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ABORTION AND REPRODUCTIVE RIGHTS

Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009).

Advances in biotechnology, especially within the area of human reproduction, have sparked much controversy. With the advent of assisted reproductive technology ("ART"), particularly surrogacy arrangements, the historically simple question of whom exactly a child's parents are has become exponentially more complicated in light of the fact that a child born by way of surrogacy might have a genetic mother, a genetic father, any number of social/intended parents and a gestational mother. Conducting a state-by-state survey, the author reveals that the legal landscape concerning surrogacy is extremely varied. While thirteen states, including Arkansas and California, expressly allow for surrogacy, the vast majority of states are silent or near silent on whether, when and how surrogacy arrangements will be recognized. However, given the attractiveness of surrogacy to infertile females, those states which have not yet legislated on the issue will, sooner or later, be forced to confront the social, biological and cultural question that surrogacy presents regarding parenthood.

Robert John Araujo, S.J., *Abortion – From Privacy to Equality: The Failure of the Justifications for Taking Human Life*, 45 HOUS. L. REV. 1737 (2009).

With the landmark decision of *Roe v. Wade*, the United States Supreme Court legalized certain instances of abortion relying largely on the rationale of women's privacy. However, as a result of intense scrutiny by legal scholars, the privacy argument used by the Court to support legalized abortion became unsound in principle. In response to these challenges, Supreme Court jurisprudence has shied away from continued invocation of the privacy rationale and has instead utilized an argument based on equality—specifically gender equality—to justify abortion. However, there is a critical flaw which fatally plagues the equality justification proffered by more recent Supreme Court cases: in asserting any equality argument, the rights and liberties of all—including unborn babies—must be taken into account. Any other analysis would, as portrayed in George Orwell's *Animal Farm*, conclude that all people are created equal, but some are more equal than others.

Douglas S. Curran, Note, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107 (2009).

After several publicized deaths of mothers and their unborn fetuses, various state legislatures criminalized fetal homicide. Historically, homicide statutes were interpreted to exclude the killing of a fetus by applying the common law "born-alive" standard, which states that a fetus cannot be killed in the legal sense unless it was first born alive. However, following the legal mobilization of fetal homicide proponents, states have utilized judicial decisions and a variety of legislation to broaden the reach of homicide laws to include the killing of a fetus. While opponents of feticide legislation argue that these laws infringe on a woman's constitutionally protected right to reproductive freedom, this Note argues that by protecting a mother's decision to bring her fetus to full term, feticide laws complement the fight to protect these rights. As of 2009, thirty-six states have implemented some form of fetal homicide law, and until the fourteen other states adopt similar legislation, a mother and her unborn child remain unprotected.

Susan B. Apel, *Access Denied: Assisted Reproductive Technology Services and the Resurrection of Hill-Burton*, 35 WM. MITCHELL L. REV. 412 (2009).

Persons attempting to benefit from Assisted Reproductive Technologies ("ART") have recently been denied treatment, either on the basis of sexual orientation or marital status. In response to the shortage of hospitals throughout the nation, Congress enacted the Hill-Burton Act of 1946, which was partially designed to provide a "community service assurance" by making medical services available to all persons within their territorial area. The author analyzes the legislative purpose, history and language of the Hill-Burton Act to determine whether it can enable people previously denied access to ART to benefit from the treatment. Although Conscience Clause legislation and other legal obstacles serve as deterrents to applying the Hill-Burton Act to ART, these should not prevent the law's application, but at most should serve only to properly determine whether a particular patient deserves such treatment. Ultimately, because the Hill-Burton Act and its regulations clearly forbid discrimination against patients for non-medical reasons, it should be an effective way of challenging recent discrimination while providing access to ART for individuals recently denied treatment.

Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155 (2009).

The Constitutional Silence Argument, which contends that the Constitution is silent concerning abortion law, is incorrect because the Fourteenth Amendment

grants "persons" the basic rights of life and the equal protection of the laws. Although pregnant women are considered constitutional persons under the Fourteenth Amendment, the status of fetuses' rights is highly debated, with a result that directly affects abortion law: if fetuses are not considered constitutional persons, then pregnant women's rights are superior, and they should be entitled to abort, but if fetuses are considered constitutional persons, then abortions should not be allowed because fetuses possess the same rights as any other person under the Fourteenth Amendment. However, if one assumes that unborn babies are considered constitutional persons, an anomaly results: pregnant women lose their rights as constitutional persons by being unable to abort because, within this approach, abortion is tantamount to murder. The author shows the incompatible nature of this approach, which deprives women of their constitutional rights, prevents them from exercising self-autonomy and uproots basic ideals of equal rights. Ultimately, because the Constitutional Silence Argument is false, the Court must reassess the constitutionality of recognizing unborn children to fully ascertain the legality of abortions in light of the countervailing state interest to protect unborn human lives.

Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433 (2009).

Posthumous reproduction raises a number of legal issues, namely determining the parentage of children for such purposes as Social Security claims and inheritance issues. Proposed uniform laws and model acts dealing with these issues—including The Uniform Parentage Act and the American Bar Association Model Act on Assisted Reproduction—require that express consent is given during the lifetime of the person for assisted reproduction to occur after his or her death in order for parentage to be attributed to that deceased individual. Some states have enacted either modified versions of the Uniform Parentage Act or assisted reproduction statutes providing for posthumously conceived children, several of which do not attribute parentage when the child was born out of a non-marital relationship despite express consent. Most states, however, have no statutes expressly dealing with posthumous conception, and in such cases it falls on the courts to interpret generalized statutes and case law to determine whether to attribute parentage to the deceased individual. Accordingly, the status of such children remains uncertain because posthumously conceived children are treated differently from state to state.

Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489 (2009).

The use of cryopreserved embryos is one type of reproductive technology through in vitro fertilization that enables a woman to give birth to a child that does not have any genetic makeup of her own. The disposition of cryopreserved embryos provides a fast and affordable alternative for an infertile person or couple to have children, but the legal status given to embryos is inconsistent and has resulted in a conflicting framework for embryo adoption/donation cases. This article presents an overview of the "typical" embryo adoption/donation in the United States, and the separate models of adoption and donation by which third parties obtain cryopreserved embryos. The traditional adoption model should not be applied to the disposition of cryopreserved embryos because it conflicts with the termination of parental rights and may create other issues where an embryo adoption is contested between the genetic and birth parents. Since issues surrounding frozen embryos are highly debatable in the political and scientific communities, legislative guidance and use of consistent terminology are needed to maintain embryo adoption/donation as a viable method of family building.

Caroline C. Owings, *The Right to Recovery for Emotional Distress Arising from a Claim for Wrongful Birth*, 32 AM. J. TRIAL ADVOC. 143 (2008).

There is continued disparity between jurisdictions that recognize wrongful birth claims and those that do not permit such claims. Wrongful birth claims involve negligent genetic testing or fetal ultrasound testing that result in planned but mentally or physically disabled children. The majority of jurisdictions employ statutory extensions of tort law to provide a cause of action for wrongful birth; the minority of states rejects such claims by relying on traditional common law notions of tort law and the inability "to place a value on human life." Furthermore, jurisdictions are still split as to whether emotional distress damages remedy wrongful birth claims, as jurisdictions that recognize the emotional injury of parents still have to meet the common law physical injury requirement. While the debate persists, the jurisdictions that recognize wrongful birth claims continue to extend the parameters of traditional tort law or find alternate paths, including bystander-witness claims and traditional negligence claims.

Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249 (2009).

The Supreme Court allows abortions only up to the point of fetal viability, after which the fetus is protected by the state from the moment it can survive

outside the womb. Two important questions arise from the Court's stance: why is the constitutional line drawn at viability, and what is the Court's justification for this line? This article criticizes the Supreme Court's failure to adequately answer either of these inquiries by examining the faulty explanations the Court offers in *Gonzales v. Carhart* and *Planned Parenthood v. Casey*. In these cases, the Supreme Court repeatedly states that the constitutional lines it draws must be legitimate, yet the Court fails to substantiate any genuine link between a standard of "independent existence" and the constitutional protection this standard provides so-called viable fetuses. This seemingly arbitrary line of protection ultimately provides state protection of fetuses in "morally random" circumstances based on constitutionally irrelevant factors, such as availability of advanced medical care or the financial status of the mother.

Theresa M. Erickson and Megan T. Erickson, Note, *What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce*, 35 WM. MITCHELL L. REV. 469 (2009).

The increasing frequency in which married couples struggling with infertility use Assisted Reproductive Technologies ("ART") has created new and challenging legal questions surrounding the disposition of embryos in the event of a divorce. Paramount among the legal issues that have yet to be fully resolved is whether constitutional or contractual law should govern the disposition of embryos and whether embryos should be viewed as "persons" or property. Courts are split on the constitutional or contractual question, with some courts applying principles of contract law to interpret the language of the embryo disposition documents that are frequently signed by couples prior to ART procedures, while other courts have used a constitutional balancing test based on the interests of the parties involved. Further, since embryos do not fit neatly into either a "persons" or property category, some have argued that embryos be afforded special status under the law. Given the current complexity and confusion that embryo disposition often causes, the legal and medical communities ought to draft binding and enforceable disposition documents to standardize the process and result in less litigation.

Wade Schueneman, *What Do We Have Against Parents?: An Assessment of Judicial Bypass Procedures and Parental Involvement in Abortions by Minors*, 43 GA. L. REV. 617 (2009).

After enumerating federal and state requirements for abortions by minors, the article focuses on the contention that judicial bypass procedures, which allow minors to literally bypass parental consent requirements imposed by statute, consistently favor minors at the expense of parental interests. While bypass procedures vary from state to state, the vast majority of bypass requests are granted.

Of the several reasons provided to explain the high frequency of approval for bypass requests, one explanation posits that the bypass hearing generally consists of conversations between a judge and the minor, with little to no parental involvement or adversarial factor. Further, courts generally have to assess both the level of maturity of the minor and how well-informed the minor is concerning the issues of abortion, yet assessment standards have proven illusory and often go unpublished. A more balanced approach to bypass procedures would make the process more family inclusive by allowing parents a more active role in the bypass process and standardizing the methods used to assess the preparedness of the minor to follow through with an abortion.

Naomi Cahn, *Accidental Incest: Drawing the Line – or the Curtain? – for Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009).

In 2004, roughly more than 30,000 children were born from egg and sperm donations, and as this number grows each year, the possibility of "inadvertent consanguinity" or "accidental incest" between half-siblings, who are unaware of their genetic similarities or sibling status, is becoming worrisome for some researchers. This article focuses on whether the same criminal and civil sanctions should apply to "inadvertent consanguinity" as to the traditional incestuous relationships, and whether there should be limits on the amount of offspring that a single sperm or egg donor can have through reproductive technologies. These issues are explored by looking at feminism and reproductive technologies and the regulation of egg and sperm donations in the United States and other countries. Ultimately, there should be federal and state restrictions on the number of offspring that an individual egg or sperm donor can have, and the rules and regulations against incest should apply to half-siblings produced through reproductive technologies. Disgust and fear of "inadvertent consanguinity" should not be in the forefront of people's mind when creating laws and regulations, but a more scholarly look should be taken into account so that laws and regulations accurately reflect potential problems.

Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 CUMB. L. REV. 1 (2008).

Since the discovery of in vitro fertilization ("IVF")—the artificial insemination of egg and sperm in a Petri dish and implantation in a woman's uterus—in the 1970s, millions of infertile couples around the world have had children through the use of IVF. However, after a string of negative media stories about human embryo and fetus research, Congress banned federally funded research on fetuses and embryos in 1974. Since then, most of the reproductive research in the United States has moved to private clinics that are funded by paying

patients. The author notes that people have voiced objections to paid surrogacy for the following reasons: it commercializes the bearing of offspring, it is not in the "best interest of the child," and it exploits poor women who need the money. Reproductive assistance should not be regulated more stringently in the United States because paying women for their eggs merely compensates them for their work and time, which relates significantly to the deregulated practice of adoption.

Gregory Dolin et al., *Medical Hope, Legal Pitfalls: Potential Legal Issues in the Emerging Field of Oncofertility*, 49 SANTA CLARA L. REV. 673 (2009).

Although traditional cancer treatments have effectively reduced the number of related fatalities, such treatments often leave patients infertile. As a result, medical researchers have developed new approaches to preserve patient reproductive capabilities, known as "oncofertility." The growth of oncofertility, has called into question values such as a woman's or a minor's right to reproduce or use reproduction-assisting technology. Additionally, oncofertility has raised numerous issues surrounding consent for reproduction-assisting treatments, as well as who maintains legal rights over excised tissue after such treatment is conducted. The article suggests that the law relating to oncofertility ought to develop by analyzing laws related to other procedures—including female genital cutting, sex assignment surgery, and sterilization—that also involve reproductive rights.

Catherine A. Clements, Note, *What About the Children? A Call for Regulation of Assisted Reproductive Technology*, 84 IND. L.J. 331 (2009).

A set of regulations should be promulgated to address the risk of injury and high costs to unborn children, parents, and the public through the use of assisted reproductive technology. Increased use of assisted reproductive technology has corresponded to an increase in the number of stillbirths, miscarriages, and multi-births that harm the mother; and mortality, mental retardation, and visual and auditory impairments that harm the children born through such technology. Although various proposed regulatory models exist—including the Model Assisted Reproductive Technology Act, the ABA Model Act, and Professor Rosato's "double-decker" approach—the author believes that these models fail to account for issues such as limiting harmful multiple births and the need to shift from ineffective state regulation to a federal system. Instead, the United States ought to borrow from European regulatory models while implementing guidelines to which physicians in the United States would more likely be receptive. In so doing, the United States could account for the welfare of unborn children without overly burdening the parents or creating problems surrounding its implementation.

Ashley E. Bashur, Comment, *Whose Baby Is It Anyway? The Current and Future Status of Surrogacy Contracts in Maryland*, 38 U. BALT. L. REV. 165 (2008).

While scientific advances such as assisted reproductive technologies have allowed people to have children when nature otherwise wouldn't allow it, such advances have also raised a number of issues concerning the enforceability and construction of arrangements such as surrogacy contracts. States vary in their view of the status of surrogacy contracts—some state courts regard surrogacy contracts as enforceable while other state courts consider them void. The Court of Appeals of Maryland's decision in *In Re Roberto D.B.* recognized a woman's right as a surrogate to challenge the child's parents' maternity of a child and also to request the removal of those parents' names from the birth certificate. The author examines Maryland's legislative and judicial history relating to the enforceability of surrogacy contracts prior to *In Re Roberto D.B.*, and then explores the implications this case has on Maryland surrogacy law when a surrogate seeks to assert her parental rights rather than relinquish them. The author suggests that the Maryland legislature should pass legislation recognizing surrogacy arrangements and should help to prevent parental rights disputes by providing contract guidelines and an explicit statutory scheme that would secure parentage for the intended parents of the baby.

Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15 (2008).

Medical advancements improving the effectiveness of surrogacy arrangements, in addition to increasing restrictions on international adoption, have created a growing trend of international surrogacy contracts between individuals in the United States and India. Although the Indian women acting as surrogates are allowed compensation, very little protection exists for such surrogates under both Indian and United States law with respect to the amount of information they are given regarding the potential risks of the procedures, their ability to give informed consent, and any legal claims to the baby that they give birth to. The international nature of these surrogacy contracts also creates ethical concerns as to whether the arrangements treat babies as commodities, thereby reinforcing racial stereotypes, including the stereotype that Western couples "shop" for women to carry their babies and for jurisdictions that will enforce their surrogacy contracts. A number of unaddressed issues arise from international surrogacy arrangements, including how to determine the baby's parentage and citizenship, and how to help affected children deal with the realization that they were created with the sole purpose of being given away. Because of the failure of individual nations and of the

international community to adequately protect the women acting as surrogates, the author concludes that the practice of international surrogacy contracts should be banned.

Joseph W. Dellapenna, *Abortion Across State Lines,* 2008 BYU L. REV. 1651 (2008).

As a result of the Supreme Court's unclear guidance, state abortion laws vary in important ways. Neighboring states that have dissimilar laws face the issue of abortion tourism, which occurs when a woman travels to a less restrictive state in order to have the procedure. This prompts the question of whether a resident, or those who help a resident who crosses state lines to have an abortion in a less regulated jurisdiction, may then be subject to civil or criminal action in their state of residence. This question is examined through various constitutional provisions, including the Full Faith and Credit Clause and the application of the Due Process Clauses. The author asserts that among the uneasy framework of choice of law theory and conflict of law issues, the possibility may exist that an abortion tourist, and those who aid them, could be subject to the more restrictive laws of their home state.

Francis J. Beckwith, *The Supreme Court, Roe v. Wade, And Abortion Law*, 1 LIBERTY U. L. REV. 37 (2006).

As it stands, *Roe v. Wade* does not place restrictions on abortions during a women's pregnancy—as long as the procedure does not harm the woman's health—but does allow the state to intervene through law on a viable fetus's behalf. The author points out the flaws in the opinion regarding the "right" to an abortion at the expense of the fetus, which is arguably a life at conception. Nineteenth century abortion laws existed to protect the unborn, and though personhood is undefined in the Fourteenth Amendment, the legislature did not intend to exclude the unborn from protection under the Constitution. *Webster v. Reproductive Health Services* questioned *Roe* by rejecting the trimester structure and the commencement of viability later in gestation, but there is still much leeway in acquiring an abortion for physical, mental, and emotional health reasons. This leeway, in addition to the *Planned Parenthood v. Casey* protection against "undue burdens" created by the state, fails to guard the life of the fetus until the fetus is born.

Mark A. Pemberton, *Kentucky, Fetal Homicide, and the Supreme Court's Problematic Personhood Jurisprudence*, 1 LIBERTY U. L. REV. 173 (2006).

The Supreme Court's classification that unborn children are not legal persons is inconsistent with state fetal homicide statutes that seek to protect the rights of unborn children. In *Commonwealth of Kentucky v. Morris*, the Kentucky Supreme Court ruled that homicide protection applied to unborn children, and overruled the common law "born-alive" standard, which stated that the killing of an unborn child was not considered homicide unless the child had some existence of its own. In response to the *Morris* case, Kentucky enacted a fetal homicide statute that punished killing of unborn children any time after conception, but still protected a women's right to abortion and did not punish doctors who performed abortions and fertility treatments. Although there is a general trend toward punishment for fetal homicide, the Supreme Court's abortion jurisprudence has made it difficult for states to effectively designate fetal homicide statutes as a standard homicide statute, and states continue to face equal protection problems. Until the Supreme Court recognizes the rights of unborn children, states will continue to face significant obstacles in protecting unborn children, and the Supreme Court will continue to have its abortion jurisprudence challenged.

Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403 (2009).

Due to medical developments that permit women to use the sperm of deceased men to conceive children, the right of posthumously conceived children to inherit from their fathers has become an unresolved issue in many states. Because most states have not passed statutes concerning posthumously conceived children's inheritance abilities, courts in such states have determined on their own that these children are allowed to inherit from their fathers. The few ratified statutes concerning posthumously conceived children's inheritance privileges state that they can inherit from their fathers only if their fathers expressed in writing that their sperm could be used to conceive children, the children were born soon after their fathers' deaths, and the children's parents were married. The author declares that the birth of more posthumously conceived children necessitates all states to pass relevant inheritance statutes, but state legislatures should consider the interests of the state, the child, the father, and others entitled to inherit from the father before enacting these statutes. While posthumously conceived children are eligible to inherit from their fathers, they should only be able to inherit if their fathers indicated in writing that their sperm could be used to create these children, and if the children were conceived a few years after their fathers' deaths.

Vincent J. Samar, *Abortion: The Persistent Debate and its Implications for Stem-Cell Research*, 11 J.L. & FAM. STUD. 133 (2008).

While the United States Supreme Court officially sanctioned a woman's right to choose in its decision in *Roe v. Wade*, debate over the constitutionality of abortion has persisted and continues to dominate public and political discussion. The abortion debate has negatively impacted scientific progress with regard to stem-cell research, because moral concerns about the protection owed to a human embryo have resulted in decreased federal funding for this important medical testing. The author argues that the scientific and political communities have failed to recognize that fetuses are not moral agents in control of their own actions and therefore, fetuses do not deserve the same amount of respect due to a pregnant woman grappling with the question of abortion. Those who support abortion rights believe that while a fetus has the potential for moral agency, it cannot be afforded rights as a human being until it is fully developed and has been physically separated from its mother. In order to protect a woman's right to choose and the right to employ embryonic tissue in medical research, it is imperative that the public develop a thorough understanding of the concept of human agency and learn to appreciate the vast differences between the legal status of a fetus and of a pregnant woman.

BIOETHICS

Priscilla Norwood Harris, *Money, Fear and Prejudice: Why the Courts Killed Terri Schiavo*, 30 WOMEN'S RTS. L. REP. 42 (2008).

The Florida court's decision in 2000 to remove Terri Schiavo's feeding tube—at the request of her husband Michael and against the request of Terri's immediate family—sparked controversy because scholars disagree whether removal of the tube would best honor Terri's wishes. Terri had no living will or written directive of her wishes, and the only actual evidence at hearings consisted of casual hearsay comments made by Terri to family members and friends from 1980. The author argues that several factors contributed to the legally incorrect decision to remove the feeding tube. Factors included procedural errors at trial, disproportionate funding spent on Michael's case and the media's faulty coverage of the issues of the case. Prejudice against individuals living with disabilities also motivated the decision to remove the feeding tube, which should not be considered when deciding a case as a matter of law.

CHILDREN AND IMMIGRATION

Melanie A. Conroy, *Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation*, 22 HARV. HUM. RTS. J. 109 (2009).

Although women fleeing their home countries in fear of female genital mutilation will likely qualify for asylum in the United States, the courts are still divided on the legal status of the parents of these young women. Under U.S. law, the granting of asylum to refugees is strictly discretionary, and courts must decide on a case-by-case basis whether the harm to the claimant-parent is sufficient to establish persecution. Parents can establish an independent and sufficient persecution claim for asylum by establishing a "well-founded fear" that their child will be subject to female genital mutilation, as well as either an inability to prevent the mutilation or the inability to maintain the family unit if the parent is not granted asylum. Several courts have rejected asylum claims by erroneously denying the possibility of independent claims and inappropriately limiting parents to unavailable derivative claims. Nevertheless, the severe harm parents endure while fearing both the possible, and often inevitable, mutilation of their daughter, as well as the forced separation of the family, rises to the level of persecution sufficient to establish an independent claim.

Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U. L.J. 219 (2008).

De facto deportation of children born in the United States occurs as a result of deporting their illegal immigrant parents. Current U.S. policy regarding children of illegal immigrants asserts that deporting the illegal alien parent does not infringe on the child's constitutional right to citizenship; the citizenship rights of the child do not transfer to the illegal immigrant parent solely due to the parent giving birth on American soil. This problem stems from our government's long standing implementation of a strict *jus soli* citizenship law—immediate full citizenship upon birth in America—because it forces children of illegal immigrants to make the impossible choice of following their parents back to a third world country, or stay in America without the constitutionally guaranteed benefits of having a family. Possible solutions to this de facto deportation problem arise by examining the policies of other liberal Western democracies, such as Canada, Australia, and France, in response to massive waves of illegal immigration and resulting *jus soli* citizen children. Accordingly, the author proposes reforming citizenship policy to follow France's model, and reward a child of illegal immigrants with full

citizenship only after prerequisites are attained, such as establishing residency or reaching the age of maturity.

MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247 (2008).

While some courts ignore a parent's undocumented status, other courts expressly examine whether or not a parent is an unauthorized immigrant when making a determination involving the custody of a child. Undocumented immigrants are not afforded the same rights as legal citizens of the United States, but the children of these immigrants who are born on U.S. soil are legal citizens and must receive the same protection and rights shared by other American citizens. Several attempts have been made to implement legislation that would prevent these children from attaining full citizenship, but these attempts have repeatedly failed because such legislation might unjustly punish the children involved. While undocumented immigrant parents who are subject to removal from the United States often argue that their child, as a U.S. citizen, may be subject to extreme hardship if removed from the country, extreme hardship is difficult to prove and therefore, many courts have persisted in deporting undocumented parents regardless of their child's citizenship. Considering parental immigration status in child custody cases is problematic since such consideration might lead to violations of the child's rights and might discourage custody claims by certain parties—particularly illegal women who have been abused by their spouse—due to fear that their spouse might use their illegal immigrant status to have them removed from the country.

CHILDREN AND TEENAGERS

Emily W. McGill, *Penny Wise, Pound Foolish: Child Welfare Agencies as Social Security Representative Payees for Foster Children*, 58 CASE W. RES. L. REV. 961 (2008).

In addition to pursuing legislative avenues, foster children may employ litigation as a new promising option to release at least some Social Security benefits from agencies' control due to John G.'s favorable decision as a North Carolina foster child. Social Security benefits of foster children prior to this case were usually administered by their payee, who acted on behalf of the beneficiary's best interest after paying for the costs of their foster care. Given the increased

occurrences of payees misusing the foster children's benefits, the author proposes that the court establish alternate methods of relaying the funds to the children, such as small bank accounts to be accessible when they reach the age of eighteen, or small allowances to help them develop money management skills. These alternate methods may be more efficient in addressing and accounting for the foster children's best interests. Although much of these children's benefit money goes towards the funding of fostercare, it would be wiser and more beneficial in the long run to allow children to have access to the resources they need now so that they receive the tools necessary to allow them to become viable citizens.

Calista Menzhuber, *In the Absence of Parents: Expanding Liability for Caretaker's Failure to Protect Minors from Third-Party Harm - Bjerke v. Johnson*, 35 WM. MITCHELL L. REV. 714 (2009).

The Minnesota Supreme Court's decision in *Bjerke v. Johnson* greatly expanded nonfeasance liability for harm caused to a child left in the defendant's care. In prior cases, the court found that special relationships existed in a very limited number of situations, such as when one party has control over another's daily welfare. In *Bjerke*, the Court held that there was a special relationship between the plaintiff-minor and the defendant whose horse farm the plaintiff visited during several summers, despite the fact that the defendant did not have legal custody of the plaintiff. The *Bjerke* decision gives rise to questions about how much responsibility should be placed on the parents to protect their children when they are far from home—an issue which has not been explored by the Minnesota courts. Though the court greatly expanded nonfeasance liability and the construction of special relationships in Minnesota, the author posits that *Bjerke* was properly founded on the court's previous decisions that established specific criteria for determining the existence of a special relationship.

Pamela Newell Williams, *A Comparison of Child Advocacy Laws in Abuse and Neglect Cases in England and the United States*, 31 N.C. CENT. L. REV. 33 (2008).

This article focuses on the shortfalls of the protections for children from abuse and neglect in England and the United States. The United States has a history of strong constitutional protection of children, but was one of only two countries in the United Nations to fail to ratify the Convention on the Rights of the Child. In contrast, England ratified the Convention but falls behind in protecting the constitutional rights of its children. Both countries have high rates of child maltreatment but their child protection legislation does not sufficiently address the factors contributing to such maltreatment and narrowly defines abuse and neglect. Some suggestions for improving the child protection policies of these two nations

include making family and juvenile court proceedings less adversarial, giving children the same legal protections as adults, and providing children support to seek help from abuse and neglect.

Sandra Keen McGlothlin, *No More "Rag Dolls In The Corner": A Proposal To Give Children In Custody Disputes A Voice, Respect, Dignity, And Hope*, 11 J. L. & FAM. STUD. 67 (2008).

The future of a child is at stake when he is the subject of a custody dispute, and thus he is entitled to representation in the courtroom separate from the counsel for each of his parents. Though courts have appointed representation for juveniles in delinquency and abuse proceedings, courts do not require that a child have an advocate in a custody battle. Historically, children's rights were not recognized—as children were analogous to property—but with the *parens patriae* doctrine, and other acts and case law that protect child welfare, the importance of seeing a child as a person emerged. The Court Appointed Special Advocate ("CASA") Program addresses the lack of the child's role in proceedings that affect his life, and works to inform the judge in exercising discretion regarding the child's best interest. An appointed advocate would act as a filter for a child that is enduring trauma such as divorce, and though funding may prove an issue, CASA volunteers are potential resources to utilize going forward.

Dana E. Prescott, *COSAs and Psychopharmacological Interventions: Informed Consent and a Child's Right to Self-Determination,* 11 J.L. & FAM. STUD. 97 (2008).

Minor children of substance abusers ("COSAs") are often diagnosed with behavioral and psychological disorders, requiring parents, who often are not sufficiently informed to make a decision, to decide whether their children should be medicinally treated. Parents may adopt a healthcare professional's judgment without considering the child's right to self-determination in taking psychopharmacological drugs, which are often not FDA-approved for use in children. Although parents historically have the final say when it comes to their children, the trend in recent cases such as *Prince v. Massachusetts* is to treat children more autonomously and to respect a child's constitutional rights to due process. Arguably, requiring COSAs to take medication may violate their constitutional right of privacy and bodily integrity. The author argues that in an ideal world, a medical professional, an attorney, and a medical healthcare professional—all familiar with the family as well as the child—should all contribute to the decision of when to medicate a COSA.

Elizabeth Upchurch, *Putting Focus Back on the Family: Using Multisystemic Therapy and Regionalized Incarceration as Alternatives to the Texas Youth Commission*, 15 TEX. WESLEYAN L. REV. 161 (2008).

This article argues for the replacement of the Texas Youth Commission ("TYC") with locally managed, multi-systemic therapy to better deal with Texas juvenile offenders. The TYC has historically been plagued with claims of abuse and neglect despite the numerous reforms that the program has undergone, in part because these reforms have not been fully realized, and also because even greater additional reforms are needed to adequately address all of the problems in the TYC. A better alternative to the TYC would require that habitual or serious juvenile offenders undertake multi-systemic therapy and incarceration in small, regionalized facilities. Research has shown that this alternative is cost-effective, keeps youth more involved with their families and reduces recurring offenses. Now is the time to implement this alternative and acknowledge the failure of the TYC to better help Texas's juvenile delinquents.

Michael T. Crabb, *Child Victim, Adult Plaintiff: How Kansas Attorney-Client Privilege Law Can Harm Teens and Their Parents*, 18 KAN. J.L. & PUB. POL'Y 73 (2008).

While the attorney-client privilege is highly protected in the legal system, it can stand in the way of a plaintiff's case due to the varying applications of the privilege by different states when parents act as agents of their minor children. A minor child is generally unable to bring his or her own case, so in such situations a parent may act as an agent on behalf of the child and maintain communications with the attorney. However, because Kansas's statutory definition of client includes agents of the attorney but not of the client, an issue arises as to whether the attorney-client privilege protecting the communications between the parent and attorney should be maintained once the plaintiff reaches the age of majority. The author posits that in order to reconcile this statutory gap with the common knowledge that a minor cannot bring a suit on his or her own, Kansas courts should adopt the "reasonably necessary" standard used by other jurisdictions to uphold attorney-client privilege between a reasonably necessary agent or representative of the plaintiff and the attorney. Otherwise, the purpose of attorney-client privilege—aiding in the preparation of a case by guaranteeing that the information and communications will remain confidential—would lead to the unjust result of weakening the case that the plaintiff was not able to bring on his or her own as a minor.

Margaret F. Brinig, *Children's Beliefs and Family Law,* 58 EMORY L.J. 55 (2008).

As indicated by the Supreme Court in *Elk Grove Unified School District v. Newdow*, children's deeply held religious convictions affect their well-being, growth, and development and as a result should sometimes be analyzed independently of parental religious views. A study conducted by the National Opinion Research Center revealed a correlation in teens between religious beliefs and positive outlook on the world, and also demonstrated the influence of parental and peer religious views on a child's behavior. Such influence, coupled with presumption that parents have the best interests of the child in mind, suggests that especially in cases of very young children, parents share their children's beliefs and will serve as the best advocates for their children's religious interests. However, if a family is in turmoil, the court might consider not associating a child's religious beliefs with their parents' viewpoints. The author concludes that while in most cases children's interests do not need to be considered separately, the court should take notice if an older child desires to express an independent religious view.

Rebekah G. Hope, *Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?*, 69 LA. L. REV. 349 (2009).

The 2004 reauthorization of the Individuals with Disabilities Education Act ("IDEA") mandates that qualified children with disabilities must receive access to affordable and adequate public education. The changed law allows judges to appoint a surrogate parent to address the needs of homeless and foster children and loosens the criteria of when a foster parent can act in the shoes of the child's parents in regard to educations decisions. The revamping of the law was greatly needed because foster children tend to underperform academically because they are constantly switching schools and "home environments," and foster children with disabilities typically do not have an advocate to make sure that they are receiving an appropriate education or are unable to receive proper diagnosis of a disability and proper treatment due to their unstable environment. Judges need to be made aware of their ability to appoint surrogates through IDEA and that disabilities can exist within that population. IDEA faces other challenges which include the need to set qualifications of what a surrogate parent entails, and the need to develop a strong communication system between school systems, child protective agencies and courts.

Danielle Hawkes, Note, *Locking Up Children: Lessons From the T. Don Hutto Family Detention Center*, 11 J.L. & FAM. STUD. 171 (2008).

Hundreds of illegal immigrant children are detained with parents awaiting immigration decisions in deplorable prison-like conditions that violate basic human rights, such as a lack of privacy, limited recreation time, and the mandatory wearing of prison uniforms. The Department of Homeland Security ("DHS") previously separated children from their parents, but upon Congress's call to reform this policy of dividing families, DHS created the T. Don Hutto Family Detention Center. Though improvements were made to the detention center following a lawsuit, DHS and United States Immigration and Customs Enforcement ("ICE") continue to abuse Congress's mandate to exhaust alternative methods to detention. Despite a great impingement of immigrant children's rights at the detention center, Congress continues to fund DHS as the agency continues to operate under a skewed interpretation of its congressional mandate. To ensure that children are not illegally detained in the United States, among other things, the author calls on Congress to create clear guidelines for use by DHS when dealing with detained immigrant families.

DOMESTIC VIOLENCE

Kimberly D. Bailey, *The Aftermath of* Crawford *and* Davis*: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1 (2009).

The U.S. court system has developed a practice of "victimless prosecutions," which allows prosecutors to utilize the out-of-court statements of domestic violence victims so these individuals do not have to take the stand and testify in court. Despite the fact that this protection is limited in certain cases, such as when the defendant has not had the opportunity to cross-examine the witness, the author argues that the "victimless prosecution" shield may discourage the goals it was designed to defend—namely, the safety, gender equality, and autonomy of a domestic violence victim. Limited involvement of the injured party in the prosecution process prevents the maturation of domestic violence law, which occurs when there is a flow of information and ideas between the victim and the criminal justice system. While "victimless prosecutions" may be necessary at times, the legal system should work towards understanding the fears of those who are afraid to testify. By directly addressing this problem, the legal system can develop a collaborative approach that breaks the silence of domestic violence victims instead of protecting it.

Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49 (2008).

Elective mediation in international kidnapping disputes, particularly those involving allegations of domestic violence, can ensure the abducted child's safety by allowing parties to improve communication and build protective terms into the agreement. However, the difficulty of conducting mediation and the likelihood of unequal bargaining power has prompted some jurisdictions to put protectionist bans on mediation involving domestic violence. Mediation bans can violate children's rights, deny the domestic violence victim charged with parental kidnapping an alternative to criminal prosecution, and leave parents without any remedies in certain destination states. Domestic violence based mediation bans have a disparate discriminatory effect on women because the majority of international parental kidnappers are mothers and more women are reported victims of domestic violence. The author argues that mediation bans should be retracted in favor of elective mediation with the proper safety mechanisms in place to ensure their effectiveness, the empowerment of the domestic violence victim, and the safety of all parties involved.

Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197 (2008).

Although possible downfalls exists in creating more specialized domestic violence courts in Massachusetts, these specialized courts represent a highly encouraged step that Massachusetts should take in addressing the problem of domestic violence. Most of the opposition's concerns about creating greater specialized domestic violence courts—such as prejudice to suspected offenders of domestic violence—can be addressed and resolved. Already, the Dorchester Domestic Violence Court, the only domestic violence court in Massachusetts, has achieved impressive results and has received a widespread positive response. Because victims of domestic violence have historically been widely disregarded, only now with the advent of special programs and integrated domestic violence courts are their needs being properly addressed. Domestic violence courts will not only make the process more navigable for victims, but it will also make offenders more likely to comply with domestic violence orders, thereby helping to break the cycle of domestic violence.

Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. L. & FAM. STUD. 35 (2008).

While the current state of civil protection orders partially empowers victims of domestic abuse by removing the existence of physical violence in a relationship, such orders fail to provide more complete protection for victims who suffer from non-violent forms of domestic abuse. Governments began tackling the issue of domestic abuse centuries ago, ultimately leading to the creation of civil protection orders, which give victims of domestic abuse a civil cause of action to obtain immediate but temporary injunctive relief from physical violence. The author reasons from various theories of domestic violence and social science studies that identify physical violence as merely one symptom of domestic abuse, and as such, civil protection orders fail to address problematic and severe power imbalances within abusive relationships. Reformation of civil protection orders to permit women experiencing coercion to bring a cause of action, permitting injunctions against coercion, or expanding statutes to relieve other types of non-physical abuse would more effectively remedy the widespread issue of domestic abuse. In order to provide more complete protection for victims of domestic abuse, states ought to create causes of action and relief for not only physical violence, but also domineering coercion.

David H. Taylor, Maria V. Stoilkov & Daniel J. Greco, *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83 (2008).

In a noble effort to combat domestic violence, all fifty states and the District of Columbia created ex parte domestic violence orders of protection, a judicial remedy aimed at protecting the most vulnerable members of society and helping them to get out of the abusive situation. Unfortunately, increasingly easy access to judicial relief has allowed abusers themselves to manipulate the system by falsely alleging incidents of domestic violence in an effort to gain an advantage or use protective orders as an additional means of abuse. While a restraining order is an atypical form of relief in other circumstances, an overbroad definition of the term "abuse," simplified form pleadings, and judicial preference to err on the side of the petitioner have made ex parte orders of protection easy to obtain in almost any jurisdiction. State statutes that grant temporary restraining orders in domestic violence situations have survived due process challenges, but the important question of how low the threshold of abuse should stand to validate such proceedings without notice to the opposing party remains unanswered. The author urges the courts to issue ex parte orders of protection only in cases where there is a showing of immediate and irreparable injury in order to best protect actual victims of domestic violence and prevent abusers from making use of the system.

EDUCATION

Jessi Carriger, *Teach Me to Act: California's Use of Title 1D Funds for Delinquent Students*, 30 WHITTIER L. REV. 329 (2008).

In 2001, Congress passed the No Child Left Behind Act ("NCLB") in order to improve the academic performance of disadvantaged children. Title 1D of the NCLB provides academic funding to various institutions via grants to state and local education agencies, for youth characterized as neglected, delinquent, or at-risk based on previous encounters with the juvenile justice system. Using New York, Washington and Florida as a barometer, the author analyzes California's use of Title 1D funds and proposes a number of recommendations to more efficiently and effectively employ the federally earmarked monies: increased communication and cooperation among local school districts and probation departments, utilizing a more holistic approach to assess a student's individual needs, added community involvement, and more accountability. California, specifically its legislature, is in the unique position of being able to enact laws and provide meaningful guidelines regarding the use of Title 1D funds. Comprehensive statutory guidelines, in turn, will benefit both the at-risk children and California's goals of rehabilitation and restitution.

Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447 (2009).

A number of scholars criticize using public schools to inculcate patriotism in young students because doing so both robs impressionable youth of the opportunity to form their own unbiased political views and, inasmuch as the United States will eventually consist of these conditioned youth, ultimately contaminates American democracy itself. Additionally, patriotic indoctrination of children seemingly runs afoul of Supreme Court precedent and the First Amendment because children cannot, in light of the inescapable reality of peer pressure, realistically opt out of political activities such as reciting the Pledge of Allegiance. Though agreeing that teaching patriotism has no place in the classroom due to the aforementioned evils, the author argues that those scholars who suggest that this important issue can be resolved via a "warts and all" approach to teaching American history overlook the fact that elementary schools do not teach adults with fully-developed cognitive abilities. Children instead learn through ceremony, ritual and emotion, and, as proven empirically, these early biases are very difficult to reverse. Thus, while public schools can teach *about* patriotism, they should be careful not to teach children to *be* patriotic.

Bryan C. Hathorn, *Searches, Seizures, and Confessions – Constitutional Protections for Students in Public Schools*, 76 TENN. L. REV. 211 (2008).

Unlike "regular" law enforcement officers assigned to schools, a school resource officer ("SRO") works under a unique standard allowing the officer to conduct a search upon reasonable suspicion and thereby circumvent the warrant requirement. In response to the increase of drug cultures in schools, this reasonableness standard was established to safeguard school children and promote public interests. However, the standard is ambiguous, and it exposes the SRO to liability because the court determines after-the-fact whether such a search was permissible. In the event that the court finds that the search was impermissible, the SRO or law enforcement officer runs the risk of being charged with violating the student's civil liberties. Although it is important for schools to have a safe and drug-free environment, sacrificing civil liberties is not the best way to accomplish this goal, and it may be best to require both SROs and law enforcement officers to obtain search warrants.

Joyce Dindo, *The Various Interpretations of Morse v. Frederick: Just a Drug Exception or a Retraction of Student Free Speech Rights*, 37 CAP. U. L. REV. 201 (2008).

In *Tinker v. Des Moines*, the United States Supreme Court held that students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," which expanded the power of schools to censor speech that is lewd, vulgar, or offensive, or any speech that is "school-sponsored." The subsequent ruling in *Morse v. Frederick* did not clearly establish to what greater extent, if any, school censorship is proper without violating a student's First Amendment right to free speech. The court's decision in *Morse* seemed to turn on the fact that the defendant's speech—a banner reading "BONG HiTS 4 JESUS"—was communicating a message in favor of the use of illegal narcotics. As a result, lower courts have offered three possible interpretations of the *Morse* ruling: 1) it established a drug exception to the protections granted by *Tinker*; 2) it gutted *Tinker* of its power, giving schools much greater power to censor; or 3) it gave final authority to school principals, allowing schools to determine which types of student speech can be censored. Consequently, the varied readings of *Morse* make it difficult to determine how narrow the protection of student speech is by the First Amendment.

R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679 (2009).

In cases upholding administrative responses to student threats lacking imminence, United States courts have failed to address the substantial distraction that such "doubtful threats" present. Instead, these courts have mistakenly tried to fit doubtful threat cases into inappropriate legal frameworks, specifically the substantial distraction prong set forth in *Tinker v. Des Moines*. The author argues that where doubtful threats are involved, a distraction rationale would be a more sensible way to justify infringing upon student's rights. An analysis of recent doubtful threat cases shows that the administrative responses were likely motivated by distractive rather than disruptive effects as they were punitive in nature and would have been inadequate to eliminate a disruption. Ultimately, a judicial shift from a disruption to a distraction analysis would be better suited to doubtful threat cases and would achieve greater transparency by revealing the true nature of the harm that doubtful threats pose in schools.

Michael J. Tentindo, Note, *Private School Tuition at the Public's Expense: A Disabled Student's Right to a Free Appropriate Public Education*, 17 AM. U. J. GENDER SOC. POL'Y & L. 81 (2009).

The Individuals with Disabilities Education Act ("IDEA") of 1997 established that schools must provide all students with a "free appropriate public education," and it is up to the parent to establish that a public school's "individualized education program" is not appropriate for their child. The United States Supreme Court held in *New York v. Tom F.* that a parent of a disabled child may receive tuition reimbursements for sending a child to a private institution without having first received any services from a public school. Although the decision was not a majority opinion, the author argues that the Supreme Court should create mandatory precedent on the issue, as it is the correct approach. An alternative method requiring a mandatory period in an improper public school setting could have a detrimental effect upon a student's academic and developmental advancement. Since there is sufficient procedural protection against fraud, the Supreme Court should approve of parents unilaterally placing their disabled children in private schools and receiving tuition reimbursement, as it is most consistent with IDEA's principles.

Linda Greenhouse, *What Would Justice Powell Do?: The 'Alien Children' Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29 (2008).

Justice Powell was known for his lifelong devotion to education, and his commitment was reflected in his unwillingness to settle for anything less than a

perfect opinion in *Plyler v. Doe*, a seminal case on the educational rights of children of undocumented immigrants. The author reviews the many drafts and correspondence that were traded by the justices, focusing on Justice Powell's desire to keep the holding in the case as narrow as possible, lest the opinion be inconsistent with the Supreme Court's past decisions or be interpreted as creating a fundamental right to education. Nevertheless, it was important to emphasize the lack of any substantial state interest in denying children of undocumented immigrants a public education, particularly when society would be forced to bear the costs of supporting this population when they failed to acquire the necessary skills to support themselves. The contemporary impact of *Plyler* is unclear, as different judges have interpreted its precedential value in different ways. However, immigration reform and undocumented workers are ever-present political and legal issues, and those charged with confronting them would do well to look to Justice Powell for guidance and insight.

Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630 (2009).

This article criticizes American courts for typically overturning school-imposed disciplinary actions on cyberbullies for disrupting class via the internet. Courts traditionally determine whether a school possesses the ability to punish a student by looking at the geographic origin of the harassing remarks, and if the bully instigated a disruption while off school grounds, the bully's speech is protected under the First Amendment. However, this dated approach neglects the realities of today's youth—where socializing occurs primarily in cyberspace—and provides unjustified protection for cyberbullies. An updated approach to school discipline of cyberbullies stems from *Tinker v. Des Moines*, holding that a student's speech is protected under the First Amendment depending on the impact it has on the classroom. Through *Tinker* and its progeny, courts have a more appropriate framework with which to decipher whether a student's speech online is susceptible to school discipline.

Mariana Kihuen, Comment, *Leaving No Child Behind: A Civil Right*, 17 AM. U. J. GENDER SOC. POL'Y & L. 113 (2009).

Limited English Proficient ("LEP") students are the lowest performing academic group in the United States, despite the passage of the Equal Education Opportunity Act of 1975 ("EEOA"), which outlined states' responsibilities to provide LEP students the opportunity to equally participate in an educational setting. The author argues that courts should interpret No Child Left Behind ("NCLB") as both an extension of the EEOA and as a civil rights statute, providing

an implied right of action for LEP students and advocates to sue states and school districts that fail to comply with NCLB. Thus far, courts have not granted a private right of action under NCLB, leaving the question of how to best educate LEP students unanswered. Providing LEP students and advocates with a private right of action would serve as an incentive for states to comply with the requirements of NCLB by working to improve the quality of education for LEP students. In reauthorizing NCLB, Congress should clarify the intent of NCLB to be a civil rights statute and create an express private right of action based on the legal standards applied to the EEOA.

David J. Fryman, Note, *When the Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 557 (2009).

The advent of the Internet has posed new challenges for courts to determine how far the schoolhouse gate extends regarding on-campus free speech and the First Amendment. In 1969, the Supreme Court laid the foundation for applying the principles of free speech to public schools in *Tinker v. Des Moines*, by adopting the policy that school speech is subject to discipline if it is materially disruptive or involves substantial disorder. Beyond *Tinker*, courts have not formulated a consistent standard for establishing on campus versus off campus speech, which is further confounded when online speech is involved. After an analysis of online-speech cases, the author suggests that when online speech is sufficiently directed toward school, it may be considered on campus speech, but such content must be sufficiently related to a material and substantial disruption that was caused by such speech. While this standard will not answer every nuance in cases involving online speech, it does serve as a starting-point from which courts can develop future holdings.

Dawinder S. Sidhu, *Are Blue and Pink the New Brown? The Permissibility of Sex-Segregated Education as Affirmative Action*, 17 CORNELL J.L. & PUB. POL'Y 579 (2008).

Although Title IX prohibits sex discrimination, section 106.3(b) of the Act allows for voluntary affirmative action to assist a disadvantaged gender, and the specific purpose of Title IX is to prevent federally funded schools from discriminating against women. In order for a single-sex school to survive an equal protection challenge, it must show an "exceedingly persuasive justification" for the classification and that the classification serves a governmental purpose. The Supreme Court provided guidance on whether a single-sex school shows an exceedingly persuasive justification by requiring that the school directly assist members of the sex that is "disproportionately burdened," and show that the

benefited gender has had some disadvantage. The Department of Justice also allows for voluntary affirmative action when it compensates for discrimination, but it requires that gender stereotypes not get perpetuated—for example, the Supreme Court held in *Mississippi University for Women v. Hogan* that the existence of a single-sex nursing school only for women perpetuated stereotypical female roles in society. Single-sex programs are still controversial and subject to scrutiny, but until there is major reform in this area, it needs to be ensured that all single-sex educational programs follow the constitutional guidance provided under Title IX.

David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009).

While Congress enacted Title IX to benefit the cause of women's equality, the recent resurgence of single-sex education, including encouragement within the No Child Left Behind Act, seems to be supported in large part by what is called "the essentialist myth of masculinity." This myth purports that boys are so inherently different than girls that it is impossible to instruct them together. If perpetuated through single-sex education, this essentialist idea will harm both genders and exist in fundamental conflict with the notion of sex equality. The author examines how the facets of the essentialist myth—heteronormativity, aggression, activity, sports obsession, competition and stoicism—adversely affect both genders, and how subtly single-sex education advocates are expressing these interests. At present, the legality of single-sex education is not clear because the federal courts have not specifically answered the question of single-sex education.

FAMILY

Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1 (2008).

With the expansion of international travel and tourism, the increase of bi-national marriages and sexual relationships, and economic globalization, international child abduction may be growing. In recognition of this increasing concern, the Convention on the Civil Aspects of International Child Abduction was adopted by the Hague Conference in 1980, its primary purpose being to secure the prompt return of children wrongfully removed from or retained in any state belonging to the convention. Despite its appeal in other areas of law, mediation has not been widely embraced in international child abduction cases, although this is beginning to change. While power imbalances may exist among the parties in the

context of international child abduction, the author points to significant benefits in utilizing mediation, including predictability, efficiency, and broad applicability. Thus, with workable and sensible guidelines specifically geared to the uniqueness of international child abduction cases, mediation can be an important and viable alternative to litigation.

Elizabeth Cunha, Note, *The Potential Importance of Incorporating Online Dispute Resolution into a Universal Mediation Model for International Child Abductions Cases*, 24 CONN. J. INT'L L. 155 (2008).

Every year, there are an alarming number of international parental child abductions, where one parent kidnaps or conceals a child without the other parent's consent. In response to this growing problem, mediation practitioners from the United Kingdom ("UK") recently introduced an international, face-to-face mediation model to help parties resolve child abduction cases. However, the UK model does not include online dispute resolution ("ODR"), an increasingly popular form of mediation, which, among other advantages, enables mediation between parties that are physically distant and potentially provides safer environments for parties. Although traditional mediation is the best alternative when parties are able to meet face-to-face, ODR is an important tool for resolving conflicts when parties are physically distant. To better handle international child abduction cases, the author proposes that the international community adopt a hybrid mediation model that incorporates the strengths of both face-to-face mediation and online dispute resolution.

Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need For "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109 (2009).

In order to properly assess the needs of today's blended families, the child support guidelines formulated in the 1970's warrant reevaluation, especially because the initial goals of these laws have begun to shift. There are two main ways of allocating child support when there are multiple families: the "first family first" policy gives preferential treatment to already existing families, and the "equalization" policy allocates child support funds equally to existing and subsequently formed families. This article proposes a new allocation theory called "limited equalization" after illustrating why these policies have fallen short of achieving the goals of fiscal savings, protecting the economic well-being of children and enforcement of parental responsibility. Limited equalization not only seeks to address the needs of overlapping multiple families by providing near equal support for all children of a non-resident parent while maintaining the existing level of support for existing families, but also seeks to eliminate the racial and gender

based stereotypes attached to child support issues and establish poverty prevention as a new goal of child support guidelines. The author concludes that child support guidelines should incorporate a limited equalization policy in order to adequately reflect the resources and needs of blended families in order to ensure that the children are adequately provided for.

Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87 (2008/2009).

The Hunan baby trafficking scandal revealed the many flaws of China's intercountry adoption system as well as United States' immigration and adoption laws aimed at prevention of trafficking in intercountry adoption. The efficacy of both countries' adoption laws and regulations is diminished by the easy process of turning babies into legal "orphans," the adoptive parents' substantial financial contributions to the orphanages, artificially created barriers for domestic adoption in China, and the high demand for foreign adoptees in the United States. As a way to eliminate the incentives behind the business of child trafficking, the authors suggest that the best interests of the child and the birth families, as defined by the Hague Convention, should take precedence over the demand for adoptable infants. Furthermore, the United States, as the leader in the fight against human trafficking worldwide, should expand the scope of the Trafficking Victim Protection Act ("TVPA") to not only ensure the optimal protection for children, but also to more successfully combat the problem of trafficking in the intercountry adoptions. Both the United States and China must enact comprehensive regulations to effectively enforce the Hague Convention and the Convention on the Rights of the Child, and must also utilize state anti-trafficking laws to fight against trafficking for adoption.

Arun Dohle, *Inside Story of an Adoption Scandal*, 39 CUMB. L. REV. 131 (2009).

Indian adoption agencies appear to be beneficent institutions, however these agencies, Preet Mandir in particular, have been a source of dispute due to rumors that their focus is monetary gain rather than the well-being of Indian orphans. Beginning in 1999, accusations were hurled at Preet Mandir, including claims that the agency forced foreign adoptive parents to pay massive adoption costs, and claims that Preet Mandir told destitute parents that their children could stay at Preet Mandir, and then gave these children up for adoption without their parents' consent. Although inspections did result from the publication of several articles addressing Preet Mandir's supposedly unsavory practices, these inspections did not prove that the agency was engaging in immoral activities. The author indicates that Preet Mandir has not been closed because as long as it merely *appears* that an

Indian adoption agency has adhered to the foreign adoption rules governing adoption of Indian children, courts allow adoptions to be carried out. Since Indian adoption regulations do not seem to prevent the mismanagement of intercountry adoptions, India needs to decide whether allowing adoption agencies to collect revenue from essentially selling children is appropriate, and other countries need to be better informed about India's corrupt adoption practices.

Joy S. Rosenthal, *An Argument for Joint Custody as an Option for all Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127 (2007).

In 2007, Kings County judges in Family Court informed program mediators—who work for a mediation program created in response to the disorganized nature of family court—that joint custody language could not be included in mediated agreements. Joint custody is not presumed in New York State, but a court must still serve the "best interests of the child," which may mean awarding joint custody to the parents. The Brooklyn judges determined that parents who resorted to the court system to resolve their differences could not make decisions together and thus were not suitable for joint custody. The author argues that parents who can successfully mediate are the "best candidates for joint custody" because they are more willing to work out problems amongst each other and take responsibility for their actions. Moreover, the meditative process can teach parents joint decision-making skills and help parents overcome their differences and focus on the needs of their children.

Christine L. Jones, *The Parental Kidnapping Prevention Act: Is there New Hope For a (Limited) Federal Forum?*, 18 TEMP. POL. & CIV. RTS. L. REV. 141 (2008).

This article examines the Parental Kidnapping Prevention Act ("PKPA"), a statute that ameliorated the national problem of parental kidnapping. The Supreme Court ruled in *Thompson v. Thompson* that no implied right of federal action exists under the PKPA that would permit adversaries in a custody suit to have a federal court decide which of two conflicting rulings would apply. The Court found that the Act "imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act," but does not create a federal right of action. *Marshall v. Marshall* and *Grable and Sons Metal Products, Inc. v. Darue Engineering and Manufacturing* exhibit a changing jurisdictional landscape and compel a reexamination of *Thompson's* ruling that a limited federal forum should be available under PKPA to decide actual jurisdictional deadlocks. There may be room within the federal court system to provide a remedy for litigants facing jurisdictional deadlocks due to conflicting custody determinations.

HEALTH

Coyla J. O'Connor, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131 (2008).

The increasing prevalence of obesity in America has many undesirable consequences, one of which is that overweight children are being taken away from their families and placed into foster care, while the states are doing little to prevent this. This article proposes a series of reforms that will help prevent the fracturing of homes already suffering from grief brought on by obesity. Through well-planned assistance programs, such as entire-family therapy, nutritional planning, and the appointment of family weight consultants, states could solve the problem of child obesity without tearing children away from their birth parents. Opposition to reform relies chiefly on the constitutional right of parents to raise their children without interference, and often cites the administrative difficulties in determining the appropriate regulatory approach. It is proposed that an amendment to Title IV-B of the Social Security Act would help encourage states to move forward with the suggested reforms.

Margaret J. Kochuba, *Public Health vs. Patient Rights: Reconciling Informed Consent with HPV Vaccination*, 58 EMORY L.J. 761 (2009).

Many states have moved for the human papillomavirus ("HPV") vaccine, Gardasil, to become a mandatory vaccination for young girls, in an effort to prevent cervical cancer, despite various ethical and medical concerns. The Supreme Court's landmark decision in *Jacobson v. Massachusetts* recognized state police power to serve as a constitutional basis for mandatory vaccinations, provided there is a necessity to do so. The author demonstrates that a state's power to institute mandatory HPV vaccination is unconstitutional and unnecessary because an individual's behavior, medical examinations and proper educational programs can control HPV transmission. Additionally, requiring the HPV vaccination will violate principles of informed consent due to the fact that the vaccination's lack of safety and efficacy is undisclosed to patients, as well as the limited information regarding Gardasil's duration of immunity and possible side effects. Ultimately, allowing a voluntary opt-in approach to the HPV vaccination, along with educational programs, is the most ideal approach, provided that additional federal and state assistance programs provide coverage for the uninsured and underinsured.

James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707 (2009).

Given the changing nature of the HIV/AIDS epidemic, statutes that criminalize the transmission of HIV ought to be repealed in favor of preexisting criminal statutes. States began adopting HIV-specific criminal statutes in the late 1980s on the ground that the burden of proof under homicide and attempted murder laws would be too high, that the penalties from an assault conviction were too insufficient and that HIV-specific statutes would serve as a deterrent. The resulting statutes—passed by nearly half the states—created various new legal issues, were ineffective in their deterrent goals and most importantly, they failed to account for the medical advances in treating and understanding HIV/AIDS. Attempting to simply reform the current laws would not sufficiently address the various strains of HIV/AIDS, which can differ in lethality and drug resistance, and which frequently change faster than state legislatures can act to amend. With the erosion of the rationale behind the original justifications for HIV-specific statutes, states should repeal their HIV-specific statutes and prosecute HIV/AIDS exposure under assault, attempted-murder and other existing criminal laws.

Kimberly A. Collier, Comment, *Love v. Love Handles: Should Obese People Be Precluded From Adopting A Child Based Solely Upon Their Weight?*, 15 TEX. WESLEYAN L. REV. 31 (2008).

Determinations of parental fitness discriminate against obese people solely because of their weight and appearance. This problem is prevalent in the United States and abroad, and though some states have enacted statutes protecting an individual's weight, this protection does not extend to adoption proceedings. Denial of adoption based on the adopter's obesity has occurred because the judge feels the obese person has a lower life expectancy and may teach the child unhealthy habits, and thus the adoption is not in the best interest of the child. However, an obese parent may raise a child to maturity as life is only shortened by about seven years, and though an obese person may carry extra fat, it is not necessarily indicative of physical fitness because build may be genetic. Adoption proceedings should include tests to show whether an obese person wishing to adopt is truly physically sound and without preexisting medical conditions, and in addition, proceedings should afford great weight to the adopter's network of relatives, family unit stability and financial situation.

Julie E. Gendel, Comment, *Playing Games with Girls' Health: Why It Is Too Soon to Mandate the HPV Vaccine for Pre-Teen Girls as a Prerequisite to School Entry*, 39 SETON HALL L. REV. 265 (2009).

States are currently deciding whether girls should be required as a prerequisite to school entrance to receive a vaccination against human papillomavirus ("HPV"), a sexually transmitted disease that can result in genital warts and cervical cancer. Proposals for mandatory HPV vaccination have spurred controversies for a variety of reasons, including the moral consequences of protecting girls from a sexually transmitted disease and the medical uncertainties of a new treatment. To avoid violation of parental rights, states should not require vaccination against HPV because the disease is not airborne and does not generally pose a widespread and imminent danger. The author suggests that legal precedent, namely *Jacobson v. Massachusetts*, should apply narrowly as justification only for a state's approval of vaccinations for diseases similar to small pox, which was the societal danger at issue in Jacobson.. The *Jacobson* case is based on a different scientific landscape and should be applied to allow states to mandate vaccination only when it would have constitutional authority to mandate vaccination for both children and adults.

HISTORY AND CULTURE

John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261 (2009).

This article analyzes the perception of male identity as it relates to American constitutional culture, including views of political authority, the arrangement of institutional power, and civic ethos. Hobbes and Filmer—two prominent philosophers on the conceptions of male identity in early Modern England—advocated the need for a strong male authority as the head of government based on the notions of hypermasculinity and gentlemanliness as formative of the male identity. Although these early notions made constitutional democracy at the birth of the United States philosophically unrealistic, the modern view of courage and civility does not consider them to be gendered virtues specific to men. The construction of the constitution by the founding fathers, particularly in rejecting an absolute monarchy, allows for an evolution of relative gender equality. As a result, male identity alone is not determinative of today's constitutional values.

Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99 (2009).

Women suffer from unequal and adverse treatment on law school faculties due to often-invisible structures and practices that discriminate based on gender. Despite the increased number of women on law school faculties today, men continue to disproportionately hold the more prestigious and high-paying positions while women make up the majority of less powerful and low-paying part-time or untenured positions. Applying social science research and pointing to empirical studies as support, this article explores the role that gender plays on areas including hiring, course assignments, and student perceptions of law school faculty. Gender segregation and the lack of women in traditionally male-dominated positions are not the result of "choice" or lack of interest, but rather deeply embedded and perpetuated gender stereotypes that create barriers for women in the workplace. Recognizing hidden gender biases and establishing policies to address these issues are necessary to eliminate gender discrimination on law school faculties.

Carla D. Pratt, *Way To Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409 (2009).

This article asserts that black lawyers serve an integral function in modern American society in that they are uniquely positioned to bridge the gap between the white-dominated institutions of our democracy and the black community. In this position, black lawyers enhance the democratic experience of black citizens in three distinct ways. First, black lawyers retain their racial identity when practicing law, thereby representing the black consciousness in the legal world and effectively legitimizing our legal institutions in the minds of black citizens. Second, black lawyers serve as interpreters for both black citizens attempting to decipher the complicated language of the American judicial system and for non-black legal professionals whom black lawyers must translate to the reality of being an African-American. Lastly, black lawyers serve as a relatable connection between poor black communities and the legal system, providing both direct and indirect pro bono conduits through which black citizens of lesser means can meaningfully access American courts.

Ramizah Wan Muhammad, *Woman in the Shari'ah Courts: A Study of Malaysia and Indonesia*, 4 J. ISLAMIC L. REV. 121 (2008).

In 2008, Malaysia, an Islamic country with no previous history of having a female judge, had 26 female officers working in the Syariah Judicial Department and on track to become shari'ah court judges. In Indonesia, a neighboring, predominantly Islam nation, a female judge is not uncommon—women have been

appointed since 1964, although always in the realm of family law. The qualifications of a judge in both countries stem from a number of common sources, none more significant than the Qur'an. The author asserts that Malaysia should follow the example of Indonesian government in acknowledging that women are not precluded from being judges, even in the Qur'an. An examination of the history surrounding Islam and a brief textual review of the Qur'an's justifications may allow for women to sit as judges, regardless of the fact that a majority of Islamic scholars believe the two ideas are incompatible.

Elizabeth Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty*, 30 U. PA. J. INT'L L. 585 (2008).

Although many countries treat women and men as legal equals, women in those countries, such as the United States and Ireland, are sometimes considered culturally inferior to men. The United Nations created the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") to achieve equality between men and women, and specifically, CEDAW article 5(a) focuses on destroying cultural customs that are prejudicial towards women. The CEDAW Committee interprets article 5(a) when necessary to determine if CEDAW's member countries are obeying its articles, and article 5(a) also compels members not to discriminate against women in any way not mentioned in CEDAW's other articles. The author emphasizes that article 5(a) orders all nations to use education and the media to eliminate female stereotypes, but article 5(a) requires *Western* countries to more thoroughly destroy gender stereotypes by, for example, ensuring that laws which seem to apply equally to men and women actually promote female equality. Because article 5(a) has inspired member countries to alter some of their discriminatory customs, the CEDAW Committee will continue to use it to make radical suggestions concerning how to change biased cultural practices.

HUMAN RIGHTS

Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493 (2009).

In the last decade, the Supreme Court has committed to bringing America's death penalty in line with international norms by establishing categorical bars on execution of the mentally retarded, juveniles and those charged with rape. The

categorical bars on executing the mentally retarded and juveniles were established in *Atkins v. Virginia* and *Roper v. Simmons* respectively, and justified by the argument that executing either group does not serve the goals of capital punishment—retribution and deterrence. While the death penalty for rape could serve these functions, the majority in *Kennedy v. Louisiana* which expanded the categorical bar to include child rape in addition to adult rape, emphasized the harshness of the punishment in relation to the crime. Based on these same justifications, the author urges expanding these limitations to bar execution of those who were mentally ill at the time of the crime and limiting the death penalty to those who intentionally killed or intentionally aided another to kill. Such steps would further civilize America's capital punishment and serve retributive and deterrent functions.

Emily Camastra, *Hazardous Child Labor as a Crime Against Humanity: An Investigation into the Potential Role of the International Criminal Court in Prosecuting Hazardous Child Labor as Slavery*, 15 GEO. J. ON POVERTY L. & POL'Y 335 (2008).

Due to insufficient enforcement of hazardous child labor laws at the state level, globalization perpetuates a collective action problem where individual countries economically exploit children so as to maintain a competitive advantage. To remedy this problem, the International Criminal Court should adopt a "functional paradigm" and prosecute child labor as slavery, which is a crime against humanity and thus within the ICC's subject-matter jurisdiction. However, supporters of the "formalist" paradigm argue that the definition of slavery does not encompass hazardous child labor, and therefore its prosecution is not within the ICC's jurisdiction. This article argues that by interpreting slavery expansively, and applying it to circumstances where a child's health and safety is jeopardized, the ICC can supplement national enforcement efforts in the hopes of eradicating hazardous child labor. Because exploitation of children results in the degradation of health, education, and the world's future labor force, the international community needs to enforce the rights of children vehemently to eliminate the vicious cycle of exploitation and lost opportunity.

Pramila A. Kamath, Note, *Blinded by the Bright-Line: Problems with Strict Construction of the Criteria for Death Penalty Exemption on the Basis of Mental Retardation – State v. Strode, 232 S.W.3d 1 (Tenn. 2007)*, 77 U. CIN. L. REV. 321 (2008).

In *Atkins v. Virginia*, the Supreme Court declared unconstitutional the execution of mentally retarded defendants and suggested, but did not mandate, that states adopt clinical definitions of what constitutes mental retardation. Since

Atkins, many states have developed bright-line legal standards to determine whether a defendant is legally retarded, based in part or in whole on a defendant's IQ score. In *State v. Strode*, the Tennessee Supreme Court applied such a bright-line rule and found that the defendant was not mentally retarded, although a totality of the evidence suggested that he was in fact clinically, if not legally, retarded. The author asserts that *Strode* was wrongly decided because, by adopting a specific standard as to what constitutes mental retardation instead of considering the evidence as a whole, the court may have misdiagnosed the defendant. To avoid misdiagnosing and potentially executing mentally retarded defendants, states should broaden their definitions of legal retardation to reflect the actual range of clinical retardation.

IMMIGRATION

Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution...,"* 35 WM. MITCHELL L. REV. 197 (2008).

Under the Immigration and Nationality Act ("INA"), an applicant for asylum must be a refugee outside their state with a fear of persecution based on the applicant's race, religion, nationality, membership in a particular social group, or political opinion. This article focuses on grants for asylum on the grounds of sexual orientation under the "particular social group" category, and also addresses the controversy over how to apply asylum law to women facing non-state sponsored persecution. Accordingly, asylum law regarding lesbian, gay, bisexual, and transgendered persons and victims of gender-based violence is analyzed to address problems and suggest possible revisions to current legislation. Congressional revision and clarification of the INA can remedy problems arising out of definitions of certain statutory words—including "persecution" and "particular social group"—and a lack of precedent concerning this area of asylum law. Suggested congressional actions include clearly defining statutory terms, expanding the INA to include persecuted individuals that do not fall within the enumerated categories, and establishing precedent by publishing all asylum cases based on sexual orientation persecution.

Cori K. Garland, *Say "I Do": The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L.J. 689 (2009).

In 1996, Congress passed the federal Defense of Marriage Act ("DOMA"), which defined marriage as the union between a man and a woman, and effectively barred gay and lesbian couples from obtaining the legal protections marriage provides. Although married heterosexual bi-national couples may easily acquire a visa for the non-citizen spouse, the U.S. government refuses to acknowledge same-sex couples or provide them with the same ability to marry and obtain permanent resident status. Because the Constitution confers on Congress the power to regulate naturalization and immigration, the judiciary has played a deferential role when deciding challenges to current immigration laws and policies. The author challenges this complacency and argues that judicial deference has permitted Congress to pass immigration laws that infringe on a U.S. citizen's fundamental right to marriage and equal protection. Therefore, the judicial branch must take a more active role in scrutinizing immigration laws and determine whether legislation passed by Congress constitutionally infringes on the rights of citizens.

Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263 (2008).

The Violence Against Women Act ("VAWA") helps female immigrants escape from abusive or violent relationships by removing previous obstacles to seeking assistance—such as fear of being reported to immigration authorities. Prior to VAWA, the Immigration and Nationality Act ("INA") generally required a U.S. citizen to file an immigration petition on a prospective immigrant's behalf, thereby giving abusers the ability to control abused persons by threatening to withdraw such petitions. In order to alleviate the situations of immigrants in abusive relationships, Congress passed a series of acts between 1994 and 2005, including VAWA, making it easier for such immigrants to bypass the immigration petition previously required under the INA. This article sets forth the various requirements and the overall process for self-petitioning under VAWA. Ultimately, the enactment of VAWA and subsequent related statutes enabled abused immigrants to seek immigration support without the abuser's cooperation or knowledge, thereby helping those immigrants escape domestic violence without jeopardizing their legal immigration statuses.

Wim van Rooyen, *Family Unity for Permanent Residents and Their Spouses and Minor Children: A Common Sense Argument for Revival of the "V" Visa*, 15 TEX. WESLEYAN L. REV. 185 (2009).

Permanent residents of the United States face difficulties when attempting to bring their spouses and minor children into the country by applying for a visa. Certain visas exist that allow beneficiaries to stay in the country with permanent residents based on preference categories, such as the Family Second Preference ("F2") for spouses, minor children, and unmarried sons or daughters of permanent residents who are twenty-one years or older. Spouses and minor children of non-immigrants receive immediate sponsorship, while those of permanent residents face a larger obstacle to obtaining a visa. The author argues that common decency should allow spouses and minor children to be with their nuclear family. The article proposes a revival of the V visa, a non-immigrant visa given to spouses and minor children of permanent residents who filed F2A petitions before December 21, 2000, with revisions so that the V visa is more humanitarian and economical.

Peter G. Wagner, Note, *Shi Liang Lin v. Gonzales: How the Second Circuit Overruled the Board of Immigration Appeals and Denied Asylum to the Spouses of One-Child Policy Victims*, 30 WOMEN'S RTS. L. REP. 219 (2008).

In response to China's coercive population control policies, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which grants asylum to refugees persecuted under China's "one-child policy." Authorized to interpret the scope of the Act, the Board of Immigration Appeals ("BIA") extended per se refugee status to spouses of individuals subjected to coercive population controls. In *Shi Liang Lin v. Gonzales*, however, the Second Circuit overruled the BIA's interpretation; and the court's decision is at odds with the BIA and congressional intent. The author analyzes the decision and argues that the outcome was erroneous and the court went beyond the issue at bar, inadequately applied statutory analysis and ignored the BIA's reasonable interpretation of the Act. Ultimately, the *Shi Liang* decision is flawed since coercive family planning practices such as forced pregnancy termination affect both members of a couple, married or not.

LGBT RIGHTS

Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1 (2009).

Stereotypes suggest that same and opposite-sex families live very different lives from one another, while demographic data shows otherwise. For instance, some common stereotypes are that same-sex couples do not have children and are not biological parents; however, according to demographic data, almost one third of same-sex couples have children, many of whom are the biological offspring of one of the lesbian or gay parents. Partly because of these false stereotypes, conventional family law has not appropriately adapted to the needs of nontraditional families. To effectively incorporate same-sex couples, traditional family law does not need to transform entirely but rather must accommodate these couples by, among other things, rejecting the notion that same-sex families are unhealthy environments for children and recognizing parental rights of non-biological parents. If incorporated into conventional legal and social institutions, same-sex couples would be able to work from within the family law system to make it more attuned to the unique needs of same-sex families.

Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725 (2009).

Despite concerning different areas of law, both the ruling in *Roper v. Simmons* and the Mature Modern Doctrine address the validity of a youth's decision-making ability. The United States Supreme Court in *Roper* invalidated the juvenile death penalty by reasoning that mitigation is warranted since adolescents act on impulse, easily succumb to peer-pressure, and lack the character and expertise of adults. In contrast, the Mature Minor Doctrine recognizes a minor's potential to make mature medical decisions by allowing a health care professional to provide hormone treatment to transgender youths without parental consent. The author contends that a careful understanding of *Roper* can reconcile the case's apparent contradiction to the Mature Minor Doctrine. The ruling in *Roper* supports a youth's ability to obtain hormones under the Mature Minor Doctrine because of preordained safeguards to ensure that transgender youths

engage in medical decision-making, the adverse peer-pressure to conform to traditional birth-assigned sex, and the need for courts to allow "incomplete characters" to develop into self-defined adults.

Aeyal Gross, *Gender Outlaws Before the Law: the Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009).

The article analyzes four trials—held in Israel, the United States, and the United Kingdom—that pose important questions of control and regulation of sex, gender, and self-identification. The trials involved four women who were accused and convicted for fraudulently presenting themselves as men in order to engage in sexual relations with females. The outcome of the cases generated debate within the LGBT community regarding whether a person has a right to live in a gender identity he or she sees fit without disclosing it. The cases also caused debate regarding whether a woman deserves a protection from having sex unless she gives her full consent to engaging in sexual relations with someone whose gender identity does not match their biological sex. Despite these debates, the author concluded that the courts' efforts concentrated on preserving conventional mainstream sex and gender identities and heterosexuality.

Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009).

Scholars such as Michael J. Klarman argue that judicial victories obtained by civil rights advocates provoke political backlash that culminates in the enactment of regressive legislation. Using the same-sex marriage ("SSM") litigation as a paradigm for his countermobilization theory, Klarman argues that three of the movement's landmark judicial victories sparked electoral setbacks that led to the enactment of twenty-three new state constitutional bans on SSM and the reelection of President George W. Bush. However, this article argues that despite negative assessments associated with the gay, lesbian, bisexual and transgender movement, legal mobilization has in fact produced widespread legislative gains that have surmounted political opposition. While contentious court decisions may provoke immediate political resistance, long term implications and success are often masked by additional civil rights efforts, such as the exposure of sexual orientation issues in television and movies. The effectiveness of judicial victories is dependent upon a number of variables, including political structuring and resourcing, and therefore judging success in a vacuum is unwarranted and incomplete.

Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1 (2009).

A push toward equality in elder care—especially among the LGBT community—is needed as the Baby Boomer generation ages. Due to discrimination and societal stereotypes against LGBT individuals both in the past and the present, the elderly in the LGBT community face inequities as they retire and seek medical attention. The primary difficulty LGBT elders face is the lack of recognition for same-sex partnerships. Generally, next of kin is chosen for medical decisions, yet, same-sex couples do not receive the same benefits as opposite-sex couples, and it is more difficult to find housing that will acknowledge a same-sex partnership. Legislative and administrative reform is needed to combat discrimination against the LGBT community and to acknowledge the particular concerns and interests of LGBT individuals.

Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV. 425 (2009).

Comparative constitutional analysis of gay rights suffers from an unsystematic selection of cases, from a perception of outcomes as complete "failures" when considered impediments to the goal of equal rights for homosexuals, and from an overemphasis on the importance of formal constitutions and litigation as the sole vehicles for promoting change. The author provides a framework for the employment of thick instrumentalism—encouraging the study of constitutions as both legal judgments and cultural symbols, while maintaining the goal of furthering social change—in comparative constitutional analyses of gay rights. Current constitutional scholars fail to use their scholarship to imagine an alternate world, where social and legal institutions recognize and promote the equality and rights of homosexuals. To assist with this reconstruction of reality, scholars would benefit from engaging other disciplines, such as anthropology, cultural studies, and feminist theory. Scholars could then consider the discursive context of constitutional texts and judgments, while still maintaining their desire to advance a particular social or political goal, namely, gay rights.

Christine Metteer Lorillard, *Placing Second-Parent Adoption Along the "Rational Continuum" of Constitutionally Protected Family Rights*, 30 WOMEN'S RTS. L. REP. 1 (2008).

Adoption of a child by the same-sex partner of a biological parent is not uniformly recognized in the United States, yet the adoption of a child by the heterosexual partner of a biological parent is uniformly allowed. Moreover, the state in which a child's legal parent and same-sex life partner reside, not the child's

best interests, determines whether the child will receive the same benefits as a child raised by a legal parent and heterosexual partner. Through past precedent, the Supreme Court has disallowed states to determine that children's rights are only dependant on the type of family they are born into, choosing instead to declare that whenever a natural parent, second parent, and child fulfill the "functions of a traditional unitary family," such a family must be given the same rights and protections as any other family. The Due Process Clause affords protection and demands protection of the second parent when that parent undertakes the responsibility of raising a child. Thus, second parent adoption should be available to homosexual couples as a right of familial association, a right that is protected along the continuum of family rights.

Shane A. Marx, Note, *A Best-Interest Inquiry: The Missing Ingredient in Utah Family Law for Children of Alternative Families–Jones v. Barlow*, 11 J.L. & FAM. STUD. 157 (2008).

Utah law disregards the best interests of children raised by same-sex couples, placing such children at a severe personal and economic disadvantage by failing to recognize the child's interest in establishing a permanent, legal relationship with *both* parents. The Utah State Legislature has enacted The Utah Adoption Act, which prohibits gay or lesbian individuals from adopting their partner's children, even when that adult has had a substantial, long-term relationship with the child. A child born to a gay or lesbian individual is effectively prohibited from forming a legal relationship with one of his or her parents, and the Utah State Legislature ignores the effects that such a prohibition has on the financial, psychological and general welfare of the children. In examining *Jones v. Barlow*, the author highlights the problematic nature of the Act and suggests that opposition to same-sex parenting conflicts with the Act, which does not, prohibit adoption by gay or lesbian individuals. The Utah State Legislature is mistaken in its belief that its legislation will discourage gay and lesbian couples from attempting to raise a child, and thus, the state must reevaluate its law to consider the best interests of *all* children, including those born into same-sex households.

Katrina C. Rose, *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals' Rights After National Pride At Work*, 35 OHIO N.U. L. REV. 107 (2009).

Michigan's anti-same-sex amendment to its state constitution in 2004, and the Michigan Supreme Court's decision in *National Pride At Work*—prohibiting public employers from offering health benefits to employees' same-sex domestic partners—do not limit the rights of individuals who have undergone sex reassignment surgery. Prior to the ban on same sex marriage and *National Pride At*

Work, Michigan enacted the transsexual birth certificate statute in 1978, which allows a transsexual individual to change the sex designation on his or her birth certificate post-operation. Several anti-same-sex jurisdictions exclusively rely on the sex of the person at birth to determine whether it is a legal union between a man and woman. However, the Michigan transsexual birth certificate statute has redefined "sex" by recognizing that a person can transform from one sex to another over his or her lifetime. States that share with Michigan a similar history of anti-gay marriage legislation and "pro-trans law" should acknowledge that marriage rights related to sexual identity favor transsexuals.

Mark Strasser, *Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring*, 2008 BYU L. REV. 1809 (2008).

Discrepancy in state law generates many unresolved issues regarding interstate recognition of court judgments that involve same-sex parent adoption and visitation rights. Under the Full Faith and Credit Clause, even if a valid adoption judgment of one state conflicts with another state's public policy, the judgment cannot be ignored as long as the issuing state had jurisdiction. However, a forum state need not defer to another state's statute, so a decision from another state can get modified via local law, which happens with visitation rights. In deciding such matters, a court should consider the best interests of the child as well as the intent of the legislators and the extent to which the decision may be affected by federal initiatives such as the Parental Kidnapping Prevention Act. Because the forum state is precluded from judging on adoption, but may not recognize a same-sex union treated as marriage and may temper the exercise of a second parent's adoptive rights, different outcomes across state lines will lead to further litigation and should be properly addressed by legislation.

MARRIAGE

Shania N. Elias, Note, *From Bereavement to Banishment: the Deportation of Surviving Alien Spouses Under the Widow Penalty*, 77 GEO. WASH. L. REV. 172 (2008).

The United States Immigration Services' current interpretation of immigration law effectively creates the "widow penalty," which terminates any foreign-born spouses' applications for permanent residency if their American spouses die prior to reaching the minimum marriage length requirement. This article argues that it was not Congress's intent to enact this penalty that is unfairly

applied to all foreign-spouses who have applied for permanent residency, while excluding those who did not submit an application. Notably, this procedure did not originate from Congress, but from two administrative decisions by the Board of Immigration Appeals, which determined that a widowed individual would be stripped of both their title as spouse and their ability to appeal a rejected application for legal permanent residence upon the death of their citizen partner. This harsh practice, which has the effect of separating American children from their foreign parents, is not based on sound legal reasoning and should therefore be abandoned. Despite litigation, private bills, and current legislation to rectify the harm of these methods, none will be able to remedy the penalty effectively or in a timely fashion; the only way to do so is if Congress adopts focused legislation to eliminate the practice entirely.

Michael Mahoney Frandina, Note, *A Man's Right To Choose His Surname in Marriage: A Proposal*, 16 DUKE J. GENDER L. & POL'Y 155 (2009).

Tradition and social convention has made it commonplace, if not expected, for a woman to acquire her husband's surname upon marriage, whereas it is quite uncommon when a man seeks to acquire the surname of his wife. A person's name not only plays a large role in forming their identity but historically, the acquisition of a surname through marriage was a publicly accepted strategy to preserve a family's lineage and acquire property. The author recounts his quest to acquire his wife's surname upon their marriage and discovers that only eight states give a man the statutory right to acquire his wife's surname. Under the Equal Protection Clause, the remaining forty-two states should extend to men the right to change his surname to that of his wife's and to revert back to his maiden name after divorce. A state's refusal to do so would constitute gender-based discrimination that should not withstand an Equal Protection challenge, and since marriage has shifted from being a public decision to a private one, the decision of which surname to keep should be private as well.

Lynne Marie Kohm, *On Mutual Consent to Divorce: A Debate with Two Sides to the Story*, 8 APPAL. J. L. 35 (2009).

Mutual consent divorces have the advantage of not only considering both sides of marriage bargains, but also take into account the children involved in those marriages. In 2008, Virginia reviewed a bill proposing mutual consent for divorces where minor children are involved—constituting a shift from no-fault divorce laws that permitted unilateral divorce decisions and often had negative economic effects on involved parties and taxpayers at large. The author explores the ways in which mutual consent divorces would grant the second party in a marriage more equality in the decision to pursue a divorce, as well as prevent premature divorces and

reduce divorce rates. Mutual consent divorce requirements would not alter the incentives associated with marriage, obstruct parties from obtaining divorces, or harm family law attorneys by reducing the number of available divorce cases. Ultimately, Virginia's interest in protecting its resident children necessitates the adoption of mutual consent divorce requirements to encourage couples to pursue bilateral agreements when terminating their marriages.

Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 IND. L.J. 743 (2009).

As society becomes more modern and liberal, Muslim societies are prompted by their evolving lifestyles to identify the sources from which Islamic law is derived and the process through which it is interpreted. On many occasions, the more conservative views that traditionalist Islam has to offer its followers have conflicted with the more progressive and liberal reformist views of modern Muslims. For example, interfaith marriage is an increasingly common practice in modern society and a primary area of dispute between traditional and reformist Islamic positions, as traditionalists seek to restrict its practice. The author proposes that Muslim scholars look to the changes in the social conditions of society and women, and take them into account when issuing fatwas on interfaith marriages. Since today's Muslim lives in an evolving society, it is imperative that the religious scholars interpret Islamic law in such a way that it encompasses and balances the traditionalist and the reformist's views.

James L. Musselman, *What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples,* 16 DUKE J. GENDER L. & POL'Y 27 (2009).

The increasing acceptance of same sex-marriage—combined with the delayed age in which individuals first marry, the increasing divorce rate, and the number of unwed mothers—have commentators crying out for reform to save the sanctity of marriage and the traditional family. Nationwide non-uniform marital laws have resulted from divergent views on the advent of, and the proper response to, the decline of the traditional family. Covenant marriage, which imposes stricter requirements to get married and divorced, is one such solution that Louisiana, Arizona and Arkansas have adopted to strengthen marriage laws. The author's proposal incorporates revised covenant marriage laws for opposite-sex couples who want a traditional marriage, and a "domestic partnership" or "civil union," resembling current marriage laws, for both same-sex and opposite-sex couples. Through this proposal, all couples will have the same rights and benefits as married

persons, while separating the institution of "marriage" to a more elevated status, thereby benefiting society as a whole.

Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage*, 11 J. L. & FAM. STUD. 113 (2008).

The institution of marriage is historically based on a patriarchal nature, where women were once given no rights, but now are afforded more freedom and equality. The radical feminist view of marriage is based on the belief that marriage oppresses women, and therefore this viewpoint favors abolishment of the institution. Claudia Card, author of *Against Marriage and Motherhood*, describes the problems with marriage and the radical feminist idea that participating in marriage is "risky practice" because of male dominance in the institution. The article points out the flaws in the radical feminist theory against marriage and proposes that behavioral modifications are needed rather than complete abolition of marriage as an institution. Rather than remove the term "marriage" and all of its associations, it is necessary to change stereotypical gender roles and approach long-term committed relationships as informal business partnerships.

Colby T. Roe, Comment, *Arkansas Marriage: A Partnership Between A Husband And Wife, Or A Safety Net For Support?*, 61 ARK. L. REV. 735 (2009).

Providing for one's spouse after death can be viewed through two different lenses: the economic-partnership theory, which awards one half of the estate, and the support theory, which awards one third of the estate. Though the goal of each approach is to bestow a fair share of the decedent's estate to the survivor, both approaches fall short by failing to calculate an appropriate portion of the estate based upon individual circumstances, and by failing to protect against disinheritance through non-probate transfers. With an elective share option, the surviving spouse can take against the will of the decedent, and receive a percentage of the probate estate according to statute. However, in Arkansas—even with an augmented estate and various tests to determine the testator's intent—the elective share does not address the shortcomings of the two theories, awarding what could be considered a meager dower, and does not effectually provide for the widow or widower. After the Arkansas Supreme Court handed down the vague decision in *Richards v. Worthen Bank & Trust Co.*, the author urges the legislature to pass law that supports a fair elective share.

PARENTING

Ayelet Blecher-Prigat, *Rethinking Visitation: From A Parental To A Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1 (2009).

Visitation rights must be separated from the context of parental rights and instead must be based on the relationship between the adult and child regardless of parental status. Currently, the law and the courts analyze visitation rights by focusing on the value of the relationship and its significance in the child's life, but also by perceiving a child as a parent's property and as a part of an ideal family model that should not be disturbed with visitation orders. Courts problematically deny visitation to a non-parent even if the child suffers as a result, whereas a parent is hardly denied visitation even if his interaction with the child is detrimental. As the construction of families changes in the United States, and state laws continue to differ, the commingling of parental and visitation rights does not offer protection to non-parent adults and the children for whom they care. Lawmakers should give precedence to the child's relationship with the adult instead of the adult's status as a parent, which should reinforce a visitation request rather than decide it.

Christopher Bruno, Note, *A Right to Decide Not to be a Legal Father:* Gonzales v. Carhart *and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008).

Whether or not to become a parent is a decision only a woman can make after conception. The author argues, however, that courts should recognize in men the same constitutional right to procreative autonomy that *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* establish in women. However, the Supreme Court in *Gonzales v. Carhart* recognized that the rights of bodily integrity and procreative autonomy are distinct; therefore a man shares the right not to procreate with a woman. When this right is violated through the deceit or willful ignorance of the woman, the man should not be subjected to forced legal parenthood, such as child support. While policy concerns will at times outweigh a man's right to avoid legal parenthood, courts can at least recognize the existence of procreative autonomy as an affirmative defense available to men in certain circumstances.

Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367 (2009).

The current legal system in the United States allows a court to remove a child from the custody of his or her parents at the moment of birth, but offers no protections for "future persons," or children that have yet to be conceived, from

unfit parents. Nevertheless, laws concerning incest, surrogacy and pharmaceutical regulation demonstrate that the law does provide some level of protection for "future persons." After an in-depth analysis of the interests of the state, prospective parents and prospective children, the author argues that states should codify a duty of prospective parental fitness, under which, parents that fall within the jurisdiction of the court, having been adjudicated "unfit," could be prohibited from procreating as part of their probation orders. Without statutory authorization, courts have been left to issue ad-hoc no-procreation probation orders that have frequently been caught up in and reversed by appeals. Basing such statutes on the same constitutional due process standards that have been used to hold proceedings to terminate parental rights would solidify the power of the court to issue no-procreation orders and would serve to stem the flood of children that has thrown the child welfare system into crisis.

Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment are in the Best Interests of the Child*, 42 AKRON L. REV. 243 (2009).

Spurred in large part by the 1989 United Nations' Convention on the Rights of the Child, which is meant to prohibit physical discipline of children even by parents, an international trend of countries outlawing the use of spanking has developed. The United States has not signed the Convention, and no state has passed similar legislation, but the trend is gaining ground in the US, evidenced by recent introduction of bills banning spanking in New Hampshire and California. Examination of the effects of such a ban in Sweden—the first country to ban spanking in 1979—reveals a dramatic increase in abusive parental outbursts and a dramatic rise in youth violence without decreased levels of peer aggression, the primary benefit that a spanking ban was to generate. Proponents of a ban largely argue using biased research, which is void of scientific integrity, thereby doing disservice to the conversation about physical punishment by grouping together a typical disciplinary spanking with a belt lashing. It is critical to understand the difference between harmful, abusive treatment and helpful, instructive physical punishment that can teach children boundaries not always teachable by mental punishment itself.

William Bradley Klein, Note, *Non-Parent Visitation in Louisiana: A Post-Troxel View of Article 136*, 69 LA. L. REV. 471 (2009).

While it is a fundamental right of parents to raise their children and determine who can visit them without unnecessary government interference, the state must balance this fundamental right with the overarching goal of maintaining extended family relationships when considering visitation petitions. The United States

Supreme Court's plurality decision in *Troxville v. Granville* established that in order for state third-party visitation statutes to be upheld, they must: (1) limit the class of persons who can petition the court for visitation; (2) presume that a fit parent's decisions are made in the best interests of the child; and (3) place the burden of showing that visitation is in the best interests of the child on the petitioner. Louisiana's Civil Code article 136 limits the class of persons who may petition for visitation to relatives but the statutory language unclearly limits their ability to "extraordinary circumstances." While article 136 is much narrower than the Washington visitation statute that the Supreme Court held unconstitutional, Louisiana—unlike other states—has not secured the constitutional validity of article 136 by clarifying how it accords with *Troxel*. The author concludes that in order for article 136 to survive a constitutional attack, Louisiana courts should reexamine *Troxel's* implications on the statute and ensure that it meets the three-fold requirements of Supreme Court's decision in that case.

Brian Jay Nicholls, *Reduction in Child Support for Extended Visitation in Utah: Extra-Credit or Financial Time-Out?*, 11 J. L. & FAM. STUD. 193 (2008).

Several states have begun to use child support reduction as a financial incentive for non-custodial parents to spend more time with their children. The incentive is issued as a credit to the non-custodial parents for the increased costs associated with extended visits. Utah's statute, "Reduction for Extended Parent Time," lowers the base-child support award paid by the non-custodial parent by fifty percent when the child is with that parent for at least twenty-five of any thirty consecutive days. In determining the proper adjustment for child support payment when the child is with the non-custodial parent for extended periods of time, courts consider the negative impact of a reduced payment on the custodial parent against possible incentives including encouraging non-custodial parents to spend more time with their children. The State of Utah correctly awards child support reductions only for the time periods the child is with the non-custodial parent in order to maintain the child's standard of living at all times.

Jason M. Merrill, Note, *Falling Through The Cracks: Distinguishing Parental Rights From Parental Obligations in Cases Involving Termination of the Parent-Child Relationship*, 11 J.L. & FAM. STUD. 203 (2008).

In order to achieve "the best interests of the child," the compulsory association between parental rights and obligations should be severed, rather than assumed, in all cases. Courts should carefully view the totality of the circumstances when discharging the obligation of parental support. Despite jurisdictional differences regarding the reciprocity of parental rights and obligations, courts unanimously seek the best interest of the child, sometimes

relieving the parents of all obligations does not meet this unanimous goal. A single parent household raises the risk of detrimental outcomes for the child and the state, and these risks should be considered, among other things, when terminating parental obligation. Specifically, if a child's welfare depends on financial support, a court will do best by the child and the state to ensure that his obligation to pay child support survives his parental rights.

Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641 (2008).

In *Lehr v. Robertson*, the Supreme Court suggested that government should not deny paternity opportunities to the genetic fathers of nonmarital children, as long as those fathers are responsible and not at fault for losing paternity in the first place. The author asserts that, despite *Lehr*, flawed birth certificates, safe havens, and adoption schemes continue to deny genetic fathers paternity opportunities. These schemes are inadequate because there are practicable alternatives, consistent with general public policy, which would better protect genetic fathers' paternity interests. For instance, states might create pre-birth paternity registries; provide financial incentives to hospitals to complete birth certificates; or eliminate safe haven laws, which protect mothers who anonymously surrender their infants to the state. Such systematic reforms are critical in order to protect genetic fathers' paternity interests and to promote dual and equal parenthood.

Lindsy J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691 (2009).

To meet the evolving needs and growth of the traditional family, some jurisdictions have created doctrines to provide third-party visitation rights. As a result of lobbyist action, every state has created some form of third-party visitation rights, despite the states' traditional common law approach of abstaining from interfering with the family unit. By recognizing third-party visitation rights, the courts have created the psychological-parent doctrine, which grants rights to an adult with a "bonded, dependent . . . relationship" with the child; and the de facto-parent doctrine, which grants rights to a party without biological relations to the child. yet has become a member of the child's family. Although there is support for a revision of the Uniform Parentage Act to include third-parties, third-party rights should not be equal to those of the natural parent. Rather, protecting the rights of the biological parents best serves the interest of children, as children generally favor being raised by their biological parents and this traditional setting usually offers the most stable environment.

David Welsh, Note, *Virtual Visitation Legislation Is Shaping the Future of Custody Law*, 11 J. L. FAM. STUD. 125 (2008).

Over 18 million children in the United States have parents who are divorced or separated, and a large percentage of those children do not get to see their non-custodial parents on a regular basis. Virtual visitations—the use of video conferencing technologies to communicate—in divorce agreements is becoming more common as requisite technologies become affordable and more states recognize the benefit that children receive from communicating virtually with their non-custodial parent. Several states have enacted virtual visitation legislation that allows non-custodial parents to communicate with their children when frequent traditional visitation is not readily available; when the technology is available to both parties and is not a financial burden; and when it is in the "best interest of the child." Virtual visitation should not be used as a substitute for one-on-one visitation, but should be used as a supplement for infrequent visitations. States have the responsibility to enact virtual visitation legislation that sets objective standards and is easily amendable to changing technologies and circumstances; however, more research is needed on the effects that virtual visitation has on the non-custodial parent and child relationship.

RACE AND GENDER

Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009).

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court declared unconstitutional school districting plans that take race into consideration for the purpose of balancing racial diversity within schools. In a 5-4 decision, the majority cited the landmark *Brown v. Board of Education*, at least partly because all merited decisions today must be consistent with *Brown*. Notwithstanding honorary mention of *Brown*, however, the majority does not invoke true *Brown* reasoning but instead, applies a principle of neutrality that requires formal symmetry of laws—all individuals must be treated exactly the same. In reality, *Brown* was founded on the concept that government may treat groups differently if doing so is necessary to eliminate vestiges of racial subordination. The author calls on Americans to remember that *Brown* did not introduce a form of neutrality in which the government cannot recognize individuals' race, but rather one in which the government cannot subordinate groups because of their race.

Christopher Ogolla, *Will the Use of Racial Statistics in Public Health Surveillance Survive Equal Protection Challenges? A Prolegomenon for the Future*, 31 N.C. CENT. L. REV. 1 (2008).

Racial data collection is widely employed in medical research and public health surveillance, but concern has been expressed as to whether the collection of such information violates the Equal Protection guarantees of the Fifth and Fourteenth amendments. The author suggests that lawyers familiar with public health issues should be involved in the creation of systems that collect racial statistics. Although many have been critical of the use of racial statistics in public health for a variety of reasons, they are necessary to promote the goals of public health agencies and practitioners, who do not focus on the health concerns of individuals, but on those of the population at-large. Nevertheless, to adhere to established legal standards and withstand judicial scrutiny, the employment of race in public health surveillance should be designed as narrowly as possible to serve a compelling interest and to remedy Equal Protection guarantees. Furthermore, the use of racial data in litigation must meet both the standard for expert scientific evidence, as well as the strict scrutiny standard for Equal Protection claim evaluations.

Matthew Scutari, *"The Great Equalizer": Making Sense of the Supreme Court's Equal Protection Jurisprudence in American Public Education and Beyond*, 97 GEO. L.J. 917 (2009).

The Supreme Court has failed to abolish inequality in public education by employing the anti-classification model of Equal Protection, which employs a "colorblind" principle to equality and asserts that race is not a factor with regard to a descriptive standard. Decades after *Brown v. Board of Education*, private choice has replaced state-sponsored segregation, and as relatively wealthier families move to more privileged communities, fewer educational resources remain in predominantly poor black communities. Moreover, the benefits to students of integrated schools is severely asymmetrical to the burden to children of color in segregated school systems—they are stigmatized as inferior students in inferior schools. Rather than employing the anti-classification model to cases of racial discrimination, the Supreme Court should apply the anti-subordination model, which provides both prescriptive and descriptive standards for determining who can be considered "alike" under the Equal Protection Clause. The anti-subordination model, which integrates extrinsic substantive factors such as inequality and oppression, would better alleviate the inequality in both society and public school systems.

Michael A. Stevens, Comment, *Down But Not Out: How School Districts May Utilize Race-Conscious Student Assignments in the Wake of Parents Involved in Community Schools v. Seattle School District No. 1*, 20 PACE L. REV. 175 (2008).

While the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* struck down two public school desegregation programs based on race, Justice Kennedy's concurring opinion serves as a guide for reframing school district plans to withstand constitutional scrutiny. In an effort to combat de facto racial segregation in the public school system, the plans of Seattle and Jackson County, Kentucky used race as a deciding factor to determine where certain students would attend school. As a result, the majority rejected the two plans because they were not "narrowly tailored" to achieve racial diversity and failed to meet compelling state interests. Justice Kennedy recognized the compelling interest of adopting policies that would create a diverse student population, but sided with the majority since he agreed that both plans were not narrowly tailored in that race played a crucial role. In so holding, Justice Kennedy suggests race-conscious programs that are specifically organized are valid where race-neutral alternatives are exhausted and race is one of several factors to consider in admissions.

RELIGION

Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479 (2009).

Due to a legacy of federal policies and treaties between the United States and Native American tribes, most indigenous sacred sites are currently located on public land owned by the federal government. As a result, federal land managers are left to make decisions concerning the use and protections afforded Native Americans who wish to practice their religion against competing public uses on these sites. There are ambiguities in the law concerning a federal land manager's ability to protect sacred sites; these ambiguities include the application of the First Amendment Establishment and Free Exercise Clauses and the Religious Freedom Restoration Act. By evaluating relevant case law and the landmark *Cave Rock* decision, the author proposes a systematic framework that federal land managers can follow to preserve sacred sites within constitutional and statutory limits. In light of societal changes like population growth and the importance of sacred sites

in Native American religion, there will be an even greater need for federal protection of indigenous sacred sites in the near future.

Don S. Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31 (2008).

Secular law's suspicion that Christian jurisprudence on marriage fails to pass the "rationality test" and is the chief carrier of Western patriarchy is based on an inadequate understanding of the history and the scope of rationality that such jurisprudence contained. To the contrary, Christian jurisprudence is a manifestation of rational thought that came before it, and can be integrated into secular family law. This jurisprudence is already entrenched in the American legal system, a system that continues a "misguided struggle" towards "moral neutrality" instead of embracing its Christian roots. Recent historical research of Christian family jurisprudence runs afoul of some scholars views who contend that Christian jurisprudence does not belong in modern family law. In this vein, the author examines the policies of private ordering at the beginning of a family, and "best interests of the child" that pervade at a family's dissolution.

Stephen L. Carter, *Religion, Education, and the Primacy of Family*, 58 EMORY L.J. 23 (2008).

Since the days of slavery, the African-American family and the African-American church have sustained the African-American community. The author considers present day challenges to African-Americans, including the political trivialization of religious faith that undermines the African-American community. In order to regenerate the community, African-Americans need the liberty to control the educational and religious upbringing of their own children. Educational initiatives should sustain African-American traditions in the face of society's neglect, racial discrimination and destructive contemporary cultural life. The government should allow the African-American community to have space to nurture their children, a liberty consistent with the notion of a separation of church and state that safeguards individual freedom to be different.

Edith Brown Clement, *Public Displays of Affection...for God: Religious Monuments After McCreary and Van Orden*, 32 HARV. J.L. & PUB. POL'Y 231 (2009).

In two cases concerning a public display of the Ten Commandments, the United States Supreme Court had a split ruling as to whether such a display is Constitutional under the Establishment Clause of the First Amendment. These

recent decisions indicate a shift from the display-focused analysis of the constitutionality of items under the Establishment Clause to an actor-focused analysis, which emphasizes the motives and actions of the government officials that erected such monuments. In determining whether the motivations of non-governmental actors can create an unconstitutional endorsement of religion, the author carefully outlines the details of these influential decisions and the advantages and disadvantages of the actor-focused approach. In *McCreary County v. ACLU*, Justice Souter applied an actor-focused approach using the *Lemon v. Kurtzman* test to show that the purpose, effect, and entanglement of the statute was religious in nature, while Justice Breyer used the actor-focused approach in *Van Orden v. Perry* to uphold the constitutionality of the edifice under the Establishment Clause. These cases—as well as other caselaw—show that unanswered questions remain as to whether the government should maintain a neutral stance in regards to religious concerns, whether the actor-focused approach will be applied with the appropriate sensitivity and flexibility to the Establishment clause, and if that could create another shift in Establishment Clause jurisprudence.

Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843 (2009).

Due to the United States government's belief that organized religion could not occur without the approval of public school officials, religious expression was seen as a mechanism that would coerce religious minorities to conform to "officially approved" religions and was thus prohibited. While reluctant to infringe on the First Amendment, the government adhered to *Board of Education v. Mergens*, and adopted a more lenient policy geared towards equal treatment of religion and its secular counterparts in certain public school situations. Despite the Court's acceptance of religious expression in open public school forums, it has concurrently passed regressive legislation that limits student expression generally. In order to reconcile the case law and seemingly contradictory laws, this article argues that equal treatment of religious treatment is appropriate in public schools as long as it presents no Establishment Clause concerns and is consistent with pedagogical goals. While religious demonstrations are important to foster individual identity and promote the values of free expression, the government needs to develop a stronger method of reconciling student religious expression and protective jurisprudence.

Joshua B. Marker, Note, *The Worship Test: Balancing the Religion Clauses in the Limited Public Forum*, 60 HASTINGS L.J. 673 (2009).

When deciding whether restrictions on a religious group are appropriate in a limited public forum, a court should ensure that they are not inhibiting the free

exercise of religion while at the same time remaining neutral between opposing viewpoints on religion. Balancing religion in a limited public forum is difficult because a religious group should be permitted equal access without the state crossing the fine line of sponsorship, which violates the Establishment Clause. The author proposes a two-prong test to properly determine whether the restrictions placed on a religious group's use of a limited public forum are viewpoint-neutral. This test provides courts with a standard to review the nature of each situation on a case-by-case basis rather than by stating a blanket rule application. In addition, the two-prong test is useful in determining whether the opinion shared in the limited public forum reflects the desires of the community at large.

David M. Smolin, *The Civil War as a War of Religion: A Cautionary Tale of Enslavement and Emancipation*, 39 CUMB. L. REV. 187 (2009).

The rhetoric used during the Civil War by North and South to both justify and condemn slavery turned on complex religious ideas of what was "right" for a community, patriarch, and their relationship to God. What is most astounding is that both arguments found roots in a shared scripture. Contemporary language used to describe modern human rights abuses blurs our understanding of each phenomenon—slavery, trafficking, and economic exploitation are labels that are superficially very similar but drastically different from one another—and encourage the idea that all abuses fall under the same umbrella. The author describes the difficulty in identifying contemporary injustices by contrasting writers from the American Civil War, including John Bingham, the author of section one of the Fourteenth Amendment, and his equally ardent opponents who found justifications for slavery in the South. Though an understanding of American slavery does not easily equate itself with the contemporary phenomenon of sex trafficking in Eastern Europe, for example, or indentured servitude in India, their rationales, justifications, and abolition movements beg comparison.

SAME-SEX MARRIAGE

Patrick J. Borchers, *The Coming Collision: Romer and State Defense of Marriage Acts*, 2008 BYU L. REV. 1635 (2008).

The increasingly attenuated same-sex marriage debate is likely to emphasize the question of whether state defense of marriage acts infringe on the equal protection rights of homosexual couples by subjecting them to a disadvantage no other group suffers. It used to be widely speculated that the issue of same-sex marriage was going to turn on the application of the Full Faith and Credit Clause of

the Constitution, but the federal Defense of Marriage Act ("DOMA") and full faith and credit jurisprudence clarify that states are not obligated to recognize same-sex marriages consummated in other states. The author suggests that two recent Supreme Court cases, *Lawrence v. Texas* and *Romer v. Evans*, when read together, indicate that state laws punishing a discrete group of people may be unconstitutional violations of the Equal Protection Clause. While the path laid by these cases might take the Court in an infinite number of directions—ranging from no meaningful impact on same-sex marriage to a creation of a federal constitutional right to same-sex marriage—the conflict between state defense of marriage acts and the Supreme Court precedent is inevitable. Whether the Court should adopt the expansive reading of *Romer* and find a federal constitutional right to same-sex marriage, and whether to extend special protection to other minority sexual practices such as polygamy and incest are questions the Court still needs to answer.

Christy M. Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143 (2009).

While progress toward bestowing marriage rights upon same-sex couples in the United States has been frustrated by the implementation of federal and state versions of the Defense of Marriage Act, Canada, in contrast, has made great strides towards affording same-sex couples equal marriage rights and benefits. U.S. federal and state legislatures have amended their respective constitutions to effectively ban same-sex marriage, but Canada extended marriage rights to gay and lesbian couples through passage of the Civil Marriage Act in 1995, largely due to the fact that individual Canadian provinces had no ability to thwart the passage of the Civil Marriage Act on their own. Though both the United States and Canadian constitutions include equal protection assurances, the United States has failed to extend equal rights protection to same-sex couples and has ignored numerous possible solutions that Canada has provided. The author points out that the United States examines gay rights issues with a heavy emphasis on religion and morality, while Canada treats gay rights as a human rights issue, thus continuing progress where the United States has consistently fallen short. Canada's efforts and successes within this realm provide a strong framework that the United States should examine and rely upon as a model against which to rethink its approach to the question of same-sex marriage rights.

Thomas Ryan Lane, *Rational Basis Review Irrationally Applied: The Legalization of Same-Sex Marriage by the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health*, 1 LIBERTY U. L. REV. 155 (2006).

In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts set aside the correct applicable standard of law to achieve their goal of legalizing same-sex marriage. The *Goodridge* court should have applied the rational basis test, where a law is valid if the state had a "rational basis" for creating the statute, rather than the strict scrutiny test, where the legislature's alleged purposes must be a "necessary component" of the statute. By using the strict scrutiny test, the court usurped the legislature's function to achieve their political desires. The author contrasts the *Goodridge* decision with the decision in *Morrison v. Sadler*—where the *Supreme* Court properly applied the law—to show how the court should have addressed the issue. Historically, there has always been temptation for courts to replace the "rule of law" with the "rule of man," but courts cannot give in to this temptation without damaging American law and government.

Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703 (2008).

When dealing with same-sex marriage, states should not be compelled to recognize same-sex couples from sister states based solely upon compliance with the Full Faith and Credit Clause, rather, states ought to apply forum law in choosing whether to recognize such marriages. Generally, those studying the right to same-sex marriage do so in a polarized manner; looking at it either as a constitutional right, focusing on the individuals, or looking at it from the interest of the state that initially recognized the marriage and the state in which recognition is later sought. Through empirical data of states', ethnicities, personal income rates, age distributions, and other categories, the author illustrates the ways in which the states are more different than they are seemingly similar. Recognizing the ways in which the states differ, while also appreciating the necessity of the Full Faith and Credit Clause, the author suggests that a "properly functioning federal structure" where marriage is defined differently among the states will support the individual's interests in same-sex marriage. Although this system would not spell uniformity throughout the United States, it might support the individual interest by deterring extremism on either side of the same-sex marriage debate and benefit the country's political structure by providing more moderate opinions on the matter.

Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations,* 2008 BYU L. REV. 1855 (2008).

The relationship between comity and controversial domestic policy has historically followed a similar pattern: as a policy is viewed increasingly as against natural law, inter-jurisdictional recognition of the policy declines. The author reviews the history of comity with regards to controversial topics such as slavery, inter-racial marriages, consanguineous marriages, teen marriages, adoption, and homosexual marriages. Slavery is one example of an issue where comity became weaker as internal domestic policy moved from mild to strong opposition. Recognition of gay marriage is following a similar course, where the decision of what level to recognize gay marriage depends primarily upon the political ideology of the state rather than uniformity of the law. In the end, resolution of this issue will have little to do with comity rather than the political flavor of the nation on this topic.

SEX DISCRIMINATION

Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009).

Due to the invisibility of heterosexuality as a factor in sex discrimination cases under Title VII and the attitude towards homosexuality as deviant from the heterosexual norm, courts rarely acknowledge or properly regard sexual orientation as a factor in discrimination claims. Although discrimination claims based solely on sexual orientation are not protected or actionable under Title VII, claims that are based on both sex and sexual orientation, or intersectional claims, may be protected under Title VII because of their reliance on a protected identity-trait—gender. Moreover, the Supreme Court holding in *Meritor Savings Bank v. Vinson* that sexual harassment is an illegal form of sex discrimination, should have acknowledged that the victim was harassed not only because of her sex, but her sexual orientation as well. The courts should employ a new approach to intersectional discrimination claims by acknowledging sexual orientation as a neutral trait, which is irrelevant to employment discrimination and neither benefits nor burdens the actionability of discrimination claims. This re-orientation approach to sexual orientation would offer homosexual and heterosexual claimants the same opportunity and neutral privilege when making discrimination claims.

Katie Manley, *The BFOQ Defense: Title VII'S Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169 (2009).

When making employment decisions, employers are prohibited from discriminating against employees under Title VII of the Civil Rights Act of 1964. However, the bona fide occupational qualification ("BFOQ") defense offers employers the ability to discriminate based on gender if they can prove that a substantial portion, if not all, of one gender cannot perform the functions of the employer's primary business, thus circumventing Title VII. Proponents opposing the BFOQ defense argue that the defense legitimizes gender discrimination, limits the positions that individuals can fill, and disproportionately disadvantages women by prolonging gender stereotypes. The author believes that the right to equal employment must be balanced against the "rights of consumer privacy and both employer and employee autonomy." Thus, though the BFOQ defense is "problematic in theory and application," it is necessary for the working of Title VII.

Rachel Marron & Andrew B. Whitford, *Constructing a Diverse State: Legal Change and the Gradual Incorporation of Women in the U.S. Armed Forces*, 33 T. MARSHALL L. REV. 241 (2008).

Women make up roughly fifteen percent of the United States Armed Forces and are legislatively banned from participating in direct combat unless they have legislative approval. These women also face constant "sexual harassment, rape, fraternization, and male resentment" in an occupational field that is dominated by men and has a history of viewing women as unequal. The organizational structure of the Department of Defense needs to change to accommodate women within their ranks. The author suggests several ways of integrating women into the U.S. military by: making leaders see the urgent need to help facilitate a better integration of women within its ranks; holding agency heads accountable for progress and ensuring that there is a plan in place for assimilating women into the armed forces; and communicating these changes to its officers and enlisted servicemen and requiring them to make sure that these changes are implemented by setting concrete goals within units. If the Department of Defense does not change its policies regarding women soon, it might not be as effective at protecting the interests of the United States and might loose the sympathy and support of the American people.

Richard D. Shane, Note, *Teachers as Sexual Harassment Victims: The Inequitable Protections of Title VII in Public Schools*, 61 FLA. L. REV. 355 (2009).

In *Plaza-Torres v. Rey*, a federal court in Puerto Rico found that just as an employee can bring a cause of action against an employer for harassment perpetrated by a customer under Title VII, a teacher should be able to bring a cause

of action against a school district for harassment perpetrated by a student. However, teachers who suffer from student-perpetrated sexual harassment have found it difficult to invoke the protections of Title VII. The protections afforded under Title VII to students who are harassed by other students or by teachers should be applied to teachers who are victims of such harassment, and yet teachers have had limited success in bringing these claims. Teachers are entitled to hold public schools liable under agency law—the law that determines in what instances a person should be deemed to have acted on behalf of another person—for hostile work environments created by sexual harassment. To facilitate Title VII claims, courts must avoid dismissal on summary judgment and establish clear guidelines for juries to consider a teacher's claim, as well as set a clear time period that a teacher must wait before filing a Title VII claim.

SEX OFFENDERS

John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37 (2009).

The Massachusetts Sexually Dangerous Person Law ("MSDPL") provides for the confinement of criminals anywhere between one day to life and aims to prevent the commission of future crimes by offenders identified as sexually dangerous. The MSDPL is overbroad in its characterization of sexually dangerous persons, which stems from the inability of both the legal and psychological communities to determine recidivism rates and separate those who commit crimes because of a mental disorder from those who do so by choice. Modifying the MSDPL could accommodate the nuances of each area that makes up sexual dangerousness, such as the difference between the psychological and legal definitions of mental disorders. Although these laws are incapable of relying on consistent science, jurisdictions heavily favor them because they give courts added discretion in sentencing. As a result, laws similar to the MSDPL are merely just another method of punishing sex offenders who the court deems have not sufficiently paid for their crimes.

Autumn Long, Note, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 145 (2009).

The existing sex offender policies of the United States are not narrowly tailored to protect the public and do not achieve their intended deterrent and rehabilitative effect. In one respect, the United States' public sex offender registry does not provide enough detail as to the type of crime the individual committed, yet in other respects, it provides far too much personal information, making the criminal susceptible to vigilantism. In contrast, the United Kingdom provides more protection as its full registry information is only made available to the police force and includes registrants' names and addresses; however, the public may be notified regarding the number of sex offenders in their area and victims may request to be informed of their assailant's release date if they are imprisoned for longer than one year. Furthermore, the United Kingdom does not enforce residential restrictions against sex offenders as in the United States, where it has the effect of making it extremely difficult for sex offenders to locate suitable housing. There is little hope that the United States' ineffective sex offender policies will change, as moves for reform are unpopular and existing laws have earned phenomenal public support.

Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solution*, 94 IOWA L. REV. 607 (2009).

Sex offender residency restrictions do little to protect children because the vast majority of sexual assaults are committed by family members or acquaintances, and arguably may worsen the problem by denying convicted sex offenders access to employment opportunities, social services, law enforcement and therapeutic treatment. Additionally, such restrictions serve as a retroactive punishment, rather than a regulative one, and thus are unconstitutional based on violation of Ex Post Facto laws. Alternatively, the author proposes managing sex offenders and protecting the public by creating a Sex Offender Containment Zone, where high-risk sex offenders would live in shared living arrangements under community supervision. The program would consist of treating and supervising the sex-offenders, as well as a community education and awareness system that would focus on teaching children how to avoid being vulnerable to attack. This emphasis on treatment and education, in contrast to the sex-offender residency restrictions, would more effectively help both the community and the offender.

SEXUAL ABUSE

Michele Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent and Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim is Non-Traditional*, 17 AM. U. J. GENDER SOC. POL'Y & L. 41 (2009).

The current standard for consent applied in rape cases stems from and further reinforces gender biases and is particularly harmful to non-traditional victims, such as prostitutes and women with multiple partners. The vast majority of jurisdictions currently view consent as something that, once given, cannot be withdrawn; while others, hold that consent is implied in the absence of total negation. The author proposes that the current construction of consent be replaced by one that views it as a continuum, where consent can be given and withdrawn at any time. Accordingly, legislation should be enacted that requires consent to be acquired at each progressing step leading up to and including sexual intercourse. Rape shield statutes—currently riddled with loopholes that allow the admission of a victim's sexual history into evidence—are also in dire need of revision to avoid the assumption by juries that consent was given.

Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU L. REV. 57 (2009).

Alcohol plays a role in roughly half of the reported incidences of rape, thus its effects must be accounted for when determining consent. The standard for consent applied in most jurisdictions heavily favors defendants; most jurisdictions find consent in virtually every scenario that does not include an express denial of willingness to participate in a sexual act. The end result of this practice is that silence often implies consent, even in situations where a victim may have been silent due to fear. The author proposes a sliding rule that requires more explicit consent as parties consume more alcohol. It is suggested that such a rule would eliminate a great deal of the ambiguity that exists under the current rigid view of consent in the presence of alcohol.

Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 MINN. L. REV. 1090 (2009).

Generally, the Confrontation Clause prevents the admission of testimony in criminal cases where the witness is not available for cross-examination by a defendant. This requirement can present a unique challenge in cases of child sex

abuse, as many of the victims are deemed too young by judges to testify competently. The admissibility of this testimony becomes even more complicated when a forensic child psychologist or other child advocate elicits it at a child advocacy center. When prosecutors are involved in interviews or where no attempt is made to test the veracity of a child's statement by exploring alternative explanations, admission of a child's testimony at trial without the possibility of cross-examination is a violation of the defendant's constitutional rights under the Confrontation Clause. Furthermore, a judge should afford a defendant the presumption that any statements made under these circumstances are testimonial, and the state should only be able to overcome this presumption with clear and convincing evidence that any involvement in the interview by law enforcement personnel was ancillary to the prosecution, or by equally proving that an interviewer appropriately explored alternative explanations to the allegations.

Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605 (2009).

Men are victims of sexual violence through prison rape, sexual assault during armed conflict, or childhood sexual abuse. Yet when the international community addressed sexual violence, women's rights groups were extremely worried that crimes against women were not properly represented as an international issue, so they insisted that the language of new international protections focused on crimes against women. As a result, most international treaties define rape as a "gender-based crime," which does not consider men potential victims because "gender-based" refers to social constructs that regard women as the victim. The author raises numerous concerns with the exclusion of men as victims of sexual violence, such as creating an improper hierarchy of victims, characterizing women as victims, and creating unhealthy perceptions of masculinity in young boys. The Rome Statute provides an alternative definition of gender by recognizing both sexes, and this definition should be implemented in other international treaties.

Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119 (2009).

Sexual violence within prisons is a widespread, terrifying problem, yet has received little public attention. Americans tend to view prisoners as unsympathetic victims whose criminal activity makes them deserving of whatever conditions they confront in prison. However, rape is as morally reprehensible within prison as it is outside of prison; prisoners, just like any potential victim of sexual violence, deserve protection. In 2003, Congress passed the Prison Rape Elimination Act ("PREA"), which has inspired some state action to increase reporting of rape in prison, but has not confronted the overarching problem of providing prevention,

protection, and treatment for potential victims of sexual violence. To address these issues, the prison violence movement must first, alter the public's perceptions about sexual violence within prisons so that eliminating violence becomes a common public goal.

SOCIAL CLASS

Katie Klaeren, *Moving Toward a More Protective Interpretation of National Original Discrimination Under Title VII?: Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006)*, 77 U. CIN. L. REV. 349 (2008).

In *Maldonado v. City of Altus*, the Tenth Circuit recognized the adverse impact of English-only workplace policies and deemed such rules discriminatory under Title VII. In *Maldonado*, after the City of Altus imposed an English-only rule on all municipal employees, twenty-nine Hispanic employees successfully brought disparate treatment and disparate impact claims based on a hostile work environment theory. The Tenth Circuit held that the hostile work environment employees were subject to were sufficient to establish a disparate impact claim, thus rejecting the Fifth and Ninth Circuits' holdings that a discrimination claim is not protected by Title VII. By shifting away from the Title VII requirement of "immunitability," the Tenth Circuit acknowledged that employees could suffer adverse consequences, regardless of whether they can adjust their own behavior to comply with discriminatory rules. Accordingly, the Tenth Circuit protected employees and eliminated a form of second-generation discrimination that Title VII was created to eradicate.

Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47 (2008).

The 2006 decision of the Board of Immigration Appeals in *C-A-* and the 2007 decision in *A-M-E* establish the use of "social visibility" as a new element of "membership in a particular social group" for asylum purposes. The "social visibility" test diverges from previous approaches by focusing on the visibility of members of a group, instead of the visibility of the group as a whole. The cases that have applied the "social visibility" test should not be given precedential value, as they constitute a sudden and unexplained change in the definition of "membership in a particular social group." Furthermore, public perception of a

social group is so difficult to quantify and analyze, that applying a "social visibility" test will likely lead to an impossible evidentiary standard for those seeking asylum on the grounds of social group membership. In particular, individuals that are forced to hide their membership in a social group for reasons of physical safety or cultural pressure—gay men in countries where homosexual behavior is prohibited or individuals that are part of a social group whose existence is denied because it conflicts with societal or religious values—are likely to be unable to demonstrate that they are "socially visible."

WOMEN'S RIGHTS

Brian Calandra, Note, *Sound and Fury, Accomplishing Nothing?: Why Haven't Empirical Data, Commentator Advocacy and Sympathetic Media Coverage Helped Women in Bankruptcy?*, 30 WOMEN'S RTS. L. REP. 184 (2008).

Despite the fact that women constitute a large portion of Americans declaring bankruptcy, the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005 did not proportionately address the interests of women and men. Women's advocates unsuccessfully tried to prevent the passage of the Act by publishing literature that articulated the detrimental effects this legislation would have on women. The Act disadvantages women in several ways; for instance, the Act makes it tougher for women to declare bankruptcy and prevents women who have filed for bankruptcy from re-filing for eight years. The author asserts that the Act was passed because of advocates who proposed that filing restrictions would decrease the overall number of bankruptcy filings, while women's advocates felt that the Act should be rejected because it would create hardship for female filers. If advocates for women in bankruptcy want to alter the bankruptcy code, they must emphasize solutions to specific shortcomings within the coder rather than propose complicated changes just to reduce the number of female filers.

Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121 (2008).

The stability of patriarchy is dependent on a notion that the woman's role in our society is subservient, and therefore such acts as breastfeeding should be conducted in the privacy of one's home to reflect that role. While most state statutes and federal law attempt to shield breastfeeding women from criminal liability, our society stigmatizes mothers who venture to breastfeed in public by

subjecting them to harassment, ostracization, eviction, and charges for indecent exposure. It is the ingrained pervasive objectification of women in our culture that discourages mothers from breastfeeding in public and adversely affects their societal mobility because men decide when a breast should be bare and when it should be covered. As a way to fight these deep-rooted preconceptions, the author argues that public breastfeeding is an act of symbolic speech that warrants First Amendment protection. By encouraging breastfeeding in public, we would protect the health of the mother and her child, encourage mother-child bonding, acknowledge women's autonomy other their bodies, and promote equality in our society.

Dana Neaçsu, *The Red Booklet on Feminist Equality, Instead of a Manifesto*, 30 WOMEN'S RTS. L. REP. 106 (2008).

This article examines the effect of globalization on legal feminism and encourages the movement to take a new stance. As globalization crept into our world, its effects were slow and at first, relatively unnoticed. Globalization slowly brought more poverty to the impoverished and more power to those who were already well off; creating disastrous disparities in income and welfare. Globalization also had the effect of undermining feminism's "base", because when women are fighting to merely be human, fighting for equality comes second. In order to deal with this reality, the author argues that the feminist movement should strive both to rediscover its roots in social justice and to promote widespread, substantive human rights.

Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89 (2009).

Mentoring is an important tool for women seeking careers in top industries, especially for women who seek higher positions in organizations. Studies have revealed a positive correlation between women in the workforce and economic productivity, further proving the importance of mentor programs. Unfortunately, women still face barriers in the workplace because of existing gender stereotypes, but mentoring helps women overcome the glass ceiling by giving them career enhancement, psychosocial support, and role models in advancing their career. Negative aspects exist within a mentoring relationship, depending on the dynamic between a mentor and mentee as well as gender differences between mentor-mentee relationships. However, mentoring has more advantages than disadvantages, and implementing certain changes in mentoring programs, such as group mentoring, can make mentor-mentee relationships more effective.

Susan W. Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L.J. 731 (2009).

Cultural reforms must be enacted to rectify the effect of China's One Child Policy, which has led to gendercide and an influx of women into sex trafficking rings. As a result of the existing policy there is a scarcity of Chinese women of marriage age, which has encouraged Chinese men to seek brides through trafficking rings. The trafficking industry is profitable and the Chinese culture's long standing preference for males is furthering the treatment of women as commodities and has an increased negative effect upon the health and well-being of the remaining Chinese women. To remedy this enormous problem, China must enforce their existing laws, such as those that prohibit sex selective abortion, trafficking, and child abandonment, and alter the One Child Policy to create incentives, rather than inflict the harsh penalties of late term abortions and sterilizations. In addition to enforcing their existing laws, China must also enact civil rights laws to counteract both the cultural traditions and government practices that promote the discrimination and murder of women and work to achieve gender equality.

WORKPLACE DISCRIMINATION AND HARASSMENT

Alyson L. Cantrell, Comment, *Weaving Prescription Benefit Plans into the Birds and the Bees Talk: How an Employer-Provided Insurance Plan that Denies Coverage for Prescription Contraception is Sex Discrimination Under Title VII, as Amended by the PDA*, 39 CUMB. L. REV. 239 (2008).

An interesting sex discrimination issue has arisen as employers exclude prescription contraceptives from employer-provided insurance plans. In 1978, Congress amended Title VII with the Pregnancy Discrimination Act ("PDA") to recognize sexual discrimination on the basis of pregnancy, childbirth or related medical conditions, yet neither Title VII nor the PDA expressly address contraception. Although the Equal Opportunity Employment Commission and a majority of district courts support the contention that employers cannot exclude prescription contraceptives from benefits plans, the Eighth Circuit in *In Re Union Pacific* held that excluding prescription contraceptives did not treat woman employees less favorably than other employees. The author contends that the holding in *Union Pacific* allows employers to exclude prescription contraceptives

from insurance plans, resulting in lawful discrimination against females. While there is proposed legislation to amend certain sections of the Employee Retirement Income Security Act, a split among the courts will remain until Congress solidifies its intent regarding prescription contraception in Title VII.

Mark R. Bandsuch, S.J., *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287 (2009).

Although the Title VII of the 1964 Civil Rights Act has significantly curbed employment discrimination, trait discrimination has increased in recent times, and courts have upheld rules that have required employees to dress or even act in a certain manner. The author describes how this unequal treatment has been unaffected by Title VII investigation primarily because of three imperfections: failure to consider these cognitive biases and stereotypes, the overemphasis on immutability as a measure of material adversity, and the confusing nature of the Title VII doctrine. One solution to this problem is for courts to implement a totality of the circumstances ("TOC") analytical framework in its assessment of employment discrimination: to weigh the harm to protected employees against the business justifications of the employer. An application of this theory is seen in American Airlines' Grooming Policy—one of many companies that prohibited employees from wearing "all-braided hairstyles"—where through a detailed analysis, one sees that American Airlines' dress code is discriminatory by a small margin. Although there are some disadvantages to a TOC analytical approach, and although there is no guarantee that this theory will completely solve the recent trend of trait discrimination, it is certainly a step in the right direction.

Rene L. Duncan, *The Direct Threat Defense Under the ADA: Posing a Threat to the Protection of Disabled Employees*, 73 MO. L. REV. 1303 (2008).

One of the intentions of the Americans with Disabilities Act ("ADA") is to restrict employers from not hiring a potential employee due to a disability; however, if the disability creates a "direct threat" to the safety and well-being of others, the decision not to hire may be acceptable. District courts are not in unanimous agreement as to who bears the burden of proving or disproving the direct threat—the employer or employee. Courts consider several factors to examine whether the individual creates a direct threat, including the likelihood and severity of the harm that could result from the hiring. This article analyzes the Eighth Circuit's decision in *EEOC v. Wal-Mart Stores, Inc.*, which required the employer to prove that a potential employee afflicted with cerebral palsy created a direct threat to safety. The Eighth Circuit found that placing the burden on the plaintiff unfairly required those individuals to prove their capacity to work while overcoming stereotypes about their disabilities; whereas placing the burden on the

employer is more congruous with the ADA's policy to protect those with disabilities from being discriminated against.

Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 when Unconstitutional Race and Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 GEO. MASON U. CIV. RTS. L.J. 371 (2009).

In *Cleveland Construction v. City of Cincinnati*, the Supreme Court of Ohio held that Cleveland Construction was not entitled to lost profits because state law did not recognize rights of bidders who were not awarded a contract. The author argues that the United States Supreme Court should grant review and reverse the *Cleveland Construction* decision because the court failed to address the basis of Cleveland Construction's § 1983 claim—that the City's Small Business Enterprise created unconstitutional race or sex-based classifications. The United States Supreme Court has held that municipalities may be held liable under § 1983 for acts the municipality officially sanctioned when the challenged act was done pursuant to a policy adopted by authorized policy-making officials. Under this analysis, it is clear that Cleveland Construction fulfilled the requirements to prevail on a § 1983 claim since city policy-making officials enacted a program providing preferential treatment to contractors who employed a quota of minority or female-owned businesses despite no empirical support for the policy. Ultimately, had the case been properly decided, not only was Cleveland Construction entitled to lost profits under § 1983, but also, damages against the city, which are essential to deterrence of future municipal misconduct.

Nancy Zisk, *In The Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule to Determine the Start of the Limitations Period for Pay Discrimination Claims*, 16 DUKE J. GENDER L. & POL'Y 137 (2009).

In *Ledbetter v. Goodyear Tire and Rubber Co.*, the Supreme Court held that Ledbetter's pay discrimination suit under Title VII of the Civil Rights Act of 1964 was time barred because Ledbetter did not file her claim within 180 days after receiving different pay from her male counterparts for doing similar work. This article suggests that the Supreme Court should have applied the statutory limitation after Ledbetter discovered that she was receiving different pay from her male counterparts. The author also notes that it is difficult to determine the exact time that someone becomes aware of pay discrimination due to employees not readily discussing their paychecks. Further, the Supreme Court should have followed the decision in *National R.R. Passenger Corp. v. Morgan*, where the Court did not dismiss a hostile work environment claim for being timed barred because the hostility occurred over a period of time. Discrimination claims should also mimic

federal causes of action, where time does not start to run until the plaintiff discovers or could have reasonably discovered the violation that gave rise to the plaintiff's cause of action.