UNIVERSITY OF BALTIMORE
Center on Applied Feminism

Author Abstracts

13th Annual Feminist Legal Theory Conference
Applied Feminism & The Big Idea 2022

Panel One: Big Ideas About Identity and Personhood

- **Ariël Decoster**, *Masculinity as Property*

    - Even if anti-discrimination legislation has significantly improved the lives of those oppressed on the basis of their sex/gender, sexual orientation and/or gender identity, gender-based inequality persists. In this paper, I suggest conceptualizing masculinity as a form of legally protected property in order to think through the links between gender, law and power. I argue that masculinity, just like property, refers to a settled arrangement of identity (i.e., an enforced agreement over who one is or should be) as well as ability (i.e., an enforced agreement over what one can or cannot do). As such, masculinity as property constitutes a political relationship between individuals that functions as a socio-legal resource, which can be and is, actively mobilized in court and beyond to maintain or gain power. Equipped with this new way of looking at the gendered and engendering nature of law, we might be able to better make sense of contemporary legal developments that keep in place or entrench remaining forms of gender-based oppression. Moreover, the idea of masculinity as property can be used as a compass to take a normative stance in certain feminist debates or to develop effective reforms for gender equality. This paper illustrates this in the area of trans rights, suggesting that the decertification of sex/gender (in combination with other reforms for gender justice) is a necessary step in a broader fight to devalue the property worth of masculinity.

- **Greer Donley**, *Subjective Fetal Personhood*

    - Longstanding dogma dictates that recognizing pregnancy loss threatens abortion rights—acknowledging that miscarriage and stillbirth involve a valuable loss, the theory goes, creates a slippery slope to fetal personhood. For decades, anti-abortion advocates have capitalized on this tension and weaponized the grief that can accompany pregnancy loss in their efforts to legislate personhood and end abortion rights. In response, abortion rights advocates have historically fought legislative efforts to support those experiencing pregnancy loss, and more recently, remained silent, alienating those who suffer a miscarriage or stillbirth. This Article is

the first to argue that this perceived tension can be reconciled through the concept of subjective and relational fetal value. The Article derives this concept of subjective fetal personhood from pregnancy loss research, which demonstrates that a pregnant person's attachment to their fetus is based on a myriad of individualized factors. Importantly, attachment in pregnancy is neither fixed nor biological and therefore does not support the antiabortion concept of personhood-at-conception. We suggest that tort law offers a way forward: a model of recognizing subjective, relational fetal value that does not collapse into personhood-at-conception. Thus, abortion rights advocates can support those experiencing pregnancy loss by acknowledging their subjective loss without ceding ground on abortion rights. Most importantly, this Article proposes that recognition of pregnancy loss within abortion narratives will better position the abortion rights movement for a post-Roe world in which abortion and pregnancy loss are inexorably intertwined. Without legal abortion access, women will turn to self-management. But because complications from self-managed abortion are indistinguishable from miscarriage, investigation and criminalization of pregnancy loss will dramatically increase as a mechanism of enforcing abortion laws. Furthermore, restrictions on abortion also create offshoot consequences that harm the treatment of pregnancy loss. Appreciating how connected these two experiences are will help to normalize and de-stigmatize all pregnancy endings that do not result in a live birth—abortion, stillbirth, and miscarriage. Finally, we argue that an abortion rights narrative that acknowledges subjective fetal value is less alienating and reflects nuanced views on the meaning of pregnancy.

- **Laura Lane-Steele**, *Contextual Identity*

    - In a previous article, *Adjudicating Identity*, I concluded that legal actors often make identity determinations in what I call a "context-detached" manner, i.e., without sufficient attention to why identity is relevant to a particular law and how that law's purpose should inform identity determinations. In this Article, I build on two themes introduced but not fully explored in *Adjudicating Identity*. First, I make clear what's at stake by describing what's lost both doctrinally and normatively when legal actors employ a context-detached approach to identity determinations. Second, I expand on an alternative approach to identity determinations, what I call a "context-informed" approach. Although I focus on three identity categories (sex, race, and sexual orientation), my goal is to develop an approach that isn't necessary limited to these three identities.

      The first part of the Article argues that a context-detached approach causes at least three different types of harms. First, this approach undermines the goals of the particular law at hand. Because a context-detached approach is, by definition, not disciplined by the purpose of law, those purposes often go unfulfilled. Second, this approach often causes legal actors to over-

interrogate identity, meaning that they examine or require more identity evidence than the law's purpose dictates. Over-interrogation of identity can infringe on two forms of constitutionally rooted privacy interests: informational privacy and liberty-based privacy. When legal actors adjudicate identity using sensitive information or force upon people an identity that is at odds with their own self-perception—when the function of the specific law at issue does not require this—these inquiries are not only unnecessary, but can also be coercive, demeaning, and even unconstitutional. Third, over-interrogating identity can essentialize identity categories in ways that draw unnecessarily narrow and rigid boundaries around identity and reinforce problematic narratives about the objectivity and stability of identity.

The second part of the Article expands on my proposed alternative to a context-detached approach to identity determinations—namely, a context-informed approach, which uses the purpose or function of the applicable law to guide the identity inquiry. This part demonstrates how such an approach could work in practice and how it mitigates the harms discussed in the first part of the Article. This part also addresses and responds to potential problems with a context-informed approach. Specifically, I explore how such an approach might operate when the purpose or function of a law is contested or normatively undesirable; whether this approach's demand for specificity about a law's purpose outweighs the benefits of maintaining a certain level of abstraction regarding a law's goals; and whether the applicable law's purpose should be the only thing driving the identity inquiry or whether other interests (privacy, autonomy, equality, etc.) should also play a role. While other scholars have proposed similar contextual or functionalist approaches to legal definitions of identity, these proposals are typically limited by identity category or type of law. This Article builds on these works, puts them in conversation with each other, and seeks to develop an approach to identity determinations that isn't confined to one identity or one area of law.

Panel Two: Big Ideas in Intimate Partner Violence

- **Dr. Alesha Durfee**, *Structural Intersectionality as a Method to Critically Analyze Domestic Violence and Law*

    - Intersectionality has been increasingly critiqued as colonized, depoliticized, commodified, and whitened (Anthias, 2012; Baca Zinn & Zambrana, 2019; Bilge, 2013, 2014; Davis, 2008; May, 2015). Often disconnected to its origins, intersectional analyses can be additive, reductionistic, and have "findings" that are based on inappropriate assumptions. With domestic violence research, this can result in support for policies and laws that appear to be "victim-friendly" but instead lead to the further marginalization, victimization, and criminalization of survivors.

Traditional approaches to the use of intersectionality as a method often start by identifying interlocking social identities at the individual level (e.g., race, class, and gender) or axes of structural inequality at the institutional level (e.g., race, class, or gender as "social structures"), and then analyzing how they operate within a "matrix of domination" (Collins, 1990, 2015; Collins & Bilge, 2016) to further marginalize individuals and solidify existing hierarchies.

I argue that we should instead identify the mechanisms by which institutions reproduce broader social inequalities and then tracing those back to constellations of marginalized social identities or axes of structural inequality. This approach avoids many of the methodological problems identified in prior intersectional research, can reveal the interconnectedness of barriers, risks, and vulnerabilities faced by different groups of multiply marginalized survivors, and can lead to systems that address abuse but do not replicate inequality.

In this presentation, I draw on 1,388 protection order case files and 80 interviews to show how this approach can be used to analyze domestic violence civil protection orders. When multiply marginalized survivors attempt to file for or enforce protective orders, this "victim-friendly" system prevents them from accessing and enforcing their full legal protections and can even have disastrous consequences for themselves, their families, and their communities. These can include system entanglements with Immigration and Customs Enforcement (ICE), deportation, Child Protective Services (CPS), the removal of children, being arrested for domestic violence or other reasons, subjection to police violence, or being picked up on warrants.

Finally, I discuss the possibilities and limitations of using this approach to structural intersectionality, including ways it can open new areas of research, contribute to broader discussions about the role of law in addressing abuse, and how this type of research can inform practice and policy.

- **Elizabeth Isaacs**, *The Corroboration Trap: Problems of Race & Gender in New York's Domestic Violence Sentencing Reform*
    - The Domestic Violence Survivors Justice Act (DVSJA) is a groundbreaking piece of sentencing reform legislation enacted in New York in 2019. The law allows judges to drastically reduce the prison sentences of incarcerated survivors who can demonstrate, among other things, that their abuse was a "significant contributing factor" to the conduct for which they were arrested, prosecuted, and punished. In many ways a triumph of grassroots activism, the DVSJA was the culmination of decades of advocacy led primarily by women of color. Nonetheless, the law includes provisions that are deeply

sexist and racist in application. Among them is the gatekeeping requirement that applicants cannot get an evidentiary hearing without first submitting two pieces of evidence corroborating their allegations of abuse, one of which must qualify as a "court record" or other official document. As a result, survivors without sufficient corroboration of their abuse never get a hearing, let alone a shorter prison term.

This article examines the DVSJA's corroboration requirement against the backdrop of credibility determinations in New York post-conviction practice, which have historically imposed a much less strenuous burden at the pleading stage. It will also critique the corroboration requirement through an intersectional lens of racial and gender equity, exploring the messages conveyed when the state allows access to the courthouse only for survivors who can buttress their credibility with state-approved documentation. Requiring corroboration of abuse harkens back to the misogynistic trope of the incredible/unchaste female victim, and the common-law rules around prompt outcry and corroborating allegations of rape. In addition, the law's criteria for overcoming the presumption of mendacity entrenches the misguided reforms of carceral feminism by privileging survivors who—by virtue of race, class, and sexual orientation—have easier access to, and trust in, the criminal legal system and government record-keeping institutions more broadly (i.e., white, cisgendered, heterosexual women). The DVSJA thus stacks the deck against the same marginalized communities who are disproportionately criminalized for conduct stemming from their experiences of domestic violence.

The article proposes a near-term legislative fix by eliminating the corroboration requirement under the DVSJA. But it also acknowledges the limits of reform, since trading corroboration for other traditional courtroom tests of veracity, such as cross-examination and impeachment, presents its own race and gender equity problems. The real work lies at the front end, addressing domestic violence and its effects through supportive systems outside the framework of criminalization.

- **Leigh Goodmark**, *Imperfect Victims: How the Criminal Legal System Punishes Survivors of Gender-Based Violence*

    - Modern legal history is full of the stories of people who acted to protect themselves from gender-based violence—rape, sexual assault, intimate partner violence, trafficking. Rosa Lee Ingram, the sharecropper convicted in 1948 for the murder of a local landowner after an armed sexual assault. Joan Little, acquitted of the 1974 murder of Clarence Alligood, a prison guard who attempted to rape her in her cell. Judy Norman, convicted in 1985 of the murder of her sleeping husband, J.T., after days of being trafficked, beaten, starved, and threatened. Cyntoia Brown-Long, released

in 2019 after sixteen years of incarceration for shooting the man who bought her for sex at age 16.

Since the 1970s, anti-violence advocates have worked to make the legal system more responsive to claims of gender-based violence. Significant changes to the substantive law governing rape, intimate partner violence, and trafficking have made both criminal and civil relief more broadly available to victims of these violations. Yet victims of violence continue to be targeted by the criminal legal system, notwithstanding the recognition that they have been victimized. This targeting happens in a variety of contexts: when victims seek help, when they are called by the state as witnesses, when they act in self-defense, and when, after years of confinement, they request clemency or parole. It happens to girls, women, and trans and gender nonconforming people, to citizens and to those who are undocumented, to those who have been raped or sexually assaulted, victimized by their intimate partners, and trafficked. The criminalization of gender-based violence has had a variety of unintended consequences. But perhaps the most problematic unintended consequence of the criminalization of gender-based violence has been its impact on those it was meant to benefit--victims of violence.

In Imperfect Victims: How the Criminal Legal System Punishes Survivors of Gender-Based Violence, I will explore how the criminalization of gender-based violence has led to the punishment of victims, paying particular attention to the experiences of people of color, particularly Black people. The project begins with the experiences of girls and young people and moves through the adult system from arrest to parole, commutation, and pardon. It highlights how police, prosecutors, and judges perceive victims of violence, the rationalizations they use to justify criminalizing victims of violence, and how the law permits those rationalizations. The project concludes that current criminal system reforms, like gender-responsive programming and trauma-informed treatment, cannot prevent the harms done by criminalizing victims of violence--they enable system actors to criminalize and incarcerate better without acknowledging the inherent harms of criminalization. The project argues that abolition feminism should frame any reform efforts, with the ultimate goal of dismantling the carceral state altogether.

- **Natalie Nanasi**, *New Approaches for Disarming Domestic Abusers*

    - Laws prohibiting perpetrators of intimate partner violence from possessing firearms have long been on the books. But the failure to enforce them, thus allowing abusers to keep their weapons, has led to deadly consequences. While the criminal justice system has in recent years increased efforts to disarm domestic abusers, they have yielded minimal success.

It should be unsurprising that threatening criminal consequences for illegally possessing firearms has not been an effective strategy. Perpetrators knew they were breaking the law when they assaulted their partners, but did so anyway. And the calculated risk they take by not relinquishing guns often pays off due to a lack of coordination between the agencies tasked to verify compliance, as well as low prosecution rates.

Because criminal justice approaches have proven ineffective in dispossessing domestic violence offenders of firearms, alternative approaches are necessary. This Article, drawing from the fields of public health, international human rights, and anti-carceral feminism, explores such alternatives. It analyzes these theoretical areas to draw out commonalities—including a move away from exclusively carceral approaches, a focus on prevention, and an emphasis on community-based solutions—that can inform efforts to remove guns from the hands of domestic violence offenders.

Panel Three: Big Ideas in Reframing Consent and Victimhood

- **Lisa Avalos**, *Innocence Beyond a Reasonable Doubt: Supreme Court Nominees and Sexual Misconduct*

    - Should we allow judicial nominees who have been credibly accused of sexual misconduct to be seated on the Supreme Court? How should we handle such allegations when they arise during the vetting process? Despite the importance of these questions and Anita Hill's repeated observation that the Senate needs a process for addressing such allegations, lawmakers have failed to act. Senators did nothing to put in place such a process between the Clarence Thomas hearings in 1991 and the Brett Kavanaugh hearings in 2018, and we are still waiting.

      This paper uses the Thomas and Kavanaugh hearings to demonstrate why we need such a process and then draws on the author's background in sexual assault investigation best practices to describe the contours of what that process should be. It also makes an argument for the standard that senators should use to evaluate such allegations.

      Part One identifies the problems that result from not having a process in place for evaluating sexual misconduct allegations against Supreme Court nominees. It describes how partisan commitment to a particular nominee interferes with a search for truth and impedes a through investigation, and how nominees have used the DARVO framework (deny, attack, reverse victim and offender) to distract from the need to assess sexual misconduct allegations. This section also argues that senators are limited in their ability to vet allegations by their lack of understanding of the realistic dynamics of sexual assault, which leads them to rely on rape myths and stereotypes in

assessing victim credibility. Finally, this section shines light on the very real security risks that victims have experienced in coming forward, and the need for the Senate to consider informants' safety as part of the process.
Part Two identifies several necessary components to any process designed to address sexual misconduct allegations against Supreme Court nominees. It argues that, as a critical first step, the Senate must reach a bipartisan consensus that credible misconduct allegations are disqualifying for SCOTUS nominees because the reputational harm to the Court as well as to the executive and legislative branches of government are too great to do otherwise. The paper goes on to set out several additional components of the type of process we need, including transparent reporting mechanisms, a commitment to a thorough, properly resourced bipartisan investigation, training for senators in understanding sexual assault, and clear procedures for handling informants who request confidentiality.

Part Three addresses the harm in senators' importing the criminal law standard of guilty beyond a reasonable doubt into the nomination process. Instead, the paper proposes a new standard, arguing that successful SCOTUS nominees must be innocent beyond a reasonable doubt of any sexual misconduct, and provides several justifications for this standard.

- **Julie Dahlstrom**, *The New Pornography Wars*

    - The world's largest online pornography conglomerate, MindGeek, has come under fire for the publishing of "rape videos," child pornography, and nonconsensual images on its website, Pornhub. In response, civil plaintiffs have crafted new, creative legal actions against MindGeek and other platforms under federal anti-trafficking laws. In pleadings, they also argued that third parties, particularly payment processing companies and capital management firms, "knowingly benefited" from online harms and should face broad civil liability. Similar expansions of trafficking have also emerged in criminal prosecutions of pornography producers.

      This Article argues that these new applications of federal anti-trafficking laws have profound implications for the future of online pornography. Like the "pornography wars" of the 1970s and 1980s, these developments seek to give new voice to victims of online harms in federal courts, providing avenues to expansive civil damages and the right to take down images. These cases are redolent of venerable feminist debates though they raise new questions about the scope of the third party liability, statutory liability, and the First Amendment. This Article, though cautiously supportive, argues that this trend, while widely heralded by advocates, is not without potential cost. It may, for example, mask important questions about civil liberties, internet freedom, and sexual expression. Therefore, this Article concludes with suggestions for judicious evolution of trafficking frames in these realms.

- **Emily Stolzenberg**, *Nonconsensual Family Obligations*

    - The pandemic has highlighted and compounded the challenges many U.S. families face in meeting their members' basic needs. Yet efforts to expand public subsidies for caretaking have gained little traction. Scholars have identified many historical and practical reasons for Americans' entrenched skepticism toward the welfare state. But ideas matter, too, and the United States' individualist political culture makes it difficult to offer convincing justifications for social welfare programs.

      This Article uncovers and critiques one individualist idea that works to limit collective financial responsibility for families: the conviction that family support obligations may be legitimated only on the basis of consent. In family law, as in liberal political theory, consent works to reconcile state regulation with individual freedom. But consent is a poor way to conceptualize the relations of interdependence that exist between both family members and conationals. As a result, consent-based ideas about what family members owe one another not only make family law doctrine less generous and justifiable than it could be, but also insulate citizens from financial obligations toward anyone's family except (maybe) their own.

      Consent-based legitimation endures in part because "consent" can bear different meanings unless it is rigorously defined—work that family law scholars have only begun to undertake. To that end, this Article identifies and analyzes the distinct roles consent plays in justifying family support obligations. It develops a taxonomy of consent as invoked in family law, then uses it to illuminate how the concept's uncritical deployment contributes to an incoherent body of law that naturalizes economic inequality within and between families.

      To begin to address these problems, family law must incorporate additional principles beyond consent for justifying family support obligations—what this Article calls *nonconsensual family obligations*. Such a pluralist approach would allow family law to grapple with important normative questions directly and openly, contributing to more defensible (and potentially more egalitarian) doctrine. Recognizing nonconsensual family obligations is also the first step toward advocating for the collective responsibility to make the material inputs of family life available to all. Under such a theory, family support obligations would be much broader and more widely spread than we currently imagine them to be.

- **JoAnne Sweeny**, *#MeToo as Social Media Vigilantism*

    - One of the most well-reported consequences of the #MeToo movement is the ramifications it has had for powerful men who have been accused of engaging in sexual assault or harassment. As part of telling their stories, women (and some men) named their abusers and their stories ultimately led to these alleged abusers suffering legal, economic and social repercussions. Despite these successes, the #MeToo movement has been criticized as vigilante justice, which has led to backlash against some of the accusers. This article will look at how #MeToo has filled some gaps left by the judicial system with its early successes, as well as its potential limitations as a pseudo-vigilante movement, particularly the backlash and retribution that been experienced by those who named their abusers. This article then argues that the #MeToo movement must move beyond its vigilante roots to propel systemic legal change that will be more stable going forward.

Panel Four: Big Ideas in Human Rights

- **Asees Bhasin**, *Love in the Time of ICE – How Parents Without Papers are Stripped of the Right to Raise Their Children in a Safe and Healthy Environment*

    - This Article analyzes narratives around immigrant reproduction and traces the construction of immigrants as bad and unfit parents. It seeks to connect these perceptions, which are driven by nativist and racist beliefs, to the formulation of laws and policies that are designed to unleash violence and fear on undocumented people and their families. In particular, this Article focuses on the "right to raise one's children in safe and healthy environments" which as per the Reproductive Justice framework is a human right that is guaranteed to all regardless of their immigration status. It outlines the capacious vision of the RJ movement which seeks to center marginalized communities and create conditions for them to live without oppression and fear. This Article goes on to note how undocumented immigrants are denied family unity, mental peace, government assistance, health care, and social and economic mobility, thereby disabling them from raising their children in safe, dignified, and healthy environments. It concludes by discussing certain legal, policy, and structural changes proposed by communities and grassroots organizers which, if implemented, may create conditions for immigrant parents, families, and communities to live empowered, self-determined, and healthy lives in alignment with the goals of the RJ movement.

- **Marcy Karin,** *Addressing Periods at Work … Around the World*

    - Structural workplace changes are needed to acknowledge, anticipate, and accommodate menstruation, without harming equity or economic security for current and former menstruators. The biological process of menstruation does not stop at work, but workplaces are not designed to support needs related to periods, perimenopause, or menopause. Specifically, some workers who menstruate have needs related to menstrual accommodations like time away from work or access to menstrual products and private and sanitary spaces to dispose of menstrual discharge and the products that absorb them. Workers also have needs related to working free from indignities and harassment because of menstruation. Yet, periods and blood are stigmatized, gendered, and subject to taboos. The corresponding shame, lack of menstrual education, gender composition and power dynamics of workplaces, and overall structural mismatch makes some menstruators susceptible to discrimination and harassment at work.

      This article is the first in a series that explores this landscape of menstruation, menopause, and work. After identifying and categorizing menstrual needs at work, it analyzes employer-provided policies and existing legal requirements that offer some protections and supports to current and former menstruators at work. It then explores how these existing policies and law fail to comprehensively address menstrual needs or corresponding problems such as absenteeism, lost wages, privacy violations, health implications, harassment, and other menstrual indignities. Building on available menstrual experiences, voluntary employer policies, international models, and analysis of applicable federal law and related litigation, the article recommends public policy interventions to minimize menstrual injustices and acknowledge that menstruation and menopause at work matter.

      The second article will dig deeper into menstrual discrimination by exploring the ways that these statutory claims are brought in Japan, the United Kingdom, and the United States and offering lessons learned from this comparative analysis.

- **Elizabeth Keyes**, *Gender and the Coming Challenges of Climate Migration*

    - As climate change intensifies and land becomes uninhabitable from economic, health, or existential perspectives, migration is an increasingly critical strategy for adapting to climate migration. Yet migration is not equally available to all. Climate migration further exposes well-known, well-understood inequities, including gender, but gender as it intersects with other forms of structural injustice. When we think about which communities are most vulnerable to climate change, we can see structural racial and economic injustice readily—but within that, what role do women in particular

play in maintaining fading and changing communities? Who in families is the first to migrate when land becomes un-farmable? What happens to those left behind? Who has the resources and health to be able to choose the migration adaptation strategy? To the extent we have data that addresses these questions, I will present findings. Largely, however, as this is a notoriously difficult form of migration to quantify, I will frame questions for consideration as we think urgently about what policies would help women either flourish in their own changing communities, or avail of migration when flourishing at home is no longer within the realm of imagination.