# ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

## ABORTION AND REPRODUCTIVE RIGHTS

Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

Working in the shadow of *Roe v. Wade* and *Planned Parenthood v. Casey*, today's Supreme Court must hold that the Constitution guarantees a woman's right to an abortion. A method of constitutional interpretation that extracts abstract principles from the text and applies them to the historical moment preserves the Constitution's original meaning. Although the Court took many years to incorporate basic constitutional protections into the Fourteenth Amendment, the general principles animating the Equal Protection and Privileges and Immunities clauses—equal citizenship, civil rights and equality—have never changed. To determine whether a state abortion law complies with the Constitution, the Court should not ask whether the state intended to impose a burden on women, but whether taking away a woman's choice and relegating her to a lower social and economic status violates her constitutional right to equal citizenship. Once the Supreme Court clarifies the principles that support a woman's right to abort for health and personal reasons, state legislatures will pass abortion laws which take into account the perspectives of the women they will affect.

Melissa Boatman, Comment, *Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce,* 37 U. BALT. L. REV. 285 (2008).

In many states, including Maryland, there is no legislation governing frozen embryo disposition disputes after a divorce. Without such legislation, courts have attempted to resolve the ever-growing number of disputes in this area by applying one of three approaches: the contractual approach, the contemporaneous mutual consent model, and the balancing/best interest test. Yet, given the wide variety of judicial approaches to settling disposition disputes, without legislative guidance, both individuals and the courts are left without means to regulate these disagreements. By analyzing current judicial trends, as well as some of the few legislative attempts to address the issue, the author hopes to find an approach that will mitigate the disparate impact towards women involved in these disputes. Ultimately, the author concludes that Maryland must enact some form of legislation in preparation for their first embryo disposition case.

Barbara Chevalier, *The Constitutionality of the FDA's Age-Based Plan B® Regulations: Why the FDA Made the Wrong Decision*, 22 WIS. WOMEN'S L. J. 235 (2007).

Plan B, the only FDA approved emergency contraception available to women in the United States, became an over-the-counter drug for women over the age of eighteen in 2006. However, Plan B should not be kept behind the counter or be made available only to women over eighteen because there is no medical reason or justifiable state interest for such requirements, and therefore, such requirements may constitute limitations that violate *Griswold v. Connecticut.* Plan B is contraception, not abortion, allowing it to fall under *Carey v. Population Services International*, which held that it is unconstitutional for a state to ban the sale of contraception to minors. The current regulations put an undue burden on both women under eighteen and those over eighteen who have to ask for Plan B and show their identification. The author argues that the regulations are the result of societal pressures rather than medical evidence, which makes them especially unreasonable.

Jocelyn E. Getgen, Note, *Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban*, 41 CORNELL INT'L L.J. 143 (2008).

A country's decision to criminalize all abortion is contrary to the recent global legal trend of viewing abortion, particularly unsafe abortion, as a public health issue. Some countries, such as Nicaragua, have decided to eliminate all forms of abortion, which may violate international norms on women's right to life and health, create discordance within the global community, and retard the progress of women's public health. The author begins by taking a close look at unsafe abortion and its consequences, and then focuses on the issue of abortion in the greater context of cultural, political, and historical forces. Pressure can be placed upon Nicaragua and other countries with similar bans, both in the form of international sanctions as a result of treaty violations, or a withdrawal by private investors who are concerned with negative public associations. The author concludes by stating that Nicaragua should care about maintaining the international status quo because ultimately, it needs to care for its women.

Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529 (2008).

Increasingly, couples who no longer want or need their excess frozen embryos donate them to another couple facing infertility or other reproductive difficulties. But, there are no set regulations regarding the ownership of the

donated embryos or parentage of the child, if one results, and as divorce rates increase, the likelihood of a recipient couple's ownership litigation also increases. Few legislative attempts have been made to define the legal status of the parties involved in a frozen embryo donation, though there has been debate and attention paid to the ownership status of a progenitor couple. Approaches to settle disputes among progenitor couples include a contractual approach and a mutual consent model, neither of which is completely effective, since they do not, respectively, consider the emotional charge of the situation or the individual procreative rights of the parents involved. The author argues that the best approach to settle a dispute of the recipient couple is a modified balancing approach used to mediate disputes between the progenitor couple, which would account for the fact that the recipient couple does not have a genetic link to the embryo.

Anthony Miller, *The Case For the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395 (2007).

In the *Stanley-Lehr* line of cases dealing with unmarried fathers, the Supreme Court held that a genetic father who takes part in his child's upbringing has a constitutional right under the Due Process Clause of the Fourteenth Amendment to continue his relationship with the child. Today, however, the Court must use the *Stanley-Lehr* line as the starting point to redefine a genetic parent's right to have a relationship with his or her genetic child, because modern reproductive technology, together with the non-traditional home environments in which children are raised, may question a woman's status as parent. The *Lehr* Court, building on the case law of Substantive Due Process regarding a parent's right to determine how to raise children, squarely held that a parent must actively show interest in the child's life beyond merely asserting a genetic bond before they can acquire a constitutional right to continue the parental relationship. Until and unless the court overrules *Stanley-Lehr*, it should at least allow biological mothers to have a relationship with their children. Most importantly, the Supreme Court's redefinition of "parent" must allow parents to maintain relationships with their children even if modern technology cuts off the biological connection between them and their children.

Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175 (2008).

*Roe v. Wade* rests on unstable ground and abortion rights jurisprudence may shift to the states, where state courts will need to turn to federal case law and their own constitutions for help in constructing abortion policies. Attempts to shore up Roe by appealing to gender equality and autonomy are likely to fail because these two doctrines: (1) are unlikely to convince those unpersuaded by the right to privacy, (2) may not grant as much protection to abortion as the right to privacy,

and (3) would abrogate Supreme Court precedent regarding both Roe and gender rights. Although state courts usually give their constitutions the same meaning as the federal constitution, many state constitutions have provisions supporting gender equality, autonomy, and privacy. State court decisions favoring abortion do not face the same challenges as Roe since textualism and originalism do not apply to state constitutions with specific privacy or gender equality provisions and state judicial decisions are not as "undemocratic" since state citizens often retain some popular control over their judiciaries. Abortion rights advocates may want to utilize state sovereignty arguments to guarantee abortion rights state by state, even though such a tactic might lead to less nationally uniform abortion jurisprudence.

Whitney D. Pile, Note, *The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws,* 73 MO. L. REV. 243 (2008).

The statute at issue in *Planned Parenthood Minnesota v. Rounds* required a physician to distribute information and convey ideology that clearly fostered childbirth over abortion and created criminal penalties for doctors who disregarded the requirements. The court held that the state could not mandate physicians to express a certain ideology and any such mandate infringed on a physician's First Amendment rights. The author argues that *Planned Parenthood Minnesota v. Rounds* was correctly decided in that it protected doctors' First Amendment rights to be free from compulsion in giving information to patients. Informed consent laws generally require that a woman receive information regarding a contemplated abortion at least twenty-four hours before the procedure, with disclosures from providers about the physical and mental risks associated with an abortion. The information in *Planned Parenthood Minnesota* fell outside the scope of informed consent laws, which are limited to scientific information.

Robert J. Pushaw, Jr., *Partial Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J. L. & PUB. POL'Y 519 (2008).

*Gonzales v. Carhart*—a 2007 decision upholding the Partial Birth Abortion Ban Act—and previous abortion case law, exemplify the Supreme Court's policy-driven decision making, and its abandonment of a constitution centered approach. Many viewed *Gonzales* as a step towards overturning *Roe v. Wade.* However, *Gonzales* can be viewed as an attempt to narrow the wide holding of *Roe* while enhancing Congressional power by failing to assess whether it had the ability to pass the Partial Birth Abortion Ban Act. Thus, *Gonzales* and other previous decisions, including *Casey, Roe,* and *Stenberg*, represent various political positions on the abortion question and the Justices' incorporation of their policy viewpoints into legal reasoning. To avoid the Supreme Court's politically guided decision making, the author argues for the judicial application of a "Neo-Federalist"

approach: a technique that attempts to identify the intent of the framers in order to apply original constitutional values to modern issues.

Emily Stark, Comment, *Born to No Mother: In Re Roberto D.B. and Equal Protection for Gestational Surrogates Rebutting Maternity,* 16 AM. U. J. GENDER SOC. POL'Y & L. 283 (2008).

*In re Roberto D.B* was correctly decided by the Maryland Court of Appeals and established the importance of protecting the rights of gestational surrogates. The court ruled that under the Equal Rights Amendment, both women and men alike should be entitled to object to parentage on the basis of genetic relation. The author argues that the current methods of establishing maternity in instances of gestational surrogacy—including the intent of the parties, the genetic contributions of the parties, gestational primacy, and the best interest of the child—violate the Equal Rights Amendment. In the future, assisted reproduction via advanced technology, especially gestational surrogacy, is bound to increase. It is the court's obligation to ensure that all individuals have adequate legal protection, especially as nontraditional families become more commonplace.

Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale,* 43 WAKE FOREST L. REV. 1 (2008).

In *Gonzales v. Carhart*, the U.S. Supreme Court denied a constitutional challenge to the Federal Partial-Birth Abortion Ban Act of 2003. The article presents a jurisprudential history of the Court's stance on abortion rights, concentrating on *Planned Parenthood v. Casey* and *Roe v. Wade*. The author then develops and addresses the framework of *Gonzales*, particularly Justice Kennedy's notion of a "woman's regret" upon performing an abortion. It is argued that the "woman's regret" rationale is a boon to the "pro-life" movement and serves as a political and legal victory for those who have sought to place the rationale at the forefront of the legislative and judicial abortion debate. In conclusion, the author states that this example signifies the influence of political opponents to established legal precedents of the Court.

## CHILDREN AND IMMIGRATION

Katie Annand, Note, *Still Waiting for the Dream: The Injustice of Punishing Undocumented Immigrant Students*, 59 HASTINGS L.J. 683 (2008).

Under current immigration policy, young people with undocumented immigration status can neither qualify for in-state tuition nor federal student loans. While recognizing that undocumented children are given the opportunity to receive up to a high school education, the author argues that treating undocumented youth as foreigners, with regards to post-secondary education, significantly limits their potential to realize academic and career dreams. Such limitations unjustifiably criminalize the children of illegal immigrants for their parents' decision to illegally enter the United States. The Development, Relief, and Education for Alien Minors ("DREAM") Act would allow some undocumented youths, who came to the U.S. when they were younger than sixteen years old, to qualify for in-state tuition and provide them with the opportunity to apply for permanent residency. Although many opponents of the DREAM Act claim that the Act will encourage illegal immigration of the parents in order to obtain a better future for their children, the author posits that claims cannot be a rationale for criminalizing undocumented young people for their parents' decision to migrate to the United States.

William J. Johnson, Note, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419 (2007-2008).

Under the Immigration and Nationality Act ("INA"), the sexual abuse of a minor can be treated as an aggravated felony—punishable by deportation and permanent banishment from the United States. The problem stems from the increasingly broad interpretation of aggravated felonies under the INA, which also includes several misdemeanor offenses such as simple battery and shoplifting. The author posits that these crimes do not warrant the harsh consequences that follow from their classification as aggravated felonies and believes that a crime should have to satisfy the federal definition of a felony in order to merit limited judicial review, expedited removal, and a permanent ban for reentry into the U.S. While three circuit courts have held that misdemeanors involving the sexual abuse of a minor constitute aggravated felonies, the Supreme Court has used an ordinary meaning approach when reviewing the scope of the aggravated felony provision. Using the Supreme Court's approach, the author concludes that the broad crimes that are currently punishable by deportation should be narrowed to those meriting such drastic measures.

Donyale N. Leslie, Comment, *A Difficult Situation Made Harder: A Parent's Choice Between Civil Remedies and Criminal Charges in International Child Abduction,* 36 GA. J. INT'L & COMP. L. 381 (2008).

An ideal solution to solve international child abductions involves a combination of both civil remedies and criminal charges. The International Child Abduction Remedies Act ("ICARA"), a civil remedy otherwise known as the Convention, is beneficial in certain cases since it permits children to be returned safely to their pre-abduction legal status without the filing of any criminal charges against the parent who abducted the child. The Convention requires the parent to submit the missing child's information to the country in which the parent resides, and that information is then transferred to the country from which the child has been abducted. The adoption of the Convention allows parents, with the help of the government, to have an easier time locating their abducted children compared to the pre-Convention era, in which it was nearly impossible to locate a child who had been taken to a different country. However, despite the benefits of the Convention, there are many instances in which children have been returned as the result of criminal charges, demonstrating that the ultimate solution should involve both civil and criminal components.

## CHILDREN AND TEENAGERS

Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey's Anti-Hazing Act,* 26 QUINNIPIAC L. REV. 305 (2008).

New Jersey's current Anti-Hazing Act presents a statutory loophole that leaves students, specifically student athletes, at risk of harm. The current language of the statute limits the definition of hazing to conduct associated with the initiation of applicants or members of a student or fraternal organization. While student organizations arguably could include student athletic teams, legislative history of the statute shows a focus only contemplating sorority and fraternity hazing, presenting an out for judges faced with the application of the statute to hazing activities conducted within the confines of student athletic teams. Additionally, New Jersey's current statute requires conduct that may produce "bodily injury" but does not take into account the mental anguish and injury that often results from hazing conduct. By broadening the application of the statute, the intent is to lessen the frequency of hazing conduct through deterrence, much like the current statute's goal to lessen hazing in sororities and fraternities in New Jersey.

Barbara Atwood, Note, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127 (2008).

The Indian Child Welfare Act imparts exclusive jurisdiction to tribal courts for child welfare and adoption disputes involving American Indian children living on reservations. Many tribal codes, empowered by the Act, permit the child to be represented during the proceedings and suggest that the state courts consider the child's interests when dealing with Indian children who do not live on a reservation. Many critics of the Act believe that it allows Indian children to be used as bargaining chips, resulting in child placements that benefit the tribe rather than the best interest of the child. Similar to international law and Indian tribal law, state courts should encourage more participation from Indian children or a representative in order to both illuminate the child's perspective for state judges and facilitate rulings that are in the best interests of the child. Despite the possible complications of increased participation by the children, such as the difficulty for representatives to determine and express the child's interests, increased participation by children would provide a better understanding of conflicting interests and encourage respect among the involved parties.

Anna L. Benvenue, *Turning Troubled Teens Into Career Criminals: Can California Reform the System to Rehabilitate Its Youth Offenders?*, 38 GOLDEN GATE U.L. REV. 33 (2007).

In the early 1970's, the California Youth Authority (CYA) was recognized internationally as a leader in the treatment of juvenile delinquents. California dealt with juvenile delinquents, not by punishment, but through various educational and vocational programs, as laid out in the *California Welfare and Institutions Code* § 1700 and in the judicial decree of *Farrell v. Harper*. However, over time, California's approach to rehabilitation has failed to reach its leadership status, and wards of the state are not receiving the rehabilitative services they are entitled to by law. The author posits that California should attempt not only further legislative reform, but also look to other states who are making great strides in rehabilitative services for juveniles. Specifically, the author cites both Missouri and Texas as up and coming leaders in juvenile rehabilitation.

John D. Bessler, *In The Support of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa*, 31 HASTINGS INT'L & COMP. L. REV. 33 (2008).

This article evaluates what more can be done to better the lives of South African children suffering from HIV/AIDS. It analyzes South Africa's

constitutional framework and its government's promises to the country's youth. The author discusses what Archbishop Desmond Tutu described as the *ubuntu*, the "very essence of human being," and how international NGOs and the South African government itself can help protect it for children. The author analyzes the rights of children under the South African constitution, with additional emphasis on the significance of international law and socio-economic rights jurisprudence in South Africa. This exploration highlights what rights are afforded to HIV/AIDS afflicted children in South Africa and how those rights are being frustrated.

Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. L. FAM. STUD. 201 (2007).

Supervised access is a tool used by courts in child-custody matters to allow for supervised visits between parents and their children, sometimes held in public locations and other times with a professional present. This tool is not always effective due to a lack of clear judicial rules outlining when and how supervised access should be administered. Supervised access is even harmful at times, allowing abusive parents visitation with a child, or subjecting the children to other physically and emotionally damaging situations with either or both parents. The author argues that the best interest of the child should be the focal point in supervised access decisions, since courts currently favor joint custody and ignore the impact that could have on the children. The government needs to review supervised access and implement guidelines to ensure the safety and interests of the children before granting supervised access.

Lyndsay R. Carothers, Note, *Here's an IDEA: Providing Intervention Services for At-Risk Youth Under the Individuals with Disabilities Education Act*, 42 VAL. U. L. REV. 543 (2008).

Through the Individuals with Disabilities Education Act ("IDEA"), children identified as requiring special education are entitled to a free public education. However, due to ineffective identification and testing methods, African-American children are disproportionately and incorrectly identified as needing special education. Although Congress amended the IDEA in 2004 in an attempt to ease this racial imbalance, the Act misidentifies students needing special education and denies them the education environment necessary to learn to their best abilities. The intervention programs required by the recent amendments of the IDEA only target at-risk infants and toddlers, as well as those students previously identified with disabilities, but neglect students who have yet to be recognized as having special needs. The author concludes that the disproportionate representation of minority students in special education programs include many students who do not belong, and although the IDEA does help to identify students with special needs,

the Act must be amended to accurately pair students with the educational setting they truly require to thrive academically.

Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services,* 11 CHAP. L. REV. 85 (2007).

The increasing privatization of child welfare services has led to a decrease in accountability since people can either blame the private services or the government for problems they have with welfare. Beginning in the 1960's, states were allowed to subcontract with private companies which created a new type of public-private child welfare system. Since constitutional guidelines do not apply to some private parties, courts are forced to determine if the state can be held accountable or whether it is beyond enforcement. Courts should be willing to hold private companies that contract with public agencies liable for "constitutional deprivations." Regardless, we must be aware and concerned of the decreasing level of accountability that comes with privatization of child welfare because a lower level of accountability can lead both private services and the government to not work as hard in helping the welfare system.

C. Eric Davis, Note, *In the Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 MICH. J. RACE & L. 433 (2008).

One of the protections afforded by the Indian Child Welfare Act (ICWA) is the requirement that the state must provide rehabilitative services to families who are in danger of having their parental rights terminated. The Adoption and Safe Families Act (ASFA)—which is similar to the ICWA but pertains to non-Indians—excuses the state from providing rehabilitative services under "aggravated circumstances" such as severe child abuse, whereas the ICWA does not contain an analogous exception. Courts are currently divided as to whether Native American families are entitled to a more active reunification in cases where there are aggravated circumstances. This note argues that the ASFA's exception should not apply to ICWA cases because the vague and undefined character of the exception could potentially undermine the "active efforts" requirement of the ICWA, which mandates that states take active efforts to prevent the breakup of Native American families. The author posits that a federal amendment incorporating a severe child abuse exception into the ICWA may help to rectify the situation, but the amendment must be carefully worded so as not to undermine the active efforts to protect the Native American community.

Susan Hanley Duncan, *MySpace Is Also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social-Networking Sites*, 96 KY. L.J. 527 (2007).

With the explosion of social-networking sites, like MySpace, keeping children safe during their use of networking remains a formidable challenge. Even with increasing use, parents, networking sites, and the legislature have failed to ensure that children are protected from the evils lurking on the Internet. The author posits that these three groups must work together to change the social norms on the networking sites and to protect children. The Note proposes solutions such as segregating the sites, making all user accounts private and punishing those users who misrepresent their age. Such methods of deterrence, along with continued education for both parents and children, are necessary steps to protecting the innocent users on networking sites.

Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107 (2008).

The authors argue that the current practice of determining child support orders through state created guidelines is a contentious process that is at odds with the policy goals of lawmakers. The current practice of using a marginal analysis in determining child support depends on guidelines based on how much the intact family spends on children. However, these guidelines may not always accurately reflect costs and expenditures that affect joint consumers such as rent and utilities. Therefore, child support guidelines should be based on three policy goals: the child's well being, the obligation of both parents to provide for the child, and the limitation of standard of living gaps between the child and the non-custodial parent. Child support orders should be forward looking, and the three policy goals set out above will allow officials to make more educated decisions based on the policy choices behind child support guidelines.

Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495 (2008).

The use of juvenile delinquency adjudications to enhance sentencing in subsequent criminal proceedings ignores the fundamental differences between juvenile and criminal courts and incorrectly equates the adjudications with criminal convictions. In *Apprendi v. New Jersey*, the Supreme Court held that the Due Process Clauses mandates that everything, except prior convictions, used to increase criminal sentences over the statutory maximum, be submitted to a jury and proven beyond a reasonable doubt. Several circuit and state courts are using prior

juvenile delinquency adjudications to increase sentencing in later criminal proceedings, even though juvenile adjudications do not provide juries in most states and most juveniles are encouraged to plead delinquency without vigorous defense against the charges. The author postulates that this procedure neglects the rehabilitative goal of juvenile courts and invalidates the need for systems of transfer into criminal courts. While positing that notions of fairness should bar juvenile adjudications from being viewed as criminal convictions and used to enhance subsequent sentencing, the author recommends that, at the very least, the infancy defense be made available in juvenile courts.

Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67 (2007).

The judicially sanctioned intake procedure at detention facilities, which requires blanket strip searches of juveniles, wrongly disregards the Supreme Court's extension of constitutional protection to children in *In re Gault*. While constitutional adult strip-searches almost always require individualized suspicion, juveniles have not received similar protection from the courts. Permitting blanket strip searches of juveniles is especially problematic due to social science findings that strip searches psychologically impact children much more severely than adults and that this invasive and embarrassing procedure is very rarely necessary in the case of minor offense juvenile arrests. The author seeks to provide advocates with a multi-faceted litigation strategy, involving both domestic constitutional law and human rights law, in order to obtain constitutional protection for incarcerated juveniles. The misuse of child protection to hinder juvenile constitutional rights must heed the actual best interests of children and the right of juveniles to receive full constitutional protection.

William Feldman, *The Role of International Human Rights Law in the American Decision to Abolish the Juvenile Death Penalty*, 7 APPALACHIAN J. L. 89 (2007).

Before *Roper v. Simmons*, the United States was one of the only countries to officially sanction the juvenile death penalty. This article argues that international law played a significant, although not the primary role, in the *Roper* court's decision not to execute two juveniles convicted of a brutal murder. Several international treaties have been drafted to eliminate the juvenile death penalty; however, the United States, though present at treaty conventions, has chosen not to ratify any of the drafted provisions. In deciding *Roper,* the Supreme Court consulted the decisions of other nations, all of which favor abolishment of the juvenile death penalty. International law may further influence the U.S. in deciding

whether the adult death penalty should be abolished, demonstrating that international decisions can play an integral role in U.S. adjudications.

Jacqulyn Giunta, Note, *Roper v. Simmons: The Execution of Juvenile Criminal Offenders in American and the International Community's Response,* 22 ST. JOHN'S J. LEGAL COMMENT. 717 (2008).

In 1989, the Supreme Court's decision in *Stanford v. Kentucky*, sanctioning juvenile execution was said to represent the general American opinion on the issue. However, in 2005, *Roper v. Simmons* overruled *Stanford*, reasoning that an increase in states banning capital punishment indicated that public opinion now perceived juvenile execution to be "cruel and unusual punishment" under the Eighth Amendment. This article examines the developments that occurred between *Stanford* and *Roper* and the Supreme Courts' changing perception on international human rights. While the *Stanford* Supreme Court rejected international human rights conventions as having any impact on the American legal system, the *Roper* Court, recognized the international community's condemnation of juvenile execution—as indicated in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. While the United States has long failed to consider international conventions, it is now beginning to incorporate human rights policies into its own legal system, and in the future, may play a more active role on the global stage.

Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143 (2008).

In *McKeiver v. Pennsylvania*, the Supreme Court ruled that the Sixth Amendment right to a trial by jury, which is incorporated in the Fourteenth Amendment, does not extend to juvenile proceedings. The Court seemed to be more concerned with efficiency of the juvenile system, the burden of juries upon the system than the rights due to the minor and the juvenile proceeding as being one of "rehabilitation," all of which have led to ineffective correctional outcomes and high rates of recidivism. The reliance on rehabilitation is a myth, as current juvenile courts are more like factories, punishing the minor for the crime committed, rather than educating and rehabilitating him or her to become a productive person. The juvenile system needs change, and a jury trial will give juvenile offenders their due process and equal protection rights, while instilling in them the seriousness of their offenses. Since the juvenile system already closely resembles the adult system, the addition of a trial by jury will only be an added safeguard to the rights of children.

Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33 (2007).

Historically, American common law has recognized that juvenile offenders should not be held to the same standards of accountability as adults, who not only have the *mens rea* to commit the crime, but also the ability to understand the consequences of their actions. The courts have developed a range of ways to handle such child offenders, including the development of a juvenile court system. The Supreme Court has found these measures insufficient to safeguard youth, and as a result, has invoked further protections, such as the right to due process and the right against self-incrimination within the juvenile court system. This led to public fear that the courts were soft on crime, driving courts to adopt a more punitive model. The author, posits that as current scientific studies substantiate the inability of young brains to conceive of the consequences of their actions, the original infancy defense is strengthened and should be more commonly used in delinquency trials.

Gregory Kenyota, Note, *Thinking of the Children: The Failure of Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 785 (2007).

The media coverage concerning violent video games and the subsequent calls for legislators to enact laws to restrict minors' access to these materials have been well documented. The author begins with a quick history of the high water marks in the recent history of violent video games, noting titles like Mortal Kombat, Grand Theft Auto III, and Doom, and the subsequent calls for legislation from prominent senators. Relying on a First Amendment defense, video game publishers have successfully struck down several state laws restricting minors' video game access. Legislators have been unable to draft a law that use both the "least restrictive means" and is "promoting a compelling interest," as the Supreme Court has required of any law restricting freedom of speech. The different loopholes that legislators have tried to pass legislation through, including obscenity and the prospect of imminent lawless action, are analyzed for strengths and weakness. The author asserts that the only effective means of prohibiting youth from obtaining games with mature content is for the video game market to self-regulate, as the industry is currently doing with the Entertainment Software Rating Board ("ESRB").

Jeremy Kisling, Comment, *Wyoming Law Division: Wyoming's "Outlaw" Juvenile Justice Act*, 8 WYO. L. REV. 103 (2008).

Under the Wyoming Juvenile Justice Act, juveniles are divided into two groups for jurisdictional purposes: juveniles under the age of thirteen who commit

delinquent acts are under the exclusive jurisdiction of juvenile courts, while juveniles between the ages of thirteen and eighteen are under the concurrent jurisdiction of the criminal and juvenile courts. In accordance with the Act, the court in *D.D. v. City of Casper* held that it was constitutional for a sixteen-year old boy to be detained without parental notification and tried in a municipal court, rather than a juvenile court, for stealing a school key. The author suggests that an analysis of the Act under the Wyoming Rational Basis Test shows that it violates the equal protection and due process rights of juveniles because it creates groups with disparate treatment based on age. The Act must be changed because it is unconstitutional to grant concurrent jurisdiction and allow a prosecutor, as opposed to the court, to exercise unrestricted discretion in determining whether a juvenile should be submitted to juvenile jurisdiction. By treating juveniles differently based on age, the Act deprives certain juveniles of their right to receive the rehabilitative benefits of the juvenile courts.

Spencer H. Larche, *From the Twin Cities to "Twin" States: Legislating the Classroom Placement of Twins and Other Higher Order Multiples*, 91 MARQ. L. REV. 587 (2007).

Some states have enacted "twin legislation" which gives parents the authority to choose whether their twins or multiples should be in the same class or in different classes in school. Historically, educators have often split up twins or multiples so that they could develop independently of each other; however, this can lead to both benefits, such as promoting independence, and detriments, such as parents not having the power to chose what is best for their children. Other ways of meeting the goal that "twin legislation" tries to accomplish, include allowing a parent to bring an Equal Protection Clause infringement claim, or otherwise claiming that the school violates a "fundamental" right by deciding where their children should be placed. A downside of "twin legislation" is the possibility that parents are given too much authority over their multiples' education and that decisions like this may be best left up to the schools. However, since there is little burden to public schools compared to the benefits given to parents, "twin legislation" is important.

Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175 (2007).

Although it has been over forty years since the Supreme Court ruled that juveniles have a right to counsel in delinquency proceedings, the need for assistance of counsel in juvenile courts is even stronger today. With an ever increasing number of juvenile delinquents in courts, juveniles should have a right to

counsel at all stages of the court process, from pretrial proceedings to post-adjudication periods of supervision. The author highlights the Sixth Amendment's guarantee to provide counsel for adults at "any critical stage" of proceedings. It is suggested that both the Sixth Amendment and the "critical stage" analysis provides support for the argument that counsel should be available to juveniles at all stages of pre and post-trial proceedings. The author suggests that the right to counsel is of the utmost importance due to the innate and inherent lack of maturity, knowledge and responsibility of juveniles.

Sarah Steward-Lindsey, *Fulfilling the Promise of Kent: Fixing the Texas Juvenile Waiver Statute*, 34 AM. J. CRIM. L. 109 (2006).

In *Kent v. United States*, the Supreme Court set out the constitutional due process standards for waivers of minors from the juvenile system to the adult system when a youth seems to be unable to be rehabilitated. In Texas, the relevant statutory scheme allows for a judge to be the only one to make a decision regarding whether a minor should be tried as an adult. While the statute makes it appear as though *Kent* is being followed and procedural safeguards are in place to protect the child, in practice some of these safeguards have deteriorated and misinterpreted. Waiver of a minor to the Texas adult system may occur without a specific factual finding or a full investigation, and can be determined by the availability of funds in the juvenile system. The author recommends a series of amendments to the Texas statutory scheme in order to fulfill the desires of the Supreme Court in *Kent*.

Emily W. McGill, Note, *Agency Knows Best? Restricting Judges' Ability to Place Children in Alternative Planned Permanent Living Arrangements*, 58 CASE W. RES. L. REV. 247 (2007).

The Ohio Supreme Court's recent decision in *In re A.B.*, which held that the Ohio statute in question prohibited judges from placing children in "planned permanent living arrangements" ("PPLAs") unless a state child welfare agency specifically requested such a placement, establishes a dangerous precedent for children in foster care and for the adoption system across the country. Although adoption or placement with a close relative is often the best option for a child, there are many situations where PPLAs are the most appropriate choice. Despite the court's interpretation of the Ohio statute, many other state courts have interpreted very similar statutes quite differently. Many states have regarded PPLAs as a last resort only in initial hearings; after subsequent hearings, children may be placed in such arrangements when it is in the children's best interests. In light of the fact that PPLAs may sometimes be the best option for children, the author suggests that Ohio overturn the holding of *In re A.B.* through legislative action or further judicial review, and allow for PPLAs when judges determine that is best for the child.

Daniel L. Meehan, Comment, *Native Children in Alaska: The State of Tribal Self-Determination in Child Custody Proceedings*, 32 AM. INDIAN. L. REV. 167 (2007).

In a 2004 opinion, the Attorney General of Alaska, following some earlier state and federal precedent supporting his position, declared that the state had exclusive jurisdiction over child custody proceedings in Alaska, including cases involving Alaskan Native American children. At the same time, however, and in contrast to the Attorney General's opinion, federal and state case law also acknowledged that, so long as such tribes were federally recognized sovereign entities, Alaskan Native tribes had jurisdiction over child custody proceedings. Such case precedent established concurrent jurisdiction between Alaska and sovereign tribes, provided the tribes possessed the power to regulate child custody proceedings. The author criticizes the Attorney General's lack of analysis of case law in the 2004 opinion, and suggests it directly contradicts an earlier opinion from the office in 2002. The author suggests several ways that the state, the federal government, and the Native Alaskan tribes might ensure that such tribes have concurrent jurisdiction over child custody disputes, including characterizing all Native Alaskan tribes as dependent Indian communities and overruling some of the earlier Alaskan cases.

Kathleen A. Murphy, *Lost in Translation: The Right to Competency and the Right to Counsel for Mentally Retarded Children in the Juvenile Justice System*, 51 HOW. L.J. 367 (2008).

Although an adult's right to competency is well defined, juvenile offenders have no such constitutional right to competency in criminal proceedings. The lack of an established constitutional right to competency has caused confusion and inconsistent treatment of juvenile offenders in the juvenile justice system. A right to competency is important for all juvenile offenders, especially for mentally disabled juveniles because mental disabilities are frequently mischaracterized and lead to improper dispositions. The courts or Congress must establish a right to competency in criminal proceedings for juveniles. Along with confirming a right, the courts or Congress should institute a standard that both evaluates the presence of mental retardation and also considers the age and maturity of the juvenile offender.

Brianne Ogilvie, Note, *Is Life Unfair? What's Next for Juveniles After Roper v. Simmons*, 60 BAYLOR L. REV. 293 (2008).

In *Roper v. Simmons*, the Supreme Court did not apply the death penalty to juveniles because it found the punishment violated the Eighth and Fourteenth

Amendments in light of society's evolving standards of decency. While the Court supported its decision by citing international prohibitions of capital punishment for juveniles, it ignored similar express prohibitions against condemning juveniles to life without parole. As a result, state legislation conceived in response to *Roper* ultimately established life without the possibility of parole as the new extreme form of punishment for juveniles, thus precluding them from the automatic appeals and heightened scrutiny inherent to death penalty cases. The article suggests measures differentiating between the punishment of children and adults, including setting minimum ages for juveniles to be convicted of life without parole. Although life without the possibility of parole should be an option for juries, using it as an unmitigated substitute for capital punishment would result in distorting *Roper's* victory for juvenile rights into a broad imposition of harsher punishments on juveniles, neglecting the rehabilitative purpose of the juvenile criminal system.

Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417 (2007).

Legislators have encountered problems regulating pornographic material on the internet as courts have held that recent laws infringe on First Amendment rights. The author argues that previous laws have failed because they attempted to regulate material in an old-fashioned manner, and therefore proposes a new, technology-based answer: legislators should require pornographic material be limited to specific ports, which are naturally occurring channels already in place under current internet technology. Consumers would be able to switch off or block these ports in much the same way they currently have the power to block a channel on cable television. This "Ports" legislation has a better chance of passing judicial scrutiny than previous laws. This technological solution will be easier to enforce, simpler to understand, and more effective than filters, the current tool allowed by the courts.

Erika Rickard, *Paying Lip Service to the Silenced: Juvenile Justice in India,* 21 HARV. HUM. RTS. J. 155 (2008).

India passed the Juvenile Justice Act ("JJ Act") and later, the additional protections of the Juvenile Justice (Care and Protection of Children) Act, to protect "juveniles in conflict with law" and incorporate the additional standards of protection required by the United Nations Convention on the Rights of Children and other international rules and guidelines. The JJ Act created an alternative court system, intended to be less intimidating for juveniles, and presided over by a panel comprised of a magistrate and two social workers. This system is flawed, however, because the presumption of innocence, along with the limited ability to punish juveniles, often leads to indifference as to whether the child was actually guilty and

the proceedings become a mere documentation of the offenses. Other issues include: delayed trials, reluctance to grant bail to juveniles, the inability for juveniles to hold the system accountable for abuse in the Observation Homes, and the incompetence of probation officers. The new Model Rules that India is proposing may ameliorate many of these problems by creating a more open and transparent system, and the Integrated Child Protection Scheme will create a new bureaucratic system to handle juvenile issues.

Kevin W. Saunders, *Shielding Children from Violent Video Games Through Ratings Offender Lists*, 41 IND. L. REV. 55 (2008).

Social science has discovered a link between video game violence and real world aggression in children who play violent games. Although the link has not reached the standard required for judicial limitation of access based on compelling interest in the physical and mental well-being of children, successive attempts by the judiciary to limit children's access require the court to examine the current science anew. In the meantime, a possible stopgap to help protect children is creation of a list of retailers and arcades that repeatedly sell video games to children whose age is below the limits set by the video game industry's rating system. This locally-focused list would allow parents to identify local retailers and arcades who abide by the age ratings when allowing their child to shop or play. The maintenance of such a site by a private entity as opposed to a governmental entity undermines a possible First Amendment challenge and presents an option to aid parents in limiting their child's access to inappropriate games, without enforcing a separate ratings system by an organization outside the video game industry.

Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Postdispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse,* 60 RUTGERS L. REV. 207 (2007).

Children in the juvenile detention system are at risk for both recidivism and institutional physical and emotional abuse. To reduce recidivism and curtail abuse, lawyers and courts must seek institutional accountability and more effective postdispositional representation. The author proposes that New Jersey implement a model similar to those successful in Mississippi and Maryland, which capitalized on the availability of law students eager for work experience. With an eye toward cost-effectiveness, such a plan would enlist attorney supervisors and students to visit detention facilities to monitor conditions and close gaps in child advocacy. Promoting both personal accountability and child safety, such an approach also furthers the rehabilitative aims of the juvenile justice system.

Abbe Smith, *The Promise of In Re Gault: Promoting and Protecting the Right to Counsel in Juvenile Court,* 60 RUTGERS L. REV. 11 (2007).

Young people facing the decision to plead guilty or go to trial are not fully capable of understanding the seriousness of their decision and should be counseled before making a decision. The author tells the story of a boy named Benny who refused to take a plea, which would guarantee him far less time in jail than a guilty verdict. Juveniles underestimate consequences and overestimate rewards, which make them poor decision-makers. Counselors should do whatever it takes to convince the young person to take a plea, even if the counselor has to interview him several times, send in others to interview him, or bully and manipulate the juvenile. This approach may not seem client-centered, but it is strategically necessary and helps kids like Benny to understand the gravity of their decision and the repercussions of ignoring counsel.

David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2007).

Disputes often arise when children are members of "mixed-status" families—specifically, when they are a citizen of the United States and one, or both, of their parents are here illegally. Although "mixed" family status plays a role in a variety of situations, it is remarkably prevalent, although hardly recognized, in the realm of child custody disputes. The author focuses on whether a parent's immigration status should be considered in child custody cases; when discussing the issue, it is hard not to recognize the child or parent's interest in having the child remain in the United States, but it is likewise difficult to ignore the potentially discriminatory nature of any evaluation that includes immigration status as a significant factor. The issue is further complicated by conflicting case law on the matter, which does not clearly define whether immigration status may factor in custody disputes. The author tries to find a medium between the fields of immigration law and family law, arguing that the two should, in many cases, be seen as more interconnected than they currently are.

Eleanor L. Wilkinson, *Massachusetts Children in Need of Services: Trapped by the Legacy of Isaac and Jeremy*, 28 B.C. THIRD WORLD L. J. 239 (2008).

In the companion cases of *Care and Protection of Isaac* and *Care and Protection of Jeremy*, the Massachusetts Supreme Judicial Court held that juvenile courts could only review Department of Social Services decisions for abuse of discretion under an arbitrary or capricious standard. The Supreme Judicial Court's refusal to allow court review of agency decisions stands in stark contrast to the

federal Adoption and Safe Families Act. This Act requires hearings regarding the permanent placement of children to be held by either a court or an administrative body appointed or approved by the court and allows regular review of children placed outside of their homes. It is stated that court oversight and regular review of placements is important to ensure that the Department of Social Services makes the child's health and safety a priority. Thus, the author concludes that the Massachusetts courts should effectively overrule *Isaac* and *Jeremy,* forcing the Department of Social Services to make appropriate placement decisions for children.

## DOMESTIC VIOLENCE

Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261 (2008).

Nicaragua has established mediation as an alternative means of conflict resolution in domestic violence cases. The author discusses the utility of mediation as a means to address domestic violence cases around the globe, looking at the methods used on the local level in Nicaragua, studies from the United States examining the effectiveness of mediation, and the greater international movements towards the use of mediation. The author acknowledges, at the same time, concern that blind faith in mediation and improper implementation of mediation could result in mediation further harming the victims of domestic violence. As such, Nicaragua and other developing nations should proceed with great caution and should follow certain guidelines to ensure mediation is effective, such as requiring proper training, protection, and oversight when implementing domestic violence mediation schemes. These strategies and guidelines will help to address many Nicaraguans' skepticism about domestic violence mediation and will help ensure that such mediation will be an effective alternative to more confrontational methods.

Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women From Domestic Violence*, CAL. L. REV. 185 (2008).

Native American women who are victims of domestic violence face greater barriers than other battered women when seeking restraining orders or criminal prosecution: tribal leaders often overlook domestic abuse problems and the state does not intervene due to confusion about proper jurisdiction. Further, there are

gaps between state laws and sovereign tribal laws that allow abusers to escape prosecution. The authors suggest that increased coordination between the federal, state and tribal governments can help stop abusers from avoiding prosecution and utilize law enforcement resources more efficiently. Tribes should be required, under the Violence Against Women Act of 2005, to bear the legal burden in domestic violence cases, which would preserve their sovereignty while decreasing instances of violence. Allowing tribes to practice their sovereignty will help close some of the jurisdictional gaps that allowed abusers to escape in the past.

Janet E. Moon, Note, *Violence, Culture, & HIV/AIDS: Can Domestic Violence Laws Reduce African Women's Risk of HIV Infection?*, 35 SYRACUSE J. INT'L L. & COM. 123 (2007).

The frequency and gravity of domestic violence in southern Africa causes a greater risk of HIV/AIDS infection for women. Presently, authorities fail to protect women by ignoring the importance of traditional cultural norms, inadequately enforcing laws, and failing to involve local community leaders. The revision of domestic violence laws will reduce domestic violence against women, and, concurrently, lower the related increase in women's HIV risk. The author suggests the following three amendments: first, allow local and traditional institutions to adjudicate grievances; second, incorporate traditional customs into the law; and, third, require pertinent authorities to have mediation training. These recommendations reflect an approach rooted in traditional cultural institutions in order to avoid the current, modern system's shortcomings and provide women with much needed support.

Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247 (2008).

The article addresses the issue of LGBT intimate partner violence and the remedies available to victims in the New York State legal system. It discusses the history of New York courts' attempts to define same-sex relationships and concludes that LGBT domestic violence victims are not protected under the current law. The article describes other limited remedies that are available, such as protections under Criminal Procedure law. The difficulties arising from separation, including custody of children and visitation rights and LGBT survivors' housing, are discussed. The article concludes by stating that the best way to address these issues is for the New York legislature to pass incident-focused legislation, specifically offering civil remedies to LGBT victims of domestic violence.

Valorie K. Vojdik, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa,* 31 FORDHAM INT'L L.J. 487 (2008).

Violence against women is a pervasive problem around the globe, but is typically recognized as a private matter to be resolved between individuals, not a public or societal issue. The international community has acknowledged through several conventions that intimate violence is a problem that denies women the right to equality. The author provides background on ways international law has addressed intimate violence as a public issue, and focuses on how the South African Constitutional Court guarantees gender equality as a constitutional norm, taking protective measures to help those who might be discriminated against. The Supreme Court of the United States has taken a different approach that considers the violence a gender-neutral crime and often leaves victims with no redress under the Constitution. The Supreme Court should look to the South African Constitutional Court's approach as a model to conceptualize intimate violence as a denial of equality and civil rights, removing the issue from the domestic sphere and addressing it in the court system.

## EDUCATION

Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race In A Question of Constitutionality,* 10 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2008).

Since the 1980s, an increasing amount of federal funding has gone towards abstinence-only education, teaching that abstinence is the only way to avoid pregnancy and the spread of sexually transmitted diseases, discouraging students from using condoms and providing inaccurate information about condom effectiveness. Abstinence-only programs hinder students and lead to misinformed decisions about their reproductive health. Such programs have a more significant negative impact on students of color because low-income schools with large minority populations receive more funding for abstinence-only programs and minority students are less likely to receive sex education at home. Additionally, because the programs are rooted in religious teachings, abstinence-only education violates a student's Constitutional right to the separation of church and state. The author concludes that to prevent further harm to students of color, the nation must change its public education policy from abstinence-only to comprehensive sex education, which would neither violate students' constitutional rights nor spread inaccurate medical information.

Shiri Klima, Note, *The Children We Leave Behind: Effects of High-Stakes Testing on Dropout Rates*, 17 S. CAL. REV. L. & SOC. JUST. 3 (2007).

The increased use of high-stakes testing in American education, which often determines whether a student will be able to graduate, has in recent years placed pressure on children that may influence their decisions to drop out of school. In light of the passage of the No Child Left Behind Act and rising levels of drop-out rates in American schools, the tremendous focus on high-stakes testing has become particularly problematic. The author argues that relying on high-stakes testing and grade retention in public schools has devastating effects, such as holding children back, increasing drop-out rates, and encouraging teachers to tailor their curriculum toward a standardized test. To address the problem, states and the federal government should require that schools calculate, record, and standardize drop-out statistics and follow No Child Left Behind's provisions concerning graduation rates more closely, or alternatively add such provisions on the state level. The best option, however, may be the most direct: stop using high-stakes testing as a mandatory requirement for graduation.

Madeline E. McNeeley, *Title IX And Equal Educational Access for Pregnant and Parenting Girls,* 22 WIS. WOMEN'S L.J. 267 (2007).

Teen pregnancy is a significant issue in the United States. Pregnancy discrimination in secondary schools continues to impede educational access for pregnant and parenting teens despite the protection of Title IX of the Education Amendments of 1972, which states that federally funded education programs or activities cannot discriminate against a person because of pregnancy or childbirth. School boards are often uninformed as to the Title IX requirements and consequently, pregnant teens and teen mothers face discrimination, expulsion, exclusion from mainstream classes, or are placed in alternative segregated educational tracks that are of a lower quality than mainstream classes. The author attributes this lack of compliance with Title IX requirements to: (1) weak enforcement by the Department of Education's Office of Civil Rights, (2) the absence of litigation in this area, and (3) the pressure on schools to minimize the effect of underperforming students in order to keep their ratings high in accordance with the No Child Left Behind Act. Although some progress has been made for pregnant and parenting teens, continued support and advocacy is needed to ensure that the Title IX requirements protecting pregnant and parenting teens are enforced in schools.

Amy Schwarz, Note, *Comprehensive Sex Education: Why America's Youth Deserve the Truth About Sex*, 29 HAMLINE J. PUB. L. & POL'Y 115 (2007).

The author posits that the current abstinence-only sex education model should be replaced by a comprehensive approach to sex education because the current method is insufficiently educating and protecting America's youth. Sex education began during the nineteenth century, but federal funding for sex education, especially for abstinence-only education, was popularized during the second half of the twentieth century. A comparison of the two different methodologies reveals that abstinence-only education often espouses medical inaccuracies and fails to take into account the reality that the majority of teenagers and young adults have been involved in sexual activity. The comprehensive approach, on the other hand, recognizes that sexual relations advance far beyond sex in a heterosexual marriage, specifically educating the youth about sexual orientation and different forms of sexual expression. The author proposes implementing a comprehensive sex education curriculum by passing the Responsible Education about Real Life ("REAL") Act in Congress, and also recommends increasing public support and awareness for comprehensive sex education programs.

Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123 (2008).

This article focuses on the recent rise in popularity of homeschooling and the inequities that can be found in that environment. The author posits that a parent is empowered by the state to educate their child, and not vice versa. This reality rebuts the notion that a parent may force a substandard education on a child. The author points to the Equal Protection clause and subsequent case law as the basis for the belief that the law forces a state to enforce the rights of a child to a non-discriminatory and decent education. The author suggests enforcement standards and methods, including: basic oversight in the form of standardized testing, and appointment of a guardian ad litem in extreme cases.

## FAMILY

Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform,* 64 WASH. & LEE L. REV. 1529 (2007).

This article explores whether principles of justice and equality could and should dictate the relationship between Muslim husbands and wives. Chronicling the discriminatory impact of the Malaysian Islamic Family Law Act of 1984 and the efforts of progressive Malaysian women activists, the author posits that such values are rooted in the Islamic legal tradition. To promote gender parity, Malaysian activists have recently drafted a model of family law that incorporates religion, domestic law, international human rights law, and sociological studies of women's family lives. However, substantial challenges to reform, such as the belief that Muslim law is God's law and is therefore immune from imperfection, persist. The author argues that coalition building among women's groups and scholarship focusing on gender and Islam are essential to overcoming these challenges.

Kathleen Ja Sook Bergquist, *Right To Define Family: Equality Under Immigration Law For U.S. Inter-Country Adoptees*, 22 GEO. IMMIGR. L.J. 1 (2007).

The article surveys the different laws governing inter-country adoptions in the United States, discussing regulations on the state, federal and international levels. It further examines individuals who can receive American citizenship under the four family based preferences, which includes children adopted overseas under the age of eighteen. The apparent problems with the system involve the failure to extend citizenship to non-American birth parents of international adoptees and the limited extension of citizenship to biological siblings of international adoptees, which requires that the siblings be adopted by the same U.S. family. The Equality under Immigration Petition argues against these distinctions between family members since the purpose of family-based immigration law is to bring families together and help adoptees understand their cultural roots. This Petition also serves as an attempt to bring attention to race and class privilege in the adoption process under the current immigration legal system.

Fernando Colon-Navarro, *Familia E Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491 (2007).

In 1996, Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act ("IIRAIRA"), which placed new restrictions on the undocumented time an alien spends in the United States. The author argues that the IIRAIRA's new grounds of inadmissibility and deportability contradict Congress's well-established goal of family reunification. Family reunification is a humanitarian effort to keep immediate family members of U.S. citizens together and is important to the nation because it maintains public order and improves the overall health of the United States. The author posits that the IIRIRA negatively impacts family reunification because it forces aliens to either live apart from their nuclear family or risk staying in the United States illegally while waiting to change their immigration status. To alleviate this obstacle in family reunification, the author proposes an amendment to Section 245 of the Immigration and Nationality Act that would allow immediate relatives of a U.S. citizen to legally stay in the United States while their visa is being processed.

Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-*Smith*?*, 108 COLUM. L. REV. 716 (2008).

When asserting a free exercise claim in a custody dispute that does not involve an exclusive right which can only be exercised by one of the parents, courts should recognize hybrid rights—free exercise claims asserted in conjunction with another right—and apply a strict scrutiny analysis when evaluating a parent's claim. The U.S. Supreme Court in *Employment Division v. Smith*, modified previous holdings to state that strict scrutiny is typically not required when dealing with free exercise claims, but did shape several exceptions in which the strict scrutiny analysis should apply, including those claims asserting hybrid rights. Currently, circuit courts have been divided regarding this issue: the author argues that courts should recognize the hybrid right exception or, at a minimum, establish whether or not they will use this exception. The author recommends that a court determining whether to apply this exception in custody cases should ascertain whether the disputed right is exclusive. The author concludes that the hybrid right exception dictated in *Smith* should be applied to custody cases when there is a claim dealing with a non-exclusive right.

S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85 (2007).

The policies of U.S. immigration and family law must be further aligned in order to protect parenting and family integrity—rights repeatedly deemed

fundamental by the Supreme Court. Contemporary immigration law involves both procedural mechanisms, such as lack of a right to appointed counsel, and recent substantive changes, such as severe mandatory deportation laws, that fail to incorporate the unique needs of an immigrant parent. The dissimilar goals of family and immigration law are especially problematic due to the practical impossibility of providing an immigrant parent with a legal forum that can simultaneously consider family and immigration issues. The author advocates for the incorporation of immigration questions into Family Court proceedings. The author concludes that both substantive reform of federal immigration law and procedural protections for immigrant parents, such as guaranteed state-appointed counsel, are necessary to align immigrant parent court proceedings with the fundamental right of a parent to be with his or her family.

Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J. L. FAM. STUD. 281 (2007).

In the landmark case of *Stanley v. Illinois*, the Supreme Court held that an unmarried father has a constitutionally protected interest in custody and raising his children. However, in the past decade the juvenile court continued to ignore fathers who were not living with their children at the time the case was filed. With current best practice manuals encouraging agencies and courts to identify and involve children's legal parents, including nonresident fathers, child protection cases are becoming more complicated. *Stanley v. Illinois* made clear that there can be positives to nonresidential father custody, yet courts and welfare agencies still caution and insist on gaining information about the nonresidential fathers to avoid instances where the father may take the child away or to avoid increased conflict between parents and reintroducing an abuser into the home. Therefore, even when placing a child with a nonresidential father, the goals of modern child protection laws must be recognized, following well-drafted statutes and rules ensuring children's safety.

Ziba Mir-Hosseini, *How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco*, 64 WASH. & LEE L. REV. 1499 (2007).

Iran and Morocco have had differing degrees of success in reforming family law, stemming from each nation's unique experiences with both international political pressure and domestic demand for legal reform. While Morocco now treats women and men more equally in marriage and divorce proceedings than any other Muslim country, women in Iran continue to be disadvantaged by a traditional, fundamentalist reading of Islamic law. After describing the political backdrop against which family law was codified in Iran and Morocco, the author seeks to

explain the divergent paths of legal reform in these two nations. Although Iran elected a reformist government in the late 1990s, the country also operated simultaneously under an unelected, increasingly Islamic higher government that retaliated against the women's reform movement, partly in response to the United State's declaration in 2002 that Iran was part of the "Axis of Evil." Morocco experienced comparatively successful family law reform because the nation's bid to join to European Unión created pressure to accept the country's women's reform movement, and because family law reform was backed by the King's political and religious power.

## FATHERHOOD

Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007).

In an age where the dynamic of the family structure has shifted, and a family no longer necessarily contains one father, society must adjust and recognize the new reality of multiple fathers. Known as "social fathers," these individuals contribute to the nurturing of the child over the course of its life even though they may not be genetically related. Social fathers and their contributions to the child vary, ranging from primary care takers to those who contribute only economically and may not even live in the child's household. The author recognizes that there are numerous forms of multiple parenting, but concludes that the best option is where core parents rear the child along with the multiple fathers who contribute significantly to nurturing the child, sharing the responsibilities and benefits of parenthood. Further research and empirical facts about the effects of multiple parenthoods is necessary to identify what is the best family structure for the children, and to reconfigure the legal system in order to facilitate these relationships.

Sarah McGinnis, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311 (2008).

The "Best Interests of the Child" standard, a principle stemming from British law, places the well-being of a child above all else. However, when employing paternity laws, many states jeopardize the interests of children by allowing judges to excuse themselves from paternity disputes, failing to provide lists of obligatory factors for the court to utilize in paternity suits, and by permitting dual paternity—

that is, allowing a biological unwed father to have the same rights as a child's legal father. Dual paternity is particularly detrimental: by allowing a child's biological father to be involved in his or her life, the state is infringing on familial privacy and disturbing otherwise stable families. In order to create a system that considers the best interests of the child, one may look to the system established in the United Kingdom. The British system demonstrates that by creating a clear and specific set of factors for the courts to comply with, and encouraging judges to thoroughly review each paternity case to ensure it is free from bias, states can take steps to guarantee that the best interests standard is secured.

## FEMINISM

Deborah L. Brake, *Celebrating Thirty-Five Years of Sport and Title IX: Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513 (2007).

Title IX has been successful in breaking down gender norms and encouraging female involvement in athletics at all levels. Title IX signifies a pragmatic answer to the discrimination practices encountered by women in athletics. The flexible theoretical approach utilized by Title IX has been able to target the specific oppression, while remaining adaptable to social changes. Even though Title IX has not completely eradicated sex discrimination in athletics, compared to other discrimination laws, Title IX has had greater success in overcoming double-bind and backlash problems. Although a single approach cannot resolve all the problems surrounding gender oppression, pragmatism shows promise.

Monika M. Charrad, *Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation*, 64 WASH. & LEE L. REV. 1513 (2007).

In the Arab-Muslim world, Tunisia has been at the forefront of "women friendly" legislative changes. Tunisia experienced two periods of reform prior to achieving a more gender and woman friendly focus in its country. The first phase took place in 1950 when the legislature implemented the *Tunisia Code of Personal Status*, which expanded interpretation of Islamic law as it related to family. The second phase was in the 1990's when citizenship law was broadened under the *Tunisian Code of Nationality*. The author suggests that it is because of these two periods of legislative reform that Tunisia will retain its place as the leader for gender legislation in the Arab-Islamic world, but posits that other countries seeking legislative reform could follow in Tunisia's footsteps.

Varsha Chitnis & Danaya Wright, *The Legacy of Colonialism: Law and Women's Rights in India,* 64 WASH. & LEE L. REV. 1315 (2007).

This article focuses on legal reforms in Britain and India during the colonial period regarding age of consent, widow inheritance, and Indian abortion laws. The authors argue that examined through the perspective of Indian women, Britain's colonial influence and the adoption of English laws in India negatively affected Indian women's rights because such laws either furthered British interests or did not take into account cultural and historic differences between the nations' family systems and lifestyles. British feminists wanted to help their "Indian sisters" by advocating for Western laws to govern Indian women, but their Victorian notions placed paternalistic and protectionist restraints on Indian women, which undermined reform in India. The authors posit that British feminists advocated for Indian women in order to promote their own political position in Britain, since British feminists argued that they needed increased political power in England, such as the right to vote, in order to better aid Indian women. In order for Indian women to move beyond these ill-fitting legal reforms, Indian feminist groups will have to recognize the patriarchal and colonial foundations of these laws.

Marie-Claire Foblets, *Moroccan Women in Europe: Bargaining for Autonomy,* 64 WASH. & LEE L. REV. 1385 (2007).

This article discusses the impact of the revised Moroccan Family Code ("MFC") on women who live abroad and the inter-relationship between the MFC and private law in the country where she resides. The new MFC provides changes regarding the treatment of women in family law, including provisions that allow both spouses to head the household and make joint decisions regarding the home, and provisions that allow divorce based on irreconcilable differences. While there are many changes to the Code, certain problematic provisions remain intact, including provisions allowing polygamy and provisions stating that the husband is legal guardian of any children during the marriage. The code has always presented challenges to Moroccans living abroad, since marriages or dissolutions performed abroad may not be recognized for failure to comply with Moroccan guidelines and principles. The new Code offers recognition of some divorces or marriages, but requires specific rules to be followed, which leads the author to suggest double marriage celebrations and the inclusion of MFC provisions in marriage contracts.

Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).

The modern family often relies upon a network of non-parent individuals, including neighbors, nannies, family friends, and extended family members in

order to adequately care for children and fill in the gaps when parents cannot be present. Although this phenomenon has become increasingly commonplace for many families, family law in its current capacity is not structured to recognize rights for any individual who is not a parent. The author begins by illustrating the current gap between family law and familial reality and suggests three possible directions the law can consider in moving towards remedying the parental/caregiver rights disparity. These suggestions include: expanding the definition of parenthood, creating alternative statuses that would consider rights for non-parental caregivers, and eliminating the parental status in favor of creating a new paradigm. The policy implications of this issue should not be taken lightly, as the current legal structure negatively affects parents, a varied network of caregivers, and the children themselves.

Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391 (2008).

After studying American jurisprudence on the issue of sexual harassment, the Israeli legislature and courts have tried to create a legal paradigm that addresses the shortcomings and limitations in American case law by treating sexual harassment as a dignitary harm, as opposed to just gender-based discrimination. By analyzing legislation and Israeli jurisprudence, the author asks whether feminists have succeeded in using the law as a tool for broader societal change regarding sexual harassment. The answer to this question, however, was surprising. The paradigm's emphasis on dignity has had unintended effects upon the image and status of women in society, such as neutralizing the reality of gender-based discrimination and promoting patriarchal attitudes of "protecting" women from sexual or indecent behavior. The author concludes that while feminists in Israel have begun a new discourse on sexual harassment, their use of legal practice as a vehicle for social change has not proven as effective as anticipated, possibly due to the male bias encountered in both the interpretation of equality and dignity.

Benjamin Shmueli, *What Has Feminism Got To Do With Children's Rights? A Case Study of a Ban on Corporal Punishment*, 22 WIS. WOMEN'S L.J. 177 (2007).

The central question in this article is whether feminist ideals are applicable to the fight for children's rights. The author looks at the recent push in the Israeli court system to abolish corporal punishment to see if feminism can be utilized to further children's rights. The role of feminism within the family is analyzed; it is shown that few feminist writers and theorists have supported children's rights through the use of their theories and, instead, they have primarily utilized children as a tool to demonstrate the inequities a woman faces during divorce proceedings.

Using the ban on corporal punishment as a case study, the author traces the legislative and legal history of the concern for children in Israeli jurisprudence. The author concludes with a series of queries about whether the advocates utilized a form of feminism in their struggle to ban corporal punishment in Israeli schools and curtail its use in the family.

Dana Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223 (2008).

No federal law has confronted the widespread practice in American prisons of shackling pregnant inmates while they give birth. However, California and Illinois have passed laws which, if combined, would ensure that women remain unshackled throughout pregnancy and also meet the prison's security standards. The Supreme Court's test in *Turner v. Safley*, which determines whether a prison regulation logically relates to a State interest, reveals that shackling pregnant women does nothing to deter pregnant female prisoners, who usually have no history of violence and who are physically incapable of fleeing right after giving birth, from posing a flight risk. In addition to the Eighth Amendment protection against cruel and unusual punishment, a wide variety of international human rights treaties and declarations—some of which the United States has signed—require American prisons to stop shackling women during and after pregnancy. In light of this constitutional and international authority, the States that allow shackling of pregnant women must reverse course and create new legislation affirmatively granting protections to pregnant inmates.

Mary Ziegler, Student Article, *Eugenic Feminism: Mental Hygiene, the Women's Movement, and the Campaign for Eugenic Legal Reform, 1900-1935*, 31 HARV. J.L. & GENDER 211 (2008).

In the first part of the twentieth century, feminists played an important, but misunderstood and underappreciated, role in the debate over the eugenics movement. These feminists were able to redefine contemporary thinking by creating a unique "eugenic feminism," yet their influence on the eugenics movement has never been fully explored. The author argues that while many feminists supported the eugenics movement as a means to prevent the eugenic decline of race, they believed that if that goal was ever to be achieved, women must be given greater gender equality. There were several key contradictions in the movement, such as views over free love and birth control, which pitted "eugenic feminism" against mainstream eugenic thinking, and eventually brought about its end. The author concludes by finding that the only way the "eugenic feminism" movement could have survived was by giving up its feminist ideals, an obvious contradiction that its leaders could not solve.

## GENDER BIAS

Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 LAW & SOC'Y REV. 45 (2008).

Many studies have suggested that female offenders receive more lenient sentences than male offenders who committed the same crimes as a result of chivalry or paternalistic views towards women. The authors attempt to take these studies further by challenging the view that all men have paternalistic views towards women. Direct public opinion serves as the best means to discover whether benevolent and hostile attitudes towards women had a decisive effect on the degree of leniency in sentencing. Indeed, there was a high correlation between paternalistic views towards women and leniency. The authors conclude that the results of this study could be helpful in understanding other kinds of discrimination.

Tracy E. Higgins, Jeanmarie Fenrich & Ziona Tanzer, *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653 (2007).

Three law professors and eight students working with the Crowley Program in International Human Rights at Fordham Law School published this report following a year-long intensive study of gender equality and customary law in South Africa. A tension exists because patriarchal African customary law recognizes potentially sexist laws, such as polygamous customary marriages, while the South African Constitution espouses both the right to gender equality and the right to cultural freedom. The authors examine both the gender neutrality and choice/consent approaches to resolving the conflict between customary law and gender equality. The gender neutrality approach advocates for gender neutral legal systems and sanctioned institutions, while the consent/choice theory espouses that individuals may lead their lives in a non-gender neutral way as long as the choice to do so was made freely and independently. Through numerous interviews of South African men and women, the article concludes that in order to modify the customary marriage laws in South Africa, women must be given access to information and a forum in which they can voice their opinions.

Elizabeth S. Kisthardt, Comment, *Singling Them Out: The Influence of the "Boy Crisis" on the New Title IX Regulations,* 22 WIS. WOMEN'S L.J. 313 (2007).

Title IX prohibits sex discrimination in education programs and activities. In late 2006, the Department of Education released new Title IX regulations that may

provide school districts with greater ability to create single-sex classes and activities. These amendments were partly the result of the alleged "Boy Crisis," which shows that boys have been left behind in public education and supports increased single-sex classrooms. In reviewing single-sex education in *United States v. Virginia*, the U.S. Supreme Court held that an all-male military school was unconstitutional, even where a parallel female program was created, and required the state to show an "exceedingly persuasive justification" for separating the sexes. Since evidence regarding the existence of an actual "Boy Crisis" is inconclusive, strict scrutiny of single-sex education programs should continue to be employed in order to ensure that the evidence provided to support such programs provides a "sufficient justification."

Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role,* 31 HARV. J.L. & GENDER 1 (2008).

Understanding the impact of gender is essential to the identification and amelioration of related forms of subordination. Roughly seventy-two percent of today's marriages result in children, and most often, it is the mother who forgoes some—if not all—potential income to assume principal caretaking responsibilities. This article explores the extent to which the law should account for such gender differences when addressing custody, child support, and alimony issues. Complete gender neutrality and immovable gender sensitivity are both significantly flawed; while gender neutrality fails to account for the unique situations in which women often find themselves, gender sensitivity can reinforce problematic stereotypes. In their place, a highly context-driven analysis, guided by whether recognizing gender in a particular situation promotes crucial societal interests, may prove more just.

Dinusha Panditaratne, *Towards Gender Equality in a Developing Asia: Reforming Personal Laws Within a Pluralist Framework*, 32 N.Y.U. REV. L. & SOC. CHANGE 83 (2007).

This article discusses the discriminatory nature of personal laws in Asia, using the Philippines, Singapore, Sri Lanka, and India as examples. The author examines each nation and identifies its discriminatory personal laws, particularly the family relations and marriages laws governing Muslims. The article then traces the development of these personal laws in the nations under colonial and independent rule. Special emphasis is placed on the need to abolish personal laws, many of which conflict with current international human rights norms and the nations' respective constitutions, while hindering the socio-economic development of women. In conclusion, the article advocates for legislative, rather than judicial, remedies that reflect an understanding of the colonial history of personal laws.

Blanca Rodríguez Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 INT'L J. CONST. L. 287 (2008).

This article examines the constitutionality of measures to achieve gender parity in political representation in France, Italy, and Spain. Minimum quotas, although inadequate on their own, are a method of introducing parity and legitimacy to the democratic system, but do not imply that votes and agendas will be gender-based. The goal is to establish a minimum presence of women in representative bodies that will challenge the fictional masculine ideal of independence and incorporate the reality of interdependence, which can bring greater focus to distinctive women issues such as reproductive biology, family care, oppression, and discrimination. The author suggests that gender parity in representation is implicit to establishing a true democratic nation, thus justifying the dismantling of gender roles compelled by the sexual contract. Accordingly, it is constitutional to impose parity by statute if it does not transpire naturally because promoting a woman's right to substantive equality is a legitimate basis for democracy.

## GENDER AND VIOLENCE

Rebecca A. Corcoran, Note, *Justice for the Forgotten: Saving the Women of Darfur*, 28 B.C. THIRD WORLD L.J. 203 (2008).

The international community's failure to protest the ongoing genocide in Darfur is a contributing factor to the atrocities occurring in Sudan. The conflict between Arab militias and black African tribes cannot be understood or defined by the usual terms of genocide. The Janjaweed militia have raped women of black African tribes in a conscious effort to add cultural chaos to the more obvious physical violence that results from civil war. Rape is a tool of war with unmatched power of destruction, which makes it vital that international forces move beyond political and economic qualms in order to address Darfurian genocide. Legal remedies in the form of International Criminal Court ("ICC") human rights litigation will begin to address the situation in Darfur, while the international community as a whole must provide more immediate humanitarian and military assistance.

## HEALTH

Tracy Solomon Dowling, Note, *Mandating a Human Papillomavirus Vaccine: An Investigation into Whether Such Legislation is Constitutional and Prudent*, 34 AM. J.L. & MED. 65 (2008).

The author analyzes the constitutionality of requiring the Human Papillomavirus Vaccine (HPV vaccine) for school attendance and argues that mandatory vaccination enforced by the state can create more disadvantages than benefits. In *Jacobson v. Massachusetts*, the Supreme Court held that mandatory vaccination is constitutional if the vaccination is necessary, not harmful to people, has a reasonable relationship to public health concerns, and the risk of disease can be addressed through such vaccination. Although HPV is the most prevalent sexually transmitted disease, two studies conducted in 2006 and 2007 revealed that at most, 3.5 percent of the female population could benefit from taking Gardasil—the HPV vaccine—by avoiding cervical cancer. Under the *Jacobson* test, Michigan's bill requiring all female sixth graders to be vaccinated for HPV is likely to be constitutional. The author, however, argues that states should not mandate HPV vaccination, considering the fairly small number of women who benefit from the mandatory vaccination, the costs, and parental concerns.

Kate Hannaher, *Caring for Invisible Patients: Challenges and Opportunities In Healthcare For Incarcerated Women*, 29 HAMLINE J. PUB. L. & POL'Y. 161 (2007).

Incarcerated women in the United States often come from communities without educational, financial, or healthcare resources; oftentimes, the health of these women is still ignored during incarceration. When a person's liberty is taken away, the additional denial of healthcare is an unnecessary punishment. Minnesota is one state that has implemented "gender-responsive" healthcare, which pays special medical attention to women's needs in order to ensure that incarcerated women get the healthcare they need. Incarcerated women should receive equal healthcare in order to assure that the public health of the country as a whole does not suffer. With proper healthcare, incarcerated women can move on with their lives and deal with the problems that led them to prison, rather than continue a cycle that will lead to their return.

## HUMAN RIGHTS

Michael B. Dye, *Qatar: The Pearl of the Middle East and Its Role in the Advancement of Women's Rights*, 84 U. DET. MERCY L. REV. 747 (2007).

Over the past few decades, Qatar, a tiny Arab emirate bordering the Persian Gulf and Saudi Arabia, has become a leading player in the international business community. In addition, Qatar has also been hailed as a progressive leader in the advancement of human rights. Qatar's role is all the more important as its neighbors in the Middle East fight to weed out fundamentalism and work to promote the rights of women and children. The author commends Qatar and its implementation of a strong legal framework to protect human rights, including a new, liberal constitution and the establishment of a Human Rights Department at the Ministry of the Interior. The author points out that even though Qatar is struggling against traditional cultural and religious conservatism in its attempt to democratize, it is important to view Qatar as a leader in this region for the protection of human rights, especially for women and children.

Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289 (2008).

The post-colonial era in Africa ushered in a wave of constitutionalism, during which many African countries abolished the exclusionary clauses in their constitutions to allow for more human rights protections. However, eight African countries have retained constitutional exclusionary provisions that exclude customary and personal law from constitutional protection, which results in denying women constitutional non-discrimination protection. Using international and human rights laws such as the Convention on the Elimination of All Forms of Discrimination Against Women and regional African human rights laws, the author posits that the exclusionary clauses must be removed in order to ensure that these countries comply with prevailing human rights standards. An analysis of the theoretical justifications for removing the exclusionary clauses reveals that women would be empowered by such an action because they could then use their national constitutions to promote gender equality. Additionally, if these exclusionary clauses were removed, courts could, in light of the constitutional guarantees, employ different approaches, such as limited, formalist, or activist intervention, when interpreting customary and personal laws.

Ruchira Goswami & Karubakee Nandi, *Naming the Unnamed: Intellectual Property Rights of Women Artists from India,* 16 AM. U. J. GENDER & SOC. POL'Y & L. 257 (2007).

This article discusses the economic threats to traditional forms of Indian artistry and the international intellectual property issues that arise from these situations. Focus is placed on the recent recognition of cultural intellectual property rights, specifically from the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples. The inherent contrasts between Western and indigenous legal notions are also discussed, including individualism, authorship, and originality of expression issues. The article then explores how this issue can be better understood from a human rights perspective, rather than through a narrow intellectual property framework. Finally, the authors conclude that an intellectual property scheme framed by a gendered human rights discourse is the best method to address the rights and protections of women in these indigenous communities.

Susan Tiefenbrum, *Child Soldiers, Slavery and the Trafficking of Children,* 31 FORDHAM INT'L L.J. 415 (2008).

Child soldiers are prevalent in many parts of the world, and represent a modern form of slavery and a type of human trafficking. The development of smaller weaponry and the unique ability of children to better infiltrate enemy grounds due to their small size, make the use of child soldiers a strategic economic choice for certain military groups. This article discusses a major domestic and international law: the United States Trafficking Victims Protection Act ("TVPA"), which criminalizes the trafficking of children and publishes yearly reports that assess governments' efforts under the TVPA to eliminate trafficking. The author offers economic and legal suggestions to increase the effectiveness of laws enacted to protect children from becoming child soldiers. Some of these solutions include: raising awareness and education around the world regarding child soldiering; urging compliance with international laws that address children's rights; limiting small arms trade with non-state actors; and improving the prosecution of those who use children as soldiers.

## LGBT RIGHTS

Luke A. Boso, Note, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool,* 110 W. VA. L. REV. 843 (2008).

In regulating eligibility criteria for donors of sperm and other human tissues, the FDA included a draft industry guidance document that identified "men who have had sex with another man in the past five years" as high risk donors that should be further scrutinized. The FDA justifies this criterion by emphasizing the HIV concerns that prevail in the homosexual community and the inefficacy of blood tests in identifying the virus. However, the FDA's explanation is not supported by scientific evidence; rather, it is based on prevalent stereotypes about the gay community. This note provides guidance for possible litigation claims on behalf of a client who has been discriminated against by the FDA's clause. Depending on the plaintiff and his personal experience, an attorney must decide whether to sue the FDA or a private sperm bank, and whether to sue in state or federal court, each choice having different benefits and drawbacks.

Amanda L. Houle, Note, *From T-Shirts to Teaching: May Public Schools Constitutionally Regulate Antihomosexual Speech?*, 76 FORDHAM L. REV. 2477 (2008).

A conflict exists in schools today between a student's First Amendment rights and the ability of schools to limit antihomosexual speech. The author argues in support of a school's power to limit antihomosexual speech in order to protect vulnerable students from obscene speech at a young age. In non-public forums, the government can exclude speakers and topics that are reasonable for the purpose of that forum, in order to eliminate harmful speech and remain within the context of what is relevant at school. Lower courts are divided on whether it can exclude antihomosexual speech in non-public forums within schools. However, for the sake of clarity and consistency, the Court needs to craft a rule that carefully considers the different forms of school speech, and specifies those forums in which antihomosexual speech can be regulated.

Jennifer N. Levi, *Misapplying Equality Theories: Dress Codes at Work,* 19 YALE J.L. & FEMINISM 353 (2008).

While facially sex-based practices are unlawful under Title VII, dress code rulings have not held to this. Historically, most dress code discrimination cases have been dismissed by courts because they either believe societal norms are not harmful or they require group-based harm when it is often only an individual

bringing a claim. It is harmful to require employees to "tag" themselves as either male or female, particularly for those transgendered and others who do not identify entirely with one gender, and it also delineates people based solely on gender. Courts must allow individual claims, as opposed to requiring group-based claims, in order to effectively challenge dress code policies. Analogizing dress code discrimination to race discrimination in the workplace may make it easier for people to see the dangers of dress code discrimination.

Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185 (2007).

Across the nation, Federal Circuit Courts of Appeals have not established a clear standard of what constitutes persecution on the grounds of sexual orientation, relying instead on a formal distinction between sexual "identity" and sexual "act." This formal difference logically falls apart, however, if one considers that a repeated pattern of sexual acts shapes one's sexual identity. While a survey of circuit court decisions granting and denying asylum demonstrates that courts deny a well-founded fear of persecution when punishment occurs as separate acts over discrete periods of time, these decisions ignore the social context of the particular culture in which this persecution occurs. To this end, circuit courts that do find a "well-founded fear" should narrow their holding to the facts and cultural context of the case, or else risk closing off asylum claims from other persecuted LGBT individuals in a particular nation. Immigration lawyers must realize that the circuit sitting in the jurisdiction where they first bring asylum claims, rather than the merits of their client's claim of persecution based on sexual identity, may determine whether the applicant is successful.

Kristin Wenstrom, Comment, *"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEX. 131 (2007).

Many transgender people experience great difficulty changing the gender on their birth certificate from their birth gender to their lived gender because the primary requirement for amendment is that the transgender person have post-operative genitalia. This requirement places an undue burden on many transgender people for a number of reasons, including the prohibitive cost of surgery and the unavailability of the procedure. The author analyzes the attempt by transgender advocates to change the requirements in New York City, including the proposal's eventual failure due to its withdraw by the New York City Department of Health, though there was strong public support for the motion. The proposed amendment did away with the surgical requirement and instead relied on a Department of Health decision that a person has changed their gender and intends to stay that way,

accompanied by an affidavit from a licensed physician. After analyzing the opposition's concerns, which include conflict with the Real ID Act and concern over quartering transgender prisoners with their new sex, the author dismisses such justifications and makes an impassioned push for less discriminatory requirements for amending gender designations on birth certificates.

## MARRIAGE

Michele Alexandra, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461 (2007).

Polygamy, usually practiced for religious purposes, is illegal in the United States but not usually addressed in the courts, resulting in the lack of a legal framework for addressing harmful practices associated with polygamy. The author does not argue for the legalization of polygamy, but rather sets forth the proposition that legal remedies should be put in place to help individuals living in multi-party unions. The United States has viewed polygamy as threatening to the social order and has only recently moved from condemning such unions towards providing legal remedies. Islamic law's approach to polygamy should serve as a model for the United States, since it understands the reality of polygamy and has a system of checks and balances in place to help those in multi-party unions if they desire legal relief. Many other countries have confronted polygamy by providing legal remedies such as the common law marriage doctrine, which recognizes illegal unions as legal for the purpose of providing legal remedies.

Penelope E. Andrews, *"Big Love"? The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483 (2007).

South Africa's acceptance of polygamous marriages and its simultaneous commitment to equality and social rights presents a curious paradox, arising from the compromise between universalism and cultural relativism. The South African Constitution and Bill of Rights embody a strong commitment to gender equality and the protection of women's rights in all arenas, but also offers recognition to customary law and the maintenance of traditional ways of life, including marriage under any tradition, system, or religion. Passage of the Recognition of Customary Marriage Act was an attempt to afford greater rights and protection to the women and children in these marriages, including protections against dissolution of marriage and requirements for consent in marriage. However, there are still many

obstacles preventing women in South Africa from achieving full equality, including widespread poverty, violence, and biased cultural attitudes in a masculine-based society. While this Act marks progress in the right direction, there is still much work that must be done to spread the protection of the Constitution and its ideals of equality to the women of South Africa.

Kristen A. Berberick, Comment, *Marrying Into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105 (2007).

The Supreme Court's view of the Free Exercise Clause has changed throughout history, and if the issue were to come before the Court today, it would likely hold the anti-polygamy statutes of the nineteenth century unconstitutional. The rationale that the government could regulate religious conduct, which developed in *Reynolds v. United States*, has been replaced by the holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which acknowledged that the Free Exercise Clause provides at least limited protection for religious conduct. Currently, acts regulating religious conduct must be neutral and the government must be able to demonstrate that it has a compelling interest in the area. The author posits that the anti-polygamy acts of the nineteenth century fail in both regards, as they are neither neutral, nor can the government show a compelling interest. The author concludes that based on the modern understanding developed in the *Church of the Lukumi Babalu* case, the anti-polygamy acts would be struck down by the current Supreme Court for violation of the Free Exercise Clause.

Vivian Bodey, Comment, *Enforcement of Interspousal Contracts: Out With the "Old Ball & Chain" and In With Marital Equality and Freedom*, 37 SW. U. L. REV. 239 (2008).

In *Borelli v. Brusseau*, the California Court of Appeals held that interspousal contracts were unenforceable. Similar to *Borelli's* analysis, the majority of courts have reasoned that voiding interspousal contracts is proper because there is a preexisting duty of care between spouses and thus any contract lacks consideration. However, the modern public policy considerations of marriage commodification and freedom to contract overshadow the traditional policy concerns presented by the majority of state courts. Moreover, the lack of consideration justification offered by *Borelli* is unconvincing in light of the present trend permitting liberal contract modifications. In today's society, where traditional marital roles and duties have been replaced, interspousal contracts may be beneficial, by allowing spouses to take a more flexible approach while still promoting the sanctity of marriage.

Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267 (2008).

In this article, the author analyzes the origin and history of polygamy and concludes that the use of the Mann Act to regulate polygamy would be deemed constitutional under the Commerce Clause. The practice of polygamy among the members of the Church of Jesus Christ of Latter-day Saints ("LDS Church") originated from the belief that the main purpose of marriage is procreation. However, the practice was officially abandoned after a series of federal laws were passed to criminalize polygamy. The Mann Act was originally passed to regulate the transportation of women for prostitution purposes, but the breadth of the Mann Act was expanded in *Caminetti v. United States* and *Cleveland v. United States*, when the Supreme Court broadly interpreted the phrase "for any other immoral purposes" to include transportation of women for non-commercial purposes. The author argues that given the current interpretation of the Commerce Clause power, polygamy regulation would be deemed constitutional because it falls within the Congress' power to regulate channels and instrumentalities.

Yury Kolesnikov, *Chapter 567: Saying "I Do" to Name Changes By Husbands and Domestic Partners*, 39 MCGEORGE L. REV. 429 (2008).

When a Californian man tried to change his last name upon marriage to that of his wife, he discovered that it would be much more difficult than if she wanted to take his name. The man, Mike Buday, sued the state of California, alleging Equal Protection Clause violations and disparate treatment. To remedy the problem, an assembly member introduced Chapter 567, the Name Equality Act. Chapter 567 applies to marriages as well as domestic partnerships and offers protection from discrimination based on name-change choices. The author argues that the ability for either spouse to change their name upon marriage falls under the right to privacy, therefore the state cannot put up barriers to prevent name changes.

H. Ray Liaw, Comment, *Women's Land Rights in Rural China: Transforming Existing Laws into a Source of Property Rights,* 17 PAC. RIM L. & POL'Y 237 (2008).

Further reforms must be enacted in rural China in order to protect women's property claims when they become divorced or widowed since the current laws that exist—the Marriage Law, the Rural Land Contract Law, and the Property Law—do not contain practical solutions for women. The 2007 Property Law, China's most recent attempt to grant women property rights, essentially failed in its mission as it did not state that rural land was jointly possessed and did not mandate that land

contracts contain both spouses' signatures. Joint possession of land under the Marriage Law and a declaration that land is able to be portioned would protect women from losing their land at the time of divorce or widowhood. Such changes in these two laws, which is fully supported by China's community property social structure, would guarantee that women would be able to obtain a half-interest in marital property upon divorce or widowhood. Moreover, legal access for women and community education would further ensure that women are not left landless.

Stephen L. Mikochik, *The Supreme Court and the Future of Marriage*, 84 U. DET. MERCY. L. REV. 479 (2007).

The Supreme Court in *Lawrence v. Texas* invalidated a Texas law criminalizing homosexual sodomy, and in doing so, increased the likelihood that it will strike down traditional limitations on marriage. Throughout the long history of laws against sodomy, homosexual conduct and heterosexual behavior were typically distinguished from each other, and though both were punished, homosexual sodomy was viewed as more grievous. However, the *Lawrence* court, specifically Justice Kennedy, treats nonprocreative sexual acts the same, regardless of whether the couple engaging in them is heterosexual or homosexual. The author posits that as a result of this similar treatment, the Supreme Court has positioned itself to bring down the traditional notion of marriage as being only between a man and a woman. Due to the holding in *Lawrence v. Texas*, the author concludes that because the Court recognizes marriage between infertile heterosexual couples, it has now obligated itself to recognize homosexual unions.

Marisa C. San Filippo, Comment, *Valuation of the Family Home: Why Feminist Theory Supports the Exclusive Use of Appraisers as Experts When the Wife Wants to Keep the Home*, 42 U.S.F. L. REV. 539 (2007).

The modern prevalence of divorce has led to many contentious proceedings in which there is a dispute over the value of the family home and the parties must turn to real estate salespersons and appraisers to determine its value. The author argues that when the wife seeks to keep the home for her and the children to live in, only appraisers should be allowed as competent expert witnesses for trial. The nature of real estate salespersons' occupation and the objective of selling the home for its maximum value makes the salespersons an unfit witness because they are more likely to inflate the value of the home, thus lowering the equity available and awarding less liquid assets to the wife, usually resulting in her forced sale of the home. It is contended that because the wife is more likely to keep the children and therefore desire to stay in the home, she needs this extra protection in order to prevent a "systematic disadvantage" of women. The author further illustrates her

ideas and theories by using a hypothetical divorce as an example that runs through the article.

Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313 (2008).

In this article, the author analyzes the factual descriptions of marriage asserted by the parties in litigation advocating for opposite-sex marriage and for same-sex marriage, and concludes that the facts asserted by opposite-sex marriage advocates more accurately describe the complexity of marriage. After comparing the factual descriptions of marriage presented by the two opposing sides, this article finds that the description of opposite-sex marriage is broader than same-sex marriage in that it covers the social goods that marriage was prescribed to create through procreation and providing supportive environments for children. The government does not require an ability to procreate as a pre-requisite to opposite-sex marriage; however, the importance of procreation and child rearing in opposite-sex marriages has always been the focus of sanctioning marriage as a social institution. Constitutional reframing of marriage as genderless would unavoidably eliminate the social goods that marriage has brought to society through its framing as opposite-sex marriage. The author posits that it is not the standard of review that renders opposite-sex marriage constitutional in a court decision, but rather the "marriage facts" that the court chooses to apply in making such decision.

Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America,* 96 KY. L.J. 275 (2007).

States should mitigate the nationally-accepted rule that only a surviving spouse can challenge deathbed marriages by allowing a decedent's heirs and beneficiaries to question the marriage. Currently, states employ rules that allow potential spouses to take advantage of possibly incapacitated people in order to receive property rights when the spouse dies. The risk of losing property rights to the surviving spouse justifies the heir's challenge of the deathbed marriage's validity. Yet instead of challenging marriage, which the Supreme Court has enshrined as a fundamental constitutional right, heirs and beneficiaries should come before courts to establish that the dying spouse lacked the level of capacity required to make a will. While this strategy would effectively deter people from taking advantage of the wealthy on their deathbeds, it may also encourage state legislatures to enact laws that squarely confront the problem of deathbed marriages.

## PARENTING

Felecia Epps, *The Right Responsibility: Does the Right to Procreate Include the Responsibility to Parent?* 34 OHIO N. U. L. REV. 85 (2008).

In instances of child neglect, a "no more kids" ruling is unconstitutional since it does not pass the constitutional strict scrutiny test. Although the State has a legitimate interest in protecting the welfare of the child, placing the child in adequate foster care would achieve the same result. Furthermore, it appears that the real interest of the State is minimizing the high expenses of foster care, which does not warrant a court ban on the fundamental right of procreation. Other alternatives, such as the Family Dependency Treatment Courts or the Recovery Coach, would provide parents with much needed assistance and thereby reduce the costs of foster care. Even if they were deemed legal, it is essential that courts be forbidden from issuing "no more kids" rulings in order to avoid a slippery slope that could lead to forced sterilizations.

Marsha Garrison, *Promoting Cooperative Parenting: Programs and Prospects*, 9 J.L. & FAM. STUD. 265 (2007).

Though children receive a multiplicity of benefits from interacting with cooperative parents, even a comprehensive legal approach aimed at creating collaborative familial environments faces an uncertain future. The author compares the ability of certain legal programs to encourage cooperative parenting and finds that some techniques, such as joint custody, cannot—for behavioral and practical reasons—serve as a strong force behind the movement to expose children to low-conflict relationships. Other techniques, such as educational programming that teaches current and potential parents the importance of raising children in harmonious home environments, demonstrate more potential to channel adults into cooperative relationships. Any legal attempt to facilitate a trend of cooperative parenting will require further research and understanding of the "behavioral, logistical, [and] emotional" nuances of the family unit. The author concludes that the law stands as an admittedly limited, but currently underutilized, tool for encouraging cooperative parenting.

Katie Holtz, Comment, *In Re The Termination of Parental Rights to Max G.W.: Beginning to Pave the Way for Wisconsin's Incarcerated Mothers to Retain Their Parental Rights and Serve the Best Interest of Their Children*, 22 WIS. WOMEN'S L.J. 289 (2007).

A recent Wisconsin Supreme Court decision, *In Re the Termination of Parental Rights to Max G.W.*—commonly referred to as *Jodie W.*—held that the State could not terminate the parental rights of an incarcerated mother because she was unable to meet a condition of return due to her incarceration. The author posits that this holding should be expanded to ensure that the parental rights of incarcerated women are not automatically terminated and that such situations are evaluated case-by-case, based on the needs of the child. Before *Jodie W.*, Wisconsin courts had held that even though an incarcerated parent may not have control over meeting certain required conditions of return while in jail, since the parent voluntarily acted against the law, the circumstances cannot be considered out of the parent's control. By examining in detail the nature and specifics of the *Jodie W.* decision, the author concludes that the case has significantly impacted the standards for terminating the parental rights of an incarcerated parent. Although *Jodie W.* is only one step toward changing these standards, both the child and society as a whole will benefit from allowing an incarcerated mother, under specific circumstances, to remain the caretaker of her child.

Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents,* 9 J.L. & FAM. STUD. 309 (2007).

In recent decades, the pervasiveness of the nontraditional family has eroded the relevance of the two-parent paradigm underlying parental rights. Advances in reproductive technology further oblige courts to reconsider traditional notions of parenthood. This article explores the challenges that non-biological or non-adoptive "parents" encounter in seeking visitation or custody rights. Often irrelevant under the law, these third parties play crucial roles in the lives of the children for whom they serve as parents. Advocating a shift towards multiple parenthood, the author argues that a disaggregation of parental rights, whereby courts evaluate each adult's commitment to a child's development, will better ensure the child's well-being.

Saul Levmore, *Parental Leave and American Exceptionalism*, 58 CASE W. RES. L. REV. 203 (2007).

Parental leave policy in the United States differs greatly from other countries: there is no nationally mandated paid parental leave, only the requirement that a

parent's job is kept open for them or a suitable replacement found upon their return to the workforce. Among those countries offering paid parental leave, the pay is often capped out at less than the normal earning level or offered on a fractional basis for the duration of the leave. Policy arguments attempting to rationalize the United States' lack of mandated paid leave range from the lack of a need for fertility incentive based upon the economic stress of a growing retiring workforce and the influx of immigrants our Nation receives. A more accurate description of the current policy is a two-tier employment and paid leave system; the first-tier for high-level employees presents more options—such as combining accrued vacation and sick leave with parental leave; in contrast, the second tier for lower-level employees is more rigid and pays only fractionally—requiring the employee to seek disability pay in order to keep some portion of income during the federally mandated 12 week leave period. If any change is to come in the United States' parental leave and pay policies, it is likely to come from the employers' change of focus from recruitment of employees through paid parental leave to retention of employees through an increase in child-care benefits rather than paid leave.

Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835 (2007).

After couples get divorced, courts often prescribe plans for them in order to help their children develop and adapt to the new situation. Parenting plan orders are long term plans given to parents that lay out detailed duties that must be performed until the children reach the age of maturity or other time period. Some see these orders as injunctive in nature since the courts have control over the parents, though they are different from typical injunctive orders in that the parents have committed no prior illegal act and the courts are not as concerned with future noncompliance and the burden of judicial supervision. In order to ensure enforcement of the orders, courts must be flexible in figuring out remedies for noncompliance and should be both disciplinary and remedial in order to prevent reoccurrence. It is in the children of divorced parents' interest that post-divorce custody orders exist and are enforced.

Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Patients Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112 (2007).

State child welfare laws, such as New York's Social Services Law, may be conflicting with the American with Disabilities Act (ADA) regarding termination of parental rights and discrimination against people with mental disabilities. The New York law makes it very easy for parents with mental disabilities to lose their parental rights, while the ADA prohibits discrimination by state action. Though

some states may disagree and the Supreme Court has not ruled on it, a termination of parental rights proceeding may be considered a state action, and if so, it is a state-based discrimination against parents with mental disabilities. The author argues that New York's statute would not withstand judicial scrutiny as it is in violation of the ADA and of previous Supreme Court case law. While some states have written the ADA into their statutes, more can be done for family welfare, especially through the work of state agencies and caseworkers.

Tali Schaefer, *Disposable Mothers: Paid In-Home Caretaking and the Regulation of Parenthood*, 19 YALE J.L. & FEMINISM 305 (2008).

As more and more women join the workforce, a larger percentage of American parents have employed in-home caretakers as substitutes to take care of their children. As divorce and custody cases involving these types of situations inevitably reach the courts, judges have implicitly revealed their approval of having a parental substitute when the parent cannot give the necessary care required to raise a child. The author analyzes these "nanny cases," where the court either gave a parent credit for in-home caretaking when granting custody or required parents to employ in-home caretakers, and argues that the courts have simply disposed of the paid caretaker by attributing their work to the parents who employ them. Furthermore, as more women strive to achieve a balance between motherhood and their professional lives, this view of in-home caretakers as substitute parents has a detrimental effect on the feminist movement. The author concludes that the courts need to come up with a new concept of how paid in-home caretaking has transformed the idea of parenting as a collaborative effort into an exclusive one.

Colleen Snyder, *The Missing Angels Act: Recognizing the Birth of Stillborn Babies*, 39 MCGEORGE L. REV. 544 (2008).

Every year approximately 25,000 women in the United States will experience the pain of delivering a stillborn baby and receive a fetal death certificate for the child. Parents of stillborn babies cannot obtain birth certificates, although many of these families would like to have a birth certificate to commemorate their loss. To help these families, the Missing Angels Act authorizes parents to obtain a Certificate of Birth Resulting in Still Birth. The Act has been adopted in twenty states, including California, where it is known as Chapter 661. The author posits that Chapter 661 promotes awareness of stillborn babies and helps grieving families deal with their loss without infringing on abortion rights, as the wording of Chapter 661 specifically avoids expanding the rights of a fetus.

## RACE AND GENDER

Theresa M. Beiner, *Not All Lawyers are Equal: Difficulties that Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317 (2008).

There has been a steady increase in the number of minority female attorneys. However, due to unique difficulties that minority female lawyers experience in working for law firms, their level of job-satisfaction has not increased along with their numbers. Often, the dissatisfaction arises from the unequally large amount of repetitive and administrative work given to minority female attorneys, as compared to non-minority female attorneys. The author argues that the formalistic approach to the practice of law utilized by most large law firms is the primary hindrance to job satisfaction for many female attorneys. Gender and racial inequalities in the practice of law may be reduced when decision makers at law firms start recognizing the necessity of establishing accountability for creating conducive work environments for both male and female workers.

D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males,* 86 NEB. L. REV. 552 (2008).

Although Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, Black men are often unable to make use of its protections. While society has recognized certain forms of discrimination, it has yet to acknowledge the ways in which race and gender interact to exponentially—rather than additively—increase prejudice against Black men. Such discrimination, for example, results in disparate opportunities for the type of social networking necessary to achieving top managerial positions within a firm or company. To reflect the unique form of discrimination that plagues Black men, the law ought to adopt an intersectional approach to Title VII claims. Allowing Black men to bring claims on both racial and gender discrimination bases is essential to promoting workplace equality.

Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008).

This article explores the development of the race-sex analogy, from its original inception to its divergence and eventual reconstruction. While initially successful, the race-sex analogy began to diverge as difficulties arose, such as cases where general legal provisions based on sex differences that affected only women were not construed as equal protection issues. After briefly exploring the early history of the race-sex analogy, the author traces the efforts of feminists to redefine

the analogy by illustrating the differences as well as similarities between the two. The author then argues for the extension of women's affirmative action to race-based situations. The race-sex analogy is complicated and its success has been subject to setbacks and flaws. The author believes that by examining the history of the race-sex analogy—its struggles, failures, and creative redevelopment—the need to examine contemporary race-based affirmative action and sex discrimination laws becomes evident.

## RELIGION

Lisa Fishbayn, *Gender, Multiculturalism, and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURIS. 71 (2008).

Traditional Jewish divorce law—which treats marriage as a contract controlled by the husband, as opposed to a sacrament between both man and woman—puts women at a great disadvantage. The Canadian government has tried to intervene and bring more gender equality into the Jewish tradition of delivering divorce through a bill known as a *get*, whereby a man relinquishes his rights over a woman. The author discusses how transformative dialogue may be able to accommodate multiple cultures and then looks specifically at the problems faced by Jewish women under traditional, patriarchal divorce law. The author then examines how Canadian *get* legislation has attempted to bridge this cultural gap by fostering national debate on the best solution that would advance women's position while still respecting traditional values. Ultimately, this legislation was successful in transforming discriminatory practices in traditional Jewish divorces and its success might serve as a model for other situations where traditions clash with modern norms.

Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools,* 19 YALE. J. L. & FEMINISM 495 (2008).

Current federal abstinence-only sex education curricula goes beyond allowing religious groups to preach to students, but is rather inherently unconstitutional and can only be remedied by a complete overhaul of the system. Previous challenges to the educational system stemmed from a theory of the curricula violating the Establishment Clause, but these challenges largely ignored the lack of a secular purpose to abstinence-only sex education programs and the religious nature of a message of abstinence. Comprehensive sex education

programs focus on keeping teens safe from pregnancy and STDs, abstinence-only sex education centers more on values—teaching students that only sex in a monogamous and married relationship is acceptable, homosexuality is either not addressed or outright condemned. Today, there is no separate federal funding for comprehensive sex education programs while abstinence-only programs are federally funded, this combined with the Adolescent Family Life Act—which funds sexual education programs by service providers who do not provide abortion counseling or referrals to abortion services—demonstrates a federal funding of Christian Right values. This blending of religious messages and federal funding is unconstitutional, and while current challenges have only focused on those programs with explicit religious literature and messages, the entirety of abstinence-only sex education programs funded by federal monies are unconstitutional.

Adrien Katherine Wing & Hisham Kassim, *The Future of Palestinian Women's Rights: Lessons from a Half-Century of Tunisian Progress*, 64 WASH. & LEE L. REV. 1551 (2007).

If Palestine stabilizes and its government takes a more secular turn, then the government may consider legal reform in the area of women's rights to those in Tunisia because the Palestinian Liberation Organization's was based there from 1982 to 1994. The Palestinian Basic Law prohibits gender-based discrimination, but also says that *Shari'a* law will be a "major source" for legislation and that it has jurisdiction over certain matters. Unlike Tunisian law, Palestinian law mandates that women generally need the consent of their fathers to marry, sets the female age of consent for marriage to fifteen instead of eighteen, allows polygamy, and does not generally grant wives the right to divorce. Tunisia has attempted to reform its legal system by working with the religious sector and grounding reforms within it-*jihad*, or the practice of Islamic reinterpretation. It has banned headscarves in classrooms and in government, and takes pride in the international recognition for its treatment of women.

## SAME SEX MARRIAGE

Margaret Bichler, Note, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167 (2008).

Homosexuality has only been perceived as a perversion and a deviant lifestyle since the late 1800's. The image of homosexuals as an "other" was

promulgated by a patriarchal heterosexual society that was motivated to maintain the structured male dominant society and as such, it is not surprising that gay marriages are hotly opposed and many homosexuals choose to remain in the "closet" to protect themselves from both legal and social discrimination. While the traditional standards of suspect classification under the Equal Protection Clause may not apply to homosexuals, the author believes that this criteria does not even apply anymore to the classes it still protects—such as women and African Americans—who now have political voices. Alternatively, the author argues that homosexuals should be perceived as a suspect classification as they are a discrete and insular minority, suffering from a history of unfair treatment with little political power to change their fate. Homosexuals should therefore fall under the protection of the Equal Protection Clause and strict scrutiny should be applied to laws that discriminate against the homosexual lifestyle, such as the marriage ban.

Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529 (2008).

The objective of modern originalism is to determine the original, objective meaning of constitutional language. This article examines the theory of originalism in the context of the defeated Federal Marriage Amendment ("FMA") by considering an originalist's hypothetical approach to resolve the original meaning of the law, had it passed, in light of the overwhelming and widely broadcasted disagreements about its meaning. In particular, the central issue of whether the FMA allows states to establish civil unions, is analyzed under three distinct conceptions of originalism: (1) original expected application, which fails to yield an answer because there was no common expectation of the FMA's application to civil unions; (2) original public understanding, which fails because strong dispute over the textual meaning was well-known publicly; and (3) original, objective textual meaning, which fails because neither the law nor society had an objective definition of "marriage" at the time. Originalism is not a viable theory because it cannot determine the original public meaning of text when there is no broadly accepted public meaning, particularly in the case of controversial laws that are drafted to be inherently ambiguous so as to obtain widespread support. As a result, judges must look beyond the text to answer challenging issues, suggesting that the premise of originalism is false because it cannot constrain judicial activism, nor can it abdicate judicial review simply because the original meaning is unknown.

John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 LAW & SEX. 7 (2008).

Though most of the debate over the legalization of same-sex marriages is centered on morality and rights, examining this concept from a public health and

policy standpoint lends great support to the argument in favor of allowing same-sex marriages. Few courts have discussed the interaction between same-sex marriage and public health, but the court in *Goodridge v. Department of Public Health* did highlight the public benefits of marriage as an institution and one judge hinted that perhaps there is a disconnect between marriage and procreation. Studies have found that there are many public health benefits to marriage that are not available to cohabitating couples, including longer life, increased mental health, and better financial returns. Although it is not possible to predict the effect that legalization of marriage would have on same-sex couples with exact certainty, the author speculates that many of the benefits heterosexual married couples enjoy would transfer to their same-sex counterparts. The author concludes that the public health benefits of marriage, when transferred to same-sex couples, would be advantageous to the entire society and may in fact be the key factor in the country's eventual acceptance and legalization of same-sex marriage.

Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN'S L.J. 53 (2008).

Social theorists agree that families affect whether children acquire a sense of duty to participate in civic organizations later in life. Yet a careful analysis of the arguments made by defenders of the traditional family demonstrates that gay couples are equally capable of instilling moral ideals and civic values in their children. The word "autonomy" takes on unique meaning for gay couples who affirm their true identity by coming out. By relating to each other as equal individuals, gay couples prepare their children to be open-minded citizens able to think for themselves but also respect other's opinions. At the very least, the general public should begin to recognize that same-sex marriages have the potential to benefit social institutions and should therefore be legitimized under the law.

John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461 (2008).

This article focuses on a similarity between the legal institutions of adverse possession and common law marriage: they both create societal expectations that eventually morph into legally binding conclusions. More specifically, both adverse possession and common law marriage cause individuals to rely on their legal status as either owner or spouse. The doctrine of adverse possession should be limited due to changes in social and economic conditions, while the recognition of common law marriage should be increased due to societal necessity. Adverse possession is no longer necessary since the initial reason for its existence—the difficulty of ascertaining land titles—is no longer needed under modern title record

systems. On the other hand, common law marriages should be given wider recognition due to the inadequacy of the marriage record system and because individuals who live as if they are married serve as better proof that a marriage exists than a certificate.

Melissa B. Neely, Note, *Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed*, 41 IND. L. REV. 245 (2008).

Indiana is one of many states in recent years to have proposed an amendment to its state constitution, which would ban marriage between same-sex couples. The proposal of such a ban is a reflection of the recent changes in the country as a whole, with some states—Massachusetts, Connecticut, Vermont—liberalizing their restrictions on same-sex couples, while other states, including Indiana, have passed legislation similar to the Defense of Marriage Act, limiting same-sex couples. Amending the Indiana Constitution to limit marriage to a union between a man and a woman would have significant negative effects on the citizens of Indiana, depriving many same-sex couples of a wide array of benefits, including medical and inheritance benefits, and impacting a series of Indiana statutes. The author argues that the argument put forward by amendment proponents—that such an amendment is needed to prevent courts from legalizing same-sex marriages—is unfounded and misplaced since there are currently statutory provisions preventing same-sex marriage and therefore, amending the constitution would be an extreme and unjust measure. The author concludes that, since the Defense of Marriage Act in Indiana has been upheld as constitutional, there is no need for the state to amend their constitution to protect marriage between opposite-sex couples.

Robert M. Pallitto & Jason Hungerford, *The Proposed Anti-Gay Marriage Amendment: The Constitution, the Law of Standing, and Liberal-Democratic Values*, 17 LAW & SEX. 75 (2008).

Advocates for a ban against same-sex marriage are continuing to push a constitutional amendment which would prohibit gay and lesbian couples from uniting in marriage. But, this constitutional ban would be unenforceable, as the law of standing as it is today would not permit a claim of legal injury by a litigant based on the marriage of two individuals. Even if the law of standing was somehow overcome, the basic fundamental right to privacy requires one to respect the privacy of another, and deeply rooted in our constitution, along with privacy, is the idea of tolerance. Tolerance would be violated on many levels, including tolerance of the outcomes of accepted procedures, tolerance of the development of the personhood of others, and tolerance born of empathy. Thus, fundamental liberal-democratic values would be undermined if a constitutional ban on same-sex marriage was to be enacted.

Gennaro Savastano, Comment, *Comity of Errors: Foreign Same-Sex Marriages in New York*, 24 TOURO L. REV. 199 (2008).

In *Hernandez v. Robles*, the New York Court of Appeals held that the state legislature could deny marriage to same-sex couples because the courts must pay deference to the legislature under the applicable rational basis test. The author argues that despite *Hernandez*, New York courts should apply the traditional liberal grant of comity to foreign same-sex marriages since they present no fraud or strong public policy exceptions. In the wake of *Hernandez*, the Nassau County Supreme Court, in *Funderburke v. New York State Department of Civil Service*, has held that same-sex Canadian marriages should not be granted comity. At the same time, the Appellate Division, Fourth Department, in *Martinez v. County of Monroe*, and the Westchester County Supreme Court, in *Godfrey v. Spano*, have both held that these marriages should be granted comity. Since New York's constitution and statutes are silent on the recognition of foreign same-sex marriages, the author believes that New York courts should give comity to foreign same-sex marriages.

Louis M. Seidman, *Gay Sex and Marriage, the Reciprocal Disadvantage Problem, and the Crisis in Liberal Constitutional Theory*, 31 HARV. J.L. & PUB. POL'Y 135 (2008).

Justice Scalia and others are incorrect to believe that there is no reasonable constitutional argument for gay rights. The Framers of the Constitution consciously decided to "constitutionalize equality" by writing the Equal Protection Clause, which creates a strong argument for gay rights. Moreover, there exists a moral argument for gay rights; therefore it follows that there is also a constitutional argument to defend gay sex and marriage. Sex does not only have a procreative purpose but is also viewed as pleasurable, and pleasurable activities are morally good. Justice Scalia and others who believe there is no constitutional legitimacy for gay sex and marriage are incorrect and should not prevent gay people from living their lives as they wish and enjoying constitutional protections.

Matthew K. Yan, Note, *What's in a Name? Why the New Jersey Equal Protection Guarantee Requires the Full Recognition of Same-Sex Marriage*, 17 B.U. PUB. INT. L.J. 179 (2007).

In *Lewis v. Harris*, the New Jersey Supreme Court held that the New Jersey constitution required the state to either provide same-sex couples with the same statutory rights as married couples or to permit their civil union. At the same time, however, it rejected the petitioner's contention that the state constitution protected a fundamental right to same-sex marriage. The author contends that in reaching its decision, the court improperly declined to apply its three-prong balancing test from

*Greenberg v. Kimmelman*, which inquires as to: (1) the nature of the right restrained by state action, (2) the extent to which it is so restrained, and (3) the public need for such restraint. Had the Court applied the *Greenberg* test, it would have concluded that the constitution protects a fundamental right to same sex marriage. Any alternative form of union is a reincarnation of the "separate but equal doctrine" that the United States Supreme Court has long since repudiated.

## SEX DISCRIMINATION

Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work after* Jespersen v. Harrah's Operating Company, Inc., 42 U.S.F. L. REV. 299 (2007).

In 2006, the Ninth Circuit sitting en banc, rendered the *Jespersen* decision, which demonstrated the acceptance of the commercialization of female sexuality, the unfair effects on women's employment opportunities due to sex-based appearance codes, and the failure of current federal anti-discrimination laws to establish equality in the workplace. In *Jespersen*, the court abandoned the fundamental principles of Title VII and failed to provide equal employment opportunities. Under the *Jespersen* decision, an individual challenging an employer's sex-based appearance code may have to rely on expensive expert testimony in order to prevail. The decision essentially immunized employers from most challenges, except particularly well-financed ones. Discrimination law addressing workplace appearance codes must be transformed before another generation of women falls victim to a hyper-sexualized business world.

Heather Shana Banchek, Note, *Overcoming a Hostile Work Environment: Recognizing School District Liability for Student-on-Teacher Sexual Harassment Under Title VII and Title IX*, 55 CLEV. ST. L. REV. 577 (2007).

Despite increasingly disrespectful and disorderly conduct by students against teachers, many school districts and courts have remained unwilling to address the issue of student-on-teacher sexual harassment. In the case of *Plaza-Torres v. Rey*, the U.S. District Court of Puerto Rico extended the application of Title VII and found that a claim for student-on-teacher sexual harassment could be valid under Title VII because its prohibition against unlawful employment practices applies to all employers, including schools. Title IX could also be applicable to schools receiving federal funds due to its prohibition against employment discrimination. Although the *Plaza-Torres* case is not binding, recent court decisions suggest a

trend expanding the protections of Title VII and Title IX to include student-on-teacher sexual harassment. In response, this article encourages school districts to implement proactive policies to prevent sexual harassment of teachers by students, including: revising school anti-harassment policies to incorporate student-on-teacher sexual harassment provisions; developing training programs for school communities to raise awareness; and passing state legislation to mandate adoption of school district student-on-teacher sexual harassment policies.

Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67 (2008).

Two recent court decisions in Hong Kong and South Korea provide the United States with examples of non-Western jurisdictions embracing sexual orientation and gender identity rights. The Hong Kong Court of Appeal found that the differing ages of consent for male-male couples performing anal sex and opposite-sex couples performing vaginal sex were discriminatory. The Court did not require proof of a discriminatory motive, but held that the Hong Kong Basic Law and Bill of Rights prohibited both direct discrimination and laws with a disparate impact on historically disadvantaged groups. The South Korean Family Register allowed a transgender female to change her records in the family register from male to female because she had undergone surgery and hormone treatment and was presenting herself as female. These two cases show that some non-Western jurisdictions are surpassing the United States in terms of protecting sexual orientation and gender identity rights, especially since the "rational basis with bite" test of *Romer v. Evans* requires U.S. courts to find illegitimate animus.

Jennifer Yue, Note, *The Flood of Pregnancy Discrimination Cases: Balancing the Interests of Pregnant Women and Their Employers*, 96 KY. L.J. 487 (2008).

Utilization of a revised legal standard in pregnancy discrimination cases will create more fair outcomes in such cases and will reduce the need for judicial intervention by providing a clear standard for employers to incorporate into company policy. The Pregnancy Discrimination Act requires that employers treat pregnant employees in the same manner as similarly situated, temporarily disabled employees. However, circuit courts are currently in disagreement as to whether pregnant women are similarly situated to workers that get injured off the job. The question of whether pregnant women are most similarly situated to employees injured off the job—as opposed to employees injured during work—is important, because many companies operate under policies of providing light-duty work only to disabled employees injured at work. The author argues that by asking the courts to balance the discriminatory intent and impact of an employer's pregnancy

policies, credence is given both to employers' financial interests and to the unique condition of pregnant female employees.

## SEX INDUSTRY

Kyle Cutts, Note, *A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 CASE W. RES. L. REV. 277 (2007).

The United States government and non-governmental organizations have tried to eradicate child sex tourism by creating measures that punish child sex tourists criminally. For example, several child sex tourists have been convicted under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act, which not only criminalizes the perpetrators, but also allows for civil remedies for the victims. As an alternative to the PROTECT Act, victims of child sex tourism may be able to bring a claim of slavery under the Alien Tort Claims Act ("ATCA"). Despite these measures, the author believes that more comprehensive measures are needed to address child sex tourism on a global level. Placing child sex tourism in the category of slavery and forced labor will reveal the seriousness of this crime, and in turn, encourage other countries to adopt and enforce laws that can eradicate child sex tourism.

Marissa H.I. Luning, *Prostitution: Protected in Paradise?*, 30 HAWAII L. REV. 193 (2007).

Private prostitution between consenting adults in Hawaii should be legalized so that prostitutes can assimilate into society and because prostitution infringes on both the United States and Hawaii State Constitutions. In Hawaii, sex in exchange for money is illegal and both the person who engages in and agrees to engage in the consensual act will be liable. Hawaii Supreme Court cases that have held that prostitution is not included in a person's right to privacy are incorrect because consensual sex between two people should be protected and fall into Hawaii's privacy guarantee. Part of the reason that prostitution is illegal in Hawaii is because the public does not want it to be legal and the legislature believes it would erode public order. The legislature and judiciary should disregard the public and realize the illegality of prostitution is unconstitutional.

**SEX OFFENDERS**

Christina D. Rule, *A Better Approach to Juvenile Sex Offender Registration in California*, 42 U.S.F. L. REV. 497 (2007).

In California, the legitimate state interests of safety against and rehabilitation of juvenile sex offenders cannot be met under the state's current juvenile offender registration statute, which requires that juvenile sex offenders first be referred by judges to the California Youth Authority (CYA). This restricts judges to transfer discretion to the CYA, which has failed to provide adequate facilities and treatment programs for juvenile offenders, causing judges to not send deserving offenders there. This lack of commitment to CYA has allowed dangerous sex offenders to bypass the registration system. The author recommends that the California sex offender registration statute should be changed to remove the CYA requirement and put juvenile sex offender registration discretion in the hands of judges. To do this, the legislature should enact standards by which judges should be guided in order to determine which juveniles should be registered, including ages of the offender and victim, circumstances and gravity of the offense, the offender's previous sex crime history and future danger, and the offender's living situation.

Tanya Simpson, *"If Your Hand Causes You to Sin . . .": Florida's Chemical Castration Statute Misses the Mark* , 34 FLA. ST. U. L. REV. 1221 (2007).

In 1997, Florida enacted its "chemical castration" statute, which permitted Florida courts to order regular administration of MPA—a female hormone commercially known as Depo-Provera—injections to individuals convicted of sexual battery; the injections become mandatory upon a second conviction. Florida's statute faces key legal problems, most notably its violation of the prohibition on cruel and inhumane treatment, as well as substantive due process and informed consent issues. Since the statute's enactment, Florida courts have refused to mandate injections for 104 of the 107 individuals whom the statute requires to be treated with MPA. This comment focuses on the legal problems facing the implementation of the statute and suggests changes to overcome the violations inherent in the current version of the law, such as by reducing the scope of offenses to those that are most likely to be committed. Those individuals confirmed as paraphiliacs would be offered the option to voluntarily participate in a course of treatment that includes the injections, psychiatric counseling, and outlined options to end the course of treatment if shown to be unsuccessful.

## SEXUAL ABUSE

Julie M. Arnold, Note, *"Divine" Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse*, 42 VAL. U. L. REV. 849 (2008).

Child sexual abuse is frighteningly common in the United States, and in almost all cases, the abuser is not a stranger but often a family member, friend, or clergyman. In cases of abuse by clergymen, the government, fearing the constitutional separation between church and state, has been willing to let religious organizations confront the abuse in their own ways. However, this system has not been working because while the State has a compelling interest in prosecuting abusers, religious organizations often want to keep the crimes quiet to avoid scrutiny. The author suggests repealing the clergy-communicant privilege in relation to already standing mandatory reporting statutes to ensure that instances of abuse are reported. By restructuring the mandatory reporting statutes to abrogate the clergy-communicant privilege, the author believes that there will be an increase in reports of sexual abuse without any violation of the Fourteenth Amendment.

Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607 (2008).

The documentation of widespread sexual slavery in prisons raises the issue of whether prisoners retain rights to challenge these conditions under the Thirteenth Amendment, which authorizes slavery and involuntary servitude as punishment if a person is convicted of a crime. Interpretation of the Punishment Clause under the Thirteenth Amendment requires analysis of the Eighth Amendment's approach in defining punishment, including the intent approach, the realist approach, and the formalist approach. However, these different approaches in defining punishment under the Eighth Amendment create inconsistencies when applied to the Thirteenth Amendment. The author proposes that an original understanding of the Punishment Clause, based on historical evidence of congressional intent, reveals that prisoners retain a limited set of rights under the Thirteenth Amendment. Therefore, under a slightly modified intent-based approach, punishment would be defined as including only lawful punishments, which would allow prisoners to challenge sexual slavery conditions under the Thirteenth Amendment, while promoting a natural reading of the language that is consistent with the Eighth Amendment.

Melina Milazzo, Comment, *Military Commissions Act of 2006: A Regressive Step Back From the International Legal Standards of Rape and Sexual Violence,* 35 FLA. ST. U. L. REV. 527 (2008).

At the request of President Bush in 2006, Congress passed the Military Commissions Act of 2006 ("MCA"), which made the legal standards for rape and sexual violence less comprehensive than those accepted by the international community. While the Act defines rape and sexual assault or abuse as war crimes, it contradicts international legal standards by excluding "outrages upon personal dignity," which means that certain types of sexual violence—such as forced nudity—do not violate the MCA. The MCA's narrow definition of rape, sexual assault, and torture excludes certain forms of non-consensual rape and forcible oral sex, whereas these types of crimes are included in international legal standards. The author argues that by eliminating these internationally accepted elements of rape, sexual assault, and torture, it is effectively harder to prosecute perpetrators of these crimes and diminishes the condemnation of these acts. The MCA's policy negatively impacts the protection of human rights because it allows tolerance for sexual violence and could set a dangerous precedent for regressive rape and sexual assault standards.

Ruth A. Miller, *Rape and the Exception in Turkish and International Law*, 64 WASH. & LEE L. REV. 1349 (2007).

The 2004 Turkish Criminal Code, based on the ideals of European liberalism and exceptionalism, is an attempt by Turkey to westernize their laws and gain membership into the European Union. According to the influential political theorist Carl Schmitt, the most fundamental right of a sovereign is to decide on the state of exception, defined as deciding when to suspend the rule of law or when the law will collapse into politics. The 2001 International Criminal Tribunal for the former Yugoslavia ("ICTY") made significant headway by redefining the concept of rape, but an examination of the rhetoric and substance of the decisions, such as eliminating the possibility of consent to wartime rape, reveals that the rulings implicitly demand a state of exception. The Turkish Criminal Code now follows some of the ICTY's interpretations and redefinitions of rape in international law by similarly defining rape as a "crime against sexual inviolability," and by punishing anyone who violates another's "bodily inviolability by sexual conduct." Although the new code is a significant step towards the government's desire to be considered "European," the author questions whether Turkey should be placing its nation's rape laws in the problematic context of exceptionalism's authoritarian and fascist history.

Jennifer C. Mitchell, *Crime Without Punishment: How the Legal System Is Failing Child Victims of Intra-Familial Abuse*, 9 J.L. & FAM. STUD. 413 (2007).

Laws related to the sexual abuse of children make a significant distinction between abuse perpetrated by parents and by strangers, giving parents leeway in the form of probation, treatment, and the ability to rejoin the family. The lighter punishment for family members results from a desire to preserve the family unit and the psychologically incorrect view that people who molest their own children are more likely to be rehabilitated than those who molest unrelated children. Many states have created an "incest" loophole for intra-familial molesters, allowing them to be charged with the lesser crime of incest instead of child sexual abuse. Several states have "family preservation" statutes which allow parent molesters to enter probation and reenter the home. The victim, who does in fact suffer serious emotional harm, may not be best served by the reentry of his or her molester into the house and therapy may not always be an effective aid.

Christina Okereke, Note, *The Abuse of Girls in U.S. Juvenile Detention Facilities: Why the United States Should Ratify the Convention on the Rights of the Child and Establish a National Ombudsman for Children's Rights,* 30 FORDHAM INT'L L.J. 1709 (2007).

The Convention on the Rights of the Child ("CRC") addresses the rights of children generally; it specifically defends those deprived of liberty by providing detailed guidelines to protect children from abuse and inhumane treatment. In order to combat the unacceptably high levels of physical and sexual abuse of girls in U.S. juvenile detention centers, the author suggests that the U.S. ratify the CRC. Although there is concern in the U.S. that the CRC undermines parental authority, the convention actually protects parental rights in raising children and supports the guidance that a familial unit provides. If the U.S. were to ratify the Convention, it could review and improve its current policies relating to children. Under the CRC, the U.S. should also create a national Ombudsman for children's rights to monitor compliance with the treaty and to focus on children's needs.

Christopher L. Peretti, Comment, *Aligning the Eighth Amendment with International Norms to Develop a Stronger Standard for Challenging the Prison Rape Epidemic,* 21 EMORY INT'L L. REV. 759 (2007).

Prison rape is a problem that can be best addressed by using international human rights norms and standards as a framework. The author first describes the types of inmates affected and the types of harm experienced. The current Eighth Amendment jurisprudence is addressed, with a special emphasis on the "deliberate indifference" doctrine. The author then discusses the international community's

understanding of rape as a form of torture and contrasts that view with the American interpretation. The article ultimately advocates for the incorporation of international torture standards into the American definition of prison rape.

Lindsay Peterson, Note, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 509 (2008).

This note focuses on the realities and shortcomings of international and U.S. refugee law in providing adequate solutions for rape victims. Limitations in both legal paradigms arise as a result of rape not being viewed as a violent crime, but rather a dignitary one. The author traces the history of this issue, from its emergence in international tribunals to the formation of the International Criminal Court, and goes on to examine how U.S. refugee law deals with rape victims. While both spheres of law can appear ineffective, the trend appears to be that the international community is reacting in a more receptive ways towards victims. The author posits that American law should consider defining gender as a category for asylum status in order to address the failures of the system to treat rape victims as equal candidates for asylum, similar to those who seek safe haven as a result of other violent crimes.

## SOCIAL CLASS

Lisa Hansen, Note, *A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace*, 59 RUTGERS L. REV. 885 (2007).

The Pregnancy Discrimination Act ("PDA") was passed in 2006 to allow pregnant women to combat employment discrimination claims. Many discrimination issues still exist, and women, particularly those in lower paying positions, are forced to forego breastfeeding to retain their jobs. Specifically, women are exposed to "two-tiered" treatment in the work place: women in higher paying jobs are granted breast feeding accommodations, yet, women working in lower paying jobs are denied these opportunities and are forced to deprive their infant of a basic necessity. Under the current legal system, women are still denied sufficient remedies because they are prevented from bringing discrimination claims for this treatment. The author proposes amendments to the PDA, arguing that the PDA should acknowledge "breast feeding" and "expressing breast milk" as catalysts for discrimination and that federal law should incentivize employers to accommodate nursing women.

Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine,* 43 WAKE FOREST L. REV. 223 (2008).

The rules of intestate succession must be revamped in order to reflect the dramatic decline in the number of nuclear families in the United States. This article focuses on different methods that courts and legislatures could employ to allow informally adopted individuals to inherit via intestate succession, thereby effectuating the testator's intent. The failure to incorporate informally adopted individuals into the intestacy statutes promotes discrimination, since informal adoptions are most prevalent in the Hispanic and African American communities, and also leaves these individuals without financial and emotional support. Although the doctrine of equitable adoption was initially designed to allow informally adopted individuals to inherit via intestacy, the required showing of an initial adoption contract precluded them from doing so. Therefore, intestacy statutes must be changed to allow informally adopted individuals to inherit, thereby eliminating discriminating and effectuating the intent of the testator.