ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Elizabeth Ann McCaman, *Limitations on Choice: Abortion for Women with Diminished Capacity*, 24 HASTINGS L. J. 155 (2013).

Abortion should be an exercise of female autonomy—a fundamental reproductive right of personal choice that is procured through informed consent. Informed consent, however, cannot be readily ascertained without the mental capacity to understand the ramifications and meaning of that choice. This Article discusses the various public policy reasons why mentally disabled women should be granted the right of reproductive choice and then considers the varied statutory policies in Florida, California, and New York for obtaining an abortion when informed consent is impossible. These statutes attempt to balance numerous considerations in delineating a procedure for helping women with diminished capacity to enjoy reproductive freedom: the feelings and desires of the woman regarding her pregnancy; the best interests of the woman emotionally, mentally, and physically; and protection from abuse. Typically, one of two standards underlie adjudicative, policy, and procedural construction: substituted judgment—focusing largely on the woman's expressed preferences—or best interests—focusing on a more objective standard that only minimally considers the woman's personal preferences. States should continue to encourage the right of reproductive choice by expressly allowing access to abortion for women of diminished mental capacity and should ensure that statutes are thorough and explicit and allow for expeditious procedures and flexibility with an individualized approach, while maintaining some level of judicial discretion to deter abuse.

Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

Despite its association with politically conservative jurisprudence, an originalist interpretation of the Thirteenth Amendment actually supports a right to abortion. Originalism is a broad concept that encompasses several potentially contradictory theories, such as the original intent of the framers and the original contextual meaning at the time of drafting. The Thirteenth Amendment invalidates laws that impose servitude on individuals and, separately, laws that stigmatize traditionally suppressed groups; because compulsory pregnancy affects both, the Thirteenth Amendment prohibits such laws. Some originalists object to this theory because at the time of the Constitution's framing, compulsory pregnancy was not considered a form of slavery. However, rape and forced mating were a regular occurrence for female slaves, and therefore, commandeering a woman's

reproductive capacities is a form of slavery which the Amendment intended to eradicate. The contention that women seeking an abortion have, unlike slavery, voluntarily assumed the risk of pregnancy fails because it does not acknowledge rape or the nuances of sexual and societal pressures. Only by continuing to protect against the specific wrongful acts imposed on American slaves can lawmakers stay faithful to the original purpose of the Thirteenth Amendment.

Lindsay J. Calhoun, Comment, *The Painless Truth: Challenging Fetal Pain-Based Abortion Bans*, 87 TUL. L. REV. 141 (2012).

Nine states currently have statutes that ban pre-viability abortions based on contested medical evidence that a fetus can feel pain at approximately twenty weeks gestation. In two of these states, Idaho and Arizona, there are open cases challenging these statutes. Such legislation should be found unconstitutional because it contradicts the United States Supreme Court's decision in *Roe v. Wade*, which found that a woman has a constitutionally protected right to an abortion until the point at which the fetus is viable—meaning it can survive outside of the womb—or approximately twenty-eight weeks gestation. Because these statutes impact a fundamental constitutional right, the right to an abortion, courts should subject them to a high level of scrutiny. Additionally, the medical evidence used to support these statutes is controversial and is refuted by other evidence indicating that while a twenty-week-old fetus may have developed the physical structures to respond to negative stimuli, it has not developed the capacity for conscious recognition and cannot emotionally and psychologically recognize such stimuli as pain. Lawmakers in states with pre-viability abortion bans relied on data from the federal Unborn Child Pain Awareness Act of 2005, which was criticized for using only medical findings that supported its purpose while ignoring contravening evidence. An examination of fetal pain-based abortion bans—likely to be heard soon in federal court—under a high level of scrutiny should result in a finding that they are unconstitutional.

Dorothy E. Roberts, *The Social Context of Oncofertility*, 61 DEPAUL L. REV. 777 (2012).

Oncofertility treatments provide female cancer survivors with options to preserve their fertility after successful cancer treatments. Although beneficial in protecting a woman's ability to have children, these treatments—which include preserving eggs followed by in vitro fertilization, or even removing the ovarian tissue of prepubecent girls and using it to grow eggs—raise serious social concerns. First, oncofertility may promote gender inequality by reinforcing the expectation of motherhood, thereby placing unfair and outdated social pressure on women. There is a need for cancer-surviving women to have greater accessibility to non-biological

parenting options, such as adoption or opting out of parenthood. Second, many of the oncofertility treatments—such as egg freezing—are painful, invasive, and can result long term health problems. Finally, allocating public resources toward oncofertility treatments unfairly privileges white women. Social factors contribute to poorer health in general for black women and public resources would be better spent on general health care. The Author urges that universal quality healthcare should receive funding priority over specialized treatments that primarily benefit women of means. Women who are considering oncofertility treatments should at the very least be made aware of the potential risks and alternative parenting options.

CHILDREN AND TEENAGERS

Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991 (2012).

International child migration is a complex phenomenon occurring in countries throughout the world, but the problem lacks an adequate solution. The Author provides an overview of what is known and what remains undetermined about child migrants and also incites scholars, practitioners, policy makers, and adjudicators to help governments develop a cohesive "best interests of the child" principle that respects migrant children's agency by ensuring their voices are easily understood. While some of the causes for children crossing borders are easily discernable—economic and educational opportunities, physical survival, family reunification, and exploitation by traffickers—those who work with and study child migrants will be better able to help them if they know more about which children migrate, their countries of origin, and migration destinations. Additionally, understanding the links between international child migration and internal migration—a practice in which children leave their parents so that relatives can help with child-rearing or so the child can learn a trade—could be beneficial in places such as Latin America, where governments' failure to understand the practice precludes their ability to implement effective legal and policy tools. Not only should scholars, practitioners, policy makers, and adjudicators examine the tools created under domestic immigration laws in order to respect migrant children's best interests, but they should also listen to the children's voices firsthand in order to gain a better understanding as to why children cross borders and allow them to express their own best interests.

Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501 (2012).

Children lack the analytical abilities and judgment of adults, yet criminal courts consistently apply the reasonable person standard—a concept inherently tied to adult behavior and decision-making—when adjudicating the conduct of children. Absent a separate standard for juveniles, who are still cognitively developing, courts are required to hold children legally accountable, thus denying them full constitutional protection. Juveniles should be evaluated based on developmentally appropriate standards with recognition of differences in education, judgment, and experience. In *Roper v. Simmons*, *Graham v. Florida*, and more recently, *J.D.B. v. North Carolina*, the United States Supreme Court recommended that a child's age be considered for the purposes of determining culpability. The Authors call for courts in the juvenile and criminal justice systems to acknowledge the unique characteristics of children and to consider other relevant factors—such as the child's mental state, maturity level, and reasonableness of a belief of impending danger—in determining the scope of blameworthiness.

DOMESTIC VIOLENCE

Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi Court-Involved Battered Mothers Just Can't Win*, 20 AM. U.J. GENDER SOC. POL & L. 797 (2012).

Although they are themselves victims of domestic violence, battered mot are often charged with abuse and neglect in juvenile court proceedings for failin protect their children from an abusive spouse or partner. Child protective services agencies can bring a case against a battered mother for not immediately leaving her abuser and cutting off all contact with him. Such cases fail to acknowledge the obstacles of leaving an abuser, such as financial dependence, the threat of further harm for attempting to leave, and custody or visitation orders from family court. Sadly, children removed from battered mothers face much greater potential harm in the foster care system. In the past, children could be removed for simply witnessing violence, but in *Nicholas v. Scoppetta*, the New York Court of Appeals held that before removal, there must be a showing that the children have actually been harmed or be in imminent danger of being harmed as a result of the mother's neglect or failure to protect. While an improvement, this reform still focuses on the mother's failings rather than the actual perpetrator of the abuse. In order to prevent the harmful removal of children, social workers, judges, and attorneys need to take

into account the psychological and safety issues that accompany domestic violence cases. Additionally, two social workers should be assigned to these cases to provide additional oversight and ensure that any removal is truly in the best interest of the children.

Diksha Munjal, *Intimate Partner Violence—Is There a Solution?*, 19 DUKE J. GENDER L. & POL'Y 347 (2012).

Intimate partner violence, and specifically violence against women, is widespread, but for the longest time, such abuse was considered a private matter and was only brought to public attention through the advocacy of the 1970s feminist movement. This Article focuses on the oft-flawed methods by which legislatures have attempted to eradicate the epidemic and offers possible solutions for the future. The first attempts at legislative remedies were protection orders, which, if breached, could result in arrest, but they were seldom enforced. Eventually, civil solutions backed by criminal sanctions for failure to comply—including arrest and conviction—were adopted. Yet, domestic violence persists because criminal convictions depend on testimony from the victim who is often not cooperative, either out of fear or hope that the situation will resolve amicably. Other relevant factors include judicial hesitance to break up families, a lack of understanding of the problem, and prosecutorial reduction of charges. Innovative approaches that have been tried in some jurisdictions and that may help diminish domestic violence include: instituted mandatory arrest policies for all domestic violence calls; enhancing the evidence gathering process so that cases do not rest completely on victim testimony; creating special domestic violence courts and registries; court-mandated perpetrator programs; and early education in which children are taught from a young age that violence is never allowed.

Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 ST. THOMAS L. REV. 544 (2012).

Same-sex domestic violence is occurring at a comparable rate and in a similar pattern as heterosexual domestic violence, yet the difference in how same-sex violence is treated causes it to remain a largely invisible issue. Victims of all orientations experience a myriad of abuses, including physical assaults, sexual violence, property damage, and psychological abuse. While heterosexual women generally have access to victim services, there are fewer options for lesbian women and practically none for gay men, who are not typically contemplated as victims. Accordingly, many gay and lesbian victims lack the resources necessary to leave violent relationships, and in cases in which same-sex victims kill their abusers, they

are not afforded the self-defense or sentencing mitigation available to sufferers of Battered Women's Syndrome ("BWS"). Under BWS, the accused asserts that he or she reasonably believed that immediate deadly force was required to protect from death or serious injury. The Author contends that in order to provide equal protection to victims of same-sex domestic violence, courts must recognize BWS for all victims and allow experts to testify about same-sex domestic violence.

EDUCATION

Tara A. Waterlander, *Canines in the Classroom: When Schools Must Allow a Service Dog to Accompany a Child with Autism Into the Classroom Under Federal and State Laws,* 22 GEO. MASON U. CIV. RTS. L.J. 337 (2012).

Autism—which the National Institute for Mental Health has called a national emergency—affects one in eighty-eight children in the United States. The aid of service dogs can be critical to improvement of the social and cognitive skills, anxiety level, and physical safety of autistic children. Public schools are required pursuant to the federal Americans with Disabilities Act ("ADA"), as well as some state laws, to allow service animals for disabled students. This Note examines how, despite these requirements, schools continue to refuse service dogs, citing concerns that they may endanger students with allergies or distract other students in the classroom. However, by prioritizing the interests of other children over those with autism, these school districts are in violation of the ADA, which makes it illegal to discriminate against differently abled persons. To mitigate this discrimination, all states should adopt legislation requiring classroom access for service dogs when the dog provides some benefit to the child. This would relieve school districts of the discretion to determine what is or is not an educational benefit, while enabling a wider array of access to service dogs. Additionally, schools should work closely with parents and teachers to mitigate the health and safety consequences of dogs in classrooms by keeping track of students with allergies or fears of dogs.

Michael Rogers, Note, *Guns on Campus: Continuing Controversy*, 38 J. C. & U. L. 663 (2012).

In recent years, great attention has been placed on the regulation of firearm possession within public academic institutions. Although there is general agreement among state legislatures about restricting firearms in public grade schools, public colleges and universities present greater legislative and legal ambiguity. This Article reviews the eminent cases and laws that sculpt Second Amendment applicability to public colleges and universities while dra' 'g on the

standards of review that may be utilized. In *District of Columbia v. Heller*, the United States Supreme Court ruled that a law was unconstitutional under the Second Amendment if it effectively banned the ownership of handguns. However, the Court did concede that the right to bear arms was not absolute and that a ruling should be more narrowly applied when considering places that warrant special protections, such as schools. Gun ownership was further protected against state legislation in *McDonald v. City of Chicago*, a case in which the Court found the Second Amendment to be incorporated under the Fourteenth Amendment, thereby extending the same protection as other fundamental rights. Although the Supreme Court has never explicitly addressed public college firearm possession, the recent jurisprudence has affected states' willingness to regulate firearms, thereby infringing on the safety interests of those who attend public colleges and universities.

FAMILY

Judith T. Younger, *Families Now: What We Don't Know is Hurting Us*, 40 HOFSTRA L. REV. 719 (2012).

In a lecture in 1993, the Author observed that women who engage in certain practices—such as marriage, divorce, and childbearing—are at an increased risk of poverty or financial dependence and argued that education, as opposed to scholarly debate or legal action, is the most effective tool for raising women out of poverty. Revisiting the issue of families twenty years later, the Author compares past and current trends but bemoans the lack of accurate data on which to draw conclusions. For example, welfare policies have done seemingly little to encourage marriage or reduce the number of children born out of wedlock—some of the stated goals of such legislation—and yet there is a paucity of information about why benefits programs are ineffective. Positive demographic changes include increased recognition and protection for gay and lesbian couples, fewer divorces for college graduates, and the gradual societal acceptance of women who choose to remain childless. In spite of these changes, there are new risky behaviors that deserve greater scrutiny, such as increased incidents of birth defects caused by assisted reproductive technology. Although many circumstances have changed, the fact remains that women who are educated about their choices and the consequences of those choices have the best chance of economic independence and autonomy.

Nancy D. Polikoff, *Two Parts of the Landscape of Family in America: Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 735 (2012).

After Arizona Governor Jan Brewer eliminated domestic partner benefits for state employees—which were previously available for those who lived together and showed financial interdependence—Lambda Legal, the nation's largest lesbian, gay, bisexual and transgender ("LGBT") rights legal organization, challenged the constitutionality of the legislation. The challenge was successful in the Ninth Circuit, but Arizona has filed a writ of certiorari. However, Lamda's challenge was only for state employees with same-sex partners, leaving out different-sex partners. Domestic partner benefits have been around since the 1980s, and although these benefits were initially intended for same-sex couples—making it a gay rights issue—most employers also offered benefits to different-sex partners. Lambda argued that only lesbian and gay employees were being denied benefits because heterosexuals had the option to marry, despite the fact that the original purpose of domestic partnership benefits was to recognize family diversity—a factor that applies for both same and different-sex domestic partners. Many more same-sex couples will begin to have the ability to marry nationwide, but legislation that predicates employer benefits on marriage unfairly denies care to those who choose alternative unions.

GENDER BIAS AND DISCRIMINATION

Kate Walsham, Note, *De-Gendering Health Insurance: A Case for a Federal Insurance Gender Nondiscrimination Act*, 24 HASTINGS WOMEN'S L.J. 197 (2013).

The healthcare industry considers transgender people an insurance risk because transgenderism has been deemed a known preexisting condition. Thus, treatment for transgender individuals has traditionally been excluded from insurance risk sharing frameworks, making it difficult to obtain coverage. Furthermore, medical coding systems used by insurance companies to determine whether a procedure will be covered routinely exclude care that is deemed transsexual-related or gender-incongruent. California's Insurance Gender Nondiscrimination Act ("IGNA") seeks to remedy the gender-incongruence problem by establishing an equality framework, mandating insurance providers to cover the same procedures for transgender patients as non-transgender patients. An analysis of four relevant provisions in the new federal Patient Protection and Affordable Care Act ("ACA")—specifically, the prohibition against health insurance exclusion based on preexisting conditions, a mandate of coverage of essential health benefits, individual and provider nondiscrimination provisions, and

the individual mandate portion serving to eliminate the effects of cost-shifting—demonstrate why the ACA is the perfect instrument to create federal protection for access to healthcare irrespective of gender. Ensuring that transgender individuals are able to obtain necessary coverage for gender-incongruent procedures will save insurers and the federal government money by eliminating the expense of denials. The Author concludes that adding a federal provision to the ACA, based on California's IGNA, is a cost–effective way to help make healthcare more accessible to transgender Americans.

Marcia L. McCormick, *Disparate Impact and Equal Protection After* Ricci v. DeStefano, 27 WIS. J. L. GENDER & SOC'Y 100 (2012).

The 2009 United States Supreme Court case *Ricci v. DeStefano* asked whether the City of New Haven violated Title VII of the Civil Rights Act of 1964, which forbids employment discrimination, and the Equal Protection Clause of the Fourteenth Amendment when it discarded test results that suggested only white employees be promoted within the fire department. The Court held that because New Haven did not present a strong basis of evidence that this action was necessary to avoid disparate impact liability, it violated Title VII by discriminating against white firefighters. The majority did not reach the equal protection issue, but Justice Scalia's concurrence suggested that the disparate impact provisions of Title VII violate the Due Process Clause—which was amended during Reconstruction to include an equal protection element—because policies designed to remedy disparate treatment inevitably make distinctions amongst groups of people. This Article argues that, contrary to Justice Scalia's concurring opinion, these provisions are within the powers of enforcement granted by the Fourteenth and Thirteenth Amendments because they give Congress the power to curtail discrimination against groups that have historically been victimized, a power that is congruent with post-Reconstruction Due Process. Nor is it certain that disparate impact even constitutes discrimination; to hold otherwise requires one to believe that any decision informed by race is necessarily discriminatory. The Supreme Court appears to assume that labor discrimination against minority groups is a thing of the past, but if the Court eventually finds that disparate impact is equal, the modern trend of increased equality in the workplace will likely be reversed.

Lauren M. Gambier, Note, *Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence*, 87 N.Y.U. L. REV. 1918 (2012).

Historically, victims of violent gender-motivated crimes have lacked adequate judicial remedies due to inadequate local resources and a lack of interest in prosecuting such cases. In 1994, Congress attempted to increase victims' access to justice by enacting the Violence Against Women Act ("VAWA"), which enabled

victims to seek monetary recovery in federal civil court. In 2000, Congress's effort was invalidated by the United States Supreme Court's decision in *United States v. Morrison*. In a highly controversial ruling, the Court held that gender-based violence was not sufficiently related to interstate commerce and thus, Congress had overstepped its Commerce Clause power. This Note asserts that civil lawsuits are inadequate tools for justice in cases of gender-based violence. Not only are there significant procedural obstacles to bringing a civil case, but the victim must shoulder the cost of the lawsuit, thereby limiting access and scope of representation. For meaningful change to occur, state legislatures must address the shortcomings of law enforcement in failing to protect women from gender-motivated violence and must not place the burden on women to seek justice through civil action.

Eric Boos, Note, *The Unscientific Science of Gender Jurisprudence: Evaluating the Negative Impact of Normative Legal Language on Issues of Sex and Gender*, 27 WIS. J. L. GENDER & SOC'Y 229 (2012).

American law and jurisprudence presumes a binary sex and gender model—one in which gender is determined solely by genitalia—and this model problematizes the constitutional rights of individuals who do not fit neatly into one of two categories: male or female. This back-and-forth tension was demonstrated in the decision overturning California's ban on gay marriage in August 2010 and in September 2011 when the U.S. military policy of "Don't Ask, Don't Tell" was repealed; the language used in both instances adhered to habitual descriptions of two gender categories. The Author—inspired by the post-structuralist philosopher Judith Butler—advocates a conscious avoidance of the binary sex and gender model. The Supreme Court of Iowa's unanimous rejection of Iowa's anti-same-sex marriage statute particularly espouses this analysis, separating sexuality from gender rather than embracing hierarchical heterosexuality. While the potential for negative results—such as disrupting the current dialectic—is recognized, Butler's method is preferable to a continuation of the limited conceptualization embraced by the majority of the legal profession.

HEALTH

Kate E. Bloch, *Creating a Clearinghouse to Evaluate Environmental Risks to Fetal Development*, 63 HASTINGS L. J. 1571 (2012).

Alcohol ingested by mothers during pregnancy can lead to infant disability, poor coordination, and low IQ, but other toxins present in food and the environment can cause similar problems. Efforts to regulate such substances are

often met with political and industrial resistance, so there is great need for an integrated and comprehensive approach to gathering, evaluating, and presenting data. The Environmental Protection Agency ("EPA") is ill-suited for the job, in part because it has adopted the troubling practice of permitting a chemical's use absent a showing that it presents a health hazard. This Note proposes a think-tank clearinghouse that would provide both government and non-governmental regulators access to current information, while also helping mothers self-regulate their exposure to fetal hazards. This clearinghouse—which would require its own funding sources separate and independent from the chemical industry—could conduct data gathering and analysis, translate the results into accessible content, and equip mothers with the necessary knowledge about toxic properties and fetal heath.

Alezah Trigueros, Note, *The Human Right to Water: Will Its Fulfillment Contribute to Environmental Degradation?*, 19 IND. J. GLOBAL LEGAL STUD. 599 (2012).

In 2010, the United Nations Human Rights Council affirmed Resolution 64/292, which was subsequently adopted by the United Nations General Assembly, establishing a legally binding human right to water. While a focus on water stress—the decreasing availability of freshwater resources—is understandable given the consequences of non-potable water to human health and well-being, this human rights-centric policy fails to address, or to even account for, the environmental impact of water scarcity. The tension between environmentalists and human rights activists arises both from a history of competing interests in international water regulation legislation and treaties, and struggles to balance the rights of territorial sovereignty over water regulation within developing nations against the international prerogative to practice conservation of the world's freshwater resources. Because Resolution 64/292 favors the former developmental interest and rights to human consumption, implementation will undoubtedly increase infrastructure and development. Environmentalists, including the Author, urge that the human right to water should include an environmental proviso that would balance the focus on consumption with an equally powerful focus on sustainability and equitable utilization of the international water way in order ensure the vitality of the world's freshwater resources and ecosystems.

HUMAN RIGHTS

Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71 (2012).

The implementation of more stringent immigration policies by federal and state governments has spurred humanitarian activists to offer sanctuary aid to undocumented immigrants crossing the United States border, including provisions of food, water, and shelter. In *United States v. Mills*, the United States Court of Appeals for the Ninth Circuit reversed the criminal conviction of Daniel Mills for providing water to migrants crossing the United States-Mexico border. Mills was charged with littering on public land, but the court failed to respond to Mills' central defense: that the duty to protect and sustain human life supersedes the duty to adhere to immigration reforms. This Article addresses the need for legally sanctioned humanitarian aid by examining the Ninth Circuit's holding in *Mills*, reviewing analogous state statutory provisions, and evaluating other federal prosecutions of humanitarians. Innovative immigration reforms, such as the DREAM Act—a failed congressional bill that would have offered a pathway to citizenship for those who emigrated as children—and President Obama's deferred action program for immigrant children, have brought to light many humanitarian issues. No matter the political climate, humanitarian aid should never be criminalized.

Grace Trueman, Comment, *Pocketing a Pretty Penny: Sexual Victimization, Human Rights, and Private Contractors in the U.S. Immigration Detention System*, 89 U. DET. MERCY L. REV. 339 (2012).

The United States detains over 380,000 noncitizens per year in federal civil detention facilities, many of which are run by private corporations and are the scenes of unreported human rights abuses. Compelled to turn a profit, private facilities lack incentives to expend resources on safety or disciplinary measures, leading to numerous instances of sexual harassment, rape, and other abuse at the hands of detention employees or fellow detainees. Privately run facilities frequently dismiss or ignore abuse claims, leaving noncitizens—women in particular—without recourse. The Department of Homeland Security ("DHS") only requires that detention employees pass FBI background checks upon hiring,

and does not intervene when one is accused of misconduct. This Comment proposes that DHS adhere to the anti-torture and abuse agreements—passed by the United Nations and signed by the United States—which require signers to take all possible measures to prevent abuse and future cruelty. Moreover, DHS should gradually phase out contracts with private facilities in order to save money, provide greater oversight of abuses, and eliminate the profit motive that triggers many of the problems.

Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J. L. GENDER & SOC'Y 133 (2012).

The Thirteenth Amendment ("Amendment"), which prohibits involuntary servitude and slavery, is an under-utilized and important tool for protecting the rights of immigrant workers. Instead of limiting the Amendment's protections to historical conceptions of slavery in the American South, a broader understanding requires that the rights of immigrant workers—particularly guest workers and undocumented immigrants who are employed in the agricultural, domestic, construction, and restaurant industries—be protected. The Author advocates for a holistic view of the Amendment that draws upon the scholarly, advocacy, and legal work of the anti-trafficking movement, but develops these ideas further to argue that the systematic oppression immigrant workers experience is akin to slavery: they are workers of color suffering from systematic deprivation of their rights and, therefore, warrant protection. Advocates can work toward recognition of the broad protections of the Amendment through a multi-step plan that includes developing case law, increasing use of T- and U-visas, challenging the constitutionality of the National Labor Relations Act's omission of domestic and agricultural workers, advocating for inclusion of migrant and immigrant workers in employment discrimination laws, and creating a diverse rights-based advocacy coalition.

Julie A. Nice, Note, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023 (2012).

Since the 1970s, the United States' shift toward neoliberalist policies—such as disassembling the welfare state in favor of individualized economic interests—has resulted in an increased disparity between the very rich and the very poor. Current regulations that address the poor are insufficient to remedy the plight of those at the economic bottom because the government safety net, which includes federal welfare, has largely been dismantled. The Author argues that to lessen the struggles of this politically unpopular and stigmatized group, courts must employ a heightened level of judicial scrutiny in interpreting laws that have had a discriminatory impact against the poor. Doing so will require a dramatic shift from over forty years of judicial disregard for the poor, ignited by the United States

Supreme Court's decision in *Dandridge v. Williams*. Dandridge held that socio-economic classifications merit the most deferential standard of review—rational basis—such that the government's actions need bear only a rational relationship to the law's ends. The Author argues that despite subsequent rulings, the Court did not intend for this deferential rational basis standard to be an automatic presumption of constitutionality, as evinced by recent Supreme Court decisions that depart from this interpretation. Federal courts should implement a higher level of scrutiny, either by treating statutory classifications affecting the poor as presumptively unconstitutional, or through a fairer rational basis standard that calls for a factual, particularized review of the relationship between the government's means to achieve its goals and its ends.

LGBTQ RIGHTS

Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29 (2012).

Although many states have passed legislation explicitly recognizing and offering financial benefits for same-sex married couples, the federal government has not. Under the Defense of Marriage Act ("DOMA"), same-sex spouses must file federal income taxes separately, which deprives them of financial benefits the institution of marriage traditionally was meant to provide, such as the offsetting of capital gains and losses acquired by each spouse and excluding employer health benefits from taxable income. This Article carefully examines the various taxation policies afforded to spouses residing in states that recognize same-sex marriages, and highlights the most effective practices. States should explicitly clarify that same-sex couples may file their state taxes jointly—even though the Internal Revenue Service requires them to file federal returns separately—and should regularly publish instructions so that couples understand what steps must be taken to be in legal compliance. Separate same-sex worksheets could assist in navigating the complexities of filing independent federal and state taxes. Until DOMA is repealed or invalidated, states that recognize same-sex marriages should enact the best possible legislation and policies in order to protect and support their same-sex citizens.

Molly E. Whitman, Comment, *The Intersection of Religion and Sexual Orientation in the Workplace: Unequal Protections, Equal Employees*, 65 SMU L. REV. 713 (2012).

When religious beliefs and sexual orientation collide in the workplace, Title VII of the Civil Rights Act of 1964 ("Title VII") can compel unsettling outcomes that repudiate society's value of equal protection and treatment in the workplace. Title VII makes it unlawful for an employer to discriminate against employees and includes robust protections against religious discrimination. Title VII places an additional affirmative duty upon employers to reasonably accommodate employees' religious practices, as long as they do not impose an undue hardship on the operation of the employer's business. In contrast, although a patchwork of local statutes and employer internal policies ban employment discrimination on the basis of sexual orientation, Title VII provides no federal protection for lesbian, gay, bisexual and transgender ("LGBT") employees. In instances where employees wish to practice their religion at work in a way that offends LGBT employees—for example, a religious employee who gives a gay employee a pamphlet with Biblical scriptures condemning homosexuality—courts have struggled to apply Title VII and employers are left with little guidance. Absent federal guidelines explicitly providing equal protection for LGBT employees in the workplace, employers may feel compelled to condone offensive conduct in order to accommodate religious employees. The Author argues that the federal government should not leave such an important class of employees without federal protection and posits that the best hope for LGBT employees would be the creation of federal legislation banning employment discrimination based on sexual orientation.

Stephanie D. Myott, Note, *The United States Military and its Anti-Gay Discriminatory Policies: Impact on the Elderly LGBT Community*, 20 ELDER L. J. 199 (2012).

Although a culture of discrimination against the lesbian, gay, bisexual, and transgender ("LGBT") community has been engrained in military policy since its establishment, recent strides—such as the repeal of Don't Ask, Don't Tell ("DADT")—have begun to ameliorate this longstanding discrimination. Yet disparate treatment remains a sad reality for many LGBT service members, in particular elderly LGBT veterans. In addition to the emotional consequences from years of concealing their orientation, LGBT veterans suffer disproportionate financial and health consequences stemming from the loss of benefits due to a less than honorable discharge, as well as the loss of survivorship benefits in states that do not recognize same-sex marriage. The Author suggests a multifaceted solution for narrowing the benefits gap between gay and straight service members and veterans. The repeal of DADT must be internalized through strong leadership,

training, counseling, and a standard of conduct requiring respect for the differences of fellow service members. An appeals process for wrongful discharge under DADT and restoration of benefits should also be implemented. The Defense of Marriage Act ("DOMA") should be completely repealed, thereby expanding the eligibility of federal benefits to the spouses of LGBT service members and in states without same-sex marriage. Further, the Department of Veterans Affairs should extend survivors' benefits to the domestic partners of LGBT veterans. Although nothing can erase the damage caused by the military's entrenched discriminatory history, these steps will be an instrumental in ensuring an equal future for LGBT veterans and service members.

MARRIAGE, DIVORCE, & INTIMATE RELATIONSHIPS

Deborah J. Anthony, *Caught in the Middle: Transsexual Marriage and the Disconnect Between Sex and Legal Sex*, 21 TEX. J. WOMEN & L. 153 (2012).

The existing sex classification system that society seems to require—the need to assign a particular gender to individuals—has many legal implications for transgender persons, including the right to marry. While the legal standard for defining sex in order to determine the validity of transsexual marriages is still unclear in many jurisdiction—factors considered by courts include physical form at birth, physical form at marriage, sex identified on birth certificate records, and the ability to engage in penetrative sex at marriage—the consensus among states is that transsexual marriages are not legally valid. The wholesale invalidation of transsexual marriages is a violation of the Equal Protection Clause of the Fourteenth Amendment in that it singles out a group for discriminatory treatment. In addition, invalidating transsexual marriages contravenes the fundamental right to marriage under the Fourteenth Amendment's Due Process Clause. The existing problematic framework for validating marriages can best be solved by taking gender out of the equation, but at the very least states should recognize an individual's right to assert his or her own gender.

Emily M. May, Note, *Should Moving In Mean Losing Out? Making a Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 DUKE L. J. 403 (2012).

The surge in modern divorce, paired with apparent societal acceptance of non-marital cohabitation, has left courts struggling to consistently address the weight afforded to an ex-spouse's non-marital cohabitation in deciding whether to modify alimony. The imposition of alimony is often based on spousal need, theories of contract, economic compensation, or additional practical implications. Courts apply similar rationales when considering whether modification is

warranted based on a partner's non-marital cohabitation—some courts modify payment upon a showing of diminished need, with a minority of courts invalidating alimony altogether. Laws nationwide are largely inconsistent in defining what constitutes cohabitation and diminished need, leaving courts to struggle in the absence of legislative clarity. These terms must be clearly defined to rectify the inconsistencies currently plaguing courts and provide a fair and equal foundation to which other courts may look for future decisions. Because cohabitation is often of a short duration and may not involve financial dependency, the Author argues that modification of alimony is only warranted when a marriage-like cohabitation exists—often indicated by joint accounts and bill payment—and diminished need can be clearly established. When marriage-like cohabitation exists, reduction in alimony payment must be made only relative to the decreased need. Further, because cohabitating relationships are statistically shorter in duration, any such modification must necessarily be temporary, with recipients able to reinstate full payments upon establishing that cohabitation has come to an end.

Micah H. Huff & Martha C. Brown, *Structuring a Divorce When a Spouse or Child is Disabled*, 46 FAM. L. Q. 199 (2012).

To protect a disabled partner or child from losing indispensable public benefits, family law attorneys must understand the threat divorce may pose to public benefits eligibility for disabled persons. The major government benefit programs for the disabled are Social Security Disability Income ("SSDI") —which is not asset or income dependent—and the means tested programs Supplemental Security Income ("SSI"), Medicare—which includes both needs based and non-needs based programs—Medicaid, and Housing Assistance Programs such as Section 8 and Section 202 Housing. When considering maintenance awards, attorneys should work to maximize availability by minimizing countable income and resources. Any income received as maintenance will not impact SSDI, but maintenance and child support may both affect receipt of needs-based SSI. Medicaid, which is often viewed as the most important public benefit, is based on SSI eligibility in a majority of states and will be impacted by an award of maintenance. Trusts offer alternative resource allocation methods that do not inhibit a disabled spouse or child's ability to receive public benefits; funds in trust are considered unavailable and are not factored into means-based benefits. Direct payment for items—which is made directly to third-party vendors—will also protect access to benefits because such payments are not considered income paid to the child. Attorneys must consider public benefits eligibility in divorce cases; however, a successful resolution will also depend on the cooperation of both spouses.

PARENTING

David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947 (2012).

The United States Supreme Court has consistently enforced a parent's fundamental right under the Due Process Clause of the Fourteenth Amendment to make decisions regarding a child's care, custody, and control. However, misconstrued perceptions of risks have created a new minimum standard of care—overprotection—that has resulted in loss of parental autonomy and has serious implications for children. Some parents who engage in free-range parenting—the principle of giving children more autonomy and responsibility—have been criminally convicted based on charges of neglect or endangerment. The societal acceptance of overprotective parenting has led state prosecutors and jurors to convict based on shifting perceptions of responsible parenting. The Author proposes a statute to prevent parents from being held criminally liable for their choice of child-rearing techniques. This proposed legislation mimics Illinois's child neglect statute by providing explicit factors for determining whether a parent's actions are legally acceptable choices or criminal behavior. It is in the best interest of families for legislators and courts to embrace a range of parenting techniques and not impose through prosecution a uniform standard of overprotection.

Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139 (2012).

Competent legal representation and support for parents involved in child welfare proceedings can be extremely beneficial to families and can reduce government spending. Foster care costs federal, state, and local governments billions of dollars each year and is traumatic for parents and children, even when removal is necessary. Children who are placed in foster care have higher rates of teen pregnancy, involvement in the criminal justice system, and unemployment. Enhanced parental representation programs—like New York City's Center for Family Representation, Detroit's Center for Family Advocacy, and Washington State's Office of Public Defense Representation Program—take a holistic approach to working with parents. Many states have adopted some form of this

multidisciplinary approach, which includes the appointment of parents' attorneys early in the case, a team of social workers and lawyers, and support for the parents and lawyers. These programs also include client-centered representation and emphasize the importance of helping parents to understand the court process. These high-quality programs have resulted in fewer children being placed in foster care, shorter foster care stays where the foster system is unavoidable, and increased reunification of families.

Amanda S. Sen, Note, *Measuring Fatherhood: "Consent Fathers" and Discrimination in Termination of Parental Rights Proceedings*, 87 N.Y.U. L. REV. 1570 (2012).

The current New York State policy requiring unmarried fathers to prove that they are consent parents—parents who are entitled to withhold consent of adoption—before they are afforded procedural protections at a termination of parental rights proceeding hinders the state goal of keeping families intact. While a married mother and father are presumed to be consent parents, an unmarried father bears the burden of proving that he is a consent father by demonstrating that he pays child support. New York has an interest in maintaining familial connections between father and child, as demonstrated by statutory and case law that emphasizes biological parenting by granting fathers stronger adoption veto power. In recent years, case law has expanded the definition of consent father to include unmarried fathers who are meaningfully involved in a child's life, yet it disregards non-negligent single fathers who are not playing an active role in child-rearing or paying child support. In order to protect a father's constitutional equal protection rights, New York should restructure the consent father standard by dropping the bright-line requirement of child support in favor of a clear and convincing evidence standard. To further ensure that a child is not carelessly separated from his biological father, the adoption agency should bear the burden of proof in any termination proceeding.

SEX INDUSTRY

Brian Chase, *An Analysis of Potential Liability within the Adult Film Industry Stemming from Industry Practices Related to Sexually Transmitted Diseases*, 23 STAN. L. & POL'Y REV. 213 (2012).

The adult film industry ("industry") has grown ubiquitous despite legal difficulties faced since its inception—including obscenity laws and anti-prostitution prosecutions—but producers' liability for exposing performers to sexually transmitted infections ("STIs") and breaches of privacy will depend on how performers choose to exercise the legal remedies available to them. Industry

performers are generally subjected to monthly tests for some infections and these test results are made available to industry producers, thereby exposing performers' private medical information and personal data. Further, this limited testing, coupled with the fact that producers strongly discourage condom use, has led to a high risk of exposure to STIs. Fear of being blacklisted prevents performers from insisting on condom use. While performers could be entitled to legal recovery resulting from violations of state and federal blood-borne pathogen regulations—safety standards that require the use of a barrier when there is a risk of exposure to bodily fluids—such lawsuits are exceedingly rare, also due to fears of loss of work or retaliation. Moreover, the workers' compensation exclusivity doctrine, which shields employers from negligence and tort claims brought by employees, could prevent performers from bringing such suits if they are considered employees. However, if performers are independent contractors—as many producers insist—performers could potentially bring tort claims against the producers for negligently exposing them to infections or releasing their private medical information.

Ione Curva, Note, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557 (2012).

Every year, hundreds of thousands of women fall victim to human trafficking—which includes forced sex work as well as labor—but current state and federal laws are inadequate to fully address and eradicate the problem. Due to the clandestine nature of trafficking, victims have limited access to legal protection out of fear of retribution or an inability to reach law enforcement. New Jersey has one of the highest concentrations of trafficking in the United States, and in recent years lawmakers have passed strong legislation meant to protect victims, such as making trafficking a first-degree crime and permitting those charged with prostitution to claim trafficking as a defense. Unfortunately, these laws have not been widely used and despite training for law enforcement, criminalization of prostitutes continues. The Author evaluates three proposals for reducing sex trafficking in New Jersey: increased penalties for pimps, increased penalties for johns, and legalized prostitution. Increasing penalties for pimps and consumers recognizes that forced sex will end only when those who propagate and patronize prostitutes are sufficiently deterred and when criminality is shifted to the perpetrator. Legalized prostitution—as practiced in the Netherlands and parts of Nevada—is a more controversial idea which has had mixed results. Some say it brings prostitution out of the shadows, allowing women to more easily report crimes and protect themselves, while others claim that it institutionalizes an inherently exploitive business and does little to reduce trafficking. Any solution will require the cooperation of elected officials and law enforcement, as well as a comprehensive understanding of the problem.

SEX OFFENSES

Samuel D. Cardick, Note, *The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women*, 31 ST. LOUIS U. PUB. L. REV. 539 (2012).

American Indian and Alaskan Native ("AIAN") women are two-and-a-half times more likely to be raped than other American women. Due to a lack of jurisdictional power and government funding, tribal courts and authorities have not been able to properly aid victims while punishing the guilty. In fact, the jurisdictional differences allow criminals to cross reservation borders to successfully avoid legal consequences since the prosecution power of a tribe does not extend beyond its tribal boundaries. Even if the rape is committed by an AIAN man, there are three elements that must be met to establish jurisdiction: whether the victim was a member of a federally recognized Indian tribe, whether the attacker was a member of a federally recognized Indian tribe, and whether the rape took place on tribal land. When a rape is committed by a non-AIAN—which is over half of the rape cases—the Supreme Court's ruling in *Oliphant v. Suquamish Indian Tribe* prohibits tribal jurisdictions from prosecuting non-Indians for misdemeanor crimes in Indian boundaries. Although Congress has recognized these limitations and passed the Tribal Law and Order Act of 2010 ("TLO") to boost tribal power through reorganization of the tribal justice and police system, the Author recognizes the Act's severe limitations as it does nothing to overcome *Oliphant*'s narrow jurisdictional requirements and does not provide sufficient funding to carry out the changes. Congress should break the barrier created by *Oliphant* and give tribal police and courts jurisdiction over all attackers, both AIAN and non-AIAN men, so that the AIAN victims of rape can successfully seek justice against their attackers.

Tyler Morris, Note, Perverted *Justice: Why Courts Are Ruling Against Restitution in Child Pornography Possession Cases and How a Victim Compensation Fund Can Fix the Broken Restitution Framework*, 57 VILL. L. REV. 391, (2012).

The mere existence of child pornography is far from a victimless crime. Children featured in the obscene images suffer harm from the presence of these images on the Internet, and are at increased risk of being sexually abused. While the federal Mandatory Victims Restitution Act of 1996 created a path for victims of

child pornography to receive restitution for the harm that they have suffered, courts are split as to whether proximate cause must exist between the possessor of pornography and the victim. Courts often fail to find proximate cause, since the harm to the child—created by a third party and viewed by the possessor—is intangible and difficult to quantify. This Note argues that the proximate cause consideration should be discarded since it denies victims the common sense outcome of restitution to which they are rightfully entitled for their suffering. Further, Congress should authorize a federally administered victim compensation fund with interstate reach to appropriately reflect the national dissemination of images posted on the Internet.

WOMEN'S RIGHTS

Dehlia Umunna, *Rethinking the Neighborhood Watch: How Lessons From the Nigerian Village Can Creatively Empower the Community to Assist Poor, Single Mothers in America*, 20 AM. U. J. GENDER SOC. POL'Y & L. 847 (2012).

Trends in the United States indicate that the hopelessness and depression arising from the combination of severe poverty and lack of social support can cause single mothers to resort to violence against themselves and their children. It is possible for these women to avail themselves of the limited support networks and services in place, but the value assigned to independence and self-sufficiency in American culture often deters mothers from seeking assistance and discourages bystanders from offering it. Drawing on her own experiences, the Author proposes a solution that merges the structure of existing Neighborhood Watch programs with the Nigerian village philosophy of Collective Watching, based on a sense of communalism and interdependence that is not traditionally fostered in the United States. The proposal combines financial incentives with social programs, similar to the Neighborhood Watch, with the goal of encouraging impoverished communities to help single mothers in times of need. Such a program could be structured based on existing state and local frameworks for funding Neighborhood Watch programs, and encourage people who may not otherwise have the time or resources to do so through incentives such as paid salary positions for organizers. Research suggests that communal support could alleviate the unfortunate side effects of poor single-motherhood, including the potential for violence and abuse, and this type of interventionist program has the potential to do so.