CHILDREN AND TEENAGERS

Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 175 (2010).

Currently, the United States lacks a uniform set of standards governing the rights of children to speak and be spoken for in court. When a child is not permitted to speak, her voice may be "diluted" by whoever speaks for her, and the speaker will unavoidably inject his own views. The author argues that the standards set forth in Article 12 of the United Nations Convention on the Rights of the Child and New York state law should guide the development of a body of national law on this subject. A new legal standard could include Article 12's specific language requiring that the child be heard and New York's requirement that children's attorneys provide direct advocacy rather than merely speaking to perceived "best interests." With Article 12 and New York's family laws as working models, further inquiry and analysis could and should ultimately lead to the implementation of a direct representation national standard that will give a real voice to the nation's children.

Jessica C. Collins, Note, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225 (2010).

While the Federal Communications Commission ("FCC") has exercised broad discretion in regulating media that it deems harmful to children, the actual standards for indecency regulation are vague and confusing, and as a result, may be compromising principles of free speech through overregulation. Although arguments about First Amendment protection and media regulation have been raised at every level of the judiciary, including in *FCC v. Pacifica Foundation*, a seminal 1978 United States Supreme Court case which gave the FCC authority over indecency regulation in the media, the grounds for regulation have never been clearly enumerated, giving the FCC a wide sphere of power with no concrete limitations. The author of this Note argues that a more clearly defined scope of power is necessary to curb FCC overregulation, and posits several child-focused justifications for regulation: preventing children from imitating harmful behaviors presented by the media, promoting socially appropriate behavior, and preventing a broad range of psychological harm. The issue discussed is not in fact whether indecency regulation should exist, since it is clear that some level of regulation is constitutional, but rather how to better define its scope and prevent abuse of its power. Given the importance of free speech, it is crucial that courts begin to carve out specific standards for what constitutes "harm to children," to set limitations on the FCC's broad regulatory powers.

Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J. L. & FEMINISM 279 (2010).

This Article examines sexual consent laws, criticizes the rationale behind them and suggests that the state laws be reformed to emphasize personal sexual autonomy rather than age or gender. Modern statutory rape laws automatically criminalize sex with persons under a certain age, even if the actors are both underage. The history of age of consent laws is discussed, beginning with their adoption in the United States from nineteenth century English common law, when a young woman's virginity was protected as an object passed from father to husband. Four potential reforms to sexual consent laws are advanced: lowering the age of consent and decriminalizing sex between teenagers, codifying age-span provisions, regulating relations of trust and dependence, and establishing standards for sex between minors versus between minors and adults. The author concludes that sexual autonomy, rather than age, should inform sexual consent laws, and that that sex amongst the youth population should be conceptualized as a new category or sexual class under state age of consent laws.

Clifford S. Fishman, *The Child Declarant, the Confrontation Clause, and the Forfeiture Doctrine*, 16 WIDENER L. REV. 279 (2010).

The Confrontation Clause requires that a defendant be able to confront any witness against him. However, when a child victim of sexual assault is unable to testify because he suffers such emotional trauma that it is burdensome and often impractical for the child to confront his assaulter, the admissibility of testimonial statements made by the child becomes questionable. The Confrontation Clause is limited by the forfeiture doctrine, which permits out-of-court testimony to be admitted where a defendant has engaged in wrongful conduct that prevents a witness from testifying. Three factors are especially relevant to the application of the forfeiture doctrine when applied to child-victims: the child's vulnerability, the nature of the abuse, and subsequent wrongdoing by the defendant to prevent the child from testifying. In *Giles v. California*, the United States Supreme Court held that the forfeiture doctrine may be invoked only where the defendant's wrongdoing was intended to prevent the witness from testifying, and not merely where the witness's failure to testify is an incidental result of the defendant's independently motivated conduct. For those who wish to spare children the pains of testifying against their abusers, *Giles*' high standard will exclude many out-of-court testimonial statements made by these victims, and will ultimately result in fewer defendants being convicted.

Jason Fuller, *Corporal Punishment and Child Development*, 44 AKRON L. REV. 5 (2011).

As a result of increased media coverage and political debate in the past fifty years, the once popular child-rearing technique of spanking has been intensely criticized, and is becoming increasingly banned in many countries despite statistics that show an increase in youth violence where corporal punishment has been banned. Studies have revealed that younger children learn more efficiently through tangible rather than abstract experiences, which has significant implications for how children understand justice, punishment and discipline. This Article examines the findings of those who oppose the use of spanking, and shows that such findings are based merely on opinions that corporal punishment, specifically spanking, leads to an increase in youth violence and delinquency during childhood, and not on statistical and empirical evidence. The author finds, based on the results of long-term studies of families with young children, that spanking, when used in conjunction with other child-rearing techniques, such as positive reinforcement, can actually decrease a child's misbehavior. It is important for parents not to dismiss spanking as a child-rearing technique because results have proven to be highly effective in lowering youth misbehavior as well as in promoting healthy child development.

Amanda M. Hiffa, Note, *OMG TXT PIX PLZ: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors from Their Own Devices*, 61 SYRACUSE L. REV. 499 (2011).

Teenagers' use of cellular phones has dramatically increased over the past decade, but a general absence of legislation over "sexting," cellular transmissions of sexually explicit text messages and photos, has resulted in the inappropriate use of child pornography laws to criminalize teenagers who "sext." Although child pornography statutes were enacted to protect minors, such laws are now being used inconsistently; some teenagers who sext receive a reprimand without any legal consequences, while others are charged as sexual offenders. Sexting, however, does not always fall within the category of child pornography because many minors voluntarily send sexually explicit images as a form of constitutionally protected sexual expression. Furthermore, the First and Fourteenth Amendment rights of free speech and substantive due process protect teenagers' sexual privacy and also parents' rights to reprimand their children. The author concludes that sexting should not be punished by courts or legislatures, but instead, should be regulated by parents and school officials who are better able to directly control minors' behavior while teaching teenagers how to use electronic devices responsibly.

Linda Kelly Hill, *The Right To Be Heard: Voicing the Due Process Right To Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011).

Unaccompanied alien children who are apprehended inside or near the United States border face complex legal issues—such as removal proceedings, the right to be released to their families within the United States, and the conditions of their detention centers—without a constitutional right to counsel. Under the framework setforth in *Lassiter v. Department of Social Services*, there is a presumption that no right to counsel exists for civil litigants absent a showing that unsuccessful litigation will result in physical confinement. As a result of unsuccessful litigation, children are frequently deported rather than physically confined. Since the passage of the Homeland Security Act of 2002—which restructured federal immigration agencies—the number of detained children has significantly increased, but their legal representation, including pro bono services, has not adequately addressed their individual needs. This Article advocates that the *Lassiter* presumption can be overcome considering the unique interests of unaccompanied alien children—separated from their families, lacking capacity, the impossibility of a child adequately representing themselves, and the State's interest in the smooth functioning of courts. Therefore, a child's right to effective independent counsel is critical, and it cannot be substituted by the efforts of federal immigration agencies to improve the treatment of children in detention centers. Denying adequate representation to unaccompanied alien children damages the integrity of our legal system, as due to the lack of independent checks for abusive treatment by operators of detention centers and by the unjust results certain to come by denying a child adequate representation.

Shireen Y. Husain, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings*, 79 GEO. WASH. L. REV. 232 (2010).

In dependency proceedings that determine children's placement into foster homes, children have a constitutional right to legal representation. Despite the fact that children in foster homes often experience abuse or neglect, state law does little to protect their needs, and the United States Supreme Court has been reluctant to rule on this issue. In order to reform these inadequate standards, the author proposes amending the Child Abuse Prevention and Treatment Act ("CAPTA")—which in part requires neglected children to be represented in dependency proceedings—to create a standard providing guidance to states on the responsibilities of representatives in dependency proceedings. These amendments would create a uniform standard of protection and would increase the children's participation in the process, thereby allowing them to feel more in control of the outcome of their case, and would also provide additional information to the court

so that it could make a more informed decision. In effect, this amendment will ensure that children can exercise their right to be heard, guaranteeing a voice for those who cannot advocate for themselves.

Dina Mishra, *Child Labor As Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59 (2010).

This Article discusses the history of Congress's exploration of the Thirteenth Amendment's approach to child labor and why it was never deemed illegal as a form of involuntary servitude. Child labor in the United States had become a widespread problem that required a uniform, federally legislated resolution because states were engaging in competition by enacting increasingly lenient child labor laws. The Thirteenth Amendment was a feasible approach to regulating child labor, but in the early twentieth century, before the Supreme Court of the Great Depression era began to enforce child-protective laws, other proposed remedies proved more favorable in the political climate. The Thirteenth Amendment was in line with the goals of regulating child labor at the time, especially with its narrower approach to regulation and its widespread effect. The author believes that the Thirteenth Amendment approach—as opposed to other enacted legislation—would have been a constitutionally and politically amenable way to regulate child labor that could have had far-reaching effects on labor regulation well into the twentieth century.

Kevin O'Gorman & Efren C. Olivares, *The Hague Convention on the Civil Aspects of International Child Abduction: An Update After Abbot*, 33 HOUS. J. INT'L L. 39 (2010).

The Hague Convention on the Civil Aspects of International Child Abduction ("Convention"), which provides a legal framework of custody orders designed to prevent and remedy trans-border child abduction, is enforced in the United States under the International Child Abduction Remedies Act ("ICARA"). The ICARA statute's ambiguous definitions of "rights of custody" led to the Supreme Court's holding in *Abbot v. Abbot*, where Mr. Abbot, the non-custodial parent of a child removed to the United States by the child's mother, argued that his rights to regular visitation meant he had a right of custody under the Convention to demand that his son be returned home to Chile. The federal district court denied the request for return, ruling that Mr. Abbot's *ne exeat* right—requiring the consent of both parents in order for a child to be removed from his or her country of residence—gave him a right to access, but not a right to custody under the Convention. The Supreme Court overruled the district court, holding that the denial of Mr. Abbot's right to regular visitation was a violation of his *ne exeat* right; it interpreted the violation of this *ne exeat* right to be a violation of a right of joint custody under the Convention. The author contends that, although it is uncertain whether the United

States will see more Convention cases due to the decision, the Supreme Court's ruling certainly makes protections under the Convention more accessible to international victims of abduction by broadening the non-custodial parent's right to bring their Convention claims in the United States.

DOMESTIC VIOLENCE

Ashley Arcidiacono, Comment, *Silencing the Voices of Battered Women: How Arizona's New Anti-Immigration Law Prevents Undocumented Women from Seeking Relief Under the Violence Against Women Act*, 47 CAL. W. L. REV. 173 (2010).

Arizona's recently-passed anti-immigration law (SB1070) undermines federal laws that were put in place specifically to help battered immigrants, and thereby jeopardizes the safety of undocumented domestic abuse victims by prioritizing and mandating the capture of illegal aliens. Created in 1994 and 2000 respectively, and representing a welcome shift from the traditionally husband-centric immigration laws, in which a woman's ability to adjust status was predicated on a petition from her husband, the Violence Against Women Act ("VAWA") and the U-Visa allow noncitizens who are being abused by their U.S. citizen or Legal Permanent Resident spouse to apply for an adjustment of status without the knowledge or cooperation of the abusive spouse. But under the new Arizona bill, and despite VAWA's explicit safeguards against this type of punitive action, a noncitizen who reports domestic abuse can instead become the target of an immigration investigation based on the requirement that all immigrants carry identification under penalty of arrest. The author suggests a two-fold solution: community outreach informing women of their rights and the pursuit of a more narrow interpretation of the Arizona law, which would allow police to adhere to and respect VAWA and U-Visa provisions. National statistics indicate that a large percentage of abused undocumented women do not report their injuries, and it is therefore imperative that steps be taken in Arizona to counteract the disastrous effects of SB1070.

Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 (2010).

Although feminist proponents of the battered women's movement initially encouraged the criminal justice system to respond aggressively to domestic violence issues, they now challenge current policies as disregarding a victim's right to choose when to allow the system to intervene in their private lives. However, their vision of "victim autonomy" is not easily translated to the current American criminal justice system, through which many domestic violence victims want to prosecute their batterers and require the system's resources to do so. Still, the

number of victims who choose to engage with the criminal justice system is small, which provides an important measure of the system's effectiveness, or lack thereof. To combat these issues, the author argues that while victim autonomy should not be the system's sole emphasis, domestic violence is a private matter, and thus policies should target the estimated 60 to 80 percent of women who recant their testimony or refuse to testify against their batterers. Ultimately, future polices should improve the domestic violence victim's experience with the criminal justice system by keeping her informed about the legal process, and perhaps involving advocates to help with safety planning, as some jurisdictions have done.

Leslie Joan Harris, *Failure To Protect From Exposure to Domestic Violence In Private Custody Contests*, 44 FAM. L. Q. 169 (2010).

Beginning in the 1980s and 1990s, practices in family law have changed to the effect that courts are required to consider the occurrence of domestic violence in a household, which has often resulted in domestic violence victims—mostly mothers—losing custody of their children because they are deemed to have "failed to protect" their children from harm. Traditionally, custody was given to the non-violent parent on the theory that the violent parent presents a danger to the child. This Article demonstrates the negative impact that this shift in family law practice has had on the adjudication of custody arrangements and argues that courts resolving domestic relations disputes in the private custody context should not make their determinations solely based on the presence of violence in the home, but rather should adopt the lessons and techniques employed by the child welfare system in dealing with these claims. The author proposes several legislative enactments: a child must have actually been harmed by the exposure to violence so that a battered spouse, by the mere fact that they have been battered and thus exposed their child to violence, does not automatically lose custody; even when the child has been harmed, that harm must be weighed against any harm to be incurred in the child's alternative living arrangement; and where a judge cannot make these findings, the case should be referred to a child welfare agency for further investigation. Absent statutory enactments to those effects, judges should still be guided by these principles as they make their determinations, and throughout the judicial process, should engage the help of child welfare agencies to facilitate investigation.

Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115 (2010).

The recent United States Supreme Court decision in *Crawford v. Washington*, holding that the Confrontation Clause of the Sixth Amendment requires any testimonial statement to be subject to cross-examination, ignores the realities of domestic violence cases. *Crawford* overruled a line of Confrontation Clause cases

that allowed out of court statements, despite qualifying as hearsay, to be admitted if they possessed an "adequate indicia of reasonability," but in doing so, *Crawford* simply replaced a vague standard with an ineffective one. In domestic violence cases, it is common that victims will not or cannot testify because they are injured or dead, fear their abuser, or are financially tied to the abuser. *Crawford* presents two problems: abusers are given incentive to silence victims so they will not testify, and the Confrontation Clause provides no limitations on the admissibility of nontestimonial statements, so that emergency phone calls to the police—which qualify as nontestimonial—may be presented in court against the caller's wishes. To remedy these shortcomings, courts should rely heavily on hearsay rules to exclude more nontestimonial statements, and should also expand the hearsay exception categories of forfeiture—which admits statements without cross-examination where the abuser has tried to prevent the victim from testifying—and dying declaration—which admits statements made at the time of death—to allow for more testimonial statements to be admitted when the victim is unable or unwilling to testify.

Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia: 1860-1930*, 86 IND. L.J. 185 (2010).

Public attitudes toward domestic violence, particularly those perpetrated by men against their wives in the late nineteenth and early twentieth centuries, were not nearly as accepting as previous scholarly research has portrayed them to be. Research on the public attitude toward domestic violence in the late nineteenth and early twentieth centuries failed to uncover not only the actual widespread disapproval of that behavior, but the reasons why domestic violence was underreported. By exploring a sample of individual cases of domestic violence from the American West and Australia, the author uncovers many of the factors affecting whether or not abusive men would be punished, including the wives' fear of retaliation; the men's invocation of defensive pleas, such as provocation and insanity; and the overall public attitude toward domestic violence as these regions entered a more civilized, domesticated era. The Article reveals that husbands' physical, mental and emotional abuse toward their wives was largely deemed intolerable in both the American West and Australia, principally because it contradicted the husband's marital duty to honor and protect his wife. The public therefore viewed marital abuse as emasculating, and while prior research tried to fit marital abuse into the traditional literary perspective of independent, free-wheeling and uninhibited masculinity, marital abuse did not, in fact, fit this mold.

EDUCATION

Diane Holben et al., *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J.L. & EDUC. 151 (2011).

This Article demonstrates that despite public outcry that tort suits brought by students cripple teachers' ability to effectively control their classrooms, teachers' behavior is not motivated by a fear of litigation. The authors conducted a study analyzing the odds of litigation and liability for teacher intervention or nonintervention in student-on-student fights that resulted in one student's injury. The study indicates that the probability of litigation is about one suit for every two thousand student fights, that teachers are not named as defendants in most of the suits, and that the odds of a teacher being held liable are low. Moreover, teachers face somewhat more liability when they do not intervene in a student-on-student fight than when they do intervene. Thus, the research contradicts claims that teachers are unable to control their classrooms and protect their students out of a fear of litigation, thereby undermining the outcry for tort reform.

Daniel Kiel, *It Takes a Hurricane: Might Katrina Deliver for New Orleans Students What Brown Once Promised?*, 40 J. L. & EDUC. 105 (2011).

Even prior to Hurricane Katrina, the New Orleans educational system had been moving away from the traditional model of public education, in which a school board governs a fixed school district, towards a choice-based model, which promotes the growth of independent schools, such as charter schools, and allows parents and students to choose where children will attend school in order to target underperforming and racially segregated schools by increasing accountability. This Article examines New Orleans school districts in the aftermath of *Brown v. Board of Education* and Hurricane Katrina, arguing that both were seen as opportunities to reform inequitable access to education. Since *Brown* was decided, New Orleans experienced several phases of change in its education system, including a legal battle to overturn *Brown* and a grant of money to develop charter schools in the wake of Katrina, and while the motives behind the changes have varied, the result has been a weakened local school board and a high number of magnet and charter schools. The author examines school data about achievement and demographics to trace the impact of these two landmark events and the ensuing decisions these events prompted—for example, the fact that Louisiana charter schools are currently poised to outperform traditional public schools, a phenomenon not replicated by other states with charter school systems. However, the author cautions that if the choice-model fails to demonstrate improved academic results, there is still the threat of a return to traditional school systems.

Michael J. Ritter, Note, *Teaching Tolerance: A Harvey Milk Day Would Do a Student Body Good*, 19 TEX. J. WOMEN & L. 59 (2009).

By not punishing students who harass members of the LGBTQ community and the teachers who ignore such harassment, schools create a psychologically harmful environment for their students, increasing the likelihood that many LGBTQ students will drop out, abuse drugs, or commit suicide. Schools also create a risk for themselves since ignoring the harassment can lead to lawsuits alleging violations of due process, equal protection, free speech guarantees, and Title IX of the Education Amendments of 1972, which makes it illegal for a person to be excluded or discriminated against on the basis of sex in a federally funded school. This Note argues that schools should promote tolerance of LGBTQ students by implementing a Harvey Milk Day, as is done by California, which would focus on the significance of Harvey Milk's accomplishments in the LGBTQ and teach acceptable forms of interactions to students for when they come into contact with members of the LGBTQ community. Harvey Milk was the first openly homosexual man to be elected to office and once there, he sponsored gay rights legislation and successfully fought against California's attempt to prohibit homosexuals from teaching in public schools. Requiring that schools celebrate Harvey Milk Day would promote equality among students and ensure that schools use their resources to provide students with the highest quality of education, as opposed to using them for avoidable litigation.

Christina Payne-Tsoupros, *No Child Left Behind: Disincentives to Focus Instruction on Students Above the Passing Threshold*, 39 J.L. & EDUC. 471 (2010).

The 2002 federal No Child Left Behind Act ("NCLB"), with its emphasis on standardized testing and achieving a minimum proficiency level, may result in certain categories of students—namely those at the lowest and highest testing levels—receiving disproportionately fewer resources. Because a school that does not meet the state-set test passage rates faces harsh penalties, educators are under pressure to make pedagogical decisions based primarily on testing, and there are allegations that some states have lowered their testing standards to ensure national compliance. The author describes an "educational triage" problem in which nearly all teacher attention is directed at students on the testing bubble, because those children are the most likely to be brought up to passing level; this is contrasted with an educational model that strives for equal treatment for all students, offering a more comprehensive means of addressing school shortcomings without NCLB's limits on learning. While the equality model has drawbacks, including difficulty of implementation and that it fails to tackle societal inequalities that contribute to educational problems, it offers long-term solutions vastly superior to those of

NCLB. An equality-based system might include spending more money on at-risk districts or identifying and channeling more resources towards at-risk children.

Jason A. Wallace, Note, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735 (2011).

LGBT students are disproportionally targeted by bullies, resulting in poor academic performance, physical assault and harassment, school absenteeism and high dropout rates. The legal remedies available to bullied LGBT students are inadequate because Title IX, which prohibits discrimination against students on the basis of sex, only prohibits discrimination based on sexual conduct—not on sexual identity—and requires that the discrimination meet a very high threshold before students can obtain favorable verdicts against schools bound by Title IX. Because Title IX and state statutes provide only limited protection to bullied LGBT students, the author proposes national legislation as a more appropriate response. National legislation would provide specific protections for sexual orientation and identity, establish a nation-wide policy, and benefit from the funding and data available to the federal government. The author compares congressional bills to demonstrate that an ideal national law would provide students with a cause of action to directly sue the schools for discrimination, while creating a liability standard less stringent than Title IX's, thereby accounting for discrimination that affects a student's ability to comfortably engage in the school's educational programs rather than only discrimination of a particularly egregious nature.

FAMILY

Nicole C. Berg, Note, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. ILL. L. REV. 267 (2009).

With an increasing number of unmarried couples in committed, cohabitated relationships, the definition of a household in the United States is rapidly changing. Legally, however, married couples are afforded a number of rights and benefits that do not exist for unmarried couples, including property rights, filing joint tax returns, health benefits, and the right to designate economic interests to one another. To address this disparity and provide unmarried couples with legal protection and financial security in their relationships, the author argues that it is necessary to extend these benefits to unmarried couples. Economics, rather than a formal marriage license, should trigger these benefits. Because unmarried couples confer benefits on society when they join their lives, houses and assets, the state has an interest in recognizing those benefits by offering legal protections in return. This Article argues that the Designated Beneficiary Agreement law in Colorado, which consolidates these rights into a statute simply and efficiently, provides a useful model for other states to adopt and thereby extend many of the benefits available to married couples to unmarried couples as well.

Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L REV. 1955 (2010).

The television series *Big Love*'s portrayal of a polygamist family as "the family next door" illustrates the similarities between same-sex marriages and polygamist relationships, and gives credence to the argument that polygamy should be the next relationship to be given legal meaning. The reason same-sex couples have gained legal recognition is because they can adapt into the traditional two-person relationship model embedded in family law, whereas polygamist relationships are composed of multiple people, and create issues with which family law has not yet dealt. The Article advocates that polygamy can be governed by family law if the law expands to include unanimity norms, which require there to be unanimity on decisions about accepting or rejecting another spouse into the relationship. The author also challenges the prominent slippery slope argument that is used to dispute the legalization of polygamist and homosexual relationships. It is important for the advocates of legalized polygamy to realize that the biggest hurdle to both its societal and legal acceptance is reconciling the polygamist lifestyle with the traditional two person family model and finding a way to regulate the relationship in a way that meets societal norms and that balances equality among the multiple spouses.

Deseriee A. Kennedy, *Children, Parents & The State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78 (2011).

When a parent becomes incarcerated, a question arises as to whether or not the incarceration should terminate the legal parent-child relationship. Severing the parent-child relationship can damage a child's growth and development, especially when there are no adoptive alternatives and the incarcerated parent poses no danger to the child. The author criticizes the Adoption and Safe Families Act's harsh policy of terminating parental rights solely based on a parent's incarceration. The Article advocates using a flexible suitable parent standard rather than an ideal parent standard so as to not sever the parent-child relationship for arbitrary reasons. In a society where incarceration of parents is increasing, a more nuanced approach to parental termination that takes the child's interest into account would be more effective.

Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

For many centuries, there has been a societal bias against illegitimate children in the legal, social, and economic spheres. Some legal consequences of such discrimination include denying intestate succession, child support, and citizenship. The author argues that this stigma persists in our judicial system and that the legal distinction between marital and nonmarital children should be

abolished. Legislatures and courts discriminate by basing policies on the assumption that society should discourage illegitimate children. While society has become more tolerant of nonmarital children, the legal system's different treatment of "illegitimate" children preserves the stigma facing nonmarital children.

Maryl Sattler, *The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction*, 67 WASH. & LEE L. REV. 1709 (2010).

In situations where one parent relocates and takes his or her child to another country without the other parent's permission or consent, many issues arise that threaten the other parent's ability to enforce his or her parental rights. Not all countries share the mindset most prevalent in the United States, which is that that children should maintain contact with both parents; therefore, in foreign countries such as Japan, a parent may be unable to enforce a United States custody decision and thus stands very little chance of recovering a child who has been abducted. Currently, the risk of parental abduction following international relocation is not sufficiently addressed by state and international custody laws because relief under laws and treaties such as the Hague Convention—an international agreement which seeks to return a child to his or her country of habitual residence if he or she is wrongfully removed to or retained in a contracting state—are limited both in remedy and enforceability. As a solution, the author suggests that states assess each international relocation case with a presumption against permitting relocation over one parent's objection unless the parent who wants to move can show that the objecting parent's rights will be protected in the destination country. While this proposal may not stop a parent who is denied court permission from attempting to flee with the child, it may prevent the abductor from being successful or at least increase the chances of getting the child back because the abduction would have violated federal law as opposed to merely a state court order.

Catherine Chiantella Stern, Note, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal To Amend Article V*, 99 GEO. L. J. 605 (2011).

Currently, no federal rule protects a parent-child testimonial privilege—prohibiting courts from compelling parents or children from testifying against one another—and most federal courts reject such a privilege, potentially resulting in harm to the parent-child relationship. Historical bodies of law and a number of Western European countries recognize a broad parent-child privilege because of the conflict of interest created by forcing a family member to testify against one's own. In the United States, however, few jurisdictions recognize the importance of this privilege, and those that do are limited in the extent of their recognition. The author addresses this topic through three sections: the first traces the background of privileges in the United States and the history of this specific privilege as well as its current status abroad; the second section examines the arguments in favor of the

privilege and; the third section proposes a model parent-child privilege. Congress should recognize the importance of the parent-child relationship by enacting an expansive parent-child testimonial privilege that defines the term "parent" broadly, encompasses confidential communications, and addresses specific congressional concerns, such as the ability for waiver and an exception for domestic abuse and other violent crimes.

Palma J. Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453 (2010).

Wealth disparity is a growing problem in the United States, especially between black and white populations; it reached a peak in the 1920s, began to decline until the 1980's, and has since steadily increased such that the level of disparity in 1998 passed the 1920s peak. Disparities between black and white populations can be traced back to early racial gaps in America, as inheritance and intestacy laws have perpetuated inequality because social norms encourage people, and the state, to keep wealth within their families. Also, inherited wealth correlates with social outcomes, such that people who are born into lower wealth groups tend to have social outcomes that also negatively correlate with wealth, like education, income and premarital childbearing. The author proposes two race-neutral solutions to decrease the wealth disparity in America: first, inheritance should be considered a taxable transaction, and second, intestacy law—through which most of the poorer population passes their wealth—should be revised to better protect that wealth, primarily by creating more efficient probate procedures for those with little wealth and by more effectively clearing the title to disputed property.

GENDER BIAS AND DISCRIMINATION

Timothy Davis & Keith E. Smith, *Eradicating Student-Athlete Sexual Assault of Women: Section 1983 and Personal Liability Following Fitzgerald v. Barnstable*, 2009 MICH. ST. L. REV. 629 (2009).

Title IX, which prohibits recipients of federal education funding from discriminating on the basis of sex, protects students from sexual assault at such universities by providing victims with a private right of action against the institution. In *Fitzgerald v. Barnstable*, the Supreme Court found that such victims also had the right to sue state actors like coaches and teachers in their individual capacities, based on Section 1983 of the Civil Rights Act of 1871. Victims can now pursue Title IX and Section 1983 claims concurrently, but this only provides a means of holding universities, coaches, and administrators liable for violence committed against women by student athletes; it does not do enough to prevent the increasing occurrences of male athletes committing sexual assault against females. Research has shown that the prevalence of sexual violence against female student athletes by male student athletes stems from the university sports culture that is

characterized by attitudes of male dominance and power. In order to truly reduce the number of sexual assaults in university athletics, players and coaches alike must recognize that the subculture allows the sexual assaults to happen, and institutions must implement policies to enhance male athletes' understanding of gender equity and sexual violence prevention, as well as policies to provide support for victims of sexual assault by student athletes.

Dorothy A. Harbeck, *Asking and Telling: Identity and Persecution in Sexual and/or Gender Orientation Asylum Claims—Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law*, 25 GEO. IMMIGR. L.J. 117 (2010).

Lesbian, gay, bisexual, transgendered, or intersex ("LGBTI") individuals seeking asylum based on persecution for their sexual or gender orientation face several issues. Applicants for asylum must demonstrate their membership in a particular social group, such as the LGBTI community, which has been deemed an immutable characteristic and thus qualified for asylum. However, immigration courts, which have been critiqued as being bogged down with stereotypical perceptions of and biases against LGBTI individuals, often impose their own stereotypical requirements of membership in the LGBTI community such that an LGBTI individual who does not comport with a court's stereotypical notions of LGBTI individuals might not be "gay enough" to qualify for asylum. Similarly, LGBTI applicants for asylum have often hid their identities in their home countries to avoid persecution, making it more difficult to present evidence of their membership in the LGBTI community. Proof of persecution, upon which asylum claims are based, complicates the issue further as persecution itself is a high standard and must be connected to the applicant's LGBTI identity; the persecution must be related to governmental actors; and future persecution can only be inferred from a pattern of past discrimination or by a well-founded fear of future persecution. The author cautions that asylum applicants should not have to prove that they are "gay enough;" instead, courts should conduct a flexible analysis of the alien's story while applying the same legal standard to LGBTI applicants as to other applicants for asylum.

Anna Peterson, *But She Doesn't Run Like a Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 TUL. J. INT'L & COMP. L. 315 (2010).

International sports associations, such as the International Olympic Committee ("IOC") maintain authority to submit athletes who are classified as having a disorder of sex development ("DSD"), or intersexed, to sex-verification testing and require treatment for any DSD as an eligibility requirement to participate in international sports competitions. The purpose of these sex-verification policies is to maintain the international binary gender categories of

sports competition and protect the ethic of fair play, that is, to ensure that each competitor has a legitimate chance of winning. However, the participation of intersexed athletes in a gendered sport does not violate fair play since there is no evidence that intersexed athletes have any competitive advantage over average-sexed athletes. Case-by-case sex-verification testing is a discriminatory restriction on intersexed athletes' right to sport in violation of the IOC's anti-discriminatory policies, and although it may be justified by the IOC's compelling interest to prevent sex fraud, the eligibility requirement is unjustified because the athlete is participating in the gender category with which the athlete associates and is not fraudulently entering another gender's category. While the IOC has altered its sex-verification policies to include DSD-based, as opposed to chromosome-based, determinations of gender and to implement testing on a case-by-case basis, continued reform of IOC sex-verification policy is necessary to eliminate discrimination against and increase inclusion of intersexed athletes.

Carla L. Reyes, *Gender, Law, and Detention Policy: Unexpected Effects on the Most Vulnerable Immigrants*, 25 WIS. J.L. GENDER & SOC'Y 301 (2010).

About one quarter of the approximately eight thousand unaccompanied children who attempt to immigrate to the United States each year are taken into federal custody by the U.S. Department of Homeland Security. These two thousand Unaccompanied Alien Children ("UACs") face exceptional difficulty in accessing the United States immigration system and effective legal relief due to the adult-focused nature of the system. This Article argues that the focus child advocates place on incorporating children into the existing system, as well as attempts by advocates to combat adult-centered bias, are undermined by social constructs imposed upon UACs during implementation of the reforms the advocates have been successful in securing. These reforms, including better protection of UACs while in custody, better protection of UAC child welfare interests, and forms of legal relief specifically tailored to UACs, are undermined by the societal constructs placed upon UACs, such as the assumption that illegal aliens pose a potential security risk to the United States, and that such children are potential juvenile offenders. In order to effectively and fairly treat UACs, the Department of Homeland Security must individually tailor treatment of each UAC and protect him or her from Homeland Security measures aimed at preventing national security threats.

Health

Shawna S. Baker, *Where Conscience Meets Desire: Refusal of Health Care Providers to Honor Health Care Proxies for Sexual Minorities*, 31 WOMEN'S RTS. L. REP. 1 (2009).

Informed consent, a cornerstone of individual patient autonomy, includes the patient's right to choose a medical proxy—an agent appointed by an individual to make treatment decisions when the principal is incapable of doing so. However, there is an ongoing battle between a patient's desire and provider's assertion of beliefs in the workplace through the use of conscience clauses that allow healthcare providers to opt out of performing a treatment desired by the patient when the provider has religious, moral, or ethical objections, including objections to recognizing homosexual partner proxies. In the context of sexual minority health situations, the enforcement of consciensce clauses often leads to discrimination where providers refuse to acknowledge a patients' partners as proxies, deny patients' partners—and sometimes their children—access into the patients' room as they are dying, and refuse to perform approved sexual reassignment surgery. The author argues that providers err when they refuse to recognize the proxies of same-sex couples because proxies arise out of individual autonomy and do not purport to create legal, marriage-like unions. The author advocates ways to combat the discrimination faced by sexual minority patients and their partners, who are often healthcare proxies for each other, through the use of the First and Fourteenth Amendments, a congressional standard of care for proxy recognition, and better conscience clause education for healthcare providers.

Amanda Bassan, Note, *Patient Neglect in Nursing Homes and Long-Term Care Facilities in New York State: The Need for New York to Implement Programs and Procedures to Combat Elder Neglect*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 179 (2009).

Nursing homes are regulated by a combination of federal and state laws, whereby federal laws such as the Older Americans Act define neglect and prescribe minimum standards of care, and state governments bear the burden of oversight, identifying deficiencies, and imposing liability on negligent caregivers. Despite this joint endeavor, nursing home neglect in New York and across the country is widespread, demonstrated by countless incidents of egregious patient neglect and statistics indicating that reports of abuse have increased in recent years. The federal government has failed to devote sufficient attention and resources to elder care, its current ratings system is insufficient, and New York performs poorly relative to other states at identifying deficiencies and correcting them. The author examines a series of failed federal proposals and the failure of New York's laws to identify problem areas, and concludes that the elimination of elder neglect in New York requires a more effective system for reporting abuse, laws containing more

comprehensive definitions of abuse, expanded penalties for negligent caregivers, a public statement of patients' rights, and better enforcement of the laws already on the books. In addition to the steps New York must take to combat elder abuse, the federal government should also enact new legislation to direct more resources to the states, set even higher federal standards of care, and implement an updated ratings system that will better gauge the quality of the nation's elder care facilities.

Michael Correll, *Getting Fat on Government Cheese: The Connection Between Social Welfare Participation, Gender, and Obesity in America*, 18 DUKE J. GENDER L. & POL'Y 45 (2010).

This Article examines empirical data—broken down by gender, race, socioeconomic status, and age—to demonstrate the correlation between poverty and the rate of obesity in women, which in almost every age and racial group outpaces their male counterparts. Furthermore, social welfare policies such as the Food Stamp Program ("SNAP") and Temporary Assistance for Needy Families ("TANF"), in which more impoverished women than men participate, have exacerbated the issue of female obesity, because SNAP simultaneously promotes the over-consumption of food while failing to provide healthy food choices in poor communities, and the hourly work requirements to qualify for TANF reduce the time to find healthy food options. The consequences of female obesity extend beyond health issues; in the workplace, for example, social stigma surrounding obesity results in lower wages and thereby increases the gender wage gap. It also masks subtle Title VII gender discrimination because a disproportionate number of women experience weight or size-based discrimination. The author concludes by suggesting that the SNAP program should be extended to promote healthy food choices in impoverished communities, and that TANF should be adjusted to accommodate increased travel time. Otherwise, poor women may not be able to escape the cycle of poverty and obesity because the presumption of unfitness relegates individuals perceived as obese to low paying jobs, and because the national obsession with weight encourages fad alternatives to losing weight that result in the dieter regaining weight along with other unhealthy consequences.

Nathan R. Curtis, Comment, *Unraveling Lawrence's Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 BYU L. REV. 1369 (2010).

Lawrence v. Texas, in which the United States Supreme Court held that a Texas statute prohibiting sodomy was unconstitutional because a legislative view of morality, by itself, was not a sufficient basis to prohibit private conduct, has created doubt as to whether other morality-based laws will be upheld—to wit, laws prohibiting the commercial sale and distribution of sex toys. Two circuit courts have reached divergent decisions on whether the sex toy laws are constitutional: the Eleventh Circuit distinguished *Lawrence* and upheld an Alabama law prohibiting

the sale and distribution of sex toys, while the Fifth Circuit used a broad interpretation of *Lawrence* to strike down a similar Texas law. The author argues that laws banning the commercial sale of sex toys are constitutional, as they do not affect a fundamental right—courts have never found sexual privacy to be a fundamental right—and because public morality remains an adequate reason for passing a law. The *Lawrence* court held that public morality was not enough to prohibit certain types of private conduct; however, that court never addressed whether public morality could restrict commercial conduct. Because the sale of sex toys is public and commercial, it does not infringe on the *Lawrence* holding, and therefore laws criminalizing the sale of obscene items do not encroach on the right to sexual freedom.

Kyla Davidoff, *Time to Close the Gap: Women in the Individual Health Insurance Market Deserve Access to Maternity Coverage*, 25 WIS. J.L. GENDER & SOC'Y 391 (2010).

The barriers women face in obtaining individual health insurance is compounded by the denial of maternity coverage to women, which is tantamount to sex discrimination. Denying women maternity coverage impacts the health of both mothers and newborns and may contribute to infant mortality rates. This Article discusses the legislative and judicial progression of maternity care in the individual insurance market, and finds the current standards lacking because maternity care is not required. The Patient Protection and Affordable Care Act of 2010 ("PPACA") will go into effect in 2014 and will require individual health insurance for women to include maternity coverage. Though the passage of the PPACA is a victory, supporters need to stay vigilant to ensure it is not repealed before 2014, and should scrutinize the PPACA as the Secretary of Health and Human Services begins to enact the plan to make certain that women receive adequate maternity coverage.

Benjamin Mason Meier, *Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Right to Health for Public Health Advancement*, 46 STAN. J. INT'L L. 1 (2010).

The United Nations created the World Health Organization ("WHO") after World War II as the first agency with the ability to effectuate both global health and international human rights law through social policies targeting basic human needs. Today WHO's progress is hindered because by the mid-1950's, WHO adopted a technical approach to improving health that focused on eradicating disease rather than on socioeconomic issues. WHO declined to work with the U.N. Commission on Human Rights to draft international standards for public health and neglected to require states to set standards for their national public health systems, thereby refusing to outline the concurrent progression of human rights and health. In 1973, "social medicine," encompassing national public programs like standards in food production and health education, was prioritized through WHO's

international "Health for All" initiative, but became nearly impossible to execute because WHO had never outlined a legal connection between human rights and health. WHO did not set up a framework that causes national governments to be responsible for their citizens' health, and accordingly societies must rely mainly on the economically-driven private sector for individualized healthcare. As a result, the disparity in health between rich and poor nations is large and will almost surely continue until WHO effectively implements changes in developing nations, focusing on primary health issues like poverty, malnutrition, disease prevention, and accessibility to clean drinking water.

HUMAN RIGHTS

Rashida Manjoo & Calleigh McCraith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INTL. L.J. 11 (2011).

Although gender-based violence and armed conflicts have received increasing international concern in recent decades, they continue to be a major problem. In conflict and post-conflict regions such as the Democratic Republic of Congo, Guatemala, and Liberia, systematic rape, abduction, forced pregnancy, and sexual slavery are used as weapons and military tools to break down the opposition. These crimes are now being recognized as war crimes and crimes against humanity, and current international standards addressing gender-based violence, such as the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the U.N. Declaration of the Elimination of Violence Against Women ("DEVAW"), and the Beijing Platform Act, provide legal safeguards for women and girls. However, continued impunity and a lack of proper implementation mechanisms for addressing gender-based crimes continue to require action from national governments and international bodies. To combat violence against women, the focus must shift to effectively implementing the current legal instruments by incorporating women into the justice processes, developing gender-specific initiatives, strengthening national legislation, training judicial and law enforcement personnel, and creating special courts to counter the rise of gender-based violence.

Patricia Viseur Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT'L L.J. 115 (2011).

Over the past one hundred years, incidents of wartime crimes committed against enslaved women have resurfaced, resulting in their captors being convicted for the sexual crimes committed, but not for the enslavements. International criminal laws have deprived women of legal redress for the non-sexual components of sexual slavery, such as ownership and slave trading, providing only redress for the sex crimes under the guise of "crimes against humanity." This emphasis on only sex crimes committed against women during war distorts the perception of

female slaves. It is important for international criminal laws to identify, and provide redress, for all components of wartime female slavery, including enslavement. A modification of international criminal law would provide justice for the victims of wartime slavery in addition to correcting its historical misconceptions.

LGBTQ RIGHTS

David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51 (2011).

To resolve the predicaments transgender and intersex individuals ("transpersons") encounter when a second state refuses to abide by a first state's determination of the individual's sex identity, litigants and scholars have argued that the Full Faith and Credit Clause mandates interstate recognition of sex determinations. This approach forgets that the constitution imposes mandatory deference on state court judgments, but not on laws or on administrative amendments to documents like birth certificates; thus, the way in which the prior state made its determination will affect the subsequent state's recognition of the rendering state's determination. Furthermore, this approach would actually be counter-effective where the first state's judgment is adverse to the transperson. A more promising assessment of the Full Faith and Credit Clause permits a state to make its own judgment on a person's legal sex when confronted with new disputes that involve laws of prospective effect, while binding states to a rendering state's retrospective judgments. Applying a relational view of identity—the perception that individuals are placed into categories for the purpose of specifying how legal rules will apply to them—means that states rely on these classifications to ascertain legal rights, and can therefore apply their own substantive law to determinations of legal sex, offering the potential for a more favorable determination if the individual, after receiving an adverse judgment, moves to another state and seeks a subsequent determination on the individual's sex identity.

Michael J. Ritter, Note, *Quality Care for Queer Nursing Home Residents: The Prospect of Reforming the Nursing Home Reform Act*, 89 TEX. L. REV. 999 (2011).

While all people residing in nursing homes face health issues, the population of elderly queers faces unique burdens—stigmatization, refusal of personal care by the nursing staff, pressure to hide their sexual identity, and aides treating them differently because of a presumption that they have HIV/AIDS. The Nursing Home Reform Act ("NHRA") was passed by Congress to protect nursing home residents from abuse and neglect, to ensure that they receive the best care possible, and to provide a way to enforce these rights, but it did not provide protections for the queer population. The author argues that because the elderly queer population

is increasing and because nursing home staffs are not adequately trained in the unique burdens facing queer residents, the federal government should reform the NHRA to protect against discrimination based on sexual orientation and gender identity. The NHRA is currently ineffective at reducing substandard care for several reasons: its penalties often provide incentive for nursing homes to only temporarily fix their illegal conduct; it provides a right of private enforcement to nursing home residents who have been subject to violations of the NHRA against only the staff of state-operated homes; and the NHRA's primary mode of enforcement—delegating to the Secretary of the Department of Health and Human Services and the states the responsibility for imposing penalties—provides too much discretion. To address these issues, Congress should reform the NHRA, providing specific statutory protection to elderly queer residents, training staffs to understand the issues that these residents face, and removing discretionary power affecting penalties so that nursing homes will have to improve care to queer residents.

Steve Sanders. *Where Sovereigns and Cultures Collide: Balancing Federalism, Tribal Self-Determination, and Individual Rights in the Adoption of Indian Children by Gays and Lesbians*, 25 WIS. J. L. GENDER & SOC'Y 327 (2010).

The issue of adoption by LGBT individuals or couples, already complicated by various state and federal laws, is made more complicated when those individuals or couples consider adopting a Native American child. Although state law has traditionally governed adoptions, the federal Indian Child Welfare Act ("ICWA") governs the adoption of Native American children in an effort to prioritize placement of these children in Native American homes, and, in certain situations, grants jurisdiction to Native American tribes in adoption proceedings, thereby creating potential conflicts between federal, tribal, and state sovereignty. Because Congress has plenary power over the tribes and government policy, the ICWA preempts state law in certain proceedings dealing with the removal of Native American children, even though such proceedings are usually governed by state law and beyond the reach of the federal government. There may be conflict, then, where adoption is recognized by a tribal entity but not the state, or vice versa. Though native cultures have traditionally been more inclusive of ambiguous gender and sexual identities, erosion of these beliefs, combined with state legislative decisions, have created an issue. The author explains that tribal law controls, so that where a tribal court approves an LGBT person or couple to adopt a child, the ICWA would override a state law that disfavors LGBT individuals. The tribal court's judgment would then be subject to the Full Faith and Credit Clause so that the adoptions would be seen as valid and enforceable throughout the country.

Rachael M. Schupp-Star, Note and Comment, *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: the Need for a Uniform Standard for Intercountry Adoption by Homosexuals*, 16 ROGER WILLIAMS U. L. REV. 139 (2011).

The Hague Adoption Convention, created to protect the interests of internationally adopted children, should be revised to clearly and uniformly govern intercountry adoption by same-sex couples. Over eighty countries follow the Hague Adoption Convention, but signatory states hold different positions regarding the permissibility of adoptions by homosexuals, and these variations prevent the completion of many adoptions. Currently, the Hague Adoption Convention is purposefully vague regarding adoptions by same-sex individuals, but certain provisions suggest that homosexuals should be allowed to adopt internationally if they can provide suitable and permanent homes for adopted children. The author recommends the creation of "a central overseeing body" to facilitate discussions between Hague Adoption Convention signatories and the creation of "a uniform standard" among member nations that explicitly permits adoptions by gays and lesbians. The Hague Adoption Convention exists to serve the best interests of children, and current barriers to intercountry adoption by a group of willing and able prospective parents are detrimental to orphaned children around the world.

David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437 (2010).

Federal courts analyze claims brought by politically powerless and vulnerable minority groups using a standard of heightened scrutiny—whereby the court demands strong justification for the challenged laws—yet the courts step aside once the minority groups begin to develop political influence; this creates a paradox, as truly powerless groups do not receive protection, but once some level of power is attained, the courts prepare to abandon the group on the basis that it no longer qualifies as a suspect class. The author uses the gay rights movement to illustrate this inconsistency: while some believe that growing gay and lesbian political power demonstrates that discriminatory policies must stop, others consider it as proof that gays and lesbians no longer need to be specially protected by the courts. Rather than viewing political power as indication that a group no longer needs judicial protection, courts should adopt a standard that focuses on whether a minority group is at-risk for prejudice and stereotyping. Since growing political power can be used to mask and justify a judge's discriminatory attitudes, a judicial standard that focuses on whether a minority group is at-risk would reduce the ambiguous use of this factor. Courts should abandon the standards that require them to act as though antidiscrimination laws solve the problem of discrimination; instead, by focusing on animus and prejudice, courts will create a superior method for providing protection to minorities.

MARRIAGE AND DIVORCE

Chase D. Anderson, Note, *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry*, 60 DUKE L.J. 1413 (2011).

The United States Supreme Court has developed a neutral approach to addressing the hotly contested area of gay rights—by reviewing the practical effects of the challenged decision it is considering—that both protects the free expressions of private organizations and prevents the state from discriminating against the rights of gay people, despite criticism from both sides of the cultural war arguing otherwise. State courts have failed to follow suit, as state court judges tend to decide gay marriage cases in the same way their electorate would vote; for example, five state courts upheld bans on same-sex marriage by accepting the argument that preventing same-sex couples from marrying protected the state's interest in promoting responsible procreation and parenting. The United States Supreme Court will have the chance to review a gay marriage ban for the first time since 1972 in *Perry v. Schwarzenegger*, a lawsuit which challenges the constitutionality of an amendment ("Proposition 8") to California's state constitution that banned same-sex marriage. The author argues that the United States Supreme Court should reject the biased methods of review undertaken by state courts and follow its established neutrality principle, which will result in a finding that Proposition 8 is unconstitutional. The Supreme Court should reach this result since allowing a state to issue a civil marriage license does not burden the rights of individuals or organizations to disapprove of homosexuality, and because Proposition 8 was passed with the purpose of discriminating against gay couples.

Katherine Annuschat, Comment, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161 (2010).

Despite the usual trend of military law mirroring changes in civilian law, the incidence of criminal prosecution for adultery in the military has increased dramatically since the inclusion in 1984 of an adultery offense in military jurisprudence, while the incidence of prosecution for adultery has fallen considerably in civilian jurisprudence. Though the military attributes this phenomenon to its goal of maintaining order and discipline in its ranks, preserving honor among its service members, and maintaining support of the American people, anecdotal evidence suggests that the military uses prosecution for adultery in order to publicly humiliate service members, such as those service members who have sought to uncover questionable actions of their superiors, or those who have been acquitted of more serious charges. This Article argues that the military could more effectively achieve its stated goals by using other existing offenses in the military code, that the military is in fact undermining those goals by continuing to prosecute service members for adultery, and that, therefore, the military should

eliminate the offense of adultery from its codebooks. Instead, the military could rely on the existing offenses of fraternization and dishonesty to more effectively accomplish its stated goals. By doing so, the military can avoid criticism for unequal application of the adultery offense while increasing favor among the American people by eliminating a military law made potentially unconstitutional by the right to privacy enumerated by the Supreme Court in *Lawrence v. Texas*.

M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081 (2010).

There are several economic benefits, including those related to insurance, taxes, and social security, that are associated with the right to marry and to have that marriage recognized on both a state and federal level. Same-sex couples are often denied these benefits, either because they cannot marry in their respective states, or because their marriages are not recognized on a federal level, and as a result, the economic benefits afforded to them are inferior to those of different-sex couples. In this Article, the author discusses the various economic impacts of marriage on same-sex couples, and argues that even alternative legal statuses, such as civil unions or domestic partnerships, do not solve the problem of the economic harm suffered by same-sex couples, both because these statuses often do not afford the same economic benefits as marriage and because, in the absence of a right to marry, many same-sex couples choose to remain legally single rather than register for an alternative legal status. This lack of marriage equality has harmful financial effects on same-sex couples, as evidenced by surveys and economic studies which have shown that by being denied the financial benefits of marriage, same-sex couples are losing out on thousands, and sometimes hundreds of thousands, of dollars. These important economic concerns should be taken into account when new policies for same-sex marriage are considered by the legislature and the judiciary, because they not only affect cultural and social standing in society, but also have a strong impact on the financial situations of same-sex couples.

Charles M. Cannizzaro, Comment, *Marriage in California: Is the Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism?*, 33 PEPP. L. REV. 161 (2010).

This Article argues for the preservation of federalism in the regulation of family law, an argument that would protect California's Proposition 8 against Equal Protection and Due Process claims. Federalism designates family law as being under the ambit of state law, and government officials during the twentieth century began regulating marriage under this theory. Decisions in Alaska and Hawaii contextualize the Proposition 8 debate as being about an area of law traditionally left to the states and their respective constitutions, not as a federal constitutional debate. The author examines the history and current state of marriage and family law as they relate to federalism, distinguishes the topic from

Fourteenth Amendment decisions that relate to same-sex issues and marriage, and explains the implications of a federal decision to constitutionalize same-sex marriage, including overturning marriage laws in over forty states and disrupting the balance of federalism. Because the definition of marriage lies deep within the heart of family law, a zone left to the states by both the framers of the Constitution and the articulations of Supreme Court justices, California, like the states of Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and the District of Columbia, should be allowed to define marriage within the context of its own constitution.

Adam C. Hartmann, Comment, *The Yellow Brick Road to Nowhere: California Same-Sex Marvin Rights After Proposition 8*, 14 CHAP. L. REV. 483 (2011).

Although *Marvin v. Marvin*, a case in which the California Supreme Court approved "cohabitation contracts," was interpreted as a contractual standard indicating that same-sex couples could contract with one another for property and support, subsequent California decisions have weakened the impact of this decision and have left same-sex couples who have chosen to forego domestic partnership unsure of their rights. Historically, California's enforcement of cohabitation agreements has been seen as a "pure contract approach" because it has ruled in favor of cohabitation agreements, even when the parties were same-sex, when it was possible to sever sexual services that were contemplated as consideration for the agreement. The author argues that California courts should not let the decision reached in Proposition 8, which states that only marriages between a man and a woman are valid, color its handling of *Marvin*-type cohabitation agreements and should, instead, continue to decide these cases based on the validity of the cohabitation relationship. Proposing two cohabitation statutes, the author suggests that the best way same-sex couples' contractual rights can be upheld in light of Proposition 8 may be through state legislation, which must specify when a same-sex couple is eligible to contract and must authorize the couple in such a way that does not interfere with the state's public policy in regard to marriage. The California legislature owes it to its citizens, homosexual or otherwise, who, by choice or by circumstance, take the increasingly popular path of cohabitation as opposed to marriage, to clarify the state of *Marvin*-agreements post Proposition 8.

Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47 (2011).

Different marriage policies between states present problems for same-sex couples seeking marital recognition, and the solutions in place to resolve conflicting same-sex marriage laws are often inadequate, unclear, or unnecessarily burdensome. Due to states' policies of treating same-sex marriages as traditional marriages, civil unions, less comparable versions of civil unions, or giving the marriages no recognition at all, same-sex couples who have obtained marital status

may not receive reciprocal treatment if they relocate to a state with a different marriage policy. To address this inequity, the author analyzes the applicability of the Full Faith and Credit Clause, case history that recognizes exceptions for marriage recognition, and finally proposes a conflict resolution doctrine which allows a state to recognize foreign marriage policies by severing only those conflicting provisions; leaving the remainder of the marriage policy as lawful. A comprehensive course of action for resolving conflicting same-sex marriage laws involves precluding those elements, such as alimony or joint tax filing, of a foreign marital policy that clash with the policies of the forum state, but still giving full weight to the couple's marital status as a whole. In the interest of clarity for courts interpreting marital legislation and uniformity for same-sex couples seeking to relocate, states can adopt this approach while also maintaining their stance on same-sex marriage.

Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97 (2011).

While acknowledging the importance of obtaining equality through same-sex marriage laws, this Article shifts the focus away from the 'right' to marry and on to the 'responsibilities' associated with marriage by advocating a need for equality among state laws that provide criminal penalties or civil damages for adultery. Many states that allow same-sex marriage also have adultery laws criminalizing certain immoral behaviors, but the application of these laws to same-sex couples and same-sex conduct differs from state to state based on how courts define adultery and whether that jurisdiction considers same-sex sexual conduct as lawful in any context. For example, in states that maintain an antiquated, gendered approach to defining adultery, laws punishing spouses who have extramarital affairs do not extend to relations with members of the same sex because the statutory regime considers all sexual activity between members of the same sex to be unlawful. In any jurisdiction, punishing same-sex conduct differently from heterosexual conduct and failing to extend adultery laws to homosexual couples demeans same-sex relationships and perpetuates gender-based discrimination. Putting aside the issue of whether adultery laws or related doctrines are constitutional, if a state or federal government chooses to regulate the private sexual conduct of married couples, it must do so without differentiating between the type of extramarital conduct involved—same sex or opposite sex—and the statutory scheme must be applied with equal force to all couples.

Allen Gary Palmer, *No Honor Amongst Thieves or Spouses—Issues Confronting the Divorcing Spouse in Disgorgement, Forfeiture, and Restitution Proceedings*, 44 FAM. L.Q. 197 (2010).

The Article examines and offers related advice for attorneys and their clients when, in divorce, the marital estate is threatened by proceedings for disgorgement of profits gained or losses avoided from insider trading, forfeiture of property used in the commission of acts prohibited by the Racketeer Influenced and Corrupt Organizations Act, and restitution proceedings. According to the author, the primary interest for the divorcing spouse should be whether he or she will also be exposed to criminal liability and how to deal with that possible exposure. To protect claims within the marital estate, one could cooperate with the government as a witness against the adversary spouse, divorce—but continue the relationship with one's spouse—as a way to keep assets from being negatively affected by the criminal proceedings, or remain married while asserting financial and ownership independence by acquiring or maintaining the assets by oneself. Furthermore, when assets within the marital estate are threatened by disgorgement, forfeiture, or restitution, a divorce practitioner must be cognizant of the timing to bring suit and the kind of legal proceedings one must commence in order to ensure legal success. In conclusion, for the aforementioned reasons, the Article asserts that the most helpful defense a client may have is proof that he or she has some indicia of individual ownership of the assets at risk and not just as a spouse, as courts would be more willing to allow the client to keep his or her property, instead of having to divest any of their assets as punishment for their spouse's illegal activity.

W. Sherman Rogers, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive*, 54 HOW. L.J. 125 (2010).

Not permitting same-sex couples the right to obtain a marriage license denies such couples over one thousand property rights and benefits that are afforded to married heterosexual couples, and calls into question whether federal and state governments have violated same-sex couples' fundamental rights of fairness and equality that are at the core of the United States Constitution. Specifically, this Article addresses whether states denying marriage licenses to same-sex couples violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also questions the constitutionality of the federal Defense of Marriage Act ("DOMA") which seems to violate the Fifth Amendment's Due Process Clause, the Tenth Amendment, and the Full Faith and Credit Clause. Adhering to the "living Constitution" approach, the majority of the Supreme Court expressly takes into account society's ever-changing views when determining whether same-sex couples are legally entitled to the rights and benefits of civil marriage, such as income tax deductions and insurance benefits through a spouse's

employer. Given that a majority of individuals ages eighteen to twenty-nine years support marriage equality today, and the fact that federal and various state courts have not found the denial of same-sex marriage to serve a legitimate government purpose, the constitutionality of DOMA and state bans against same-sex marriage appear dubious. DOMA and state prohibitions of same-sex marriage are a form of government-sponsored discrimination against a suspect class, and such discrimination is in direct conflict with fundamental values of the Constitution and new emerging societal values.

Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FL. COASTAL L. REV. 135 (2010).

A state, when it legally recognizes same-sex marriages or civil unions acquiesces to the fundamental rights of one minority group at the expense of another—religious groups who oppose same-sex unions—whose members acting in a workplace capacity must observe the law in spite of their religion. Legislators often debate the passage of conscience clause legislation, which would exempt those religiously opposed to same-sex marriage from promoting it; however, an exemption, though settling to those whose religious sensibilities are offended, could lead to a society in which LGBTQ people are deprived of fundamental rights. The author empathizes with those whose religious values are challenged by adherence to the law, but finds that the Constitution does not support an exemption from recognizing laws protecting the LGBTQ community because such laws would discriminatorily target the LGBTQ community and demote its members to second-class citizens. If conscience clause exemptions were drawn more broadly so as to apply to more groups than just the LGBTQ community, the exemptions may withstand constitutional muster, but they severely risk fragmenting society into competing factions. Ultimately, society is better off without exemptions because the slight infringement on one group's rights will protect another's, or many others' rights, from much harsher marginalization.

PARENTING

Helen M. Alvare, *Beyond The Sex-Ed Wars: Addressing Disadvantaged Single Mothers' Search For Community*, 44 AKRON L. REV. 167 (2011).

Rising pregnancy rates among young single women indicate that current sex education methods and optimal child-rearing campaigns are inherently flawed and limited. Despite increases in contraceptive use and consistent efforts to educate women on the disadvantages of single parenting, births to single mothers continue to climb. Rather than combating single mother births solely through education on abstinence or contraceptives, the author suggests understanding the need women have to use maternal status as a means of establishing their position within their community as selfless, upstanding citizens. Those governmental efforts that

effectively reduce single parent births suggest that the corrective course of action is to concentrate on developing single women's sense of community support, particularly by addressing the plausibility of marriage and parenting, effectively raising children, and building relationships that foster participation within the community and encourage the delay of sexual activity or child-rearing. So far, the predominating governmental efforts aimed at preventing pregnancy among single women speak only to a woman's individualistic and material ambitions rather than supplementing these efforts with developing relationships.

Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285 (2011).

State laws that allow adoptive parents to pay a birth-mother's living expenses should be repealed because they decrease domestic adoptions, increase financial costs and risks of domestic adoptions, conflict with a societal value against the sale of babies, perpetuate racial and class distinctions, and inadequately regulate and define the types of living expenses included. Although the goal of laws that permit the adoptive parents to pay the birth-mother's medical and living expenses is to create financial neutrality between the adoptive- and birth-parents, living expenses are not direct and necessary consequences of the pregnancy or adoption and therefore financially benefit the birth-mother. Since living expenses constitute a large portion of an adoption budget and increase the financial risk already inherent in adoptions, the living expense laws discourage prospective adoptive parents from adopting domestically. The American system of private and agency adoption should ban prospective adoptive parents' payment of birth-family living expenses to encourage domestic adoptions and improve the domestic adoption system.

Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485 (2010).

In vitro fertilization ("IVF") is a form of assisted reproductive technology that allows couples who experience difficulty conceiving to have genetically related children. Due to its high expense, many states have taken steps to reduce the cost of this procedure by requiring health insurance providers to cover IVF. Opponents of this state assistance argue that as IVF becomes more affordable and accessible, there will be a reduction in adoption, and this paradigm is referred to as the "substitution theory." The substitution theory is examined through both a normative and empirical lens, comparing the welfare gains and losses to the potential genetic parents who will use IVF and to children waiting for adoption. The authors conducted multiple econometric analyses comparing the effect of state-level mandates on adoption rates. The analyses yielded no statistically significant negative effects on adoption from complete insurance mandates, indicating there is

no strong evidence supporting the contention that the introduction of comprehensive state mandates is directly associated with a decrease in adoptions.

Bridget J. Crawford & Lolita Buckner Inniss, *Social Factoring the Numbers with Assisted Reproduction*, 19 TEX. J. WOMEN & L. 1 (2009).

In 2009, Nadya Suleman, a single mother of six who gave birth to octuplets, became a media phenomenon as society became obsessed with her and her decision to use reproductive technology to have eight more children. This story serves as a backdrop to discuss society's views about racism, classism, white privilege, motherhood, doctors' roles in policing women, and other socio-legal issues, as well as society's need to explain Suleman's "bad choice" by characterizing her as the "Other"—someone who must be different or flawed because they are not behaving acceptably. Society focuses on her race; her false white-ness—as shown by her Middle Eastern ancestry and a video where she argued with her mother; her bad mothering in having too many children; the doctor's decision to implant the embryos in her and how they should not have allowed Suleman to have the procedure; how she could afford the reproductive procedure when she was on welfare; her children's disabilities; her status as a single mother; and her mental status. Suleman's "Other" status is confirmed by the way the media and society have done all they can to find something wrong with her, clearly showing that people have stopped thinking about her as person but instead have focused on her faults and her deviations from the norm. The authors conclude that even if Suleman's choice was imprudent and, perhaps, poor, we must accept it, even if it is beyond the norm, because she has the right to control her own body.

Michelle Gough, *Parenting and Pregnant Students: an Evaluation of the Implementation of the "Other" Title IX*, 17 MICH. J. GENDER & L. 211 (2011).

Though Title IX prohibits gender discrimination against pregnant students, current school policies indicate that failures to implement the Title IX regulations are less an issue of vagueness in the requirements and more an issue of lack of awareness amongst schools, parents, students, and society at large. This Article argues that there are three central reasons for the failures in implementation: the perception that there is little to no case law; the lack of knowledge of education providers and of students themselves; and the social and legal marginalization of the affected students. Strengthening regulations will lead to their implementation; however, better education for school personnel, parents, and students is also necessary in order to enforce Title IX. Increasing awareness and knowledge of the Title IX rights of pregnant students will combat their marginalization. It is critical that the negative perception of pregnant students be transformed, so that the social discourse can focus on students' rights to equality and success in school.

C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights? Parental Rights Termination As A Consequence of Deportation*, 60 DUKE L. J. 1459 (2011).

Despite the existence of a constitutional framework under which termination of parental rights cases for all parents—including illegal immigrants—must be adjudicated, many courts have terminated the parental rights of illegal immigrant parents awaiting outcomes of immigration violation proceedings without regard for these constitutional requirements, making the unlawful separation of U.S. citizen children and immigrant parents a growing problem. Family law issues fall within the province of state laws and state courts, yet states are restricted by the Constitution, which requires that parental unfitness be determined by a clear and convincing evidentiary standard before parental rights can be terminated; federal and state laws are designed to work in conjunction with one another to ensure that parental rights of all people are protected. The continuous violation of the rights of illegal immigrant parents can be attributed in part to cultural bias: judges often presume that a child will have a better life with adoptive American parents than with their biological parents in the parents' home country; judges also find that parents have "abandoned" their child while they are incarcerated and awaiting deportation proceedings, which bears on a parent's "unfitness" to have custody. The author also attributes these constitutional violations to prison-life constraints: parents are often transferred to remote detention centers, thus creating a barrier to communicating with their children, which thereby lends itself to a finding of abandonment and unfitness. The author advocates for more culturally sensitive laws to be enacted on state and federal levels, thus preventing individual judges from incorporating their own cultural bias into decisions regarding the parental rights of illegal immigrant parents in deportation proceedings, and argues that governments—federal and state—should adhere strictly to internal laws as well as international treaties that strongly protect the rights of immigrant parents.

Robert E. Larzelere & Diana Baumrind, *Are Spanking Injunctions Scientifically Supported?*, 73 LAW & CONTEMP. PROBS. 57 (2010).

While there is a growing trend to ban physical punishment by parents through family or criminal law, spanking prohibitionists first need to show that spanking is detrimental in situations when it is considered most appropriate by parents. To determine whether a legal distinction between spanking and physical abuse is necessary, the article considers the detrimental effects of spanking, situations in which parents are most likely to spank, and the reasons why corporal punishment is correlated with antisocial behavior and aggression. A summary of scientific evidence on the effects of spanking children is also used to consider whether a ban will undermine effective parenting that combines nurturance with discipline, as opposed to parenting that uses hostile verbal discipline and severe corporal

punishment. Studies show that spanking prohibitions may increase the use of verbal hostility and physical control, which are the most detrimental forms of parental discipline. Thus, while spanking is not necessary for child compliance, parents should retain the option to spank children, keeping in mind that not all disciplinary tactics work well for every child.

Robin Levi et al., *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 UCLA WOMEN'S L.J. 1 (2010).

Women who are imprisoned and pregnant face the risk of physical and mental harm to themselves and their babies because of abuses of the rights of pregnant and post-partum individuals in prisons. The risk is made worse by the public perception—perpetuated by the media and the government—that people in prison are not worthy of being mothers and that they are essentially "bad" mothers whose children will grow up to be "bad." The article (1) presents background information on how the government has historically restricted women's mothering rights, especially those of women of color; (2) analyzes the failure of the United States to meet its legal obligations in regards to the rights of pregnant women in prison; (3) discusses the abuses of the rights of pregnant and post-partum individuals in California's women's prisons; (4) examines how international human rights law challenges these abuses; and (5) concludes with a call for action to protect the rights of mothers. The author's proposed solution to protecting the human rights of parents and their children is to eliminate prejudicial notions of who should be a mother and reduce the number of mothers in prison by creating alternatives to incarceration such as family-based drug rehabilitation centers. The goal of strengthening families rather than breaking them up can be fulfilled through the combined efforts of all women, whether free or in prison.

Francis Sohn, Note, *Products Liability and the Fertility Industry: Overcoming Some Problems in "Wrongful Life,"* 44 CORNELL INT'L L.J. 145 (2011).

The tort of "wrongful life," defined as a tort brought on behalf of a child who, because of a genetic counselor's negligent screening of the child's genetic identity, was born with congenital defects, should be recognized in the American and English legal systems. In a wrongful life action, the child's injury is a life of suffering caused by having been born with genetic defects, and this harm is alleged to have been caused by the failure of a doctor or genetic counselor to discover or disclose the defects. The author argues that donor sperm should be treated as a product, and the fertility clinic, as the supplier of that product, should be held strictly liable for their failure to warn of the defect. Currently, wrongful life torts are not recognized in either legal system due to both systems' reluctance to weigh a life of suffering against never having been born, but this difficult question could be bypassed if wrongful life torts were dealt with as products liability suits rather than

as standard negligence actions because it would allow harm to be shown by the risk or manifestation of the defect rather than by the fact of being born. This would end the hypocrisy of disallowing wrongful life torts while allowing "wrongful birth" torts, which, like wrongful life torts, allege negligent genetic screening, and differ only in that wrongful birth claims are brought by the parents on behalf of themselves, so the harm is the parents' inability to make an informed decision as to whether to give birth to a child with birth defects.

Kate Wevers, Note, *Prenatal Torts and Pre-implantation Genetic Diagnosis*, 24 HARV. J.L. & TECH. 257 (2010).

As assisted reproductive technology becomes more pervasive, legal remedy for negligent application of the technology—specifically, negligent Pre-implantation Genetic Diagnosis ("PGD"), where the medical provider negligently screens the genetic makeup of embryos—has been sought through prenatal torts. Prenatal torts traditionally fall into three major categories—wrongful pregnancy, wrongful birth, and wrongful life—and liability for all three hinges on whether the injury occurred pre-conception or post-pregnancy; the injury in negligent PGD, by contrast, occurs post-conception but pre-pregnancy, thus creating a conceptual hurdle to its inclusion in the recognized categories. Likewise, causation in PGD cases differs from causation in prenatal torts because it refers to the provider's selection and implantation of the child's genetic makeup, whereas causation in prenatal torts typically refers to the parents' inability to opt for an abortion because they were not aware of the child's genetic makeup. The author argues that because the political branches have shied away from deciding the liability for negligent PGD and related assisted reproductive technologies, the courts will have to address the issue. Courts can have a significant effect on the number of parents who opt for assisted reproductive technology, the manner in which such technology is administered, and the legal rights that accompany such technology.

SEX INDUSTRY

Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443.

Many people do not automatically equate the mail-order bride industry with human trafficking, but the author makes the argument that "bride trafficking" is comparable to forced prostitution and slavery. The foreign bride industry preys on victims of severe power imbalances, and ensnares more than twelve million people worldwide. The Article presents a comparative analysis of the Chinese market for North Korean brides and the United States market for international brides, and in doing so confronts popular but perhaps misguided perceptions about the true realities of this phenomenon: although brides purchased by American men may seem to enjoy comfortable lifestyles, they are actually suffering in ways

comparable to North Korean sex slaves. The United States Trafficking Victims Protection Act is dangerously under-inclusive in its insistence on physical force, fraud, or coercion as a necessary requirement of severe trafficking; the better standard is that of the U.N.'s Palermo Protocol, an international agreement brought into force in 2003 that includes victims subjugated by subtler yet still devastatingly forceful exploitations of vulnerability. With this and other essential legal reforms, ranging from recognition to criminalization, there could promising advances made for the victims of bride trafficking.

Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447 (2011).

Human trafficking remains a serious issue throughout all societies, and although many legislatures worldwide have adopted criminal sanctions against those responsible for human trafficking in an attempt to combat the issue, such legislation should include a public health approach to address the root causes of the issue, thereby decreasing the amount of human trafficking victims. After reviewing the current approach the United States has taken regarding the issue of human trafficking, the author reveals the health implications of human trafficking, such as increased physical and sexual violence and infection with HIV and other sexually transmitted diseases. Criminal law provides an incomplete response for several reasons: it has a limited deterrent-effect, as it fails to engage the community and promote strong social norms condemning trafficking; it is reactive—punishing individuals after they commit the act—rather than preventative; and it fails to consider that human trafficking affects entire communities, not just trafficked individuals. A public health approach can reorient efforts against trafficking to prevention rather than reaction through several mechanisms, including community awareness initiatives which will provide stronger social condemnation and, ideally, a stronger deterrent effect, as well as helping to collect evidence on groups at-risk for trafficking, which will in turn aid prevention efforts. The author acknowledges the shortcomings of public health approaches to various issues, but concludes that these shortcomings are not certain to occur, and argues that their occurrence still would not outweigh the benefits.

SEX OFFENSES

Shailini Jandial George, *Do Sexual Harassment Plaintiffs Get Two Bites of the Apple?: Sexual Harassment Litigation After Fitzgerald v. Barnstable School Committee*, 59 DRAKE L. REV. 41 (2010).

In *Fitzgerald v. Barnstable School Committee*, the Supreme Court ruled that plaintiffs may litigate Title IX and Section 1983 claims concurrently against both individuals and institutions, thus allowing plaintiffs a higher chance of remedy. Prior to *Fitzgerald*, the circuits were split on the issue of whether the concurrent

and parallel Title IX and Section 1983 claims should be allowed, with one side stating that the claims were not permitted because Title IX provided a sufficiently comprehensive remedy scheme that demonstrated the congressional intent to limit outside redress through Section 1983. However, the holding in *Fitzgerald* gives plaintiffs a greater chance at remedy because of the ability to bring in multiple defendants under more than one claim. Further, under a Section 1983 claim, the high standard of proof of "actual knowledge" and "deliberate indifference" traditionally used in a Title IX claim is reduced to the Section 1983 standard where the defendant "knew or should have known" he was violating a right established under Title IX, a much easier standard to prove. Due to the lowered standard and plaintiff's increased opportunity to file suit, the Supreme Court's ruling in *Fitzgerald* may now affect the way schools and institutions handle allegations of harassment because instead of ignoring problems in order to prevent having "actual knowledge," schools will have a greater incentive to follow the Office for Civil Rights guidelines which govern the enforcement of Title IX.

Chih-Chieh Lin, *Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan Has Been Unsuccessful*, 18 DUKE J. GENDER L. & POL'Y 163 (2010).

The feminist movement heavily influenced rape law reform in Taiwan, culminating in amendments to the Criminal Code and a series of legislative enactments aimed at incorporating feminist ideals of sexual autonomy and gender neutrality. The reform, which has so far failed to achieve its goals, expanded statutory definitions of rape to encompass broader forms of sexual assault, removed gender-specific language to acknowledge that both men and women are victimized by sexual crimes, and eliminated the requirement of high-level force in favor of a model that criminalizes sexual acts lacking consent. Empirical data and case law analyses demonstrate that, despite extensive reform, courts continue to neglect the notion of sexual autonomy, frequently failing to convict in cases of acquaintance rape, cases where the victim does not display physical injuries, and other cases falling outside the "traditional" rape scenario. This failure stems from a poorly designed legal framework that lacks a clear definition of sexual autonomy and contains overlapping statutory language, whereby judges inconsistently apply the law and exercise unfair discretion when choosing which standards to apply in any given case. To better fulfill the goal of abandoning a model that requires a perpetrator to use physical force to face conviction, the author urges a conception of rape as a crime against both personal autonomy and women as a group, and suggests further reforms to adopt a model that consistently requires the affirmative consent of both parties engaged in intimate relationships.

Bela August Walker, *Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183 (2010).

The author examines a wave of increasingly harsh legislation creating new civil sanctions against sex offenders—including strict registration, notification, and residency restrictions—and argues that such legislation reflects a new and peculiar form of social panic, which the author describes as combining aspects of a traditional moral panic—a society's extreme response to a well-defined and controllable evil—and of a "risk society,"—a society in which invisible and pervasive risks, largely uncontrollable on a local level, fuel anxiety and a belief that the federal government can and should manage and eliminate the risk. The wave of new sex offender legislation resembles the traditional moral panic in that it imposes an extreme response on an easily definable group, and it resembles a risk society in that the anxiety over potential sex crimes has put pressure on the state to manage and eliminate that risk, even at the cost of unjustly abridging the civil liberties of those affected by the legislation. The author concludes that such legislation is disproportionately harsh in relation to the crime, triggered by fears unlikely to materialize and excessively expensive to implement, and should be replaced with legislation that better balances the need to manage risk with the civil liberties of those affected. Ultimately, many risks cannot be eliminated, and attempting to eliminate them wastes huge sums of money, unjustly abridges the rights of those affected, and achieves few results. While the legislation based on moral panic may quell certain fears, it actually contributes to a more consuming risk society in which surveillance and control efforts are constant and pervasive.

John Gabriel Woodlee, Note, *Congressional Manipulation of the Sentencing Guideline for Child Pornography Possession: An Argument For or Against Deference?*, 60 DUKE L. J. 1015 (2011).

In balancing the determinations of the judicial and legislative branches of government, a tension arises between the obligation of the courts to uphold commission-made guidelines by maintaining adequate deference to the legislature, and the power of Congress to affect those guidelines through its legislative power. The guideline in Section 2G2.2 of the Federal Sentencing Guidelines, which discusses the sentencing procedures for the charge of possession of child pornography, demonstrates this imbalance between the branches by reflecting the judiciary's legitimate concerns of following a guideline that is not without undue political influence and paying deference to the legislature's close relationship to the public and duty to represent its desires. The author concludes that while, in many cases, district courts should be willing to adhere to guidelines provided regardless of the political influence, the child pornography sentencing guideline is an exception to this practice, given the harsh public opinion about such illegal activity that inherently forces Congress to require harsher sentencing guidelines for such

offenses. As a result, the Article concludes that courts should embrace their ability to exercise independent judgment about sentencing guidelines to counteract the strength of the legislature. Doing so would ensure that the district courts could play their part in the checks and balances system and provide a guard against the unduly influenced opinions of Congress.

WOMEN'S RIGHTS

Becky Jacobs, *Unbound by Theory and Naming: Survival Feminism and the Women of the South African Victoria Mxenge Housing and Development Association*, 26 BERKELEY J. GENDER L. & JUST. 19 (2011).

South African women have found it necessary to re-conceptualize feminism because traditional feminism—viewed as the "Western" concerns of white women—may not be inclusive enough to address the specific needs of black women, who have different historical, cultural, racial, and class experiences than their white counterparts, and may not value the African ideals of motherhood, home, and family. Although these African women may not consider themselves feminists in the same way that Western women do, these women are still actively involved in changing their political, economic, and domestic circumstances. Using the Victoria Mxenge Housing and Development Association as a lens, the author lays out a disturbing history of the inaccessibility to property rights for South African women, legislation enacted in response to these social inequalities, and the ways in which that legislation has failed because of its inability to address the fact that South African women still operate within a patriarchal structure in which men act as their legal guardians. The women of the Victoria Mxenge Association served as a unique example of feminism because they were able to respond to their need for adequate and secure housing alternatives by forming an organization that raised funds, negotiated the purchase of land, and built a flourishing community. By using the Victoria Mxenge women as an example, the South African government can further these types of self-help building initiatives and, by understanding that housing needs are gendered, further involve women in the process.

Dionne L. Koller, Note, *Not Just One of the Boys: A Post Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401 (2010).

Title IX implements a model for sport participation that was created for and by men, and forces women to either conform to the male-constructed model or not play, thus creating an "interest paradox" where Title IX actually extinguishes women's interest in sports and perpetuates gender discrimination. Despite encouraging data on the increase in women's participation in sports since Title IX was enacted, the number of women and girls participating in sports is drastically different from the level of male participation. While critics argue that women are

not participating at the same levels because they are not interested, the characterization of the issue as simply "interested" or "not interested" hinders a deeper analysis of what shapes a woman's desire to participate in athletics, and whether Title IX can help. Educational institutions as well as Title IX have perpetuated a male-centric model for sport that does not meet the needs and interests of women, and an "interest paradox" has been created because of the theory that women will be interested in sports solely based on whether gender discrimination prevents an equal opportunity to participate. The discussion of gender equity in sports needs to shift from focusing on whether women are interested in athletics to whether there is a gender-neutral athletic that could lead to greater participation in women's sports.

Margo Kaplan, Comment, *"A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment After Gonzalez v. Carhart*, 13 U. PA. J. CONST. L. 145 (2010).

The Supreme Court's decision in *Gonzalez v. Carhart* upheld the federal Partial Birth Abortion Ban, which outlaws a particular abortion procedure. The Court reasoned that states have a legitimate interest in protecting human life and preventing women from making a decision that may harm their psychological health. This Comment examines the implications of *Carhart* and argues that, by reinterpreting the state interest in fetal life and a woman's right to choose, the majority's reasoning can compel pregnant women to submit to medical treatment that is crucial to preserve the life or health of the unborn child. Since *Carhart* justifies a state's intrusion into a woman's medical decision to choose an abortion procedure, there is arguably an even stronger justification for intrusion where the life of the unborn child may depend on a particular medical treatment. The ability to intervene in a pregnant woman's right to choose medical treatment infringes on her personal autonomy because it makes them a "special class of persons" with a more limited ability to make their own medical decisions.

Danielle Moriber, Note, *A Right To Bare All? Female Public Toplessness and Dealing With The Laws That Prohibit*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 453 (2010).

Society's differing perceptions about the eroticism of male versus female breasts have led to the enactment of statutes throughout the country that make it illegal for women to go topless in certain areas, even though men are permitted to do so in the same areas. Women have protested these laws under the First Amendment of the Constitution, which protects female toplessness when it is more than just conduct and is associated with a message that women are trying to send. The constitutionality of laws prohibiting expressive conduct is measured against the relative value of the expressive conduct, with courts scrutinizing laws more heavily when the relative value of the expressive conduct is lower. Applying these

levels of scrutiny to the ban against toplessness, the only time a woman would be protected under the First Amendment for going topless in a prohibited area would be if she was doing so in conjunction with some form of political speech or expression and there was no other way for her to deliver her message as effectively since the need to prohibit a woman from going topless in certain areas has been attributed to the need to preserve order and morale throughout society. More specifically, the past decisions of the Supreme Court suggest that the only time a woman would be protected under the First Amendment for going topless in a prohibited area was if she were protesting her inability to go topless in that area, in connection with some form of political speech, since a heightened level of scrutiny would then apply.

Nicole Kennedy Orozco, Note, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281 (2010).

While the Patient Protection and Affordable Care Act provides federal protection for nursing mothers in the workplace by directing employers to accommodate their breastfeeding and lactating needs, the lack of an explicit provision in the Act prohibiting discrimination on the basis of lactation exposes affected women to discriminatory treatment at work. The absence of such a provision has compelled women to rely on the Pregnancy Discrimination Act of 1978 ("PDA")—an amendment to Tile VII of the Civil Rights Act of 1964—to bring forth pregnancy discrimination claims, but a string of federal cases have held that breastfeeding and lactating mothers are not protected under the statute, which prohibits discrimination on the basis of "pregnancy, childbirth, or related medical conditions." States have taken inconsistent views on the issue, so national resolution, either through federal court precedent or through Congressional enactments, is necessary to protect nursing mothers. Federal courts might be persuaded that lactation is protected by the PDA by understanding that lactation is a physiological response to pregnancy and childbirth, as opposed to breastfeeding, which is a social act and thus outside the PDA's scope. This approach is consistent with the PDA's legislative history, but if it is not accepted by federal courts, Congress must overtly prohibit lactation discrimination by amending the PDA.

John Sarto, Note, *The Disproportionate Representation of Women in Subprime Lending: Cause, Effect, and Remedies*, 31 WOMEN'S RTS. L. REP. 337 (2010).

Mortgage lenders have disproportionately targeted single women and mothers because of the gender inequality in wages, bankruptcy, and other financial matters, regardless of their ability to properly finance the loans, resulting in foreclosures, bankruptcies, loss of home equity, and wealth reduction. Recognizing that the absence of effective regulation on subprime mortgage lending combined with a strong cultural desire to own a home has particularly affected women, this Article discusses the steps that women should individually take to mitigate the

negative impact of the discriminatory lending practices and home defaults, such as filing for bankruptcy and filing suit against the lender. The Article also suggests legislative remedies to effectively regulate the subprime market to protect women from predatory lending practices: amending bankruptcy law to permit loan modification; requiring that lenders making residential mortgage loans put forth a good faith effort to ensure that the borrower has a reasonable ability to finance the loan; and imposing liability on mortgage lenders and mortgage brokers for the risk of loss. Provided that the money lending practices of banks were the main cause of the financial and housing crisis, particularly subprime loans, it is important to analyze potential regulations for the subprime market in order to prevent future economic collapse. Furthermore, it is crucial to acknowledge the disproportionate negative impact that subprime loans have on women so regulators understand who requires protection from predatory lending practices.

Deborah L. Threedy, *Dancing Around Gender: Lessons From Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010).

While traditional schools of thought reinforce the view that contract law is not shaped by gender, contract doctrines continue to implicate social hierarchies, particularly in the form of the subordination of women, which is evinced through judicial rhetoric and the disparate treatment of female and male plaintiffs. As evidenced in the "Arthur Murray cases," involving people who file suit to rescind enforcement of long-term contracts for dance lessons, gender affects the result of contractual defenses, as courts are prone to subordinate women to underscore the defense-theory that the female plaintiff is more deserving of the court's protection as a result of her gender. There have been two theories presented to prevent the marginalization of women in contract law: (1) replacing the notion that "mutual assent" creates a binding contractual obligation with the concept of "expressive choice," which proposes a multifaceted approach to "assent" by focusing on factors other than "rational choice," like reliance and reasonableness; and (2) omitting the use of gender as a basis to evaluate the plaintiff's "vulnerability" and the merits of contract defenses. Ultimately, the most effective method of preventing the subordination of women in contract law is to have courts analyze contract defenses without requiring an inquiry into whether the harmed party is "deserving of" or "entitled to" the court's protection. It is crucial to acknowledge that current contract law doctrine subordinates women in order to prevent the reinforcement of notions that women are more deserving of the court's protection due to their gender.

Ajmel Quereshi, *287(G) and Women: The Family Values of Local Enforcement of Federal Immigration Law*, 25 WIS. J. L. GENDER & SOC'Y 261 (2010).

The Federal government should reevaluate the structure of the 287(g) program because local officials have strayed from the program's original purpose, causing it to adversely impact a class of immigrant women and minorities to an extent Congress did not foresee. Available data that suggests the overwhelming majority of individuals deported through the program are initially arrested for misdemeanors and traffic offenses indicates that 287(g)'s stated goal of targeting immigrants who have committed violent crimes is not being achieved. The 287(g) program has an especially negative effect on immigrant women because it deters them from reporting crime, such as domestic violence or abuse, for fear that they will be deported. The author proposes solutions, specifically, that the federal government implement rigid procedures whereby violent felons are prioritized for deportation and local officials follow through on the prosecution of an underlying crime before determining the immigration status of those arrested. Before the 287(g) program continues to spread to localities all over the U.S., the federal government should analyze data and conduct research to address the above-mentioned problems, and implement workable protections for classes of immigrants disproportionately affected by the implementation of the program.