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ABORTION AND REPRODUCTIVE RIGHTS

Mary Zeigler, *The Bonds that Tie: The Politics of Motherhood and the Future of Abortion Rights*, 21 TEX. J. WOMEN & L. 47 (2011).

Abortion rights advocates have both struggled with and benefitted from women's still-prominent role as the primary caregiver for children. This Article provides a neutral exploration of the influence that women's caretaking role has had on the fight for abortion rights from the 1970s to the present day. In the early 1970s, feminist arguments for abortion rights—particularly those promulgated by the National Organization for Women ("NOW")—acknowledged that women were the primary caretakers, but blamed this fact on societal, sex-role stereotypes and the lack of opportunity for advancement of women in the workforce. Activists used the caretaking role as evidence of how abortion prohibitions deprived women of life and liberty. Notably, when social conservatives began to fight against government-sponsored childcare, arguing that it would destroy the important bond between mothers and children, NOW's statements evolved. NOW advocates acknowledged the mother-child bond, but argued that it resulted in a lifelong burden. Over the following decades, this issue influenced the United States Supreme Court both to uphold abortion rights in order to protect women from the potential parental burden and to place restrictions on access in order to shield from the emotional harm caused by loss of this bond. Because different explanations for women's caretaker role can lead to very different judicial conclusions, abortion activists must continue to proceed with caution when invoking these arguments.

Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665 (2012).

The ever-increasing costs associated with surrogacy in the United States have prompted many would-be parents to seek gestational surrogates abroad. Given the human rights, health, and economic implications of a trade involving the human body, there is an immediate need for the international regulation of gestational surrogacy in Eastern Europe, India, and other inexpensive markets. In the absence of such regulation, women will continue to expose themselves to avoidable risks such as infection, postpartum depression, and a skewed sense of self worth. The Author enumerates welfare, immigration, and labor law as possible platforms from which to monitor international surrogacy, but acknowledges the need for significant World Trade Organization involvement. Additional challenges include the lack of uniformity in international law, the potential for political backlash, and the inevitable noncompliance of private citizens. However, if the international community can achieve some sort of consensus on the issue, then it will be closer to protecting surrogates from the open marketplace.

Roy G. Spece, Jr., *The Purpose Prong of* Casey's *Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny*, 33 WHITTIER L. REV. 77 (2011).

In addressing the controversial issue of abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court of the United States applied the undue burden test ("the test"), which prevents a state from imposing a regulation where the purpose is to frustrate a woman's right to choose whether or not to have an abortion. This Article examines the constitutionality of the Affordable Care Act of 2010 ("the Act") and how, through its eight statutory restrictions on medical insurance for abortion, it violates the purpose prong of the *Casey* test. Once found in violation of the test, the Act should be subject to intermediate scrutiny, under which the government must successfully prove that the Act furthers an important government interest in a manner substantially related to that interest. The Act's legislative history demonstrates that the purposes of these restrictions stem from both the pro-life position of the Act's proponents and the desire to lessen the cost of health insurance; both of these purposes encumber a woman's right to choose and consequently fail the test. Furthermore, the Act has inspired an array of state statutes that not only prevent women from obtaining abortion insurance, but completely bar funding for abortions. These bars, in effect, prevent a woman from obtaining abortions necessary to save her life or health, something the Court deemed patently unconstitutional in *Casey*. In future litigation on this issue, courts should take a broad approach by considering the Act's provisions, both individually and as a package, to find an improper purpose in violation of *Casey's* test.

CHILDREN AND TEENAGERS

Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549 (2012).

The capabilities approach ("CA")—an academic theory predicated on the protection of human dignity—affords a minimum threshold of rights to which all persons are entitled. It maintains that we afford a person additional rights based on his or her actual capacity for rational choices or judgments. The CA emphasizes that when children are afforded more rights at a younger age, it generates greater capabilities at an older age; this is analogous to recognizing the rights of people with disabilities in order to expand their potential. Proponents of the CA find it difficult to justify a special priority for children's rights, as all humans deserve an equal level of respect. There are two circumstances in which the CA warrants

prioritizing children's rights over others: when children are vulnerable and thus economically dependent on adults, and when the cost of protecting a right is so trivial that to deny it would upset the child's dignity. These justifications must be considered and applied within the context of each nation's situation and history. There are also logical limits on these justifications: flexibility should be applied in consideration of what is reasonable to expect of a parent in a particular society and considerations of cost should be limited to nations in which there are actual resource constraints. Developing a theoretical basis for providing children with rights based on their capabilities remains a work in progress, and while other theories for ensuring children's rights are still of great importance, the CA approach is preferable for theorizing entitlements of children within the overall concept of human rights.

Julia Halloran McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, 45 U. MICH. J.L. REFORM 315 (2012).

Under current child pornography laws, teens can be criminally charged for possessing or sharing sexual images of themselves or their peers—called Teen Sexting Images ("TSI")—and if successfully prosecuted, these teens can be made to register as pedophiles in state sex offender registries. While the United States Supreme Court has held that pornography is protected speech, the Court created an exception for depictions of minors, stating that the creation of such images harms a child's ability to form healthy relationships and would serve as a reminder of the abuse. The broad definition of child pornography used in most states has led to the prosecution of teens for taking nude photographs of themselves or significant others and sharing these images—a practice that many scholars agree is a healthy exploration of teen sexuality. Because the intent of child pornography laws is to protect children from predators, the current laws classifying TSIs as child pornography are too broad. The Author proposes a Teen Sexting Statute to allow for varying permitted conduct according to age, to have such violations handled in juvenile courts, and to find a violation only where a teen has created, possessed, or distributed a TSI recklessly or intentionally. This model statute satisfies the intent of the child pornography laws in that it protects children from abuse and protects from harsh prosecution teens who willingly create or share TSIs as a part of a normal sexual exploration stage of their development.

DOMESTIC VIOLENCE

Carrie M. Hobbs, Comment, *Domestic Violence and the Budget Crisis: The Use of a Risk Assessment Tool to Manage Cases in Prosecutors' Offices*, 35 SEATTLE U. L. REV. 949 (2012).

Since the early 1980s, many law enforcement agencies and prosecutors' offices have adopted policies that drastically increase the number of domestic violence cases by mandating the prosecution of abusers even when a victim is uncooperative. The overabundance of cases is difficult to manage during a recession, when domestic violence typically becomes more common and prosecutorial resources are scarcest. Although risk assessment tools—such as questionnaires that collate socioeconomic status, gender, and severity, and frequency of past abuse—are an imperfect means for prosecutors to identify and prioritize the most serious cases of domestic violence, they are more reliable than the subjective evaluations made by juries and legal and psychiatric professionals. Prosecutors already compile facts relevant to a person's likelihood of reoffending and tailor that person's sentence accordingly. This Comment posits that these risk assessment tools should be used not only in sentencing, but also to determine in which cases the domestic abuser is most likely to harm his or her partner again. Prosecutors can easily modify practices currently in use by police and healthcare professionals for implementation in the near future. While risk assessment tools may produce false positives or negatives, numerous studies show that these tools are more accurate than the subjective evaluations used to assess the risk of future violence, allocating limited resources toward higher-risk defendants and setting appropriate bail.

Brent Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U. J. GENDER SOC. POL'Y & L. 741 (2012).

Domestic violence is the leading cause of injury to women in the United States and incidents of professional athletes committing such acts are on the rise. In spite of this statistic, athletic associations—such as the National Football League ("NFL") and Major League Baseball ("MLB")—fail to address domestic violence in their off-the-field codes of conduct. In the MLB, punishment for off-the-field conduct is limited to behavior likely to affect the game of baseball—a less than stringent standard—such as the MLB's programs to crack down on steroid use.

The NFL takes off-the-field conduct more seriously: the 2007 Amendments to the NFL's Personal Conduct Policy demonstrated a greater willingness to enforce longer suspensions and increase fines. This NFL stance resulted in the six-game suspension of Ben Roethlisberger in 2010, despite the lack of criminal charges against him, for the alleged sexual assault of a cocktail waitress. The leagues' hesitation to respond to domestic violence results from the threat of lawsuits for suspending players ultimately absolved of domestic violence charges and the economic impact of taking star players off the field. However, given the propensity of athletes to commit acts of domestic violence, and the damage to both leagues' images in failing to condemn such acts, stand-alone domestic violence policies are necessary to ensure the reduction of domestic violence in professional sports.

EDUCATION

Lisa C. Connolly, Note, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248 (2012).

The problem of anti-LGBT bullying in America is striking: suicides have been documented in high schools across the United States and statistics show that the problem is only getting worse. The Author explores how to control the epidemic without infringing on students' First Amendment rights. The few states with anti-bullying statutes specifically enumerating sexual orientation as a protected class are consistent with *Tinker v. Des Moines Independent Community School District*, a United States Supreme Court decision providing that school officials may restrict a student's First Amendment rights when the student's speech creates a "substantial disruption" to school activities. Such laws send a direct message to students and school officials that hate speech is harmful and in need of attention. The ramifications of LGBT bullying are startling, ranging from significant grade drops to tragic incidences of suicide. Even if LGBT bullying does not decline immediately, strong anti-bullying legislation would send a firm message to society that such behavior will not be tolerated.

Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165 (2011).

Although the United States Supreme Court recognized that public school students are entitled to First Amendment protections in its 1969 decision *Tinker v. Des Moines Independent Community School District*, upholding free speech in schools has become more circumscribed in favor of protecting students from hate speech. Whereas *Tinker's* vindication of students' free speech rights initially left lower courts unwilling to restrict hate speech unless there was a history of such actions leading to disruption or violence, recent decisions allow schools to restrict

racist, sexist, or homophobic invectives toward other students, even where a history of speech leading to disruption and violence is lacking. The Author argues that these decisions are justified under Supreme Court precedent regarding the treatment of school speech, which has led courts to become more protective of the targets of hate speech. While protecting free speech is an important concern, the Supreme Court held in *Bethel School District v. Fraser* that students' First Amendment rights are different from the rights of adults in other settings and must be evaluated in light of the special context and circumstances of the school environment. Recent court decisions have recognized that hate speech causes recipients to question their self-worth, damages their sense of security, and interferes with their opportunity to learn. Where speech degrades the dignity and equality of students on the basis of their race, ethnicity, gender, or sexual orientation, courts increasingly recognize the right of school authorities to protect students who are trying to obtain a fair and complete education in public schools.

Sean Cooke, Comment, *Reasonable Suspicion, Unreasonable Search: Defining Fourth Amendment Protections Against Searches of Students' Personal Electronic Devices by Public School Officials*, 40 CAP. U. L. REV 293 (2012).

Fourth Amendment jurisprudence in public schools has not kept up with advances in personal electronic devices; as a result, students are facing blind spots in their protections against searches by school officials. In *Safford Unified School District No. 1 v. Redding*—a 2009 case regarding in-school strip searches—the United States Supreme Court created a reasonable suspicion test for searches in public schools. The test requires identifying the subjective expectation of privacy, evaluating whether this expectation meets the Fourth Amendment's reasonableness requirement, and finally, if the first two steps establish a reasonable expectation of privacy, the search must be "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." In *Morse v. Frederick*, the Supreme Court held that schools may also consider the special needs of the school environment in determining whether or not to limit students' Fourth Amendment rights. This outcome limited students' First Amendment rights by creating broad discretion for searches and seizures of students' electronic devices. The Author argues that the stricter standard found in *Redding*, rather than the broader *Morse* framework, should apply to electronic devices; the need for privacy is substantially equivalent to bodily privacy because of the highly personal nature of the information contained in electronic devices. Without this heightened protection, students' electronic devices are subject to broad searches by school officials, resulting in invasion of personal information and the muting of student speech.

Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act To Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169 (2012).

In furtherance of the United States Supreme Court's mandate in *Brown v. Board of Education*, the Elementary and Secondary Education Act of 1965 sought to establish educational equality for all children. In 2001, the No Child Left Behind Act ("NCLBA") was passed to continue *Brown*'s mandate by providing even greater federal control over the education system in order to more effectively promulgate educational reform for socioeconomically disadvantaged children. NCLBA places numerous requirements on educational systems at local and state levels, establishing minimums for testing scores and graduation rates. Despite these efforts, however, the children for whose benefit the 1965 act and the NCLBA were enacted continue to suffer from disparate educational opportunities. For instance, a loophole in the NCLBA allows for intradistrict funding disparities, causing financially needy schools to receive the least resources. The NCLBA also places an intense focus on testing scores and graduation rates as indicators for progress, but inadequate accountability systems and a lack of standardization undercut the Act's purposes. The Author contends that the NCLBA's reauthorization needs narrower definitions and a stronger focus on implementation and enforcement strategies. Proposed improvements include a redefinition of accountability to avoid current system failures, a standardization of graduation rates based on uniform computation methods, the ensured availability of qualified teachers through regular evaluations, and active promotion of diversity by allowing interdistrict transfers from lower- to higher-performing schools.

FAMILY

Maria Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOW. L.J. 359 (2012).

During the recent recession, low- and modest-income families, many of whom are people of color, encountered substantial policy-related difficulties as lawmakers were forced to accommodate for tighter budgets. Two examples of government attempts to alleviate these families' financial burdens include increased funding for the State Children's Health Insurance Program ("SCHIP") and the drafting of the Development, Relief, and Education for Alien Minors ("DREAM") Act. SCHIP was designed to provide health insurance for families that earn enough to be disqualified from entitlement health programs but do not have access to private or subsidized health insurance, while the DREAM Act would have provided young undocumented immigrants with a path to U.S. citizenship through academic

success or military service. Both programs addressed needs of low- to modest-income families, but while SCHIP expanded in 2009, the DREAM Act died in the Senate in 2010. The Author argues that this contrast is due to rhetorical tactics: though held aloft by its previous successes, SCHIP owes its expansion to legislators' emphasis of aid for underprivileged children, while the DREAM Act failed because it generated anti-immigrant discourse. Recognizing the heavily politicized nature of passing legislation such as the DREAM Act, orienting the conversation accordingly is an important step towards its ultimate passage, which would benefit not only the groups addressed but the American workforce and military.

Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012).

Despite demographic changes to the American family, the current jurisprudential methods for determining child support, property distribution, and alimony have become less contextual and more mechanical. The traditional family is becoming progressively uncommon due to increases in divorce, gay families, single parents, and dual-income families. The two methods for calculating child support—based either on each spouse's contributions to the family income or on a percentage of the non-custodial parent's income—are problematic because they rely on highly suspect data, outdated assumptions about family norms, and contested understandings of appropriate parental duties. The majority of states divide marital property equally, but this method is questionable because it assumes that an equal distribution is a fair distribution, ignoring the proportional contributions of each spouse during the marriage. Conversely, alimony calculations based on the income of spouses and duration of the marriage remains discretionary, which makes it difficult for a divorcing couple to predict alimony awards. Some argue that a state's ability to define family infringes on the fundamental right to family freedom and that the law needs to keep up with changing social standards. While the methods of calculating child support, property distribution, and alimony are anachronistic, the Author argues that they are necessary because the alternative—individual, contextual analyses—is too timely and costly to children, spouses, and courts.

Katherine Moore, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 COLUM. J. GENDER & L. 29 (2012).

While issues of foster care and teen pregnancy have been addressed *separately* through legislative and judicial channels, agencies, courts, and lawmakers have failed to address situations in which they arise together.

Inadequate legislation and policy have hindered the exercise of basic rights—access to abortion services, healthcare, and counseling—for girls who become pregnant while in foster care. In such instances, it is unclear who may assume legal guardianship for the young woman, leading to confusion over who can parentally consent to abortion services. Along with the inherent risks in delaying an abortion, this uncertainty has a grave impact on these girls' access to abortion services. A lack or delay of funding and support can result in the separation of mothers from their newborns and even their removal from foster homes. The Author recommends that agencies create planning and funding programs to assist pregnant teens and their foster families. In accordance with lawmakers' value for kinship care, parental consent statutes should broaden in scope so that pregnant girls in foster care may exercise the rights that should be granted to all. In the meantime, judges should continue to issue orders that allow minors to get abortions without consent, but they must aim to increase access to medical care. A system that comprehensively addresses such a widespread and pressing problem is long overdue; the wide variety of ways various channels can begin to provide care for pregnant girls in foster care leaves lawmakers with no choice but to respond.

GENDER BIAS AND DISCRIMINATION

Aishlin P. Hicks, Note, *Unsportsmanlike Conduct: Female Sportswriters as Targets for Sexual Harassment*, 23 HASTINGS WOMEN'S L.J. 219 (2012).

Female sports reporters covering the men's professional sports world are especially susceptible to sexual harassment. This is due in large part to their unconventional workplace—namely, sidelines and locker rooms. Beginning in 1977, when women journalists were first given the same access to professional sports locker rooms as their male counterparts, women are often the objects of vulgar, tasteless, or insulting comments and gestures from the athletes they are assigned to interview. Because of the nontraditional work environment, it is uncertain whether female reporters have a legal harassment claim under federal or state law, like employees in most other workplaces do. The Author asserts that while bringing a suit under existing sexual harassment or tort law would likely be unsuccessful for female sports journalists, there are steps that professional sports organizations could take that might alleviate the problem. Ultimately, a hybrid approach—modeled in part after the Major League Baseball Players Association's Basic Agreement and comprised of both education and policy—should be implemented. Specifically, all professional sports organizations must explicitly describe what will be considered improper conduct and what the resulting consequences will be, such as significant fines and suspensions. While this will help guarantee that the team's expected standards are clear, the effectiveness of these programs will be contingent on the actual implementation of the policy.

Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, 32 WOMEN'S RTS. L. REP. 105 (2011).

White male heterosexual norms are deeply ingrained in the political and legal communities, impeding the diversification of the federal judicial appointment process. A look at current federal bench demographics indicates that women and minority groups remain largely underrepresented vis-à-vis the country as a whole, despite the availability qualified female and minority candidates. Proponents of diversity argue that symbolic representation—where the composition of the bench reflects the demographics of a given jurisdiction—is required to comport with notions of fairness. Additionally, while women and minority judges often share common perspectives with their white male counterparts, their unique backgrounds offer additional perspectives benefitting the decision-making process. Studies have shown that diverse backgrounds result in more favorable outcomes for minorities, particularly concerning employment discrimination and civil rights. The role of the diverse judge is not to rule based on given perspectives, but to determine when such viewpoints may be useful in understanding a litigant's outlook. Though United States Supreme Court Justices Sonia Sotomayor—a Latino woman—and Elena Kagan—a woman sympathetic to homosexuals in the military—appear to embrace this understanding, their diverse backgrounds were ironically criticized during their recent nomination processes as discordant with the prevailing white male heterosexual norm. This apparent hostility towards a candidate's unique background ultimately frustrates the realization of a diverse bench.

HEALTH

Christine Parkins, Note, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents who Opt-out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437 (2012).

Herd immunity is the principle that if a significant portion of the community is vaccinated, then they will protect those who are not. When a large number of parents choose not to vaccinate their children, their decision creates a negative externality by compromising herd immunity and putting everyone at risk. To internalize externalities, the Author proposes that the federal or state governments impose a tax on parents who choose not to vaccinate their children against Center for Disease Control-recommended preventable illnesses. The tax would ensure that parents consider their decisions more carefully, and it would help provide funding for vaccine-preventable illnesses, cover the cost of containing an outbreak, provide free vaccines to low-income children, and provide education to the community in order to improve falling vaccination rates. The federal government's authority to impose such a tax would best overcome constitutional hurdles if defined as an income tax, and it would be more effective than a state tax at increasing vaccination

rates, since parents all over the country will have an equal incentive to vaccinate their children. The tax is preferable to a subsidy since most people value a loss more than they value a gain, and it would be calculated by considering both the costs of vaccine-preventable illnesses as well as the willingness to pay for the tax in areas with lower prevalence of illnesses. The amount of the tax would increase depending on the number of vaccines opted-out of and would also be higher for wealthier parents.

Maggie Ellinger-Locke, *Food Sovereignty Is A Gendered Issue*, 18 BUFF. ENVTL. L.J. 157 (2011).

According to the United Nations ("U.N."), worldwide agricultural output has exceeded possible consumer demand in recent years, yet the U.N. has also found that over one billion people live with chronic hunger. Food sovereignty is a movement that seeks to provide all people with direct control over the agricultural system that feeds them. This entails wholesale transformation of many legal and political institutions that currently favor first world corporations over farmers and consumers in the global South. Adherents of food sovereignty criticize the alternate principle, known as food security, which posits that as long as people are able to meet their nutritional needs, it is not necessary to challenge those in control of food sources or their methods. The former movement claims that food security fails to recognize the right of access to culturally appropriate sustenance and to live in a world where food is produced with respect for the environment and for the people who farm and harvest it. Current legal structures—such as patent law in the United States—allow large corporations to deprive farmers of control over their crops; some international agreements have exported these legal standards abroad, resulting in increased corporate profits at the expense of poor farmers. Issues of food production and farmers' rights are also closely tied to gender and reproductive rights; studies have shown that poor women produce the majority of food in the developing world yet own substantially less property than men. This Article argues that only by reconceiving control over food production as a basic human right and not as a property interest can the harmful effects of patriarchy and the lingering scars of colonialism be mitigated and the endemic crisis of access to food be solved.

HUMAN RIGHTS

Michael Ashley Stein & Janet E. Lord, *Enabling Refugee and IDP Law and Policy: Implications of the U.N. Convention on the Rights of Persons With Disabilities*, 28 ARIZ. J. INT'L & COMP. L. 401 (2011).

The United Nations Convention on the Rights of Persons with Disabilities ("CRPD") signifies a notable change in the protection of refugees and internally

displaced persons ("IDPs") with disabilities. Historically, the international framework for the protection of refugees and IDPs did not effectively safeguard the needs of refugees with disabilities in emergency crises, in part because persons with disabilities were not a specifically recognized subgroup; rather, they were lumped into the all-encompassing category of vulnerable people. Even when there has been adequate humanitarian response in times of crisis, the responses neglect to account for the specific needs of disabled refugees who face heightened challenges during flight, such as a lack of access to shelter, food, water, and health-care services. The CRPD should provide for increased accessible programming for refugees and IDPs during displacement, however humanitarian organizations must also begin to include these programs into their response efforts. This Article examines two case studies: the Asian tsunami—impacting parts of India, Thailand, and Indonesia—as well as the Biharis in Bangladesh, in an effort to highlight how disability-specific issues were not considered in the relief efforts following conflict or natural disaster. While the CRPD has improved the international framework with regard to the protection of rights of persons with disabilities, these case studies prove that a disability-specific scheme is still needed to ensure protection of the most basic rights of disabled refugees and IDPs, including access to food, shelter, employment, and education.

Jenny Sin-hang Ngai, *Energy as a Human Right in Armed Conflict: A Question of Universal Need, Survival, and Human Dignity*, 37 BROOK. J. INT'L L. 579 (2012).

International humanitarian law and human rights law should cover access to energy during an armed conflict because basic necessities—such as food and shelter—are compromised when there is energy deprivation. Further, since the right to economic and social development has been recognized by the United Nations and energy is a prerequisite to such development, the logical conclusion is to include energy in the list of human rights to which all people are entitled. It is also vital that energy be recognized as an implied right within the human liberties detailed by the predominant governing instruments of human rights law since basic necessities such as food production and adequate health services cannot be provided to general populations without energy in today's world. Because of this modern reality, explicitly naming energy as a human right in these instruments is the first step toward progress. Future advancements would come in the form of specific obligations required of all countries, provisions for enforcement and sanctions for violating these obligations, and remedial avenues for those whose rights have been violated. Although the Author concedes that a mere conceptual elucidation of energy as a human right does not necessarily translate into action, the issue is still due this level of recognition.

Beth A. Colgan, *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct*, 18 UCLA WOMEN'S L.J. 195 (2012).

Sexual abuse perpetrated by staff members of American prisons against inmates is a pervasive problem that often goes unpunished in either criminal or civil proceedings. The majority of sexual abuse within prisons is perpetrated by institutional personnel, and leaves victims with physical injuries and lasting mental health problems. Once released, victims of sexual abuse threaten public health and safety because they have been shown to have higher recidivism rates as a result of their mental health injuries. Many prosecutors do not view correctional staff sexual abuse as a serious offense and claim that it is often too difficult to prosecute these cases due to a lack of evidence, inadequate investigations, and unsympathetic victims. Civil remedies are seldom available to victims because of limitations within the Prison Litigation Reform Act ("PLRA"): restrictions on attorney's fees, the requirement that victims first exhaust all administrative procedures, and the physical injury prerequisite. In order to compel prosecutors to prosecute staff sexual abuse, trained correctional facility employees or law enforcement officers should conduct investigations, impose stricter penalties for abuse, and prosecutors' attitudes about the seriousness of such offenses must evolve through instruction on the consequences of sexual abuse. To remedy the barriers of the PLRA, Congress should pass the Prison Abuse Remedies Act—which was introduced in 2009 and would eliminate the physical injury requirement—and provide other reforms that would give adequate access to justice to victims of prison staff sexual abuse.

LGBTQ RIGHTS

Ryan Goodman, Symposium, *Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line*, 44 N.Y.U. J. INT'L L. & POL. 407 (2012).

James Hathaway and Jason Pobjoy ("H&P") published an article entitled "Queer Cases Make Bad Laws" questioning recent rulings in the United Kingdom ("UK") and Australia that provide increased protection for lesbian and gay asylum seekers. Although some of H&G's criticisms are valid, the Author discusses additional explanations for why the Australia and UK rulings were reasonable. First, the UK and Australia eliminated the discretion requirement, which had previously allowed only closeted gay and lesbian asylum applicants to petition. H&P concede that concealment should not be a requirement, but suggest instead a nexus test to determine if the asylum-seeker's protected activities reveal sexual identity. This test is vague, however, and lacks actual support from the cases H&P use in attempting to fortify their approach. Another ruling allowed lesbian and gay applicants who would individually decide to conceal their sexual orientation to

qualify for asylum protection; H&G felt this was a mistake because such applicants must not have an actual fear of persecution if they are able to keep their identity hidden. Nonetheless, there are justifications for why the second ruling was appropriate: compelling an individual to conceal his or her sexual orientation is itself a form of persecution, and even if a person's sexual orientation is concealed, he or she may still fear persecution. H&P's arguments will receive attention, but must be examined and questioned before accepted.

Kaitlyn Redfield-Ortiz, Comment, *Government by the People for the People? Representative Democracy, Direct Democracy, and the Unfinished Struggle for Gay Civil Rights*, 43 ARIZ. ST. L.J. 1367 (2011).

Despite the recent gay rights advances in United States, there is still a need for federal anti-discrimination laws on the basis of sexual orientation in the areas of employment and housing. Direct democracy allows citizens, as opposed to legislators, to propose, write, debate, and vote on legislation, and has been used by gay rights opponents since the 1970s to marginalize minorities. James Madison and other early Federalists advocated a republic, where the people delegate power to their elected officials, as opposed to a direct democracy. Madison believed a republic would better prevent self-interest, preserve the public good, and hold legislators accountable to minority constituents and co-legislators, thereby defending constitutional rights for all citizens. A study concerning discrimination against gays and lesbians in housing and employment revealed that local and state legislatures act more often than the electorate to protect gay civil rights and rarely, if ever, rescind existing anti-discrimination laws. The study also found that, despite national and local public opinion reflecting strong support for anti-discrimination laws, proponents of direct democracy act most often to revoke gay civil rights. Gay rights advocates should abandon the use of state and local ballot initiatives, refocus efforts on state and federal legislation, and speak out against the distorting effects of direct democracy.

Toni Lester, *Machismo at the Crossroads—Recent Developments in Costa Rican Gay Rights Law*, 20 MICH. ST. INT'L L. REV. 421 (2012).

Recent legal and cultural changes in Costa Rica have evidenced an important shift towards equality for gays and lesbians, however the Catholic and machismo cultural influences pose a challenge to full legal rights and acceptance. Since 2008, many Latin American countries have taken steps towards gay and lesbian equality under the auspices of human rights protections. Advocates have championed this approach as a way to gain support from those who do not wish to be seen specifically promoting gay rights. In Costa Rica, the legal system has been the primary mechanism for change, through the human rights provisions of the

Constitution and the new court system called Sala IV. This court only addresses constitutional issues and encourages advocates to file cases, leading gay rights advocates to bring an action that outlawed police harassment on the basis of sexuality. However, Sala IV has also affirmed the right of the Catholic Church to make negative statements about gay marriage. There is a tension in Costa Rica between the entrenched homophobia and advancements in gay rights, and significant challenges such as gang violence towards gays and ingrained gender roles remain impediments to achieving full social equality. This Article articulates that even in a macho and religious culture like Costa Rica, significant gay rights achievements can be made if addressed strategically.

Nicole M. True, Note, *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 IOWA L. REV. 1329 (2011).

State courts reviewing denials of medical coverage for individuals diagnosed with gender identity disorder ("GID")—severe discontent with the sex an individual was assigned at birth, identified as an individual exhibiting all of the designated criteria of GID in the Diagnostic and Statistical Manual of Mental Disorders—should rule that sex reassignment surgery ("SRS") and hormone therapy are covered medical expenses under the Federal Medicaid Act because the medical community has found that such treatments are necessary. The United States Tax Court's 2010 decision in *O'Donnabhain v. Commissioner*—ruling that such treatments are tax-deductible medical expenses under the Internal Revenue Code—reflect a growing consensus among medical professionals that gender-confirming healthcare, including hormone therapy and SRS, is medically necessary treatment for some cases of GID. Thus far, five states have heard challenges to a denial of medical coverage for SRS, but only California permits coverage under Medicaid. Courts, legislatures, and state Medicaid agencies should recognize the general medical necessity of SRS because the medical community endorses SRS as an appropriate and effective treatment for GID and the medical profession no longer views the treatments as experimental or dangerous. Further, SRS is medically necessary because there are no viable alternative treatments for those individuals with severe GID. States that exclude coverage of gender-confirming healthcare in their Medicaid programs should repeal the regulations. Alternatively, the Author urges judicial activism in state courts to declare such provisions void and to force states to comply with the Federal Medicaid Act.

MARRIAGE, DIVORCE, & INTIMATE RELATIONSHIPS

Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER LAW & POL'Y 41 (2011).

Social science studies indicate that women typically feel more emotional responsibility for divorce, making it all the more difficult for women to properly negotiate for alimony, and often leading them to settle for subpar alimony awards. Despite the changing economic status of women, alimony remains a crucial line of support for women who have sacrificed their careers to be stay-at-home moms, as well as for those adjusting to newly increased financial responsibility. To remedy this problem, the Author suggests three possible legal solutions: the elimination of alimony, required pre-nuptial agreements, or the institution of alimony formulas, similar to the child-support formulas already utilized by family courts. The first two options have obvious problems: getting rid of alimony can have the drastic result of leaving one spouse without any financial stability, and pre-nuptial agreements are often impractical. The adoption of an alimony formula—which would weigh the length of the marriage, each spouse's income, number of dependents, and other factors—is thus recommended as it can provide both predictability, flexibility, and a general starting point from which judges can weigh the factors of a marriage.

Debra Berman & James Alfini, Symposium, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887 (2012).

Family mediation offers divorcing couples an alternative to the court room; utilizing professional mediators, couples reach a mutual agreement about the dissolution of their marriage. The creation of court-sponsored marriage counseling services marked the advent of family mediation. Later, the institutionalization of no-fault divorce had the greatest impact on the field as it not only encouraged couples to seek help in resolving their separations, but it increased national acceptance of divorce. Mental health professionals historically dominated family mediation but more recently the composition has changed, creating uncertainty as to the future of the discipline. As more and more lawyers take up the practice of mediation, courts across the country increasingly refer couples to private attorney-based mediators. This trend is especially evident in Texas where attorneys comprise majority of mediators and outsiders struggle to succeed. Budget cuts have compounded the problem as courts are forced to eliminate mental health

counselors and mediators from the staff. These trends have detrimentally impacted couples by slowly eliminating the discussion and healing aspects that mental health professionals provided and further diminishing the aspects of family mediation that popularized the field in the first place. Attorney-based family mediators can counter this trend by studying and adhering to the core values of mediation and including mental health professionals in the process.

Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197 (2012).

The parent who serves as primary caretaker for a child or children bears most of the career opportunity costs associated with that responsibility, such as lower pay, less advancement, and reduced earning potential. The overall family wage may compensate for such loss; however, divorce often severs the ties between the couple and in most cases the divorced mother will bear most of the market cost of her family role, while the father will enjoy most of the benefits. The current tools available in family court—property distribution, alimony, and child support—have failed to compensate the primary caretaker fairly, partly because all of these remedies aim to transform a married couple into two separate individuals. The Author advances a new conceptual framework which is to view married parents committed to each other on two levels: as intimate life partners through marriage and as co-parents through the addition of children to their family. When couples divorce during their child's minority, the marital partnership terminates but divorce does not so swiftly terminate the co-parenting partnership. For example, parents could coordinate on issues such as who provides the children with certain meals, and the spouse who assumes this responsibility discharges a legal obligation and is compensated accordingly. The co-parenting partnership model provides a basis for two parents to share not only the costs of their children's food and shelter, but also the opportunity cost of parenting. Building on this conceptual foundation, a number of practical problems are to be resolved, such as determining the appropriate level of income sharing and identifying the intimate relationships other than marriage that give rise to co-parenting commitment.

Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012).

Family law has traditionally been drafted to favor conventional relationships and family structures, such as heterosexual marriages and biological children. But non-traditional kinships, such as same-sex partners or children conceived through a sperm donor, are often indirectly regulated by such legislation, calling into question the constitutionality of laws that attempt to normalize all relationships. Such regulation of family law margins—namely those who maintain relationships

peripheral to the sanctioned notion of family—bring to light the law's expressive function and possibility for back door regulation. Further, because non-traditional kinships have few explicit constitutional protections, legislators have been able to draft laws that forbid same-sex marriage, dictate the rights of non-legal parents, and limit fertility insurance to married couples. While conceding that some of her arguments may be far-reaching and aspirational, the Author argues for closer consideration of constitutional challenges to seemingly benign laws that have great power over our lives and liberties.

PARENTING

Talia Saypoff, Note, *Breeding Incentives: Parental Leave in Japan and the United States*, 23 HASTINGS WOMEN'S L.J. 275 (2012).

In Japan and the United States, cultural norms and traditional notions of gender roles, as opposed to legislative parental leave policies, appear to influence whether women take maternity leave or return to work after childbirth. Whereas Japan offers extensive paid parental leave, U.S. policies are limited and do not guarantee paid time off. However, substantially more women in the U.S. take maternity leave and return to work after childbirth than in Japan. An analysis of the history of the parental leave policies in the U.S. under the Family and Medical Leave Act ("FMLA"), and Japan under the Equal Employment Opportunity Law ("EEOL") and the Child Care and Family Care Leave Law ("CCFCLL"), shows that the respective policies have different aims regarding female employment, reflecting differing cultural identities. While Japan's laws encourage fathers to take an active role in child rearing to allow women to maintain careers, American law is focused on preservation of the family and curbing work-related discrimination. Yet both laws seem to fail at bringing about their stated aims, since women in Japan rarely take leave or return to work after childbirth and women in the U.S. return to work almost immediately following childbirth. The Author argues that this seemingly inverse relationship between the expansiveness of each country's available leave policy and the number of people using it results because women are integral in the preservation of a society's culture. Thus, the only way to effectuate change in the utilization of parental leave policies is to change traditional notions of family and gender roles that push women away from the corporate world back into the home.

Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407 (2012).

Men who have had their sperm used for nonconsensual insemination—including, for instance, cases of statutory rape or situations in which women have artificially inseminated themselves after sexual encounters—are frequently held financially responsible for the resulting child. This strict liability rule requires the man to take legal responsibility without any proof that he participated in or consented to the child's creation. Family courts across the country have prioritized the child's best interest in being supported by two parents, ignoring evidence of deception. This policy trivializes male sexual assault and punishes the victim by forcing him to provide for a child he never consented to producing. The Author proposes a new defense whereby the biological father could challenge a child support order through a showing of lack of consent: he would have to offer clear and convincing evidence that he did not agree to any intercourse or artificial insemination. Asserting this defense successfully, and in a timely manner, would terminate any parental rights or responsibilities of the father. This proposed rule, which has not yet been adopted by any state, would let the father choose whether to accept fatherhood, rather than having it foisted upon him by the family court.

Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. MICH. J.L. REFORM 657 (2012).

The current procedure for prosecuting Shaken Baby Syndrome ("SBS") deaths—the leading cause of child abuse homicide in the United States—convicts many innocent defendants and is in need of reform. While SBS convictions have previously been prosecuted through the establishment of a triad of head-trauma findings—retinal hemorrhages, subdural/subarachnoid hematomas, and cerebral edema—doubt has recently been cast upon these convictions. Not only is there excessive dependency upon medical experts—like the doctor in Julie Baumer's case who was unqualified to read CT scans—but opinions have shifted in the medical community, with some experts now questioning whether shaking alone causes such damage, whether neck injuries should be present, whether lucid intervals negate an inference of SBS, and whether the symptoms mimic other trauma. The Author proposes, through a Model Statute, the creation of an SBS Review Panel to identify for exoneration convictions that appear to be unsound. This panel would be error-correcting, rather than one of systemic reform, because adjustments should naturally flow from the medical community's changing opinions as the science is perfected. This proposed review panel of overseers—staffed by legal and medical experts and orchestrated by a director—is necessary to

address the current, flawed system of trying SBS cases in which jurors are simply asked to choose between competing medical expert testimonies.

SEX INDUSTRY

Abby R. Perer, Note, *Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking*, 77 BROOK. L. REV. 823 (2012).

The Internet has become a principal locus for solicitation of sexual services, but many websites are immune from criminal liability for illegal advertisements posted by third-party users under Section 230 of the Communications Decency Act of 1996 ("Section 230"). Consistent with this Act, courts have ruled in favor of defendant websites who contend they are merely providers of a legal service—an online forum—while third-party users create the unlawful content. Litigation strategies which attempt to hold a website liable if it induces illegal posts by third-parties often fail because of the heavy burden in proving the website's encouragement of a third-party's unlawful actions. The Author urges amendments to Section 230 by proposing the Commercial Sex Distribution Amendment ("CSDA"), which would distinguish between publishers and distributors, holding distributors liable. Under CSDA, publishers become distributers of sex sales and become criminally responsible after a website has been effectively notified by law enforcement of such content but fails to remove it. While there are potential problems with CSDA, including free speech limitations, Section 230's policy goal of respecting web publishers' inability to monitor every ad would be maintained; a website would only become culpable when it crossed the line into distribution. Law enforcement would have an effective instrument for eliminating online sex sales and protecting society from the harms associated with online sex sales.

Julie M. Spanbauer, *Selling Sex: Analyzing the Improper Use Defense to Contract Enforcement Through the Lens of* Carroll v. Beardon, 59 CLEV. ST. L. REV. 693 (2011).

Carroll v. Beardon, an important and shocking public policy case decided by the Supreme Court of Montana in 1963, involved the sale of a notorious prostitution house from one madam to another. The court upheld the sale contract despite allegations that the property would be used for prostitution, and that the seller had knowledge of the buyer's intent to use it as such; however, the sale constituted an improper use which should have rendered the contract void on policy grounds. In analyzing *Carroll v. Beardon*, the Article argues that it was wrongly decided because the court failed to analyze a body of public policy precedent in favor of non-enforcement, and improperly relied on a dissimilar case involving gambling to reach its conclusion. The *Carroll* decision articulates the standard

necessary to void the contract as active participation in the illegal act by the selling party, and found there was not sufficient evidence since the seller's participation ceased after the sale; the court reached this conclusion despite evidence that the seller knew the buyer would only be able to pay the mortgage through the continued use of the house for prostitution. The court's use of humor in the opinion shows its tolerance for, and even endorsement of, prostitution and is a missed opportunity to articulate a clear standard for the future. Instead, the court should have found the contract unenforceable and constructed an equitable remedy for the plaintiff, or remanded for a new trial.

SEX OFFENSES

Meghan Gilligan, Note, *It's Not Popular But it Sure is Right: The (In)admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs*, 62 SYRACUSE L. REV. 255 (2012).

The federal government administers voluntary Sex Offender Treatment Programs ("SOTP") that aim to rehabilitate convicted sex offenders through the use of cognitive behavior therapy. During therapy, patients are encouraged to write an autobiography detailing prior offenses and wrongdoings, including those for which they have not been criminally charged. If these sex offenders commit and are charged with sex crimes after completing an SOTP, some prosecutors submit the SOTP autobiographies and other written or oral statements as evidence. However, this practice is not in the best interest of social policy; these therapeutic writings should be excluded so as not to deter future offenders from seeking treatment. Neither the Fifth Amendment to the Constitution nor Federal Rule of Evidence 414 preclude admission of SOTP statements, but the Author argues that doing so violates the therapist-patient privilege, as well as Federal Rule of Evidence 403, because the probative value of such statements would rarely be outweighed by their prejudicial effects. Further, admitting SOTP declarations could violate an offender's Sixth Amendment right to counsel if he was not afforded the opportunity to consult a lawyer before agreeing to an SOTP plea bargain. Despite the societal risks posed by some sex offenders, rehabilitation programs and trials must still operate within the confines of the law and should protect a program that aims to lead offenders to recovery by rendering SOTP statements immune.

Kari Mercer Dalton, *The Priest-Penitent Privilege v. Child Abuse Reporting Statutes: How to Avoid the Conflict and Serve Society*, 18 WIDENER L. REV. 1 (2012).

Priests are increasingly being designated mandated reporters of child abuse, a requirement that often puts them at odds with their religious obligations and the statutorily created priest-penitent privilege of confidentiality. As a result of

declining public respect and trust in the Catholic Church, some legislatures have enacted child abuse reporting statutes that include priests, requiring these clergymen to either report instances of possible abuse or face criminal and civil liability. In addition, because courts in various jurisdictions struggle with how to resolve this conflict, there have been inconsistent results, with some priests held accountable and others escaping sanctions. Offering a historical perspective of both the priest-penitent privilege and child abuse reporting laws, the Author argues that those who have regular and direct contact with children are better positioned to serve as reporters of abuse and that it is therefore unnecessary to burden priests with this additional responsibility. By excluding priests from the mandated duty to report child abuse, legislators can alleviate the conflict between church and state, and diminish inconsistent outcomes.

WOMEN'S RIGHTS

Juliana Garcia, Note, *Invisible Behind a Bandana: U-Visa Solution for Sexual Harassment of Female Farmworkers*, 46 U.S.F. L. REV. 855 (2012).

Undocumented female agricultural workers often face sexual abuse from bosses and supervisors who threaten to either fire them or report their presence to the government in order to coerce sexual favors and silence. The U-Visa offers sexually abused, undocumented female agricultural workers a remedy for obtaining both legal status and recourse for the sexual harassment and violence faced at work. The U-Visa, which was passed in 2000 under the Victims Protection and Trafficking Act, grants recipients and their families nonimmigrant status, creating a path towards citizenship and, more importantly, making it possible for them to report abuses without fear of deportation. Victims of qualifying crimes must receive certification from a law enforcement agency that they will aid in prosecuting the perpetrator. Since undocumented women often fear that reporting crimes to law enforcement will result in deportation, the U-Visa can empower women to combat the abuse that is so pervasive in agricultural work. Eligible applicants are often non-English speakers and unaware that the U-Visa exists, but grassroots movements, community education, and further training of advocates can all help in spreading this valuable information.

Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C.L. REV. 43 (2012).

Gender discrimination still lingers in today's society and current federal law affords no adequate protection to pregnant women whose jobs are inflexible to the physical limitations of pregnancy. This often leaves women—particularly those in male-oriented or low-income jobs—to face the dilemma of either risking maternal health or facing employment termination. The Equal Employment Opportunity

Commission ("EEOC") has held that the American with Disabilities Act of 1990 ("ADA") does not extend disability accommodations to typical pregnancy-related conditions because pregnancy is not considered an impairment; this interpretation has been upheld by the courts. The ADA Amendments Act of 2008 ("ADAAA"), however, poses a challenge to the EEOC holdings. Although it does not expressly provide for pregnancy accommodations, the ADAAA expanded disability coverage to include temporary physical conditions. The Author argues that under this new Act, pregnancy should qualify as a legally protected temporary physical condition, thereby ensuring job security for pregnant women and furthering workplace equality.

Shelly Kreiczer Levy & Meital Pinto, *Property and Belongingness: Rethinking Gender-Biased Disinheritance*, 21 TEX. J. WOMEN & L. 119 (2011).

For generations, the societal norm in many cultures has been to disinherit women from their family's wealth. This practice of gender-biased disinheritance, with its customary and religious origins, continues to be legally upheld even in egalitarian states. The Authors discuss the history of inheritance law, particularly focusing on the United States' evolution to a modern society mindful of women's rights, and how that conflicts with American testamentary freedom. It has been said that a family collectively, if symbolically, owns its property. But current testamentary laws disregard the societal value placed on the equal treatment of women, protecting a testator's right to devalue female heirs through disinheritance. Lawmakers should consider the pubic policy effects of gender-biased disinheritance and enact laws that seek to curb such oppressive practices.