ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Brock A. Patton, Comment, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 (2010).

Surrogacy agreements provide a solution to couples who cannot bear children on their own, but commercial surrogacy, which requires the contracting couple to pay the surrogate a fee for her gestational services, creates pressing legal issues, including those involving custody rights and reasonable compensation for the surrogate. The increasing use of contractual surrogacies and the globalization of commercial surrogacy agencies have caused confusion and legal inconsistencies. States have taken diverse positions on the issue; some pass legislation explicitly prohibiting surrogacy, others have refused to uphold portions of these contracts, some require prejudicial authorization, and a significant number have not addressed surrogacy at all. These legal variations incentivize surrogacy agencies to operate in jurisdictions with favorable laws. They also create uncertainties, interstate custody disputes, and inadequate legal protections. The author proposes a federal legislative approach that recognizes commercial surrogacy contracts and balances the rights of the genetic donors with the interests of the state in protecting the surrogate and the child. Such federal legislation will result in more efficiency and uniformity in addressing both domestic and international surrogacy contracts.

Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517 (2011).

In determining the legal parenthood of a child born to a surrogate mother, courts should focus on the child rather than on the maternal claim. Traditional and gestational surrogacy both permit infertile couples to have children through one of four options: (1) using artificial insemination to fertilize the surrogate's egg with the male sperm; (2) implanting the couple's own fertilized eggs into the surrogate; (3) implanting a donated egg, fertilized with the male's sperm, into the surrogate; or (4) implanting both donated eggs and sperm into the surrogate. These surrogacy processes create as many as three potential maternal claims to the child—those of the intended parents, the surrogate and the egg donor—and when disputes arise, courts apply different standards to each of the different claims. The author structures this Comment by addressing the importance of maternal rights to one's child, explaining the differences between surrogacy options available, exploring the three potential claims and the tests courts have used in weighing them, and concludes by suggesting a "best interest test" that focuses on the child produced by the surrogacy. The proposed new test combines the three definitions of motherhood currently in use with the best interests of the child and includes a tie-breaker that emphasizes the intent of the parties at the outset of the surrogacy

arrangement as a means to fairly adjudicate the rights of potential mothers in surrogacy arrangements.

Juliana Vines Crist, *The Myth of Fetal Personhood: Reconciling* Roe *and Fetal Homicide Laws*, 60 CASE W. RES. L. REV. 851 (2010).

There is a deep divide between the decision in *Roe v. Wade*, which did not classify fetuses as living persons, and criminal fetal homicide laws, which do categorize fetuses as persons. It is difficult to reconcile these two opposing, yet coexisting viewpoints. The ramifications of fetal homicide laws for women's reproductive rights is potentially enormous, and could include investigations into miscarriages and the banning of certain kinds of birth control. The author denies that a constitutional protection for fetal personhood exists, but notes that fetal homicide statutes would be consistent with *Roe* because they do not explicitly provide that fetuses are persons. Rather, fetal homicide laws are intended to protect mothers from their attackers by imposing harsher punishments on crimes against pregnant women. Overall, the author believes that fetal personhood statutes do not belong in the realm of criminal law.

June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?*, 79 UMKC L. REV. 333 (2010).

The variety of methods to selectively alter the genetics of children before they are born, and to create or sever legal parental relationships based on these genetics, gives rise to regulatory issues. With the development of new gene-altering technologies such as nuclear transfers, cloning, and genetic engineering, and the growing acceptance of surrogacy and three genetic parents, the author advocates the development of a new framework to regulate the use of these gene-altering technologies, one that encourages government-employed regulatory agencies (such as the Food and Drug Administration) to provide potential parents with more information about assisted reproduction methods prior to using these methods, rather than the current framework wherein governmental agencies must pre-approve such genetic experimentation. The latter framework raises concerns that the regulatory agency will be accountable for failed or botched genetic experimentation; pre-approval for genetic experimentation also presumes that prospective parents will not adequately consider the risks of using the gene-altering technologies described above because they desperately want to bear children. The former framework, however, addresses inadequate industry standards governing the use of gene-altering technologies by forcing the industry to provide potential parents with more information about using gene-altering technologies. Ultimately, though it is unclear what sort of regulatory framework will prevail due to the number of conflicting ethical concerns that currently exist, the framework will likely be fractured based on the different assisted reproduction practices that exist, as they each raise unique ethical concerns.

Jessica L. Waters, *In Whose Best Interest?* New Jersey Division of Youth and Family Services v. V.M. and B.G. *and the Next Wave of Court-Controlled Pregnancies*, 34 HARV. J. L. & GENDER 81 (2011).

While it may appear that American jurisprudence has steered away from state-sanctioned eugenics or the forced sterilization of "undesirable" persons, recent court decisions suggest that courts may be returning to this troubling practice by allowing state regulation of pregnancy, labor and delivery. This Article analyzes *New Jersey Division of Youth and Family Services v. V.M. and B.G*, a New Jersey child welfare case, in which the trial court relied on a mother's refusal to consent to a C-section, although she consented to other preventative and emergency procedures and gave birth to a healthy child, to support its decision to remove the child from her parents' custody. The mother had a history of psychological disorders, and although a psychiatric evaluation during labor showed that she was competent to make medical decisions, the court in *New Jersey v. V.M.* found that the mother's refusal exhibited a failure to exercise a minimum degree of care. Since both the New Jersey Supreme Court and the United States Supreme Court denied certiorari, the author argues that this decision has problematic implications for women's reproductive rights because other courts may now rely on the decision as a means of compelling pregnant mothers to consent to unwanted procedures to avoid losing custody of their children. *New Jersey v. V.M.* has the potential to open the door to the court-compelled regulation of *all* of a mother's decisions during pregnancy and may lead to the disparate regulation and coercion of particularly vulnerable groups of women.

Maggie Abbulone, Comment, *Redaction is Not the Answer: The Need to Keep Third Party Minors' Abortion Clinic Medical Records Safe From Discovery*, 39 CAP. U. L. REV. 161 (2011).

Although protecting the privacy of minors who have undergone abortions may seem like a universally important social goal, state actors across the United States have recently taken strong actions—such as attempting to obtain a minor's medical records in suits involving abortion clinics—that have jeopardized this privacy. Federal courts have refused to allow discovery of confidential patient records, recognizing that disclosure would lead to a chilling effect on the doctor-patient relationship and place an undue burden on women considering abortions, but these decisions did not apply to minors, due to minors' limited constitutional right to privacy. In *Roe v. Planned Parenthood*, the parents of a child who had undergone an abortion sued Planned Parenthood for failing to report that the child's sexual partner was an adult, and moved for discovery of the medical records of non-party minors. The Ohio Supreme Court decided in *Roe* that the minors' records could not be released, but also stated that regulation in this area of public policy may be better left to the legislature. This Comment argues that teens should be afforded the same right to privacy as adults and claims that policies aiming to

simply redact minors' medical records are not enough. Confidentiality is critically important to teens because it impacts their reproductive choices, and in turn, their sexual health. Thus, it is essential that third-party minors' medical records be protected from discovery in private litigation involving abortion clinics.

Staci Visser, *Prosecuting Women for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power*, 13 J.L. & FAM. STUD. 171 (2011).

In response to a brutal self-inflicted abortion, Utah introduced House Bill 12 (H.B. 12) and its predecessor, House Bill 462 (H.B. 462), which proposed prosecuting pregnant women who actively partake in their own illegal abortions. Under H.B. 462, women could be prosecuted for intentionally or knowingly participating in a self-inflicted abortion. However, H.B. 462 directly contravenes the Utah courts' attempts to promote gender equality, since it appears that the legislature has increased protections for rape and domestic violence victims, but has eliminated remedies for women who seek abortions. In fact, the legislature seeks to prosecute women whose own self-inflicted abortions may have stemmed from rape or domestic violence. H.B. 462 represents a large step back for the state of Utah; this bill, instead of protecting women, prosecutes them while giving them few other options. The author argues that the legislature should instead have attempted to further the courts' gender equality goals by addressing the *reasons* for self-inflicted abortions, specifically by refusing to criminalize abortions as well as making abortions more accessible.

CHILDREN AND TEENAGERS

Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-*Crawford *Legal System*, 38 AM J. CRIM. L. 101 (2010).

The United States Supreme Court's interpretation of the Sixth Amendment's Confrontation Clause in *Crawford v. Washington* is potentially problematic for the admissibility of child victims' hearsay statements in criminal child abuse cases. In 2004, the *Crawford* Court moved away from the 1980 *Ohio v. Roberts* test, which focused upon the reliability of hearsay statements, and created a new test that deems statements inadmissible if "the declarant is legally unavailable to testify at trial" and if "the prior statement is testimonial in nature. . .unless the defendant had a prior opportunity to cross-examine the witness." In child abuse cases, the pro-defendant *Crawford* test would require child victims to speak before their accused abusers for their testimonial statements to be admissible. This rule is flawed because it neither considers the likelihood that the defendant's physical presence could be psychologically traumatic for the child witness, nor the defendant's effect on the child witness's ability to testify. Since 2004, the Supreme Court has failed to provide a useful definition of "testimonial" for the implementation of the

Crawford test. This Note suggests that the continued usage of the *Roberts* "indicia of reliability" standard, in addition to the implementation of innovative technological methods of testimony, such as one-way closed circuit video monitors, would satisfy the Court's Confrontation Clause tests. Ultimately, courts, with the help of state legislatures, must find ways to conform to Confrontation Clause requirements while still safeguarding child victims.

Aimee Fukuchi, Note, *A Balance of Convenience: The Use of Burden-shifting Devices in Criminal Cyberharassment Law*, 52 B.C. L. REV. 289 (2011).

Cyberharassment law would best serve prosecutors and defendants by featuring burden-shifting devices in the form of affirmative defenses and rebuttable presumptions. Cyberharassment, which encompasses cyberbullying and cyberstalking, presents difficulties in identifying and holding defendants accountable for various reasons: the Internet provides anonymity, there is a public policy interest in protecting anonymous speech, and criminal law is based on the tenet that in general, people must specifically intend the consequences of their actions in order to be held responsible. Cyberharassment is an exceedingly pervasive and invasive crime, and it can affect people in private and public spheres. Many of the difficulties in effectuating justice in cyberharassment cases cannot be resolved, but burden-shifting frameworks may help. A comparative convenience test, for example, would allocate the burden of proof to whichever party reasonably possesses the information in question. There have been constitutional objections to burden-shifting frameworks which may relieve the prosecution of proving all elements of a crime beyond reasonable doubt, but these objections are flawed. Moreover, burden-shifting would allow defendants to exculpate or justify their alleged actions.

Benjamin Shmueli & Ayelet Belcher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011).

While the United States Supreme Court and many areas of American jurisprudence acknowledge the importance of privacy rights for children, children's privacy rights in the context of parental intrusion are rarely discussed. Rather, children's privacy rights generally address the relationship between children and third parties outside of the family unit, as interfamily interactions are often treated as a private domain that courts should not enter. The authors of this Article discuss the lack of clearly elucidated standards for privacy between children and their parents and argue that in our increasingly technologically-based society, there needs to be a balance between parents' rights to invade their children's privacy for the safety of the children, and children's entitlement to privacy from their parents. Through an analysis of parental consent requirements for abortions, parent-initiated wiretapping of telephone conversations, and children's rights to privacy on the internet and in their education, the Article specifies that privacy is an issue with

important consequences for children. Though there are situations where parents should be permitted to invade their children's privacy rights to protect their safety, it is equally important that children are given privacy rights in their relationships with their parents. A legal right of action for children will help accomplish this goal, because despite courts' reluctance to intrude into family matters, the very act of creating a law that addresses this issue will send a message that children are entitled to a certain level of privacy, even from their parents.

Charlyn Bohland, *No Longer a Child: Juvenile Incarceration in America*, 39 CAP. U. L. REV. 193 (2011).

The current juvenile justice system fails the offending youth in our country by stigmatizing them and stripping them of opportunities for rehabilitation or advancement in society. Currently, most states incarcerate juveniles along with adults, implement punitive sanctions, and impose harsh sentences. Juvenile correctional facilities often ignore mental health and suicide treatments, provide insufficient educational resources, and expose juveniles to abuse at the hands of guards and officials, thereby exacerbating recidivism rates. An alternative Balance and Restorative Justice approach focuses on healing and restoring the offender and the community by encouraging the offender to take responsibility for the wrongdoing, giving back to the harmed community, and reintegrating into society. Such an approach would provide dorm-like living, group support, education, life-skill training, rewards for good behavior, and the opportunity for the offender to make amends with the victims and with society. This mission would promote rehabilitation by ensuring that the offender would no longer be classified by the crime that he committed, but rather by his or her future potential.

Jessica R. Caterina, Note, *Glorious Bastards: The Legal and Civil Birthright of Adoptees to Access Their Medical Records in Search of Genetic Identity*, 61 SYRACUSE L. REV. 145 (2010).

Adoptees in the United States face legal barriers to accessing their biological parents' medical records because statutes and judicial standards aimed toward preventing adoptees from accessing their records were enacted at a time when a serious stigma surrounded illegitimacy. Even though modern statutes grant adoptees conditional access to their birth parents' medical records, adoptees are required to meet high legal standards to gain such access, which is frequently denied. This Note illustrates the evolution of adoption in the Unites States, beginning at a time when it was shrouded in secrecy as a consequence of hostile attitudes towards illegitimacy. While examining the current domestic adoption laws, this Note (1) analyzes the constitutional issues with respect to denying adoptees' access to their genetic identity; (2) explains why disclosure of genetic information is vital to the integrity of adoption; and (3) offers a solution for making broader disclosure possible. Finally, this Note sheds light from the perspective of

an adoptee familiar with the challenges faced when attempting to obtain medical information. The author concludes that laws regarding the process of obtaining an adoptee's medical history should reflect society's more modern, positive view of abortion, and that the barriers to adoptees' access of genealogical information should dissolve.

Lisa Pasko, *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System*, 100 J CRIM LAW & CRIMINOLOGY 1099 (2010).

By examining sexual stereotypes impacting girls in the youth correctional system throughout the past 100 years, the author uncovers the damaging effects that a heteronormative construction of sexuality has had on females in the justice system. Despite a shift from the historical focus on Christian values and maintaining young girls' morality, current stereotypes about young females' sexuality tend to assume that risky sexual behavior is caused by broken families, poverty, or alcohol and drug abuse. Due to the conceptualization of girls' sexual activity as "bad" and deserving of treatment within the justice system, there is a focus on creating a sexually vapid environment in which alternative sexuality is viewed as stemming from sexual abuse or the institutionalization experience. The rules and treatment in these facilities categorize girls' behavior as temporary and a method of manipulation and power over other girls and staff. In fact, the Prison Rape Elimination Act, passed in 2003, has a "zero tolerance" policy for prison rape, and it criminalizes institutionalized girls' sexual activity with each other. Public and private detention facilities, as well as long-term correctional institutions, impose conservative heterosexual choices and identities on institutionalized girls, depriving them of opportunities to attain treatment for issues such as same-sex sexual abuse without being stigmatized and judged.

Mary Graw Leary, *Reasonable Expectations of Privacy for Youth in a Digital Age*, 80 Miss. L.J. 1035 (2011).

Despite technological advances that permit students to store their private information on cell phones and social networking sites, courts still rely on the Fourth Amendment's "reasonable expectation of privacy" test—as laid out in *Katz v. United States*—to protect students from the unreasonable searches and seizures of their mobile devices. The *Katz* test is no longer applicable to the search and seizure of students' electronic devices because courts presume that students who leave their digital content exposed to the outside world have conceded their "reasonable expectation of privacy" in the contents of their devices. However, the author argues that students have not conceded their privacy rights but rather the complex nature of technology, combined with a focus on instant and unimpeded access to information takes precedent over a student's interest in maintaining privacy. Notwithstanding that a school can ban cell phone use, confiscating mobile devices does not always carry the presumption that students have relinquished their

expectation of privacy over their mobile phone content. In *United States v. White*, Justice Harlan articulated a more comprehensive approach to resolving privacy protections over mobile content by: (1) analyzing the parameters of the search; (2) assessing the impact of the policy on the student's expectations; and (3) evaluating the efficacy of the search. Emanating from Justice Harlan's multi-tiered approach is the benefit of ensuring student privacy expectations without compromising the school's ability to reasonably govern its student body.

Thomas R. Finn, *The Massachusetts Child Hearsay Statute And The Admissibility of Non-Testimonial Out-Of-Court Statements Describing Sexual Abuse*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 33 (2011).

This Article addresses a 1990 Massachusetts law admitting out-of-court statements of children under ten in criminal sexual abuse proceedings. The theory behind this exception is similar to the excited utterance exception to the hearsay rule, except that children do not make spontaneous utterances because they lack the appreciation for the significance of sexual contact and often wait until in the safety of a trusted adult to confess what happened. Often, children are not allowed to testify at trial because they cannot appreciate the repercussions of lying under oath. The reliability of their statements is evaluated on a case-by-case basis, similar to the approach taken in the Federal Rules' residual exception, which can provide a basis for admitting children's hearsay statements. This Article explores the due process implications implicated by childrens' hearsay statements under federal and state Confrontation Clause jurisprudence. In *Crawford v. Washington*, the Supreme Court set forth two types of hearsay: "testimonial," which requires unavailability of the witness and prior cross-examination, and "non-testimonial," which is at the court's discretion as to reliability of the statement. Childrens' statements regarding sexual abuse, statements to family, social workers, and case-aides are classified as non-testimonial, while their statements to police are classified as testimonial. Since *Crawford* allows states to formulate their own definitions of non-testimonial hearsay, Massachusetts requires that the statements be the most probative form of evidence on the issue, that the recipient of the hearsay testifies (e.g. the family member to whom the child made the statements), that there be notice to the defendant, that the child be unavailable, and that the judge make an overall reliability determination.

DOMESTIC VIOLENCE

Mary Hutton, *Domestic Violence and Due Process:* Crespo v. Crespo *and the Need for a Higher Standard of Proof*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103 (2011).

Crespo v. Crespo involved a challenge to the standard of proof required under New Jersey's Prevention of Domestic Violence Act (PODVA). PODVA provides that final restraining orders may be issued in domestic violence cases. Although final restraining orders have the potential to deprive a parent of many rights and privileges of parenthood—and can even lead to a loss of custody—PODVA will award final restraining orders based on a showing of domestic violence. However, domestic violence is only required to be proven by a preponderance of the evidence—the lowest standard of proof. In *Crespo I*, the trial court applied a balancing test to determine whether a higher standard of proof was constitutionally required. The test, derived from the Supreme Court decision in *Mathews v. Eldridge*, relies on three factors: the nature of the private interest at stake, the risk of erroneous deprivation, and the countervailing government interest. The trial court determined that under the *Eldridge* balancing test, a higher standard of proof—clear and convincing evidence—was mandated by the U.S. Constitution. However, the lower court's decision was overturned in *Crespo II*, when the New Jersey Superior Court determined that the government's interest in protecting domestic violence victims was so high that only the minimal standard of proof was required for issuing a final restraining order. In reversing the lower court's decision, the Superior Court failed to address the lower court's analysis of the constitutionality of PODVA. The Court reversed the decision by applying only the third prong of the *Mathews* test and reasoned that the countervailing government interest of protecting domestic violence victims was enough to overrule the need for a higher standard of proof. The author asserts that the New Jersey courts should reconsider the *Crespo II* holding to specifically address the *Crespo I* courts' constitutional analysis of PODVA using all three of the criteria laid out by the Eldridge balancing test.

EDUCATION

Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J. L. & FAM. STUD. 1 (2011).

This Article analyzes current trends in school violence—most notably an increase in teachers as victims of student violence, drugs and weapons in schools, and a rise in tardiness and absenteeism—and recommends alternative ways in which school systems can more successfully address these issues. The authors review statistics of school disciplinary proceedings and conclude that severe

punishments, like suspension and expulsion, are rising while violent crime overall is decreasing. Thus, schools currently emphasize disciplinary methods that remove a student from school, but these methods are ineffective. For example, suspension or expulsion of students without providing an alternative education environment has far-reaching adverse effects on student's future employment or higher education goals, thus diminishing their chances of becoming a contributing member of society. Schools can avoid discipline that causes a cumulative negative impact on a student's future by instituting disciplinary methods that do not remove a child from school. The authors then recommend alternatives to suspension and expulsion for non-violent offenses, including counseling for students and families. For violent actions, the authors list 20 recommendations for schools to follow in implementing a suspension policy, including hearings by an impartial examiner, alternative education programs, uniform procedural protections for all students, parent training classes, and conflict resolution programs for suspended students.

Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect*, 62 MERCER L. REV. 407 (2011).

Recent incidents of bullying in public schools—in particular cyberbullying—have raised the question of how extensively a school district may censor and regulate students' conduct and speech. This Article discusses the United States Supreme Court's attempts to balance the free speech rights of students against the need to maintain a safe and effective educational environment. The author examines Supreme Court jurisprudence from 1969 to 2007 and concludes that the Court has shifted stances. In 1969, the Court adopted the view that school officials are limited in their ability to restrict student speech that does not pose an immediate distraction to the educational environment. The Court's most recent opinion, *Morse v. Frederick*, gives schools broad discretion to restrict the style and content of student speech in school-sponsored activities. The author approves of this trend. To protect children from the pervasiveness of school bullying and from the unique features of cyberbullying—which often originates off school grounds—school officials must be given broad discretion to restrict student speech. In future bullying cases, courts should not allow the First Amendment to overshadow the needs of students who are bullied and should continue to equip school districts with the tools necessary to protect their students.

Gabriela Brizuela, Note, *Making An "Idea" A Reality: Providing A Free And Appropriate Public Education For Children With Disabilities Under the Individuals With Disabilities Education Act*, 45 VAL. U. L. REV. 595 (2011).

Congress passed the Education for All Handicapped Children Act in 1975, amended and renamed in 2004 as the Individuals with Disabilities Education Improvement Act ("IDEIA"), in an effort to provide disabled children with equal

access and opportunities in public school systems. Before this enactment, children with mental and physical disabilities were denied the educational opportunities afforded to children without disabilities. Despite Congress's efforts to rectify past discrimination against disabled students, IDEIA has proven to be unclear in application and scope, thus leading to inconsistent holdings among the courts. Specifically, Congress's failure to define the legislation's "FAPE" provision, which broadly ensures that disabled children receive "free appropriate public education," has led courts to implement their own standards when interpreting whether a school's compliance, or noncompliance, with their individualized education program ("IEP") amounts to a deprivation of FAPE in violation of IDEIA. In response to the inconsistent decisions, the author has proposed two alternatives that would resolve the inconsistent holdings and standards in cases alleging IDEIA violations. First, IDEIA should define FAPE as requiring schools to strictly comply with the IEP that has been drafted for a particular student. Second, a uniform standard should be created for evaluating IEP violations. These alternatives would provide clear standards and guidance to judges while guaranteeing that disabled students are provided with an effective education.

Gage Raley, Note, Yoder *Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681 (2011).

Tens of thousands of Amish children have been denied a high school education because the United States Supreme Court in *Wisconsin v. Yoder* held that a state could not compel Amish children to attend high school under state compulsory education laws because the laws substantially burdened their right to free exercise of religion. The *Yoder* court reasoned that the state's interest in compulsory education—preparing children for their livelihood after high school and for keeping children out of the labor market—was outweighed by the law's burdens on Amish practices, to wit: requiring Amish students to attend consolidated high schools with non-Amish students, which exposes them to non-Amish teachings and interferes with the Amish belief that children should engage in farm labor. The author argues that changes during the past forty years render the *Yoder* holding unjustifiable. Compulsory secondary education would not cause Amish students to attend school with non-Amish students because there are private Amish-only high schools and home-schooling structures, nor would it interfere with religious farming because the number of Amish youth that work on farms has decreased. Also, the state's interest has become more compelling as Amish communities are more integrated in the world and so the value of a public school education has increased. Moreover, Amish children have moved away from farming and into factories, so compulsory education can help prevent illegal child labor. The author also argues that the Supreme Court's test in *Planned Parenthood of Southeastern Pennsylvania v. Casey* justifies abandoning *Yoder* as valid

precedent because changed circumstances since *Yoder*'s decision have canceled its value.

Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625 (2011).

Although school district boundary lines are important in shaping students' educational opportunities, students are rarely given the chance to attend schools outside of the school district in which they reside. Residential neighborhoods, and thus school boundary lines, are sometimes segregated by race and socio-economic status. The lack of choice in choosing where they can attend school leads to disparate educational opportunities for many minority students. The Article criticizes the federal judiciary, especially the United States Supreme Court, for deferring to local school officials' decisions on financial schemes and student assignment plans. The Supreme Court's preference for localism, as evidenced in the cases following *Brown v. Board of Education II*, has actually contributed to inter-district educational disparities. The author proposes an expansion of the public choice provision in the No Child Left Behind Act ("NCLB") to allow students to transfer from under-performing schools to better-performing schools in other districts and not just within their districts. NCLB should adopt a statutory framework similar to the sections of the Fair Housing Act that incorporates an affirmative duty to consider regional rather than local solutions with inter-district transfer, desegregation and integration plans. The public choice provision should also include fiscal and accountability incentives to ensure compliance.

James M. Patrick, Comment, *The Civility Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855 (2010).

Internet speech by students while off-campus may still fall under the jurisdiction of the school when this speech is sufficiently connected to the school and has the potential to either disrupt on-campus life, or to violate the school's mission of providing effective education. The First Amendment limits a school's authority to regulate off-campus speech, but the particular standards vary by jurisdiction. For example, the Second Circuit Court of Appeals determined that an instant message icon created off school grounds could disturb school activity and therefore be regulated by school authorities in the same way that school officials can regulate on-campus speech. The United States District Court for the Southern District of Florida, by contrast, deemed a Facebook group—complaining about a teacher and created on a home computer—to be off-campus speech that was protected by the First Amendment because it was not foreseeable that this speech would disturb on-campus activity. The author argues that the multiplicity of standards jeopardizes students' First Amendment rights because, without a uniform

standard, students cannot be sure which off-campus speech is constitutionally protected. Courts should apply a "compelling interest standard." Off-campus speech presumptively falls under First Amendment protection; thus, to establish that off-campus speech is sufficiently connected to a school, the school must demonstrate a compelling interest to strip the student of his right.

Kara Carnley Murrhee, Note, Squelching Student Speech in Florida?: Cyberbullying and the First Amendment, 21 U. FLA. J.L. & PUB. POL'Y. 307 (2010).

A number of states have been prompted by cyberbullying-provoked student suicides since 2006 to enact legislation that seeks to curb this modern embodiment of schoolyard bullying. The author analyzes a representative sample of the cyberbullying policies enacted by Florida school districts—pursuant to the state's Jeffrey Johnston Stand Up For All Students Act—and concludes that many of these policies must be revised in order to comply with the First Amendment. These policies use vague language to restrict the cyber-communication of students outside of the scholastic setting, reaching past school grounds and into any form of communication remotely associated with a fellow member of the school community. The author scrutinizes the Florida school district policies by first determining their compliance with the state law; comparing the structure, terminology and effects of various district policies; scrutinizing the policies in light of the four United States Supreme Court and two additional federal decisions regarding permissible encroachments on student speech; and noting specific improvements to the policies. The examined school districts, and by extension others with similar acts, should remove vague language that extends the schools' powers off-campus to ensure that students' First Amendment rights are not impermissibly inhibited.

Ronald Kreager Jr., Note, *Homeschooling: The Future of Education's Most Basic Institution*, 42 U. TOL. L. REV. 227 (2010).

Homeschooling in the United States began in the colonial times, and today, an estimated 1.1 million students are homeschooled. The United States Supreme Court has upheld the parental right to control the upbringing of one's child in cases such as *Meyer v. Nebraska* and *Wisconsin v. Yoder*. However, a California state Court of Appeals opinion, *In re Rachel L.*, held that the California constitution does not support the right to homeschool children. Although the same court later reversed its stance, the initial decision demonstrates that the future of homeschooling may be threatened by increases in state compulsory education laws and homeschooling regulations. In addition, the potential ratification of the United Nations Convention on the Rights of the Child poses the biggest threat to the legality of homeschooling because if ratified, the Convention would supersede state law and homeschooling could be banned. The author analyzes homeschooling

statutes in all fifty states and proposes that states revise their statutes to include specific elements to protect parental rights. The Article concludes by urging homeschool advocates to devise creative ways to fight for the parental right to use homeschooling, lest an important feature of American heritage be lost.

Tyler C. Haslam, Comment, *Leveling the Playing Field: Using Rational Basis with a Bite as Means of Overcoming the NCAA's Violation of Equal Protection*, 37 OHIO N.U. L. REV. 283 (2011).

Under NCAA regulations, a student may compete for a professional team in one sport while maintaining eligibility to compete in the NCAA in another, provided that the student does not accept sponsorships or endorsements for the professional sport. This framework effectively discriminates between athletes who would play professional team sports like football or baseball, where the team can pay the player, and those who compete in individual sports like skiing, where outside endorsements are necessary for financial viability. This Comment examines challenges to these regulations based on the United States Constitution's Equal Protection Clause. The Equal Protection Clause includes a state actor requirement for discrimination liability. Although the United States Supreme Court held in *NCAA v. Tarkanian* that the NCAA is not a state actor, the Supreme Court more recently held in *Brentwood Academy v. Tennessee Secondary School Athletic Association* that a state high school athletic association is a state actor, and this latter decision could be used to challenge the legal status of the NCAA. The author argues that the Supreme Court should review equal protection challenges to these NCAA regulations on a "rational basis with a bite" standard whereby courts scrutinize the legislative body's expressed intent. This standard of review is more scrutinizing than those typically applied to economic regulations—and the NCAA regulations are "economic"—and is justified because the regulations are related to an individual's career choice, a matter in which there is a vested liberty interest. The author concludes that these NCAA regulations were actually developed to further the economic interests of the NCAA. Because the prohibition on student-athletes receiving money does not rationally contribute to the NCAA's economic interests, the NCAA regulations are unconstitutional.

FAMILY

Chesa Boudin, Note, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

With the level of incarceration rising 500% in the last thirty years, the number of children growing up with incarcerated parents has similarly skyrocketed to as many as 1.7 million in 2007. However, children are not taken into consideration when incarceration policies are created, specifically those policies relating to sentencing and visitation rights. While the children of incarcerated

parents suffer from social and psychological issues associated with their parents' incarceration, this Note focuses on the legal and constitutional issues of incarceration from the perspective of the rights of the children rather than rights of prisoners. This Note uses international legal norms to suggest that children's rights are relevant in drafting sentencing and visitation policies and argues their rights stem from the constitutional freedom of association and due process liberty interests. The issue is then examined in the context of two jurisdictions: the federal system and the New York state system, which both demonstrate that the needs of the children are treated as privileges and not rights. Counterarguments rejecting children's interests include a belief that third parties should not influence criminal justice proceedings and that considering children would create discrepancies between similarly situated offenders depending upon whether they have children. The author advocates for recognition of children's rights in the context of the parental incarceration, adding a new consideration to criminal justice proceedings.

Evelyn H. Cruz, *Because You're Mine, I Walk The Line: The Trials And Tribulations Of The Family Visa Program*, 38 FORDHAM URB. L.J. 155 (2010).

This Article addresses the complications placed on families while spouses, children or other immediate family members try to obtain visas to reunite with the rest of their family in the United States. With a complicated process, long waiting times, and strict rules, many family members prefer to remain undocumented in the U.S in an effort to avoid familial disruptions rather than returning to their origin country while awaiting their pending visa status. The immigration process has been subject to a give-and-take between Congress and administrative agency regulations. Congress has attempted to relieve some of the stress that the immigration process places on families awaiting their loved ones' visa determinations, while administrative agencies narrowly interpret Congress's legislation in their regulations. For example, Congress enacted the Child Status Protection Act ("the Act"), which allowed minor children of U.S. Citizens to retain their eligibility for visa even if their application was processed after they turned 21. After this legislation was passed, the U.S. Citizenship and Immigration Services ("USCIS") narrowly interpreted the Act as prospective only, therefore limiting the potential beneficial scope of the Act. The author suggests that although a comprehensive reform program for immigration is necessary, there are smaller changes that can be made by Congress and the USCIS, such as increasing the number of visas allowed to be processed per year and eliminating the bar imposed on submitting visa applications when people have been unlawfully residing in the U.S.

June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527 (2011).

The concept of social class has enjoyed resurgence in political discourse, but the standard views of both conservatives and liberals lack the complexity needed to harness the implications of this issue toward overcoming inequality. Conservatives tend to see class as a product of individual choice and merit, while liberals favor a view of broad structural barriers, such as socioeconomic disadvantages in upbringing that can impair a child's prospects for upward mobility. Both perspectives fail to address the important role of family and gender in class construction and mobility. A stable two-parent family confers social and educational advantages that predict economic success and comfort, but this family structure is now largely absent from working-class life. Stability is also affected by having educated, professional women in households and by marrying later in life. Similarly, these features have not substantially become a part of working-class families. As means of combating inequality, scholarly emphasis on education, professional support for low-skilled men, and wider access to family planning may all help to raise those struggling in difficult lower-class conditions. Legislative action that responds to this scholarship, such as implementation of welfare reform targeted to medical and daycare assistance, would be appropriate and beneficial.

Michelle Seo, Note, *Uncertainty of Access: U.S. Citizen Children of Illegal Immigrant Parents and In-State Tuition for Higher Education*, 44 COLUM. J.L. & SOC. PROBS. 311 (2011).

Birthright citizenship—automatically conferring citizenship on children who are born in the United States—has been a source of contention in many states as concerns grow over ways to deter illegal immigrations. Some federal and state policies have been created or proposed to reduce illegal immigration, including controlling access to public benefits for undocumented immigrants. These policies raise the question of whether a state can deny in-state tuition to children who are United States citizens because of their parents' status as undocumented immigrants. Policies meant to deter illegal immigration may adversely affect the citizen children of undocumented illegal immigrants, specifically in the context of higher education and access to in-state tuition. Two states, Virginia and Colorado, have reached conclusions on this issue. A memorandum from the Virginia Attorney General's office stated that undocumented immigrant parents could not be domiciled in the state of Virginia for purposes of a citizen child's tuition determination, whereas Colorado's Attorney General found the opposite result. This Note argues that allowing this disparity towards citizen children based on the immigration status of their parents violates the Equal Protection Clause of the Fourteenth Amendment and will likely be found unconstitutional. Therefore, such policies should be revised to ensure equal treatment and access to post-secondary education for citizen children.

GENDER BIAS AND DISCRIMINATION

Danielle R. Dale, Note, *Gender Identity Protection: the Inadequacy of Shareholder Action to Amend Corporate Employment Discrimination Policies*, 36 J. CORP. L. 469 (2011).

The transgender population is inadequately protected from corporate employment discrimination. The federal government provides protection from employment discrimination through Title VII of the 1964 Civil Rights Act based on an "individual's race, color, religion, sex, or nationality," but courts that have interpreted the statute have been unwilling to fully expand the interpretation of "sex" to include protection for a transgender person. This Note discusses the idea of transsexuals gaining protection through shareholders proposing amendments or adoptions to their corporations' by-laws which would specifically provide protections for sexual orientation and gender identity. Ultimately the author concludes that although the shareholders possess the power to amend corporate policies, they are unlikely to do so due to their indifference and/or ignorance about the corporation's existing policies. More significantly, even if the shareholders moved to amend policies, many corporations retain the ability to exclude amendments from voting ballots by claiming that the issue pertains to the corporation's ordinary business operations. In order for transsexuals to obtain Title VII protections, they must rely on the judiciary. The United States Supreme Court has given transsexuals a stepping-stone in its decision in *Price Waterhouse v. Hopkins*, where the Court created and provided relief under the doctrine of sex stereotyping, which is where an employer discriminates based on the employees' inability to perform stereotypical gender norms. But the judiciary must go further to protect against discrimination in forms other than blatant sex stereotyping.

Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in our Nation's Schools*, 86 IND. L. J. 827 (2011).

Lynching, once prevalent throughout the American south, was a way for white society to exercise control over the black population through the use of fear and violence. School bullies today are using tactics similar to those once used by a racist white population. Bullies often act with impunity and on the basis of societal stereotypes—particularly gender stereotypes—and bullying often leads to severe psychological trauma or even death. Studies show that around 11% of students in grades six through ten have been the victims of consistent bullying and the majority of these students do not conform to gender norms. As a result of this bullying, these students are the most likely to suffer from severe psychological harms such as depression, anxiety, and even suicidal tendencies. Just as white southerners once used lynching as a method of control, school bullies use threats and taunting to exercise control over others, and the only way to find a solution to this problem is through social change. While further legislation and litigation of the bullying

problem may help provide some relief, education in our public schools about gender stereotypes and the effects of bullying is likely the most effective answer to this problem.

Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOBAL LEGAL STUD. 65 (2011).

Legal systems throughout the world that are based on customary religious laws often violate a woman's right to equality. Historically, countries have not accommodated both religious and gender rights. Rather, countries have either ignored religious laws and become solely democratic, or to adopt a legal system based entirely on customary law. This Article examines the difficulties caused by the inherent conflict between gender equality and customary religious law, and presents alternative means to relieve this conflict. The author argues that a hybrid system of religious and democratic laws will ultimately fail because the two systems are so at-odds. The best solution is to incorporate women into religious law discussions, thus ensuring that each gender is equally represented. To accomplish this goal, women must be given adequate legal education, as well as equal representation among political leadership. Furthermore, the author advocates for a more pronounced separation of politics and religion and argues that customary law should not be codified because codification memorializes thoughts prevailing at the moment of codification rather than allowing for cultural adaptations to modify the law.

Thaddeus Matthew Lenkiewicz, Note, *Green Jackets in Men's Sizes Only: Gender Discrimination at Private Country Clubs*, 44 VAND. J. TRANSNAT'L L. 777 (2011).

Many private country clubs, including those with some of the most prominent golf courses, continue to enforce gender-discriminatory regulations despite the 20th century's social, economic and political movements criticizing and eliminating gender discrimination. Litigation brought by victims of gender discrimination against country clubs in the United States, Ireland, and the United Kingdom has been largely unsuccessful, except for a small number of successful suits brought against small private clubs. In addition to reinforcing gender stereotypes that have been largely overcome in other arenas, discriminatory regulations at the most well-known country clubs provide justification to smaller golf courses to adopt and enforce similar discrimination. Furthermore, though many states have passed statutes prohibiting gender discrimination at private country clubs, there remain numerous states and jurisdictions that continue to allow such practices. This Article proposes a three-pronged attack at eliminating gender discrimination at all country clubs. First, suits should target more prominent country clubs. Second, states should seek the revocation of liquor licenses at

offending clubs. Finally, plaintiffs should be especially sympathetic, like long-time members at clubs who are still denied full membership, to appeal to juries.

Wendy Parker, *Juries, Race and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209 (2011).

The Civil Rights Act of 1991 effectively overturned a number of hurdles to plaintiffs in employment discrimination suits that were created by a series of United States Supreme Court cases. A study of employment discrimination cases in the last twenty years, however, reveals that success rates for plaintiffs have decreased, with federal litigation becoming less relevant to redressing employment discrimination. This Article examines the success of employment discrimination plaintiffs under the 1991 Act. The author studies 102 jury trials and 10 bench trials. Since the Act was passed, more cases are decided by jury trial than bench trial, and employment discrimination plaintiffs are more successful when juries decide the facts. However, this study concludes that African Americans and Latinos have the least success in employment discrimination jury trials. The author believes further research into the demographics of actual juries is needed to determine the degree to which juror bias has caused the disparage outcomes for African Americans and Latinos, and suggests that increasing juror diversity may be a partial remedy.

Whitney Woodington, *The Cognitive Foundations of Formal Equality: Incorporating Gender Schema Theory to Eliminate Sex Discrimination Towards Women in the Legal Profession*, 34 LAW & PSYCHOL. REV. 135 (2010).

The preconceptions society holds about people are largely based on the brain's way of processing and storing information in categorical units. Unfortunately, the schemas men develop about women as primary care givers occur early in life and thereafter dictate how women are perceived in the workplace. All too often, women are not considered on the same level as men and thus suffer reduced salaries, lack of leadership opportunities, and feigned respect. To overcome society's stereotypical notions, we must make conscious efforts to evaluate men and women on their individual achievements and qualifications. Instead of offering individualized accommodations, which only reinforce gender stereotypes, a shift towards uniform treatment of all needs and work responsibilities will neutralize sex discrimination in the workplace. Specifically, gender-based stereotypes in the workplace can be eliminated by modifying hiring, promoting, and family-leave practices to respond solely according to the individual's needs and credentials instead of the collective generalizations attributed gender.

HEALTH

Richard L. Kaplan, *Analyzing the Impact of the New Health Care Reform Legislation on Older Americans*, 18 ELDER L.J. 213 (2011).

The Patient Protection and Affordable Care Act, passed in 2010 and otherwise known as "ObamaCare," will create substantial changes for Americans, particularly elderly Americans. This Article analyzes the new legislation to shed light on both the positive and negative changes that will affect older Americans, specifically concerning prescription drug coverage, long-term care and Medicare's general coverage. Changes from ObamaCare include: expanding pharmaceutical coverage, but increasing out of pocket costs for brand name drugs; creating a long-term care program that emphasizes alternatives to traditional institutional settings and provides an average of $50 per day for patients in long term care; and an emphasis on preventative care such as initial preventative physical examinations and education. While ObamaCare introduces expanded benefits for retirees, the Act cuts more than a half trillion dollars of Medicare to finance ObamaCare. The author acknowledges that the impact of ObamaCare on Medicare is uncertain, as much will depend upon the newly created Independent Medicare Advisory Board and the changes the Board implements. How an individual is benefited or disadvantaged by the implementation of ObamaCare depends largely on his or her healthcare needs and whether they fall under the scope of ObamaCare's expanded benefits.

Timothy D. Lytton, *An Educational Approach to School Food: Using Nutrition Standards to Promote Healthy Dietary Habits*, 2010 UTAH L. REV. 1189 (2010).

A regulatory technique that would monitor the consumption of food in school is needed to teach children healthy eating habits. Consumption of unhealthy foods by children in school has become a problem because the lack of adequate funding for school meals, and for schools in general, forces schools to turn to "competitive foods"—those most likely to sell—as a means of generating revenue. Federal nutrition standards that make schools eligible to qualify for reimbursement are based on estimates of the nutritional contents of the average meal served as opposed to those the student actually consumes. A more personal approach should be used by instituting daily aggregate nutrition standardization ("DANS"), which monitors the actual nutritional content of the food in school available to students on any given day and provides a nutritional standard of what the student should be allowed to purchase based on dietary factors relevant to their individual needs. Many schools use computerized Point of Sale technology that registers nutrition content at a cafeteria checkout, which in turn generates transaction records that are used to monitor the nutrient profile of the average meal served to ensure compliance with federally-regulated nutrition standards. DANS would incorporate

all food sold or served in school into this Point of Sale system, and students would provide their identifying information at other venues, such as school stores and vending machines, thus keeping track of each student's consumption. Assigning individual students a daily aggregate nutrition standard would improve children's dietary habits by providing them with skills and habits to develop a healthy and balanced approach to food and eating.

MaryBeth Musumeci, *Modernizing Medicaid Eligibility Criteria for Children with Significant Disabilities: Moving from a Disabling to an Enabling Paradigm*, 37 AM. J.L. & MED. 81 (2011).

The current health insurance system fails to meet the needs of children suffering from disabling illnesses. Medicaid has given states options to provide health care to children who are sick with disabling illnesses despite their financial limitations, but under the present eligibility standards there are interpretational issues over which children fall into the disabled child category. The lack of comprehension has lead to the release of many children from the Medicaid program because, while receiving their necessary treatments, they become "too healthy" to meet the requirements to maintain the health care coverage, despite retaining the underlying disease. After explaining the history and development of the Tax Equity and Fiscal Responsibility Act ("TEFRA") Medicaid option—which provides children under the age of 19 with Medicaid even though they would only be eligible for the health care coverage if they lived in a medical institution—the author suggests three options to reform the TEFRA institutional level of care. Ultimately, the Article advocates revising the institutional level of care criteria by creating a workable definition of disability, which would create an inquiry into whether the medical treatment was the cause of the child's improvement in health, and if so, whether the child would still qualify for the health care as a disabled child. This reform would coincide with the current medical advances because it would focus on providing the medical treatments and support needed to keep a child functioning in society instead of focusing on their degree of disability to establish whether they receive the health care.

Ashley N. Southerland, Note, *Stigmatized Silence: The Exclusion of HIV and AIDS Sufferers from the "Obamacare" Legal Landscape*, 20 CORNELL J.L. & PUB. POL'Y 833 (2011).

Insurance companies have historically set premiums for private individuals based on their predicted future cost of health care, resulting in "pricing out" those individuals who are deemed high-risk by setting their premiums at unaffordable rates or by denying coverage for treatment of pre-existing conditions. In 2010, President Obama signed the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act ("HCERA") into law. These acts, which came to be known as "Obamacare," attempt to solve

the pricing out problem by prohibiting insurance companies from denying coverage to individuals with pre-existing health conditions. However, asymptomatic HIV and AIDS infections may not fall into the category of pre-existing health conditions, leaving patients with these conditions to rely on statutory protections against disability-based discrimination. These protections, however, are also insufficient. To protect individuals with asymptomatic HIV or AIDs, the Secretary of Health and Human Services must exercise his authority under the PPACA to define "health status" as inclusive of HIV or AIDS infection, and ensure that the insurance coverage benefits given to asymptomatic HIV and AIDS sufferers are equal to the benefits provided under a typical employer plan.

HUMAN RIGHTS

Siba N. Grovogui, *To The Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions*, 18 IND. J. GLOBAL LEGAL STUD. 41 (2011).

Many think that revolutions of the past—specifically the French, United States, and Haitian revolutions—were directly influenced by the Western conception of human rights, holding that every person is born with universal, inalienable, and natural rights. Though the Western notion of human rights is the most widely known, the Haitian Revolution is an example of a revolt whose leaders envisioned and fought for a novel set of rights. The main instigators of the Haitian Revolution were different from those in France and the U.S., in that they were slaves who were considered less than human prior to the Revolution. This difference influenced the concept of the rights that Haitian revolutionaries struggled to attain, and the resulting Haitian Constitution includes both Western and non-Western ideals. It incorporates the Western ideal of giving rights to all, but goes further as it also protects those who have been cast away from society. The Haitian Revolution and the resulting Haitian Constitution are proof that the Western idea of human rights is not the only set of rights strong enough to dramatically transform a nation.

Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 FAM. L.Q. 409 (2010).

International adoption began as a humanitarian effort arising out of war, but has changed to one where prospective parents in the United States are seeking to evade the adoption pool, which they view as undesirable. Of the foster children in the United States awaiting adoption, sixty percent are over six years old, forty-two percent are black, and many are disabled. Moreover, the procedural obstacles to adopt the limited number of younger and non-black children available domestically are significantly more stringent than the procedures for international adoptions.

The applicants' desire to evade higher scrutiny probes into their lives, international adoption agencies' aiming to satisfy the demand for foreign adoptive parents, and the United States' imposition of a lower scrutiny in international adoptions than in domestic ones have led to a systematic commodification of children, which often leads to child trafficking. Children in places like Cambodia, Romania, and Latin America are sometimes held in dirty "orphanages," kidnapped from their birth parents or families, and denied a chance to live with their relatives because Americans are willing and able to pay to adopt them. The author advocates financial restrictions on the amount international adoption agencies can charge to facilitate the process, transparency on their activities, and accountability for their actions like using third-party facilitators to "locate" children as ways to decrease the instances of child trafficking. Also, the author argues that domestically, there must be well-tailored and consistent legal standards relating to the basic elements of the process that would promote local adoptions, and essentially slow the commodification of children internationally.

Erin Sthoeger, *International Abduction and Children's Rights: Two Means to the Same End*, 32 MICH. J. INT'L L. 511 (2011).

The Hague Convention ("Convention"), created under the auspices of an intergovernmental organization, promotes general deterrence of child abduction by establishing a procedure focused on effectuating the prompt return of the child to her residence. In recent years, courts and scholars have analyzed whether adjudication proceedings under the Convention coincide with human rights, focusing on the Convention on the Rights of the Child ("CRC"). The author concludes that the Convention is in accordance with the CRC's notions of human rights. In contrast to the Convention, the CRC focuses on the best interests of a *specific* child as the *primary* consideration for international child abduction proceedings. The CRC argues that a court adhering to the Convention violates basic notions of human rights that lead to insufficient hearings by promptly returning the child to his or her habitual residence, instead of taking into account certain factors and rights of the specific child. Supporters of the Convention acknowledge that the Convention may prescribe a result not always in conformity with the best interests of the specific child before the court, but this concern is trumped by the general idea that a deterrence policy through the prompt return of the abducted child promotes the best interest of all abducted children, unless a situation involving physical or psychological harm exists. In response to alleged human rights violations for not taking into account the best interest of the specific child, the Convention argues that the best interest of a specific child will be heavily weighed at the time of the custody decision in the child's habitual residence. Under the Convention, the best interests of a particular child is trumped by the best interests of abducted children as a whole through the promotion of a policy

ensuring that children actually abducted can seek a swift adjudication proceeding to minimize harmful impact.

Lance Gable, *Reproductive Health As A Human Right*, 60 CASE W. RES. L. REV. 957 (2010).

Access to reproductive health care remains almost non-existent in many regions throughout the world. The author in this Article discusses the two models for reproductive health as an international human right: namely the reproductive rights model and the right to health model. The reproductive rights model involves the woman's right to make reproductive decisions and maintain individual autonomy, while the latter focuses on the economic, social, and cultural right to access health services. This Article establishes a unique conceptualization of the right to reproductive health as a separate and distinct human right. The author broadens the notion of reproductive health as more than merely a woman's right to make her own reproductive decisions and explores a slew of health rights, such as prevention of sexually transmitted diseases, access to abortion services, and prohibition of genital mutilation. Creating a broadened view of reproductive health rights stems from the global need to reduce reproductive health risks and the need for improved health outcomes. Finally, the author advocates for a discrete international human right to reproductive health, which would encompass more than just reduction of infant mortality, but also pre-natal care, right to family planning, abortion access, and pregnancy services.

LGBTQ RIGHTS

M. Katherine Baird Darmer, *Structural Barriers: Keeping Outsiders Out: "Immutability" and Stigma: Towards a More Progressive Equal Protection Rights Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 439 (2010).

True equality for the LGBT community is still elusive. Gays and lesbians can only marry and adopt in certain states, face challenges gaining employment, and must contend with the Defense of Marriage Act. The author discusses judicial protection for LGBT rights under the Equal Protection Clause and argues that the characterization of certain traits as "immutable" has hindered the attainment of true equality for the LGBT community. When allegedly discriminatory laws are challenged under the equal protection clause, courts consider whether the traits upon which the laws are based are immutable. If the traits are immutable, courts often apply strict scrutiny to such laws, thus providing heightened protection against laws based on immutable traits. However, some dispute whether sexual orientation is immutable exists, and states often seek to circumvent the relevance of whether traits are immutable by regulating conduct rather than status. Moreover, the inquiry of whether sexual orientation is immutable is inherently stigmatizing and assumes that heterosexuality is the norm. Immutability, although an important

factor in determining whether to strictly scrutinize a law, is not necessary to create a suspect classification and thus trigger heightened scrutiny. Instead, the focus of the equal protection doctrine should be on the trait's connection to personhood, like sexual orientation's integral nature to one's identity.

Allison Davidian, *Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children*, 26 WIS. J.L. GENDER & SOC'Y 1 (2011).

When sexual reassignment surgery is not medically necessary to preserve the life or health of an intersex child, the decision-making process to receive genetic reconstructive or corrective surgery needs to be improved. According to the author, the views of the child, and not only the parents and doctors, should be considered. Intersex children in the United States have had little to no voice in determining which sex they would choose if born with reproductive organs that do not fall into a "normal" male or female category. This is partly because the decision to choose one's sex is made when the infant is still in the hospital after they are born or when the child may be too young to understand their bodies. Psychiatrists in the 1960s supported the dominant treatment method, in which the doctor assigned genetic change as early as possible in the child's life, but it has not yielded one documented outcome of a happy intersex child living within their doctor-assigned gender. Allowing courts to get involved gives fundamental body integrity rights, privacy rights, and liberty to the intersex child, and values the viewpoint of the child by allowing the judicial branch to critically evaluate the decision-making process. The immediate urgency of surgery can be reduced if a court order is necessary beforehand and fosters the idea that surgery is only one option for an intersex child. There is a line that should be drawn as to when courts may get involved, but by giving the courts some amount of power, the child's voice can be heard.

Sue Landsittel, *Strange Bedfellows? Sex, Religion and Transgender Identity under Title VII*, 104 NW. U. L. REV. 1147 (2010).

Title VII prohibits discrimination "because of sex," which has been interpreted as prohibiting discrimination based on one's status as a man or a woman. Traditionally, Title VII protection did not extend to discrimination based on gender nonconformity. This Article asserts that Title VII also prohibits discrimination against transsexual or transgender persons whose gender identity does not fit into the rigid category of "male" or "female." Supporting this argument is a recent decision from the D.C. District Court, *Schroer v. Billington*, which found that Title VII also prohibits discrimination based on a person's status as transgender. This Article explores the doctrinal implications of *Schroer* and asserts that although the *Schroer* court protects transgender individuals who have been medically diagnosed and whose gender expression sufficiently conforms to the socially established male-female binary, the decision will not encompass the

full range of transgender individuals, many of whom do not have a medical diagnoses or fit within one of the two proscribed genders. A better model would be to evaluate gender identity like religious identity; instead of looking towards a dogmatic social norm or fixed external reference, a court should evaluate the consistency and sincerity of the plaintiff's beliefs. A test based on consistency of belief and deeply held feelings will much more accurately encompass those who are discriminated against based on their gender, rather than relying on external indicators such as a medical diagnosis or stereotypical gender expression.

William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487 (2011).

Pending since 1994, the Employment Non-Discrimination Act ("ENDA"), a federal bill designed to protect lesbian, gay, bisexual and transgender employees from discriminatory conduct, seemed to offer the most pragmatic approach for protecting LGBT Americans in the workplace. But partisan compromises have diluted much of ENDA's original strength. The most egregious revisions eliminated protections for transgender individuals entirely, although the current version reinstates gender identity as a protected class. Due to ENDA's inadequacies, the author argues that an amendment to Title VII of The Civil Rights Act of 1964 would provide a more effective safeguard for LGBT rights. Were Title VII's "because of sex" definition amended to include "actual or perceived sexual orientation or gender identity," LGBT workers would be afforded the same protections as other minorities and given equal standing in the eyes of the law. The Title VII proposal is superior to ENDA in a number of ways. Title VII's doctrinal history is well-established, while interpreting ENDA would require years of new jurisprudence. Additionally, ENDA offers almost complete insulation for religious organizations whereas Title VII makes exceptions only in cases of "bona fide occupational qualification." Finally, recent United States Supreme Court holdings have expanded the interpretation of "sex" to include gender-stereotyping and same-sex harassment. While not LGBT-specific, this trend suggests a judicial willingness to consider other gender non-conforming claims, and adds credence to the argument in favor of amending Title VII.

Audrey C. Stirnitzke, Note, *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285 (2011).

Debates over same-sex marriage have traditionally assumed that an individual can only have one "true sex" for purposes of marriage, but this formulation ignores the roles of gender identity, anatomy, and sexual reassignment surgery in the transsexual community. Today, courts in the United States have relied on *Corbett v. Corbett*, an English case that introduced the "true sex" model in marriage, which could leave intersex and transsexual people unable to marry

since neither group always fits into strict, fixed sexual categories. Despite deeply entrenched policies that marriage should be between people of the opposite sex, the "true sex" model often leads to absurd results, making it increasingly difficult to justify. For example, a male partner in an opposite-sex union might decide to go through sexual reassignment surgery during the marriage, resulting in a valid, legal marriage between two people of the same sex. Moreover, a reasonable legal alternative to the "true sex" model exists that would recognize and validate how an individual functions sexually and socially at the time of marriage, rather than trying to ascertain their "true sex" which could lead to absurd results. Abandoning the law's "true sex" model would mean that prohibitions on same-sex marriages will no longer be tenable and would mark an important step for marriage equality in the transsexual community.

MARRIAGE AND DIVORCE

Dan J. Bulfer, Note, *How California Got It Right: Mining* In Re Marriage Cases *for the Seeds of a Viable Federal Challenge to Same-Sex Marriage Bans*, 41 CAL. W. INT'L L.J. 49 (2010).

As challenges to same-sex marriage bans have come to the forefront of United States politics and jurisprudence, the decision in *Perry v. Schwarzenegger* and its potential for appeal to the United States Supreme Court may determine the constitutionality of all federal and state marriage restrictions. In *Perry*, the Northern District of California found that Proposition 8, which restored California's same-sex marriage ban via a state constitutional amendment, violated the United States Constitution's due process and equal protection clauses. Considering that the United States Supreme Court has yet to hear a marriage equality case, this Article examines how federal law-based arguments against same-sex marriage bans can utilize the legal doctrines successfully adopted by the California Supreme Court in *In re Marriage Cases* to create viable federal challenges. The decision, which was essentially superseded by Proposition 8, overturned California's same-sex marriage ban on the basis of the state constitution's due process and equal protection clauses. The California Supreme Court credited two of the petitioners' legal theories which can be fashioned into viable federal challenges: that depriving same-sex couples the right to marry without a compelling government justification violates their substantive due process, and that discrimination on the basis of sexual orientation violates the equal protection clause. Considering that California's equal protection and due process doctrines are almost identical to their federal counterparts, federal courts should be persuaded by similar arguments adopted by the California Supreme Court.

Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455 (2011).

Marriage, which is a contractual relationship, should permit proxies to participate in formal marital ceremonies on an absent party's behalf, despite marriage being a uniquely personal contract. Proxy marriages exist where one party authorizes an agent to stand in his place at the marriage ceremony, and they have existed throughout history, from ancient Roman times through English common law and still exist in much of the world. Shortly after World War II, people in the United States began to scorn proxy marriages due to concerns about individuals evading immigration laws and importing mail-order brides. The author considers how the nature of marriage—both a personal and contractual relationship—shapes the use of proxy marriages, and compares the marriages to other intimate relationships where proxies have been permitted based upon equitable considerations: wills, childcare, and death. The Article examines why proxy marriage would be useful today, including the benefits with regard to couples who wish to marry but are separated or cannot afford to travel to another state or country where they need to perform the marriage for legal or immigration purposes. The author argues that the marriages would not cause problems of control because agents would be bound by a power of attorney, only able to act as the contracting parties allowed, leaving the control vested in the parties. Although proxy marriages are contrary to the idea of marriage in the United States, the use of agents in intimate dealings is permitted in other circumstances and proxy marriages should similarly be accepted.

Austin Caster, *Why Same-Sex Marriage Will not Repeat the Errors of No-Fault Divorce*, 38 W. St. U. L. Rev. 43 (2010).

Many argue against same-sex marriage for fear that allowing same-sex couples to marry will lead to the same consequences experienced after the introduction of no-fault divorce. Though no-fault divorce created negative ramifications, allowing for same-sex marriage will not; rather, it will only enhance families and society overall. The divorce rate increased after most states in the 1970s introduced no-fault divorce legislation, but there is no risk of harming the institution of marriage in allowing same-sex couples to marry. No-fault divorce changed marriage exit rules while proponents of same-sex marriage merely wish to increase and celebrate the institution of marriage as a social good. After Scandinavian countries such as Denmark, Norway and Sweden enacted laws recognizing same-sex unions, the marriage rates in those countries rose dramatically and divorce rates dropped. The author believes that such a drop in divorce would similarly happen in the United States if same-sex marriage became legal. Moreover, the legalization of same-sex marriage will have benefits in areas which no-fault divorce legislation harmed society. Such benefits would include healthier spouses, the decrease of sexually transmitted diseases, positive economic stimulants, and happier, healthier children. The fear that allowing same-sex

couples to marry will lead to similar problems created by no-fault divorce is unfounded, and is not a reason against allowing same-sex marriage.

Jennie Croyle, Note, Perry *v. Schwarzenegger, Proposition 8, and the Fight for Same-Sex Marriage*, 19 AM. U. J. GENDER SOC. POL'Y & L. 425 (2011).

The author argues that if *Perry v. Schwarzenegger* reaches the United States Supreme Court on appeal, the Court should take the position of the District Court in the Northern District of California and the California Supreme Court, both of which held that California's constitutional amendment barring same-sex marriage is unconstitutional. In 2008, the California Supreme Court found that it was unconstitutional to limit marriage to heterosexual couples. The Court found that sexual orientation is a suspect class and that the right to marriage is a fundamental right applying to heterosexual and homosexual couples. Therefore, the Court applied heightened scrutiny in finding that the right to same-sex marriage was mandated by the California constitution. Six months later, California voters adopted Proposition 8, in effect reinstating the ban on same-sex marriage in the state. Two same-sex couples challenged this new state law in federal district court, and following the analysis of the California Supreme Court, the court invalidated Proposition 8 under the United States Constitution's Due Process and Equal Protection Clauses. The author argues that Proposition 8 should be reviewed under strict scrutiny because it targets a suspect class—classes based on sexual orientation—and because it restricts access to the fundamental right of marriage. Under this standard, the author argues that Proposition 8 violates the Due Process Clause because it is not narrowly tailored to serve a compelling government interest. The author urges the United States Supreme Court to overturn Proposition 8 and other state laws that bar same-sex marriage.

Holning Lau & Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 LAW & INEQ. 107 (2011).

Proponents of same-sex marriage have drawn on established social science research suggesting that marriage generally benefits the health and well being of different-sex couples and thus similar results would follow the legalization of same-sex marriage. These benefits accrue because the legal rights and the social meaning of marriage promotes commitment, which in turn fosters care, and because family and friends offer greater support due to the state's legitimization of their relationship. This Article explains how scholars can supplement their discussions on same-sex marriage by analyzing the inferences and limitations of emerging social science research that directly study the effects that the legal recognition of same-sex marriage has on health and wellness. The research is divided into four main categories: comparing recognized and unrecognized same-sex couples, comparing outcomes by jurisdictions, comparing partnered and single orientation minorities, and directly asking same-sex couples, through survey or in-

depth interviews, about the effects of legal recognition on their relationship. Overall the results were consistent with prior inferences drawn from different-sex couples that legal recognition of same-sex marriage enhances same-sex relationships to the benefit of society. Although the evidence is not conclusive, this research strengthens public policy arguments for same-sex marriage, because it directly supports the inferences that marriage contributes to the health and well-being of same-sex relationships and to the public in general.

Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011).

Claims that state laws banning same-sex marriage are unconstitutional for violating the United States Constitution's Equal Protection Clause are often rejected by courts on tradition alone. Courts find that the traditional definition of marriage, as being between a man and a woman, is sufficient justification for upholding the law. However, because of the different levels of judicial review and doctrinal analysis employed by individual courts in determining when a state's law banning same-sex marriage is unconstitutional, it is not always clear when the tradition of opposite-sex marriage will serve as a legitimate justification for upholding a state's ban. Moreover, the traditional argument allows for people to mask their socially unacceptable views towards the group being targeted by the law. The author argues that courts could be more consistent in their analysis of when the tradition of opposite-sex marriage is a sufficient justification by applying the highest level of judicial review to these claims and by taking into account the state's underlying purposes for the law, excluding tradition as an underlying purpose for the sake of their analysis. By utilizing this method, courts will be able to consider tradition in addition to the actual purpose behind the law. If the law's purpose falls into the categories of illegitimate or suspicious, the law should be invalidated, but if it falls into the category of legitimate, than it should be upheld.

Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F L. REV. 357 (2010).

This Article examines the significance of same-sex marriage in Massachusetts and San Francisco by analyzing surveys and interviews of three different groups of same-sex couples: (1) couples married at San Francisco City Hall in February and March 2004, when same-sex marriage was legal in San Francisco; (2) couples in San Francisco after the California Supreme Court invalidated San Francisco's same-sex marriage law and before the same court legalized same-sex marriage; and (3) couples married in Massachusetts—the first state to fully legalize same-sex marriages—during the same time period. The analysis utilizes legal consciousness—the way people interact with the law—and the constitutive perspective, which examines the differences between the day-to-day application of the law and what is written, to focus on the reasons for seeking

legal marriage and catalogues them into four groups: "with the law," which utilizes marriage as a strategy to enable rights like end-of-life decision making capabilities; "against the law," where marriage is a political statement; "before the law," which seeks legitimization, that commitment ceremonies nor domestic partnerships convey; and "outside the law," which seeks marriage for personal reasons. Overwhelmingly the most important reason to marry was the personal meaning of marriage rather than equality or the legal privileges and responsibilities. Furthermore, the interviews confirmed that legal recognition of marriage affects happiness and well-being because families perceive of same-sex marriage in a more positive light when it is condoned by the state, and because and the legal commitment to a long-term relationship fosters care. Although "feelings" are intangible, these concerns are appropriate subject matter for the law because they affect whether same-sex couples support and respect the law and the state.

Mark Strasser, *Same-Sex Marriage and the Right to Privacy*, 13 J. L. & FAM. STUD. 117 (2011).

This Article asserts that the right to marry is a fundamental right based on the right to privacy found in many state constitutions and in the United States Constitution's Due Process Clause. The United States Supreme Court has recognized that several matters related to family fall within the right to privacy, and although the scope of such matters has been debated, the author asserts that past jurisprudence support the inclusion of the right to marry in this category. Granted, some prior Supreme Court cases can be used to dispute this contention. For example, the Court in *Washington v. Glucksberg* asserted that rights are only fundamental if deeply rooted in the nation's history. Moreover, same-sex marriage is often differentiated from marital rights in other scenarios, like the right to marry someone of another race, on the basis that same-sex relationships are unrelated to procreation. However, the author argues that the right to marry is just as fundamental as the right to procreate. This is so because the court has long recognized the importance of family without mentioning children. In *Loving v. Virginia*, for instance, the United States Supreme Court invalidated Virginia's anti-miscegenation statute on equal protection and due process grounds without mentioning children. The author, after surveying many state decisions regarding same-sex marriage, argues that many of the reasons cited by courts for disallowing same-sex marriage are specious and devalue the interests of same-sex families. Though many arguments—most often based on equal protection guarantees—have been advanced to justify the right of same-sex couples to marry, the author asserts that the right to marry should be protected as a matter of state and federal due process guarantees, and that the fundamental right to privacy encompasses a right to marry.

PARENTING

Shawn P. Ayotte, Note, *Protecting Servicemembers From Unfair Custody Decisions While Preserving the Child's Best Interests*, 45 NEW ENG. L. REV. 655 (2011).

While the federal Servicemembers Civil Relief Act (SCRA) provides servicemembers of the United States Armed Forces with stays on various civil proceedings while deployed, there is still no federal or state legislation that effectively protects them from losing custody of their children while they are deployed. The effectiveness of such legislation is hindered by the interactions of four areas of law: military policy and regulations, the SCRA, state-based family law primarily concerned with the best interests of the child, and the interest of the children's parents in custody arrangements. After addressing how the military rules and federal and state legislation produce unfair results for servicemembers in child-custody proceedings, the author discusses potential solutions at both the federal and state levels. The state-based solutions include: allowing the non-servicemember parent to have temporary custody of the child while the servicemembers is deployed; deemphasizing the absence of the servicemember while deployed when the courts rule on who should be given custody; and in post-deployment challenges, placing the burden to establish the need for a change in custody on the non-servicemember parent. It is crucial that individuals become aware of the current circumstances surrounding deployed servicemembers and child custody issues in order to ensure that protective legislation is passed to prevent the non-servicemember parent from gaining an unfair advantage by having had temporary custody over the child, thereby disadvantaging those who volunteer to defend the United States abroad.

David Bigger, Note, State v. Ellis*: Protecting the Rights of Parents to Be Secure Against Unreasonable Searches and Seizures*, 72 Mont. L. Rev. 151 (2011).

The Montana Supreme Court correctly ruled in *State v. Ellis* that a person retains the right to be free from unreasonable warrantless searches and seizures, even if the subject of the search is a parent accused of a crime by his or her own minor children. The decision in *Ellis* was an extension of an earlier rule developed by the Montana Supreme Court in *State v. Schwarz*, which, using the heightened privacy rights afforded to citizens under the Montana Constitution, held that children under the age of sixteen cannot consent to searches of their parents' homes and thus cannot waive their parents' right to privacy. The *Schwarz* holding is supported by the proposition that since children have lesser authority in shared property than do parents, the child's relationship to the property is insufficient for the child's consent to a search of the property to be constitutionally meaningful. Because of the rule developed in *Schwarz*, the *Ellis* court properly found that even if the child consenting to the search is a purported crime victim, the child still lacks

authority to consent to a search of the parent's property. Though points of the *Ellis* opinion were weak—notably its failure to admit that the *Schwarz* court did not fully address a child-victim exception to the rule—the Montana Supreme Court's holding still stands. If the Court were to create a child-victim exception to the per se rule, the rights of parents would be subrogated to the will of law enforcement and the capriciousness of their children. Moreover, a failure to extend the *Schwarz* per se rule creates a situation where parents are subjected to searches to which they did not consent, thereby violating their constitutional right to be free from government intrusion in the home.

Scott R. Conley, *The Children's Television Act: Reasons & Practices*, 61 SYRACUSE L. REV. 49 (2010).

In 1990, Congress, concerned about the amount of television children watch, passed the Children's Television Act. The Act requires the Federal Communications Commission ("FCC") to restrict the amount of advertising networks may air during children's programming and to allocate a certain amount of airtime to educational programs for children. In *Red Lion Broadcasting Co. v. FCC*, the United States Supreme Court found that the Act does not infringe on First Amendment free speech rights because the networks are a limited resource, thus having fewer rights to free speech than do common carriers, and because the networks, by virtue of their free use of broadcast time—a limited resource—owe a fiduciary duty to the public. Even with the expansion of technology and media, which has somewhat replaced network television as a source of information and entertainment, the restrictions still provide a benefit and fulfill a need. Television can teach children academically and socially, and in the absence of any regulation, the networks would be less motivated to provide educational programs. However, the amount of educational programming networks have aired has not increased and there is little review of the quality of the programming. The author approves of a proposed amendment to the FCC's rules that is designed to help regulate and maintain the quantity of educational programming on television, but explains that this amendment does not go far enough because it does not regulate the quality of programming. The author then proposes an amendment that would ensure the quality of educational programming.

Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175 (2011)

While thirty-seven states have laws that require minors to involve their parents in abortion decisions, studies show that parental involvement laws do not meet their stated goals of protecting the health and well-being of minors or encouraging dialogue about pregnancy options. In the past, reproductive health and youth rights advocates have challenged consent and notice laws in court, through legislative appeals, and in campaigns designed to shape public attitudes

about adolescent abortion. However, the author explains that these typical reform proposals do not work because they are unclear about how parental involvement should be governed. An alternative is a "new governance" approach that takes reform outside of courts and legislatures. The new governance approach centers on collaboration between public and private entities that are interested in meeting public policy objectives. It also suggests involving lawyers as problem-solvers rather than as advocates. Though new governance presents challenges such as continuing abortion debates, the author recognizes that it will be beneficial in the long run by gradually changing societal norms about abortions, and thus granting unrestricted abortion access for minors.

SEX INDUSTRY

Jennifer Bays Beinart, Note, *Beyond Trafficking and Sexual Exploitation: Protecting India's Children from Inter and Intra-Familial Sexual Abuse*, 21 IND. INT'L & COMP. L. REV. 47 (2011).

Child sexual abuse is a serious global issue that can negatively affect a young person. In India, rates of child sex abuse are high for several reasons: offenders are not punished severely; the government does not fund programs designed to prevent child sexual abuse; and the legislature has not criminalized incest. Moreover, cultural differences may make child sexual abuse hard to define and difficult to prevent. In the Indian culture, a male figurehead usually makes decisions for children, female virginity is prized, and child sex abuse is considered taboo. Thus, little legislation has been passed to prevent or criminalize CSA. The Indian Penal Code (IPC) of 1860 recognizes only penile penetration as rape. In *Saskshi v. Union of India & Ors*, the Supreme Court of India asked the Law Commission of India to review the IPC's laws, and the Law Commission found the laws should be modernized. Goa, a state in India, began trying to address these issues with the Goa Children's Act of 2003. The Act—the first Indian statute to criminalize incest—creates a specialized court for child victims, and defines three levels of sexual abuse: grave sexual assault, sexual assault, and incest. The Indian Parliament can use the GCA as a template to write better laws criminalizing child sexual abuse, and the executive branch can do more to enforce the laws against it. Ultimately, India should focus on prevention mechanisms such as increasing funding and community education and outreach programs to fight child sexual abuse.

Christopher M. Brown, *Quit Messing Around: Department of Defense Anti-Prostitution Policies Do Not Eliminate U.S.-Made Trafficking Demand*, 17 ILSA J. INT'L & COMP. L. 169 (2010).

The United State's Department of Defense should institute policies focusing both on anti-prostitution and anti-human trafficking, and should cooperate with

international entities, to diminish the occurrences of human trafficking near military bases in the Republic of Korea. U.S. military bases have created a demand for prostitution, and while the Department of Defense has instituted anti-prostitution legislation, such legislation has proven to be too narrow in scope. The author addresses the issue by giving background on how military members seek out prostitution and the prevalence of human trafficking within the Republic of Korea. The government's attempts to combat human trafficking, primarily by criminalizing prostitution, may diminish the occurrences of prostitution, but they have not ended U.S troops' involvement with human trafficking. Legislation such as the Victims of Trafficking and Violence Protection Act of 2000 has not been effective. To fully eliminate U.S. military involvement with human trafficking abroad, awareness programs, frequent investigations, and policy changes need to be implemented by the Department of Defense, along with cooperation by the Republic of Korea and other countries where human trafficking originates. Additionally, this goal must take precedence over any potential negative economic impacts on the Republic of Korea.

Sung Chang, Note, *Prostitutes + Condoms = AIDS?: The Leadership Act, USAID, and the HHS Guidelines' Failure to Define "Promoting Prostitution,"* 19 AM. U. J. GENDER SOC. POL'Y & L 373 (2011).

The Leadership Act—allocating $15 billion to combat HIV/AIDS, Tuberculosis, and Malaria—requires that recipients of such funds pledge not to promote prostitution or support any organization that does not explicitly oppose prostitution. The pledge requirement, along with interpretations of the Act by the United States Aid for International Development ("USAID") and United States Department of Health and Human Services ("HHS") Guidelines, are unconstitutionally vague and violate the First Amendment by compelling the speech of organizations receiving such funds to mirror the stance of the United States government. Many non-government organizations, to obtain funds under the Act, have ceased programs that might be construed as "promoting prostitution," such as training sex workers in condom use or giving free medical treatment to HIV-positive prostitutes. Other non-government organizations have refused funds so that they may continue with similar treatment methods. The author examines how "promoting" is defined in other contexts, including anti-terrorism efforts, faith-based initiatives, and abortion issues, to determine a constitutionally sound interpretation of "promoting prostitution." The author concludes that the ban on "promoting prostitution" should be struck down for violating the First Amendment by compelling speech; that the USAID and HHS Guidelines should be rescinded for being unconstitutionally vague; that the Guidelines violate Congress' intent to promote U.S. leadership in combatting HIV/AIDS; and that the courts should adopt the approaches taken by the United States Supreme Court in the anti-terrorism and

faith-based initiatives contexts, thereby including a mens rea requirement in defining what constitutes "promoting prostitution."

John A. Hall, *Sex Offenders and Child Sex Tourism: The Case for Passport Revocation*, 18 VA. J. SOC. POL'Y & L. 153 (2011).

Child sex tourism is a booming industry impacting up to two million children worldwide each year, and the current legal regime does little to prevent sex offenders convicted in the United States from traveling overseas to abuse children abroad. Federal domestic laws, marked primarily by the PROTECT Act of 2003 and recent amendments to the Trafficking Victims Protection Act, currently criminalize overseas sex abuse by Americans without requiring prosecutors to prove that the offender traveled abroad with the intent to commit a crime. These laws also impose strict penalties for those who are convicted. Nonetheless, this approach is ineffective because obtaining evidence and testimony from overseas victims is often impossible, and it improperly focuses on penalizing crimes after their commission, rather than on preventing them from occurring. The author drafted proposed revisions to the federal Passport Act, arguing that a better approach would authorize the revocation of convicted abusers' passports, forcing them to remain in the United States, where significant post-incarceration controls mitigate the possibility of recidivism. Due process concerns notwithstanding, such a scheme is constitutional because international travel is not an unqualified right. Therefore, restrictions on international travel are likely subject only to rational basis review, whereby the government will be permitted to refuse a passport merely by demonstrating that such action is reasonably related to the government's goal of preventing convicted sex offenders from abusing children in countries that lack the resources or initiative to prevent such abuse within their borders.

SEX OFFENSES

James J. Carty, Note, *Is the Teen Next Door a Child Pornographer? Parenting, Prosecuting, and Technology Clash over "Sexting" in* Miller v. Skumanick, 42 U. TOL. L. REV. 193 (2010).

Sexting—when teenagers send and receive explicit text messages or photographs—is a widespread social issue that has outpaced the law because lawmakers seem confused about how to prosecute and punish instances of sexting. Several concerns arise, including defining what constitutes "child pornography," a youth's First Amendment right to be free of forced speech, and the role of the prosecutor and judge in deciding what path to take in response to sexting cases. *Miller v. Skumanick* highlights these problems. A prosecutor discovered images on several minors' phones and deemed those images pornographic. The prosecutor then threatened prosecution against those who either pictured or possessed the images if they did not instead choose a diversionary program consisting of classes

and a period of probation. As there is very little precedent guidance in the area of sexting cases, prosecutors are basically "making up" the law as they see fit. In response to the mishandling of "sexting" cases such as the *Miller* case, the author suggests that state legislatures develop a statute that clearly enumerates the conduct it criminalizes, so that the minors pictured in the images will be dealt with differently than from those distributing the images. The statute should further state what types of images are prohibited and what consensual activity by minors will be criminalized, and should take into account the perpetrator's age. Legislative responses should balance the need to deter and protect children but should not be quick to prosecute children and destroy their futures by assigning them sex offender status.

Jenny M. Flanigan, Note, *Once, Twice, Three Times a Victim: Why a Defendant in a Sexual Assault Case Has No Right to Compel Physical Examinations*, 113 W. VA. L. REV. 621 (2011).

Defendants accused of sex offenses who request compulsory medical examinations of their victims often argue that due process entitles them to the tests' results. In the West Virginia case, *J. W. v. Knight*, the state's highest court affirmed the trial court's decision to require a fifteen-year-old victim to undergo a physical examination over her objections. The United States Supreme Court has yet to consider whether due process includes the right to compel physical examinations, or whether the victim has a privacy interest to refuse such an order, and states have adopted conflicting stances. In *Knight*, for example, the court employed a compelling need test which balances the defendant's need for the tests results against the victim's right to privacy. It has been posited, however, that a compulsory physical examination can provoke a victim into reliving the psychological and physical trauma experienced during the offense. Additionally, in cases of delayed examinations, the results will often be inconclusive and will not help to prove a defendant's innocence or guilt. Moreover, the Constitution does not protect a defendant's discovery requests over a victim's right to privacy and bodily integrity. Considering that this issue concerns a fundamental right and an expectation of privacy protected by the Fourth Amendment, the United States Supreme Court should resolutely affirm a victim's right to bodily integrity in sex offense cases, and thereby create a single standard for all states to follow.

Stephanie Gaylord Forbes, Note, *Sex, Cells and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM AND MARY L. REV. 1717 (2011).

The growing prevalence of "sexting," or sending sexual images via text messages, presents real-life policy concerns for teenagers today. In particular, minors can be prosecuted under state and federal child pornography laws for sexting, subjecting them to harsh penalties such as sex registration requirements as prescribed by the Sex Offender Registration and Notification Act ("SORNA").

While some states like Vermont have decriminalized sexting by adjudicating these offenses through juvenile delinquency proceedings, concerns over the harsh penalties for sexting in other states highlight the importance of trial practices, particularly the role of the jury in SORNA prosecutions. Child pornography offenses under SORNA require a "comparison test," or a finding that the offense is "comparable to or more severe than" other serious sex crimes such as sex trafficking or sexual coercion, but the law is silent on who should perform this test. Arguably, this determination should be left to a jury because the question involves findings of fact and because jurors, as members of the community, can engage with the facts on a case-by-case basis in order to make common sense judgments about the actual offense at trial. As a result, a congressional amendment to SORNA requiring a jury determination will ultimately serve the interests of justice, enabling the distinction between sexting and real child pornography to shine through.

Carissa Byrne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 WASH U. L. REV. 853 (2011).

The modern trend of conflating possession of child pornography with child sex abuse has resulted in unfair sentences for the former offense. Since the 1990s, state legislatures have significantly increased the penalties for the private possession of child pornography, sometimes to the extent that the punishment for such possession is greater than that for actual child sex abuse. The author identifies and rejects three arguments for such increases: that child pornography is worse than actual sexual abuse, rejected as hyperbole; that greater punishment for possession of child pornography prevents future child sex abuse, rejected as not being supported by the empirical data; and that possessors of child pornography are sexually abusing children undetected, so greater punishment is warranted for the former offense in order to compensate for the difficulty of prosecuting the latter, rejected also for being unsupported by empirical data. The author then argues that such conflation leads to the misperception that most sexual abuse is perpetrated by strangers and that laws focused on such offenders are sufficient, and contends that these misperceptions actually allow most sexual abuse to continue unaddressed. The nature of possession of child pornography has changed with the advent of the internet, and the sentences attached to such offenses should be reevaluated to better reflect the nature of, and dangers posed by, the offense. To address these changes, the author suggests a number of legislative and judicial reforms that would result in more appropriate sentences for the possession of child pornography.

Patrick J. Hines, Note, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879 (2011)

While most states have rules of evidence that protect rape victims in criminal proceedings from having their sexual histories discussed at trial, few jurisdictions have adopted similar protections for victims seeking civil damages against their

attackers. The stated reason for allowing evidence of the victim's prior sexual history in civil cases is that a victim's sexual history—whether it includes consensual sex or prior sexual abuse—bears directly on the victim's credibility and the defendant's guilt in a civil suit. However, admitting evidence of victims' sexual history discourages victims from bringing civil suits against their attackers. This is especially true if the victim's sexual history differs from the "ideal" virtuous virgin, who was where she was "supposed" to be when she was suddenly ambushed by a crazed stranger. States that do not extend protection to civil proceedings often allow defendants to escape financial liability because rape victims will often be dissuaded from bringing civil suits against their attackers if they wish to avoid having their sexual past exposed in a courtroom. The author discusses the importance of extending evidentiary protections to victims in civil suits, because criminal convictions do not solve the financial hardships that rape victims endure, such as physical injury, chronic pain, depression, and job loss.

Sarah Shekhter, Note, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085 (2011).

Following the passage of "Jessica's Law," every felony sex offender in California is required to wear a GPS tracking device for the rest of his or her life, and other states are quickly adopting similar schemes. Although the constitutionality of lifetime monitoring has yet to be formally decided, GPS monitoring of parolees has withstood constitutional challenges because parolees have lower expectations of privacy and are therefore unable to assert the Fourth Amendment's prohibition of warrantless searches. Lifetime monitoring, however, requires an alternative analysis. Since a convicted offender regains his pre-conviction expectation of privacy upon transition out of parole, the automatic continuation of monitoring violates the Fourth Amendment as an intrusive search without probable cause. Lifetime monitoring also violates constitutional prohibitions against retroactive punishment by restricting travel and stigmatizing the wearer of the GPS unit. Furthermore, lifetime monitoring frustrates due process because there is a lack of evidence that lifetime monitoring prevents repeat offenses, and courts are therefore unlikely to find it "narrowly tailored" to achieve public safety. There are also implementation problems that plague lifetime monitoring, including technological limitations and high financial costs. A better approach, the author argues, would require law enforcement to make individualized determinations based on an offender's history, and impose GPS surveillance selectively on offenders deemed to be particularly dangerous or unstable.

Amanda Moghaddam, Comment, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes from an Empirical Perspective*, 40 SW. U. L. REV. 223 (2010).

States commonly use residency restrictions for convicted sex offenders to monitor sex offenders and ensure that they are not residing near children, but these laws are ineffective at reducing recidivism rates. The restrictions further punish the offenders by denying them the fundamental right to choose where to live. During the 1990s, federal legislation required sex offenders to register in their state of residency, but some states went further in their attempts to keep children safe by implementing restrictions that forbade registered offenders from living near schools, parks, day cares, and playgrounds. Empirical evidence shows that repeat offenses by sex offenders are rarely committed close to where the offenders live. Restrictions often leave the offenders homeless and therefore undetectable by police if they do repeat their crimes. This Article argues that the United States Supreme Court should overturn the restrictions because they violate the Ex Post Facto Clause. If the legislative intent in passing residency restrictions were to enact a civil law, but if the law has punitive effects, the United States Supreme Court has the responsibility of determining whether the statute indeed imposes a criminal penalty and therefore violates the Ex Post Facto Clause.

Julie Halloran McLaughlin, *Crime and Punishment: Teen Sexting*, 115 PENN ST. L. REV. 135 (2010).

The First Amendment right to free speech does not protect certain categories of obscene images, including a teenager's digital transmission of nude or semi-nude images that rise to the level of child pornography. The author provides examples, statistics, and a summary of social and scientific studies to illustrate the growth and negative consequences of teen sexting and sexual activity. A review of Supreme Court cases, federal cases, and federal legislation shows that teenagers who engage in sexting and the transmission of pornographic imagery can be criminally prosecuted under federal child pornography laws. In fact, certain particularly severe state child pornography laws have resulted in the prosecution of teenagers as sex offenders. This Article argues that these legal responses to teen sexting have been inappropriate, and presents a "model teen sexting statute," which considers existing federal and state legislation, teens' constitutional rights, and additional concerns discussed in academic scholarship on teen sexting. The model statute applies to the activity of teenagers between the ages of thirteen and eighteen and shelters their private, non-obscene, and consensual transmission of sexual imagery from child pornography laws. The purpose of the model legislation is to sort constitutionally protected activity from harmful and obscene activity that should be adjudicated through the juvenile justice system.

Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327 (2011).

It is difficult for courts to administer criminal restitution claims under the Violence Against Women Act for child pornography possession against defendants who are not involved with actual production or distribution of child pornography. This is mainly due to the difficulty of establishing a causal connection between the possession of child pornography and the victim's harm. There is also the difficulty of administering the numerous cases spread across the United States, and courts rarely deny these restitution claims or provide proper reasoning for the damages awarded. The author addresses two theories of causation—the "relational theory" and "policy-based framework" as espoused in the seminal case *Palsgraf v. Long Island Railroad*—and finds that both approaches would most likely limit the application of Section 2259 restitution claims. To clarify the proximate cause issue, the author analogizes the possessor of child pornography to the reader of defamatory material. Under the single-publication rule, the producer and distributor of defamatory material may be liable, but the reader is not. The reader does not "cause" injury in a direct enough way, which should be the same method in handling the case of a possessor of child pornography. Rather than relying on criminal restitution claims, child pornography victims may be better served by bringing a civil tort claim of emotional distress or a civil action of restitution, which would avoid the problem posed by this causation issue.

Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 CLEV. ST. L. REV. 575 (2010).

Child competency hearings in sex abuse cases are inherently flawed and must be modified to ensure accurate exploration into the developmental maturity of a child and his ability to offer reliable, truthful testimony during a trial. Traditionally, child competency hearings inquire only into the basic functions of the child witnesses, revealing their simple ability to recognize the need to tell the truth, to tell the difference between right and wrong, and to identify dates and times. However, these factors are often not strong enough indicia of whether a child will be able to recognize the greater complexities in testifying: specifically, distinguishing reality from fantasy, placing events in chronological sequence, and relating the stories as they experienced them personally, rather than how others may have discussed them. Due to a lack of clear standards that address how to conduct these hearings, a child's capabilities may not be accurately assessed, and such unreliable testimony may lead to false convictions, a lack of helpful witnesses, and lasting psychological effects on the child. To ensure sufficient competency hearings, the author proposes various adjustments to the hearing process, including expanded questioning of the child, an investigation into the background of the child

before the hearing, appointing an independent legal guardian to conduct the examination, and employing expert witnesses to determine the maturity of the child if the competency hearings are inconclusive. Each of these changes to the system will enable more effective hearings and higher-quality determinations of child competency.

Jasmine S. Wynton, *Myspace, Yourspace, But Not Theirspace: The Constitutionality of Banning Sex Offenders From Social Networking Sites*, 60 DUKE L. J. 1859 (2011).

Recent state legislation prohibiting convicted sex offenders from using social networking websites have raised concern for two reasons. In some instances, when the bans are broadly applied, they restrict sex offenders' First Amendment right to freedom of association—a constitutional right that is not lost just because one has committed a sex offense. In other cases, where the bans are applied only to certain offenders, they are often based on misconceptions about sexual violence and sex offender behavior, and thus will not necessarily keep minors safe. Federal courts have developed a successful balance by generally opposing broad Internet bans and by upholding these prohibitions when there is a clear nexus between the underlying conduct leading to the offender's conviction and the Internet ban. State policies in this area have found support in large part from studies that are not based on reliable evidence, but have been successful because they instill a sense of public safety and legislative action. The author suggests that the courts, rather than state legislatures should be charged with delineating the rights of convicted sex offenders, because the courts are more readily able to tailor the result to the nature of the specific crime and the specific offender before them. Policies concerning the rights of convicted sex offenders need to be more narrowly tailored and based on empirical findings in order to vitiate the offenders' constitutional rights while at the same time protecting minors who use social networking sites.

WOMEN'S RIGHTS

Daphne Barak-Erez & Jayna Kothari, *When Sexual Harassment Law Goes East: Feminism, Legal Transplantation, and Social Change*, 47 STAN. J. INT'L L. 175 (2011).

By examining sexual harassment laws in India and Israel, this Article provides an analysis of the successes and failures of two national legal reforms. Chosen for their similar backgrounds—both were modeled on western lawmaking traditions and evolved in the late 1990s—India and Israel's laws differ starkly in application and public reception. Workplace sexual harassment was outlawed in India when the Supreme Court, urged by a women's rights organization, held that such behavior violated a woman's constitutional right to life and liberty. While India's new measures enjoyed popular support, in practice the guidelines have done

little to alter the workplace climate for women, largely due to the male and class-dominated culture. Israel, by distinction, passed comprehensive legislation which broadened the definition of sexual harassment, provided for criminal charges as well as civil actions, held employers accountable if they failed to comply with measures meant to curb harassment, and eliminated the need to prove lack of consent in situations of harassment by a workplace superior. Widely utilized, the laws have been a source of controversy from the beginning, culminating in a guilty verdict and sentence of hard labor for a government official accused of delivering an unwanted kiss to a subordinate. Even some feminists opined that the law went too far. The authors conclude by noting the gap between social acceptance and legal reform, observing that laws meant to protect the disenfranchised are more effective when they seek to benevolently protect these groups without challenging the society's power relationships.

Erin E. Buzuvis, *The Feminist Case for the NCAA's Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. REV. 439 (2011).

Competitive cheer should be recognized as an emerging sport by the NCAA and the courts for Title IX purposes because of the many benefits such recognition could have for women and the athletic programs of universities nationwide. Title IX prohibits gender discrimination in federally funded schools, but allows schools to exclude women from men's athletic teams so long as the school has "equivalent" opportunities for women. For years, courts have refused to recognize competitive cheer as a sport, arguing that the NCAA did not regard it as an official sport and that it did not resemble other varsity sports in regards to "coaching, budget, tryouts eligibility, practices" and competitions. This Article addresses how the NCAA's Emerging Sports initiative and the National Collegiate Acrobatics and Tumbling Association ("NCATA") have proposed to promote the growth of women's sports by redefining and reorganizing the sport of competitive cheer to make it more similar to other collegiate varsity sports. The NCAA agreed to recognize competitive cheer as a varsity sport if at least forty schools added it to their athletic programs within ten years, while the NCATA implemented rigid guidelines for the size of squads, number of competitions, meet format, and scoring. If the NCAA were to accept competitive cheer as a sport, women who participate in the sport would be given the proper athletic recognition that they deserve, as opposed to being stereotyped as sex symbols whose only role on the playing field is to cheer for male athletes.

Mala Htun & S. Laurel Weldon, *State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law*, 18 Ind. J. Global Legal Stud. 145 (2011).

At the end of the nineteenth century, laws across the world began to recognize women's rights, such as the right to work, the right to marry or divorce, and the right to inherit, own, and manage property. The greatest reforms were seen in countries that embrace a civil law, common law, socialist, or postsocialist legal tradition; however, many countries that were governed according to religious legal tradition (such as Islamic Shariah law) often continued to subrogate the rights of women. The author analyzes the variation of family laws cross-nationally and concludes that, generally, women remain most disadvantaged in countries with religiously inspired laws. In noncommunist countries that experienced the liberalization of family law, advances were precipitated by social change coupled with widely supported and intense political movements, and succeeded despite opposition from the religious establishment. In communist countries, the call for the equality of women was consistent with socialist thought, and many nations developed an egalitarian outlook toward family laws that was retained with the fall of communism in Eastern Europe. However, in the postcommunist era, many of these same states repealed social programs that enhanced the rights of women. While many countries that follow Shariah law have failed to significantly advance law that liberalizes family matters, several countries are taking small steps toward change. These changes indicate a possibility for any country—no matter the path that it has followed—to change its family law to promote equality between the sexes.

Terri Nilliasca, Note, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377 (2011).

In the United States, the denial of labor protections for domestic workers, who are often immigrant women and women of color, underscores divided but interconnected forces of race, class, and gender between the domestic worker and their often White employers. The author argues that White employers' ability to exert substantial power over the workers' lives and employments can be explained by structural liberalism—a theory which divides various areas of society into independent "private" and "public" spheres that should be governed differently. The codification of this theory has led to the legal protection of the home (the "private sphere") of White employers while simultaneously reinforcing White supremacy and White privilege by allowing the employers to overuse, underpay, fire at whim, and harass their domestic workers without substantive legal recourse. Furthermore, the White feminist movement has contributed to the problem of class and racial divide between White women and women of color that began in slavery when Black women had to raise White children and perform domestic tasks. This

substitution of homemakers has continued into modern times and allowed the White women to take on the public role as "liberated", working women while the women of color's struggles as the nannies and maids of White families never entered public feminist discourse. Although the New York's Domestic Worker Bill of Rights aims to provide legal protection and immanency for the workers by requiring overtime pay and time off in certain circumstances, and providing recourse for sexual or racial harassment, it does not fully address the issue of the actual working conditions. The author asserts that in fighting for true legal recognition and protection, domestic workers and their allies should fight for systematic change in actual domestic employment conditions through a variety of tools, including political efforts and non-political forms of resistance.