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## ABORTION AND REPRODUCTIVE RIGHTS

Shannon Byrne, Note, *Weaning Ohio Employers off of Lactation Discrimination: The Need for a Clear Interpretation of Ohio's Pregnancy Discrimination Act Following Allen v. Totes/Isotoner Corp.*, 59 CLEV. ST. L. REV. 265 (2011).

In *Allen v. Totes/Isotoner Corp.*, the Supreme Court of Ohio considered the rights of lactating women to take breaks from work to express breast milk. In *Isotoner*, an employer permitted a lactating mother to express breast milk only during her lunch break, and when she did so at other times, her employment was terminated. While the Supreme Court of Ohio found in favor of the employer, it did not examine whether lactating mothers are protected by the Ohio Fair Employment Practices Act, and as such, its holding permits employers to implement practices that discriminate against lactating women. The author examines the federal and state laws concerning pregnancy and lactation, such as the Federal Pregnancy Discrimination Act of 1978 and the Ohio Pregnancy Discrimination Act, along with the relevant case law. She concludes that it may be successfully argued that practices discriminating against lactating women are a form of pregnancy discrimination under Ohio law because lactation is a direct result of pregnancy and childbirth.

Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J. L. & GENDER 413 (2011).

This Note argues that in countries where abortion is illegal, women should be given more information about safer—albeit still illegal—abortion methods, such as the use of the drug misoprostol, to decrease the number of complications and maternal deaths associated with clandestine and self-induced abortions. In Uruguay, for example, abortion is illegal, but doctors are permitted to provide women with information about safer methods of self-administered abortion without actually prescribing medication or advising patients about where to obtain such medication. The author examines two discourses behind such initiatives: human rights discourse, which promotes access to such information as a normative right, and harm reduction discourse, which justifies access to information on a pragmatic level. Harm reduction provides evidentiary support for the human rights discourse, and the human rights discourse adds normative justification to the value-neutral human rights approach. Thus, the two discourses may help reduce injuries from unsafe abortion methods and also expand women's rights. The author concludes that harm reduction may be a stepping stone: initially, states may permit access to information to curb adverse health consequences, and this recognition will make

states more likely to accept access to information and safer abortions as normative human rights.

Kimberly Moss, Note, “*Do No Harm—Unless She Wants an Abortion or Birth Control*”: *The Conscience Movement’s Impact on Women’s Health*, 19 TEX. J. WOMEN & L. 173 (2010).

The United States Supreme Court, through a series of groundbreaking decisions, has held that a woman has the right to decide whether to end her pregnancy, but has found certain restrictions on that right to be permissible. The *Weldon Amendment*, for example, which allows health care providers to refuse to perform abortions, provide unplanned pregnancy counseling, or give referrals for such services on the basis of moral or religious objection, is a permissible restriction on a woman’s right to choose. Some states have similar “conscientious objection” statutes allowing pharmacists to refuse to provide contraception if doing so would violate a religious or moral belief. The author argues that these state and federal statutes violate the duty doctors have to protect their patients’ health over their personal interests, place disproportionate burdens on poor women in remote areas, and limit the right of these women to participate in American life by basing their family planning decisions on the religious and moral beliefs of their doctor. The *Weldon Amendment* is also problematic because it is written broadly enough to include health insurance companies in the group of protected health care providers, which allows these insurers to drop coverage of abortive and contraceptive services for moral, religious, and even financial reasons. States should follow the example set by California, which allows for conscientious objection by doctors and pharmacists if notice is provided to patients, but never in the performance of emergency medical situations.

Ruthann Robson, *From Page To Practice: Broadening The Lens For Reproductive and Sexual Rights: Lesbians and Abortion*, 35 N.Y.U. REV. L. & SOC. CHANGE 247 (2011).

A woman’s right to engage in a relationship with another woman and to choose whether to have an abortion are fundamental rights that gained recognition during the women’s rights movement. However, these rights are often recognized independently of one another, and a woman’s right to an abortion seems to be considered less fundamental when the woman getting an abortion is a lesbian. This issue causes many problems for lesbians who are raped and lesbians who are minors. While lesbians who are raped face many of the same dilemmas as heterosexual women who are raped, such as finding a safe clinic to obtain the procedure away from the protesting public eye, the author argues that it is much harder for lesbians who are minors to obtain an abortion than for heterosexual

minors. A lesbian who is a minor might not be aware that she is pregnant until the statutory period in which she can obtain an abortion has passed because she lacks the ability to relate to and engage in discussions with heterosexuals having sexual relations. It will also be harder for a lesbian minor to obtain an abortion through a judicial bypass procedure since a judge may think that a lesbian minor who engages in sexual intercourse with a male is immature and thus needs parental consent to legally have an abortion. Some courts also view lesbianism as evidence of hatred towards men. Although a woman's rights to engage in homosexual relationships and to have abortions are finally being recognized, state legislatures need to continue to take action to secure these rights for women.

Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J. L. & PUB. POL'Y 1 (2011).

While critics of informed consent laws condemn newly-enacted state legislation as non-neutral, they fail to recognize that the approach to these provisions is not so simple, and that based upon the ethical and legal foundation upon which they rest, some imposition of values and judgments are inevitable. Many states have recently expanded state abortion informed consent policies. Critics raise objections focusing on factual accuracy, materiality of information, emotional impact, likelihood of misleading patients, and discriminatory assumptions about women. Although admittedly these arguments have some foundation in the ongoing debate, the author emphasizes that the informed consent doctrine will always be socially constructed and infused with ethics and values. In contrast with the critics' approach, she points out that objectivity is often impossible, and that partiality often accompanies the patient's value judgments, the importance of framing an issue so that the patient can understand and re-teach the information, the attitude of the physician when reflecting upon the patient's decision, and the fact that most laws do not require neutrality, but rather reasonableness. By including some of these considerations into their arguments, critics can enhance their challenges to the provisions, and shift their emphasis from neutral, informed consent-based arguments towards more nuanced arguments that include public policy and constitutional theory. Rather than taking a simplistic approach, these critics would be more effective by considering ideological view of informed consent.

Maddie Schueler, Note, *A Fertile Ground for Legislation: Proposing a Kentucky Statute Requiring Advance Directives for Couples Undergoing In Vitro Fertilization*, 49 U. LOUISVILLE L. REV. 267 (2010).

This Note asserts that Kentucky's legislature should require that before artificially conceiving, parties must sign a binding contract agreeing upon a method

for preembryo disposal. Oftentimes when a couple uses in vitro fertilization (“IVF”), more preembryos are created than are implanted, and the remaining preembryos are frozen for potential future use. If the couple later separates or divorces and cannot agree on the preembryos’ fate, that decision is left to the court system. Kentucky law does not classify preembryos as property or persons, and therefore the courts cannot look to either property or child-custody law for guidance on the embryo’s fate. Like other states, Kentucky give preembryos “potential life” status, which means that the embryos do not have actual legal rights, and if no written agreement exists, that courts must balance the interest of both parties to determine the outcome. Having a contract signed by both parties reduces the time and money spent litigating because the outcome is essentially predetermined by the disposition agreement, and it allows courts to interpret written directives instead of subjectively balancing the interests and desires of one parent over the other. The author drafts and urges Kentucky to adopt a model statute governing pre-IVF agreements.

Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to Be Learned From the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357 (2011).

In light of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which allowed states to impose qualified informed consent laws on abortion clinics, state congresses have used *Casey* as a green light to further their pro-life initiatives. However, entrenched within the legislatures’ childbirth campaigns are unscrupulous practices that deceive pregnant mothers about the true nature of abortion safety and procedures, thereby abusing *Casey*’s “informed consent” directive. To remedy the shortcomings of “abortion informed consent,” the author proposes a plan that models the ethics standards for “medical experimentation informed consent”—an information disclosure plan designed for patients undergoing experimental procedures. The efficacy of ethics standards rests on their ability to promote principles of autonomy and impartial disclosure by preventing harmful state disclosure practices such as insufficient medical information; saturating patients with endless medical risks; presenting presumptive data; and using outdated or generalized medical principles. In effect, under the guise of *Casey* and similar case law, “informed consent” legislation has enabled states to effectively impose deceptive abortion disclosure practices, thereby unduly burdening women’s right to reproductive autonomy.

Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J. L. & GENDER 377 (2011).

Courts and scholars have traditionally used two doctrines to defend a woman's right to abortion. The liberty doctrine justifies the right to abortion as a matter of decisional autonomy and bodily integrity—both of which are protected liberty interests. The sex equality doctrine regards abortion restrictions as tools of subordination, reinforcing stereotypical gender roles. The liberty doctrine, however, has been substantially weakened. Under the liberty doctrine, states may enact legislation designed to protect women's health and potential life so long as the legislation does not unduly burden a woman's right to abortion. State legislatures have carefully tailored abortion restrictions to comport with these requirements, for instance by framing informed consent laws as necessary to protect women's health. The author proposes that litigators incorporate sex equality arguments into their challenges against abortion restrictions because unlike liberty-based challenges, sex equality-based challenges will force courts to scrutinize the purpose behind abortion restrictions. There are practical hurdles to bringing sex equality challenges—for example, that the law behind such claims is less developed than liberty claims—but sex equality challenges have the potential to ultimately expose and address the discriminatory purpose behind most abortion regulations.

#### CHILDREN AND TEENAGERS

Daniel Jay Cameron, Note, *Loss of Parental Consortium: Ensuring that a Disabled Child's Loss-of-Parental-Consortium Rights Are Secured*, 49 U. LOUISVILLE L. REV. 581 (2011).

In Kentucky, loss-of-consortium claims are available to surviving spouses, parents, and children under the age of eighteen. A federal district court in Kentucky misinterpreted a state statute that changed the age of majority for disabled children to twenty-one, and erroneously ruled that disabled children over eighteen could not bring loss-of-consortium claims. The author argues, based on state statutes dealing with parental consortium and the age of majority for disabled individuals, along with the state's interest in providing for the needs of disabled children, that a disabled child should be allowed to claim loss of parental consortium until the age of twenty-one. Kentucky courts and the state's General Assembly have even stated that disabled children under twenty-one are still entitled to support and are not considered emancipated. To resolve the issue, the author argues that the court should create a test to determine whether the child is disabled, whether the disability creates a complete dependence on the parents, and whether

the relationship between the parent and the disabled child is sufficiently close. If these conditions are met, the court should allow the child to claim loss of consortium.

Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J. L. & EDUC. 417 (2011).

The Due Process Clause of the Fourteenth Amendment restricts the government's ability to disclose one's private information to the public or to third parties, but there is no definitive judicial approach to analyzing a minor's right to informational privacy. Adults have a reasonable expectation of privacy in their sexual affairs, and courts balance an adult's interest in privacy against the government's interest in disclosure when determining whether the right to informational privacy has been violated. The Third and Ninth Circuit Courts of Appeals have held that a minor's right is subject to the same balancing test applicable to adults, and the Tenth Circuit has held that a minor's right to informational privacy is significantly weaker than an adult's right. However, minors are uniquely harmed by unwanted disclosure of sexual affairs, because forced disclosure of a minor's sexual identity is damaging to his or her sexual development, may heighten family conflict, and may hinder access to necessary sex-related healthcare. To protect against the lasting physical and psychological effects of exposing a minor's sexual affairs, the author argues that courts should apply strict scrutiny to intrusions on minors' informational privacy. Under strict scrutiny, the government may only disclose information if the disclosure is narrowly tailored to achieve a compelling government interest. This approach would allow the government to disclose information if necessary to protect minors from sexual abuse or other serious harms, but would safeguard against other instances of unnecessary and potentially harmful exposure of a minor's sexual identity.

Tessa Davis, Note, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653 (2011).

This Note argues that asylum law has failed to recognize the unique hardships facing child soldiers because it denies them asylum based on their status as either persecutors or victims of atrocity. Asylum law requires the petitioner to show that he will be persecuted because of race, religion, nationality, membership in a particular social group, or political opinion. When petitioning for asylum, former child soldiers have argued that their status as children places them in a particular social group that has suffered persecution. However, many courts consider age to be too broad to qualify as a social group and find that, unlike other

characteristics that lead to persecution, age is not an immutable characteristic because children eventually “grow up.” For example, in *Lukwago v. Ashcroft*, the Third Circuit found that the petitioner’s persecution was “atrocious and severe,” but rejected the argument that he had been persecuted on the basis of age, and denied him asylum. The author suggests that denying the existence of children as a social group is flawed since children are targeted for conscription precisely because they *are* children—individuals who are obedient, without resources, inexpensive to feed and train, and ultimately dispensable. Thus, the author argues for the adoption of a new social group, which she defines as children living in countries that regularly conscript adolescent child-soldiers and tear them from their families. Remedying this flaw in asylum law will allow victimized children to gain the protection of humanitarian asylum and the opportunity to begin a new life.

Katherine Fiore, *ACLU v. Miami-Dade County School Board: Reading Pico Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students’ First Amendment Right Violations*, 56 VILL. L. REV. 97 (2011).

This Article examines the scope of First Amendment protections when a public school restricts certain materials in its library. In the Supreme Court’s only case involving the removal of books from a public school library, *Board of Education, Island Tress Union Free School District No. 26 v. Pico*, a plurality of the Court held that that judicial intervention is necessary when school authorities unduly interfere with students’ constitutional rights. In 2006, this issue was presented to the Eleventh Circuit in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, in which a parent complained that a book in his child’s school library contained factual inaccuracies about Cuba and should be removed from the library. Upon review, the school board agreed with the parent’s opinion that the book failed to sufficiently convey the difficulties of life in Cuba, and some of the board members expressed their personal disdain for the book’s subject matter. While the district court found that the school board had removed the book to prevent access to the ideas it contained, the Eleventh Circuit reversed the district court’s ruling, stating that the book was not educationally suitable. The Eleventh Circuit’s decision overlooked the possibility that the school board did not legitimately exercise its discretion and the book’s removal was instead motivated by improper motives. Although the Eleventh Circuit correctly applied *Pico*, its analysis under the standard was flawed, and the Court impeded the students’ First Amendment rights due to its failure to recognize that the school board’s justification for removing the book was pretextual.

Teresa Henderson, *From Brussels To Rome: The Necessity of Resolving Divorce Law Conflicts Across the European Union*, 28 WIS. INT'L L.J. 768 (2011).

The growing international way of life for citizens of the European Union ("EU") creates a need to resolve conflicts of divorce law amongst member nations. Divorcing couples of two different nationalities living in a third EU country face a variety of issues, including legal uncertainty in conflict-of-laws rules between countries, unpredictability as to how their divorce will be treated by the chosen forum, and unfairness faced in countries that could prove to have harsher laws. While international legislation is not perfect, the EU attempted to resolve issues of international family law with the Brussels II and Rome III conventions. Brussels II was the first attempt to unify the rules of international divorce by giving preference to the court of the country in which the divorce proceedings are first undertaken. Rome III was the most recent attempt at unification and addressed both the procedural issues undertaken by Brussels II, but also tackled conflict-of-laws situations that arise in international divorces—for example, various countries require longer periods of separation before divorces are granted. The author believes that even further harmonization of laws between countries is necessary to combat evident problems of international divorce, specifically regarding the safety of children caught in these battles. There should be more innovative legislative solutions that address all aspects of divorce instead of merely the procedural or substantive issues. Even though many saw the Brussels II and Rome III conventions as failures because they did not do enough to clarify conflicts between countries' laws, harmonizing the EU's family law is a necessity.

Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379 (2011).

Cyberbullying has become a nationwide epidemic marked by well-publicized tragedies, including the recent suicide of Tyler Clementi, a college student who took his life after his roommate used a hidden camera to record a sexual encounter between Clementi and another man and stream it over the internet. After the 1999 Columbine High School shooting, several states adopted statutes to address bullying, but these statutes typically apply only to school-age children, and merely prohibit the act of bullying without attaching any liability. A better approach, the author argues, would recognize cyberbullying as an intentional tort attaching traditional tort liability to the bully. Although courts already recognize intentional infliction of emotional distress as a cause of action, that tort attaches liability to extreme and outrageous behavior designed to cause emotional distress, and is inappropriate for intentional acts—like cyberbullying—that cause harmful contact to the victim. Cyberbullying is more akin to a type of battery, and liability should attach to the bully accordingly. *Vosburg v. Putney*, the classic tort case standing for

the proposition that a tortfeasor is liable even for unforeseen harm that flows from unlawful contact, should be extended to cyberbullying cases like Clementi's, where tragic and unforeseen consequences flow from an act of cyberbullying.

Eboni S. Nelson, *From the Schoolhouse to the Poorhouse: The Credit CARD Act's Failure to Adequately Protect Young Consumers*, 56 VILL. L. REV. 1 (2011).

The Credit CARD Act of 2009 fails to adequately protect college-age consumers from amassing life-long debt. Since the 1980s, credit card companies have targeted university students as potential credit card consumers. The result is that university students, many of whom are unprepared to undertake a high level of financial responsibility, accrue unmanageable amounts of debt. Congress sought to counter this cycle of debt by enacting the Credit CARD Act, which implemented a number of restrictions on credit card companies' ability to reach students—such as requiring either proof of income or parental consent for all potential cardholders under the age of twenty-one. The author first explains how the banking industry entered the young consumer market and lists the negative financial consequences faced by young consumers as a result. The Article familiarizes the reader with the Credit CARD Act, critiquing its effectiveness, and then proposes alternative and additional measures to protect young consumers. These proposed protective measures include increasing the age restriction for applying for a credit card, applying a stricter review of students' ability to pay their debt, and capping interest rates. However, the congressional attempt to curtail the crippling effects of student debt has not gone far enough to protect young consumers, and a more comprehensive scheme of protection must be implemented to safeguard students from the dangers of unregulated debt.

Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 TEX. J. WOMEN & L. 131 (2011).

Teenagers' excessive use of technology, combined with their normalization and acceptance of unhealthy relationship patterns, such as "cyberstalking," verbal, and physical abuse, is leading to a potential domestic violence crisis. Technological advances have diminished teenagers' desire to protect their privacy in sexual relationships and facilitated teenagers in sending sexual text messages—also known as "sexts"—and nude or semi-nude pictures to their significant others. This phenomenon makes teenagers vulnerable to intimate partner abuse. Abusers are able to use technology to more effectively stalk their romantic partners without detection and without criminal consequences. To address this crisis, the author suggests that the police and parents implement programs to help teenagers relearn healthy relationship norms. Law enforcement often does not recognize teen dating violence as a major problem, and in order to

create a solution, must dedicate its resources to implementing adequate training so to be able to better detect, investigate, and prosecute these crimes. To provide effective healthy relationship guidance to teenagers, schools should implement programs that embrace technology by creating a place on the web for teenagers to access information and allowing teens to support their peers through social networking. It is critical for the legal system to recognize the risk posed by teenagers' current conception of healthy relationships, to prevent a new era of domestic violence.

Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend*, 40 STETSON L. REV. 777 (2011).

The United States Supreme Court, under Justice Roberts, has used social science research in a series of three cases leading to a stronger protection of children. Research has shown that children and adolescents are more impressionable than adults because their brains are undergoing a remodeling of its basic structure, making them more vulnerable to negative influences. People learn through imitation and develop cognitive associations, or assumptions, through their experiences. Once these assumptions are established, they are very resistant to change, so assumptions formed early in life are particularly powerful. For example, children who play video games that promote violence, profanity, and drug use may develop similar cognitive patterns. Based on this scientific evidence, the Roberts Court has ruled that a banner promoting marijuana use off-campus at a school-sponsored event is not protected under the First Amendment; that the Federal Communications Commission could fine Fox for the single use of a profane word; and that it is unconstitutional to sentence a child to life for a non-homicide crime. The Court in all these cases cited research concerning children's cognitive development, and its recent rulings indicate that the Roberts Court is taking a more active role in protecting children because of their undeveloped and impressionable nature. These cases also foretell the Court's ruling in the *Schwarzenegger v. Entertainment Merchants Assn.*, in which the Court will test the link between a child's psychological harm with violent video games.

## DOMESTIC VIOLENCE

Niji Jain, Comment, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Act*, 60 EMORY L.J. 1011 (2011).

Title 42, Section 1983 of the United States Code creates a cause of action for those whose constitutional rights were violated by someone acting under the color of law. This Article examines the viability of section 1983 claims against police officers who continually fail to enforce restraining orders against domestic violence offenders, leading to the victim being harmed again. The United States Supreme Court has rejected claims alleging that a victim's substantive or procedural due process rights can be violated by a failure on the part of law enforcement to protect the victim from harm, and claims of gender-based equal protection violations are largely unsuccessful due to the high burden of proving either discriminatory intent or disparate impact on women. An alternate theory re-imagines the equal protection argument: rather than asserting systemic discrimination within the precinct or county, plaintiffs should focus on the ways in which gender-based stereotypes led the police officer(s) in question to exercise discretion and choose not to act. This is an appealing strategy because the Supreme Court has issued particularly strong opinions where behavior was motivated by gender stereotypes unrelated to a substantial government interest. The author acknowledges that evidentiary hurdles exist for this framework—plaintiffs may face difficulties in demonstrating that the officer's actions were influenced by gender stereotypes—but maintains that a well-constructed argument could successfully prove a gender-based rights violation.

Megan Shipley, Note, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 IND. L.J. 1587 (2011).

Abused mothers deserve unbiased treatment in custody modification cases. Where the mother is the victim of domestic abuse by a present boyfriend, the court often relies on negative stereotypes about abused women in determining that custody should be taken away from the mother. These stereotypes—that abused women are bad mothers; that their testimony is unreliable; that they are at fault for not leaving the present abuser—amount to victim-blaming and reflect an unjust bias against abused women. The author cites a number of cases demonstrating such bias and then offers a few cases that demonstrate a more progressive approach. The author concludes that custody modification cases that embody such a bias against victims of domestic abuse fail to provide for the best interest of the child, and that judges should be educated in such a way as to account for and overcome this bias. Courts also must recognize that problems often associated with

victims of abuse—mental and economic instability, substance abuse—are often the consequences of such abuse. Relying on these factors too heavily results in decisions that do not reflect the victim’s actual parenting abilities and has at times lead the court to discount the victim’s testimony and to award custody to the spouse that actually committed the abuse.

#### EDUCATION

Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267 (2011).

Many states have recognized the seriousness of bullying and have enacted anti-bullying statutes to protect their children. However, the author argues that such statutes are inadequate to address the issue of bullying because they focus only on punishment and do not incorporate any restorative justice principles. Restorative justice is “a philosophy or a social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights.” Adding restorative justice principles to anti-bullying statutes would provide a better solution to bullying by allowing the victim, the family, and the community to participate in the resolution. This would require the offender to be accountable without suffering, and comport more closely with the school’s primary goal of educating its students. Although punishing bullies can deter their behavior, it is usually ineffective and can even exacerbate the problem by making the bully feel like a victim, justifying the next incident of bullying as retaliation against the school and the victim. There are some concerns about the use of restorative principles, including the expense, the possibility of re-victimizing the victim, and the desire to see the bully punished and the victim protected. However, the legislature can mitigate these concerns by collaborating with schools to determine which restorative principles should be implemented in concert with more punitive principles to create the most effective system. Given the serious epidemic of bullying, legislatures should compel schools to take these additional alternative measures to help reduce the number of these incidents.

Rena M. Lindevaldsen, *Holding Schools Accountable for their Sex-Ed Curricula*, 5 LIBERTY U. L. REV. 463 (2011).

As more states begin to legally recognize same-sex relationships, schools are faced with the decision of how to teach students about these relationships. School districts have increasingly adopted curricula that convey same-sex relationships as healthy and normal, yet many states give parents a statutory right to opt out of particular curricula. However, opt-outs tend to center around sex education, and no

state allows a general right to opt children out of other classroom lessons that seek to normalize same-sex relationships. Federal law provides little recourse to parents in this area since courts have traditionally afforded schools with broad discretion to determine their curricula without intrusion from parents or courts. This Article argues that teaching children about same-sex relationships without warning of purported risks, such as disease and high rates of sexual addiction, is a harmful educational practice. Three legal avenues for finding school districts accountable for teaching students this information are explored: holding schools liable in tort for teaching factually inaccurate information, finding schools liable for violating parental rights by teaching harmful information, and seeking court orders declaring the curriculum to be factually inaccurate and enjoining its implementation. Schools have a responsibility to provide truthful information to students, and when they fail to fulfill this responsibility, these legal approaches provide methods to hold them liable.

Nicholas B. Lundholm, *Cutting Class: Why Arizona's Ethnic Studies Ban Won't Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041 (2011).

In 2010, the Arizona State Legislature passed an ethnic studies bill, HB 2281, prohibiting teaching materials that “promote” resentment of caucasians and “advocate” ethnic solidarity among minorities in Arizona public schools, in response to lobbying by Arizona’s Superintendent of Public Instruction against the Tuscon Unified School District’s La Raza Studies Department. Directly prior to leaving office, the Superintendent found the La Raza Studies Department to be in violation of the ethnic studies bill, and his successor issued a similar finding shortly after taking office. This Article argues that both superintendents acted beyond the scope of the power given to them by the law in issuing these findings, and that their determinations would not survive judicial review, as they conducted no in-class observations and did not find any fault with the intent of the La Raza curriculum program. Furthermore, the author contends that the La Raza Studies Department does not violate the ethnic studies bill, as the exceptions carved out by the legislature illustrate a legislative intent to focus on the proposed purpose of the curriculum, and not its potential outcomes. Using the La Raza Studies Department findings as a case study, the author shows that the ethnic studies law is ineffective at limiting the public school curriculum in Arizona.

Andrew J. McCreary, *Public Single-Sex K-12 Education: The Renewal of Sex-Based Policy by Post-Race Politics, 1986-2006*, 40 J.L. & EDUC. 461 (2011).

Once race-based policies became politically and socially untenable as a way to close school achievement gaps between students of different races, gender-based policies were advanced as a new way to deal with disparities in education. School

populations have become racially homogenous, making gender-based gaps evident. Legislators attempted to address this gap with increased federal funding and by increased choice in school selection. However, addressing the small, gender-based gaps will divert funding from addressing the larger, more significant, race-based gaps in education. Additionally, single-sex education is a constitutionally suspect practice because it may violate the Equal Protection clause, especially in light of the fact that single-sex programming initially had a racial and economic motivation. This Article examines the movement towards single sex education, arguing that it was developed on the premise that single-sex education could be used to place black males in classrooms with black teachers who could act as role models. Single-sex education then emerged into national politics as part of the movement towards school choice for all students, regardless of race, with three major legislative pushes to increase single-sex education. The author concludes by assessing the quality of the changes brought about by single-sex education and advocates close monitoring to prevent regression in both gender and racial equality.

#### FAMILY

Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135 (2011).

Child Support Guidelines over the last 30 years vary greatly from those with small awards that hardly affect the wealth of the noncustodial parent to those with awards so large that they are tantamount to unintended spousal support. This Note looks briefly at the history of child support guidelines—tables linking monthly gross income and number of children to determine child support awards—and analyzes the problems with creating such guidelines, including the difficulty of estimating costs of children, how these costs should be shared amongst parents, and the value or utility that children may offer the parent with whom they live. Three models are utilized to demonstrate successful and unsuccessful guidelines: Indiana as an example of good guidelines, Alaska an example of bad guidelines, and Canada as an example of terrible, or “ugly” guidelines. In some jurisdictions—like Canada—child support is based on the noncustodial parent’s income, instead of the actual cost of supporting a child, and as a result, child support increases the wealth of the custodial parent and the household beyond the necessary costs of supporting the child. Bad guidelines incentivize divorce, and in Canada an increase in a child support award increased a couple’s probability of divorce by up to ten percent. The author asserts that poor child support guidelines should be reformed to take into account both parents’ incomes, and that awards should decline after income reaches approximately \$5,000 per month to curb overcompensation. Divorce rates should not vary depending on state’s child support guidelines, and guidelines that overcompensate the custodial parent should be reformed.

Steven Berenson, *Homeless Veterans and Child Support*, 45 FAM. L.Q. 173. (2011).

Veterans have risked their lives to serve our country, and so it is unconscionable that many are homeless. Compounding the myriad of hurdles associated with their homelessness is an unduly complicated legal framework for child support payments. To assist those who have helped the United States, several legal reforms could be implemented. Specifically, the process for downward modification in payments could be simplified; a struggling homeless veteran may lack the income that once justified his initial payment level, but he needs a system that makes modification possible. Training for social service providers could be helpful, and retroactive adjustments should be available. Additionally, veterans' benefit garnishments should be permitted in order to facilitate payments and prevent unnecessary arrearage accumulation. These innovations would safeguard the interests of child support recipients while lifting a needless burden from the shoulders of the country's homeless veterans.

Suzanne B. Goldberg, Harriet Antczak & Mark Musico, *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348 (2011).

In the realm of family law, there is uncertainty as to whether the law should recognize "functional parenthood"—the parental rights of a person who "functions" as a parent—even though she does not have biological or adoptive ties to the child. This uncertainty was at issue in *Debra H. v. Janice R.*, a New York Court of Appeals case, in which an amicus brief by a group of forty-five family law scholars argued in favor of the legal recognition of functional parenthood, and ultimately in favor of affording the "functional parent" standing to petition for custody and visitation rights. The brief aimed to draw the Court's attention to three factors of functional parenthood consistently endorsed in academic literature: 1) legal parent's consent; 2) functional parent's intent; and 3) formation of a parent-child bond. While the Court decided that Debra H. had standing, it did so based on her civil union with Janice R., not on the concept of functional parenthood, and reaffirmed its prior holding in *Alison D. v. Virginia M.* which held that "parentage . . . derives from biology or adoption." Thus, the decision left unmarried or non-traditional functional parents as "legal strangers" to their children. The author argues that because recognizing functional parenthood better serves and protects the interests of the children affected, the Court must shift away from its formalistic conception of family, and should utilize the academic consensus reflected in the brief as an indication that it is necessary to move toward a jurisprudence that more closely corresponds with the reality of family life today.

Leslie J. Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157 (2011).

Since the early twenty-first century, the rate of children younger than eighteen living below the poverty line has risen from sixteen percent to twenty percent, and child poverty is more prevalent among children of unmarried or single parents. Congress passed the federal-state child support enforcement program in 1975 and welfare legislation reform in 1996 to help combat the rising problem of child poverty. The legislation gives states incentives to comply with paternity establishment programs by withholding funds from states that do employ such programs, thereby improving rates of paternal monetary child support. This Article argues that the legislation passed by Congress has had adverse effects on noneconomic forms of child support, discouraging absent fathers from remaining in contact with their children due to the fact that they will be required to pay child support they cannot afford if they comply with paternity establishing programs. The author advocates reforming the current system in favor of programs directed at improving fatherhood involvement, while providing direct government subsidies to support impoverished children, alleviating the impediment to paternal noneconomic child support by removing the requirement of paternal economic child support. The current system, devoid of flexibility, has not realized its goal of significantly reducing poverty among poor children, and therefore must be modified.

Lori W. Nelson, *High-Income Child Support*, 45 FAM. L.Q. 191 (2011).

The Family Support Act of 1988 required each state to enact presumptive guidelines for child support as a condition of receiving federal funds. These state guidelines resolved child support issues for the average case, but not for high-income cases—when the parents have an income in excess of a state's guideline amount—because the question of the appropriate child support amount is not easily answered in high-income cases. Consequently, nearly every state has added a specific statute dealing with the parents' income and its effect on the guidelines in an attempt to eliminate the quandary regarding the appropriate level of child support for the high-income parent. The result, however, is that each state has created its own distinct regulations, and even within any particular state, courts have failed to apply these methods with the clarity needed to produce uniform results. The author surveys the varying state approaches and discusses both valid deviations from the guidelines and the use of judicial discretion. Some states, known as "straight percentage states," calculate child support based on a percentage of the parent's income. Other states require that the level of child support be dependent on the child's *actual* needs, taking into account the parent's income but not to the same extent as "straight percentage states." The author concludes that there are currently many strategies in which states have handled child support with

respect to high-income cases; however, as a whole, state courts are persistently addressing and modifying methods to calculate child support in high-income cases that are fair to both the child and the parents.

Nadia Stewart, Note, *Adoption by Same-Sex Couples and The Use Of The Representation Reinforcement Theory to Protect The Rights Of The Children*, 17 TEX. WESLEYAN L. REV. 347 (2011).

Most state adoption statutes recognize only one partner of a same-sex relationship as the legal parent, thereby subjecting the adopted child to legal, social, and economic disadvantages. Nine states permit second-parent adoption—a process by which two unmarried individuals can become the legal parents of an adoptee—though the procedure for doing so is time-consuming because it requires two separate processes. In a few states, an unmarried couple can adopt through joint adoption, which unlike second-parent adoption, would not require two adoption proceedings. As a result of these hurdles, children of same-sex partners do not have two parents representing them in the voting population and, therefore, cannot adequately influence the legislature to pass laws protecting their interests. A number of additional factors, including the outright prohibition of same-sex parent adoptions in certain states and the wide discretion given to judges when determining custody, highlight the need for stronger legal protections in same-sex adoptions. The author urges courts to strictly scrutinize legislation regarding adoptive children of same-sex couples. This heightened scrutiny is justified by the United States Supreme Court's history of using representation of reinforcement—where the Court protects the fundamental rights of minority groups from legislative domination by the majority. Moreover, this standard would also remedy the dangers of statutory inconsistencies, prohibitions of same-sex parent adoptions, and the unreliability of judicial discretion. By applying this standard, the courts would streamline the adoption process so that both same-sex parents can adopt, which would promote the best interests of a child by providing stability in guardianship.

#### GENDER BIAS AND DISCRIMINATION

L. Camille Hebert, *The Causal Relationship of Sex, Pregnancy, Lactation, and Breastfeeding and the Meaning of "Because of . . . Sex" under Title VII*, 12 GEO. J. GENDER & L. 119 (2011).

The majority of courts have refused to recognize sex discrimination claims brought by women who faced discriminatory practices by their employers in the workplace for lactation or breastfeeding. For example, in *General Electric Co. v. Gilbert*, the United States Supreme Court did not find sex discrimination on the basis of pregnancy when addressing the legality of an employer's disability plan

that denied benefits to women with pregnancy-related ailments. Congress overruled *Gilbert* with the passage of the Pregnancy Discrimination Act of 1978 (“PDA”), which amended Title VII and broadened the scope of protection for women facing discrimination on childbearing matters. Despite this legislation, lower courts continue to rely on *Gilbert* and deny that lactation is a gender-linked trait that is protected from discrimination. The author argues that the legislative history of the PDA indicates that lactation or breastfeeding is a medical condition related to pregnancy, and would thus fall within Title VII’s definition of sex. Further, regardless of whether lactation or breastfeeding is deemed as a sex-linked trait, an employer’s adverse treatment of these employees would still impose a disproportionate negative impact that generates the need for legal protection. The author argues that the Breastfeeding Promotion Act of 2009, which would explicitly deem lactation as a sex-linked trait to protect against discrimination, is inadequate as a remedial measure. Instead, courts should require accommodation for lactating or breastfeeding women so that an employer would be required to consider pregnancy when making workplace decisions.

Michelle Mitchell, Note, *Gender and Unemployment Insurance: Why Women Receive Unemployment Benefits At Lower Rates Than Men and Will Unemployment Insurance Reform Close the Gender Gap?*, 20 TEX. J. WOMEN & L. 55 (2010).

While unemployment insurance is a vital system for providing temporary aid to unemployed workers, the current system disproportionately disqualifies women, especially single mothers, from receiving benefits. In particular, the current system fails to account for the social and economic realities of women’s lives, often related to their dual roles as workers and mothers. For example, working part-time or voluntarily leaving a job due to compelling marital or family circumstances can prevent women from receiving benefits under the current eligibility standards. Fortunately, the Unemployment Insurance Modernization Act of 2009, later incorporated into the American Recovery and Reinvestment Act of 2009, offers key reforms to helping women obtain benefits that had previously been unavailable. Under the new law, a woman remains eligible for benefits if she is seeking part-time work, and is not denied benefits if she resigns for a compelling family reason including domestic violence or an immediate family member’s illness or disability. In a time where women make up an increasingly large percentage of the American workforce, the author views these reforms as a positive step toward guaranteeing equality and security for women seeking unemployment benefits in the future.

Deborah Weiss, *The Annoyingly Indeterminate Effects of Sex Differences*, 19 TEX. J. WOMEN & L. 99 (2010).

Workplace gender segregation exists, although it is unclear as to whether the gender disparities in various disciplines are due to differences in ability, preference, or market discrimination. Although some occupational gender segregation may be explained by biological, neurological, and physiological differences, this distinction is problematic because statistics show that there are far more gender distinctions than biology warrants. The author argues that even slight distribution differences are severe because recognition of such differences may lead young people into a conscious or unconscious decision to pursue disciplines more likely to be practiced by their own gender. The author then examines why gender distribution differences occur, various attempts at reform that have failed, and suggests a number of principles that must be taken into account when discussing reform. Some of the failed reform attempts include Title VII of the 1964 Civil Rights Act, which attempted to prohibit the discrimination that occurs when employers use sex as a proxy for ability in hiring, but failed to take into account the disparity that arises because of actual ability or preference differences. Numerical targets, including equal representation of men and women in all fields, have similarly failed because they do not address the underlying causes of the discrimination. Reform must address the underlying causes, including schooling and socializing young children to acquire skills traditionally taught to the opposite sex, while still acknowledging the reality that gender differences do, and will continue to, exist.

### HEALTH

Guion L. Johnstone, Note, *A Social Worker's Dilemma When A Client Has A Sexually Transmitted Disease: The Conflict Between The Duty Of Confidentiality And The Duty To Warn Sexual Partners*, 49 U. LOUISVILLE L. REV. 111 (2010).

A social worker owes a duty of confidentiality to a client and, in certain instances, a duty to warn third parties of dangerous actions that may be committed by the client. This Article considers the conflict between these two duties when a social worker suspects that a client may transmit a sexually transmitted disease ("STD") to a third party. No specific case law or legislation addresses the issue, so the author examines the issue by analogizing it to the widely accepted analysis in *Tarasoff v. Regents of the Univ. of Cal.* *Tarasoff* ruled that psychiatrists owed a duty to convey patients' threats of serious danger of violence to any foreseeable victim of that danger. Post-*Tarasoff*, the duty to warn third parties has extended through case law to all special relationships, social worker and client included. However, STD transmittal is not always a decidedly serious danger, and in the face of competing interests, the author promotes a compromise to a duty to warn: the

physician-championed privilege to warn, which allows a social worker greater case-specific flexibility in deciding whether to breach confidentiality so to warn third parties.

### HUMAN RIGHTS

S. Denay Brown, Note, *Protecting the Children: The Need for a Modern Day Balancing Test to Regulate Child Labor in International Business*, 20 J. TRANSNAT'L L. & POL'Y 129 (2010).

International child labor practices should be regulated with a balanced approach involving the cooperation of private corporations that utilize child labor, nation states that permit child labor, and international organizations that promote human rights. Complete bans on child labor have been suggested, but this approach fails to recognize aspects of child labor, such as self-realization and economic stability, that are beneficial to child workers and their families. Absolute bans are also ineffective and unrealistic because the abolition of child labor would only deregulate working conditions, hide the continued use of child workers, and force children into harmful alternate paths like prostitution or begging. The author proposes the creation of a regulatory scheme that considers the best interests of child workers and the cultural differences of the various countries that permit child labor, while balancing the economic benefits of child labor with its harms. Such a scheme must incorporate children's opinions, recognize exploitation, abolish harmful practices, and create an enforceable code of conduct for nation states and corporations to implement. If international organizations were to create a balancing test, nation states could adapt the test to suit the conditions in their respective countries. The financial cost of implementing a new and balanced regulatory scheme would be outweighed by the benefits of reforming international child labor practices.

Sarah J. Conroy, *Women's Inheritance and Conditionality in the Fight Against AIDS*, 28 WIS. INT'L L.J. 705 (2011).

International economic institutions ("IEIs"), including the International Monetary Fund and the World Bank, should lead efforts to enforce women's property rights through conditional funding to governments in areas where the failure to recognize women's inheritance rights has contributed to the spread of HIV/AIDS. Women in regions such as sub-Saharan Africa are often prevented from inheriting property after the premature and often AIDS-related death of a husband or father; male relatives then become inheritors who force these unprotected women out of their homes, sexually abuse them, and provide few options for survival apart from entering the sex trade. Local governments' failure

to properly stop these practices exacerbates the HIV/AIDS epidemic by allowing situations of inheritors contracting AIDS from widows and widows spreading AIDS through the sex trade. The author discusses the current absence of funds and adequate legal regimes, and contends that proper enforcement of widows' property rights would grant them economic stability, and in turn reduce the financial necessity of either finding a new husband or joining the sex trade, diminishing the rate of AIDS transmission to new partners. Although IEIs' policy-making authority has yet to be fully established, the institutions, which provide below-market interest rate loans to lesser-developed countries, should amend their charters to include human rights implementation. International human rights courts and organizations can assist IEIs with navigating through obstacles such as fragile political structures and potential intrusion upon existing humanitarian efforts.

Seth M. Hyatt, Note, *Text Offenders: Privacy, Text Messages, and the Failure of the Title III Minimization Requirement*, 64 VAND. L. REV. 1347 (2011).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 subjects government agents to minimization requirements when surveilling private communications—that the agents listen only to communications that are essential for an investigation. Judicial standards, however, have detracted from the minimization requirement's purpose, giving agents a high level of deference. Moreover, minimization does not protect non-verbal communications like text messages and emails. Congress enacted the Electronic Communications Privacy Act ("ECPA") to protect individuals from government surveillance of communication in new technological modes not covered by Title III, but Congress has not enunciated strict guidelines for the surveillance of non-verbal communications, and judicial interpretation has carved a number of exceptions to the ECPA, limiting its protection. There have been very few court cases that cover minimization requirements in nonverbal communications, but one federal court has held that when minimizing faxes, one "monitoring" agent, along with the Assistant U.S. Attorney, must read all faxed documents and then relay all information pertinent to the investigation to the rest of the agents. The author concedes that this approach has been one of the most practical in the history of the ECPA, but nonetheless argues that Congress should abolish the electronic minimization requirement and begin anew with legislation that can balance citizens' privacy rights with the government's investigatory interests. There are too many loopholes and exceptions carved out of the minimization requirement for people to be given proper protections when the government is surveilling them, especially when these communications include text messages—a topic court have yet to address.

Laura C. Turano, *The Gender Dimension of Transnational Justice Mechanisms*, 43 N.Y.U. J. INT'L L. & POL. 1045 (2011).

Historically, while wartime tribunals have strengthened their prosecution of sexual violence against women through more expansive definitions of what constitutes such violence, they still fail to take into account many of the non-physical harms that women suffer during armed conflicts. Women suffer harm before, during, and after such conflicts, in the form of interruptions to daily life and decreased access to food and water, amongst others. The author establishes four goals for the tribunal process to effectively respond to war crimes against women—punishing offenders; memorializing the full scope of past atrocities; properly respecting and responding to the needs of victims; and cultivating respect and opportunities for women in post-conflict society—and assesses how prosecutions and truth commissions, as part of the tribunal process, potentially achieve these goals. Prosecution is less effective in accomplishing these goals than are truth commissions because it tends to focus on individual crimes rather than patterns. Prosecutors put women in the position of facing their abusers and acknowledging the crime that has been committed, which women are seldom eager to do. Prosecutors focus on the traditional elements of a crime, whereas the goals address more auxiliary elements. Truth commissions have the potential to be more successful in accomplishing the goals because they penetrate the essence of the crime more deeply than does prosecution and, while truth commissions have the potential to establish a gender-biased record of past atrocities, they have a greater potential to address the needs of crime victims.

Adrien K. Wing & Peter P. Nadimi, *Women's Rights in the Muslim World and the Age of Obama*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 431 (2011).

The Obama Administration's relationship with the Muslim world has created unique and important opportunities to allow for foreign assistance with women's human rights issues in the Muslim community. There are ongoing and persistent human rights abuses against women in the Muslim world caused by a number of factors, including patriarchal customs, religious traditions and the notion of female obedience, which force many women to remain in violent relationships. Four of the most pressing issues facing Muslim women are a lack of access to quality education, lack of economic empowerment, minimal involvement in the political process, and extreme domestic violence. The author makes eight recommendations as to how the United States, under the command of President Obama, could help to put an end to these human rights abuses. Some of these recommendations are ratifying the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), encouraging Congress to pass the International Violence

Against Women Act (“IVAWA”) and providing funding for increased access to quality education for women in the Muslim community. By directly supporting women’s rights in the Muslim world, the Obama Administration has the power to effect change for women and put an end to human rights abuses suffered in the Muslim community.

Katie L. Zaunbrecher, *When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations*, 33 HOUS. J. INT’L L. 679 (2011).

There is a growing understanding among the international community that gender equality is essential to international peace and security, but attempts to achieve this goal—such as creation of the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)—are thwarted by a lack of consensus as to the substance, scope and enforceability of international human rights as well as by certain governments’ refusal to abandon so-called “cultural” practices that discriminate against and endanger women. By defending state-sanctioned practices as “traditional,” patriarchal governments seek to immunize violence and discrimination against women, leading to irrational justifications for atrocities such as genital mutilation, domestic abuse, and rape. In light of CEDAW’s weak enforcement provisions and broad language, the author insists that states and local advocacy groups work together to implement and enforce universal concepts of human rights in local cultural practices by informing men and women, through educational community-based programs, about their legal rights and obligations under international law. This will empower citizens to break down repressive and discriminatory practices against women. States often sign on to international human rights treaties in hopes that a public pledge will deflect attention from their reprehensible practices, so NGOs and CEDAW must work together to accurately report conditions of women and promote awareness of which states are, and are not, complying with international standards.

### LGBTQ RIGHTS

Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669 (2011).

The experience of lesbian, gay, bisexual, and transgender (“LGBT”) people in the judicial system is often studied from the perspective of that person as a victim, defendant, or party to the litigation. This Article examines the experience of LGBT individuals serving as jurors, focusing on how treatment of LGBT people

during jury service impacts their perception of the court system. Using two state reports on treatment of LGBT people in the court system, the Article discusses a pattern of degradation of jurors when their sexual orientation is known. This disparate treatment can lead to negative perceptions of the court system and even a desire to reduce contact with that system. While the author acknowledges that the studies have some data limitations because of sampling techniques and question formations, he concludes that, as contact with the court system increased, so did a person's negative feelings; though negative treatment seems to be more predominant when the person is more actively participating in the court process as, for example, a party to litigation. Discrimination was particularly noticeable when an LGBT person's identity was more visible, and a visible LGBT identity was more likely to be exposed when there was prolonged contact with the court, such as during the voir dire process for selecting the jury, which can result in unintentional revelation of a person's sexual orientation and often involves discriminating questions, particularly involving marital status.

Jeannie J. Chung, *Identity or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1 (2011).

Although federal law expressly excludes transgender individuals from the protected class of persons with disabilities, many states do actively include transgender individuals under anti-discrimination laws; this has been controversial. This article surveys state statutes and judicial decisions in cases where transgender plaintiffs brought discrimination claims under disability laws and analyzes how courts have applied these laws to transgender individuals. The state courts apply two models of disability with respect to transgender plaintiffs: the medical model and the social model. Most courts, enabled by statutory definitions of disability, apply the medical model to transgender plaintiffs by relying on a medical professional's Gender Identity Disorder diagnosis; however, some state courts rely on a social model to demonstrate that the societal stigma of transgender individuals plays a specific role in disabling plaintiffs from effectively exercising their capabilities in their job. Nonetheless, the author points out the existence of practical and theoretical problems with employing the social model of disability. Therefore, the application of disability laws has largely perpetuated a judicial reliance upon the medical model of disability to prove that the transgender plaintiff has a disability, but the continuing application of this model may perpetuate the view that transgender individuals have an "illness."

Chinyere Ezie, *Deconstructing The Body: Transgender And Intersex Identities And Sex Discrimination—The Need For Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141 (2011)

The author advocates for suspect classification of transgender and intersex persons under the Equal Protection Clause, thus requiring strict scrutiny for government discrimination. The Article begins by exposing how gender is a social construct. When a baby is born with intersex biology, medical professionals will engage in pediatric surgeries to “normalize” the patient’s sex in a way that fits with the traditional binary legal definition. In addition to the hazy biological definition of sex, transgender persons are not classifiable in the traditional binary norms since their gender stems from personal identification—which may include androgyny—rather than biology. When there is a legal dispute about an individual’s gender, courts act as the fact-finder and often defer to physicians’ opinions, which are based on biology. The legal classification of gender as a binary system is analogous to the long abandoned racial science that was once used to classify persons as “white” or “black.” These classifications broke down when race-based science was debunked and old rules, such as the “one-drop rule,” were abandoned. Since race was given suspect classification due to its arbitrariness, so too must gender. The current classification of gender under intermediate rather than strict scrutiny enables the government to discriminate easily based on gender in many areas, including identification documents, restrooms, prisons, schools, the military, and within the workforce. Giving transgender and intersex citizens strict scrutiny protection will destroy some of these discriminatory barriers the way racial segregation was destroyed.

Stacy Larson, Comment, *Intersexuality and Gender Verification Tests: The Need to Assure Human Rights and Privacy*, 23 PACE INT’L L. REV. 215 (2011).

To provide intersex individuals—individuals whose biology is atypical and therefore neither strictly “male” nor “female”—with the same protection afforded to individual “men” and “women,” both the United States and foreign countries need to amend their current laws to recognize intersex as a legal classification. This Article addresses the issue by exploring the obstacles that intersex individuals face as a result of not being recognized legally in the matters of marriage, employment, criminal justice, human rights, and sports. More specifically, the author focuses on gender verification in sports by tracing the history of gender verification tests in sports and arguing that classifications should be based on factors such as age, weight, height, and muscle mass, as is relevant to the particular sport, as opposed to “male” and “female.” The author also notes the difficulties of revising athletic classifications, particularly how discrepancies between national and international law affect international athletics. By legally recognizing intersex

individuals in the law and not forcing individuals to identify only as “male” or “female,” intersex individuals will be provided with the protection that they deserve.

Yamuna Menon, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221 (2011).

Presently, the American legal system does not provide any protected legal status to intersex persons—those whose physical or chromosomal traits have both male and female aspects. The author concludes that the Americans with Disabilities Act (“ADA”), through its 2009 amendments, protects intersex individuals. Intersex individuals may, but probably do not, fall within the ADA’s explicit exclusion of transgender individuals and those with “gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.” Assuming they do not fall within this exclusion, intersex individuals must show an impairment—physical or mental—that meets one of three prongs: the impairment substantially limits major life activities; the person has a documented record of the impairment; or the person is regarded or perceived as having such impairment. The 2009 amendments are promising because they expanded “disability” to include perceived, rather than actual, disabilities, and expanded “major life activities” to include mundane behaviors like sleeping, working, and reproductive functions. The author concludes that intersex individuals may suffer physical impairments because of surgical complications many face, and that intersex individuals may satisfy each of the ADA prongs—that their impairment substantially limits major activities; that they have a documented record of the impairment; and that they are regarded as being impaired. Although invoking the ADA as protection for intersex individuals has downsides—notably that negative associations with disabled and intersex individuals may exaggerate after intersex individuals are protected by the ADA—the author notes that the ADA is the only currently available option.

Xavier B. Lutchmie Persad, Note, *Homosexuality and Death: A Legal Analysis of Uganda’s Proposed Anti-Homosexuality Bill*, 6 FLA. A. & M. U. L. REV. 135 (2010).

Many countries have abolished their laws against homosexual relationships, but anti-sodomy laws still exist in seventy-six countries. Uganda’s parliament is trying to intensify its current anti-sodomy laws by introducing the Anti-Homosexuality Bill of 2009, which, if passed, would forbid sexual relations between people of the same sex and impose harsher punishments for violations, including death for serial offenders. This Note examines the bill’s legality—both its anti-sodomy and death penalty provisions—under the Constitution of Uganda

and three international treaties: the International Covenant on Civil and Political Rights (“ICCPR”); the International Covenant on Economic, Social, and Cultural Rights; and the African Charters on Human and People’s Rights and Rights and Welfare of the Child. The author concludes that the bill would probably not violate the Ugandan Constitution. Although the Ugandan Constitution is progressive—it gives great protection to individual rights by forbidding discrimination in various contexts, and granting equal protection and the right to privacy to all citizens—it makes no mention of sexual orientation, thus permitting discrimination based on sexuality. The strongest challenge to the bill would come from the ICCPR, since its anti-discrimination clause prohibits discrimination based on sexual orientation.

Keith Southam, *Who am I and who do you Want me to be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 CHI.-KENT L. REV. 1363 (2011).

By establishing a divide between lesbian, gay, bisexual, and transgender (“LGBT”) conduct and LGBT identity as a means of defining the LGBT social group in the asylum context, the Board of Immigration Appeals in *In re Toboso-Alfonso* set a potentially harmful standard for LGBT persons who were persecuted in their home countries. Allowing asylum in other countries for people who were persecuted for an LGBT identity while forbidding them asylum in the U.S. is effective because it deters refugees from abusing the relatively LGBT-friendly asylum law—for instance, by passing themselves off as belonging to the LGBT community and then rescinding this identity once they have attained asylum. The law is problematic, however, because it relies on standards for identifying LGBT identity, such as social perception or social visibility, which may not apply to all LGBT refugees. There are refugees who prefer to keep their identity under wraps, if such an identity or social group did not exist in their prior country as it exists in the U.S., or if they prefer not to identify with LGBT stereotypes, because they are afraid of the potential social persecution they may suffer for openly expressing their identity. After detailing the inner working of the asylum process and discussing its unnecessarily demanding standards, the author conducts a sociological explanation of the problems with distinguishing LGBT conduct and identity, instructing readers that they are ultimately intertwined because both are social constructs rather than natural traits. In order to remedy this aspect of asylum law, adjudicators need to consider both the conduct and the status of asylum applicants, in light of the fact that an LGBT community or social group did not necessarily exist in the applicant’s former country. The applications should provide for a more individualized approach to gaining asylum, as applicants come from a variety of backgrounds and define themselves in a variety of ways that may not necessarily mesh with the definitions that U.S. society has constructed for LGBT identity and conduct.

James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE J. COMP. & INT'L L. 631 (2011).

This Article examines diverging and converging state approaches to lesbian, gay, bisexual, transgender, and intersexual (“LGBTI”) marriage rights and identifies impediments and progressions toward the recognition of international LGBTI human rights, which reflects global consensus on fundamental human rights regardless of citizenship. Although many Eastern countries view homosexuality as Western-based and see no need to protect sexual minorities in their legal system or internationally, this view is faulted because historically, same-sex unions were accepted in Eastern societies until the spread of colonialism and conquest by the Judeo-Christian-Islamic faiths, which have strict tenets with respect to sexuality. As the effects of colonialism and conquest diminish, the attitudes of many nations toward LGBTI rights is converging, but the U.S., despite similarities with these nations, has regions in the South hugely resistant to the recognition of same-sex relations. This sociopolitical resistance is a product of the advent of uniquely American Christian denominations that, although not inherently biased, promulgated theologies of racial and gender inferiority to justify slavery and apartheid. Although divergent approaches to LGBTI rights between the U.S. and other nations are diminishing, it remains unknown whether the South will continue to influence the government to deny LGBTI rights on a national level. This Article also illustrates that some developing countries are converging toward LGBTI rights by following the footsteps of their former colonizing countries, while other areas in Asia, Africa, and the Caribbean diverge and criminalize homosexuality because of the lingering effect of race-based colonialism and efforts of U.S. fundamentalist groups to spread intolerant theologies. The international landscape shows that momentum is on the side of LGBTI rights converging, but that impediments remain to international LGBTI rights.

#### MARRIAGE AND DIVORCE

Eric Schmidtke, *Perry v. Schwarzenegger: Why the Federal Judiciary is the Right Course to Secure Marriage Equality, Remove Unnecessary Disparities, and Integrate Same-Sex Couples into Society*, 32 HAMLINE J. PUB. L. & POL'Y 215 (2010).

Though a number of state courts have upheld the right of same-sex couples to marry, *Perry v. Schwarzenegger* is the first case in which a federal court has held that a state may not exclude same-sex couples from the institution of marriage because doing so violates both the Due Process Clause and Equal Protection Clause of the 14<sup>th</sup> Amendment. This Article argues that the Supreme Court must grant

certiorari for this case if the opportunity presents itself, because doing so is the only way to guarantee application of the Equal Protection Clause of the 14<sup>th</sup> Amendment to the rights of all citizens to marry the individual of their choice. The author further argues that the Supreme Court must rule on *Perry* because it offers a uniform strict scrutiny standard of review, which has yet to be applied in state courts. By interpreting the institution of marriage as a fundamental right under the Equal Protection Clause, the Supreme Court would refute the legal arguments against same-sex marriage, and would also relieve the disparities resulting from the prohibition on same-sex marriage that affect gay women and men, as well as their families. By affirming *Perry* in the highest court of the federal system, the Supreme Court would bring the issues of inequality and fundamental rights in gay marriage to the forefront of the public policy landscape, and by ruling that marriage is a 14<sup>th</sup> Amendment fundamental constitutional right for all, the Supreme Court would correct the inequalities and disparities suffered by same-sex couples and their families.

Austin Tyler Brown, *Senate Bill 1070: An Opportunity to Align the Interests of Federal and State Governments With the Rights of the Child*, 12 FLA. COASTAL L. REV. 453 (2011).

While Senate Bill 1070 (“SB 1070”) is not perfect, it presents a workable groundwork for President Obama to address the problems faced by illegal immigrant children. SB 1070 is an Arizona state bill that requires state and local law enforcement to carry out and adhere to federal immigration law; it also makes it a crime to fail to submit alien registration documents to the government, hire or solicit work from illegal immigrants, and harbor or transport aliens. The state law has serious ramifications, but United States federal laws guiding the regulation of illegal immigrants and their children are equally contradictory and convoluted when compared with state laws. Federal laws are also in direct contradiction with the United Nations’ Convention on the Rights of the Child (“CRC”); for example, the CRC does not allow for juvenile executions while U.S. law does not prohibit this punishment for capital crimes. The U.S. and Somalia are the only two member countries not to ratify the CRC, which is anachronistic and counterintuitive when taking into account the U.S.’s belief in the importance of human rights. The Article proposes that by integrating SB 1070—effectively creating a more solid federal response to illegal immigration—the U.S. will solve many of the problems connected to illegal immigration. President Obama has called for Congress to implement federal legislation similar to the framework provided by SB 1070. The author believes that SB 1070 provides a useful framework for Congress because the issue of illegal immigration necessitates a strong federal response.

June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219 (2011).

American families today include an increasing number of nonmarital births; however, laws governing parentage and child support under the marital presumption, which presumes that a child born during a marriage is the child of the husband, have not been modified or voided to meet this changing definition of family. Moreover, the lack of uniformity among and within state jurisdictions in determining child support obligations according to biological, marital, or parental rules shows that states waver between ideological and bright-line rules. Recent state decisions that rely on the marital presumption to govern parentage and child support reveal that application of the marital presumption are inconsistent because they reflect a state's attempt to balance its interest in upholding traditional sanctity of marriage against biological parenthood. Similarly inconsistent are states that use estoppel as a means of locking in parentage. In these cases, when a husband assumes the role of fatherhood for a child born to his wife, even if it is not biologically his child, neither the husband nor wife can refute his parenthood. The authors argue that due to the approaches taken to determine child support and parentage, married couples encounter more complicated support determinations, where deception and mistake necessarily undermine their relationships and the futures of their children after marital dissolution.

Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225 (2011).

There is a long tradition in the United States of treating marriage as a private union that should not be disturbed by judicial interference. Thus, courts have traditionally refused to enforce marital agreements or bargains, holding that if a marital partner is unhappy, he or she can choose to end the marriage via divorce or separation proceedings. The author argues that marital privacy is often used as a justification for the refusal to enforce fully negotiated agreements between marital partners, and questions whether this is a wise approach, given the importance of preserving marriages when possible. While the concern over unfair bargains in marriage is valid, there is an equally compelling argument that more protection is needed in marriages, especially for those partners who choose less conventional roles, such as a wife who works full-time or a stay-at-home father. Marital agreements concerning unconventional gender roles are more vulnerable, since they are less likely to be recognized or accepted by non-legal third parties, such as religious figures and family members, who often prefer traditional gender roles. As a result, spouses are unable to rely on familial or communal pressure to ensure that the other spouse keeps his or her part of the bargain. Judges, therefore, are in the best position to make decisions about enforcement of marital agreements.

Although they too sometimes prefer traditional gender roles, they are also more familiar with contract law and the constitutional guarantees of gender equality. Given the strong public policy considerations, a reform of the long-established judicial non-interference policy might be the best solution.

Lauren Giudice, Note, *New York and Divorce: Finding Fault in a No-Fault System*, 19 J.L. & POL'Y 787 (2011).

By 1985, every state except New York had abandoned the fault-based divorce system, replacing it with no-fault divorce. Until 2010, when New York's Governor Patterson signed a three-bill package that overhauled divorce laws by eliminating strict fault requirements for divorcing spouses, legally terminating a marriage remained an extra-long process, largely due to a mandatory separation period. In many cases, divorces also became unnecessarily contentious, as former spouses incurred expensive legal fees from divorce litigation and custody battles. While the author acknowledges that the adoption of no-fault divorce laws vastly simplifies divorce proceedings and thus was a much-needed reform, she maintains that fault requirements in some cases can be a positive thing, as they sometimes encourage—or force—divorcing spouses to negotiate with one another as a means of ensuring better post-divorce settlements. Fault requirements also mandate that courts take into consideration blameworthy conduct by either party, thus ensuring that post-divorce settlements are more tailored to the needs and circumstances of particular spouses. On the contrary, no-fault divorce systems are governed by a set of default rules, so settlements cannot be tailored to particular spouses. The author argues that fault should still play some role in certain divorce proceedings, specifically in determining post-divorce maintenance and the distribution of marital property. Additionally, New Yorkers should contemplate entering into premarital or post-marital agreements as a means of maintaining control of their post-divorce lives.

Matthew J. McCauley, Note, *Divorce and the Welfare of the Child In Japan*, 20 PAC. RIM. L. & POL'Y J. 589 (2011).

In the 1950s, Japan codified law regarding visitation, custody, and divorce, but it has remained stagnant since. This Note analyzes the current state of Japanese family law, including the negative effects on parents and children resulting from various problem areas: visitation is not protected as a fundamental right under the law; there is no provision for joint custody, requiring parents to battle over sole custody; and the *kyogi rikon* family law system of divorce by mutual consent provides no oversight and does not allow for the creation of enforceable divorce agreements. The *kyogi rikon* system has a detrimental effect on the healthy development of children: the lack of visitation rights results in extremely limited

contact with non-custodial parents; and the mutual consent system causes a systemic failure to make decisions that protect children's welfare, specifically in facilitating healthy interaction between parents and children following divorce. The author proposes three reforms which aim to protect the fundamental rights of children and non-custodial parents: recognizing the right of visitation for non-custodial parents; creating a preference for joint custody; and reforming the *kyogi rikon* system to mandate the creation of detailed parenting plans for minor children. It is important that individuals understand the negative social effects of the family law in Japan in order to motivate systemic reformations that better protect children and non-custodial spouses after divorce.

### PARENTING

Linda S. Anderson, *Just Because You Don't Want Kids Doesn't Mean I Can't Have Them: How Clarifying Definitions of "Parent" and "Procreate" Can Prevent the Indefinite Storage of Cryopreserved Embryos*, 49 U. LOUISVILLE L. REV 231 (2010).

This Article analyzes novel legal challenges presented by assisted reproductive technology ("ART"), including determining parenthood and disposing of preembryos. Multiple preembryos are created during the ART process, and the couple who intended to procreate with the embryos may dispute over disposal. In resolving such disputes, courts typically balance the right to become a parent versus the right not to become a parent, but the party wishing to avoid parenthood usually prevails. This analysis, however, is complicated because the definitions of "parenthood" and "procreate"—both essential terms in the analysis—are ambiguous. Several people may participate in ART: the couple who intends to raise the child; the people who contribute sperm and eggs; and the gestator and the gestator's spouse. Thus, parenthood is not clearly delineated, and procreation is also more complicated than has been recognized by courts. The author examines efforts to clarify these ambiguities and ultimately proposes that "parenthood" determinations consider the person who has control over the preembryo and compels it to be developed into a person. Since genetic relations are not considered, the use of such preembryos will be encouraged.

Deborah J. Anthony, *Tradition, Conflict, and Progress: A Closer Look at Childbirth and Parental Leave Policy on University Campuses*, 12 GEO. J. GENDER & L. 91 (2011).

In the 19<sup>th</sup> Century, work in the public sphere was designed with the expectation of the ideal worker being a man who was fully devoted to his career and who had no competing responsibilities because he had a wife at home handling

family issues. Today, businesses recognize that most workers do not fit this standard, yet colleges and universities have lagged behind in employing models that balance work and life demands, including features like flexible work schedules and childcare. This is particularly burdensome for women, who, despite earning fifty-one percent of all Ph.D.s, only make up thirty-nine percentage of full-time faculty. This Article investigates parental leave policies and reveals that many practices are unfair, ineffective, or even violate state and federal law—including the Pregnancy Discrimination Act and the Family and Medical Leave Act—due to university departments’ practice of ad-hoc decision-making regarding parental leave. Best practices include having clear and specific written policies that: entitle individuals to parental leave rather than letting it be a university option; encourage employee awareness and uniform application; modify faculty duties, including a temporary reduction in teaching and other responsibilities with full pay; a centralized budget to hire temporary workers; and the support of administrative leadership to combat any stigmatization of parental leave. The author argues that even in tough economic times, caretaking should be a priority because it encourages institutions to recruit the most talented faculty and avoids costly litigation.

Hillary B. Farber, *A Parent’s “Apparent” Authority: Why Intergenerational Coresidence Requires a Reassessment of Parental Consent to Search Adult Children’s Bedrooms*, 21 CORNELL J. L. & PUB. POL’Y 39 (2011).

In the wake of the economic decline of 2008, many American households have changed from a nuclear family structure to one of multigenerational homes. With this demographic shift, the author argues that there should be a responsive change in the Fourth Amendment apparent authority doctrine, which carves out circumstances in which otherwise unlawful home searches are allowed based on third party consent. The generally accepted belief that parents, as superiors, may permit police to search the premises, including spaces inhabited by their children, does not automatically extend to situations in which adult children are living with their parents. When analyzing the reasonableness of the search in these situations, courts are beginning to consider contemporary demographics, so parental dominion over the home no longer grants police unquestionable permission to search. In *Georgia v. Randolph*, the Supreme Court held that to assess reasonable reliance on third party consent, a court must take into consideration “customary social understanding” when deciding whether parental consent validates the search. To offer Fourth Amendment protection to both parents and adult children, our legal system must, at a minimum, require police to conduct a thorough inquiry into the parent’s authority over any area occupied exclusively by an adult child. Setting up guidelines whereby police must actively explore facts to better ascertain consent

affords an adult child the same reasonable expectation of privacy he or she would have while living with an unrelated third party.

Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. LOUISVILLE L. REV. 371 (2011).

Under state statutes that determine the legal mother of a child held in surrogacy, three faulty assumptions have developed: that the legal mother is the woman who provided the child's genetic material; that the legal mother is the woman who contracts to have the child conceived; and that the legal mother is the woman who gives birth to the child. The author argues that none of these statements are accurate, as states have adopted different methods for determining maternity: some consider gestation, others the intent of the parties, and still others the terms of the surrogacy contract. The best way to determine the maternity of a child born through a surrogate is to decide which mother-child relationship best serves the child's interests. Courts should emphasize the needs of the child and evaluate the parental potential, environmental stability, and primary caretaker status. In evaluating the mothers, courts should consider the woman's emotional and physical health, her financial resources, and her support system. Therefore, in order to choose the mother that will best promote the child's interests, courts must consider the benefit each woman would provide to the child, as well as the effort each woman has made to ensure that the child came into being. To have fair adjudication, courts should also obtain guidance from an independent board of experts.

Kelly M. O'Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115 (2011).

Many state statutes provide for the parental rights of couples who conceive children through artificial insemination, but many do not provide for couples who are lesbian or transgender. The author examines the Uniform Parentage Acts of 1973 and 2000, along with various common law doctrines regarding parental rights, and notes gender-specific language—husband or wife—that courts often interpret to mean that only different-sex parents have parental rights. Without legal recognition as a parent, non-biological lesbian or transgender parents may not have standing to sue for custody. This devalues the relationship among lesbian and transgender couples, and it jeopardizes a child's relationship with his or her parents. The author argues that courts should uphold contracts between the biological and nonbiological parents in all artificial insemination cases where the law needs to determine legal parentage. This will allow the nonbiological parent to

sue for breach if the biological parent attempts to end the nonbiological parent's contact with the child.

Nadia Stewart, Note, *Adoption by Same-Sex Couples and the Use of the Representation Reinforcement Theory to Protect the Rights of the Children*, 17 TEX. WESLEYAN L. REV. 347 (2011).

Most state adoption statutes recognize only one partner of a same-sex relationship as the legal parent, thereby subjecting the adopted child to legal, social, and economic disadvantages. Nine states permit second-parent adoption—a process by which two unmarried individuals can become the legal parents of an adoptee—though the procedure for doing so is time consuming because it requires two separate processes. In a few states, an unmarried couple can adopt through joint adoption, which, unlike second-parent adoption, would not require two adoption proceedings. Despite the variation in adoption statutes, all states base their final decisions in adoption proceedings on the best interest of the child, though this determination is left to judicial discretion. The author urges courts to strictly scrutinize legislation regarding adoptive children of same-sex couples. This heightened scrutiny is justified by the United States Supreme Court's history of using representation of reinforcement—where the Court protects the fundamental rights of minority groups from legislative domination by the majority. Moreover, this standard would also remedy the dangers of statutory inconsistencies, prohibitions of same-sex parent adoptions, and the unreliability of judicial discretion. By applying this standard, the courts would streamline the adoption process so that both same-sex parents can adopt, which would promote the best interests of a child by providing stability in guardianship.

#### SEX DISCRIMINATION

Harriet M. Antczak, *Problems at Daubert: Expert Testimony in Title VII Sex Discrimination and Sexual Harassment Litigation*, 19 BUFF. J. GENDER L. & SOC. POL'Y 33 (2011).

In sex discrimination and sexual harassment cases, expert testimony can play a vital role and should therefore typically not be excluded. This testimony provides judges with important information, prevents fact finders from deciding cases based on their own assumptions, and can make a difference in avoiding dismissals of meritorious claims. The current standard for expert testimony admissibility, established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, is too restrictive because it effectively allows for exclusion wherever a judge is content with his or the jury's own knowledge of sex discrimination or sexual harassment, even though such personal knowledge is not

properly relevant. Expert testimony specifically helps by supplanting these personal assumptions with scientific facts. A broader, more holistic approach that encourages admissibility of these facts according to Federal Rule of Evidence 401's lenient standard of relevancy should be adopted. Such an approach would yield decisions that better reflect modern scientific understanding of sex discrimination and sexual harassment.

Margaret Ryznar, *To Work, or Not To Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921 (2010).

The United States encourages the pursuit of gainful employment; however, there are three strong disincentives embedded in the federal tax code for secondary income earners, consisting mostly of married women, to pursue paid work: the marriage penalty, the marriage bonus, and the inadequate treatment of child-care expenses. The marriage penalty, which requires married couples to pay more than their unmarried counterparts in the same economic position, is a result of the joint return and progressive tax rate structure, under which secondary wage-earners' income is taxed at a higher rate than primary wage-earners' income and both spouses have smaller tax brackets. The marriage bonus is a benefit to one-income and significantly unequal two-income married households from the use of the larger tax brackets of the married schedule, which taxes more income at a lower rate, at the expense of equal two-income households who do not receive this benefit. The disincentive to work is greatest for married women with children who must decide whether to pay child care expenses and enter the workforce or forego gainful employment in view of the joint return and receipt of only a small tax credit for child care expenses. The author argues in favor of a code that does not penalize the secondary income earner, and specifically recommends the creation of a married tax schedule that has tax brackets double the size of the single schedules, expansive deductions for married women to offset the marriage penalty, a distinction between married mothers and married women without children, and more generous child care tax credits. If Congress reforms the federal tax code, as President Obama pledged to do in 2009, it should create a marriage-neutral code that does not influence the decision of secondary income earners, consisting of mostly women, to pursue or forego gainful employment.

Dan Subotnik, *Do Law Schools Mistreat Women Faculty? Or, Who's Afraid of Virginia Woolf?*, 44 AKRON L. REV. 867 (2011).

This Article addresses the argument that hiring, retention, and promotion in United States law schools are gender-orientated in favor of males. The author tackles the validity of arguments that women are discriminated against during the initial hiring process, are steered towards teaching courses that traditionally are

gendered female—such as juvenile law, as opposed to its male-gendered counterpart, corporate finance—while also challenging studies that conclude that women professors receive fewer positive teaching evaluations than male professors and that women are promoted to deanship less frequently than their male counterparts. In contrast to the studies and arguments purporting to show gender bias in the law school setting, the author also acknowledges conflicting studies that demonstrate that women are dominant in all areas of law school today, representing over two-thirds of legal writing professors and twenty-three percent of all law school deans. Additionally, those women faculties now comprise forty-nine percent of “tenure track” faculties, and may even be promoted at a higher rate than their male counterparts. In response to these arguments, the author, drawing upon his own law school experiences, concludes that without further empirical studies, the arguments presented showing gender discrepancies in favor of male academics disproportionately comprising law school faculties, are uncertain and may serve a self-aggrandizing purpose for a historically oppressed group.

Joan C. Williams & Allison Tait, *“ManceSSION” or “Momcession”?: Good Providers, a Bad Economy, and Gender Discrimination*, 86 CHI.-KENT L.REV. 857 (2011).

In the wake of the recession, gender stereotyping in the workplace has resurfaced. However, unlike typical gender stereotyping, the recession has produced inverted gender roles. These roles are illustrated by an increase in male unemployment, referred to as the “manceSSION,” which has placed men into the role of caregiver. The “manceSSION” is accompanied by a corresponding influx of females in the workplace, referred to as a “momcession.” The increase in gender stereotyping in effect is hurting both men and women by refusing to let either sex out of their proscribed patterns, and while males are facing discrimination for being less macho, women are overburdened and placed under hyper-scrutiny in the workplace as they struggle to balance the roles of caretaking and the extra workload brought on by a decreased workforce. The recession has important implications for gender roles—men are penalized for being caretakers, while women are penalized for simultaneously working and caretaking. Although the stereotyping carries with it negative connotations, the author suggests some good has come from the recession’s impact on gender roles—most notably that the recession has reenergized the conversation about gender stereotypes in the workplace and has provided the public with the tools to question these stereotypes and reimagine the norms that have confined men and women to their newly proscribed roles.

## SEX INDUSTRY

Bryan Kim-Butler, Note, *Fiction, Culture and Pedophilia: Fantasy and the First Amendment After United States v. Whorley*, 34 COLUM. J.L. & ARTS 545 (2011).

The public's relation with pedophiles—characterized by intense intrigue and moral condemnation—might be illustrated as a melodramatic gothic narrative. The author argues that the United States Supreme Court has become immersed in the cultural narrative, establishing laws that curtail freedom of thought, expression, and speech in an irrational manner. In *Miller v. California*, the Supreme Court explicitly held that obscenity was not speech entitled to First Amendment protection and established a test for determining obscenity—which applied to pornography. In *New York v. Ferber*, the Court determined that child pornography is distinct from obscenity because children were physically or psychologically harmed in the production of the work, and should be more restricted. This has allowed state governments and Congress to pass such laws like the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act, which also criminalizes cartoon pictures and other fictional depictions of child pornography. The constitutionality of such laws was proven in *United States v. Whorley*, where the defendant was convicted for possession of actual and stimulated child pornography, despite a dissenting judge's vigorous argument that the criminalization of fantasies due to the fear that they engender certain thoughts is improper. The author argues that in cases like *Whorley*, where real children are not used, there is a serious risk that the criminalization of thoughts and fantasies violates the First Amendment.

Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011).

To many, prostitution is work—a profession in which money is exchanged for a service—while sex trafficking is the exploitation of children and adults who are kept as slaves and bought and sold by third parties. But those who would draw a bright line between prostitution and trafficking may be unaware of how similar the characteristics and working conditions are for persons involved in both practices. Both prostitutes and victims of sex trafficking are mostly women, poverty-stricken, members of a socially disadvantaged racial group or class, and unable to leave their current situation. The majority was also conscripted into sex work at an early age, often as young children. Defenders of prostitution believe that legalization and union protections will bring sex workers up to the standards of any other laborer, free to leave a profession when they choose or to bargain for better working conditions. But in countries where sex work has been legalized,

such as Australia, trafficking actually increased because sellers of women were assumed to be operating a legitimate business. The legalization paradigm also ignores the inherently dangerous and exploitative nature of selling sex—as prostitutes, women endure physical abuse, rape, exposure to disease, and pimps who control every aspect of their lives. The only way to end the exploitation of disadvantaged women, the author argues, is to shut down prostitution entirely by arresting the buyers as well as the pimps and brothel owners. This change can only occur when the world acknowledges that the distinction between prostitution and sex trafficking is one of semantics rather than autonomy.

John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939 (2011).

The distribution of pornography was once a federal offense, but the United States Supreme Court has generally protected Internet pornography under the First Amendment, so long as it is not obscene, because the Internet is a fruitful forum for the exercise of free speech. Assuming Internet pornography was not entitled to protection, regulation would be impracticable—even in restrictive regimes like China—because too much of the population visits pornography websites. This Article responds to the law's failure in controlling Internet pornography by framing pornography as a pollution problem. Pornography is like pollution in that once it is introduced into an environment, it harms those who are directly or indirectly exposed to it. Since direct regulation of Internet pornography likely violates the First Amendment, the author examines adapting environmental law's non-legal approaches of educational campaigns resulting in voluntary action, advances in technologies, and avoidance strategies to respond to the concerns about pornography. Although there is no single solution to the pornography problem, the law should not presume the ability of victims—especially children—to avoid Internet pornography due to unsolicited e-mails, incorrectly entering web addresses, and the use of search terms with double connotations.

John Reynolds, Note, *Universal Jurisdiction to Prosecute Human Trafficking: Analyzing the Practical Impact of a Jurisdictional Change in Federal Law*, 34 HASTINGS INT'L & COMP. L. REV. 387 (2011).

In response to widespread human trafficking, the United States Congress amended the Trafficking Victims Protection Act to give U.S. authorities universal jurisdiction to pursue prosecution of, and to try in American courts, human traffickers, even if the offender and the victim have no territorial connection to the United States. While universal jurisdiction was historically used to fight piracy and slavery in the 19<sup>th</sup> and 20<sup>th</sup> centuries, there is controversy over whether it should be extended to crimes such as torture, terrorism, and human trafficking today. Proponents of universal jurisdiction contend that it will heighten enforcement of

crimes that are infrequently prosecuted. Detractors claim it will increase tension in international relations. Even if universal jurisdiction is extended, there is debate over its effectiveness, particularly because few criminal prosecutions have ever relied on the principle of universality. Since countries rarely use universal jurisdiction, other means must be used to meaningfully decrease the impact of human trafficking, such as increasing public awareness of the problem and promoting cooperation between international law enforcement agencies. However, the most meaningful reform will come from addressing the structural factors—such as underemployment and a failure to liberalize labor—that cause human trafficking in the first place.

Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403 (2011).

Congress passed the Trafficking Victims Protection Act (“TVPA”) of 2000 in an effort to prevent human trafficking, prosecute traffickers, and protect victims of trafficking. Despite Congress’ efforts, through various amendments of the TVPA, the United States has still fallen short of sufficiently compensating and supporting victims and survivors of sex trafficking. While the TVPA mandates criminal restitution, many prosecutors fail to collect and enforce the judgments ordering criminal restitution to be paid. Sex trafficking victims are granted the opportunity to bring a civil action under the TVPA, but many lack the resources and knowledge needed to effectively sustain such an action. Additionally, Congress, recognizing that the victims of trafficking are mainly comprised of illegal immigrants, has attempted to protect these victims by providing them with a specific visa—the T Visa—that permits them to remain in the United States for a short time to work. While the issuance of a visa is beneficial for victims who fear returning to their home country, the requirements with which Congress conditions such an allowance are strict and have proven to be unworkable. In response to these deficiencies in the TVPA, the author has proposed several recommendations that would help to compensate victims of sex trafficking: revising the requirements for receiving a T Visa; collaboration between government and non-government agencies to promote and provide services for civil litigation on behalf of the victims; and strictly enforcing the collection of criminal restitution.

Phillip Walters, *“Would a Cop Do This?”: Ending the Practice of Sexual Sampling in Prostitution Stings*, 29 LAW & INEQ. 451 (2011).

While police officers often go undercover in order to arrest sex workers, some of these officers are engaging in “sexual sampling” during the sting—they are participating in sexual acts with the sex workers. The author argues that although

this tactic sometimes helps to discover criminal activity, the behavior is also outrageous and should be prohibited. Over the years society's view of sex workers and their clients have changed—sex workers are now viewed as victims rather than sinners—and this change should alter law enforcement practices in prostitution stings. The author suggests that, if police officers cannot successfully investigate sex workers without engaging in sexual activity, they should focus their enforcement efforts against the clients rather than the sex workers. Officers are rarely prosecuted for this behavior, as neither prosecutors nor trial courts want to point out police misconduct, and because sexual conduct during a prostitution sting is not considered objectionable. In general, courts hesitate to dismiss charges against sex workers when police behavior is morally objectionable but does not reach the level of the outrageous conduct due process defense. In order to prove that police conduct is outrageous, the sex worker must show that the government intended to use sex as a weapon; that the government agent initiated the sexual relationship or allowed it to escalate; and that the sexual relationship was related to the charges at issue. Allowing police to engage in this sexual conduct permits officers to believe that sex workers are contemptible and can be taken advantage of.

#### SEX OFFENSES

Shaudee Navid, Comment, *They're Making a List, But Are They Checking it Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process*, 44 U.C. DAVIS L. REV. 1641 (2011).

The existing regime for placing individuals on child-offender lists has led to litigation by accused offenders over the quality of states' administrative practices for maintaining current databases. The nature of child abuse reporting statutes allows for individuals to be reported to child-offender databases with seemingly effortless ease, while being removed from the registries after false accusations involves clearing insurmountable hurdles and endless governmental red tape. This Comment argues that states' faulty child abuse reporting violates fundamental liberties, in the form of "reputational harm," and deprives the wrongfully accused of their procedural due process by employing a minimal burden of proof before inclusion and by failing to promptly—California has a ten-year hearing process—remove names of the innocent. To prevent or alleviate the harm caused by erroneous reporting, the author suggests employing administrative safeguards that bolster the standard for list inclusion so as to remove innocent names in a timely fashion. While few states operate with model inclusion or removal procedures, instant improvement could be realized by automatically expunging the aggrieved parties' names after findings of "factual innocence;" heightening the standard of proof beyond "any credible evidence;" and consulting judicial determinations to expeditiously delist clearly innocent parties.

Samantha Alessi, Note, *Who May We Detain and How: Lessons From Post 9/11 Enemy Combatant Jurisprudence For New York's Civil Commitment of Sex Offenders*, 85 ST. JOHN'S L. REV. 231 (2011).

In 2007, after the New York Court of Appeals struck down Governor Pataki's attempt to civilly commit two-dozen sex offenders past their prison release dates, the New York legislature passed the Sex Offender Management and Treatment Act ("SOMTA"), enabling New York State to civilly commit sex offenders after their prison sentences based on the threat they pose to the community. This Note analyzes SOMTA's constitutionality, specifically whether SOMTA comports with procedural due process by giving offenders the requisite notice and opportunity to be heard. While generally overlooked, the author suggests that the United States Supreme Court cases addressing due process for enemy combatants in Guantanamo Bay are particularly relevant to the constitutional analysis of SOMTA and similar statutes. Thus, SOMTA due process challenges implicate United States Supreme Court jurisprudence from two lines of cases: those which establish that the involuntary detention of dangerous mentally ill sex offenders is constitutional so long as due process requirements are met; and those concerning the civil confinement of post-9/11 enemy combatants in Guantanamo Bay. This Note analogizes these lines of cases to SOMTA, and also postulates additional due process challenges for Guantanamo-held enemy combatants, and how this can affect the constitutional analysis of SOMTA and other similar statutes.

Cameron Carpino, Note, *Banishment in Georgia: A New Approach to Domestic Violence*, 27 GA. ST. U. L. REV. 803 (2011).

Banishment—an ancient practice that requires the criminal to vacate an area for a designated amount of time—is still being used in several states. Georgia uses banishment as a response to domestic violence because the state's judiciary and legislature support banishment as a better way to protect victims. The author examines the benefits and limitations of banishment, noting that it may provide more protection to victims than alternative protective orders—which are merely verbal prohibitions. Georgia's Supreme Court in *Terry v. Hamrick* emphasized the benefits. In *Hamrick*, the victim's injuries were minor, so extended imprisonment was unlikely, but the perpetrator had previously violated a protective order, thus warranting another form of punishment—banishment. However, banishment is a harsh punishment that limits an individual's freedom, and the protective benefits may often be obtained by less drastic punishment. The author proposes that courts consider a multi-factor test before imposing banishment, directing the courts to impose banishment only where its necessity is demonstrated after considering factors like patterns of abuse, the relationship between the criminal and victim, the severity of the crime, and the adequacy of other punishments.

Brian Griggs, Note, *Homelessness Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757 (2011).

The federal Sex Offender Registration and Notification Act (“SORNA”) requires certain sexual offenders to register a current address with state authorities. In response to an upset and frightened public, states often impose more stringent requirements than SORNA requires—such as establishing “sex offender free” zones which prohibit residency within a certain distance of schools, churches, and playgrounds. However, these stricter laws ignore a crucial issue: many sexual offenders are released with no or limited access to a place of residency, thus failing residency and registration demands. Their inability to meet the requirements has lasting legal and social consequences for the offenders, such as being imprisoned for violating registration requirements because they cannot provide a valid address and being isolated in rural areas with no housing, treatment, jobs, and transportation. Also, law enforcement has difficulty tracking offenders who are homeless and either lie about their addresses or disappear because they cannot meet registry requirements. The author argues that proximity restrictions need to be modified because they lead to homelessness or clustering. Instead of reactionary legislation, states should create more halfway houses that would give offenders an initial address while being closely monitored, and would aid in reintegration of offenders by helping them find employment. Also, states should fund scattered-site lease programs, where the state leases properties from owners and rents them to sex offenders.

Wendy Murphy, *Sexual Harassment and Title IX: What’s Bullying Got to Do With It?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 305 (2011).

Current anti-bullying legislation in Massachusetts undermines the magnitude of the prevalence of sexual harassment in school and inhibits the victims’ opportunity to pursue legal redress. In an attempt to rectify the rampant suicide among bullied teenagers, Massachusetts enacted a law in 2010 that set out to define bullying and delineated proper protocols for administrators to report these acts; yet, it failed to address bullying as a violation of the victim’s civil rights, which, if rising to the level of sexual harassment, is protected under Title IX. There are inconsistencies between the new legislation and Title IX—most importantly, the lack of legal recourse in the Massachusetts law. School officials fear liability, which deters victims from reporting these instances out of fear that the administration will turn a blind eye. The Massachusetts law fails to rectify this inaction by prohibiting all private rights of action for bullying, perpetuating inadequate legal protection for the victims. By separating the concepts of bullying and sexual harassment, many schools escape liability for actions that may qualify as both, given the lack of legal redress inherent in the Massachusetts law. The

author encourages reform in anti-bullying legislation by seeking to codify federal and state civil rights laws into these statutes, provide information to students about laws such as Title IX, facilitate liability for schools that fail to report sexual harassment crimes, and frame bullying properly to include violent acts of sexual perversion. Doing so will raise both educators' and the public's awareness of this pervasive problem that affects education, and ensure that bullying of all types will have proper legal redress.

Karen Newburn, *The Prospect of an International Sex Offender Registry: Why an International System Modeled After United State Sex Offender Law is Not an Effective Solution to Stop Child Sexual Abuse*, 28 WIS. INT'L L. J. 547 (2010).

In response to the growing international problem of child sex tourism, a bill entitled "International Megan's Law" was introduced in the U.S. House of Representatives. The purpose of the bill is to protect children from sexual exploitation by creating a system to monitor the international travel of convicted sex offenders. While the goal of preventing child abuse is crucial, the international law should not be based on the domestic Megan's Law. Critics of the U.S. sex offender registry argue that the registration laws are overbroad and overlong in duration, that sex offender registries do not inform people of the nature of the specific crime, that notification laws have resulted in public harassment and violence against registrants, and that residency restrictions exile registrants from certain areas and isolate them from the support networks they need for rehabilitation. Instead, the international law should be based on the European Union's ("EU") 2009 framework decision to create a cross-border criminal information system with a sex offender component. The proposed EU framework would be structured so that if an individual is prohibited from working with children in one EU country due to a sexual offense conviction, then all other member states would be obliged to recognize and enact the ban. In addition, the use of the sex offender's personal information would be strictly regulated. Should the international community decide to create an international sex offender registry, the author believes that a system modeled after the EU framework would best protect both children and the privacy rights of offenders.

Ryan M. Rappa, *Getting Abused and Neglected Children into Court: A Child's Right of Access Under the Petition Clause of the First Amendment*, 2011 U. ILL. L. REV. 1419 (2011).

State statutes and Supreme Court jurisprudence differ significantly regarding the protection of children from abuse. In order to remedy these differences without overturning precedent, courts should recognize a child's right to petition the court under the Petition Clause of the First Amendment. State statutes regarding who

may file a petition in an abuse and neglect case often require that the judicial or executive branches initiate the proceeding, precluding individuals from doing so. Further, many of the states that require executive branch initiation of an abuse or neglect proceeding have precedent that requires the voluntary dismissal of the case by the court at the request of the executive branch. In order to overcome the voluntary dismissal of abuse and neglect cases, and a Supreme Court precedent that children do not have a substantive right under the Due Process Clause to receive government protection from injury inflicted by a private person, children should be provided a right of access to courts based on the Petition Clause of the First Amendment of the U.S. Constitution. The Clause, which states that Congress shall not create a law that abridges the right of people to petition the government for a redress of grievances, is a fundamental right incorporated to the states under the Fourteenth Amendment. By granting children this right of access, any state which does not allow a child to petition the court on his or her own behalf would be in violation of the U.S. Constitution, and further, the right would prevent the unilateral dismissal of the case by the executive branch because it would no longer have the sole authority to initiate an abuse and neglect proceeding.

Rachel V. Rose et al., *Another Crack in the Thin Skull Plaintiff Rule: Why Women with Post Traumatic Stress Disorder Who Suffer Physical Harm from Abusive Environments at Work or School Should Recover from Employers and Educators*, 20 TEX. J. WOMEN & L. 165 (2011).

The “thin skull” plaintiff doctrine is a principle of tort law that holds defendants liable for their negligence, even if the extent of the physical harm caused was not foreseeable at the time of the negligent action. In the past, courts have struggled to apply this doctrine to cases of Post Traumatic Stress Disorder (“PTSD”), where the harms have been classified as mostly mental or emotional, and not physical in nature, such as damage triggered by traumatic events such as military service, dangerous accidents, rape, or abuse. The authors argue that the emergence of new studies confirming that those with PTSD suffer physical harm to their brains as a result of the trauma, along with compelling public policy concerns, require that the “thin skull” doctrine apply to cases of sexual harassment triggering PTSD in workplace environments and schools. While the scientific studies finding physical harms associated with PTSD will reduce some of the uncertainty around the legal application of the “thin skull” doctrine, this Article places an equally strong focus on the public policy concerns warranting the application of this doctrine. Employers and educators must be held responsible for their misconduct in the workplace when it aggravates PTSD symptoms, specifically in women, even if those symptoms were unforeseeable. Teachers and administrators need to work to ensure that sexual harassment does not occur in schools and in the workplace, and if they fail to adequately protect their students and employees, they should be

responsible for the damages that result, pursuant to the “thin skull” plaintiff doctrine.

Katherine J. Strle, Comment, *Use With Caution: The Illinois Hearsay Exception for Child Victims of Sexual Abuse*, 60 DEPAUL L. REV. 1229 (2011).

The Illinois hearsay exception for child victims of sexual abuse—rendering children’s out-of-court statements admissible when those statements concern abuse or neglect—fails to protect the right of the accused to defend against false accusations. Studies indicate that allegations of sexual abuse are false in as many as twenty percent of cases that coincide with a divorce or custody dispute. Despite this, the Illinois hearsay exception lacks any statutory language establishing a minimum standard for the reliability of the out-of-court statement, nor does it provide a minimum standard for its required corroborative evidence, and courts have yet to fill this gap. To address this problem, the author proposes a two-part test directing the court to address separately the reliability of the out-of-court statement and the existence of corroborating evidence, suggesting a number of factors that should be considered in each analysis. Following the reliability and corroborative evidence analysis, the court would then apply a balancing test that would allow a strong finding under one requirement to counterbalance a weak finding under the other. The author concludes that this two-part test would help to ensure that the statute is applied fairly, protecting the rights of the accused while accounting for the difficulties of proving “secretive” crimes such as child sexual abuse.

Angela Snell, Note, *The Absence Of Justice: Private Military Contractors, Sexual Assault, And The U.S. Government’s Policy Of Indifference*, 2011 U. ILL. L. REV. 1125 (2011).

The United States continues to expand use of Private Military Contractors (“PMC”). Although providing logistical and cost benefits, PMCs have committed severe instances of civilian slaughter and sexual assault. The author attributes such abuse to a misogynistic norm among PMCs, usually attributable to an individual contractor’s former service in the U.S. military. The author explains that PMCs have fallen into a jurisdictional no-man’s land, thus avoiding accountability. International Human Rights Law (“IHRL”) has proven ineffective at curbing sexual assault because it is rife with gender bias, and because PMCs are corporate—not State—implements of war. International Criminal Law also fails because PMC assaults may not be committed in a strictly war context and may not be widespread, thus failing the elements for prosecution. The Federal Alien Torts Statute is promising, but the circuits are split as to whether it applies to PMCs, thus providing no clear guidance for those seeking restitution for PMC assaults. Moreover, the

U.S. expresses strong desire to avoid foreign prosecution of its citizens. Thus, the U.S. is the only entity able to hold its PMCs accountable. As this has not occurred, the author believes that the U.S. government itself should be held responsible for these crimes. Until the U.S. affords complainants a viable method for prosecuting assaulters, at minimum, it should provide restitution to the victims under IHRL, because it has allowed PMC's to circumvent the system.

Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969 (2011).

The escalating use of preventative detention of sex offenders indicates a dangerous departure from the typical principles of the criminal justice system. Although clearly an infringement of an individual's rights, detention has been supported because there is a strong revulsion that the public has against sex offenders, with many states targeting them after release from prison and labeling the criminals as sexually violent predators ("SVP"). States have set up programs providing authority to government officials to control the actions of sex offenders upon release, including the ability to send them to detention facilities. Such SVP laws are motivated by the belief that sexual offenders experience greater recidivism rates than other offenders, but this belief is contradicted by the Department of Justice's data. The author argues that detention should only be used in limited circumstances because it sets dangerous precedent for its application in other scenarios. Instead of detention, there should be robust inquiry into alternative means to prevent sexual offenses.

#### WOMEN'S RIGHTS

Evelyn Atkinson, *Abnormal Persons or Embedded Individuals?: Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J. L. & GENDER 617 (2011).

Informed consent began as a legal concept to promote autonomy and self-determination, but now seeks to restrict and influence a woman's decision as a means of promoting the state's purported interest in a woman's reproductive choices. By examining the treatment of women through various laws and at different historical junctures, the author describes a two-track system for the legal treatment of individuals. On the "normal" track, the law perceives women as capable of rational autonomy; on the "abnormal," women are irrational and require the law's protection. Progressive politics in the early 20<sup>th</sup> century placed women on the normal track. However, within the social context of being a normal individual, women were still prevented in many social contexts from exercising this autonomy because labor law differentiated women from men based on their

childbearing capacity. The author examines current pro-choice strategy and urges a return to the normal track.

Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409 (2011).

There have typically been two dominant ideologies surrounding the issues of sex work and trafficking for sexual purposes. The abolitionist theory, arising from dominance feminist ideology and shared by evangelical Christian groups and a number of feminist groups, perceives sex work as inherently exploitative and maintains that it is an industry women are forced into because traditional gender roles cause economic desperation. The liberal feminist theory, often articulated by sex workers' rights organizations, relies on the concept of self-determination to suggest that women employed in the sex trade industry are working of their own volition, and thus exercising their autonomy. The Article identifies shortcomings in both theories, asserting that the abolitionist theory is too narrow, based entirely on the work's sexuality while ignoring the individual circumstances of the women. Liberal feminist theory, on the other hand, overlooks the social influences that limit the range of options available to women who do ultimately choose to be sex workers. The author offers a new approach that recognizes that women make choices, but often within existing systems of oppression. The author then proposes measures to help women act as agents on their own behalf, thus eliminating the need to choose sex work: reforming the methods of police investigation and prosecution of prostitution, and creating labor unions and groups for women in low-income jobs.

Olivia St. Clair, *Building Backwards: Helping Heal Iraq through Women's Rights*, 19 TEX. J. WOMEN & L. 81 (2010).

The American government has actively participated in the Iraqi government's changes following the ousting of Saddam Hussein, but it has done little to support Iraq's already-existing women's movements. The author traces the history of Iraqi women's groups, noting their existence in the 1920s, their gains in the 1960s and 1970s—including access to education and divorce—and their setbacks with the rise of religious fundamentalist politics in the mid-1980s. The 2005 Iraq Constitution set women's rights back further by including two Articles—39 and 41—that decentralize power and authorize local clerics to issue binding interpretations of Islamic law, regardless of how these interpretations affect women. The author explains American reticence in promoting the rights of women as based on two faulty beliefs: that Islam is a religion at-odds with women's rights, and that the creation of a democracy requires Americans to bargain with fundamentalists. In order to establish a democracy in Iraq, internal women's movements must inform

American priorities where women's rights are concerned and Americans must cease their appeasement of the fundamentalist sects. This might begin with returning Iraqi Personal Status Laws to their 1959 status, prior to the limiting provisions of the 2005 constitution.

Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker's) Art and (Janet Halley's) Law*, 23 YALE H. L. & FEMINISM 1 (2011).

Legal theorist Janet Halley and contemporary artist Kara Walker use the theory of abjection in their respective fields to repudiate the traditional notions of power, subordination, and sex proffered by movements such as civil rights and feminism. Instead, both embrace abjection—which contends that degradation, suffering, and shame can actually be liberating in a sexual context— and its dematerialization of power and bodies. Halley argues in a series of essays entitled “Take a Break from Feminism” that traditional feminism overshadows alternate theories of sexuality—such as queer projects—and believes that a divergence between feminism and other theories will leave room for alternate theories of sexuality to develop. Walker uses the silhouette art form to invoke images of pre-Civil War slavery in the South, and frequently focuses on the sexual representation of black women in sexually compromising positions, while at the same time embracing the liberating potential of this same subordinating sex. However, the author contends that both Halley and Walker are unsuccessful in eschewing traditional justice movements because the theory of abjectionism depends on identity and power—the very themes that they try to reject. In particular, Halley's dismissal of feminism is weakened by her decision to recognize a queer theory—instead of a feminist one—and thus assume her own notions of sexuality.