem*, University of Iowa College of Law - Innovation, Business & Law Award, October 29, 2020 (with Ana Santos Rutschman); *Structural Racism, COVID-19, and Essential Workers*, Washington and Lee University School of Law, October 29, 2020; *Direct Care Workers and Disparities in COVID-19*, American Bar Association – State and Local Government Meeting, October 28, 2020; *COVID-19 legal briefings: A conversation with the experts*, American Public Health Association, October 26, 2020; *Using disparities data to spur local policy change to improve social determinants of health*, American Public Health Association, October 26, 2020; *Applying the Justice Principle to Human Subjects Research*, U.S. Department of Health and Human Services Secretary's Advisory Committee on Human Research Protections, October 20, 2020; *Centering Marginalized Groups in Interdisciplinary Bioethics Courses*, American Society for Bioethics and Humanities, October 15, 2020; *Whose Justice? Whose Flourishing? Diabetes and Race in Maryland*, American Society for Bioethics and Humanities, October 16, 2020; *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequities During and After COVID-19*, Harvard Law School – Petrie Flom Center - Health Law Policy, Bioethics, and Biotechnology Workshop, October 13, 2020; *Critical Perspectives in Health Law & Policy*, American University Washington College of Law - Health Justice Engaging Critical Perspectives in Health Law and Policy Conference, October 2, 2020; *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequities During and After COVID-19*, SMU Dedman School of Law, September 23, 2020; *Protecting Workers that Provide Essential Services*, 2020 Public Health Law Summit - Network for Public Health Law, September 17, 2020; *Structural Discrimination and Essential Workers*, Georgia State University, Jean Beer Blumenfeld Center for Ethics, September 9, 2020; *Workers, Health Inequities and Structural Discrimination during the COVID-19 Pandemic*, American University Washington College of Law, September 4, 2020 (with Seema Mohapatra); *Health Equity and Justice in the COVID-19 Pandemic*, American Society of Bioethics, July 29, 2020; *Black Bioethics: Racism, Police Brutality, and What it Means for Black Health*, American Journal of

Bioethics, July 14, 2020; *Ethics & COVID-19: Ethnic and Racial Disparities*, George Washington University Milken Institute School of Public Health, July 7, 2020; *Humanizing Equity: Moving Past Equality to Achieve Equity*, University of Virginia School of Law, The Equity Center, January 30, 2020.

News from University of Louisville Brandeis School of Law: Louisville Brandeis hosted the 15th Annual Colloquium on Scholarship in Employment and Labor Law. Two awards were bestowed. The Paul Steven Miller award to **Nicole B. Porter** & the Michael J. Zimmer award to **Sunjukta Pau**

2020 Advocacy and Publications

Advocacy Efforts

Sam Bagenstos argued *In re Certified Questions (Midwest Inst. of Health v. Governor)*, --- N.W.2d ----, 2020 WL 5877599 (Mich., Oct. 2, 2020), in the Michigan Supreme Court on behalf of the Michigan House Democratic Caucus defending Governor Whitmer's COVID emergency orders. Bagenstos also filed an amicus brief on behalf of a coalition of farmworker advocates in *Castillo v. Whitmer*, 823 Fed. Appx. 413 (6th Cir. 2020), a case specifically involving the legality of the Whitmer Administration's emergency public health order protecting farmworkers from COVID-19.

D. Wendy Greene served as a legal expert in *Arnold v. Barbers Hill Independent School District*: a high-profile civil rights case brought by the NAACP-Legal Defense Fund on behalf of two Black male students who challenged a school grooming policy that barred male students from wearing shoulder-length hairstyles and effectively required Black male students to cut off their locs in order to matriculate and participate in high school graduation. In August, the district court issued a groundbreaking decision enjoining enforcement of the school's grooming policy on the grounds that it violated students' constitutional rights to be free from sex discrimination, racial discrimination and arbitrary infringement upon their cultural expression.

In support of the C.R.O.W.N. Act of 2020 (also known as Creating a Respectful and Open World for Natural Hair Act)—federal legislation that Professor Greene co-drafted—Professor Greene authored a letter garnering 253 legal academics and law school administrators signatories from across the country. [The letter of support](#) was entered into the legislative record during the United States House Judiciary Committee mark-up held in September and the United States House of Representatives passed the C.R.O.W.N. Act also in September. Professor Greene also provided testimony on behalf of four C.R.O.W.N. Acts in Philadelphia, Maryland, New Orleans, and Wisconsin.

Sandra Sperino co-authored an amicus brief in *Comcast v. National Association of African-American Owned Media et al.* (with Sachin Pandya, Deborah Widiss, and Anthony Michael Kreis).

Ruqaiyah Yearby submitted [comments](#) to the U.S. House of Representatives, Ways & Means Committee regarding the disproportionate impact of COVID-19 on communities of color.

Books

Deepa Das Acevedo, *BEYOND THE ALGORITHM* (Cambridge University Press 2020).

Sam Bagenstos, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* (3d ed. Foundation Press 2020).

Chris Cameron, Doug Ray, and Bill Corbett, *LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS* (2020-21 ed. West Publishing Co.).

Jennifer A. Drobac, Carrie N. Baker and Rigel C. Oliveri, *SEXUAL HARASSMENT LAW: HISTORY, CASES, & PRACTICE* (2d ed. Carolina Academic Press 2020).

Samuel Estreicher & Matthew Bodie, LABOR LAW (2d ed. Foundation Press 2020).

Marcia McCormick, UPDATES AND COMMENTARY ON EMPLOYMENT DISCRIMINATION LAW (Wolters Kluwer 2020).

Ann C. McGinley and Nicole Porter, FEMINIST JUDGMENTS SERIES: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS (Ann C. McGinley & Nicole Buonocore Porter, eds.) (Cambridge University Press 2020).

Ann Noel and David Oppenheimer (eds.), [THE GLOBAL #METOO MOVEMENT](#) (Full Court Press 2020).

David B. Oppenheimer, Sheila R. Foster, Sora Y. Han and Richard T. Ford, [COMPARATIVE EQUALITY & ANTI-DISCRIMINATION LAW](#) (3d ed. Edward Elgar Publishing UK, 2020).

David B. Oppenheimer and Frederick C. Moss, [ROWEV PACIFIC QUAD - PROBLEMS, TEACHING NOTES AND CASEFILE](#) (6th ed. National Institute for Trial Advocacy 2020).

Merrick T. Rossein, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION (Thomson Reuters West 2020).

Sandra Sperino, update to [MCDONNELL DOUGLAS](#): THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (Bloomberg 2020).

Sandra Sperino, FEDERAL DISCRIMINATION LAW IN A NUTSHELL (9th ed. West Academic Press 2020) (w/ Player).

Book Chapters & Articles

Bradley A. Areheart, Organizational Justice and Antidiscrimination, 104 MINN. L. REV. 1921 (2020).

Bradley A. Areheart, *Commentary*, Young v. UPS, 135 S. Ct. 1338 (2015), in FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS (Ann McGinley & Nicole Porter eds., 2020).

Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Mobility (and the Scholarship of Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223 (2020).

Rachel Arnow-Richman, Integrated Learning, Integrated Faculty, 92 TEMPLE L. REV. 745 (2020).

Sam Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26 (2020).

Sam Bagenstos, *The ADA Amendments Act and the Projects of the American Disability Rights Movement*, 23 UDC L. REV. 139 (2020).

Sam Bagenstos, *Consent, Coercion, and Employment Law*, 55 Harv. C.R.-C.L. L. REV. 409 (2020).

Sam Bagenstos, *The Hidden Disability Consensus in the 2020 Campaign*, JAMA Health F. (Feb. 7, 2020) (with Harold Pollack), <https://perma.cc/VE32-NELP>.

Sam Bagenstos, *How the Law Harms Public Health*, Democracy: A Journal of Ideas (Fall 2020) (with Lindsay F. Wiley), <https://perma.cc/C96C-X86A>.

Sam Bagenstos, *Litigation for the People*, Dissent (Fall 2020), <https://perma.cc/D2ZC-HZ5S>.

Sam Bagenstos, *Lochner Lives On*, Econ. Pol’y Inst. (Oct. 7, 2020), <https://perma.cc/EQ68-3LTB>.

Scott Bauries, *Public Employees Who Testify*, 24 EMPLOYEE RIGHTS & EMPLOYMENT POLICY JOURNAL 71 (2020).

Scott Bauries, *Professor Williams and the Education Debates in State Constitutional Law: A Festschrift for Robert Williams*, 72 RUTGERS UNIV. L. REV. 101 (2020).

Susan Bisom-Rapp, *The Landmark “Bostock” Decision: Sexual Orientation and Gender Identity Bias in Employment Constitute Sex Discrimination Under Federal Law*, Dispatch 26 COMPARATIVE LABOR L. & POL. J. 1 (2020) (invited essay on the *Bostock* decision explaining the import of the case to foreign scholars).

Ronald Brown, *U.S.-U.K. FTA Negotiations: A Primer On Labor Agenda*, 10(2) BRITISH J. OF AM. LEGAL STUDIES (Winter 2020).

Ronald Brown, *China’s BRI in Central Eastern European Countries*, -- SAN DIEGO INT’L L. J. -- (December 2020).

Ronald Brown, *Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!*, 29 WASH. L. REV. 533 (2020).

Ronald Brown, *Enhanced Enforcement and Umbrella Coverage of AntIFini Corruption*, 43 HASTINGS INT’L & COMP. L. REV. 211 (2020).

Ronald Brown, *EU-China BIT & FTA Enhance Labor Cooperation & Protection*, 4 BOLOGNA L. REV. 366 (2020).

Ronald Brown, *China Moving BRI into Latin American Countries: Chinese FTAs and Labor Implications*, 42 HOUSTON J. INT’L L. 85 (2019-2020).

Ronald Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 U. WASH. L. J. 61 (2019-2020).

Miriam A. Cherry, *A Global System of Regulation?: Crowdwork and Conflicts of Law*, 94 Tulane L. Rev. 183 (2020).

Jennifer Drobac, *Sexual Harassment: The U.S. in Comparative Perspective* in COMPANION TO SEXUALITY STUDIES (Nancy Naples, ed., 2020).

Deepa Das Acevedo, “*Essentializing Labor Before, During, and After COVID-19*,” Exertions: Society for the Anthropology of Work (May 6, 2020), <https://saw.americananthro.org/pub/essentializing-labor/release/1>.

Deepa Das Acevedo, *Lumpy Work*, UNIV. OF CHIC. L. REV. ONLINE (2020).

Andrew Elmore, *Labor Redemption in Work Law*, 11 UC IRVINE L. REV. 287 (2020).

Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357 (2020) ([link](#)) (invited contribution to 25th Annual Clifford Symposium on Tort Law and Social Policy, *Rising Stars: A New Generation of Scholars Looks at Civil Justice*).

Andrew Elmore & Kate Griffith, *Op-Ed: A Bad Rule Lets Fast-Food Chains Off The Hook for Workers' Rights*, L.A. TIMES (March 9, 2020) (with K. Griffith) ([link](#)).

Katie Eyer, *Progressive Textualism and LGBTQ Rights*, (SCOTUSBlog Symposium on *Bostock v. Clayton County* 2020), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/>.

Katie Eyer, *Irrational Inequality: The Role of Fact-Based Review in Equality Change*, 73 VAND. L. REV. EN BANC 177 (2020).

Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 FORDHAM L. REV. 2255 (2020).

Michael Z. Green, *Mediating Psychiatric Disability Accommodation for Workers in Violent Times*, 50 SETON HALL L. REV. 1351 (2020).

Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Coleman, Malveaux, Pedro & Porter, eds.) (NYU Press, forthcoming 2021).

Michael Z. Green, *Framing the Debate to Show How Big Guys Insist that Little Guys Arbitrate as a "Corporate Tool,"* in DISCUSSIONS IN DISPUTE RESOLUTION: THE FORMATIVE ARTICLES (Cole, Hinshaw & Schneider, eds.) (Oxford University Press, forthcoming 2021).

Michael Z. Green, *Rewritten Opinion of Clark County School District v. Breeden*, in FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION OPINIONS REWRITTEN (McGinley & Porter, eds.) (Cambridge Press, 2020).

Tristin Green, *Rethinking Racial Entitlements: From Epithet to Theory*, 93 S. CAL. L. REV. 217 (2020).

Tristin Green, *The Juxtaposition Turn: Watson v. Fort Worth Bank & Trust*, 50 SETON HALL L. REV. 1445 (2020) (invited symposium piece).

Tristin Green, *Feminism and #MeToo: The Power of the Collective*, in the OXFORD HANDBOOK ON FEMINISM AND LAW IN THE U.S. (Deborah Brake, Martha Chamallas, and Verna Williams eds., forthcoming 2020).

Tristin Green, *Love Match or Compatible in Theory? Charting the Relationship between Critical Race Theory and Queer Theory in Legal Scholarship*, co-authored with Camille Gear Rich, in the OXFORD HANDBOOK ON RACE AND LAW (Khiara Bridges, Devon Carbado, and Emily Houh eds., forthcoming 2020).

D. Wendy Greene, *EEOC v. Catastrophe Management Solutions, Inc.*, Rewritten in FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION OPINIONS REWRITTEN (Ann C. McGinley & Nicole B. Porter, eds.) (Cambridge Univ. Press, 2020).

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Upcoming Conferences, Lectures & Symposia

- Equality Law Scholars' Forum, to be held in the Fall of 2021 at Boston University, the organizers are Tristin Green (San Francisco), Leticia Saucedo (UC Davis) and Angela Onwuachi-Willig (Boston University).

Recent Legal Developments

Employee Benefits:

The Supreme Court held in *Thole v. U.S. Bank, N.A.* that participants and beneficiaries in defined-benefit plans do not have standing to bring claims for fiduciary breach, at least in the absence of catastrophic plan and sponsor failure. The plaintiffs, retirees from U.S. Bank, alleged that plan

fiduciaries breached their duties of loyalty and care, causing the plan to lose more than \$748 million. The 5-4 majority affirmed the 8th Circuit’s holding that the plaintiffs had received all the benefits to which they were entitled and therefore lacked standing. Justice Kavanaugh, writing for the majority, found that the plaintiffs not have a sufficient stake in the outcome of the lawsuit because, win or lose, they would receive the same amount of monthly pension benefits from the plan. Justice Sotomayor, writing in dissent, argued that the rights of defined-benefit plan participants and beneficiaries were similar to the rights of those entitled to benefits from defined-contribution plans or grantor trusts. If defined benefit plan participants and beneficiaries were not entitled to the “equitable title” in the plan’s assets, then no one would hold that title. The dissent also would hold that a financial injury is not necessary to establish standing, as trust beneficiaries have standing to bring claims for a breach of loyalty even in the absence of any loss to the trust.

Employment Discrimination:

Bostock v. Clayton County, 590 U.S. __ (2020)

In three consolidated cases, the Supreme Court held that discrimination on the basis of sexual orientation or gender identity is “because of...sex” within the meaning of Title VII, and thus prohibited. In prior cases, the Supreme Court had held that the words “because of” as a matter of ordinary meaning connote “but for” causation, and thus that the statute is violated where protected class status is a but for cause of the discrimination. In *Bostock*, the Court built on this holding, holding that Title VII’s text required a finding in favor of LGBT employees.

As the Court recognized, this conclusion followed logically from the fact that “it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex.” For example, if a woman is terminated because of her intention to marry her female partner, she would not have been fired “but-for” her sex—if a man were to undertake similar conduct, the employer would not object. So too, all of the conduct that an employer might object to in a transgender employee—dress, appearance, self-identification—is conduct that an employer would not object to if the employer perceived the employee’s sex differently.

Bostock represents a major advance in LGBTQ rights, for the first time providing clear nationwide employment discrimination protections to LGBTQ employees. But it also includes language helpful to all anti-discrimination litigants, including language recognizing that the “but for” standard is an expansive one that can be satisfied even where other substantial and legitimate factors played a role in the decision, provided protected class status made the difference. Other language that may be useful to all anti-discrimination litigants includes language suggesting that any “intent” requirement under Title VII does not entail a self-aware perception of the role of protected class status, and language reaffirming that stereotype-based decisions violate the Act.

*Special thanks to Katie Eyer for this submission!

Labor Law:

In February 2020 the House of Representatives passed the Protect the Right to Organize (PRO) Act. The PRO Act would beef up federal labor law in a number of key respects. It would provide a private right of action for unfair labor practices, along with civil penalties and compensatory damages; the Board would also be required to seek an injunction (along the lines of NLRA’s § 10(l)) to reinstate

workers fired for union activity. Employers would have less involvement in the setting and scheduling of elections and would not be permitted to hold mandatory employee meetings advocating against the union. The PRO Act also would eliminate the “right to work” provision allowing states to prohibit union security clauses, eliminate current prohibitions on secondary boycotts, and prohibit employers from permanently replacing striking employees. Unions and employers engaged in first-contract negotiations would have to go to mandatory interest arbitration if they could not reach an agreement. The Act also would modify definitions of employee and joint employment to be more inclusive. After passage by the House, the Senate did not consider the bill. Much of President-Elect Biden’s labor law platform is based on PRO Act reforms.

The National Labor Relations Board responded to the coronavirus pandemic by shutting down representation elections for a short period, followed by mail-in balloting. In November the Board issued guidance on situations in which mail ballots should be used in the context of the pandemic. The circumstances include: the Board is operating under “mandatory telework” status; coronavirus cases in the region have surpassed certain benchmarks; an in-person election would violate mandatory state or local health orders relating to maximum gathering size; the employer fails or refuses to commit to abide by the Board’s suggested election protocols; the employer is experiencing a COVID-19 outbreak at the facility; or other similarly compelling circumstances.

Because of the pandemic, the Board delayed its December 2019 election rule changes from April 16 to May 31. On May 30, 2020, the United States District Court for the District of Columbia issued an injunction in *AFL-CIO v. NLRB* that prevented five of the Board’s planned changes to its election rules from going into effect, ruling that the NLRB failed to follow the proper administrative procedure in issuing the new regulation. The Court ruled that certain of the Board’s rule changes are substantive rather than procedural in nature and cannot go into effect until the Board engaged in the proper rulemaking procedure. The invalidated changes are: (1) giving parties the right to litigate eligibility issues prior to an election, instead of after; (2) instructing Regional Directors to normally not schedule an election prior to the 20th business day after the direction of election; (3) serving the voter list within 5 business days, instead of 2 days; (4) limiting election observers to those in the voting unit; and (5) instructing Regional Directors not to issue certifications, if a request for review is pending or the time to file such request has not yet passed. The Court’s injunction, however, will not halt implementation of the other rule changes announced by the Board.

A new rule on joint-employment status was issued and went into effect this year. The rule restores the joint-employer standard that the Board applied for several decades prior to its 2015 *Browning-Ferris* decision. To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer’s employees. The final rule defines key terms, including “essential terms and conditions of employment,” “direct and immediate control,” and “substantial” direct and immediate control.

The Board issued final rules with further changes to the election processes based on rules proposed in 2019. The amendments would change the current blocking charge policy to either a vote-and-count or a vote-and-impound procedure. Elections would no longer be blocked by pending unfair labor practice charges, but the ballots would be either counted or impounded—depending on the nature of the charges—until the charges are resolved. However, the certification of results (including, where appropriate, a certification of representative) would not issue until there is a final disposition of the charge and its effect, if any, on the election petition. With respect to the voluntary recognition bar, the

new rule adopts the rule of *Dana Corp.*, 351 NLRB 434 (2007), which requires employees to receive notice that voluntary recognition has been granted and to be given a 45-day open period within which to file an election petition before the recognition bar takes effect. In addition, the amendments would change certain construction-industry rules to require positive evidence of majority employee support. These rule changes became effective on June 1.

In *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), the NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of otherwise protected activity. The ruling shifted cases involving offensive or abusive conduct in the course of otherwise-protected activity to the *Wright Line* standard, long used by the Board in mixed-motive cases. The standard announced replaced a variety of setting-specific standards—one for encounters with management (*Atlantic Steel*), another for exchanges between employees and postings on social media (a “totality of the circumstances” test), and a third for offensive statements and conduct on the picket line (*Clear Pine Mouldings*).

In *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, the Board overruled *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016) and determined that employers have no statutory obligation to bargain before imposing discretionary discipline that is materially consistent with the employer’s established policy or practice. *Total Security Management* had required an employer, with limited exceptions, to provide a union with notice and opportunity to bargain about discretionary elements of an existing disciplinary policy before imposing “serious discipline,” such as suspension, demotion or discharge. *800 River Road* returns to the prior rule that did not require bargaining.

In *Bethany College*, 369 NLRB No. 98, the Board held that it has no jurisdiction over the faculty at religious institutions of higher education, overruling the prior jurisdictional standard set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014). The Board adopted the jurisdictional test announced by the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

In 2020 the Board also invited briefs on the current “contract bar” doctrine as well as the use of large inflatables such as Scabby the Rat in picketing and protests. At present the Board has not issued rules on these issues, although the General Counsel has repeatedly expressed his concern that the use of inflatables can be coercive.

CNN agreed to pay \$76 million in backpay, the largest monetary remedy in the history of the National Labor Relations Board, in January 2020. The dispute originated in 2003 when CNN terminated a contract with a company that had been providing CNN video services and hired new employees to perform the same work without recognizing or bargaining with the two unions that had represented the company’s employees. The settlement came amidst continuing litigation over whether CNN had failed to live up to its obligations as a successor employer and joint employer to bargain with the two unions.

State Law Developments:

California voters passed Proposition 22, which changed the status of app-based transportation (rideshare) and delivery drivers from employees under California’s AB 5 (and the *Dynamex* decision) to a version of independent contractors. The ballot initiative defined app-based drivers as workers who (a) provide delivery services on an on-demand basis through a business’s online-enabled

application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform. Prop 22 stripped traditional employment protection from these workers but also imposed certain requirements on ride-sharing companies. These requirements include: insuring that drivers make at least 120% of the minimum wage during their "engaged time;" limiting drivers to 12 hours during a 24-hour period, unless the driver has been logged off for an uninterrupted 6 hours; providing healthcare subsidies for drivers who drive at least 25 hours a week for three months, and a lesser subsidy for those driving 15-25 hours per week; and requiring companies to provide or make available occupational accident, death, and disability insurance. Prop 22 also required the companies to: develop anti-discrimination and sexual harassment policies; develop driver training programs; have zero-tolerance policies for driving under the influence of drugs or alcohol; and require criminal background checks for drivers.