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Citation:
17 Cardozo J.L. & Gender 197 (2010)

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Thu Feb 7 22:12:18 2019

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ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Kellie Brady, Comment, *Some People Just Shouldn't Have Kids!: Probation Conditions Limiting the Fundamental Right to Procreate and How Texas Courts Should Handle the Issue,* 16 TEX. WESLEYAN L. REV. 225 (2010).

The right to procreate is a fundamental right protected under the U.S. Constitution but federal and state courts are split on the issue of whether a probationary limitation on the right to procreate is a violation of that right. Some state courts have found that probationary limitations of the right are not a violation because it is only a temporary restriction of the right to procreate, while other courts have found the probationary condition to be invalid because the condition was not reasonably related to the goal of rehabilitation and less restrictive conditions were available to create the same rehabilitative effect. No Texas appellate court has set a precedent on this issue but the author considers how it would rule if such a case came before them by analyzing how the Texas trial and appellate courts have dealt with other fundamental rights cases. The author concluded that the Texas Court of Appeals could hold the probation on procreation to be constitutional if the right to procreate was only temporarily taken away, related to the crime, and could be reason for the future criminality of the probationer. Because probation allow convicted criminals to complete or supplement their sentences amongst members of the general community, reasonable restrictions to fundamental rights can be allowed in order to achieve the rehabilitative goals of probation while protecting other members of the public.

Elizabeth M. Bux, Note, *The Unwelcome Cohort: When the Sentencing Judge Invades Your Bedroom*, 85 NOTRE DAME L. REV. 745 (2010).

Recently, procreative restrictions have been placed on criminals convicted of child related crimes. In *State v. Talty*, Talty—who failed to pay child support—was ordered by the Medina County Court of Common Pleas to reasonably attempt not to procreate as part of his probation sentence. The author examines whether the restriction on procreative rights violates Due Process and Equal Protections rights under the Fourteenth Amendment by exploring the right to privacy in sterilization, birth control and abortion, and sexuality, and how being a convicted criminal affects these rights. While convicted criminals' procreative rights may not be protected from government restriction as analyzed alone, they may be protected when looked at under a hybrid rights exception model of the privacy rights of religion combined with the fundamental right to marry. Due to this hybrid nature, a sentence restricting procreative rights would require a compelling reason to be enforced.

Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749 (2009).

Justice John Paul Stevens' voting record on abortion has changed from a conservative, somewhat restrictive stance, to a highly influential pro-choice position upon his retirement from the U.S. Supreme Court. Stevens was the first Justice to join the Court after the *Roe v. Wade* decision and the last appointed without a strong focus on the abortion issue. Justice Blackmun's records—which go beyond written opinions into personal and professional correspondences—reveal that there is a clear path tracking Stevens' change from early post-*Roe* cases to the eventual alliance between the two Justices that led to Stevens being pro-choice. Furthermore, Justice Blackmun's records show that Stevens' influence changed the stance of other, more conservative Justices such as Justice O'Connor. The eventual conversion of Stevens from a Justice who voted conservatively in abortion cases to a leader in the Court's pro-choice faction shows reverence to the concept of *stare decisis* and the underlying meaning of the right to an abortion.

J. Brad Reich & Dawn Swink, *You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1 (2010).

With the introduction of the internet, the ability of potential parents to seek and find egg donors has increased dramatically. However, coupled with new advances in reproductive technology, more parents and donors will inevitably find themselves in increasing legal and ethical dilemmas regarding parental rights, child support obligations, and products liability. The author argues in order to minimize such issues, state and federal regulation of the sale of donor eggs on the internet should be implemented, and rights and responsibilities of the donor and parents should be clearly defined. Moreover, given the pervasive nature of internet-based sale of donor eggs, the need for close scrutiny and regulation is even more imperative. Hopefully, better internet industry guidelines will provide a safer and more attractive environment for donors and persons seeking to become parents.

Elyse Whitney Grant, Note, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 HASTINGS L.J. 997 (2010).

The U.S. Supreme Court should adopt James Beauchamp and Sam Childress's four principles of bioethics in order to create consistency and fairness in the area of reproductive technologies. Due to increasing advances in this area, there is a pressing need to address the potential conflict between state government regulations and an individual's constitutional rights. The author reviews the potential benefits and drawbacks of new technologies such as preimplantation

genetic screening and prenatal genetic testing as well as using case law to elaborate on the problems with the current undue burden test and the need for change. The solution to this problem is a two part-test; first considering a "procreative liberty interest prong" and then a "balancing prong" which would scrutinize the interests of state government with the individual's rights using the four bioethical principles—autonomy, nonmaleficence, beneficence, and distributive justice. By implementing a two-part test there can be a convenient marriage between technology and individual rights, which is both impartial and uniform because of the ability of the four principles to adjust along with technological advances.

Catherine D. Payne, Comment, *Stem Cell Research and Cloning for Human Reproduction: An Analysis of the Laws, The Direction in Which They May Be Heading in Light of Recent Developments, and Potential Constitutional Issues*, 61 MERCER L. REV. 943 (2010).

The recent growth in stem cell research carries important legal implications, particularly in the field of reproductive rights. Stem cells are unspecialized cells that have the potential to transform into any one of the bodies' many types of cells. One potential application of stem cell research is allowing individuals who cannot have natural children—for example, homosexual couples and unfertile couples—to procreate. This comment focuses on the legal issues, particularly in the fields of reproductive rights and freedom of expression, which may arise if the federal or state governments move to ban embryonic stem cell research. Ethical considerations—such as religious objections and human cloning—are mentioned but do not have an impact on the author's analysis, which is focused primarily on the legal issues that may arise if the United States government were to ban stem cell research for reproductive purposes.

Maya Manian, *The Irrational Women: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009).

After the Supreme Court decision in *Gonzales v. Carhart*—which "upheld a federal ban on a type of second-trimester abortion that many physicians believe is safer for their patients"—women's capacity to make decisions regarding their own pregnancies was severely limited. The Court determined that pregnant women lacked the mental capacity to decide on their own healthcare, and the capacity to give informed consent in regards to abortion-related medical treatment. This article aims to expose abortion law's discriminatory treatment towards women as healthcare decision-makers. By exploring *Carhart*'s reasoning, comparing women's decision-making ability under abortion law to general health related decision-making, and by contrasting the doctrine of informed consent in both the field of torts and abortion law, this discriminatory treatment becomes apparent.

The *Carhart* decision negatively impacted women's health, particularly as it relates to abortion, and could potentially have far-reaching implications for gender equality in the future.

BIOETHICS

Kristin M. Roshelli, Note, *Religiously Based Discrimination: Striking a Balance Between a Health Care Provider's Right to Religious Freedom and a Woman's Ability to Access Fertility Treatment Without Facing Discrimination*, 83 ST. JOHN'S L. REV.977 (2009).

In a situation where a physician refuses to perform certain medical procedures for a lesbian couple based on religious beliefs, there exists a clash between the physician's right to religious freedom and the patient's right to live in a society devoid of discrimination. The number of such scenarios will only increase given the expanding number of same-sex couples that wish to undergo fertility treatments in order to procreate. In response to this increase, many physicians and religious organizations—such as Catholic health care institutions—are lobbying to protect their religious freedom by further broadening the definition of "conscience clauses," which are designed to protect a physician's right to refuse to perform medical treatments that are contrary to his or her moral or religious beliefs. The author addresses this issue by exploring the developments in society and healthcare that give rise to these concerns, current state and federal standards designed to define the scope of conscience clauses, and recent state and federal cases that attempt to balance religious freedom against a patient's right to seek treatment without discrimination. Ultimately, a statutory provision is proposed attempting to strike such a balance and highlighting that both sides of the debate must be willing to compromise in order to create a successful solution.

Carter Dillard, *Future Children As Property*, 17 DUKE J. GENDER L. & POL'Y 47 (2010).

In modern substantive due process jurisprudence, the right to procreate is a protected privacy right. The author argues that though this right is viewed as a symbol of personal liberty, the procreation right undermines the personal liberties of our future children. It does so because it conflicts with another constitutional principle that prohibits one class of people from treating another class as property. Here, the modern right to procreate allows parents to treat the class of future children as property because parents are given exclusive control to create any number of children, under any circumstances, and thus have total control over members of the class. This power tends to institutionalize the class as property,

which conflicts with constitutional principles and requires that we reexamine the way we view the right to procreate.

Cynthia B. Cohen & Peter J. Cohen, *International Stem Cell Tourism and the Need for Effective Regulation Part I: Stem Cell Tourism in Russia and India: Clinical Research, Innovative Treatment, or Unproven Hype?*, 20 KENNEDY INST. ETHICS J. 27 (2010).

"Stem Cell Tourism" refers to when people with serious and disabling medical conditions and diseases travel overseas in search of stem cell treatments, due to the intense exuberance surrounding the discovery of stem cells and the subsequent publicity regarding their possible uses. There are two categories within this new phenomenon, both of which are seen in Russia and India: (1) accredited and regulated institutions that offer proven treatments at lower costs than the patients' home countries, and (2) the more problematic unaccredited and unregulated clinics that provide unproven treatments not provided in patients' home countries. Clinics of the latter category offer treatments to determined or desperate patients, placing them at serious risk, as there is typically little or no evidence of the safety and effectiveness of the treatments, and usually subject to limited or no governmental oversight. Stem cell treatments in Russia are offered in a weak, and almost nonexistent regulatory environment, where there is no national or institutional oversight of the private centers at which they are offered, and in India, although there is more oversight than in Russia, unproven treatments have still taken place in clinics. If each country wishes to establish itself as a credible region for stem cell research and treatment, they must require that stem cells studies be carried out under international scientific and ethical standards that address efficacy, safety concerns, and informed consent, especially with "innovative" treatments.

CHILDREN AND IMMIGRATION

Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 AKRON L. REV. 435 (2010).

For years, reality television programs have been gaining greater popularity, especially those featuring young children living their lives on camera. Reality shows focused on children impose an inherent detriment on those children and on society in general, so much so that the current legal regime regulating child employment must be reworked to prevent child exploitation and a deterioration of societal values in this area. The current legal landscape focuses on the Fair Labor Standards Act, and numerous state statutes related to the entertainment industry are

largely inept at providing remedies for child reality stars. This article argues that the state is not the best vehicle for addressing reality show issues, but rather that an express federal statute using a sliding scale of prohibition for children in reality programming is the best way to protect child reality stars. The proposed federal statute solution escapes constitutional challenges, as it falls within Congress' Commerce Clause power and does not violate parents' due process rights, or the First Amendment.

Laureen A. D'Ambra, *The Vital Role of the Rhode Island Family Court and Its Unique Jurisdiction in Immigration Cases Involving Abused and Neglected Children*, 15 ROGER WILLIAMS U. L. REV. 24 (2010).

It is increasingly necessary that Rhode Island Family Court judges—as well as practitioners and agency representatives appearing before the court—have an understanding of immigration law as it relates to undocumented juveniles who come to the court as a result of abuse, neglect and/or abandonment. In certain circumstances, family courts have significant impact on immigration issues. In order for a juvenile to be eligible for Special Immigration Status, the court must make findings of fact referred to as special consequences. When a parent makes an admission of child maltreatment in family court, it may lead to severe immigration consequences for both the parents and children. Additionally, case law establishes that while the court has jurisdiction over undocumented children and families, state courts lack jurisdiction over children in the custody of United States immigration authorities, do not have jurisdiction to prevent their deportation, and must receive the consent of the Attorney General prior to issuing a dependency order.

Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010).

United States immigration law covers many objectives, but furthering family unity is an effort largely overlooked; even the measures specifically aimed at addressing immigrant family issues reflect a legal definition of "family" largely grounded in a biological, nuclear family. This article identifies the concept of a "functional family" that escapes the current law's, narrow conception but still satisfies the caretaking needs of children. The United States must expand beyond the confining biological definition of family if immigration laws are to adequately protect internationally recognized children's human rights. The progressive international concepts identified in the United Nations Convention of the Rights of the Child and other instruments in Europe and the Americas prove strong arguments for the reformation of U.S. immigration law. Although Congress is not legally bound by international law, the interests in maintaining family unity should

guide Congress to follow international human rights law reflecting family relationships grounded in care, rather than traditional, biological definitions.

CHILDREN AND TEENAGERS

Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241 (2009).

Since 1994, juveniles who are tried for crimes as adults in U.S. courts have been subject to the same minimum sentencing requirements as adult defendants. As a result, individuals who are more immature, vulnerable to the influence of peer pressure, and are still developing their own individual identity and character are being incarcerated for long periods of time. After the U.S. Supreme Court's decision in *Roper v Simmons* regarding juvenile punishment and the Eighth Amendment, this may soon change. In *Roper*, the Court reflected on juveniles' immaturity and still developing-minds in order to declare that giving the death penalty to juveniles was cruel and unusual punishment and thus violated the Eighth Amendment. The author believes that this same reasoning should apply as well to mandatory minimum sentences for juveniles in this situation and that these sentences ought to be declared unconstitutional.

David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81 (2010).

Concerns regarding the criminal liability of individuals who recruit child soldiers and the culpability of child soldiers who commit war crimes have led to the global and legal need to protect children from this new form of abuse and exploitation. This article discusses the conditions surrounding the initial recruitment of child soldiers and the war crime liability that they may incur. Under the 1998 Rome Statute of the International Criminal Court—proposed by the United Nations and followed by many countries—a universal legal standard was created so that the recruitment and active participation of child soldiers under the age of fifteen was prohibited, but this statute was silent as to the potential culpability of child soldiers for war crimes. Although child protectionism has been the dominant theme in the international arena, as indicated by the United Nation Security Council's creation of a statute that suggested individuals under the age of eighteen would not be tried, national and domestic courts have taken its own initiative in recognizing war crimes committed by child soldiers. In order to narrow the gap between international and local policies regarding child soldier war

crimes, child soldiers should be held accountable for criminal acts, but the degree of culpability and punishment should be lower than those for adults.

Joseph O. Oluwole, *"Danger Or Resort To Underwear"*: The Safford Unified School District No. 1 v. Redding, *Standard For Strip Searching Public School Students*, 41 ST. MARY'S L.J. 479 (2010).

The Fourth Amendment to the United States Constitution dictates the constitutionality of searches and seizures in schools; however, the United States Supreme Court has ruled that the rights of students under this amendment are not entirely the same as those of adults. The decisive case on Fourth Amendment jurisprudence in public schools is *New Jersey v. T.L.O.*, in which the Court spelled out the "reasonable suspicion" standard and two-part test for evaluating searches of students at school. One particular area of searches in schools that has been repeatedly challenged by students and parents is the strip search, the constitutionality of which was addressed by the Court in 2009 in the case of *Safford Unified School District No. 1 v. Redding.* In *Redding*, a thirteen year-old girl, Savana Redding, was strip searched after the school received information from one of Redding's classmates that Redding was distributing prescription drugs to other students. The author examines the Court's decision in *Redding* in the context of *T.L.O.*, and discusses the consequences of *Redding* on future school strip searches of students.

Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L.R. 843 (2010).

In recent decades, the United States juvenile justice system has moved towards giving offenders traditional criminal proceeding rights, however, these protections have not been extended to status offenders. Juvenile courts were initially created to serve the purpose of ensuring that children and adolescents did not descend into a life of delinquency, so courts had jurisdiction over both criminal offenses and non-criminal status offenses such as running away and truancy. This note traces the development and reformation of the juvenile justice system and proposes means by which status offenders may be granted the same protections that regular offenders are given. Juvenile courts have adopted an unfair and interfering paternalistic approach to status offenders—especially female ones—because they view such offenders as individuals in need of the court's guidance in order to live successful lives. Status offenders should be granted the same protection as criminal juvenile offenders, or they should be removed from the system entirely.

Collin D. Schueler, *Loss of Parental Consortium: Why Kentucky Should Re-Recognize the Claim Outside the Wrongful Death Context*, 98 KY. L.J. 919 (2009).

The Kentucky Supreme Court should allow a minor child to bring a loss of parental consortium claim even when his or her parent is severely injured. The Supreme Court of Kentucky recognizes consortium claims between husband and wife and for parents upon the death of a child without the requirement of an accompanying wrongful death. Analogously, because Kentucky in *Giuliani v. Guiler* recognized loss of consortium to encompass claims of a child's loss of parental care—but did not distinguish between cases of severe injury and wrongful death—it is logical that the Kentucky Supreme Court should allow a minor child to bring a loss of parental consortium claim even if his or her parent is only severely injured. Although *Lambert v. Franklin Real Estate Co.* interpreted *Giuliani* narrowly as only allowing loss of parental consortium claims in cases of wrongful death, evidence in the language of the opinions of *Giuliani* and *Lambert* indicate otherwise. Moreover, trends in recent case law and commentary lean toward recognizing loss of parental consortium claims when the parent is only severely injured.

Lili Levy, *A "Pay or Play" Experiment to Improve Children's Educational Television*, 62 FED. COMM. L.J. 275 (2010).

The FCC has attempted to uphold both first-rate educational programming and a hands-off approach toward broadcaster editorial discretion, while also attempting to protect children from extreme commercialization by requiring advertising-supported bodies to air costly, high-quality educational and informative ("E/I") programming. Due to broadcasters' economic incentives and the makeup of the broadcasting industry, these aims have opposing interests, leading to mediocre results for child viewers and a general inefficiency of the FCC. This article assesses the current regulatory scheme and suggests policy changes. It proposes that the FCC consider alternative children's television rules by testing whether the following goals are accomplished: promoting quality programming, increasing the amount of children's E/I programming in a manner responsive to market needs for various types of such programming, providing sufficient flexibility for broadcasters to enhance innovation over time, ensuring administrability by the FCC, and empowering parents with information. One alternative suggestion is a "pay an E/I fee for play" model for encouraging high-quality children's E/I programming in lieu of the current "three-hour rule" model, which requires broadcasters to run at least 3 hours of E/I programming per week.

Ashley N. Johndro, Note, *Thwarting California's Presumptive LWOP Penalty for Adolescents: Psychology's and Neuroscience's Message for the California Justice System*, 83 S. CAL. L. REV. 341 (2010).

In 1990, the people of California enacted Proposition 115 by referendum, which permits life in prison without parole for juveniles convicted of first-degree murder. In 1994, the California Supreme Court held that Proposition 115 requires life in prison without parole for "special-circumstance" first-degree murder charges. Modern psychology and neuroscience shows that this is not a fair system of justice because adolescents have not developed mature mental faculties that would allow them to make proper decisions. This note encourages California to reform its penal code to take the mental development of a juvenile offender into account when life without parole is a possible sentence, and argues that the California Supreme Court wrongly interpreted the proposition. California courts should instead mitigate harsh verdicts to a fairer sentence of twenty-five years to life in prison.

Katherine Neifeld, Note, *More than a Minor Inconvenience: The Case for Heightened Protection For Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447 (2010).

Minors in the entertainment industry are afforded certain legal protections regarding their finances, working hours and education, but with the rise of the reality television genre, the unique issues and potential negative consequences of minors appearing on reality television shows call for greater protection of these child participants. The nature of reality television is that the participants are filmed as themselves and lack direct control over their broadcasted portrayals, and minors who have been featured on reality shows have dealt with negative repercussions, such as expulsion from school and adverse media attention. By highlighting the differences between minors performing on a fictional television show and a reality television show—such as the lack of separation between their lives on film and their private lives—the author demonstrates the strong need for stricter regulations. The vulnerability of minor reality performers calls for the establishment of regulations pertaining to the minor's consent to certain footage, and begs for assurances of financial security and mental health. Juvenile performers are particularly susceptible to the dangers of having their personal lives filmed and manipulated in order to create the drama necessary for the television networks to attract viewers, but through new regulation that addresses these concerns, child stars would be better protected.

Alison Virginia King, Note, *Constitutionality of Cyberbullying Law: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845 (2010).

The immense popularity of social networking sites and the increasing population of technologically savvy American youths have created an epidemic of cyberbullying throughout the United States that remains difficult to remedy. As cyberbullying continues in greater frequency, legislators have been unable to control its spread due to two crucial limitations on the creation and enforcement of adequate cyberbullying legislation. Specifically, the restriction of exclusively penalizing on-campus cyberbullying activity and the lack of Supreme Court guidance in defining schools' authority to govern online speech, result in legislation that is both easily circumvented and susceptible to First Amendment challenges. Due to the current failure of cyberbullying legislation, the author suggests a multidisciplinary approach to address cyberbullying that includes revising the Communications Decency Act to require Internet Service Providers and websites to remove defamatory content upon notification of its existence, and creating internet safety curriculum beginning at the elementary education level. Furthermore, given the current muddled understanding and scope of cyberbullying, the Supreme Court must precisely define the free speech boundaries of cyberbullying to allow legislators to rectify this ongoing problem.

Jonathan S. Carter, *You're Only As "Free to Leave" As You Feel: Police Encounters with Juveniles and the Trouble with Differential Standards for Investigatory Stops Under* In Re I.R.T., 88 N.C. L. REV. 1389 (2010).

Courts use an objective test—whether circumstances would lead a reasonable person to feel "free to leave"—to determine whether the Fourth Amendment protection against unreasonable searches and seizures has been violated. This article addresses whether an individual's subjective reactions affect the Fourth Amendment inquiry using the "free to leave" test. In *In Re I.R.T.*, the North Carolina Court of Appeals significantly broke from precedent, holding that a juvenile's age is relevant in determining if a police encounter amounts to a seizure under the Fourth Amendment. The consequences of the Court's modification to the "free to leave" test indicate that a defendant's age may be appropriate in other legal inquiries, but is inappropriate in a seizure analysis because it risks frustrating the Fourth Amendment's purpose by subjectifying an objective test meant to provide law officers with a clear and predictable measure of conduct. By setting aside a special standard for juveniles involved in investigatory stops, the *In Re I.R.T.* decision will most likely present more problems then it resolves, compelling a reconsideration of the "free to leave" test's modification.

DOMESTIC VIOLENCE

Margaret B. Drew & Marilu E. Gresens, *Denying Choice of Forum: An Interference by the Massachusetts Trial Court with Domestic Violence Victims' Rights and Safety,* 43 SUFFOLK U. L. REV. 293 (2010).

The newly instituted pilot program in the Norfolk Division of the Probate and Family Court in Massachusetts—which allows a judge to transfer civil order of protection petitions that are filed in other courts if the parties also have current domestic disputes in Probate or Family Court—conflicts with Chapter 209A of the Abuse and Prevention Act ("APA") and frustrates efforts to protect domestic violence victims. The main purposes of Chapter 209A and the APA more generally are to ensure the safety of domestic violence victims and to allow victims to obtain quick judicial relief. The provision allows a domestic violence victim to petition and receive an emergency order of protection on the same day that the victim files the complaint, and also increases the victim's access to the court system by allowing the victim to petition in any trial court in the county in which the victim currently resides. The author argues that since 209A does not give the courts authority to transfer order of protection petitions between departments, the pilot program conflicts with the language of 209A and interferes with the statute's objectives by restricting the victim's access to judicial relief. The pilot program should be abandoned and the previous system that complied with 209A should be reinstituted.

Elissa Stone, Comment, *How the Family and Medical Leave Act Can Offer Protection to Domestic Violence Victims in the Workplace,* 44 U.S.F. L. REV. 729 (2010).

In light of the shortcomings of current state-enacted legislation to protect victims of domestic violence from discrimination in the workforce, Congress should amend the Family and Medical Leave Act ("FMLA") to include victims of domestic violence. The article explains the pervasive and severe obstacles that victims face, and how those problems negatively affect their jobs, sometimes resulting in loss of income or employment altogether. Although twenty states have enacted domestic violence legislation such as work leave, these laws are neither comprehensive nor consistently applied nationally. Amending the FMLA, as opposed to enacting new federal legislation, would provide a recognized legal mechanism to protect the job security of domestic violence victims while potentially cutting costs for employers by fostering a safer and more productive work environment. Although there are potential shortcomings to amending the FMLA, such as the possibility of employees taking undue advantage of the

amendments and creating additional costs for employers, these fears are outweighed by the societal interest in protecting victims of domestic violence.

EDUCATION

Aaron H. Caplan, *Freedom of Speech in School and Prisons*, 85 WASH. L. REV. 71 (2010).

The U.S. Supreme Court should avoid using interchangeable language and case citations in opinions dealing with schools and prisons. It is possible that this common practice will bring to the forefront institutional similarities between the two and in turn negatively influence society's attitude toward schools. The author addresses on a macro level the use of similar language and principles in two U.S. Supreme Court cases—*Tinker v. Des Moines Independent Community School District*, which deals with students' freedom of speech and *Turner v. Safely*, a decision that concerns prisoner's speech. On a micro level, there are differences in the way speech is restricted and students generally have more liberties when it comes to speech than prisoners. However, there are areas where it seems that prisoners have more rights than students and given the serious implications of judicial opinions on society, a greater effort should be made to create a more definitive line in judicial opinions between prisons and schools.

Lauren S. Foley, *From Comparing Plus Factors to Context Review: The Future of Affirmative Action in Higher Education,* 39 J.L. & EDUC. 183 (2010).

The Roberts Court may reject an "individualized" admissions process that compares potential students and values "plus factors" in a student's application that can add uncommon, distinctive traits to the incoming student body. The only admissions process that the U.S. Supreme Court has approved of—which considers numerous factors including the applicant's race—is on shaky ground. The Court presently consists of only four Justices that would allow for an admissions process that takes into account a student's race among other factors, and Justice Kennedy—the swing vote—has shown disapproval of any individualized admission policy that allows a candidate's race to be in of itself a determining factor. The author believes that higher education institutions should instead adopt a "contextual approach" that does not compare applicants but instead considers each applicant in his own right by analyzing his achievements in light of his background and personal struggles. Justice Kennedy is more likely to approve of a contextual approach because it eliminates comparing two applicants directly against each other and limits recognition of race to understand the applicant's background.

William J. Glenn, *Altering Grade Configurations in Virginia Schools: Reducing School Segregation Without Necessarily Considering Race in Light of the Parents Involved Ruling*, 88 N.C. L. REV. 1091 (2010).

Grade reconfiguration of schools can be a successful alternative for race-based desegregation plans, which the U.S. Supreme Court has held to be unconstitutional in *Parents Involved in Community Schools v. Seattle School District No. 1*. Despite rulings from the *Brown v. Board of Education* line of cases, segregation is still prevalent in many school districts. The author analyzes and remodels demographic statistics of Virginia schools to illustrate how grade reconfiguration could potentially reduce the segregation of schools by allocating students by grade level rather than by their current geographic zone. The analysis shows that grade reconfiguration is more successful in eliminating racial segregation when implemented in small school districts than in larger districts because large districts have too many students to allocate schools by grade. Although it is difficult to eliminate segregation in larger districts by implementing grade reconfiguration, it can still contribute to reducing and even eliminating segregation in larger districts if used as a part of a more intricate plan.

Samar A. Katnani, Note, PICS, Grutter, *and Elite Public Secondary Education: Using Race as a Means in Selective Admissions*, 87 WASH. U. L. REV. 625 (2010).

Strict reliance on standardized test scores when selecting students to elite public high schools in America has caused unequal enrollment of minority students and thus the standards for admission must be changed. Historically, standardized test scores of racial minorities—excluding Asian students—have been categorically low for a plethora of hypothesized reasons, and thus the percentage of minority students at these elite schools have been disproportionate to the general population of students in these districts. By looking at admissions standards currently used by three of these schools, together with cases such as *Parents Involved in Community Schools v. Seattle School District No. 1,* and *Grutter v. Bollinger*, as well as attempts at creating a more diverse student body, one can see how the struggle for equality has hit several roadblocks, especially when litigation has been brought by students who feel that the efforts created unfair inclinations to admit less qualified students based heavily on race. In most cases, federal courts—including the U.S. Supreme Court—have struck down admission models that include quotas or any other differentiated standards for racial minorities. The author suggests several alternatives that would increase enrollment of these students, including reduced emphasis on standardized tests and an increased commitment to rectifying these glaring discrepancies by individualized school districts.

Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725 (2010).

American public schools are more segregated today than they have been in decades, eliciting the author to challenge the Obama administration to finally achieve racially integrated education in this country. The U.S. Supreme Court's decision in *Brown v. Board of Education* was significant in declaring segregation of public schools unconstitutional, but gave little guidance to the states on how to implement such a change, and history has shown that action is needed by all three branches of the government to effectively accomplish public school integration. Since *Brown's* passage, each administration has attempted—with varying success and dedication—to give effect to the case's holding and integrate public schools. With past failures and successes in mind, two recommendations are made to the current administration; first, the administration should engage in a renewed commitment and clear approach to desegregation litigation and second, it should adopt affirmative policies promoting racial integration as a bipartisan civil rights matter. Specifically, the Obama administration should shape its education programs after other federal programs that carry integration implications such as housing, transportation and urban policy strategies, to successfully reach the goal of racially integrated education.

Jessica Moy, Note, *Beyond 'The Schoolhouse Gates' and Into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After* Morse v. Frederick, 37 HASTINGS CONST. L.Q. 565 (2010).

Cyberbullying is a modern form of bullying that takes place over the internet and has become an increasingly widespread issue amongst middle and high school students—resulting in a variety of unfortunate consequences ranging from truancy to suicide. School systems across the country are now faced with the challenge of disciplining cyberbullies. The U.S. Supreme Court has not provided a clear course of action for the schools to take and has created three standards: *Tinker*, *Fraser* and the *Hazelwood* standards, all of which only deal with on-campus speech, and most recently *Morse v. Frederick*—which although it was the first time the court dealt with an off-campus incident—rendered such a narrow holding that it failed to provide any real resolution on how to handle the issue of off-campus speech and conduct. The author proposes two possible solutions to evaluating cyberbullying: first, declare that cyberbullying does not fall within the ambit of protected speech under the First Amendment, and second, look to the *Tinker* standard, which applies a "substantial disruption" test by looking to whether the speech materially interfered with students' class work, as opposed to following the *Morse* opinion. A more nuanced application of the *Tinker* test would respect the students'

constitutional right to express their views and beliefs freely as long as they do so outside of the school environment.

Allison S. Owen, Note, *Leaving Behind a Good Idea: How No Child Left Behind Fails to Incorporate the Individualized Spirit of the IDEA*, 78 GEO. WASH. L. REV. 405 (2010).

By amending the No Child Left Behind Act ("NCLB") so that it integrates the principles of the Individuals with Disabilities Education Act ("IDEA") and modifying its standards for measuring a student's progress, disabled students will have the opportunity to have an individualized education program that takes into account their social, behavioral, developmental and functional skills. This Note analyzes relevant portions of the NCLB and the IDEA, the tension and interplay between both acts, and their negative effects on disabled students. The main goal of the NCLB is to provide all children with a high-quality education under challenging academic standards, and the main purpose of the IDEA is to provide children who qualify for special services to receive an educational plan which takes into consideration a child's particular needs. However, the NCLB deprives and neglects to recognize a disabled student's right to an individualized education set forth in the IDEA. By applying the IDEA to the NCLB and providing disabled students with individualized assessment and instruction, disabled students will have a greater chance of academic success.

Davin Rosborough, *Left Behind, and then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions,* 87 WASH. L. REV. 663 (2010).

The "pushout syndrome" occurs where school administrators improperly inform students that they should leave school, either due to poor attendance, low grades or a failure to attain enough credits, when they are legally entitled to remain enrolled. This practice—which is often illegal—has dire consequences for youth of color who already face disproportionately high dropout and suspension rates. Pressure on educators to meet state and federal testing standards are usually at the crux of these pushout decisions, as administrators exclude poorly performing students instead of addressing their educational needs. The author analyzes various litigation strategies that can be advanced to combat pushout syndrome and suggests a framework for federal and state courts to adopt in considering these challenges. Though policy changes are necessary to create sustainable change in public education, pushout litigation can provide immediate remedies for wronged students and can bring attention to this issue, which largely goes unnoticed in the public and in courts.

Justin D. Smith, Note, *Hostile Takeover: The State of Missouri, the St. Louis School District, and the Struggle for Quality Education in the Inner-City*, 74 MO. L. REV. 1143 (2009).

The author examines racial inequality in the St. Louis' education system by tracing the failed and insincere attempts at desegregating St. Louis public schools throughout the years. After Missouri sought to release its obligation under desegregation funding programs mandated by *Brown v. Board of Education* by seeking a declaratory judgment that its schools were no longer segregated, its state legislature passed a bill ("§162") which conditioned the transfer of St. Louis public schools from federal to city control on various benchmarks designed to ensure that racial equality was being realized. While under the city's control, the racial composition of St. Louis schools remained heavily unbalanced and the academic achievement gaps between minority and white students persisted. Missouri then transferred control of St. Louis public schools from the city to a Transitional School District; the State's action was upheld in *Board of Education of the City of St. Louis v. Missouri State Board of Education* because §162 specifically authorized the action if certain benchmarks were not met. The author cautions that the terse decision—based on statutory interpretation rather than on practical considerations—offers little reasoning to help govern future debates surrounding the possible takeover of other Missouri school districts, and that such state takeovers have seen questionable success in St. Louis and across the country.

Timothy Brandon Waddell, Note, *Bringing it All Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541 (2010).

Lack of regulation regarding a parent's right to homeschool his or her children presents constitutional concerns for children, parents and states. There is little state and federal regulation of homeschooling and no U.S. Supreme Court case that addresses the constitutionality of the process, thus creating the potential that children will not receive a proper education, and given the fact that schools serve as a main reporting agency for suspected child abuses, perhaps a greater likelihood that child abuse will go unreported. Although the Court has determined that parents have the liberty under the 14th Amendment to choose whether to homeschool their children, this determination is superseded by a state's right to provide for the well-being of its students. Homeschooling must become more regulated so the rights of parents and states with regard to the education of children are better defined. The U.S. Supreme Court should clarify the parameters of the parents' right to homeschool, while states should enact regulation to protect children, so that the rights of parents and children can be better protected.

Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education*, 58 U. KAN. L. REV. 665 (2010).

In the U.S., the requirements of financial child support by divorced spouses or single parents in each state cover children through the end of their secondary school education. However, in most states the requirements for child support do not require parents to contribute toward the cost of their child's higher education. The requirements of states that do require contributions toward higher education vary greatly from state to state; some states require child support for higher education regardless of the age of the child in question while other states limit the obligations of a parent so that they only need to contribute until the child reaches a certain age. The author suggests that federal and state governments should enact statutes to require parents to contribute toward their children's higher education. These statutes must strike a proper balance between what is best for the child and restricts a parent's autonomy, but are important to ensure that children who do not come from a proper nuclear family are not disadvantaged by their lack of final resources to put toward a college education.

Nicole Stelle Garnett, *Reassessing the State and Local Government Toolkit: Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201 (2010).

As public education reform is not enough to attract families to urban neighborhoods, city governments should use tax incentives to keep private education costs down and more accessible to middle class families. City governments should seek to encourage middle class families to live in cities because it has been shown that residents who buy homes and put down roots create successful and safe neighborhoods. Where the children will attend school is a significant factor when a family is deciding where to settle down, and middle class families who are unable to afford the more expensive city private school tuition often choose to settle in the suburbs in order to provide their children with a quality education. Creating a tax credit incentive for those who donate to nonprofit organizations that give scholarships to poor and middle class children to attend private school would increase the educational options in the city for those children, encourage new private schools to open, and support the existing schools. The author argues that increasing the availability of affordable private schools in urban areas will encourage middle class families to stay in the city, helping to create stable neighborhoods and successful cities.

Monique M. Chartier McElwee, Comment, *Strip Searches in Public Schools: They're Not Child's Play* [Safford Unified School District No. 1 v. Redding, 129 S. Ct. 2633 (2009)], 49 WASHBURN L.J. 563 (2010).

Students subjected to warrantless strip searches in public schools often feel embarrassed, ashamed, humiliated, and violated as they liken their experiences to episodes of sexual abuse. Traditionally, in almost all contexts, similar strip searches have been prohibited as infringements on individuals' Fourth Amendment rights, absent a warrant of probable cause. Recently, in *Safford Unified School District No. 1 v. Redding*, the Supreme Court held that any school official could conduct a warrantless strip search on a student so long as the official believes there is a "moderate chance of finding evidence of wrongdoing." However, due to the intrusive nature and emotionally traumatizing effects of performing warrantless strip searches on school children, the author suggests that the "reasonable suspicion" standard be elevated to a probable cause threshold. By raising this standard, students will be protected from miscalculations by school officials, schools and parents will save money by avoiding legal costs, and only a fraction of the students will have to endure the lasting detrimental effects of strip searches during their adolescence.

Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline In Public Schools*, 54 N.Y.L. SCH. L. REV. 977 (2009/2010).

In unparalleled numbers over the past ten years, police—often referred to as "School Resource Officers" ("SROs")—have become a presence in American public schools in response to increased violence and a mandate for additional security. These SROs have taken on a variety of different roles, from counselors and role models, to extra helpers for school administrators, to harsh enforcers of the law. The public's view of the expanded role of police in schools varies: some believe that police officers are necessary to curb violence, keep schools safe, and criminalize certain behaviors, while others believe that students are being criminalized for behaviors that otherwise would be dealt with by parents or school administration. This article investigates the role of SROs in schools, and identifies several different "models" currently being employed by school systems in Massachusetts. Based on their review of the current models in Massachusetts, the authors recommend that Massachusetts school districts mandate that (1) schools and SROs clearly explain the consequences of certain behaviors and activities—specifically those which may result in arrest or summons—to students and parents; (2) a comprehensive data collection system is created to document all law enforcement intervention in school incidents; (3) communities supervise the general and specific acts of SROs; (4) SROs be provided with more varying types

of training depending on their roles within a specific school; and (5) further research is conducted on the effect of SROs in schools.

FAMILY

Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 ARK. L. REV. 113 (2010).

Arkansas has sanctioned the Unmarried Couple Adoption Ban or the Initiated Act 1 ("Act"), which bans homosexual or unmarried people residing with their sexual partners from adopting or nurturing children. The Act—which evaluates eligibility for placement solely on the basis of sexual orientation and marital status—should be termed unconstitutional for its discriminatory and detrimental effects. Not only does the Act violate the constitutional rights of homosexual and unmarried people who may want to adopt or be foster parents, it also jeopardizes the designated choices by parents of people they would want to adopt their child upon their death. Although one justification for the Act's restriction is that it is to the children's advantage to be raised in homes where the adoptive or foster parents are not living together outside of marriage, social science research has discredited that assumption. Rather than upholding this Act for arguments not empirically supported, this Act should be reversed considering the overabundance of children in need of amorous adoptive and foster parents, the numerous people in the homosexual and unmarried population who would satisfy such deprivation and the rising monetary costs states would face as a consequence of the restriction posed by the Act.

Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption,"* 54 ST. LOUIS L.J. 271 (2009).

The nominal frequency with which courts of equity recognize the inheritance rights of a child of equitable adoption indicates that inheritance laws across the U.S. should be amended to resolve this discrepancy. The American family has changed in modern times to include children being raised by birth parents, adoptive parents, and also parents who have custody through equitable adoption. This altered family model coupled with the frequency of individuals dying intestate, has resulted in situations where children of equitable adoption often do not have heirship claims over the estate of the individuals whom they have always regarded as their parents. Though looking pointedly to the intent of the decedent who did not draft a will naming the children as heirs is a justification against allowing for

those children to inherit, there is a stronger justification in assuming that the decedent considers children they raised to be their legal heirs. The author suggests expanding the state statutory definitions of one's child and revising inheritance and intestate succession laws to include a few possible tests to examine whether the child should be the presumed heir.

Nat Stern & Karen Oehme, *A Comprehensive Blueprint for a Crucial Service: Florida's New Supervised Visitation Strategy*, 12 J. L. & FAM. STUD. 199 (2010).

Supervised visitations for children who do not live with one or both of their parents allow children to maintain stability by sustaining parental relationships while assuring the child's safety. The Florida legislature's innovative new program strives to standardize the widely growing private industry. The author gives a history of supervised visitations nationally and then outlines Florida's approach, which focuses on the following goals: safety, training, diversity and community, and includes uniform state standards and a proposed certification process for supervised visitation services. The program also addresses the problem of finding adequate funding—so that parents are not responsible for the entire service fee—by only providing funding to programs certified under the new standards, which would help assure that funds are used efficiently. Florida's pledge to innovate supervised visitations to assure the quality of service providers is a model that should be followed by the other states.

Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010).

Courts in the United States and abroad are increasingly recognizing the benefit of post-adoption contact between children and their birth families. The author advocates adoption with contact statutes—which create agreements for post-adoption contact and visitation based on the consent of all parties—over court-imposed post-adoption visitation because such arrangements respect the parental autonomy of adoptive parents while allowing children to maintain significant relationships with their birth families. In a best-case scenario, the contact agreement is in place before the adoptive parents are even selected, so that in choosing to adopt the child, parents are consenting to the preexisting arrangement. There is a dearth of research on the impact of post-adoption contact in the United States, but relevant studies in England have shown that with on-going interaction, adoptive parents tend to have a more positive view of birth families, adoptive children desire even more contact with their blood relatives, and birth parents are better able to come to terms with contested adoptions. Families that blend

extended members of a child's birth family with adoptive relatives are rich, diverse and reflect the changing notion of the modern family unit.

Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195 (2010).

Two competing and somewhat contradictory perspectives belie the decision whether or not courts should permit intra-family tort claims. The individualistic approach emphasizes personal autonomy and an individual's right to receive just compensation against a tortfeasor. The traditional common-law family approach purports to focus on family harmony and tranquility, and thus disfavors intra-family tort litigation. A proposed intermediate approach is a practical and theoretical framework that balances the qualities of both approaches. The author advocates the individualistic approach for situations where there will be no effect on family harmony, and incorporates the family model, complete with mediation sessions and extrajudicial remedies, for situations where family harmony is at stake, while still protecting the individual's right to receive just compensation.

FATHERHOOD

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

Most states require biological fathers to pay child support to the child's mother, thereby conflating biological fatherhood with legal fatherhood. The right not to procreate, however, has been acknowledged as a privacy right in such cases as *Eisenstadt v. Baird* and *Roe v. Wade*. Acknowledging legal fatherhood is important to certain public policy goals—e.g. providing financial support to children born out of wedlock and promoting a relationship between a biological father and his child—but the right not to be a father follows from the firmly established right to procreative autonomy. Were the right to be acknowledged, courts could limit its application to circumstances where a father's right to autonomous procreational decision-making was compromised. For instance, where a child is conceived after the biological mother misrepresents herself as infertile, or where the biological mother secretly collects sperm from the biological father and artificially inseminates herself, the biological father's right not to be a father may be violated and the biological father should then be exempted from child support payments.

Tyler M. Hawkins, Comment, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal that Better Balances the Interests Involved*, 2009 UTAH L. REV. 1335 (2009).

In determining a father's rights in adoption cases, the U.S. Supreme Court has focused on whether he has established a relationship with the child, but this relationship is impossible if he does not know that he has fathered a child. When a mother gives her newborn up for adoption and the father is aware of the child's existence, a multitude of interests are at stake—those of the mother, the father, the prospective parents, the child, and the state. This comment argues that states' current adoption schemes do not do justice to these interests. Some states permit notice by publication for actions to terminate fathers' rights, which makes it more difficult for a father to learn of the existence of the child, while other states make notice more probable but give fathers little opportunity to demonstrate commitment towards their children and are quick to terminate their parental rights. The author proposes an adoption scheme that contains a putative adoption registry to increase awareness of the existence of the child, and requires an affidavit of support and commitment from any father who withholds consent to adoption in order to better ensure that he is prepared to raise the child.

FEMINISM

Jacob Richards, Comment, *Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims*, 98 CAL. L. REV. 197 (2010).

The author examines polygamy activism by analogizing it through the lens of the traditional struggle for LGBT rights, feminism, and sexual freedom. Liberal sex rights advocates criticize the analogy because fundamentalist Mormons are often accused of violating sex rights principles about gender equality and freedom from coercion and abuse, and because their roles often reflect patriarchal gender roles. However, an investigation of an analogous dialectical relationship in other sex rights demonstrates that similar tensions are common in sex rights debates. Therefore, since tensions concerning autonomy and imperfect consent are prominent in polygamy activism as well as in political and legal debates about pornography, sadomasochism, and abortion, the ambiguity and contradiction of examining polygamist rights through the lens of the struggle for LGBT rights, feminism, and sexual freedom creates room for constructive dialogue. Moreover, a comparative analysis of polygamy activism, pornography, sadomasochism, and abortion reveal common themes that propose guidelines for legal approaches to imperfect consent.

GENDER AND VIOLENCE

Lauren Hoyson, Note, *Rape is Tough Enough Without Having Someone Kick You From the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, VAL. U. L. REV. 565 (2010).

Although courts do not uniformly consider "substantial bodily injury" an aggravating factor in rape cases, the mental and physical effects of pregnancy are consistent with those harms to such an extent that states should adopt statutes officially designating pregnancy an aggravating factor. Modern rape law—including distinguishing between statutory and adult rape—developed in response to the women's movement of the 1970s. States today take four distinct approaches to addressing pregnancy in rape cases: (1) enacting a statutory mechanism for counting pregnancy as an aggravating factor; (2) excluding evidence of pregnancy, lest it be prejudicial to the defendant; (3) considering pregnancy a substantial bodily injury in all cases; and (4) determining if pregnancy constitutes a substantial bodily injury on a case-by-case basis. Because childbirth, miscarriage and abortion all cause significant physical and psychological trauma—arguably to an even greater degree than those harms legally accepted as substantial bodily injuries—courts should uniformly recognize pregnancy as an aggravating factor in both statutory and adult rape cases. The objective of punishing rapists for *all* of the harms caused by their crimes, as well as creating a uniform, fair system among can states, can be achieved through the implementation of this change.

GENDER BIAS

Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After* Ricci *and* PICS, 16 MICH. J. GENDER & L. 397 (2010).

Continuing racial and gender inequalities have recently brought about the issue of whether it is constitutional for states to pursue the issue of racial and gender inequality and what means they can use to do so. The term "contingent equal protection"—referring to the assumption that equal protection discussions center upon the assumption of a structural inequality—is used to discuss efforts made to rid states of gender and racial hierarchies. The article explores many recent cases—such as *Ricci v. DeStefano* and *Parents Involved in Community Schools v. Seattle School District No. 1*—to expose the issue of whether there is a compelling state interest in counteracting structural inequality. Such plurality opinions—arguing that there may be no state interest in counteracting structural inequality—go against precedent and the Fourteenth Amendment. States have a compelling interest in changing structural inequality that should not be overshadowed by societal discriminations.

Celia Rumann, *Use of Female Interrogators: The Analysis of Sexualized Interrogations the Detainee Interrogation Working Group Did Not Conduct*, 21 HASTINGS WOMEN'S L.J. 273 (2010).

The recent Abu Ghraib scandal exposed the United States government's "de facto" policy of using women's sexuality as a weapon of war against Guantanamo Bay detainees. Photographs and stories document female army reservists' use of sexualized interrogation tactics, which include the use of pornography and sexual humiliation—for example conducting investigations while topless or nude—and threats of rape against the detainee's family. These strategies, taught to women at training camps, are based upon and intended to exploit the interrogator's gender. This article discusses the legal implications of these types of interrogations, with a view toward preventing discrimination and unfair treatment of women. In conclusion, sexualized interrogations potentially violate domestic and international laws and resolutions for the protection of women, specifically the Uniform Code for Military Justice, the Mann Act, anti-trafficking statutes, and the Convention for the Elimination of All Forms of Discrimination Against Women.

Asmara M. Tekle, *The "Non-Maternal Wall" and Women of Color in High Governmental Office*, 35 T. MARSHALL L. REV. 169 (2010).

In contrast to the historical trends that saw only one mother of color appointed to the President's cabinet, cabinet level, and Supreme Court positions, President Barack Obama appointed three mothers of color to his cabinet when he took the office of the President of the United States in 2009. The theory offered by the author behind this historical trend is based on the Expectation States Theory, which seeks to explain inequality in the workplace by providing that individuals with higher-status characteristics—including males, whites, professionals or non-mothers—have higher initial competency expectations than women, blacks or mothers. Because of this notion, it is suggested that Presidents may seek the path of least resistance, thus choosing white or black males, white mothers or black single women. Additionally, black mothers may also self-select out of the running for top-level government positions because of the subtle barriers they must overcome. However, women like Michelle Obama—who although was not appointed to a high-level government position, but occupies a powerful un-official position in the federal government—may represent a shift in the perception of women of color, and could provide a new model for future leaders.

Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury,* 18 J.L. & POL'Y 295 (2009).

As opposed to the legal obstacles in the tort system that men who suffered from asbestos overcame, women face many difficulties in regard to recovering for injuries specific to women due to the courts' adherence to strict tort doctrine over Adam Smith's notion of "fellow-feeling." As opposed to the courts' leniency afforded to male plaintiffs who successfully established causation between asbestos exposure and their injury, women face greater obstacles when presenting gender-specific injuries. For example, young women whose reproductive organs were damaged from DET exposure unsuccessfully lobbied state legislatures to amend the discovery rule—a victory that men achieved easily in asbestos litigation. The article explores the phenomenon of "fellow-feeling," and its inconsistent gender-biased application in determining recovery in tort law. The remedy to this problem requires a societal shift in perspective and a greater demand of "fellow-feeling" to overcome the inherent tort system restrictions, such as rigid statute of limitations and pleading standards that impede recovery.

HEALTH

Janet L. Dolgin, *Class Competition and American Health Care: Debating the State Children's Health Insurance Program*, 70 LA. L. REV. 683 (2010).

The State Children's Health Insurance Program ("SCHIP")—which aims to aid children of families who cannot afford private health insurance and are not eligible for Medicaid to get health care coverage—is influenced by U.S. class competition that uses health as a marker for class status. The article argues that such unrelenting class competition contributed to preventing the realization of decades of efforts to form a universal health care coverage structure. The fact that the Medicaid health program—for the poorest children—received overall greater coverage than the SCHIP health program—for relatively less poor children—reflects a subliminal uneasiness of benefiting a class that is in competition with the middle-class in terms of status. This unique and unacknowledged form of class competition was especially evident in the opposition of the SCHIP expansion when opponents claimed that granting health care coverage to families who are between poverty and middle class would unduly tip the country's socio-economic structure. However, given the economic downturn of 2007, the nation has realized the severe cost of limiting access to health care to numerous people and is likely prepared to forego the restrictive assumptions of class status and welcome a form of universal health coverage.

Jonathan D. Gillerman, Comment, *Calling Their Shots: Miffed Minor Leaguers, the Steroid Scandal, and Examining the Use of Section 1 of the Sherman Act to Hold MLB Accountable*, 73 ALB. L. REV. 541 (2010).

In the early 2000s, Major League Baseball ("MLB") was rocked by a steroid scandal that questioned the authenticity of the awe and revenue-raising homerun boom the league had recently experienced. Often overlooked victims of the scandal are minor league players who chose not to indulge in steroid use and, perhaps as a result, were never elevated to a major league team. This article analyzes the probability of success of a claim made by these minor league players that the MLB violated Section 1 of the Sherman Antitrust Act by turning a blind eye to the steroid use and thus restricting trade of players from minor to major league teams to only those on steroids. Such a claim would present several obstacles: at the outset, each claimant would need to prove he was not on steroids—a highly difficult task because steroids remain in a person's body for only a short period of time and already several years have passed—and the players would need to argue around the MLB's long-standing federal antitrust exemption. Despite these difficulties, with the right set of claimants, very good expert witnesses and an activist judge, such a claim could carry weight and maybe even prevail.

Tara Guffrey, Note, *Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of* American Home Products Corp. v. Ferrari, 26 GA. ST. U. L. REV. 617 (2010).

Congress enacted the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act") in order to ensure compensation for victims of vaccine related injuries and discourage vaccine manufacturers from exiting the market or increasing prices by shielding them from certain tort liability claims. However, the Georgia Supreme Court's decision in *American Home Products Corp v. Ferrari* has led to interstate conflict by finding that design defect liability claims under traditional tort law are not preempted by the Vaccine Act, in contravention to all other American jurisdictions. The author suggests that the Vaccine Act's ambiguous preemption clause must be read in favor of vaccine manufacturers by granting vaccines "exceptional product" status. Such an interpretation would ensure manufacturers are subject to uniform standards and will curb litigation, thus stabilizing prices and preventing shortages of necessary vaccines. Moreover, reading the preemption clause in favor of manufacturers comports with Congress's original goals in passing the Vaccine Act.

Katharine Kruk, Note, *Of Fat People and Fundamental Rights: The Constitutionality of the New York City Trans-Fat Ban*, 18 WM. & MARY BILL RTS. J. 857 (2010).

The 2006 New York City ban on the use of artificial trans-fats in restaurants was intended to reduce the rate of deaths caused by heart-disease. However, there are concerns that the ban is an unconstitutional restriction on individuals' decisions regarding their own health. This Note evaluates whether the New York City ban violates the rights of New Yorkers under the Due Process Clause and whether it is an improper taking without compensation under the Takings Clause of the U.S. Constitution. The author concludes that this ban does violate the Due Process Clause because it is not a proper regulatory fit—as the ban does not affect the vast majority of sources of trans-fats—and violates the Takings Clause by economically harming only certain individuals without compensation. As a result, the ban is an unconstitutional restriction on the personal autonomy of New Yorkers over decisions affecting their own health.

Michelle D. Layser, *Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity For Health Plan Beneficiaries Act*, 32 U. HAW. L. REV. 73 (2009).

Although it is becoming commonplace for employers to offer same-sex couples health benefits, significant disparities still remain within the Internal Revenue Code that unfairly discriminate against gay spouses and domestic partners. In 1996, Congressed passed The Defense of Marriage Act ("DOMA"), which strictly limits the legal protections afforded to gays and lesbians by defining "marriage" as a union between a man and a woman. As a result of DOMA, homosexuals whose employers provide health benefits for same-sex marriages or domestic partnerships cannot obtain the tax exclusion that is given to heterosexual couples, thus forcing gay couples to pay the full market price for the tax benefits. To resolve this tax discrepancy, Representative Jim McDermott recently introduced a bill in Congress called the Tax Equity for Health Plan Beneficiaries Act of 2009, which would broaden the tax exclusion category to all "qualifying" beneficiaries. This article addresses the need for Congress to pass Representative McDermott's bill to eradicate tax inequity in the United States for all gay couples and domestic partners by increasing the number of employees who are eligible for such insurance health coverage and by promoting more reasons for employers to offer health benefits to domestic partners.

Bryan A. Liang, *Crisis on Campus: Student Access to Health Care,* 43 U. MICH. J.L. REFORM 617 (2010).

College students and young adults—the most underinsured demographic in the U.S.—often turn to health care plans offered by their educational institutions for health insurance, even though these plans provide inadequate coverage at a price that is often no better than those offered by private health insurance companies. As a remedy, some states have attempted to invoke a student mandate that would require college students to have health insurance; however these mandates have still not provided adequate care to the students even though the number of insured college students may have increased. The author suggests enacting a statute that would amend the Higher Education Opportunity Act by invoking a student mandate for health insurance. The statute would require school and private health insurance plans to meet a minimum standard benefits plan as well as require colleges to allow students to use their private health insurance in lieu of the benefits plan offered by the school. The proposed statute would bring benefits to college students who cannot afford a health insurance plan by requiring a portion of the schools' surplus to be used for health insurance scholarships.

J. Paul Singleton, Comment, *The Good, The Bad and The Ugly: How the Due Process Clause May Limit Comprehensive Health Care Reform,* 77 TENN. L. REV 413 (2010).

Despite widespread agreement that the American health care system is in need of reform, lawmakers still face obstacles in solving accessibility problems without influencing costs or quality of the health care provided. Extending accessibility while cutting costs can arguably lead to rationing, whereby the government, either explicitly or implicitly, limits the type of services available to citizens. This Comment discusses the due process concerns that arise in creating federal health care reform and how a rationed health care system would infringe on the Fifth and Fourteenth Amendment rights of citizens to make decisions regarding personal health care. The author suggests that Congress should protect Americans' rights to obtain private health insurance and avoid a public option plan that would lead to monopolization by the federal government. By doing so, lawmakers could avoid constitutional challenge on due process grounds, thus enabling them to create the changes needed in the health care system.

Lisa M. Keels, *"Substantially Limited:" The Reproductive Rights of Women Living with HIV/AIDS,* 39 U. BALT. L. REV. 389 (2010).

Although the ADA Amendment Act of 2008 ("ADAAA") was intended to protect people living with HIV/AIDS from discrimination, Congress failed to

explicitly disavow the *Bragdon* Court's assertion that women with HIV/AIDS suffer an impairment that supposedly substantially limits their ability to reproduce, thereby stigmatizing women with HIV/AIDS. Women with HIV/AIDS encounter obstacles in their pursuit of appropriate medical attention stemming from the stigma surrounding their disease. The article discusses these obstacles and how the rationale of the leading United States Supreme Court case on this issue, *Abbott v. Bragdon*, is outdated in light of medical advances. Courts should prospectively interpret the ADAAA broadly to counter the stigma that surrounds the reproductive rights of a woman afflicted with HIV/AIDS. One way in which courts can achieve this goal is to define the potential or active suppression of the immune system as a disability under ADAAA, which will simultaneously protect women with HIV/AIDS and reduce its stigma.

HUMAN RIGHTS

Erick T. Gjerdingen, Note, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as "Exploitation" and Smuggling as "Choice" Along the Burmese-Thai Border*, 26 ARIZ. J. INT'L. & COMP. L. 699 (2009).

Incidents like the suffocation of fifty-four Burmese migrants in a cold storage truck in Thailand, and the unique situation in Thailand and Burma more generally, highlight the problems in international law regarding the distinction between, and subsequent treatment of, human trafficking and smuggling. The situation in Burma often necessitates migration to Thailand, either as migrants or as refugees, but the conditions found in Thailand often, according to commentators, amount to exploitation. These facts are used to support the contention that trafficking and smuggling do not lie on a continuum—with those being trafficked as victims at one end and those being smuggled as complicit participants at the other—but require a more nuanced distinction than the current, underdeveloped discourse provides. To do this, consent as a criterion for determining whether or not a situation is smuggling or trafficking must be looked at very narrowly since the voluntariness of the move does not always mean that there was another viable option or that all of the surrounding circumstances were consented to—e.g. the mode of transportation. The Thai-Burmese situation provides a context in which to review and revise the United Nations protocols regarding trafficking and smuggling to better address the complexity of the issue.

Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutation as a Basis for Asylum,* 95 CORNELL L. REV. 599 (2010).

Female Genital Mutilation ("FGM"), which involves the partial or complete removal of a woman's external genitalia and is often practiced as a tradition in some cultures, has extreme negative health consequences in young women. Currently, women affected by FGM have a difficult time obtaining asylum status because immigration and federal courts have had difficulty defining what constitutes "persecution" under the Immigration and Nationality Act ("INA"). According to the INA, a noncitizen can claim asylum status in the United States if the person can establish persecution based on membership in a particular social group. This Note describes the dangers of FGM by providing its history amongst various communities to argue that the term "refugee" as defined by the INA should include women who are threatened or who have already suffered from FGM. Based on the mental and physical harms caused by FGM, the women who suffer from this type of female mutilation should be categorized as a "particular social group" as defined by INA section 101(a)(42) to protect these women who are seeking U.S. asylum.

Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453 (2010).

U.S. government enforcement programs created to address human trafficking focus on legal and immigration-based issues of human trafficking but fail to address the human rights of trafficked people. It is very difficult for human trafficking victims to attain refugee status because they often do not satisfy the requirements for refugee status by definition, as their departure was not due to fear of persecution for their "race, religion, nationality, membership in a particular social group or political opinion." The author argues that gender should qualify trafficked women for refugee status as survivors of gender-based persecution because their gender usually played a role in why they became a victim of human trafficking. The resistance against creating a nexus for persecution and gender is because governments are wary that it might lead to a blanket acceptance for all women domestic violence victims. However, the gender factor should fulfill the requirement of having "membership in a particular social group" if it was an influencing factor for the victim's persecution or if it can be shown to have been a factor that put the victim at a higher risk for persecution.

Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1 (2009).

Sexual harassment law derives from Title VII of the Civil Rights Act of 1964, which is specifically designed to redress workplace inequality. Sexual harassment occurring outside the workplace, then, is analyzed under a body of law that regards sexual harassment as a means to promote equality in the workplace. The author examines how prisoners' sexual harassment claims have been analyzed to illustrate the broader point that applying sexual harassment law in its current, workplace-oriented form fails to adequately redress non-workplace sexual harassment and produces an unstable and seemingly contradictory body of law. For instance, Title VII's unwelcomeness standard—permitting minor expressions of sexual interest by an employer towards an employee when the employee has previously expressed sexual interest—is inappropriate in prisoner sexual harassment suits against guards because the power difference and the threat of physical compulsion prevents prisoners from entering into a voluntary sexual relationship with a prison guard. Were sexual harassment conceived as a dignitary harm—harm that offends social norms and therefore violates one's dignity expectations—sexual harassment law could be shaped to adequately address sexual harassment in a variety of contexts while maintaining a coherent body of law.

Naomi Cahn et al., *Returning Home: Women in Post-Conflict Societies*, 39 U. BALT. L. REV. 339 (2010).

While the transition from war to peace in a post-conflict society is mainly focused on emergency relief, incorporating a gender-focused development plan and addressing women's issues in the beginning stages of the reconstruction process would strengthen that society's ability to attain its long-term goals. As most countries experiencing conflict are among the poorest in the world, development efforts in the areas of education, health care and women's safety fall to wayside in the aftermath of war and during the recovery period. The author uses studies that show that fulfilling real local community needs and educating women has a broader impact on society, which is necessary for the country's socioeconomic advancement and long-term stability. The international presence and funding in a post-conflict environment creates the unique opportunity for a downtrodden society to address long-term developmental issues such as education, health care and safety, while also working on short-term reconstruction. By starting reconstruction efforts at the ground level and developing a deeper understanding of women's impact on their communities, a country's ability to achieve broader macro goals, such as long-term safety and economic development, would be strengthened.

LGBT RIGHTS

Courtney Megan Cahill, *Celebrating the Differences that Could Make a Difference:* United States v. Virginia *and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943 (2009).

In arguing for marriage equality, many proponents have relied on emphasizing similarities between homosexuals and heterosexuals rather than acknowledging differences. Arguments based on the "no-differences" model work on a doctrinal and strategic level, but are inaccurate and normatively undesirable. The author suggests that gay rights advocates should turn to a new model that celebrates differences while still arguing against exclusionary marriage legislation, using the idea of difference put forward by Justice Ruth Bader Ginsburg's majority opinion in *United States v. Virginia*. *Virginia*, which acknowledges gender differences while maintaining that difference alone is no reason to deny equal treatment and opportunity under the law, offers a solid foundation for marriage equality jurisprudence. Submitting that differences cannot justify unequal treatment constitutes a more accurate approach to gay rights and marriage equality advocacy and one that should be espoused in future litigation.

Steven J. Fugelsang, *Reconciling* Lawrence v. Texas *with "Don't Ask, Don't Tell": The Value of the* Cook v. Gates *Intermediate-Deferential Approach*, 20 GEO. MASON U. CIV. RTS. L.J. 237 (2010).

After the U.S. Supreme Court decision in *Lawrence v. Texas*, it is unclear whether the Court created a right for an adult to engage in private sexual conduct and whether Don't Ask Don't Tell ("DADT") unconstitutionally denies that right by prohibiting homosexual servicemembers from engaging in or discussing their homosexual relationships while in the military. This article discusses the legal and constitutional implications of DADT and argues for affirming its constitutionality. By disregarding the rational basis review set forth in *Lawrence*—which analyzes whether the violation of a right is reasonably related to a legitimate state cause—and using an intermediate, interest-based balancing approach to military sexual orientation discrimination provided by the *Cook v. Gates* model, due process implications would be resolved without hindering the unique operational needs of the U.S. military. This approach takes into consideration the military and policy needs that justify the adoption of DADT such as the privacy interests of heterosexual servicemembers, recruitment and retention and a history of judicial deference supporting the operational flexibility of the U.S. Armed Forces. By implementing a deferential, intermediate standard of review, courts should structure federal due process jurisprudence so that U.S. military needs are recognized and

factored into a considered assessment of state-sponsored sexual orientation discrimination under the Due Process Clause.

Renee T. Hindo, Note, *Connecticut's Class Divide: Sexual Orientation as a Quasi-Suspect Class,* 87 U. DET. MERCY L. REV. 227 (2010).

The 2008 Connecticut Supreme Court case of *Kerrigan v. Commissioner of Public Health* defined same-sex couples as a quasi-suspect class and invalidated discriminatory laws preventing gays and lesbian residents of Connecticut from getting married in the state. In cases alleging a violation of the Equal Protection Clause, state courts use a set list of criteria to determine whether members of the party making the complaint fall under normal, quasi-suspect, or suspect class distinctions. Each class correlates to a different level of scrutiny that state courts use when analyzing an alleged Equal Protection Clause violation. By holding that same-sex couples are a quasi-suspect class, the Connecticut Supreme Court employed a heightened level of scrutiny, and it was because of this determination that the law preventing gay and lesbian residents of Connecticut from getting married in the state was nullified. This holding can be used in future challenges to gay marriage bans by supporting the notion that other state courts should employ a stricter level of scrutiny when analyzing the constitutionality of statutes affecting gay marriage.

Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based on Asylum Claims*, 19 COLUM. J. GENDER & L. 367 (2010).

The asylum laws in the U.S. dealing with gender and sexual orientation are too rigid and need to be reformed in order to accommodate the inherent individual nature of the claims themselves and to expand the protections in the U.S. for human rights. The author supports a new identification system called the "axis-oriented approach." This approach would expand categories of gender and sexual orientation away from general definitions based on American culture and politics and toward a more personalized view for the individual. Currently asylum laws have numerous faults, which includes forcing applicants to manipulate their persecution claims to meet the on-going and causally linked standards and conform to a standard of gender or sexual orientation. By changing the asylum policy to the "axis-oriented approach," a larger number of people will benefit and be protected against persecution.

Alvin Lee, *Assessing the Korean Military's Gay Sex Ban in the International Context*, 19 LAW AND SEXUALITY 67 (2010).

Article 92 of the Korean Military Penal Code criminalizes male homosexuality in the military and as such, it is an anachronistic outlier within the international sphere. In the context of postwar Korean militarization and universal conscription, policies that are explicitly anti-male homosexuality have persisted. The author discusses postwar Korean history and undertakes a comparative analysis of various countries' policies with regard to tolerance of homosexuality in the military. The Korean policies in question violate Korean legal obligations under international law, but also constitute denials of full citizenship to the affected parties. In concluding that the Korean policy is an outlier, the discussion inevitably extends to the American "Don't Ask, Don't Tell" policy—concededly a de facto prohibition on male homosexuality—even if superior to the Korean policy in that it treats men and women equally and is likely to be relaxed in the future.

Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21 (2010).

Martha Nussbaum has been a pioneer in lesbian, gay, bisexual, and transgendered rights litigation and her theories on expanding litigation can be of great help to the LGBT community. Though LGBT rights have improved, they have progressed by equating LGBT individuals to "normal" heterosexual couples—emphasizing the idea of the "white picket house" family. The author argues that by focusing on emotions such as love and by emphasizing recent scientific trends in the LGBT community, LGBT rights can progress to include all LGBT individuals, and not just the ones that give off the stereotypical heterosexual lifestyle. Through portrayals of love and affection while maintaining a focus on sexuality, analogizing sexual orientation to religion, by increased exposure by telling individual's stories, and by expanding scientific and immutability principles, litigation for LGBT individuals can be improved. It is important to emphasize the aspects of love and science while also including the aspect of sexuality to ensure that all types of LGBT individuals are included when promoting their rights.

David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133 (2009).

In California, the campaign for the approved Proposition 8—prohibiting same-sex marriage—that resulted in protests between advocates of the proposition and their employers, was reflective of the argument that donor disclosure in ballot elections threatens the donor's privacy and well-being. Despite the ill consequences of donor disclosure of deterring political speech and facilitating

harassment with the advent of technology, proponents argue that disclosure serves significant state interests of offering lucidity and obstructing corruption. The author proposes a new, balanced disclosure structure that guards donors against invasion of privacy, intimidation and harassment by deterring from disclosing donors' names. Instead, the donors' occupation and employer should be disclosed to counteract corruption; the donors' city and state of residence should be disclosed to determine the number of out-of-state donors and the collective data on institutional support and percentage of contribution should be disclosed to improve voter proficiency. Since the costs of full disclosure are high and the informational advantage relatively low, a new disclosure standard must be embraced that meets the vital state interests for disclosure yet protects First Amendment rights of individual privacy.

Matthew T. Moore, *Long-Term Plans for LGBT Floridians: Special Concerns and Suggestions to Avoid Legal and Family Interference*, 34 NOVA L. REV. 255 (2009).

Although Florida's Amendment 2 strictly prohibits same-sex marriage, Florida has "personal choice" laws that can provide members of the LGBT community an opportunity to create relationships with legal substance. Despite the fact that Florida has a fast growing LGBT population, it is largely intolerant of giving its LGBT residents marriage or domestic partnership rights. However, the use of long-term planning within the confines of Florida's existing legislation can prevent LGBT residents from becoming "legal strangers" to their friends and family members. Long-term planning can give legal effect to relationships amongst unmarried LGBTs because it allows them to make financial and health care decisions, for instance, to protect against "legal stranger danger" upon death or incapacity of one partner. The U.S. Supreme Court and Florida's Constitution both recognize a right to privacy and this right—together with proper planning and perhaps even a quasi-judicial process overseeing the planning process—can give LGBT residents legal validity to their relationships.

Dara Smith, *Home is Where the Heart is: Sexual Orientation Discrimination and the Right to Adequate Housing in International Law*, 40 GEO. WAS. INT'L. L. REV. 1343 (2009).

The United Nations' Universal Declaration of Human Rights says that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including... housing." Several other international instruments—such as the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; and International Covenant on Civil and Political Rights —create or protect a similar right to adequate housing.

Increasingly, the United Nations Human Rights Committee and Committee on Economic, Social and Cultural are recognizing sexual minorities as a group requiring protection and yet a disproportionately high number of lesbian, gay, bisexual, and transsexual people—particularly youths—are still discriminated against when seeking housing. The author advocates a broader construction of the existing international standards to include protection of sexual minorities, in much the same way it grew to protect other discrete groups, for instance those based upon race, gender, and socioeconomic status. While sexual minority groups have become a protected group under the U.N.'s international standards, more codification of nondiscrimination against sexual minorities in fair housing instruments is necessary to ensure the increasingly difficult housing situation doesn't leave sexual minorities out in the cold.

Katherine A. Womack, Comment, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365 (2010).

This comment urges colleges and universities to create policies to protect transgender students in light of the recent trend to protect gender identity and the passage of the Hate Crimes Prevention Act ("HCPA"). Until the HCPA, there were conflicting judicial decisions about whether gender identity discrimination is protected under Title VII, and no federal laws explicitly protected transgender persons from discrimination or targeted violence. When a transgender person is forced into an environment that is incongruent with his or her gender identity—such as a residence or bathroom—psychological damage from the denial of this identity and physical damage inflicted by others may result. Therefore, colleges and universities should allow transgender students to choose the housing option with which they are most comfortable or provide gender-neutral housing and bathrooms, but should avoid completely isolating transgender students from the other residents by creating transgender-only housing. The federal government should send a message to schools by amending regulations to allow transgender students to choose the single-sex housing that corresponds to their gender identity.

Alexander Lara, Note, *Forced Integration of Gay, Bisexual and Transgendered Inmates in California State Prisons: From Protected Minority to Exposed Victims*, 19 S. CAL. INTERDISC. L.J. 589 (2010).

The gay, bisexual, and transgendered ("GBT") populations in California state prisons are at an abnormally high risk of becoming victims of sexual assault and violence at the hands of other inmates. With the drastic influx of prisoners in the 1990s and lingering negative attitudes against homosexuality amongst Americans, social hierarchies within the microcosms of California state prisons promote sexual

abuse against GBT inmates. Although social science reports from the Human Rights Watch in the new millennium have resulted in recent legislative attempts to protect GBT inmates' safety and Eighth Amendment rights, disparities between the victimization of heterosexual and GBT inmates remain. In response, this note proposes reducing the overcrowding of California state prisons, amending the Sex Abuse in Detention Elimination Act to include mandatory classification procedures to identify and segregate GBT inmates, and training correctional officers more comprehensively to deal with incidents of sexual abuse amongst inmates. Additionally, because of the California Supreme Court's decision to extend "strict scrutiny" review on the basis of sexual orientation in the California Marriage Cases, the author hopes that courts and legislators will begin to analyze the disparate treatment of GBT inmates in a manner that will ensure the security of their rights as a protected class in the future.

Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747 (2010).

Mediation is a promising means of resolving gay rights and religious liberty conflicts and addressing feelings of polarization and embattlement. When private or governmental entities create rights for gay and lesbian persons, it is inevitable that they simultaneously threaten challengers' rights of religious liberty. Opponents of gay rights fear that laws or policies codifying gay rights may necessitate conduct inconsistent with their religious beliefs, preclude practices that their religious beliefs require, or silence their opposition to gay rights. Mediation creates opportunities to deal with psychological obstacles to agreement, allowing adverse parties to better understand each other, and unite their distinct but often complementary interests in ways that are not possible through litigation. The author evaluates how mediation might have been effective in cases in which negotiated resolutions were not achieved and suggests that enduring harmony is only possible when individuals are able to understand the needs of individuals with conflicting beliefs.

MARRIAGE

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

Immigration Services' reading of immigration law has resulted in a "widow's penalty" where Immigration Services will reject an alien's application for legal permanent residence ("LPR") if that alien's spouse was an American citizen who

died before the couple's second year marriage anniversary. This penalty applies even if the citizen spouse had filed an I-30 petition on the alien's behalf, and consequently many aliens are subject to deportation and separated from their American born children who are U.S. citizens. This Note argues that it is unlikely that Congress meant for a widow's penalty to exist and to require an alien to be married to her citizen spouse for two years in such a situation. The widow's penalty is bad policy because it separates families, randomly subjects aliens to deportation based on an occurrence that is out of their control, and does not serve any practical purpose in preventing "fraud marriages" since other legal mechanisms are in place to deter aliens from marrying citizens in order to obtain LPR status. Therefore, Congress should strike the two-year requirement to avoid the widow's penalty and allow the alien spouse to self-petition for LPR status within two years of her spouse's death.

Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context,* 13 CHAP. L. REV. 27 (2009).

Premarital agreements allow prospective spouses to draft the terms of their marriage and divorce, thereby avoiding the default statutes that regulate these matters. While American case and statutory law have hashed out many of the legal problems that premarital agreements once faced, this article compares American and European approaches to premarital agreements in order to raise awareness to several issues that remain. The authors show that Americans enjoy greater freedom in drafting the agreements than Europeans, but that one consequence of this freedom is that courts occasionally deem a premarital agreement unenforceable because the terms of the agreement put one party at a significant disadvantage. Unlike some European nations that permit or require the public registration of premarital agreements in order to better protect third parties, most American states maintain the confidentiality of premarital agreements, allowing for intimate details to be included but at the same time limiting the agreement to the spouses themselves. Despite the usefulness of premarital agreements, fewer than 10 percent of Europeans and Americans use them because Europeans negatively associate the agreements with American celebrity divorces, while Americans have unrealistic optimism about marriage.

Bridgette Toy-Cronin, *Forced Marriage in International Criminal Law: The Cambodian Example,* 19 COLUM. J. GENDER & L. 539 (2010).

In 2008, the Appeals Court in Sierra Leone recognized forced marriage—rampant in many conflict areas of Africa—as criminally punishable when it overturned a dismissal of an indictment of forced marriage as a crime against

humanity. The international population is largely unaware of the extent of the torture and horror endured by women in forced marriages. The article argues that while it is imperative to acknowledge forced marriage as a crime against humanity, the Appeals Court in Sierra Leone should not combine forced marriage with the crimes that occur within the forced marriage, such as rape. The author argues that separating forced marriage as its own separate crime is the only way to truly close the gap in this developing jurisprudence. The Extraordinary Chambers in the Courts of Cambodia was established for the purpose of prosecuting crimes committed by Khmer Rouge and presents an opportunity to bring light to the traumatic events that these Cambodian men and women endured as a result of being forced to marry.

Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law,* 85 IND. L. J. 893 (2010).

Family law is abound with examples of how language affects status. The author in this article argues that language plays a critical role in reflecting and reinforcing gender hierarchy within status categories like marriage, and considers whether same sex couples who are entitled to the benefits of marriage should be entitled to the term "marriage," as well as the hierarchy created by marital naming, where women typically take the name of their husband. By naming marriage, the state addresses the gender boundaries of who can actually participate in marriage—for example, in California, the Supreme Court held that opposite sex couple have the title "marriage" while same sex couples are entitled to a "domestic partnership," despite having the same legal rights, privileges and benefits—while with marital naming, the private individual and law defines the way the genders interact within the marriage. These two practices create a gender hierarchy in both the private and public sphere, and as a result, the use of language and labels plays a special role in the perpetuation of prejudice about differences; for example, designating same-sex couples under a separate relational name implies that same-sex relationships are qualitatively different and less worthy of public approval. In order to blur the line between genders and sexual orientation, thus shaking the gender hierarchy, it is suggested that "marriage" should no longer involve only a man and woman, and same-sex marital naming should be considered, therefore disrupting the assumption that men keep and women change.

Ashley E. Rathbun, Comment, *Marrying into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 227 (2010).

Many elderly individuals—people at or over the age of sixty-five—are susceptible to elder abuse, specifically in situations where they lack mental capacity and are coerced into marriage. With the growth of the elderly population in the

United States, such situations have become common and of mounting concern. This comment seeks to address the issue of an elder person's mental marital capacity and suggests that California should require proof of mental capacity before the start of marriage. The law of trust and estates has procedural and statutory safeguards to ensure the required level of testamentary capacity, such as observation and questioning of each client, as well as medical and psychiatric evaluations when necessary. Such procedural protections should be adopted to determine an individual's mental capacity, requiring that he or she meet a minimum level of capacity before entering marriage, in order to provide additional safeguards from elder abuse.

Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113 (2008).

The idea of marriage is based on two people sharing their lives; therefore it is a logical and beneficial conceptualization of the institution to consider marriage both a symbolic and legal partnership. Traditionally, the idea of power in the home is based on what each spouse contributes to the partnership, either through the pooling of premarital resources, wages and earnings, or domestic work. Nonetheless, studies show prescribed notions of gender roles—namely, the male breadwinner and female caretaker categorizations—has a greater impact on the power structure of a marriage than disparities in earning potential, meaning women are more disadvantaged by sharing resources than men. State ownership and property rules should be changed to reflect the communal nature of a marriage, giving each spouse a legal entitlement to the couple's assets, because that would prevent the devaluation of non-monetary contributions of women and promote the marital ideal of partnership. Legal recognition of the rights of both spouses facilitates the primary goal of marriage, which is the sharing of two lives, including all of the practical realities that entails.

PARENTING

Ian Vandewalker, *Of Permission Slips and Homophobia: Parental Consent Policies for School Club Participation Aimed at Gay-Positive Student Groups*, 19 B.U. PUB. INT. L.J. 23 (2009).

The conditions of the adoption of parental consent policies demonstrate that they are particularly directed at the gay-positive groups, such as Gay-Straight Alliances ("GSAs"). This article provides an overview of local and state parental consent policies, discusses how parental consent policies violate all three

provisions of the Equal Access Act, and analyzes the constitutional validity of parental consent policies. A close look at the contextual nature and discriminatory animus of parental consent policies demonstrate that such policies create special hardships for GSAs, but the Equal Access Act of 1984 ("EAA") provides a statutory safeguard for student groups, such as GSAs, and ensures that schools may not deny equal access to resources provided by the school, deny fair opportunities or discriminate against students based on the content of their student group discussions. Furthermore, constitutional safeguards ensure that these groups have rights of association, equal protection and privacy. It is imperative that students have the unrestricted right to join beneficial extracurricular groups—in particular gay-positive groups—that contribute to their growth as individuals, and that their ability to do so is not subjected to parental veto.

Alicia Ouellette, *Shaping Parental Authority Over Children's Bodies*, 85 IND. L.J. 955 (2010).

Current United States law grants parents the power to use modern medicine to affect the appearance of their children through the use of shaping procedures. Traditional scholarly work in this field has been limited to whether the particular treatment at issue is harmful enough that the parents should not be allowed to choose to subject their children to it. The author hopes to reframe the discussion on this issue by focusing on the problem of parental control over a child's body, and thus hopes that the law will follow suit and allow medical decisions to be made only for a child's benefit. A trust-based test for medical decisions that focuses on a child's needs would be a better system in today's age, because we view children as independent people. However, the limitations to this method lie in its implementation, and the inability to distinguish for which needs the definitions may change along with societal values.

Jason Fuller, *Corporal Punishment and Child Development*, 43 AKRON L. REV. 537 (2010).

Despite the common belief that corporal punishment has a negative impact and promotes violent behavior in children, when exercised correctly and at the proper age, corporal punishment is shown to be more effective than other forms of discipline. Where spanking bans have been put into place in certain countries, the level of violence and emotional problems in children has actually increased. Child psychology studies by Dr. Jean Piaget show that as a child's mind develops, his thinking ability progresses from only understanding concepts in simple, concrete terms to the ability to think abstractly when he reaches adolescence. As the most effective punishments match the child's level of thought process, the use of spanking at a young age can be very beneficial, but gradually decreases in value as

the child matures. In order to be effective, the form of discipline used needs to be adapted to the child's age and level of maturity, and applied both consistently and immediately in order for the child to connect the punishment to the unacceptable behavior.

Cheryl George, *Parents Super-Sizing Their Children: Criminalizing and Prosecuting the Rising Incidence of Childhood Obesity as Child Abuse*, 13 DEPAUL J. HEALTH CARE L. 33 (2010).

With obesity as a leading cause of death in the United States, and childhood obesity on the rise, the need for both state intervention and parental liability for neglect of their child's morbid obesity is ever-apparent. As both genetics and environmental factors play a role in a child's propensity to become obese, the two major spheres of a school-aged child's life, school and family, are responsible for taking steps to guide the child toward a healthy lifestyle. However, while the school system can be mandated to implement physical education programs or student health report cards, it is also the parents' responsibility to establish healthy eating habits for their children and to address the medical issue of obesity in their children. The author proposes that where parents neglect to care for their morbidly obese children, it is essential that the state be able to intervene and either hold parents criminally liable for medical neglect or remove the children from their families to enforce a healthy diet. While there are clear disadvantages to government involvement in this arguably private sphere, state intervention has proven to be an effective method of combating this serious, but treatable medical condition.

RACE AND GENDER

Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy,* 19 COLUM. J. GENDER & L. 287 (2010).

This article seeks to debunk the notion that anti-polygamy laws were created to ensure women's equality and to shield teenage girls from marrying old men; rather, it argues that today's ban on polygamy grew out of the nineteenth century white American view that Mormons committed political and social treason. That is, white Americans viewed Mormons as committing political treason by wanting to establish a separatist theocracy in Utah, and committing social treason by adopting a "non-white" and "barbaric" form of marriage—polygamy. Judicial, political, and medical discourse, along with the political cartoons of the nineteenth century, demonstrate that polygamy was viewed as "unnatural" for whites but "natural" among "inferior colored races." The author uses several theoretical

frameworks to help demonstrate that this "racialization" of polygamy as non-white helped justify the ban on the practice, as well as the deprivation of Mormons' fundamental rights of citizenship such as voting. Uncovering the origins of the anti-polygamy ban may help us rethink the logic and reasoning behind the ban itself, and also may shed light on the same-sex marriage debate.

Naomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053 (2009).

Though Justice Ruth Bader Ginsberg advocates for individualized equality for women eschewing specialized and unequal treatment of the genders, her views on racial inequality have emphasized policies that treat individuals preferentially based on race. There are two distinct ways to approach inequality in the legal sense, either antidiscrimination—the complete equality with no distinction between or preference shown for the supposed disadvantaged group—or antisubordination, which attempts to raise the status of a group in society by drawing distinctions between and showing preferences for that group. The author argues that Ginsburg's preferences for an antidiscrimination stance regarding gender and an antisubordination stance on racial inequalities—exemplified by her firm support for affirmative action programs—are in conflict. Furthermore it can be argued that treating all individuals even-handedly, and applying an overarching antidiscrimination stance to all inequality issues can remedy this conflict. This is especially important as the antisubordination approach actually continues the subordination of racial minorities by applying overarching stereotypes to the individual, which undermines the concept of full equality.

Angela P. Harris, *Race and Socioeconomic Class: Examining An Increasingly Complex Tapestry*, 72 LAW & CONTEMP. PROBS. 37 (2009).

There are at least three lenses through which to examine the relationship between gender and class: viewing both as identity categories, using a structural analysis to determine how gender and class are used to create accepted social and economic norms, and considering the process of "person-making"—determining how people in various classifications are valued and what privileges they do or do not possess. As an identity, gender is extremely prominent, while class identity is primarily demonstrated via taste. The structural perspective is best utilized by discarding traditional ideas of "public" and "private" sectors, and instead considering how all areas of society can be reorganized to maximize benefits to both individuals and groups. Finally, a person-making perspective shows how disadvantaged people in both gender and class groups are marginalized and made to feel less deserving of respect than their counterparts. As gender, class, and other classifications are inextricably linked, it is important to avoid creating fixed

conceptions of these titles, but rather to look for new ways to compare and relate them.

RELIGION

Edward A. Liva, *Even Silence Has No Prayer: The Third Circuit Sacks Coach's Silent Team Prayer in* Borden v. School District of East Brunswick, 54 VILL. L. REV. 801 (2009).

The Third Circuit's decision in *Borden v. School District of East Brunswick*—which held that a football coach who led his players in prayer could not bow his head or kneel while his players were praying—demonstrates the court's preference for the endorsement test in determining whether a football coach violated the Establishment Clause of the First Amendment. The U.S. Supreme Court developed the endorsement test to determine whether a practice violates the Establishment Clause, and considers whether an objective outsider who is knowledgeable about the history of the practice would consider the practice an endorsement of a particular religion. Because the endorsement test focuses on the historical context surrounding the controversial practice, coaches who had previously joined their players in prayer will in the future also probably not be allowed to show any quiet signal of support for their player's religious practices. *Borden* is limited to its facts, and therefore a coach who has no previous pattern of overtly praying with his players may be allowed to engage in such quiet gestures. Still, *Borden* indicates that the courts are hesitant to allow coaches to engage in any form of prayer with their players, and coaches who wish to do so will have a hard time persuading that the Third Circuit that such practices do not violate the Establishment Clause.

Ekaterina Yahyaoui Krivenko, *Muslim Women's Claims to Refugee Status Within the Context of Child Custody Upon Divorce Under Islamic Law*, 22 INT'L J. REFUGEE L. 44 (2010).

Divorced and widowed mothers in countries with allegedly Islamic laws must turn over their children to their former husbands or their former husbands' families once the children reach a given age or the mothers remarry, even when the fathers are physically and mentally abusive. As such, even when children are in their mothers' custody, these countries' legal systems make it impossible for women and their children to escape their abusers because fathers and their families have legal rights with regards to their children. This article discusses the ways in which the United Kingdom, New Zealand, and Canada handle the claims for refugee status of the women and their children who are in this position and flee their home countries.

Unlike the United Kingdom, New Zealand and Canada take a more holistic approach in determining refugee status and look at both the mother's situation and the best interest of the children. New Zealand's and Canada's systems are more favorable because they recognize that women constitute a particular social group, take more and wider-ranging factors into account when determining whether countries of origin will protect divorced and widowed children, and treat social and cultural rights as basic human rights.

Michael Young, Note, *In Defense of the Constitutionality of Critically Discussing Religious and Ethics in Schools in Light of Free Exercise and Parental Rights*, 70 OHIO ST. L. J. 1565 (2009).

The hypothetical Critical Discussions program of study in secondary schools—which would promote a philosophy of open dialogue for significant issues such as religion, ethics and values—potentially faces constitutional opposition under free exercise and parental rights claims. Despite the fear from opponents that such a curriculum would undermine children's religious beliefs, encouraging the open contemplative discussion of diverse religious and ethical views through a hypothetical Critical Discussions curriculum would instead enhance the social values of our country and be constitutional if the state made it compulsory. Even though the standard of review for the free exercise claim is minimal, the author argues that any extensive burden on the religious plaintiff—though not likely present—is trumped by the undeniable state interest of its citizens developing such useful skills of open discussion. In addition to the free exercise claim, the parental rights claim is countered by the argument that parents generally do not have the power to refuse the curriculum directives made by the states. The Critical Discussions program—which would augment the social good and improve the rational skills of our citizens—can be adopted by the state as part of its mandatory curriculum owing to its constitutionality.

SAME SEX MARRIAGE

Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 CORNELL J.L. & PUB. POL'Y 383 (2010).

Same-sex families and couples need to be legally recognized and protected; this can be done through state constitutions that allow same-sex marriage and by adding sexual orientation to federal non-discrimination statues. The author addresses the legal rights of same-sex couples and families in some states and the problems caused for them by the Defense of Marriage Act. The international community's inclusion of sexual orientation in non-discrimination clauses and the

almost widespread acceptance of same-sex couples contrasts greatly with the policies of the U.S. The article discusses how to protect both religious views and LGBT rights in the U.S., where the statutes protecting LGBT persons and families from discrimination by religious communities depend on the state, but typically allow discrimination when dealing with transmission activities. There needs to be a greater understanding and recognition of same-sex couples rights not only for these couples, but also for the betterment of society as a whole.

Anthony C. Infanti, *Surveying the Legal Landscape for Pennsylvania Same-Sex Couples*, 71 U. PITT. L. REV. 187 (2009).

Currently, Pennsylvania does not permit same-sex couples to marry and does not recognize same-sex marriages performed in other states, although some Pennsylvanian cities allow same-sex couples to register as domestic partners. The inability of same-sex couples to obtain rights and obligations through marriage forces them to turn to alternative methods of securing legal recognition. For example, a same-sex couple can formalize their relationship through a domestic partnership agreement or provide for the disbursement of property or appointment of a guardian for a minor through a will. The author provides a thorough survey of the legal rights afforded to same-sex couples, ways in which a same-sex couple can protect those rights even without a legal marriage, and the challenges that remain unresolved by the Pennsylvania courts or state legislature. This snapshot of the current legal environment for same-sex couples in Pennsylvania illustrates that the hurdles faced by same-sex couples in Pennsylvania are similar to those faced by couples in other parts of the country.

Arthur S. Leonard, *New York Recognition of a Legal Status for Same-Sex Couples: A Rapidly Developing Story*, 54 N.Y.L. SCH. L. REV. 479 (2009).

New York recognizes out-of-state same-sex marriages as valid, but does not authorize same-sex marriages performed within the state. The development of the right to recognition began with *Hernandez v. Robles* in 2006 when the New York Court of Appeals determined that there was no affirmative right to marriage but that the state's marriage recognition statute did not preclude recognizing those performed lawfully elsewhere. At the time, only one other state—in which marriage licenses were unattainable by nonresidents—and Canada allowed same-sex marriage, so the right to recognition was largely meaningless. However, after the expansion of marriage rights both domestically and abroad, the right became more significant and was affirmed in the Appellate Division decision of *Martinez v. County of Monroe*, subsequent state court decisions, and an executive letter issued by Governor Paterson of New York stating that not recognizing out-of-state same-sex marriages was unlawful. Considering that the lower court and executive

decisions have recognized out-of-state same-sex marriages, the Court of Appeals and state legislature can no longer remain silent on this issue.

Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and An Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207 (2010).

States' treatment of same-sex marriages performed in Native American communities is not uniform. Historically, courts have treated Native American tribes as "domestic dependent nations" and permit them to act as separate sovereignties with respect to their internal affairs. Both the federal government and the states have deferred to tribal marriage practices even when a practice has clashed with public policy, as is the case for the recognition of polygamous marriages even though no state permits polygamous marriage. This article advocates the recognition of Native American same-sex marriages through repeal of the Defense of Marriage Act. Repeal would allow same-sex marriages performed on tribal lands to be recognized in all states even though certain states have found that same-sex unions are against public policy.

Jared B. Arader, Note, Chambers v. Ormiston*:* *The Harmful and Discriminatory Avoidance of the Laws of Comity and Public Policy for Valid Same-Sex Marriages*, 15 ROGER WILLIAMS U. L. REV. 187 (2010).

In *Chambers v. Ormiston*, the Supreme Court of Rhode Island ruled that two women—Rhode Island residents married in Massachusetts—could not obtain a divorce in Rhode Island family court. The author argues that the doctrine of comity requires that where state law is silent on the issue, valid same-sex marriages carried out in other states should be recognized. The law of comity thus conveys all state marriage benefits upon couples validly married in other states without requiring the courts to evaluate specific benefits and burdens. As an exception to the law of comity, a marriage will not be recognized when it is against public policy, but Rhode Island legislature has not passed legislation prohibiting same-sex marriages. The law of comity fosters equality and justice by protecting a range of couples throughout American history and should be applied to same-sex marriage in this tradition.

SEX DISCRIMINATION

Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

Early sex-based constitutionality challenges championed by Justice Ruth Bader Ginsburg are often thought to have limited sex-based equal protection cases today because most of the plaintiffs were male. Scholars have argued that the use of male plaintiffs limited the scope of the doctrine and made the alleviation of women's subordination impossible. This article proposes that the anti-stereotyping principle under which early U.S. Supreme Court cases were argued and decided—a theory of equal opportunity in which sex-based roles are myths—was revolutionary in its time because it set a foundation in constitutional law limiting states' power to enforce sex-based roles. The anti-stereotyping doctrine is becoming the basis of the Court's opinions about constitutional questions regarding women in the military, reproductive rights, and male caregivers—areas of the law that have been slow to treat women and men equally. State and federal courts should similarly use anti-stereotyping doctrine in cases involving LGBT rights because successful legal oppositions to LGBT rights have been entrenched in sex-based stereotypes.

SEX OFFENDERS

Alberto Cadoppi & Michael Vitiello, *A Kiss Is Just a Kiss or Is It? A Comparative Look at Italian and American Sex Crimes,* 40 SETON HALL L. REV. 191 (2010).

As a result of shifting cultural and legal norms, numerous reforms have been made over the last few decades in Italy and in the U.S. to deal with sex offense cases. However, the legal systems in these two countries treat sexual offenses differently in two key ways: in Italy, rape is the only sex offense charge available in the legal system—meaning that it is used as an umbrella to cover all sorts of sexual acts—and in the U.S., the consequences of a sex offense conviction are potentially much harsher than in Italy. In comparing several American and Italian cases and examining how their outcomes would differ if decided in the other country, the authors argue that Italy's general charge of rape leads to puzzling and unfair outcomes, while American courts' penalties for sexual offenses can be too stringent. In Italy, for example, a man was convicted of rape when he kissed his female coworker after she objected to his advances, while in the U.S., a 17-year old was convicted of molestation after having intercourse and oral sex with two girls under the age of consent at a New Year's Eve party and prior to a successful habeas corpus petition, faced a mandatory ten year prison sentence without the possibility of parole. In both countries, the criminal law should be geared towards creating

proportional sentences that reflect criminal behavior and target offenders with a high risk of recidivism in order to belie injustice and a loss of confidence in the criminal justice system.

Jennifer Dukarski, Comment, *The Sexual Predator's Scarlet Letter Under the Federal Rules of Evidence 413, 414, and 415: The Moral Implication of the Stigma Created and the Attempt to Balance by Weighing for Prejudice*, 87 U. DET. MERCY L. REV. 271 (2010).

Federal Rules of Evidence ("FRE") 413, 414 and 415 create a situation in which a potential sexual predator is branded with a "Scarlet P" that in turn promotes the assumption "once a sexual predator, always a sexual predator." Originally passed by Congress to "protect the public from rapists and child molesters," the ultimate consequence of FRE 413, 414 and 415 is that the prosecution is permitted to cast a wide net in an effort to find any evidence that bolsters the prosecution's case and decimate any potential defense. The problem with this approach is that all available data also includes non-conviction allegations and unreported incidents, and invites the possibility that a defendant is prematurely branded a sexual predator. The author reviews FRE 413, 414 and 415 to determine their limits and the stigma created by their use, and concludes that the application of FRE 413, 414 and 415 increases the risk of injustice and presents a moral dilemma.

John A. Humbach, *Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010).

Cell phone texting utilized by minors for "obscene" expression in the form of creating and transmitting nude photographs has resulted in the prosecution of minors under child pornography laws. Notwithstanding this ad-hoc prosecution of a few minors, it is problematic that the majority of the prohibited conduct is viewed as insufficiently serious to warrant prosecution. A limitation on the criminalization of sexting is proposed, premised on the First Amendment protection of obscenity affirmed by the U.S. Supreme Court. The criminalization of sexting under child pornography laws harms the very people those laws purport to protect, and such a distortion of the prohibition on child pornography should be remedied, given that exploitative pornography and exhibitionist pornography are two very different genres. In arguing this distinction, the author finds generalizations categorically excluding all sexual content involving minors from First Amendment protection may not apply to this new mode of communication.

Lisa Pearlstein, Note, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims,* 47 AM. CRIM. L. REV. 109 (2010).

Statutory rape laws have expanded beyond their intended scope and their effects have become injurious to those that fall under their purview. Otherwise upstanding individuals are subject to draconian prison sentences for engaging in consensual sexual conduct with their peers. The author discusses the various state statutory rape statutes as well as the Convention on the Rights of the Child ("CRC")—an binding international consensus placing that holds paramount the best interests of children—concluding that states should refocus their laws using the CRC as a guide, consensual acts among peers should not be criminalized, sentencing should be refocused on rehabilitation, and judges should be accorded wider latitude to make case-by-case decisions. Since the current U.S. statutory scheme does not meet international standards, the CRC should be used as a guideline to bring it into accord with such standards. Despite the imprecise wording of the CRC and its standard-based best interest standard, states can utilize the CRC to draft their own legislation while using the goals of the CRC as a drafting guide.

Michael J. Ritter, *Child Pornography, the First Amendment, the Mistakes of Age: An Age-Old Date,* 88 TEX. L. REV. 1110 (2010).

There are two approaches to prosecuting child pornographers—one that allows a mistake of age defense and one that does not—but neither approach successfully protects both the First Amendment's right to free speech and a child from potential pornographers, and thus an intermediate standard should be implemented. Most federal circuit courts apply a strict liability standard to any producer of child pornography, but defendants argue that this position infringes upon the right to free speech. Conversely, the Ninth Circuit allows a mistake of age defense, but this approach potentially harms the well-being of children, since pornographers could raise the defense despite having had reason to know a child was under age. This article posits that an intermediate mistake of age defense is the most sensible approach to prosecuting child pornographers, because it would protect a defendant's right to free speech, while also protecting children by requiring defendants who utilize the defense to show that they had no knowledge of the child's age and that they checked the age against valid government records. An intermediate mistake of age defense is less chilling on the right to free speech, but also is not overly forgiving of those who produce child pornography.

Brett M. Shockley, Note, *Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353 (2010).

The Protect Act of 2003 imposes a minimum of five years released supervision for sexual offenders against minors under 18 U.S.C. § 3583(k), although these offenders are often subject to lifetime supervised release due to the fear of a strong likelihood of recidivism. The Protect Act calls for the revocation of supervised release upon a violation of a condition of release, resulting in incarceration for the remainder of the released supervision period upon a showing of violation by a preponderance of the evidence in a nonjury hearing. The result is that a sex offender who was incarcerated for ten years and then given a lifetime of released supervision will be given a life sentence upon revocation. Case law calls into question whether the current revocation system violates these offenders' due process rights and three solutions are proposed: the first solution is to allow offenders to be subject to lifetime supervised release but only allow repeat offenders to be incarcerated for a maximum of five years upon revocation; second is to increase the initial time the offender would spend in incarceration where they will be unable to reoffend. Finally, the third solution—which provides repeat offenders with proper due process by making revocation hearings subject to jury trials and the higher reasonable doubt standard as well as amending § 3583(k) so that they may only be incarcerated upon revocation for the maximum period allowed for that particular offense—is the most advantageous solution as it would address Congress's concerns of controlling these offenders while still providing the offenders due process.

Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. (2010).

Title IX of the Education Amendment of 1972 is designed to protect students from gender discrimination. Currently, survivors of sexual assault cannot get requisite relief under Title IX because the Office of Civil Rights ("OCR") does not adequately specify the way in which a school should respond to potentially dangerous persons on its campus. Two recent cases, an Eleventh Circuit case, *Williams v. Board of Regents* and a Tenth Circuit case, *Simpson v. University of Colorado* may cure some of the current defects in OCR's guideline policy, because "actual notice" and "deliberate indifference"—where the school inadequately responds to alleged sexual harassment to a risk of sexual assault—have been more stringently tailored. However, theories of constructive or inquiry notice are not sufficient to recover under a Title IX discrimination claim, and the deliberate indifference standard still burdens Title IX victims more so than the defendants. Although the OCR guidelines regarding proper response to sexual assault are

becoming clearer, it is still difficult for victims to get relief under Title IX. Congress should legislate Title IX's private right of action, so as to increase the range of remedies available to victims and to hold schools liable unless they can show they exercised sufficient care in dealing with sexual harassment cases.

Melissa Wangenheim, Note, *'To Catch a Predator,' Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559 (2010).

Sexually Violent Predator Acts ("SVPA")—laws that allow a state to institutionalize a sexually violent offender after he or she has served a prison term—have been enacted throughout the country with the common goal of preventing recidivism of sex offenders through commitment procedures. The reasoning behind SVPAs is to protect the public, as well as the fact that sex offenders generally are afflicted with personality disorders, such as bipolar disorder, drug or alcohol dependency, and abnormal sexual behavior, such as paraphilia and pedophilia, both of which have a high rate of recidivism. Based on the United States Supreme Court decision that upheld a similar post-prison commitment law in the state of Kansas, the author argues that the New Jersey SVPA is unconstitutional based on its two prong test that the state must fulfill to have a sexually violent offender committed. New Jersey's SVPA differs from all other state SVPAs, save South Carolina, in that it proposes several deprivations of liberty that are not limited to temporary commitment after the Attorney General submits the proper certificates before the final commitment hearing, and may allow a trial judge to use his or her discretion to determine which offenses are considered sexually violent. Therefore, because the discretionary provision of New Jersey's SVPA is unconstitutionally vague and overbroad, thus not providing proper notice to affected individuals of prohibited conduct, legislatures should more adequately tailor their statutes so as to prevent deprivation of constitutional rights.

Benjamin A. Mains, Note, *Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence have Affected the Criminalization of Child Pornography*, 37 HASTINGS CONST. L.Q. 809 (2010).

Possession and distribution of child pornographic material is a criminal offense, however, with the introduction of virtual child pornography—sexually explicit material of minors without images of actual children—prosecution of such an offense has become increasingly difficult. Though child pornography is not entitled to protection under the First Amendment, a court is limited by the definition of child pornography, which includes images that pertain to depictions of actual children and not those of virtual children. This note examines recent United

States court decisions surrounding the issue of criminalization of virtual child pornography, including the Supreme Court decision in *New York v. Ferber*; the confusion that persists between criminalization of virtual child pornography and First Amendment protection; and Congress' attempt to resolve this issue by enacting the Child Pornography Prevention Act of 1996 ("CPPA") and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"). The CPPA—Congress' response to the proliferation and accessibility of child pornography on the Internet—proved to be too broad in scope because it infringed upon the rights of free speech. In response, the PROTECT Act was enacted to ban material that someone would believe contained images of children engaged in sexually explicit conduct, yet it is arguable that the PROTECT Act is just as overbroad as the CPPA.

Daniel J. Schubert, Comment, *Challenging Ohio's Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and Remedial Treatment of Sex Offenders*, 35 U. DAYTON L. REV. 277 (2010).

In response to gruesome incidents of sexual abuse against minors in the 1980s, sex offender registration laws have undergone stringent reform that some consider punitive—rather than remedial—in nature. Most notably, the Adam Walsh Act in 2006 broadened "the scope, scale, and requirements of sex offender registration programs" by creating a sex offender "tier" classification system which imposes specific burdens on sex offenders in each tier. This comment discusses whether the most recent Ohio sex offender registration laws modeled on the Adam Walsh Act—the Ohio Revised Code 2950 as amended by Senate Bill 10 ("S.B. 10")—violate the Ex Post Facto Clause of the United States Constitution, and the retroactivity clause of the Ohio Constitution. Specifically, sex offenders may have a compelling argument that S.B. 10 is unconstitutional when analyzed as a matter of punitive degree. Although the Ohio Supreme Court found that S.B. 10's predecessor, House Bill 180, was a constitutional civil legislation in *State v. Cook*, S.B. 10's newly imposed duties and arguably criminal penalties substantially violate the rights of sex offenders.

SEXUAL ABUSE

Emily C. Aldridge, Note, *To Catch a Predator Or to Save His Marriage: Advocating for an Expansive Child Abuse Exception to the Marital Privileges in Federal Courts*, 78 FORDHAM L. REV. 1761 (2010).

In *United States v. Banks*, the conviction of a man accused of distributing child pornography was nearly overturned due to the Ninth Circuit's exclusion of

testimony from his wife under marital privilege rules. The privilege applied to the testimony—concerning the defendant's grandchild—because the Ninth Circuit interpreted the child abuse exception to the privilege as applying only in cases where the abused child was the birth child, stepchild, or "functional equivalent" of a child of either spouse. While consistent with an earlier Eighth Circuit decision and Federal Rule of Evidence 501, this decision highlights the inconsistency with which both federal and state courts have applied marital privilege in child abuse cases—since the Tenth Circuit, military courts martial, and the U.S. District Court for the Western District of Texas all have broader exceptions than the Eighth and Ninth Circuits—and the public policies weighed by courts in reaching their conclusions. The author advocates a more expansive exception to the privilege that would apply to all cases involving child abuse, not just those in which the child is related to the defendant or witness spouse. This broader exception is consistent with all federal and state court decisions on the matter, as well as with Rule 501, and satisfies the policy-balancing tests used in these cases.

Kim Thuy Seelinger, *Violence Against Women and HIV Control in Uganda: A Paradox of Protection?*, 33 HASTINGS INT'L & COMP. L. REV. 345 (2010).

In Uganda, more women are infected with HIV than men; in a 2007 estimate, sixty percent of the 810,000 Ugandan adults with HIV were women. The increased vulnerability of women to HIV infection has been linked to gender-based violence such as sexual assault, female genital mutilation, and domestic violence. The Ugandan Parliament is currently considering legislation to reduce HIV infection through the HIV/AIDS Prevention and Control Bill. The author argues that although the Bill features many beneficial provisions, certain other provisions such as those relating to "a) mandatory testing, b) exceptions to confidentiality, c) overbroad disclosure permissions, and d) criminalization of intentional transmission," not only breach international guidelines concerning HIV testing and counseling, but also exacerbate the violence against women that contributes to HIV infection in the first place. To combat the HIV pandemic, the Ugandan Parliament should instead focus on legislation aimed at thwarting the gender inequalities that are central to women's risk of HIV infection in conjunction with revising the Bill's provisions regarding testing, disclosure and criminalization.

WOMEN'S RIGHTS

Lori Johnson, Comment, *Within Her Sphere: Determining a Woman's Place in the Constitutional Order Under the Privileges and Immunities Clause*, 79 MISS. L.J. 731 (2010).

This article discusses how the Privileges and Immunities Clause should be interpreted as protecting against state-enforced social roles. Although the *Slaughterhouse* cases narrowed the Privileges and Immunities Clause by interpreting it as only encompassing a limited number of rights owing their existence to the federal government, it is clear that the drafters intended the clause to encompass a broad array of fundamental rights, including the right to control one's role in society. In order to define the Privileges and Immunities Clause, one must first consider the main goal of the Fourteenth Amendment—eradication of "Black Codes," which employed State power to limit the newly freed slave's role in society. The author contends that analogous to the newly freed slaves' right to protection from discrimination by the "Black Codes," women also had the right to protection from subordination by the "separate spheres" mentality that trapped them in the domestic sphere, and that the Privileges and Immunities Clause should have been interpreted to encompass this fundamental right as well. However, the decision in *Bradwell* limited women's choices concerning the work they performed and as a result deprived them of the basic right to define their role in the constitutional community, a decision that conflicted with the Fourteenth Amendment's main purpose.

Chi Mgbako et al., *Penetrating the Silence in Sierra Leone: A Blueprint for the Eradication of Female Genital Mutilation*, 23 HARV. HUM. RTS. J. 111 (2010).

Movements to eradicate female genital mutilation ("FGM") have succeeded in several African countries, but the movement to eradicate FGM in Sierra Leone poses a greater challenge because the practice takes place within the all-female *bondo* secret society. Members of the *bondo* must undergo FGM, but benefit from an elevated social status and economic benefits for their families. The *bondo* is the only place a woman may go without her husband, and therefore it represents an important aspect of women's independence in a male-controlled society. This article develops a complex framework for ending FGM in Sierra Leone without compromising the *bondo*. The author suggests reaching out to *soweis*, who perform FGM and have the most authority within the *bondo*, to take a stance against FGM, while protecting the *soweis*' status and income by replacing FGM with a different ritual marking a girl's passage into adulthood.

Terra L. Gearhart-Serna, Comment, *Women's Work, Women's Knowing: Intellectual Property and the Recognition of Women's Traditional Knowledge*, 21 YALE J.L. & FEMINISM 372 (2010).

There are two types of knowledge: "traditional" knowledge is passed down from generation to generation, largely by women, and is not protected by international intellectual property agreements; and "innovative" knowledge is scientific, inventive, male-dominated, and protected by most intellectual property regimes. If a woman has innovative knowledge, she will face the same recognition as a male counterpart, but if a woman wants recognition for traditional knowledge, she has no realistic option for acknowledgment and it may be exploited later as innovative knowledge. For example, anthropologists now believe that women invented agriculture, but until now, this discovery went unrecognized. There are four principles that are important in determining how to create a system to recognize this work: (1) a need for redistribution of the knowledge, (2) a desire for the knowledge to serve development, (3) the recognition that the contribution to society is from a woman, and (4) the goal to empower women to achieve community development and economic stability. Ultimately, the author recommends a "public domain plus" system where the companies that use traditional knowledge must publish its origins, and a portion of the profits is put toward the woman's community.

Karen Musalo et al., *Crime Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161 (2010).

Guatemala—along with several other Latin American countries—has seen a recent spike in violence against women, and while laws have been written and international organizations have responded, there is no significant decrease in this violence. Reasons for this increase include a long history of violence, deep gender inequality, impunity, gangs, organized crime, and social cleansing. The article discusses the specific reasons why the attempts to solve this problem are ineffective and failing. In order for Guatemala to experience substantial change, it must improve the collection of statistical data for these crimes, and modify existing laws that are discriminatory in nature. In addition, the international community—specifically the United States—must take serious action by holding back aid to Guatemala until there is a credible showing that the country is taking the appropriate steps to remedy this issue.

WORKPLACE DISCRIMINATION AND HARASSMENT

Courtney J. Jefferson, Comment, *Gender Confusion: The Need for Effective Legislation to Protect Gender Identity Discrimination*, 39 U. BALT. L. REV. 137 (2009).

At present, legal protection for transgendered individuals against employment discrimination is greatly lacking. The 1989 U.S. Supreme Court case of *Price Waterhouse v. Hopkins* arguably expanded Title VII of the Civil Rights Act of 1964 to include protection for transgendered individuals by prohibiting sex stereotyping in employment decisions, which are decisions based on the employer's subjective belief of how a man or a woman should act. However, since *Price Waterhouse*, only the Sixth Circuit and thirteen states plus the District of Columbia, have included transgendered individuals as a protected class by labeling employment discrimination on the basis of gender identity as a form of sex stereotyping. A comparison of federal, state and local approaches to gender identity discrimination illustrates the inconsistent protection transgendered individuals are afforded, including the flawed current federal legislation, the Employment Non-Discrimination Act, which is too vague to be effective. With more than fifty percent of transgendered individuals experiencing employment discrimination, the author concludes that more immediate and transparent legislation is needed.

Jordan F. Kaplan, Comment, *Help is on the Way: A Recent Case Sheds Light on Workplace Bullying,* 47 HOUS. L. REV. 141 (2010).

Workplace bullying—commonly defined as continual, aggressive behavior by a bully with the purpose of weakening the victim to strengthen the bully—has ignited a debate in the United States requiring legislation to be passed to protect these victims. As a result of this workplace harassment, companies suffer from increased legal fees, reduced efficiency amongst employees, and training of new employees. Although other countries, such as in Europe and the United Kingdom have enacted anti-bullying laws, United States statutes such as Title VII and the common law tort of intentional infliction of emotional distress do not currently protect workers from such bullying. This Comment examines the problem of workplace bullying and discusses *Raess v. Doescher*—an Indiana Supreme Court decision that represents the first case in the United States to specifically mention workplace bullying as an example of intentional infliction of emotional distress ("IIED")—suggests that the future of an anti-bullying law seems possible. Although *Raess* is only a small step towards protecting victims from being bullied at work, the case suggests that future victims would be able to portray bullies in a

lawsuit to demonstrate that such harmful and intimidating behavior constitutes IIED.

Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U MICH. J.L. REFORM 713 (2010).

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based upon sex, but it does not expressly prohibit employment discrimination based upon sexual orientation or gender identity. The U.S. Supreme Court's decision in *Price Waterhouse v Hopkins* established that Title VII can protect against discrimination based upon sexual orientation or gender identity, but this protection is limited and the circumstances under which Title VII extends this protection remain unclear. As a result, several pieces of legislation have been proposed to amend Title VII to protect against discrimination based upon sexual orientation or gender identity or both. The author suggests that masculinity theory—a theory that explains attitudes toward different genders and sexual orientations based upon societal reverence for male behavior—can explain discrimination against sexual minorities in terms of sex discrimination as discussed by the Court in *Price Waterhouse*. Thus if federal and state courts were to gain an understanding of masculinities theory, Title VII would not need to be amended in order to protect against discrimination against any sexual minorities.

Katherine R. Morelli, Note, *A Misguided Reversal: Why the Oklahoma Supreme Court Should Not Have Interpreted* Saint v. Data Exchange, Inc. *to Provide a Burk Tort Cause of Action to Plaintiffs Alleging Age Discrimination in Employment,* 62 OKLA. L. REV. 329.

Mindful of the benefits and drawbacks of at-will employment, the Oklahoma Supreme Court crafted a narrow public policy exception to the doctrine that gives certain terminated at-will employees—those who are protected under the Oklahoma Anti-Discrimination Act ("OADA")—a tort cause of action for wrongful discharge. Previously, the exception was understood to apply only where there was no federal remedy for those protected under OADA. *Saint v. Data Exchange*, however, created confusion regarding the availability of a cause of action because it contained overly broad language and did not seem to adhere to applicable precedent. *Saint* was later interpreted in a manner inconsistent with pre-*Saint* precedent: terminated at-will employees were given a cause of action merely if the remedies available to his individual class within OADA were not evenhanded with the remedies afforded to other OADA protected classes. This interpretation of *Saint* affords greater remedies to terminated at-will employees than the Oklahoma Supreme Court originally intended and therefore disrupts the balance of the benefits and drawbacks of at-will employment.

Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW AND SEXUALITY 1 (2010).

The Employment Non-Discrimination Act ("ENDA") is currently being proposed, which would give homosexual and bisexual Americans federal employment discrimination protection in the private sector. This article questions whether the ENDA should include a bona fide occupational qualification ("BFOQ") defense—allowing for hiring practices on the basis of religion, sex or national origin when a particular business deems it reasonably necessary to do so—as does Title VII, which ENDA was based off of. The uses of the BFOQ defense under Title VII is explored for religious exemptions to show how a BFOQ defense for sexual orientation under ENDA could be helpful. If a BFOQ was added to ENDA, employers could take advantage of it, as do certain religious organizations, allowing gay night clubs, community centers, and youth centers, for example, to hire only homosexuals. The inclusion of a BFOQ could have positive or negative effects as the same arguments that allow for BFOQ defense for gay businesses could be made for heterosexual businesses as well.

Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act,* 63 VAND. L. REV. 439 (2010).

The 2008 Genetic Information Nondiscrimination Act ("GINA") prohibits employment discrimination on the basis of genetic information and reflects a sense of legislative apprehension that is preemptive in nature. The GINA is unique among its predecessor antidiscrimination laws because it is the first preemptive antidiscrimination law in American history. The author discusses the passage of the GINA and conducts a comparative analysis between GINA and preceding antidiscrimination legislation. GINA's preemptive qualities may be constitutionally problematic; if authorized under the Congress' commerce power, the GINA unconstitutionally abrogates state sovereign immunity; if authorized under section 5 of the Fourteenth Amendment the GINA is inapplicable to private parties and fails the applicable congruence and proportionality test with respect to the states. It is also unclear whether the fear of discrimination upon which the law is based is accurate and whether the specter of genetic discrimination would have materialized but for GINA's passage.

Kerry van der Burch, Note, *Court's Struggle with Infertility: The Impact of* Hall v. Nalcon *on Infertility-Related Employment Discrimination*, 81 U. COLO. L. REV. 545 (2010).

Currently, there is no legislation that directly addresses the issue of protecting infertile employees from employment discrimination while they undergo physically and emotionally difficult treatments for their infertility in hopes of conceiving a child. Employees undergoing infertility treatments fear they may lose their current position or a promotion because of the additional absences they take from work to receive the treatments. A recent Seventh Circuit case, *Hall v. Nalco*, held that terminating an employee for infertility treatment is sex discrimination under Title VII of the Civil Rights Act of 1964 and is not gender neutral because even though both genders are affected by infertility, only females have to take absences from work to receive treatment. However, the Seventh Circuit's decision was unclear on whether future infertile employee litigants should bring a disparate treatment or a disparate impact claim for their employment discrimination claims and the plaintiff did not seek remedy under other employment statutes, like the Americans with Disabilities Act of 1990 or the Family and Medical Leave Act of 1993. Even though this case set a precedent for protecting infertile employees from employment discrimination, it was only a partial victory for infertile employees because the plaintiff and the Seventh Circuit failed to take advantage of chances to set additional precedents for similar cases in the future.

Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms,* 78 FORDHAM L. REV. 2245 (2010).

Female lawyers are consistently underrepresented as partners in large law firms, and it remains unclear whether male partners and other policymakers are even aware of such a disparity. The author chronicles the shift of ideologies that have been present within large law firms beginning with the first generation of female attorneys at these firms in the 1970s and 1980s under a competitive meritocracy ideology. However, the 1990s and 2000s represent a glass-ceiling effect, in which female attorneys constitute about fifty percent of entry-level associates in large law firms yet only account for approximately fifteen percent of equity partners nationwide. In addition to discussing the more traditional ideologies generally associated with the glass-ceiling effect, this article also discusses a fifth reason—male-oriented professional ideology—to explain such a discrepancy between male and female equity partners. More recently, the hypercompetitive meritocracy ideology, which places much higher emphasis on complete loyalty to the firm and its clients through twenty-four hour dedication and

thus hinders many female attorneys from advancing their careers, is possibly on the decline.

Anna C. Camp, Note, *Cutting Cupid Out of the Workplace: The Capacity of Employees' Constitutional Privacy Rights to Constrain Employers' Attempts to Limit Off-Duty Intimate Associations*, 32 HASTINGS COMM. & ENT. L.J. 427 (2010).

With an increasing number of intimate relationships among co-workers, many employers require their employees to sign contracts—known as "no-fraternization" policies—to prevent them from engaging in romantic relationships. These contracts range from standard policies that are less invasive by only limiting employees from dating a direct inferior or superior co-worker, to strict policies that prohibit dating any company employee. Many employees argue that a ban against dating co-workers violates their constitutional rights, while employers tend to argue that these policies are necessary to avoid litigation over sexual harassment. Courts have upheld no-fraternization policies, but recent decisions have shown some apprehension in upholding the stricter policies. The author concludes with a proposal that strict no-fraternization policies should be prevented under the California Constitution's explicit right of privacy.

Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1 (2010).

The Supreme Court's recognition of a private right of action for retaliatory discrimination under Title IX in *Jackson v. Birmingham Board of Education* increased the legal remedies through which coaches and administrators can address sex discrimination in college athletics. Prior to Title IX, women's sports were coached almost entirely by women, but perhaps as an unintended consequence of the law, women now represent only a minority of coaches. The recent increase of retaliation cases involving women in college athletic departments demonstrates the existing barriers to female leadership in college athletics and the harsh consequences female coaches face when they speak out against gender inequality. Success against college athletic departments in these cases provides hope that law can be a source of change in the culture of college sports. Legal remedies through which plaintiffs can achieve high profile verdicts and receive large settlements motivate athletic departments to strive for greater equality in the coaching and administration of college sports.