ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657 (2010).

The recognition of health care as a fundamental right in the United States may lead to the recognition of therapeutic abortions—those performed to protect a women's health—as a form of health care that all women should have access to, regardless of economic class. Although the Supreme Court has repeatedly ruled that abortion is a fundamental constitutional right, unlike many other constitutional rights and international norms, the government has no obligation to ensure access to the procedure. This leaves many women in the United States without the ability to fund their abortions and without a claim against the government for not providing them with access. In other countries where abortion has been legalized or where there is national public health care, this inequity has led to access to public funding for needed abortions or government funding for abortions. While it is unlikely that this nation's health care options will change access to abortion in the immediate future, the fact that access to health care is increasingly being seen as a basic human right in the United States suggests that in the long term, therapeutic abortions may become a normal part of health care and an important woman's right.

Morgan Kirkland Wood, Note, *It Takes a Village: Considering the Other Interests At Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873 (2010).

The right to reproduce is one of the basic civil rights of man and with the advent of new reproductive technologies—for example, adoption, surrogacy, artificial insemination, and in vitro fertilization—the choice to exercise that right is far more complex than before, especially with the option of posthumously conceiving children. Posthumous conception, the possibility of conceiving a child after the sperm or egg donor dies, is an unexplored area of the law, and to date only twelve states have enacted laws specifically addressing the rights of posthumously conceived children. Thus, in states without such legislation, state courts are left to confront the issue and as a result, courts are reaching inconsistent conclusions; a problem that reflects the need for reform and uniformity in this emerging area of law. When enacting legislation, state legislatures should craft detailed provisions modeled after legislative provisions for other complex family issues—for example, safeguarding the rights of a surviving partner, the deceased parent's other children and the deceased parent. Additionally, several possible statutory provisions are provided for striking an appropriate balance of interests, including: requiring decedent's consent to posthumous conception, limiting the time window for

conception or birth, requiring notice to the court of the surviving partner's intent to attempt posthumous conception, allowing different time limitations based on the existence of other children, and providing for creation of a trust during the window after a parent's death but before a child's birth.

Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305 (2010).

At the moment of birth, every child is given constitutional rights. However, the parent of the child does not have the fundamental right to raise that child—or exercise legal parentage—until the state statute determines so. The author argues that when drafting parentage statutes, states must take care to act pursuant to the doctrine of parens patriae, and thus ensure that the child receives their constitutional right to legal parents at birth. In the current system, the reliance on presumptions, particularly the marital presumption, as well as the stagnant approach to adapting to improvements in reproductive technology has the effect of denying children this fundamental right. To be in accordance with the Constitution, state statutes must be altered so as to eliminate presumptions, conferring legal parentage to genetic parents who conceive through sexual reproduction, and granting legal parentage to the intended parents in the case of assisted reproductive technology.

Melinde Lutz Sanborn, *The Case of the Headless Baby: Did Interracial Sex in the Massachusetts Bay Colony Lead to Infanticide and the Earliest Habeas Corpus Petition in America?*, 38 HOFSTRA L. REV. 255 (2009).

Zipporah, one of only ten African children known to have been born in Massachusetts Bay during the short period when nobody could be born enslaved, chose to leave the home where her parents were enslaved and go to work as a servant in the home of Richard Parker. At a time when fornication was considered a crime punishable by fine, Zipporah was unwed when she gave birth to what witnesses testified was a dark skinned, dark haired, still born baby boy that she buried in the Parker's fields. The birth was reported by an unknown source and, after admitting to fornication with another African servant, Zipporah was imprisoned, most likely because, as it appears from court records, she was suspected of murdering her child. Upon an investigation that stemmed from a Habeas Corpus petition that Zipporah wrote while in prison, the only baby excavated from the fields was a decapitated white child, and because witnesses had testified that Zipporah gave birth to a dark skinned baby, the grand jury refused to charge her and she was released from prison. It is suggested that the only possible explanation for the headless baby discovered in the fields is that Richard Parker's nephew, who was often in the Parker home just before Zipporah appeared pregnant,

and who was believed to have accosted women in the area on more than one occasion before fleeing the Country, was the father of the unidentified headless baby discovered in the fields.

Shannon K. Calt, Note, A., B. & C. v. Ireland*: "Europe's* Roe v. Wade*"?*, 14 LEWIS & CLARK L. REV. 1189 (2010).

A., B. & C. v. Ireland is a pending case in the European Court of Human Rights ("ECHR") that has a likely chance of ending Ireland's constitutional ban on abortion. In 1983, an amendment to the Irish constitution established that the unborn are considered living human beings, whose right to life is just as protected under the law as the mother's right to life. Ireland's abortion policy has not changed since *Attorney General v. X* held that abortion is allowed in limited cases where the pregnancy would pose a substantial physical or emotional risk to the mother's life. The author argues that the ECHR will likely classify Ireland's concern about abortion as a matter of morals that does not justify such strict interference with a woman's right to choose, and that Ireland does not provide enough proper abortion counseling and medical attention to Irish women who get abortions in England. The ECHR will at the very least require Ireland to make pre and post-abortion services more readily accessible to Irish women, or mirror the U.S. Supreme Court decision in *Roe v. Wade* and hold that Ireland's ban on abortion violates the European Convention on Human Rights.

Anthony Dutra, Note, *Men Come and Go, But* Roe *Abides: Why* Roe v. Wade *Will Not Be Overruled*, 90 B.U. L. REV. 1261 (2010).

Although *Roe v. Wade* creates controversy amongst people who believe that abortion is murder and those who feel that the choice to have an abortion is fundamental to women's liberty, it is likely that this case will never be overruled. The author argues that *Roe's* continued viability is based on the U.S. Supreme Court's thirty-seven year role in maintaining the central elements of its decision, the expansive and accessible nature of a woman's right to choice and the fact that this decision can be alternatively supported by the Equal Protection Clause of the Fourteenth Amendment. Furthermore, the possible passage of legislation such as the Freedom of Choice Act—an act that would preclude any federal, state, or local government from creating restrictions that would interfere with a woman's right to choose to have an abortion—would codify *Roe*. Few states currently have restrictions on abortion that directly implicate *Roe*, and anti-agenda groups are shifting their focus and support of such broad restrictions. Because it is unlikely that *Roe* will be overturned, fruitless efforts by anti-abortion and pro-choice groups should be diverted to more effective causes such as preventative measures that will reduce current abortion rates.

Theresa Glennon, *Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction*, 55 VILL. L. REV. 147 (2010).

Thirty to thirty-five percent of all assisted reproduction pregnancies result in multiple gestations—causing health risks for both mother and child, an increased burden on individuals and the public in the form of healthcare and education costs, and an increased rate of early life mortality for the children born. Yet despite data and medical opinions that say single-embryo in vitro fertilization ("IVF") is the best way to reduce risky pregnancies, the majority of women choose hormone therapy and intrauterine insemination ("IUI") because they are cheaper and less invasive. Current legislation and regulation in the area of assisted reproduction make it even more difficult for the U.S. to move to a single-embryo IVF by creating a rigid definition of successful IVF and by providing inadequate education on the risks involved with multiple gestations. By using cognitive psychology and behavioral economics to evaluate the context in which parents make decisions about assisted reproduction and by evaluating European countries where the majority of women opt for single-embryo transfer IVF, the author creates interdisciplinary solutions for the U.S. If the U.S. broadened the criteria patients use to select clinics, created more effective education, and adopted full coverage of IVF procedures similar to Massachusetts' current plan, it would be able to begin catching up with Europe in the field of successful, healthy assisted reproduction.

Amanda McMurray Roe, Note, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205 (2009).

Informed consent statutes—statutes that require a physician to provide his or her patient with medical information that is necessary to make an informed decision about treatments—have increased throughout the U.S. for procedures such as breast cancer tumor removal and abortion. When it comes to informed consent statutes on abortion procedures, a number of states such as South Dakota, West Virginia, and Texas require physicians to provide patients with inaccurate or incomplete information so as to discourage the patient from having the abortion. Since the U.S. Supreme Court seemed to endorse informed consent statutes in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Gonzales v. Carhart*, federal and state courts have treated these statutes with great deference to the state legislatures. The result has been that several statutes that provide information regarding the risks of abortion that is not scientifically accurate—such as an increased risk of suicide and depression as a result of having an abortion—have been allowed to stand by the courts. The author suggests that a less deferential review of these statutes would be proper because courts are only being

asked to review the truthfulness of alleged facts—a task that they are already equipped for—and not to determine the validity of any policy put forth by the state legislature.

Rachel White-Domain, Comment, *Making Rules and Unmaking Choice: Federal Conscience Clauses, the Provider Conscience Regulation, and the War on Reproductive Freedom*, 59 DEPAUL L. REV. 1249 (2010).

The Provider Conscience Regulation ("PCR") promulgated by the U.S. Department of Health and Human Services ("HHS") addresses the extent to which healthcare workers can refuse to provide care. In arguing that a patient's right to information and quality care takes precedence over a professional's right to refuse care, the author discusses the political and legal contexts in which the PCR came into force. The PCR's promulgation under the Bush administration involved a blurring of the definitional line between abortion and contraceptive, and similarly in the courts, state laws permitting refusals to perform abortions were construed to permit healthcare professionals to refuse contraceptive care. An analytical framework for the key elements of conscience clauses is put forth, which include the entities protected, the health services implicated, the activities implicated within those services, and the rationale for objection. The HHS' interpretation of the regulation's language has resulted in an undue expansion of the scope of federal conscience clauses, allowing for the legal protection of health care workers that refuse care based upon highly attenuated connections to objectionable health services.

BIOETHICS

Jenny Shum, Note, *Moral Disharmony: Human Embryonic Stem Cell Patent Laws, WARF, and Public Policy*, 33 B.C. INT'L & COMP. L. REV. 153 (2010).

The progress of human embryonic stem cell ("hESC") research in the U.S. has been retarded by broad patents issued to the Wisconsin Alumni Research Foundation ("WARF") and by restrictions placed on federal funding for stem cell research. Although the purposes of patents are to promote innovation and encourage inventors to disclose discoveries, the prohibition on federal funding for the purpose of creating new hESC lines, coupled with the three broad patents assigned to WARF in 1998 will potentially restrict subsequent scientific research relating to all hESCs. Although harmonizing global patent law would bring uniformity to patentability standards, and likely increase efficiency in patent offices, doing so would require applying moral standards to United States laws, as is done in the European Union, which would increase uncertainty within the process due to the variances in mores between cultures, especially when

considering heavily contested subject such as stem cell research. A balance must be found between encouraging innovation through patents—which can result in the creation of monopolies due to broad patents like those issued to WARF—and promoting society's need for the continuation of basic scientific research. A recent policy change enacted by President Obama in 2009 lifted some limitations on stem cell research, allowing federal grants for research on established hESC lines, while continuing to prohibit the use of federal funding for creating new hESC lines, but the effects that this new policy will have on stem cell research in the United States will remain unclear until the WARF patents expire in 2015.

Pamela Foohey, Comment, *Paying Women for Their Eggs for Use in Stem Cell Research*, 30 PACE L. REV. 900 (2010).

The Empire State Stem Cell Board's ("Board") decision to allocate funds for the compensation of women who choose to donate their egg cells for use in stem cell research—coupled with its recommendations for safeguards against undue influence over women who may be enticed by compensation to donate—is a correct and necessary decision even though further safeguards should be implemented. Although the process for human egg harvesting is a complicated and potentially risky one, the human egg can provide significantly more stem cells for research then any other process for extracting stem cells. In 2009 the Board allocated state level funding for the compensation of women who choose to provide egg cells for this research; as a result, New York became the first state to provide state funding for compensation beyond mere reimbursement of medical costs. This article evaluates the purpose for paying for egg cells, the arguments in favor and against compensation, the Board's decision in this matter, as well as options for further safeguards against the exploitation of women who might be enticed to donate by the compensation. Compensation by researchers for the donations of eggs is necessary for the success of research, however, the Board has not successfully implemented a sufficient amount of safeguards to protect women from being unduly influenced, and should adopt further, more comprehensive safeguards.

Joanne Barken, Note, *Judging GINA: Does the Genetic Information Nondiscrimination Act of 2008 Offer Adequate Protection?*, 75 BROOK. L. REV. 545 (2009).

There has been a rising fear throughout the nation that developments in genetic testing are causing discrimination in the workplace and in the healthcare system. This is an issue that not only impinges on the realm of civil rights, but also impedes scientific advancement. Despite early efforts to combat this discrimination—such as the Americans with Disabilities Act, Title VII of the Civil

Rights Act of 1964, and the Health Insurance Portability and Accountability Act of 1996—federal laws failed to specifically address the concerns of people who are predisposed to genetic diseases. Therefore, Congress passed the Genetic Information Nondiscrimination Act of 2008 ("GINA") in order to "prohibit the use of genetic information to set health insurance premiums, deny coverage, or affect employment." Although GINA provides some protection against genetic information discrimination, amendments will be necessary in the future to protect additional types of genetic diseases and accommodate new developments in medicine.

Elliot Garvey, Comment, *A Needle in the Haystack: Finding a Solution to Ohio's Lethal Injection Problems*, 38 CAP. U. L. REV. 609 (2010).

Lethal injection is the primary means of execution in all thirty-six states that enforce capital punishment, but the way in which it is traditionally carried out—by a combination of three separate drugs—has led to failed execution attempts. Despite the risks, the three-drug lethal injection was found constitutional by the U.S. Supreme Court in *Baze v. Rees* because the cruel and unusual punishment clause of the 18th Amendment is not violated unless there is an "objectively intolerable risk of harm," which the Court did not find. However, Ohio, for example, failed execution attempts for three separate death row inmates with the three-drug approach in recent years, and has now begun to execute death row inmates with a single injection after the Sixth Circuit ordered the stay of an Ohio execution in response to the three failed attempts. The author catalogues the history of capital punishment in the U.S. from public hanging to firing squad to electric chair and finally lethal injection, and compares the risk of failure and/or pain to the inmate of the three-injection approach with Ohio's new single injection. Ohio has had no failed execution attempts since the state instituted the single-injection method, but it remains to be seen if this method will withstand a constitutional challenge.

CHILDREN AND IMMIGRATION

Jacqueline Hagan, Brianna Castro, & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010).

Since 1996, several federal laws that provide mechanisms to arrest, detain, and deport illegal immigrants, have caused severe hardship for immigrant families and their communities. These laws are ineffective in their goal to end illegal immigration of criminals and other undocumented individuals, but rather have other unintended costs. The article looks into the history of United States

immigration law followed by information from interviews with immigrants, their families, and community members in Texas and North Carolina, in addition to deportees in El Salvador. Immigrants are deported for small crimes, cultural businesses suffer because their patrons are afraid to leave their homes, families are split up, and deportees' skills that are useful in the United States are not useful in their home countries. Furthermore, these interviews show that deportation does not permanently keep individuals out of the country, as nearly half of interviewed deportees stated that they intended to return.

CHILDREN AND TEENAGERS

Jeremy R. Singer, Note, *Taking on Tobacco: The Family Smoking Prevention and Tobacco Control Act*, 34 NOVA. L. REV. 539 (2010).

The Family Smoking Prevention and Tobacco Control Act designated tobacco a drug and subjected it to regulation by the Food and Drug Administration ("FDA"), thus raising questions about the constitutionality of the advertising and marketing restrictions imposed on tobacco companies. In light of the substantial harm tobacco poses to the public, particularly children, Congress enacted the aforementioned bill to combat the marketing of tobacco products to minors, and to further highlight the dangers of tobacco use. The author speculates that bans or partial bans on tobacco marketing will raise first amendment challenges related to the freedom of speech, and compares these potential conflicts to previous unsuccessful legislative efforts to ban alcohol advertisements in Rhode Island. One part of the legislation that may be unconstitutional is the provision that prohibits tobacco advertising within 1000 feet of a school, because this may be a place where minors are sufficiently exposed to the advertisement. The author concludes that the FDA's newfound role of tobacco regulation is both a blessing and a burden because the FDA has the opportunity to counter the harmful effects of tobacco, but it will also be encumbered with this enormous task, and inevitable litigation.

Emily Buss, *What the Law Should (and Should Not) Learn From Child Development Research*, 38 HOFSTRA L. REV. 13 (2009).

When analyzing the constitutional rights of children, courts must use more sophisticated approach in order to understand the developmental stages of children including, the contingent nature of identity formation and capacity, and how the law can spur child development. Traditionally, our legal system has distinguished children from adults based only on developmental facts—such as what children can do at a certain age—suggesting that capacity at any given age is fixed, and that the law plays no role in child development. Solely acknowledging fixed capacities has the benefit of keeping the law simple, but this approach creates many problems for

determining the legal rights of children, particularly because capacity is extremely complicated and the studies on it are incomplete. Expanding the focus of the courts beyond fixed capacity will improve their analysis of children's rights. A consideration of developmental effects will force courts to acknowledge that case outcomes are not pre-determined by scientific facts, and will encourage laws that help children develop into the ideal adult citizens we want them to become.

Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010).

This article examines the remedies available to juveniles who have suffered from defective legal representation in their delinquency proceedings and proposes avenues for reform. Among the remedies currently available is the right to bring a claim of ineffective assistance of counsel ("IAC"). However, at present these appellate claims are underused, inadequate and almost never provide an appropriate means of redress. The author proposes reforms to the current system of IAC claims, such as establishing standards of professional conduct, using these norms to deter misconduct, establishing the seriousness of delinquency practice, and identifying ineffective lawyers who should be considered for removal by a panel of court-appointed lawyers. The author concludes that through reform of the IAC system, children will be ensured dignity, fairness and adequate representation, which the juvenile system was meant to protect.

Merril Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061 (2010).

The jurisdictional age for juvenile courts in New York should be expanded beyond its current level, which is set at less than sixteen years of age. Every state except New York allows for sixteen year-olds to be prosecuted in the juvenile court system—many states permit seventeen or eighteen year-olds to be considered juveniles—and North Carolina has recently passed legislation to increase the jurisdictional age. The author describes the history of the juvenile court system nationwide from its birth in the late 19th century to developments in the 21st century. New York's policy seems harsh compared to other states' with its firm policy of excluding adolescents sixteen and older from the juvenile court system. New York could handle the relatively minor financial and logistical adjustments involved in amending the system, and should join the other states by expanding the juvenile courts' jurisdiction, given the generally petty nature of adolescent crimes and low rate of recidivism.

Andrea Knox, Note, Blakely *and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals"*, 70 OHIO ST. L.J. 1261 (2009).

A blended sentencing scheme allows the juvenile court judge, without a jury, to impose a juvenile disposition with a stayed adult sentence that could trigger the automatic placement of the juvenile in adult criminal court on his or her next offense. When juvenile courts use a blended sentencing scheme that combines delinquency sanctions and criminal punishment, the juvenile does not receive the protections given to a criminal defendant under *Blakely v. Washington*, which found that a sentence over the statutory maximum must be supported solely by a jury's findings. Most states' blended sentencing schemes allow a juvenile court judge to unilaterally impose a sentence beyond the statutory maximum for a juvenile court when giving a stayed adult sentence. Under *Blakely,* the broad discretion given to the judge in determining whether to impose an adult sentence violates the defendant's Sixth Amendment right to a jury trial. Legislatures should either explicitly define which juvenile offenders may receive blended sentencing in order to eliminate the unconstitutional exercise of judicial discretion, or permit a jury to decide whether a juvenile could benefit from other rehabilitative efforts.

Sarah Marquez, Note, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 SYRACUSE L. REV. 617 (2010).

Despite leading to approximately eight to ten child deaths per year, the use of physical restraints on children with disabilities in public schools is steadily increasing. Currently, there is neither a federal law, which governs how restraints may be used for behavior modification nor any federal statute compelling educators to report instances where there is use of physical restraint. The Individuals with Disabilities Education Act ("IDEA") requires a non-restrictive educational setting for all students, but does not include any regulations for physical restraints. To address this issue, the author proposes that Congress amend IDEA to include safeguards to protect disabled students from the potentially dangerous and fatal effects of physical restraints. The most pertinent of these safeguards include mandates for restraint only in emergency situations; adequate training for all individuals performing physical restraints; and obligatory reporting of all occasions on which both restraints are used and an injury is suffered.

W. Warren H. Binford, *School Lessons in War: Children at Tuol Sleng & the Rise of International Protections for Children in War*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 28 (2008).

This article discusses the history of the Khmer Rouge regime's exploitation of children at Tuol Sleng torture prison to illustrate the development and need for international treaties to protect children, especially during times of war. There were international human rights instruments in place that provided limited protection for children's rights before the Khmer Rouge took control of Cambodia, but they failed to protect children from being used as a means to carry out genocide of the Cambodian people. Advancements have been made during and after the Khmer Rouge regime to address some of these shortcomings—such as lack of a minimum age for participation in armed conflicts and lack of a right to education—but gaps remain in the law that leave children susceptible to exploitation due to of missing enforcement methods and international monitoring. The failure to convict the director of Tuol Sleng, Kaing Guek Eav, thirty years after the fall of the Khmer Rouge regime exemplifies the shortcomings of current treaties and laws in place to protect children's rights. In order for international treaties—including the Declaration of the Rights of the Child and Declaration on the Protection of Women and Children in Emergency and Armed Conflict—to effectively protect children during times of war, there needs to be greater international compliance so that the possibility of prosecution can serve as an efficient disincentive for exploiting children.

Angela Olivia Burton, *"They Use It Like Candy": How the Prescription of Psychotropic Drugs To State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453 (2010).

Psychotropic drugs—drugs designed to alter perception, mood and other brain functions by directly affecting the body's central nervous system—are subject to excessive prescription, frequent addiction, abuse, and diversion into illicit channels. The dangers are especially acute for state-involved children who are administered psychotropic drugs at a rate far exceeding that of the general population, due to caretakers who seek to control basic child behavior not symptomatic of psychiatric disease with pharmaceuticals, and because state-involved children have often undergone traumatic experiences and as a result, exhibit symptoms associated with but not necessarily symptoms of psychiatric disease. The 1971 United Nations Convention on Psychotropic Substances seeks to minimize the dangers of certain psychotropic drugs by requiring member states to implement several protective policies. The U.S. has failed to abide by the treaty's terms by permitting direct-on-consumer advertisements, failing to consider alternative treatment methods that might be safer in particular cases, and not sanctioning excessive pediatric prescription without sufficient information regarding the effects on children. The U.S. violation of international law is likely a result of the psychopharmacology culture which holds that certain behavioral and

psychiatric diseases stem from brain dysfunction rather than socio-environmental factors and are better treated by medicine than by behavioral therapy.

Kemi Mustapha, Note, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses By the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163 (2010).

The U.S. chocolate manufacturing industry has been known to rely upon the use of child labor in West African cocoa farms. Despite enhanced media coverage of this issue, the chocolate industry has not changed its procedures to prevent the use of child labor in the production of chocolate. Moreover, existing laws that would refuse the importation of goods made with child labor such as the Tariff Act of 1930 or the Trafficking Victims Protection Reauthorization Act ("TVPRA") are currently not being enforced against the chocolate manufacturing industry. The author notes that voluntary initiatives—such as the Harkin-Engel Protocol—have been ineffective at reducing the use of child labor on these farms since there are no penalties imposed on corporations for failing to comply with these initiatives. However, the proposed Section 3205 in the Food, Conservation, and Energy Act could finally make a difference in reducing child labor by setting up a partially independent consultative group that will increase the effectiveness of existing law such as the TVPRA against companies that use child labor.

DOMESTIC VIOLENCE

Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517 (2010).

Restorative justice—in which an offender voluntarily accepts responsibility for the harm caused, gives reparations to the victim, and reduces the possibility of another offense—should be used as a foundation upon which alternative methods could be developed to intervene in domestic violence cases. Despite the increase in statutes and policies implemented to prevent and eliminate domestic violence, many victims are not satisfied with the current justice system's design and are often left in more danger afterwards. A restorative justice system would better attend to the victim's needs by more adeptly addressing complicated issues with tailored resolutions and offering a forum for genuine apologies, leading to decreased repeat offenses and increased possibilities for emotional healing. The author proposes a system where informed victims could opt into one or more conferences involving the offender, a qualified facilitator, family members, and community members as the most feasible and effective method of reaching a personalized written resolution enforceable by a court. Creating a more flexible option based on restorative justice

for victims of domestic violence beyond the civil and criminal justice systems presently available may allow the victims to benefit from a more effective intervention that addresses both the offender's and victim's needs.

Cheryl Hanna, *Supreme Court Advocacy and Domestic Violence: Lessons from* Vermont v. Brillon *and Other Cases Before the Court*, 24 ST. JOHN'S J. LEGAL COMMENT. 567 (2010).

In recent years, the U.S. Supreme Court has demonstrated a growing sophistication about and concern for issues pertaining to domestic violence. This can be attributed to the work of the Domestic Violence Advocacy Community ("DVAC"), consisting of individuals and organizations committed to combating intimate partner violence. The DVAC has presented thoughtful arguments that exemplify a developing legal maturity, by filing amicus briefs with empirical data pertaining to the reality of the lives of abuse victims, which has allowed the Court to recognize domestic violence as a pervasive problem. However, there are still opportunities to expand the scope of the DVAC's impact on Supreme Court jurisprudence by, for example, strategically reviewing certiorari petitions for potential impact on domestic violence victims and ensuring that only committed advocates in the DVAC define victims' interests. This article, through a review of recent high court decisions, including *Vermont v. Brillon*—a Supreme Court case involving the speedy trial rights of a habitual domestic and sexual offender defendant, where the author filed a powerful amicus brief—encourages lawyers, scholars and advocates to strengthen their involvement in Supreme Court litigation to give domestic violence victims a voice in the country's highest court.

EDUCATION

Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1 (2010).

Federal statutes, such as the Education for All Handicapped Children Act ("EHA"), exist to protect the rights of youths with disabilities, and to ensure that states provide them with a sufficient special education. Due to trends showing significant increases in the number of persons incarcerated, juveniles with disabilities between the ages of thirteen and twenty-one who are housed in adult prisons receive a special education that is inadequate and far inferior to the education received by their non-incarcerated peers and their peers housed in juvenile facilities. This crisis stems from factors including social and educational policies in public schools such as zero tolerance policies that result in many youths being moved from school systems to the criminal justice system, the lack of public

awareness regarding special education for incarcerated youths, and an overall political apathy to the needs of special education youths. In order to enact change in the system, those concerned with ensuring that states provide an adequate education for incarcerated youths with disabilities should raise awareness about the issue by lobbying for stricter oversight of the relevant statutes, launch campaigns through various media outlets and use targeted litigation efforts. Incarcerated and disabled youths have a right to equal opportunity of education, even if they do not have a right to freedom, and in order to ensure that those incarcerated in adult prisons have the opportunity to exercise this right, the current policies must be challenged.

Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843 (2010).

Until laws geared at assisting the disabled first began to be written and implemented in the second half of the 20th century, students with disabilities were drastically underrepresented in higher education. Once the Federal government began to address this issue with regulations, including the Individuals with Disabilities Education Act and Americans with Disabilities Act, the situation slowly began to improve, picking up momentum in the 1990s and carrying through to the present day. The author presents a historical evaluation of the evolution of disability-discrimination law over the last fifty years, examining several cases and statutes individually, and measures the impact of the various laws and subsequent litigation on increasing the number of disabled students in higher education. Although they impose challenges on higher education institutions, anti disability-discrimination laws aimed at higher education significantly enhance the quality of life for disabled students, and vastly improve their capability to contribute to society rather than relying on government benefits. Essentially the litigation era has come to a close, but there will likely be continued regulatory guidance and litigation to preserve the status quo for students with disabilities and to continue striving for improvement.

John E. Taylor, *Family Values, Courts and Culture War: The Case of Abstinence-Only Sex Education*, 18 WM. & MARY BILL RTS. J. 1053 (2010).

Abstinence education in schools, when taught without any religious or theoretical motivation behind it, is so ineffective that, though it may seem facially secular, it is more likely an attempt to promote conservative religious and moral views. Abstinence education promotes a vision of family life should that is typically held by specific religious groups, leading some to describe this form of education as fundamentalism and conclude that any government policies supporting this form of education breaches the Establishment Clause of the First Amendment.

The author argues that the federal government should not invalidate any abstinence education programs under the Establishment Clause, even facially secular programs, because the courts have no role to play in resolving the value conflicts between the sexual liberals who wish to teach safe sex and the conservatives who want to teach abstinence. Legislators and educators must not use public schools to promote one side's cultural values over another and should instead, attempt to form sexual education programs that forge the cultures of the liberals and conservatives and appeal to those in the middle. A program that focuses on abstinence when teaching school aged children, while still providing some information about safe sex and contraception, would combine the policies of the two conflicting cultures.

Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education,* 95 CORNELL L. REV. 989 (2010).

Public schools in this country receive some of its funding from the federal government based upon property taxes, which causes a sizeable difference among wealthier and poorer school districts. Education reformers who oppose this method of receiving federal funding continue to lobby for improved quality of public schools through three varied approaches. Two failed approaches—called federal and state equality litigation—sought to increase money in the schools by arguing that the current plan for school funding violates the Equal Protection Clause of students in low-income school districts. Currently, reformers are using a third and more effective method—state adequacy litigation—in which the litigants focus on education clauses in the individual state constitutions rather than on the states' equal protection clauses. However, this Note argues that a fourth movement would be even more successful, based on recent U.S. Supreme Court dicta in *San Antonio Independent School District v. Rodriguez*, by implementing a federal adequacy litigation approach where litigants sue in federal court under Due Process Clause violations.

Aaron T. Martin, Note, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 225 (2010).

Homeschooling is illegal in Germany but it is legal—though often highly regulated—in the U.S. This is in large part due to the very different histories of the two countries: education laws in Germany still resemble Nazi nationalistic controls, while laws in the U.S. continue to resemble English educational philosophy and early settlers' preferences to educate their children with their own religious teachings. In 2009, the Georgia and Tennessee legislatures passed resolutions in 2009 to urge Germany to legalize homeschooling, as legislatures from these states feel that all parents—including those in Germany—have fundamental rights to

homeschool their children. While homeschooling is lawful in the U.S., courts have disallowed homeschooling for "dubious reasons"—in one case because the parents were not certified teachers—in part because there is no specific right in the Constitution for parents to choose how to educate their children. The author argues that parents have fundamental universal rights to homeschool their children and that these rights must be observed in order to preserve liberal democracies.

N. Georgeann Roye, Comment, *High Hopes Hamstrung: How the "Trial De Novo" for Termination of Tenured Teachers' Contracts Undermines School Reform in Oklahoma*, 62 OKLA. L. REV. 527 (2010).

To ensure that American children have the knowledge, aptitude and favorable conditions to become valuable citizens, an educational policy at the national, state, and local levels and a unified educational-reform model that uses the collaborative efforts of teachers, parents, societal organizations, and legislators are required. The notion that teachers—without any outside aid—can meet the difficult task of rising above the educational crisis is unrealistic in the current times. Rather, educational policy makers at national, state and local levels should start by providing continual, shared didactic research and feedback for teachers to incorporate into their teaching practice. The author suggests that Oklahoma should adopt this collaborative model and that such a development should be initiated by the state legislators by explaining how teachers' evaluation criteria can lead to grounds for termination of ineffective teachers. The author recommends that the trial de novo standard of review should be replaced with a heightened standard to aid school districts in terminating unproductive teachers, thus removing detrimental effects to a sound educational policy.

Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969 (2010).

In loco parentis—the idea that schools have the power to act "in the place of a parent"—is outdated as both a latinism and common law tenet and is typically used less for the protection and well-being of students and more often as a justification for unreasonable punishment tactics. Common law today reflects the common reading of William Blackstone's Commentaries' definition of the in loco parentis doctrine, which applies only the disciplinary aspect of the doctrine to defend teachers behaviors while the protection and supervision aspects are ignored. Courts applying the Blackstone definition have issued decisions ranging from giving unlimited discretion to teachers' decisions concerning treatment and care of students, to several decisions disregarding the doctrine, ending with a resurgence as seen in the U.S. Supreme Court's decision in *Morse v. Frederick*. The death and rebirth of the doctrine is easily attributable to several factors, ranging from lawyers

applying loco parentis to protect teacher clients to the Court's misreading of the doctrine. Instead of evoking loco parentis, schools should establish clear disciplinary codes.

Jordan Blair Woods, *Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act*, 34 N.Y.U. REV. L. & SOC. CHANGE 373 (2010).

The Equal Access Act ("EAA") was implemented in 1984 to compel federally funded secondary schools to provide equal access to extracurricular activities. The EAA, however, has three safe harbor exceptions, which allow a school to deny equal access if the exception is made to uphold order and control of school property, ensure the safety of students and faculty, and ensure that student attendance is by choice. Federal circuit courts are split on whether the EAA's safe harbor exceptions should be analyzed under the seminal case on First Amendment student speech—*Tinker v. Des Moines Independent Community School District*—or a more deferential reasonableness standard. The author concludes that a deferential reasonableness standard should not be used because it allows schools to use their unfounded belief that gay-straight alliances will cause increased harassment and violence towards lesbian, gay, bisexual, and transgender students to ban the formation of gay-straight alliances under the EAA's safe harbor exceptions. The *Tinker* standard—requiring a direct connection between student speech or activity and school disruption—should be used when interpreting the EAA's safe harbor exceptions because it requires schools to base their decision to allow or disallow extracurricular activities on actual research or facts rather than preconceived prejudices.

FAMILY

Orly Rachmilovitz, Comment, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785 (2010).

The termination of parental rights or removal of children from families dealing with parental mental illness is a troubling trend, and as such, lawmakers should first consider the fundamental right of family integrity and explore likely alternatives without removing the child from the home. Women who suffer from a mental illness are just as likely to have children as those who don't, but as much as seventy to eighty percent of parents with mental illness lose custody of their children, significantly higher than parents without a mental illness. Under many state laws, when dealing with a mentally ill parent, the primary mode of protecting children is through removal; and in some states having a mental illness creates a

presumption of unfit parenting. This contradicts the Supreme Court ruling in *Washington v. Glucksberg* which recognized the fundamental rights of parents and children, elevated family preservation and established a test which applies strict scrutiny to the infringement of this right. States should pursue the continued use of Programs of Assertive Community Treatment, which have proven effective with persons suffering from mental illness, and can provide services that promote the parent's recovery, the child's well-being, and family's unity.

Michelle A. Travis, *What a Difference a Day Makes, or Does It? Work/Family Balance and The Four-Day Work Week*, 42 CONN. L. REV. 1223 (2010).

Advocates of a four-day work week take the position that a compressed work schedule improves work-family balance. While this position has been corroborated by scientific studies, other legal theorists question the assumption that all forms of workplace flexibility are equally beneficial. Research should move beyond establishing a causal link between compressed work schedules and reduced work/family conflict, and examine the types of workers who are most and least likely to experience these benefits. The author argues that this inquiry will reveal that the workers who are most likely to experience the greatest benefits are the ones for whom a four-day work week is the most impracticable. Exploration of this issue provides an opportunity to consider ways in which legal regulation could enhance workplace flexibility for more workers.

Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593 (2010).

As more women continue to enter the workforce, the United States government has failed to effectuate legal change in order to assist citizens in negotiating the work-family relationship. Doing so would ensure that employees are granted adequate time for family life and would make certain that critical functions typically handled within the family unit, such as child rearing and caring for elderly relatives, continued to be accomplished successfully. By maintaining silence on this issue, states have neglected their responsibilities and are in direct conflict with the nation's commitment to human dignity. Unlike other countries, the United States government embodies the notion that negotiating the work-family relationship falls outside of the government's role and views the conflict as something to be dealt with privately, leading to problems including the undermining of the welfare of American children, the promotion of sexual inequality and the undercutting of the role of the State and its commitment to

supporting its citizens. The government should change its course in dealing with the work-family relationship conflicts and take a more hands-on approach in order to ensure that adults can financially support their families while also meeting their caretaking needs.

Katharine B. Silbaugh, *Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267 (2010).

Utah's adoption of the four-day work week in 2008 has lead to an interdisciplinary analysis of reallocating employment hours as a form of sprawl reform. After World War II, Americans migrated away from dense urban areas and toward geographically dispersed residential developments, which led to high commuter costs and arguments that the traditional five-day work week be rearranged. The author explains that four ten-hour work days a week decreases commuting costs, lowers employee absenteeism, increases employee schedule flexibility, and can potentially decrease traffic congestion. However, adoption of a four-day work week, conversely disrupts the synchronization between common work, leisure and social time in the everyday lives of Americans—a disruption that many are not willing to accept. While the four-day work week may serve as a superficial resolution to the economic costs that burden employees living in areas of sprawl, urban planners must weigh competing social interests against short term economic benefits to create long-term minimally disruptive forms of sprawl reform.

Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J. L. & TECH. 309 (2010).

The debate about the implementation of DNA familial searches has lead to exploration of the bounds of civil liberty and privacy intrusions that genetic informants, arrestees, and families may experience. When DNA familial searching is successful, the benefits of convicting individuals who have committed sexual or violent crimes may seem to outweigh the potential intrusions upon civil liberties and Fourth Amendment privacy rights. However, the potential for embarrassment and reputational damage to arrestees, ancillary family members, and family units as a whole, through unknown surreptitious familial searching as well as through voluntary DNA collection have presently discouraged its federal implementation. Further, the disproportionate representation of African Americans and Hispanics in prisons—and potentially in DNA databases—could lead to a disproportionate amount of minority family members subjected to familial searches. Due to the legitimate, competing interests of law enforcement agencies and those who would be subjected to familial searches, the author cautions against quick implementation and suggests proceeding slowly with its expansive use in the future.

Lucy A. Williams, *Administrative Advocacy: Justice in the Lives of Low-Income Families*, 31 HAMLINE J. PUB. L. & POL'Y 47 (2009).

The long history of poverty policy in the United States contributes to a mixed perception of administrative advocacy and administrative law in the representation of impoverished people. This article examines sources of bias in administrative advocacy against indigent people, while questioning the current system to identify innovative possibilities of improvement. Examination the history of benefit programs adopted from Western European models to the turning points marked by the Great Depression and later reforms during the 1960s, provides insight into the different challenges faced by the poor using the administrative system. Questioning both the failures and achievements of administrative processes, such as the landmark *Goldberg* case, "aid-paid-pending" a fair hearing, and other administrative process developments, improvements can be made, but advocates must look outside the box when hoping to reinvigorate the administrative system. Advocates must tailor administrative proceedings, overcome the concepts of worthy and unworthy beneficiaries, and question rigid rules to make administrative processes more user-friendly for all applicants in order to bring about broad-based economic benefits to impoverished people through a system free of bias.

Clay Calvert, *Freeway Porn & the Signs of Sin: Sex, Cigarettes and Censorship of Billboards*, 30 LOY. L.A. ENT. L. REV. 215 (2010).

A recent trend in United States case law addresses whether billboard advertisements of adult stores along highways and outdoor advertising by tobacco companies near schools and playgrounds violate various state statutes prohibiting such advertisements, despite the First Amendment right to free speech. The United States Supreme Court case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* developed a test to analyze the constitutionality of these statutes. For commercial speech to gain protection under the First Amendment, it must advertise for "lawful activities that are neither false nor misleading," and the asserted governmental interest to be served by the restriction of commercial speech must be determined to be substantial. If both these questions are answered in the affirmative, it must then be established whether the regulation directly advances the governmental interest asserted, and whether it is "not more extensive than is necessary to serve that interest." Under the *Central Hudson* test, the Court of Appeals for the Eighth Circuit and two federal district courts struck down state laws targeting billboards for sexually-oriented businesses, and in 2001, the United States Supreme Court held that a Massachusetts law which banned outdoor advertising for cigars near playgrounds or schools was unconstitutional.

Karen Syma Czapanskiy, *Chalimony: Seeking Equity Between Parents of Children with Disabilities and Chronic Illnesses*, 34 N.Y.U. REV. L. & SOC. CHANGE 253 (2010).

Despite the fact that almost three million American families include at least one child with a disability or chronic illness, family law often fails to provide a suitable response to the issues these families face. For example, though the law provides for child support and alimony, neither takes into account the unique situation of a parent raising a child with special health care needs. To combat this deficiency, the author suggests a new interparental financial remedy called chalimony, awarded to parents of children with disabilities or severe illnesses, where the child's health care needs inhibit the caretaker parent's ability to work and participate in the labor force. Chalimony would allow families to allocate the financial burdens of caregiving, while generating a solution that focuses on the entire family. Moreover, this would allow parents to devote more time and energy into their parenting and can possibly lead to changes in family law in areas such as public benefits, childcare, education and employment.

Ashley Hawley, Comment, *Taking a Step Forward or Backward? The 2009 Revisions to the FMLA Regulations*, 25 WIS. J.L. GENDER & SOC'Y 137 (2010).

In 1993, President Bill Clinton signed the Family and Medical Leave Act ("FMLA") to ensure that Americans who need to temporarily leave their jobs for medical reasons—most of which stemmed from caretaking responsibilities—are able to have job security and obtain medical benefits instead of having to choose between the two. The Act is of particular benefit to female employees who are often caretakers within the family. In 2009, the U.S. Department of Labor amended its 1993 regulations to the FMLA in a number of ways. The author discusses three of the amendments—clarification to eligibility requirements, timing of notice that the employee must give to the employer, and regulations with regard to perfect attendance awards—and the negative and positive impact that they will have on employees and employers. Overall, these regulations clarify the FMLA, but in making it more difficult for employees to obtain FMLA leave and giving employers more time to determine whether employees are eligible for FMLA leave, they also depart from the original purpose of increasing employees'—particularly female employees—rights.

Jane C. Murphy, *Revitalizing the Adversary System in Family Law,* 78 U. CIN. L. REV. 891 (2010).

Problems with the traditional family law adversary system have contributed to the emergence of a system in which the court seeks to address both the parties'

legal troubles and personal issues. The adversary system—which uses vague standards such as "the best interest of the child" and pits parties against each other—is under attack for being too procedurally complex and inefficient. As a result, a system that also focuses on the parties' non-legal social problems, allows for more mediation, and de-emphasizes the role judges and lawyers play in arriving at a solution has been increasingly adopted. However, the "holistic" system is problematic because it threatens a person's legal rights and access to a fair and unbiased forum, since the system can require mandatory mediation where not all parties are represented by lawyers and gives non-legal professionals—mediators and social workers who are not always bound by procedural and statutory requirements—more discretion in solving family related disputes. Rather than abandon the traditional adversarial system in favor of the "holistic" system, efforts should first be made to reform the adversary system by replacing unclear standards with rules, improving the quality of non-legal services such as mediation and making these services accessible but not mandatory.

Benjamin Shmueli, *What Have Calabresi & Melamed Got to Do with Family Affairs? Women Using Tort Law in Order To Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125 (2010).

Calabresi and Melamed's famous article known as the "Four Rules," which created two alternative forms of protection for a single legal entitlement—a primary remedy and a secondary remedy—can be applied to gaps in family law that may need to be filled with tort law. In 2004, a cause of action for "get refusal"—in religions law, a woman must receive a get from her husband in order to not be married anymore—was recognized in a tort action. This article explores the history of intrafamilial tort actions in the family court in Israel by exploring five situations in which family law can be supplemented with tort law. Though tort law cannot always be a clear substitute as a secondary remedy, exploring Calabresi and Melamed's theory can be useful to show that tort law and family law are not as separate as they appear. Though a classic secondary remedy may not exist, the Calabresi and Melamed framework can create a better understanding of the interactions between tort law and family law.

Meredith A. Wegener, *Purposeful Uniformity: Wrongful Death Damages for Unmarried, Childless Adults*, 51 S. TEX. L. REV. 339 (2009).

The U.S. demographics have outgrown the traditional-family style model used in most states to formulate and calculate the compensation in wrongful death statutes. These statutes make it more difficult for survivors—without a familial connection—of unmarried, childless adults to receive damages under a wrongful death action. Currently, more and more Americans are choosing to remain single

or are in a same-sex partnership and with this rise in the population deviating from the norm, the state and federal statutes policy purpose of deterrence, punishment, and compensation is not being fulfilled since the list of survivors who can be compensated is too narrow. The inequality in the tortfeasor's punishment occurs because the majority of state statutes fail to provide adequate compensation for economic loss as well as the loss of human life for the death of an unmarried, childless adult. In order to remedy this, states wrongful death statues need to be amended to include loss-to-the-estate damages as an option instead of solely damages based on loss-to the-survivors.

FEMINISM

Rosalind Dixon, Comment, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297 (2010).

Beyond the symbolic, there is no current literature on judicial behavior that shows any meaningful connection between a female judge and her pro-feminist views. Justices O'Connor and Ginsburg clearly played a role in how female judges are viewed and the advancement of gender equality in the court, however, younger female judges are less likely to have experienced the same level of discrimination as their older counterparts and therefore less likely to have those kinds of experiences shape their point of view on the court. Feminists argue that empirical data shows the link between a judge's gender and her voting record on feminist issues, when in reality, although gender discrimination still exists, the empirical data fails to suggest any real connection. By examining the experiences and voting records of the United States Supreme Court female justices, empirical data on female justices' voting records, and similar judicial arrangements in other countries, the author concludes that in order to promote pro-feminist issues, the feminist movement should to expand their requirements for a judge beyond just gender. This will ensure that justices who are placed on the court are sympathetic to their cause—and are not just female—and will avoid the possibility of backing a female judge who disagrees with pro-feminist values.

Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203 (2010).

Sociological research has demonstrated that the workforce can be divided into an over utilized workforce that works too much, and an under utilized workforce that does not work enough. This is a serious problem for gender equality, because the woman in a professional couple must typically sacrifice her time at work to take care of the house and family. The author advocates a thirty-five hour workweek—an admittedly arbitrary number—in order to create a more

equitable work situation. The recent financial crisis has created an opportunity for new and innovative work schedules—such as telecommuting—that can help accelerate gender equality. Feminists should promote these flexible workplace programs, but should be cautioned not to over-romanticize them.

Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

The 2007 United States Supreme Court decision in *Gonzales v. Carhart*, which upheld the federal Partial-Birth Abortion Ban Act, gave a constitutional footing to the rising anti-abortion argument of women's trauma. The trauma argument is that some women who have abortions due to outside social pressures later regret this decision and suffer from severe depression. The argument is highly controversial, and is seen by pro-abortion advocates as paternalistic and failing to meet solid scientific grounds. However, the author shows that in the past few decades, the legal arguments for female trauma stem from similar arguments advocated by feminists such as those behind Battered Woman Syndrome. Thus, anti-abortion advocates are now using feminist-influenced theories of trauma to achieve their conflicting legal goals.

GENDER BIAS

Lourdes Benería, *Globalization, Women's Work, and Care Needs: The Urgency of Reconciliation Policies*, 88 N.C. L. REV. 1501 (2010).

As women's representation in the workforce continues to increase globally, this shift has increased the pressure on women to adequately provide both familial and labor needs, thus underscoring the pressing problem to address family care. The "crisis of care" is particularly problematic in countries facing international female migration and in high-income European countries in which a historically lower fertility rate, higher life expectancy, and smaller family size have increased familial tension to care for the sick, elderly, and young children. Shortcomings and benefits of three models are discussed: market based, state interventionist, and mixed. Although not specifically endorsing one model over another, the author concludes that the status quo is untenable and the demographic and economic pressures will encourage discussions about which approach of reconciliation policy to adopt. The current economic downfall has intensified the "crisis of care" as family incomes decrease, public programs are cut, and women increasingly feel greater economic and familial pressure because of the disproportionate percentage of unemployment facing men.

Joslyn R. Muller, Comment, *Haven't Women Obtained Equality? An Analysis of the Constitutionality of Dower in Michigan*, 87 U. DET. MERCY L. REV. 533 (2010).

Dower is a widow's legal right to a life interest in a portion of her deceased husband's estate. Michigan is the only state that maintains a gender-distinctive dower statute, while other states have implemented a gender-neutral dower scheme, held the dower statute unconstitutional and abolished the dower statute altogether, or both. This Comment discusses equal protection considerations and the analysis of the intermediate scrutiny standard—a two-prong test that applies when a law distinguishes on the basis of gender: the law must further an "important governmental objective" and there must be a substantial affiliation between the classification and the achievement of the governmental objectives—in relation to gender distinction in the law and the Michigan dower scheme. Michigan should amend or abolish its current dower statute and follow the example of other states. The historical reasoning behind a dower scheme—to protect a woman's property interest in the event of her husband's death—is no longer applicable in a time of equality between men and women.

Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739 (2010).

In September 2008, Natalie Dylan sold her virginity in a legal manner in Nevada, raising a debate on "taboo trades," or trades in which the good or service exchanged is both legal and alienable, but in which transfer for profit is banned in doing so—for example, selling sex, human eggs (or "oocytes") and surrogacy services. "Taboo trades" attract a large number of suppliers and consumers, but continue to be regarded as socially problematic and in need of strict controls and because of this, many states have enacted anti-commodification legislation, such as price controls in the egg market, or taxes for Nevada brothels or California marijuana dispensaries. However, these commodification constraints have not been successful, and because providers of these products are largely or exclusively female, the structure, regulation and social norms surrounding these markets significantly impact women negatively by constraining their agency, earning power and status. Additionally, the examples given that are subject to significant constraints on normal market operation are often the products of unexamined instincts that fail to withstand more careful scrutiny, and frequently embed class and gender stereotypes. As a result of these affects on supplies, consumers suffer a reduced supply and high prices, and broader social goals are negatively impacted, such as public health, disease control and welfare of children.

Robert Sparrow, *Better than Men?: Sex and the Therapy/Enhancement Distinction*, 20 KENNEDY INST. ETHICS J. 115 (2010).

The trend among bioethics philosophers is to abandon the distinction between therapy and enhancement, ignoring the realities of sexual difference. By explaining the reasons behind this trend, the author illustrates the contrary and unappealing implications of the inevitable female preference, arguing that the distinction should not be abandoned. The distinction hinges on considerations of what is "normal," so the author argues that the distinction should be contingent on a particular biological sex and calls for the acknowledgement that both are normal. The distinction is crucial because what is considered an enhancement in one sex could be considered therapy for another and eliminating the distinction would lead to unlimited improvement of the human species and an all-female species. The importance of dimorphism to the human species shows the importance of the therapy/enhancement distinction and ultimately the abandonment of enhancements.

Rhacel Salazar Parreñes, *Transnational Mothering: A Source of Gender Conflicts in the Family*, 88 N.C. L. REV. 1825 (2010).

Female migrant workers with children, or "transnational mothers," subvert the traditional gender constructs in the nuclear family. Each year the Philippines deploys approximately 1 million migrant workers, the majority of which in recent years have been women; worldwide there is a trend of migrant mothers raising their children from abroad, which forces a shift in traditional gender roles. The author presents information gathered in an eighteen-month study during which the author conducted interviews with members of sixty-nine different families with a parent who is a migrant worker. The physical separation of the mother from the home, and the breadwinner role a migrant mother plays in running the family challenges traditional ideas of mothering, leading to the vilification of migrant mothers in Filipino society. The clash between the image and reality of migrant mothering and traditional mothering is a source of great tension in families with migrant mothers.

Tamara R. Piety, *Onslaught: Commercial Speech and Gender Inequality*, 60 CASE W. RES. L. REV. 47 (2009).

Currently, the advertisement industry is inundated with advertisements featuring women portrayed as child-like sex objects, subordinate to men or unreliable in making key decisions, which in turn leads women to feel anxious. These images have a negative impact on gender equality and are destructive to women's self-esteem and economic potential. The Dove "Onslaught" video—a video in which the audience is bombarded with images of incredibly skinny and large breasted women—is interesting because it seems to take a social stand against such sexist advertising, but in reality is still an advertisement by a corporate entity

whose main objective is to sell its product. The author examines the impact of corporate speech, such as the Dove video, and discusses why if such speech is afforded First Amendment protection, it could result in the inability to discuss the harmful effect of advertisements and diminishment of potential ways to combat sexist advertisements. In essence, the Dove video is nothing but an advertisement aimed as selling the parent company's products, and therefore should not be afforded First Amendment protections, which are more appropriately targeted at true political speech.

HEALTH

Nausheen Rokerya, Note, *Caffeine: The New "Energy" Crisis: The Dietary Supplement Health and Education Act of 1994 and its Implications for Caffeine Regulation*, 75 BROOK. L. REV. 627 (2009).

The Food and Drug Administration's ("FDA") inconsistent regulation of caffeinated products has led to the over-consumption of caffeine by Americans through coffee, caffeine pills, and energy drinks. Most Americans are unaware that too much caffeine can cause substantial harm by leading to caffeine intoxication, addiction, miscarriage, or dehydration from mixing with alcohol or exercise. Manufacturers are not required to list the amount of caffeine in their products and can easily circumvent the seventy milligram per twelve fluid ounces caffeine limit on soft drinks by labeling their products as "dietary supplements," which do not require pre-market approval by the FDA under the Dietary Supplement Health and Education Act. The author proposes a more consistent regulatory scheme , with the FDA conducting safety tests for all products containing more than 300 mg of caffeine, setting a lower threshold that must be met in order to pull a product off the market, and requiring manufacturers of dietary supplements to research what would be a dangerous quantity of caffeine for its target consumer. The author also suggests that the government fund a simple and casual "caffeine awareness campaign" to urge moderation in caffeine consumption before Americans' excessive caffeine intake turns into a real drug problem.

Sana Loue, *Faith-Based Mental Health Treatment of Minors*, 31 J. LEGAL MED. 171 (2010).

While there may be modern medical treatments for mental illness, many parents choose religiously mandated methods to handle their children's issues, even if these methods are far from helpful. These methods—illustrated through two real life scenarios—are not necessarily suitable because religious leaders do not have to follow standard procedures that doctors and mental health specialists must follow by law. It is difficult for courts or legislatures to handle these matters because of

legal concerns regarding parental and religious choices and their tensions against the Establishment Clause of the First Amendment of the Constitution. For religious leaders, it is possible that a breach of fiduciary duty may be shown as long as there is no inquiry into religious belief and the parents are protected in most states in their decision to opt for faith-based methods. The author concludes with a proposal that can protect children and have limited impact on religious liberty by suggesting secular counseling education for religious leaders, repeals of religious treatment exemptions from state child abuse statutes, and legislation that aptly characterizes religiously founded action and inaction on the part of the parents.

Anna Hickman, Note, *Born (Not So) Free: Legal Limits on the Practice of Unassisted Childbirth or Freebirthing in the United States*, 94 MINN. L. REV. 1651 (2010).

"Freebirthing," or the practice of giving birth without the assistance of a midwife or physician, stands on uncertain legal ground in the United States. Although the vast majority of women choose to deliver their babies with the aid of professionals, a small group of mothers—whether due to fear of needless medical procedures, lack of midwives available for home-care, or personal values—forego hospitals in place of unassisted labor. Although there is currently no statute prohibiting freebirthing in the United States, the "state's interest in the life of a viable fetus" and "the generally recognized parental duty to provide necessary medical care for children" are two legal doctrines which may curtail unassisted childbirth and facilitate the criminal prosecution of women who deliberately do so. This note argues that if the state imposed a requirement for women to obtain medical support during labor, not only would it fail to reduce freebirthing, it would drive mothers considering unassisted birth to abstain from prenatal care to avoid prosecution. In order to combat unnecessary harm or death to newborns as a result of unassisted labor, the state should prosecute mothers by invoking the legal duty to provide health care to children, thereby encouraging freebirthing women to educate themselves on after-birth infant care or deliver in the vicinity of a hospital.

James Gerard Eftink, Note, *Mental Retardation as a Bar to the Death Penalty: Who Bears the Burden of Proof?*, 75 MO. L. REV. 537 (2010).

In accordance with the United States Supreme Court's holding in *Atkins v. Virginia*, many states have passed statutes banning the death penalty for mentally retarded criminal offenders. Most states require the defendant to prove that he or she is mentally retarded in order to be exempt from the death penalty; however, three states, including Missouri, do not expressly state whether the defendant or the state has the burden of proving mental retardation. The author analyzes the Missouri case of *State v. Johnson* and argues that the Missouri court's decision in

Johnson ignored the rule of lenity, under which an ambiguous criminal statute must be construed in favor of the defendant. The Missouri statute is ambiguous because it does not expressly provide whether the defendant or the state shall bear the burden of proof, and the rule of lenity should have been triggered in *Johnson*. In holding that the statute "necessarily implies" that the defendant bears the burden of proof, the majority opinion construed an ambiguous statute against the defendant, and therefore its holding is in direct contravention with Missouri's rule of lenity.

Kathy L. Cerminara, *Pandora's Dismay: Eliminating Coverage-Related Barriers to Hospice Care*, 11 FLA. COASTAL L. REV. 107 (2010).

Hospice—a holistic medical program paid for by Medicare—provides terminally ill patients with state-of-the-art medical services to relieve their physical pain, including access to physicians, nurses, drug and medical supplies, and counseling for the patient and surrounding family members. Medicare and Medicaid require that terminally ill patients give up all curative medical treatment before the programs will pay for hospice care, because the purpose of hospice is to comfort a patient during the final stage of life and not to treat the patient in the hopes of a recovery. Consequently, the majority of patients who are not yet ready to give up treatment do not receive the vitally important services from hospice until much too late. Congress should therefore eliminate the distinction between curative and holistic treatment in the law by amending the Medicare statutes in a way that would provide earlier hospice care for terminally ill patients. Under these new statutes, patients would be able to receive curative treatments and also mental health counseling that could allow the patients to accept and come to terms with their unfortunate fate at an earlier time.

Michael W. Cromwell, Comment, *Cutting the Fat Out of Health-Care Costs: Why Medicare and Medicaid Write-Offs Should Not Be Recoverable Under Oklahoma's Collateral Source Rule*, 62 OKLA L. REV. 585 (2010).

Oklahoma courts have not yet determined whether the collateral source rule—providing that a negligent party to a malpractice claim cannot offset its liability just because the injured party has been compensated by a third party—applies to Medicare and Medicaid write-offs. Since the collateral source rule increases malpractice costs by forcing the negligent party to pay despite the fact that Medicare or Medicaid has covered some or all of the medical expenses incurred as a result of the negligence, the author argues that the collateral source rule should not prevent a defendant from introducing into evidence the Medicare and Medicaid write-offs, because disallowing such evidence goes against the state's goal of making healthcare more affordable. This Comment concludes that it is best for Oklahoma courts not to apply the collateral source rule in such circumstances,

so as to prevent plaintiffs from receiving a windfall by having their healthcare costs paid for and then receiving an additional award in damages. A significant percentage of Oklahoma's population cannot afford healthcare, and larger trial and settlement awards increase health care costs. The Oklahoma court should address the issue of allowing write-offs to be admitted as evidence to create legal precedent allowing Oklahoma to achieve its plan of reducing healthcare costs.

Valery Federici, Note, *Genetically Modified Food and Informed Consumer Choice: Comparing U.S. and E.U. Labeling Laws*, 35 BROOK. J. INT'L L. 515 (2010).

Much of the food consumed in the U.S. today contains genetically modified organisms ("GMOs"), but consumers are primarily kept in the dark about which products contain GMOs because the U.S. Food and Drug Administration ("FDA") does not require producers to label products that contain the genetically altered substances. Genetically altering plants and other food substances can lower fungal toxins and pesticides and increase shelf life and crop yields; conversely, though no serious harm has been shown by studies on GMOs, they do present some risks to the environment and human health, including the creation of new allergens and/or toxins. Proponents of GMO labeling argue that consumers have a right to know what they are putting into their bodies, but the FDA maintains that GMOs are not materially different enough from their conventionally grown counterparts to require a specific label. This Note examines the European GMO labeling system and proposes a framework for GMO labeling in the U.S., taking some portions of the European system and introducing original ideas as well. The proposed labeling system takes into account the economic interest in continuing growth of the GMO industry—which could be thwarted by consumers choosing not to purchase products with a GMO label—and the monetary costs of a new labeling rubric, but focuses mostly on the need for informed consumer choice as the ultimate justification for a GMO labeling system in the U.S.

Amy Foster, Note, *Critical Dilemmas in Genetic Testing: Why Regulations to Protect the Confidentiality of Genetic Information Should Be Expanded*, 62 BAYLOR L. REV. 537 (2010).

There are approximately 1,000 genetic tests currently available that allow doctors to better diagnose and confirm diseases amongst patients, including the ability to predict, and thus prevent, the risk of contracting such diseases in the future. In 2008, Congress enacted regulations to prevent genetically based discrimination by protecting a patient's confidentiality in situations where patients who have a genetic mutation apply for health insurance but do not disclose such information. Despite these state and federal regulations, the newly enacted laws

have limited applications, are generally useless in the majority of situations, and are not uniform across the individual states. One common example of a useless regulation includes state courts that require physicians to disclose their patients' genetic information to the patients' relatives. The author concludes that these federal and state regulations must be uniform and must encompass greater penalties for violations of patient confidentiality in order to deter such actions from occurring in the future.

Caitlin O'Connell, Note, *Return to Sender: Evaluating the Medical Repatriations of Uninsured Immigrants*, 87 WASH. U. L. REV. 1429 (2010).

Medical repatriations—the practice of hospitals transporting impoverished, uninsured immigrants to medical facilities outside of the U.S. to diminish the financial cost owing to their unreimbursed care—may prove disastrous to both the immigrant as well as the hospital. Medical repatriations are a response to the fact that immigrants in the U.S. have limited access to public or private insurance and legislation has forced hospitals to provide such uninsured immigrants with necessary care. Federal immigration laws—such as Personal Responsibility and Work Opportunity Reconciliation Act—and health care laws—such as Emergency Medical Treatment and Active Labor Act—have converged to increasingly burden hospitals with mandated uncompensated care and thus have led to the emergence of medical repatriations as a cost-effective response. While immigrants are plagued with harmful health consequences, damaging immigration consequences, separation from family and loss of livelihood, hospitals may also suffer from a breach of federal discharge requirements, tort liability for false imprisonment of the immigrant and violations of due process under the Fourteenth Amendment. Although no conclusive answer awaits repatriations, the author suggests starting with a mandate of a meaningful informed consent, which will guard hospitals from liability and protect immigrants by conveying to them the consequences of repatriation.

Elliott Schwalb, *Reconsidering* Makin v. Hawaii*: The Right of Medicaid Beneficiaries to Home-Based Services as an Alternative to Institutionalization*, 26 GA. ST. U. L. REV. 803 (2010).

The U.S. Supreme Court's decision in *Olmstead v. L.C.* held that states cannot restrict health services for disabled individuals to institutional settings. However, the enforcement of this decision has been frustrated by *Makin v. Hawaii*—a federal district court ruling that provided states may limit the amount of people allowed into a waiver program in Medicaid—since it effectively prevents many individuals from being able to receive Medicaid outside of institutionalized settings. The author argues that *Makin*, though supported by subsequent judicial

decisions, was incorrect as the Centers for Medicaid and Medicare Services ("CMS")—the federal agency that runs the Medicaid program—was not authorized by Congress to allow such limits to be created. *Makin* came to the incorrect conclusion because it improperly gave the CMS deference on this issue when there was no actual or implied intent in the statute for such limits to be imposed on the waiver program. Every individual who qualifies should have the choice to be in the program and receive care outside of an institutionalized setting.

Devon E. Winkles, Comment, *Weighing the Value of Information: Why the Federal Government Should Require Nutrition Labeling for Food Served in Restaurants*, 59 EMORY L.J. 549 (2009).

Obesity in the U.S. is a major issue that can cause numerous health-related problems such as heart disease, cancer, type 2 diabetes, high blood pressure, high cholesterol, and strokes. In order to begin the fight against obesity, steps need to be taken through the implementation of a nation-wide law requiring restaurants to disclose certain nutritional facts such as calorie count, portion size, and grams of saturated fat plus trans fat and carbohydrates. These facts should be displayed on the menu or on boards in the restaurant—not solely upon request or on a special menu—because studies have shown that when Americans are given a choice between two meal options, they are more likely to choose the healthier one. For example, Kellogg Company sales increased for high-in-fiber cereal after they marketed the cereal as a potential cancer preventer. Although there are downsides to the purposed rule—such as restaurants may switch to artificial sweeteners in order to keep calories down and due to specialized orders the calorie count may not be accurate—these reasons do not overshadow the need for an across the board requirement for states to give citizens proper nutritional information, which may enable them to make healthier choices and in turn combat obesity.

HUMAN RIGHTS

Peter Margulies, *Putting Guantanamo in the Rear-View Mirror: The Political Economy of Detention Policy*, 32 W. NEW ENG. L. REV. 339 (2010).

In May 2009, President Obama announced a one-year deadline to close the Guantanamo Bay Detention Center; this deadline has come and gone and yet the facility still remains open. Congress viewed the decision as rash and ill informed because the Administration did not conduct a thorough review of detainee law and policy before announcing the deadline. Because the President did not take into account the values of efficiency, equity, and accuracy—particularly over the fear of preventing false-negatives—Guantanamo did not close on time. The author analyzes the prospects of closing Guantanamo by looking at the efficiency, equity,

and accuracy concerns and examining how the President has behaved since the closing announcement was made. The author concludes that a blended approach, where a small group of confirmed dangerous terrorists remain at Guantanamo and the rest of the detainees are transferred to special facilities in the United States and abroad, is the most likely resolution of the problem.

Victoria Hayes, Note, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 CHI.-KENT L. REV. 1105 (2010).

This Note examines the sharp increases in host city demands for prostitution during world sporting events, and their relationship to simultaneous increases in human trafficking for sexual exploitation. Empirical data on trafficking is scarce, but international instruments, national policies on prostitution, and observations on recent World Cup and Olympic games suggest that even if world sporting events do not lead to a flood of sex trafficking, they are still opportunities for host countries to revise and refine their anti-human trafficking strategies. The author looks specifically to approaches taken by Canada and South Africa. Both countries were confronted with morally driven calls to legalize prostitution from interest groups concerned about increases in human trafficking. No matter what domestic policy is accepted regarding the criminalization of prostitution, world sporting events represent a unique international opportunity for host countries to legally define and demonstrate their commitment to combat trafficking.

Janie A. Chuang, Note, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627 (2010).

Migrant domestic workers are often discriminated against because of gender, class, race, nationality and immigration status. The "push-factors" of emigration from poorer countries and the "pull-factors" of wealthier destination countries contribute to an alienating sociological perception of migrant workers. This social attitude is compounded by the tendency for domestic work to be considered informal labor, which is not regulated by destination countries. The author focuses on a case study of migrant domestic workers trafficked into the United States by foreign diplomats, which illustrates the legislative failure to protect domestic workers from the abuse of power. As a result, exploiters remain unaccountable for their mistreatment of migrant workers.

Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010).

Inherent contradictions materialize when nations embrace the goal of protecting trafficking victims while at the same time enforcing a severely limiting immigration policy. Several tensions arise from these paradoxical policies: first, anti-trafficking advocacy fuels the discourse that drives severe immigration policies, and second, growing attention to the trafficking issue has coincided with and justified the increasing dependence on the criminal justice system to regulate migration. The Trafficking Victims Protection Act (TVPA)—which allows unauthorized migrant victims to obtain T-visas in order to come forward to report and seek protection from trafficking—has been severely restricted due to conflicting immigration polices. Although the intent of the TVPA is to protect trafficking victims, the ability of public officials to use the tools of the TVPA to assist them is limited by the more powerful aims of immigration enforcement. Therefore, the government should either (1) increase the legal understanding of the behaviors that fall into the scope of trafficking to include more of the exploitations that migrants endure in a time of unprecedented immigration enforcement; or (2) reevaluate policies that have little impact on enhancing border protection yet cause severe marginalization of all migrants, including trafficking victims.

Alana Chazan, Note, *Good Vibrations: Liberating Sexuality From the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263 (2009).

The commercial regulation of sexual devices—primarily, state obscenity statutes that define specific items including dildos and vibrators as obscene—violates Fourteenth amendment due process rights to sexual freedom and privacy. In 2008, using the Supreme Court's decision in *Lawrence v. Texas* the Fifth Circuit found that Texas's obscenity statutes were unconstitutional. However, this decision conflicted with the Eleventh Circuit's holding on the issue in *Williams v. Morgan*. The circuit court split may cause the Supreme Court to decide whether *Lawrence* is controlling in substantive due process cases. This article discusses the past, present and future legal challenges related to commercial regulation of sexual devices, and concludes that because regulation stems from the historical suppression of female sexuality, this history must be used to frame due process arguments against such regulation.

Abram L. Seaman, Note, *Permanent Residency for Human Trafficking Victims in Europe: The Potential Use of Article 3 of the European Convention as a Means of Protection*, 48 COLUM. J. TRANSNAT'L L. 287 (2010).

Article 3 of the European Convention for Human Rights ("ECHR") and Fundamental Freedoms offers human trafficking victims living in Council of Europe nations a potential way to avoid deportation to their home countries and gain asylum in their destination country, after they have been denied residency

under the domestic laws and through other means. Historically, the rights of human trafficking victims have been ignored and efforts have largely focused on the capture and prosecution of their traffickers. The victims are often left without protection and are deported to their home countries where they will potentially be re-victimized through alienation from society and re-trafficking. The author addresses the shortcomings of the protections available and argues that the plight of the victims could be addressed through the use of Article 3 of the ECHR which makes it easier for victims to find protection because determinations made by the European Court of Human Rights are generally more flexible and objective than domestic courts. Article 3 therefore, provides an additional avenue for human trafficking victims to seek asylum after all other methods have been exhausted.

James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

Two approaches to antislavery, which can be applied to human trafficking, have developed under the Thirteenth Amendment of the United States Constitution: "prohibition" and "free labor." This article discusses the strengths and limitations of both approaches and applies them to the problems of immigration and sex trafficking, and concludes that integrating these approaches provides the most effective attack against slavery and human trafficking. Legal prohibition as applied to human trafficking is important in defining unwanted activity, punishing perpetrators and assisting victims. However, because legal prohibition focuses on lower-level operators instead of higher-level beneficiaries of slavery, it is costly as far as resources and human rights externalities and it does not guarantee these free slaves access to jobs, thus making them vulnerable to slavery once again. On the other hand, the free labor approach focuses on the workers, providing them with rights sufficient to either attain economic independence or to pressure employers out of servile employment, requiring a smaller amount of resources and focusing on creating sustainable alternatives to slavery.

Silas W. Allard, Comment, *Casualties of Disharmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System*, 24 EMORY INT'L L. REV. 295 (2010).

The European Union's Common European Asylum System is struggling in its effort to find accord among member states in its commitment to refugees seeking asylum. The two pieces of legislation responsible for this deficiency are the Council Directive 2004/83 ("Minimum Qualifications Directive" or "MQD")—which sets minimum qualifying standards for asylum—and Council Regulation No. 343/2003 ("Dublin II"), which deals with the procedures of transferring applicants between member states. When combined with the MQD, Dublin II may cause an

asylum applicant who would qualify in one member state to be transferred to a different member state where she may not qualify and risk returning to persecution. To remedy these shortcomings, the European Union has considered alternative avenues that may be taken including having all its member states under a singular asylum procedure as opposed to varying standards. While the author celebrates the European Union's remedial action to the MQD, she is concerned that asylum applicants will still be preempted because of Dublin II and offers two alternatives. First, the European Union should consider suspending Dublin II until the disharmony of standards under MQD is rectified, and to allow applicants who were denied by Dublin II a second review in a different member state with terms that will be more favorable to the applicant.

Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L. REV. 803 (2010).

In regulating the war on terror, it is disputed whether international human rights laws should govern rather than the laws of armed conflict. The law of armed conflict dates back to ancient societies such as the Roman and Chinese empires but began to be put in written form in the mid 1800s and is still being developed today. International human rights law, on the other hand, originated as part of the 1948 Universal Declaration on Human Rights and was not traditionally meant to apply in times of war. This article describes how there is current confusion over which doctrine should apply in warfare where civilian human rights is at issue—such as the current war on terror—and specifically analyzes which doctrine should control a recent mission to kill a suspected al Qaeda leader. The authors conclude that it is unwise for international human rights law to bear on this specific mission and wartime conflicts in general because the law of armed conflict has a history of international compliance, whereas international human rights law does not and furthermore the international human rights law doctrine was originally conceptualized solely as a peace time doctrine.

Katherine Scully, Note, *Blocking Exit, Stopping Voice: How Exclusion from Labor Law Protection Puts Domestic Workers at Risk in Saudi Arabia and Around the World*, 41 COLUM. HUM. RTS. L. REV. 825 (2010).

There is an international problem of abuse and exploitation of domestic workers—many of whom are female migrants—because they are not protected by labor laws. Domestic workers are often trapped in their employer's home and under paid, and the most effective way to remedy these injustices is for the international community to extend legal protection through labor laws. The author utilizes Saudi Arabia—a country with a very high number of migrant workers—to illustrate such abuses including isolation of workers and reduced wages, and to

suggest improvements that should be made in order to afford greater protection to workers. The widespread abuse and lack of rights cannot be mended by use of the "exit, voice" theory, because Saudi Arabia's legal system does not allow domestic workers to speak out, as the country isolates employees, restricts their communication options, and has a "kafala system"—Saudi Arabia's immigration policy that disallows workers from leaving the country without their employer's permission. Saudi Arabia's annex to its 2005 labor law is not a sufficient panacea to the persistent human rights violations of its domestic workers, and it should be amended to take into consideration the position of migrant domestic workers.

Payal Shah, *Uterine Prolapse and Material Morbidity in Nepal: A Human Rights Imperative*, 2 DREXEL L. REV. 491 (2010).

Despite the Nepalese Supreme Court's decision in *Prakash Mani Sharma v. Government of Nepal*, acknowledging that a high rate of uterine prolapse—a condition where a woman's uterus falls or slides out of its normal position and into the vaginal canal—may constitute a human rights violation, the Nepali government has failed to institute corrective policies and have instead scaled back programs treating this serious condition. According to a 2006 survey, more than 600,000 Nepali women suffer from a form of uterine prolapse and nearly 200,000 need immediate surgery. Though this condition affects 2-20% of women reproductive age worldwide, studies estimate that as many as 51% of uterine prolapse cases in Nepal occur in women between the ages of twenty and twenty-four; the author argues this is indicative of the governments' failure to address what can be a preventable or treatable condition. Human rights bodies must intervene, by including the issues of maternal morbidity and uterine prolapse in the upcoming meeting of the Committee on Economic, Social and Cultural Rights, and include recommendations on these issues in Human Rights Council reports. By strengthening awareness of this condition and governments' obligations to protect human rights, advocacy bodies can play an important role in encouraging officials to recognize the *Sharma* decision and reduce the rate of uterine prolapse in Nepali women.

Elizabeth K. Tomasovic, *Robbed of Reproductive Justice: The Necessity of a Global Initiative to Provide Redress to Roma Women Coercively Sterilized in Eastern Europe*, 41 COLUM. HUM. RTS. L. REV. 765 (2010).

Although the practice of coercively sterilizing "undesirables" in Central and Eastern European officially ended with the fall of Communism, hundreds—if not thousands—of Romani Gypsy women claim to have been sterilized since then. While the Czechoslovakian and Slovakian constitutions, criminal laws, and parliamentary acts should in theory prohibit coercive sterilization, this article

argues that there are social, political, and pragmatic factors that prevent the Romani from accessing the protections afforded by domestic laws. According to the author, the key to overcoming these barriers is through an effort led by non-governmental and international organizations because they are potential avenues for relief. As international organizations are concerned, the United Nations Committee on the Elimination of Discrimination against Women offers Romani women who were allegedly coerced into sterilization the best avenue for redress because of the Committee's procedural and substantive advantages, including a lack of a time limit for filing a complaint and case precedent in favor of compensating victims of coerced sterilization. Non-governmental organizations are also essential because in addition to conducting investigations, interacting with the United Nations, and raising global awareness to the plight of these women, they encourage domestic governments to set up a mass compensation fund to make amends for acts of wrongdoing.

Iskra Uzunova, Note, *Roma Integration in Europe: Why Minority Rights are Failing*, 27 ARIZ. J. INT'L & COMP. L. 283 (2010).

The current European attempt at integrating the Roma into the surrounding society is inadequate because it fails to address major issues occurring in the Roma world such as anti-Gypsyism and mutual mistrust between Roma and non-Roma. A recent policy adopted by Italian authorities aimed at fingerprinting Gypsies who lacked valid identification papers was at first not supported by the European Parliament, but after a second look, the European Commission found there was no evidence of discrimination against the Gypsies. The author first explores Gypsy law and history, which has evolved to insulate Gypsies from the rest of society, then explores anti-gypsy sentiment to establish the disconnect that exists between Gypsy culture and Non-Gypsy culture. Societal attitudes are more important than minority rights legislation in enacting a change and norm-internalization is important in changing the European landscape. Norm-internalization is when legal norms take the form of social norms, and this process could shed light on the interactions necessary to provide the meaningful dialogue needed to improve the relationship between Roma and non-Roma in Europe.

LGBT RIGHTS

Haven Ward, *"I'm Not Gay, M'kay?": Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739 (2010).

Courts should hold that the erroneous identification of someone as a homosexual is non-defamatory as a matter of law. When courts allow the false accusation of homosexuality to serve as the basis for a defamation claim, they

judicially label homosexuality as undesirable and endorse homophobic viewpoints. That some plaintiffs might be without legal recourse does not require the courts to hold such statements as defamatory. Instead, when determining whether a statement is defamatory, courts must assess the public policy implications of such a determination. Holding that the false imputation of homosexuality is an actionable defamation claim contravenes the public policy of intolerance for hostile discrimination, and the importance of condemning discrimination against homosexuals far outweighs the potential harm to a plaintiff who may have no legal recourse for being falsely labeled as a homosexual.

John Parsi, Note, *The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497 (2010).

The United States currently lacks a uniform system to recognize post-operative transsexuals' acquired sexual identity, leaving it up to states to decide if and how to change an individuals' birth certificate. States that fail to recognize transsexuals' acquired sexual identity violate the due process clause of the Fourteenth Amendment. The author discusses the problems of gender recognition in the United States, describing the systems in place among the states and also the evolution of similar systems in the United Kingdom and the European Court of Human Rights ("ECHR"). Forty years ago, sexual identity was legally fixed at birth in the U.K., but as a result of litigation through the ECHR, the U.K. now recognizes post-operative transsexuals' acquired sexual identity for the purpose of marriage. The author explains how the United States could adopt the U.K.'s emerging sex equality system—which acknowledges non-recognition of acquired sexual identity as discrimination—in order to resolve the state split over recognition of changed sex and possibly elevate the issue from state to federal courts.

Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMM. LAW CONSPECTUS 349 (2010).

While there has been a progressive shift in attitudes toward homosexuality, the portion of society that objects to same-sex orientation remains large enough that falsely labeling an individual as homosexual could still cause undue reputational injury. Current events and entertainment programming demonstrate both increasing acceptance and continued antipathy towards homosexuals. While courts are sometimes willing to stretch defamation per se to include circumstances not anticipated in the common law understanding of the term, courts have differed as to whether a false imputation of homosexuality constitutes defamation per se. If a considerable segment of society demonstrates intolerance for a particular group,

our legal system should not declare that associating someone with that group is insufficient to cause reputational harm. Refusing to recognize that an extensive portion of society still treats homosexuals with the obloquy, ridicule, and contempt that defines defamation per se will not eliminate that prejudice from reality.

Nicole LaViolette, *UNHCR Guidance Note of Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary*, 22 INT'L. J. REFUGEE. L. 173 (2010).

While the United Nations High Commissioner for Refugees ("UNHCR") Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity provides an important interpretative guide for decision makers tasked with deciding such claims, it should not be used as the only available resource for refugee claims based on sexual orientation and gender identity as provided by the 1951 Convention. However, the Guidance Note establishes that sexual minorities encounter a specific set of problems when seeking refugee status and this is particularly important because the international community has been slow to recognize the human rights of sexual minorities. Use of the Guidance Note as the sole interpretative tool is problematic because it fails to thoroughly deal with state protection, challenges on convention grounds, bisexuality and intersexuality, the availability of objective documentation, and the distinction between discrimination and persecution. The reason for the gaps in the study is because the Guidance Note was non-consultative—it did not include key stakeholders on the issue in its process, such as organizations working on LGBT issues, academic scholars in the field, or tribunal experts familiar with such claims. Nevertheless, despite all of its flaws, the Guidance Note is an important tool for refugee claims based on sexual orientation and gender identity, and the UNHCR is taking steps for its promotion and advocating for its implementation, as well as spreading awareness of the issues surrounding sexual orientation and gender identity.

Katrina McCann, Comment, *Transsexuals and Title VII: Proposing an Interpretation of* Schroer v. Billington, 25 WIS. J.L. GENDER & SOC'Y 163 (2010).

While the sex stereotyping theory set forth in *Schroer v. Billington* is useful, an explicit protection for transsexuals is necessary under Title VII to encompass all transsexual individuals. In this case, Diane Schroer filed suit in federal court when her job offer to become a terrorism specialist for the Library of Congress was rescinded after she informed the employer that she was about to go through sex reassignment theory to become a woman. The United States District Court for the District of Columbia concluded that there was a Title VII violation under two theories—sex stereotyping, discrimination based on failure to conform to a specific sex, and a literal reading of the statute. This article clarifies the phrasing used in

the court's decision—that Schroer was discriminated against because she intended to change "legally, culturally, and physically, into a woman." These phrases are explored, addressing the issue of how much change in these three categories is needed for an individual to qualify for the literal protection under Title VII. In broadening this literal violation of Title VII to emphasize cultural aspects, more transsexual individuals can claim discrimination under the statute without necessarily having to undergo sex changes, which may be costly.

MARRIAGE

Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348 (2010).

The existence and meaning of a constitutional right to marry is the subject of fervent debate and controversy. In 1942, the Supreme Court in *Skinner v. Oklahoma* struck down a state eugenics law that forced the sterilization of criminals with multiple felony convictions. In its opinion, the Court, unprompted, articulated a constitutional right to marry. This article explains this dictum in light of ongoing public debate about marriage as a constitutional right. The author concludes that the nature of the Court's discussion of marriage has the potential to sever the relationship between marriage and sexual freedom.

Robert E. Rains, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, But Who Am I to Do So?*, 64 U. MIAMI L. REV. 809 (2010).

This article examines the controversy surrounding marriages officiated by ministers of the Universal Life Church ("ULC"), and offers a solution for legislatures to avoid having to define what constitutes a legitimate religion. The ULC, founded by a man in his garage in California in 1959, does not require its ministers to receive any kind of theological training, and today will essentially ordain anyone as a minister online through its website. The author describes the differing responses of state courts and legislatures to ULC weddings—including state statutes dictating the solemnization and registration of marriage—and explains the public policy problems that these different laws create. The author argues that while the state has a legitimate interest in marriage licensing and registration, as both are effective ways to ensure certain standards are maintained regarding marriage—like preventing first cousins from marrying—ultimately whoever performs the marriage ceremony is irrelevant. Thus, states should avoid strict rules regarding who may solemnize a marriage.

Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J.L. GENDER & SOC'Y 1 (2010).

The ability of individuals to marry has traditionally been limited by the state based on various factors such as age, race or familial relationship. Difficulties arise when determining whether or not a state is compelled to recognize a marriage performed in a sister state when that marriage would be invalid in its own borders. This issue will most likely come before the U.S. Supreme Court with regards to same sex marriage. This article outlines the ways in which state courts determine when to recognize a non-forum state marriage and the federal constitutional constraints—such as due process and equal protection guarantees—placed on a states' ability to refuse to recognize a valid sister state marriage. The analysis concludes that without a compelling state interest to justify denial of a sister state marriage, state courts should enforce such unions, and therefore, most likely same sex marriages in one state will be recognized in other states.

PARENTING

Sarah E. Kay, Note, *Redefining Parenthood: Removing Nostalgia from Third-Party Child Custody and Visitation Decisions in Florida,* 39 STETSON L. REV. 317 (2009).

According to Florida courts, for legal purposes related to custody and visitation, the true parents in a family can only be the biological or adoptive parents, and while this analysis is derived from religious, historical or constitutional premises, it is far more restrictive than any of the foundations on which the courts base their interpretation. In society today, the typical family composition has changed to include stepfamilies, extra-marital cohabitation in hetero- and homosexual relationships and greater involvement of grandparents. The law must not be stagnant; it must change and develop so that it outlines the behavior that society deems acceptable. The Florida legislature should alter its interpretation of a typical family and implement a statutory construction that is more reasonable in today's society and the state's judiciary must enforce this legislation. The new legislation should be derived from the United States Supreme Court's expansive interpretation of family, which includes a consideration of what is in the best interest of each child, and the role of third parties in fulfilling parental functions in the child's life.

Melissa B. Jacoby, *Credit for Motherhood*, 88 N.C. L. REV. 1715 (2010).

The social pressure to become parents even in the face of infertility has opened the door to a wide variety of financing options available to those willing to

become parents at any cost. With the growing number of generic and specialty consumer credit markets providing finance options for aspiring parents struggling with fertility, the parenthood "market" has created incentives for lenders to influence parenting decisions. Non-profit, mission-oriented lenders use low-cost lending to promote certain social missions such as the adoption of specific types of children, the expansion of particular religious practices or the promotion of certain values in marriage. For-profit lenders have incentives to promote family building because it can build brand loyalty—an example is "Going Home Barbie", a doll distributed by Mattel for no charge to new adoptive parents who stay at a specific hotel in China—and the actual "production" of new consumers. These incentives result in increased marketing of motherhood to women of all socioeconomic statuses who may be ambivalent about becoming parents, and who may decide to participate in a fertility regime because of the growing accessibility.

Marissa Wiley, Note, *Redefining the Legal Family: Protection the Rights of Coparents and the Best Interests of Their Children*, 38 HOFSTRA L. REV. 319 (2010).

For gay and lesbian couples with children, the non-biological parent is often viewed by the law as a "third party" to the parent-child relationship—despite the intention of the couple to have a joint parental relationship—and when the adult relationship is dissolved this can result in the co-parent without legal recourse to assert their parental rights. Courts across the United States have tried to morph existing doctrines to provide these rights, such as allowing second-parent adoption, giving power to co-parenting agreements or judicially declaring the second parent a de facto parent, which gives the co-parent legal standing. However, barring any statutory action creating same sex marriage, civil unions, domestic partnerships or third party parental statutes, gay and lesbian co-parents' legal standing remains at the whim of the courts. In New York, non-legal parents must depend on unreliable doctrines like second-parent adoption, in loco parentis plus equitable estoppel arguments, and the recognition of out-of-state same sex marriages to provide non-legal co-parents with legal rights. New York needs to examine other options to better protect children in non-traditional families and should provide non-legal parents who decide to raise a child with their appropriate rights.

Nichole Walsch, Note, *Fundamental, But Not Fundamental Enough: Missouri's Balancing Test in the Area of Parental Rights*, 75 MO. L. REV. 641 (2010).

The Missouri Revised Statute Section 452.455.4—requiring a parent in child support arrears of more than $10,000 to post bond before a previous custody order is modified—was found in *Weigand v. Edwards* to be in accord with procedural

due process. In rejecting the equal protection and due process claims brought by the parent in arrears, the Supreme Court of Missouri failed to apply a more rigorous strict scrutiny analysis, which the author contends was a misapplication of the law because the statute was not narrowly tailored to Missouri's interest. Such a shift from typical due process and equal protection analysis, which involves intermediate scrutiny at the very least, in favor of a balancing-of-interests test places the state's interests on equal footing with the parents' interests. Furthermore, in light of case law interpreting the open courts provision of the Missouri Constitution, which guarantees a measure of access to the judicial system, the procedural aspects of the statute should have been analyzed. Had the court done so, it would have held the statute unconstitutionally impedes access to the courts, since the statute's restriction on access to the courts fails to meet the Missouri Supreme Court's arbitrary and unreasonable standard.

RACE AND GENDER

Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. REV. 1687 (2010).

Race-based pricing in adoptive processes is a deeply troublesome issue that implicates racial-equality norms. There are three means of adoption in the United States: (1) by accessing the public child-welfare system—for children who have been removed involuntarily from birth parents; (2) by working with a for profit or not-for-profit non-governmental organization to organize a voluntary adoption from birth parents, or (3) by arranging an independent adoption directly with birth parents. Substantially more white adults enter the formal private adoption process, whose demand for white infants exceed supply, and because the laws regulating private adoption grant the organizations discretion in how fees are set, there are higher charges for white babies. Despite the passage of laws that prohibit the delay or denial of a foster or adoptive placement based solely on a child or adoptive family's race, and make it unlawful for organizations receiving federal funds to consider race in any way in making placement decisions, there is still a disproportionate representation of black children in foster care, and these pieces of legislation have not impacted race-based pricing, especially because they do not affect private organizations. In the absence of a regulatory scheme that does anything other than set broad parameters within which organizations may set their own fees, the organizations can hardly be faulted for maintaining a race-based fee structure with the goal of maximizing profit, and as such, notions of black inferiority, the commodification of infants, and the reinforcement of the notion of whiteness as a property right is likely to continue.

William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK. L. REV. 667 (2009).

"Saggy" pants fashion involves wearing pants below the waist so that underwear and/or skin is exposed. Many communities view this style as a symbol of gang membership and therefore have passed laws that criminalize the wearing of saggy pants. These municipal ordinances have created controversy because many believe they are racist in nature—the majority of saggy pants wearers are minorities—and that they violate the First Amendment right of free expression. This note analyzes the First Amendment principles that are involved in saggy pants laws that target individuals that do not have exposed skin. Because the government does not have much of an interest in regulating expressive clothing, the author concludes that Saggy Pants Laws represent an imposition on freedom of expression.

Jonathan R. Alger, *From Desegregation to Diversity and Beyond: Our Evolving Legal Conversation on Race and Higher Education*, 36 J.C. & U.L. 983 (2010).

The discussion about race and its role in higher education—particularly in college and university admissions—has always been contentious. College admission boards' decisions regarding their applicant pools have long-lasting consequences for the rest of society. In our knowledge-based economy, higher education is an indispensable tool for achievement in many different fields and is the gateway to success. This article traces the development and changes in legal rationales regarding the use of race-conscious measures in higher education, from the need to provide equal access to higher education to all members of society to the educational benefits of diversity for students of both minority and majority classes to the economic, rather than purely educational, rationale for diversity in higher education. The author suggests that while much progress has been made in reducing racial inequalities in education, obstacles to equal opportunity continue to exist, and that in an era of unprecedented globalization, we must find a way to approach these issues confronting race and higher education in a meaningful and constructive way.

Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Towards Desegregation*, 36 J.C. & U.L. 945 (2010).

This article traces the evolution of desegregation in colleges and universities in the South and adds personal reflections from the author. From mandated segregation in educational institutions to statewide recognition of equal educational opportunity regardless of race, the author highlights desegregation as the most

important change in higher education law over the past 50 years. The author begins with an analysis of pre-*Brown* graduate and professional school cases and follows with an explanation of the extension of *Brown's* holding to higher education institutions. The impact of Title VI of the Civil Rights Act of 1964 is clarified through the cases that followed which examined the scope of the State's duty to desegregate under Title VI and the Equal Protection Clause. The finding that the State has an affirmative duty to integrate and a discussion of this finding's subsequent impact leads to the author's conclusion that while much progress has been made there is still areas outside of education in need of improvement.

I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010).

The sexualization and racialization of rape have led to the presumption of criminal intent to commit rape in a situation involving an accused black male defendant and a white female complainant, which influences the outcome of interracial rape cases. With a focus on the Alabama Supreme Court decision of *McQuirter v. State*, the author analyzes how historical social conditions under "white letter law"—a term coined by the author to describe the influence of racial considerations and its effects in determining burdens of proof and persuasion and presumptions—influence past and current discrepancies in the "black letter law" of rape. This article provides an overview of the black letter law of rape, discusses the issue of mens rea in rape cases, provides information regarding feminist reforms and analyzes the possibility of whether the defendant in *McQuirter* was an unintentional rapist. Largely conceptualized by the evolving law of rape and social conditions, the sexualization and racialization of rape have unfairly impacted the lives of many black females and black male defendants. In order to uphold fairness and ameliorate such discrepancies, it is necessary for society to apply the law of rape that is free from stereotypes.

RELIGION

Todd E. Pettys, *Sodom's Shadow: The Uncertain Line Between Public and Private Morality*, 61 HASTINGS L.J. 1161 (2010).

The divine accountability thesis proposes that both religious and secular people believe there is a link between morality and public policy so strong that the law should usurp citizens' rights to make certain moral decisions for themselves. History is rife with examples of varying cultures and religions viewing their geopolitical welfare as being directly related to the moral stature of the community, a position that remains prevalent in the United States among those who view the country as specially protected by God, even while the Constitution's establishment

clause prevents government from using the thesis as a justification for its actions. Even political liberals who ostensibly believe that men are answerable for their own sins, support community decision-making through integration theory—a secular adaptation of the divine accountability thesis—as a way of creating strong geopolitical identities where everyone is invested in the success of the whole. Religious citizens agree it is still important to draw a line between public and private morality, and this can best be achieved by using seven key questions that address issues such as harm to others, the conduct's effect on an integrated community, whether the moral judgment is independently defensible, and whether a non-governmental remedy is more appropriate. The idea of moral standards directing public conduct parallel its secular counterpart held by those who believe identity is inextricably tied to community.

Karima Bennoune, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUMAN RIGHTS L. REV. 635 (2010).

Muslim fundamentalist movements challenge international law in the areas of human rights and humanitarian law as evidenced by suicide bombings, discrimination against women, and extraordinary rendition and torture. Despite apprehension and discriminatory attitudes that some may have about these movements, the author advocates fostering a conversation in the international law community about Muslim fundamentalism. The current literature on fundamentalist movements and terrorism consists of simplistic, careful discussions of "cultural sensitivity" and victim's rights, which make it difficult for the international law community to adequately deal with these issues, and undermines Muslim and more local efforts to combat radical movements. International and human rights lawyers must publicly renounce and expose the actions of individuals, groups, and governments violating international law—as they would other human rights violators—and support advocates who do the same. They must also reaffirm their commitment to the universality of basic human rights and correctly apply the existing laws in response to these fundamentalist movements.

Kelleen Patricia Forlizzi, Note, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*, 44 NEW ENG. L. REV. 387 (2010).

President Obama's decision to repeal the "right of conscious" rule takes away incentives for hospitals and pharmacies to protect health care employees who refuse to perform medical procedures that violate their religious beliefs, and demonstrates a growing trend that places a person's equal access to healthcare above healthcare employees' right to practice their religion. The U.S. Supreme

Court stroke down part of the Religious Freedom Restoration Act ("RFRA") in *City of Boerne v. Flores*. Consequently, ten states—Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas—have used their policing powers to enact their own versions of RFRA in order to protect a person's right to exercise his or her religion. This Note argues that health care employees' right to practice their religion is not adequately protected in those states that have not adopted the RFRA, since employment discrimination statutes do not ensure that employees will keep their jobs if they refuse to perform medical procedures that are against their religious beliefs. More states should enact their own versions of RFRA because RFRA's strict scrutiny standard will allow states to choose for themselves whether a person's equal access to healthcare is enough of a compelling interest to allow states to interfere with healthcare employees' First Amendment freedom of religious rights.

Jesse Merriam, *Establishment Clause-Trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence*, 41 COLUM. HUM. RTS. L. REV. 699 (2010).

National security since September 11th has incited religious tensions, but surprisingly little scholarship has been devoted to the applicability of the Establishment Clause abroad and as a result, U.S. foreign policy is riddled with uncertainties regarding the constitutionality of its acts. Recognizing that religion poses a significant threat to national security, governmental agencies have come to regard religion as a political vehicle and have funded certain religious initiatives abroad that promote religious tolerance and democratic values. For instance, the Islam and Civil Society Program in Indonesia—implemented by the United States Agency for International Development—provides funding to American-friendly Islamic non-governmental agencies that promote democratic values and couch their messages in religious terms. The author creates a framework—derived from precedent regarding the transnational applicability of the Constitution—locating potential U.S. action into distinct categories to describe when the Establishment Clause applies. The impracticable and anomalous determinations are extremely context-dependent, and so cases falling within intermediate scenarios must be decided on a case-by-case basis.

Peter Zwick, Note, *A Redeemable Loss:* Lyng, *Lower Courts and American Indian Free Exercise on Public Lands*, 60 CASE W. RES. L. REV. 241 (2009).

The conflict between the U.S. government and American Indians over the use and development of public lands has had several implications regarding the Free Establishment Clause and the Religious Freedom Restoration Act of 1993 ("RFRA"). Early free exercise cases brought by American Indian tribes were often

found in favor of the tribes under a strict scrutiny standard. However, an overly broad reading of the U.S. Supreme Court's holding in *Lyng v. Northwest Indian Cemetery Protective Association* has led to a lower success rate for American Indians even though Congress passed the RFRA to codify the strict scrutiny standard. *Lyng* is not properly applied as that case involved a plaintiff who sought to ban all public access to government land of religious importance, whereas most other cases only want to prevent government actions that would cause damage to religious sites. The reasons why the federal courts are more likely to find for the government in such cases is a lack of understanding of the American Indian religions, which involve stronger ties to physical locations than the most western religions, and because there is no separation between church and state in the American Indian communities.

SAME SEX MARRIAGE

Ruth Butterfield Isaacson, Comment, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121 (2010).

Child-centered arguments have influenced marital rights throughout United States history, and now these opinions are shaping the debate over same-sex marriage. Proponents of California's controversial Proposition 8, a ballot proposition that added a same-sex marriage ban to the California Constitution, used images of confused children to promote this ballot initiative. The issue of child-centered arguments is addressed through an analysis of how children were used to argue against interracial marriage in the mid-1990s, and how current activists against same-sex marriage are applying similar faulty arguments. Proponents of same-sex marriage also use child-centric arguments to show that because the marriage provides certain protections to families, same-sex couples should be allowed to marry and these protections to the benefit of their potential children. Ultimately, marriage has an evolving function, and the arguments that are heard in each state on same-sex marriage are an opportunity to reassess the modern purpose of marriage.

SEX DISCRIMINATION

Sonia Goltz, et al., *University Women's Experiences in Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural Approach*, 18 TEX. J. WOMEN & L. 145 (2009).

The current legal and academic regulatory frameworks inadequately protect women who present second-generation discrimination claims, which are subtle and structural forms of prejudice as opposed to overt forms of discrimination. Women

in academia who present second-generation discrimination claims rarely succeed because the current systems of redress are rule based and ill equipped to address structural discrimination. The article uses a study of sixteen plaintiffs who complained of second-generation discrimination in academia, and discusses various difficulties that women face to successfully argue their case. The academic research coupled with the court's structural approach toward discrimination in *Watson v. Fort Worth Bank & Trust*, provides essential resources for courts and institutions to identify and remedy second-generation discrimination claims. Furthermore, employers and attorneys should be agents of change by shifting their attention to structural forms of discrimination.

Maria Herminia Graterol & Anurag Gupta, *Girls Learn Everything: Realizing the Right to Education Through CEDAW*, 16 NEW ENG. J. INT'L & COMP. L. 49 (2010).

One of the obligations taken on by members of the United Nations' Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") involves counteracting discrimination against women in education, yet the failure of CEDAW to engage in the policy processes surrounding the facilitation of formal education is cause for concern. Persistent gender inequality in the educational realm is rooted in patriarchalism, which socializes women to accept their subjugation and prevents challenges to the inequality of the system. Article 10 of the CEDAW prescribes state action to combat this inequality, which should be interpreted to promote gender equality—the securing of materially equal conditions for men and women in an educational context—as opposed to equity, or notions of fairness and justice that may be grounded in notions of patriarchalism that allow inequality to persist. Recognizable information gaps and a lack of political will have contributed to the failure of CEDAW to adequately address gender inequality in education, and consequently a more detailed analysis of the means to achieve the principles set forth in CEDAW is necessary. Beyond the necessary transformation of ideas, values and patriarchal structures, progressive reforms in formal education may be spurred by coordination among treaty bodies in the implementation of an agenda based upon a natural right to education.

Katherine Johnson, Note, *Charting Infertility in the Workplace: An Analysis of* Hall v. Nalco *and the Seventh Circuit's Recognition of Sex Discrimination Based on In Vitro Fertilization*, 59 DEPAUL L. REV. 1283 (2010).

The Pregnancy Discrimination Act ("PDA")—an amendment to Title VII of the Civil Rights Act of 1964—prohibits sex-based discrimination in the workplace, including discrimination based on pregnancy and childbirth. The advent of reproductive technologies means that employers are potentially prohibited from

using reproductive techniques as a source of workplace decisions. Infertility treatments are indistinct as to whether they function to treat medical conditions shared by both sexes or solely women. *Hall v. Nalco*—decided by the Seventh Circuit—was the first decision to hold that infertility is related to a woman's prospect for pregnancy and thus it is a violation of Title VII for an employer to discriminate against a woman based on a surgical impregnation method performed only on women for the goal of getting pregnant. *Hall v. Nalco* led to the conclusion that sex-specific categorization violates Title VII and that even sex-neutral categorization may violate the PDA.

SEX INDUSTRY

Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729 (2010).

Generally, feminist abolitionism tends to advocate the "Swedish model" of policy and legal responses to sex trafficking. This model favors social-welfare policies that help individuals exit and avoid prostitution, public education campaigns designed to change the social norms that support sex trafficking and prostitution, and criminal law reforms penalizing trafficking, pimping, and the purchase of sex, while decriminalizing the sale of sex. While conservative and reactionary forms of abolitionism hold that prostitution is wrong because it challenges existing social norms such as heterosexual patriarchal marriage and family, for feminist abolitionists prostitution is wrong because it harms women. An accurate description of the harms resulting from prostitution must recognize that prostitution harms women both individually and by sustaining and perpetuating patriarchal structural inequality. Feminist abolitionism cites these harms as justification for the criminalization of prostitution without positing them to be inevitable.

Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

The United States plays an important role in both the debate and remedy of international human trafficking, the debate over which has been heavily influenced by the separate but related debate over prostitution-reform. Opinions in the United States are polarized regarding prostitution and anti-trafficking, pitting "neo-abolitionists" who support an outright ban of prostitution against "non-abolitionists", who have differing views of both prostitution and the best policy solution to deal with it. The author analyzes the prostitution reform debates over the past two decades, examining their impact on both domestic and international

anti-trafficking laws and attitudes. Human trafficking and prostitution are complicated issues that will require considering a wide range of factors that create, contribute to and influence them. In general, the neo-abolitionist models are less nuanced, and are therefore less likely to address the causes of trafficking, focusing instead on the consequences.

Emily L. Stark, *Get a Room: Sexual Device Statutes and the Legal Closeting of Sexual Identity*, 20 GEO. MASON U. CIV. RTS. L.J. 315 (2010).

The sexual device statutes in Texas and Alabama—that allowed the private use of sex toys but prohibited their purchase and sale in the public sphere—were overturned on privacy grounds. The decisions stated that preventing the purchase and sale of the devices blocked access and constituted regulation of activity within the privacy of citizens' homes. Although rightfully decided, these cases place unnecessary limits on sexual expression and delegate non-traditional forms of that expression exclusively to the private sphere. The author of this article argues that the judges who decided the sexual device cases missed an opportunity to define the purchase and sale of such devices and their vending locations as protected political speech under the same line of reasoning in such gay speech cases as *Gay Students Organization of the University of New Hampshire v. Bonner* and *Gay Law Students Association v. Pacific Telephone and Telegraph Co.* Such reasoning would allow for a more public conversation and acceptance of non-hetero-normative sexual behaviors and freeing sexuality from its currently private sphere.

SEX OFFENDERS

Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs From Pederasts*, 61 HASTINGS L.J. 1281 (2010).

This note points out that under the current sentencing guidelines, the recommended sentence for a person who had repeated sex with a child would be less than that of a child pornography possessor without a prior record. The United States Sentencing Guidelines are not binding on judges, but Congressional amendments to the Guidelines have increased punishments for child pornography possessors beyond a point recommended by the Sentencing Commission, and have instituted a five-year mandatory minimum. The "moral panic" that led to these increases assumes that possession of child pornography will lead to actual child molestation, which studies have found is not likely to happen. When the Internet is a factor in obtaining child pornography, a typical child pornography possessor may be sentenced in a range meant for more serious offenders, due to the Guidelines' distribution and number of images enhancements, which are easier to meet when

obtaining the prohibited photographs online. Section 2G2.2 of the Sentencing Guidelines should be amended to reduce the recommended sentence for first-time offenders, narrow the definition of distribution to exclude mere possession via a peer-to-peer file sharing program, and adjust the enhancements for the number of images found in the offender's possession to reflect how little effort it now takes to amass a large collection via the Internet.

Isaac A. McBeth, Comment, *Prosecute the Cheerleader, Save the World?: Asserting Jurisdiction Over Child Pornography Crimes Committed through "Sexting"*, 44 U. RICH. L. REV. 1327 (2010).

"Sexting" can lead to prosecution under the Protection of Children Against Sexual Exploitation Act of 1977 ("PCASEA"). Due to the prevalence of sexting—"the practice of sending or posting of sexually suggestive text messages and images"—by teenagers, it has become necessary for federal law to address the issue. The author applies the federal definition of child pornography to sexting, relates sexting to the transportation, distribution, receipt, and possession of child pornography, and concludes that sexting can be prosecuted under the PCASEA. Two approaches would allow the government to prove the jurisdictional requirement: per se-child pornography sent over the Internet automatically proves jurisdiction, and interstate movement, which proves jurisdiction by determining the path that the image traveled to reach its destination. Of these, the per se approach will prevail, since it will apply to offenses after October 8, 2008, and the interstate movement approach will inevitably become obsolete.

Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U REV. L. & SOC. CHANGE 299 (2010).

Though the impetus for most child pornography statutes is legislatures' desire to protect children, an influx of technology made available to adolescents has resulted in several convictions of teenagers stemming from images taken of consensual sexual acts. One side of the argument, as exemplified in the U.S. Supreme Court decision in *Osborne v. Ohio*, puts as much emphasis on protecting the children depicted in pornographic images as it does on preventing those who buy these pictures from causing future harm. However, those who disagree with *Osborne* believe that the trend of prosecuting teenagers who create, and often are featured in, these images arises from a fear of adolescent sexuality, both as an overall concept and as a lead-in to child pornography. These same critics believe that treating teenagers depicted in a consensual image as criminals encroaches upon their right to privacy and First Amendment free speech protections. The author argues that a less strict reading of child pornography laws should be applied when

the minors prosecuted are either the subjects of those images, or engaged in a consensual relationship with the informed, minor subject since these individuals will be viewed as adults in the eyes of the courts, and thus should be treated as such.

SEXUAL ABUSE

Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse In Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705 (2010).

The Eighth Amendment is the primary tool that provides recourse for sexually abused prisoners by allowing them to sue the prison or its officials for failure to protect. The "deliberate indifference standard," which must be proven for a victim to be successful, is based on both the prison official's subjective knowledge of the risk of harm to the inmate, as well as the objectively-determined "substantial risk of serious harm" and inaction of the prison official in responding reasonably to the attack. Through a survey of Eighth Amendment cases, this article demonstrates that the two important questions of whether the prisoner has a right to protection and whether he gave consent to the sexual act are conflated. The Supreme Court's resulting inconsistent application of the deliberate indifference standard can be remedied through mandatory education in sexual abuse and victimology for prison employees and potentially for judges, to better determine when a prisoner is at risk for abuse. Additionally, the Prison Litigation Reform Act, which serves to eradicate prison rape, should be amended to include rape under the umbrella of "physical injury" that an inmate must prove in order to bring an Eighth Amendment action.

SOCIAL CLASS

Shirley Lung, *The Four-Day Work Week: But What About Ms. Coke, Ms. Upton, and Ms. Blankenship?*, 42 CONN. L. REV. 1119 (2010).

The current legal discourse surrounding the reform of working hours does not address the conflicts inherent in the balance of work and family for low-income and immigrant women. Instead, the discussion focuses largely on "reduced hours, compressed work weeks, and other alternatives work schedules" which benefit professional working mothers but do not support women who are poor or employed in low-wage labor markets. As a result, factors such as class, race, and citizenship continue to serve as the dividing lines among various types of work available to women. The author focuses on three seminal cases in order to demonstrate how the work/family discourse should be broadened to encompass the needs of paid laborers who care for others, single-parent families, and women forced into part-

time jobs. These cases help to further promulgate the idea that workers should be able to control their own time, a radical concept in our society.

Catherine M. Reif, *A Penny Saved Can Be a Penalty Earned: Nursing Homes, Medicaid Planning, the Deficit Reduction Act of 2005, and the Problem of Transferring Assets*, 34 N.Y.U. REV. L. & SOC. CHANGE 339 (2010).

In attempting to decrease the amount of federal spending on Medicaid, the Deficit Reduction Act of 2005 inadvertently created a class of deserving senior citizens who will be denied nursing home care due to the ways they have chosen to spend their money. As the only federal program that pays for long-term care, the combination of the rising costs of nursing homes and increases in covered citizens caused the need for stricter requirements to qualify for Medicaid coverage to prevent abuse of the system. The author illustrates the unjust effects of these more stringent requirements through the juxtaposition of realistic hypothetical situations, where the senior citizen who gambles her life savings would still qualify for coverage of long-term care, while the grandmother paying a family member's tuition or medical bills would be denied. The Medicaid system would still be able to distinguish those abusing the system from needy senior citizens even if qualified senior citizens were allowed to transfer assets and maintain a higher standard of living before anticipating the need for a nursing home. The eradication of the presumption that assets are transferred for the sole purpose of qualifying for Medicaid coverage will prevent senior citizens who have given away unrecoverable assets from enduring undeserved penalties that should be reserved for those trying to abuse the system.

WOMEN'S RIGHTS

Dina F. Haynes, *Lessons from Bosnia's Arizona Market: Harm to Women in a Neoliberalized Postconflict Reconstruction Process*, 158 U. PA. L. REV. 1779 (2010).

The Arizona Market—a product of internationally assisted postwar reconstruction, democratization, and market liberalization—was acclaimed for its expansive, cosmopolitan free market; however, the Arizona Market was also where women were being sold and sent to brothels. This article illustrates how postwar reconstruction and politico-economic engineering can harm women by analyzing the creation and evolution of the Arizona Market and its effect on human trafficking. It is unclear whether market liberalization or democratization is a successful component of postwar reconstruction. Rather, the focal point of postwar reconstruction should be securing human rights through effective programs and practices. Such practices should be carried out by individuals in that area that are

mindful of not only their objectives, but also the rights, dignity, physical and mental integrity of women; thereby framing their goals by integrating both components in the process.

Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505 (2010).

Women seeking asylum from persecution under the United States refugee laws should be included under the category of belonging to a particular social group in order to obtain this status. Women have inconsistently been denied the right of protection from persecution due to the inconsistent definitions of what constitutes a particular social group and the differing court interpretations on the matter. The author proposes that women should be included under the umbrella of particular social group by advocating for a "bifurcated nexus approach," which would allow women to claim persecution by both state and non-state actors. This approach follows current case law and proposes the inclusion of gender as one of the grounds for refugee status. The outright inclusion of women under the category of a particular social group, and properly following the decisions of United States courts on the matter is the only way to achieve consistent results and protect these women.

Brenton T. Culpepper, Note, *Missed Opportunity: Congress's Attempted Response to the World's Demand for the Violence Against Women Act*, 43 VAND. J. TRANSNAT'L L. 733 (2010).

The Supreme Court should have upheld the private right of action created under Section 13,981 of the Violence Against Women Act ("VAWA") on the basis that it brought the United States into accordance with its international obligations under both the International Covenant on Civil and Political Rights ("ICCPR") and customary international law ("CIL"). Noncompliance with the goals and obligations under the ICCPR injures the United States' already deteriorating human rights credibility in the international arena. The Supreme Court has continually supported congressional authority to pass legislation which places the United States in compliance with a treaty or CIL, and when Congress ratified the ICCPR it agreed to protect individual rights from being violated by another private individual, including gender-related violence as under Section 13,981 of the VAWA. However, in *United States v. Morrison* the Supreme Court invalidated a victim's private right of action in Section 13,981 by determining that violence against women was a non-economic activity that did not fall under the Commerce Clause or within the purview of the Equal Protection Clause, as the right created was against a private individual rather than the state. Because Section 13,981 provided a private right of action in compliance with the ICCPR, *Morrison* should

have been argued and upheld on treaty power grounds, restoring the United States' credibility in gender-related human rights issues.

Stephanie Hunter McMahon, *California Women: Using Federal Taxes to Put the "Community" in Community Property*, 25 WIS. J.L. GENDER & SOC'Y 35 (2010).

In the early twentieth century, community property states allowed couples to find their way into the lowest federal tax bracket by dividing their community income. Unfortunately this benefit was denied in California because the state refused to honor joint control of community property to California wives—angering feminists who sought to gain marital rights and joint control over their community property. During this time, the federal government had implemented tax obligations on the wealthiest California citizens. Since the feminist regime was not a universally popular movement, these women, seeing an opportunity, linked their cause with the push for tax reductions, which was a much more popular cause among California citizens and thereby increasing support for their cause. In the end, the women's ultimate goal of equal marital and joint property rights was lost to the tax reduction regime and although the California legislature eventually granted the sought-after tax benefits, they did nothing to improve the rights of California wives. By trying to mask their feminist efforts by pushing tax reduction as their goal, their efforts were effectively lost in translation, which were not finally realized for another quarter century.

WORKPLACE DISCRIMINATION AND HARASSMENT

Carolyn E. Sorock, Note, *Closing the Gap Legislatively: Consequences of the Lily Ledbetter Fair Pay Act*, 85 CHI.-KENT L. REV. 1199 (2010).

The Lily Ledbetter Fair Pay Act ("LLFPA")—an amendment to Title VII—addresses the unequal pay scale for men and women in the United States by defining how to determine when an unlawful employment practice occurs for purposes of the statute of limitations, rather than lengthening the existing 300-day timeframe. The LLFPA came about in response to *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Supreme Court ruled a female manager could not bring an action under Title VII because she failed to prove both an unlawful act and a "present discriminatory intent" within the tolling period. Justice Ginsburg led a compelling dissent by arguing the policy benefits of viewing each individual paycheck issued from a lower pay scale as triggering a statute of limitations that could include all previous discriminatory acts, a position adopted by the legislature. Lower courts have already limited the Act's scope based on its opening language, which indicates it is only a remedy in instances of discriminatory pay, despite the

fact that language later in the Act refers to "other practice." Nonetheless, the LLFPA is a success because it addresses *Ledbetter*'s troubling result by incorporating the policies and ideas outlined in its dissent.

Douglas R. Garmager, Note, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a "Hostile Work Environment" Claim Under Title VII*, 85 CHI.-KENT L. REV. 1075 (2010).

Circuit courts are divided on whether a Title VII hostile work environment claim is limited to conduct within the workplace, or if it also includes actions and relationships between employees at work functions or in private spaces away from the office. The legislative history of the Civil Rights Act of 1964 offers little interpretive guidance, as sex discrimination was initially included in the drafting as a failed tactic to make the Act appear scandalous and overbroad, thus its implications for the workplace were never substantively addressed. Absent guidance from the Supreme Court, lower courts have been split, with some acknowledging only acts within the workplace, some focusing primarily on the chain of command in employment, and still others examining if conduct outside the office had a carry-over effect, creating a hostile work environment inside it. Courts would do better to uniformly allow claims including actions outside the workplace, following the standard set in *Parrish v. Sollecito*, which advocates focusing on the relationship between the plaintiff and defendant rather than where any given conduct takes place. Extending *Parrish* would eliminate arbitrary distinctions that serve as a bar to legitimate hostile work environment claims, while incentivizing employers to keep their workplaces safe and fair.

Sophia Z. Lee. *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010).

This article explores the history of the equal protection clause, and its disparate administrative application by the Federal Communications Commission ("FCC") and the Federal Power Commission ("FPC"). According to the author, this is the first effort to analyze the administrative agencies' constitutional interpretation of the equal protection clause. The FCC proactively and creatively established administrative rules to ensure equality in broadcasting and licensing company practices, whereas the FPC interpreted Supreme Court precedent restrictively, thereby failing to monitor and guarantee civil rights enforcement at utility companies. The author concludes that this analysis underscores the importance of the state action doctrine to buttress civil rights, and the outlook of administrative agencies' affirmative role in interpreting and applying the equal protection clause. One example of the FCC administrative rules' impact is that under these new rules, the Equal Employment Opportunity Commission

successfully brought a discrimination suit in 1970 against AT&T for employment discrimination that resulted in a an unprecedented settlement, including long-term structural changes to ensure equality and monetary damages for victims of discrimination.

Jeanne Hayes, Note, *Female Infertility in the Workplace: Understanding the Scope of the Pregnancy Discrimination Act*, 42 CONN. L. REV. 1299 (2010).

With more women placing a priority on their careers and starting families later in life, female infertility has become a common medical issue, prompting the need for insurance coverage of treatments and protection of these women from employment discrimination based on their need to undergo fertility treatments. While the Pregnancy Discrimination Act ("PDA") currently protects women from sex discrimination by their employer based on pregnancy, childbirth and related medical conditions, current case law has either not interpreted PDA to prohibit discrimination based on infertility, or stopped short of recognizing infertile females as a protected class even though women have been subjected to discriminatory employment practices, such as preemptive termination. While both men and women experience infertility, women bear the burden of greater economic, physical and psychological struggles, and deserve protection in order to pursue their human right to bear children. Since avoidance of pregnancy is treated the same as pregnancy for purposes of mandating the coverage of contraceptives, the author argues for Congress to clarify the vague language of PDA so that fertility treatments, as a means to attempt pregnancy, are treated as a related medical condition of pregnancy. While employers have misconceptions about coverage for fertility treatments, it would actually only cause a slight increase in employers' premiums and could also help to retain content employees due to an attractive medical plan.

Jamie Burnett, Note, *Women's Employment Rights in China: Creating Harmony for Women in the Workforce*, 17 IND. J. GLOBAL LEGAL STUD. 289 (2010).

An analysis of workplace discrimination against women in China presents a unique opportunity to examine how cultural norms, state institutions and international bodies influence gender-based inequality. This Note provides information regarding discrimination against women in China historically and today, and ways in which the international community and international anti-discrimination standards have affected the way the Chinese state combats gender inequality. For example, despite participation in international conferences such as the International Women's Assembly, a recent study shows that eighty percent of surveyed Chinese women reported experiencing some form of gender

discrimination. The Chinese government has made improvements through national legislation such as the Labor Protection Regulations passed in 1988, which purports to provide Chinese women with equal footing in the workplace. In addition, in response to its participation in and hosting of the Fourth World Conference on Women, China created the Program for Development of Chinese Women, which focused on improving current laws and enforcing sanctions against violations. However, in order for true equality to become a reality, the Chinese government needs to acknowledge that gender discrimination in the workplace exists and must implement measures to help educate the public about gender discrimination and reduce mediation costs for women pursuing claims.

Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861 (2010).

In the U.S. Supreme Court case of *14 Penn Plaza LLC v. Pyett*, the employer moved to compel arbitration according to the union-negotiated arbitration clause in the contract after the doormen—members of Services International Union—filed suit in federal district court against their employer for age discrimination. The Supreme Court held that the union-negotiated arbitration clause clearly covered both contractual and statutory discrimination claims and was binding on the employees. The author argues that this case was correctly decided because the use of labor arbitration instead of litigation will give unions a greater likelihood of favorable results and terms. This benefit is due to a number of factors—such as arbitration will allow for better outcomes due to unions' greater practice and creation of expertise in arbitration, labor arbitration increases cooperation between employers and unions, and arbitration is less costly and quicker than litigation. Although a majority of academics view *Pyett* as problematic because they believe unions will bargain away women and minority rights, this is incorrect because women and minority rights are protected under Title VII and both empirical and legal doctrines suggest that labor arbitration has the potential to work as well—if not better—for unions than litigation.

John J. Feeney, Comment, *An Inevitable Progression in the Scope of Title VII's Anti-Retaliation Provision: Third-Party Retaliation Claims*, 38 CAP. U. L. REV. 643 (2010).

There is a lack of consensus among the circuit courts as to whether protection under Title VII of the Civil Rights Act of 1964 extends to third-party employees who were retaliated against for a co-worker's engagement in a protected activity. Title VII prohibits employee discrimination based on race, religion, color, and sex, and forbids retaliation against employees for certain protected activities such as

opposing or charging an employer for engaging in discriminatory conduct. Courts that adhere to the plain language of Title VII do not generally permit retaliation claims brought by third parties, whereas courts that do recognize third party retaliation actions take the position that to prohibit these claims would be inconsistent with Title VII's goals. In order to deter frivolous lawsuits and ensure these claims are within Title VII's protection, third-party plaintiffs must show they have a close relationship with the employee who committed the protected activity and that they were retaliated against because of this person's act. The author argues that the broader reading of Title VII—allowing for third party retaliation claims is the better option because the statute is meant to give victims of discrimination incentive to report incidents that may take place in their employment without fear that their loved ones may face retaliation. The author recommends the U.S. Supreme Court grant certiorari to reconcile the inconsistent Title VII interpretations.

Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875 (2010).

The U.S. Supreme Court decided in Olmstead v. L.C. that mental illness is a form of disability and that institutional isolation of a person with a disability is a form of discrimination under Title II of the Americans with Disabilities Act ("ADA"). The author argues that Olmstead prohibits unjustified isolation of people with disabilities in segregated workshops when they would prefer to work in the community with the aid of supported employment services. One criticism of sheltered workshops—segregated work environments for disabled people that often operate in conjunction with day habilitation programs—is that they frequently pay sub-minimum wages and are isolating. Professionals in the field of developmental disabilities generally favor the supported employment model, which provides individualized support for disabled persons to join the regular workforce working at actual jobs and receiving competitive wages. This article advocates for the eradication of sheltered workshops, calling on advocates to apply Title II to force states to transition towards integrated supported employment.