ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Maya Manian, *Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation*, 50 FAM. CT. REV. 241 (2012).

Despite the fact that most states permit adolescent girls to independently make decisions regarding contraception, prenatal health care, and whether to place a child for adoption, thirty-seven of these states require parental consent or a judicial bypass—in which a teenager petitions a judge for permission—before a young woman may terminate her pregnancy. In a 1979 decision, the United States Supreme Court justified these types of laws as a way to ensure that young women engage in careful decision-making before exercising their right to choose. Unfortunately, for teenage girls whose parents refuse to give permission to abort or for those who are afraid to ask their parents—and contrary to the directive that the bypass procedure be "anonymous and expeditious"—obtaining the approval of a judge is frequently an intimidating, humiliating, and lengthy process. The author advocates incorporating the functional parent model increasingly used in family court, in which the mandated advisory role of a parent is extended to include other adults who typically serve parenting roles or who have established counseling relationships with teenagers: extended family, guidance counselors, nurses, clergy, and licensed mental health professionals. While state legislative reform of parental involvement rules would not alleviate all concerns surrounding teenage access laws—it would not, for example, address the delay in access to abortion care caused by consent requirements—it would provide teenagers with additional consultation options while addressing the Supreme Court's concern for teenagers reaching conscientious decisions.

Scott A. Allen, Note, *Patents Fettering Reproductive Rights*, 87 IND. L.J. 445 (2012).

The monopolization of reproductive technology licenses by private patent holders threatens the future of reproductive choice and access to services for future generations of women. Technological privatization—made possible in the United States by constitutionally mandated patent laws—creates an opportunity for misuse by the patentees and makes their inventions vulnerable to targeted resistance, as was the case with the French-made drug RU-486, an abortion-inducing pill and alternative to surgery. Fearful of consumer boycotts that would threaten the company's viability, Roussel-Uclaf refused to license production of RU-486 in the United States for over a decade. The author outlines the constitutional history of reproductive rights and considers the vast possibilities and implications for the future of reproductive science, including—and in contrast to the RU-486 imbroglio—the doctor who is searching for the gene that determines sexual

orientation in the hopes of patenting it and then preventing others from using for discriminatory purposes. Steps need to be taken to ensure that new technology is available in the United States and that consumers are not driven to the black market or foreign countries that lack sufficient regulatory protections. By subjecting patent holders to the rigors of the Bill of Rights, so that they cannot deny individuals' fundamental rights, and by granting the United States Patent and Trademark Office greater authority to create compulsory licensing regulations, we can better prepare ourselves for the inevitable breakthroughs and changes in reproductive health.

Sarah London, Note, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71 (2011).

In the struggle for women's rights, the reproductive justice movement presents a significantly different approach than the one taken by reproductive rights advocates. Reproductive rights lawyering has played a key role in protecting a woman's legal right to reproductive services, but the emerging reproductive justice movement seeks to shift resources to those who lack the means and support to achieve self-determination in the realm of reproduction and sexual health. Despite the legal victories protecting reproductive rights, many women still face barriers in exercising those rights due to inequalities stemming from race, class, and immigration status. As a law student mobilized by this emerging movement, the author posits that lawyers can be involved in reproductive justice, but that their role must appropriately respect and reflect the needs of the cause. The women seeking reproductive justice should be shaping the agenda and directing the movement through grassroots, educational, and coalition-building tactics, all of which should be favored over litigation-centered and attorney-driven strategies. The environmental justice movement provides two instructive lawyering models—community and integrative lawyering—for those interested in joining the reproductive justice movement. In the community model, lawyers would identify policies that oppress women and collectivize claims to empower communal action, whereas integrative lawyers would serve as counsel to already established groups. Reproductive justice aims to empower the women who are the focus of the movement, rather than entrusting the decision-making to attorneys, thereby achieving a more holistic understanding of the problem and solutions that address a wider set of needs.

CHILDREN AND TEENAGERS

Jonathan Todres, *Beyond the Bedside: A Human Rights Approach to Adolescent Health*, 20 J.L. & POL'Y 191 (2011).

Policy makers should take a holistic human rights approach in order to address the full range of health problems facing adolescents in the United States. The human rights framework employs a broad definition of health, understanding that environment, the presence of violence, and financial resources have as much of an impact on a child's overall wellness as do nutrition and medical care. This Article argues that in order for children to reach their full potential, a more comprehensive response is needed. Currently, the general public is more focused on the political and social impacts of specific adolescent health issues—such as teenage pregnancy—likely because they are easier to identify and address. As a result, the policy conversations focus solely on the specific medical issue—such as reproductive services—and ignore the interrelated and systemic community problems. Legal remedies for violence are limited to prosecutable crimes and cannot encompass the full range of harm being visited upon many children. The consequence of this segmented approach yields incomplete results; thus, policy-makers and advocates must go beyond political debates, health care facilities, and legislation and involve children in the decisions that affect their lives. Prevalent issues such as obesity and substance abuse can also be best understood and combatted by examining the overall living conditions of the affected children. Only by implementing a holistic strategy will the United States be able to adopt integrated administrative, social, and education measures to effectively improve the entirety of adolescent health.

Carol Sanger, Note, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269 (2012).

Stillbirth is a reproductive event unlike any other: the unimaginable experience of a mother giving birth to a child who died in utero or during the birthing process. The Missing Angel Acts, enacted over the past decade in more than twenty-five states, give parents the option of obtaining a birth certificate, in addition to a fetal death certificate, when there is a stillbirth. Although the Missing Angel Acts represent a compassionate application of the law, some legislators have expressed unease about extending the law's authority into private mourning practices. The author explores the history of legal and social responses to stillbirths as well as the implications of the Missing Angel Acts, questioning whether stillborn birth certificates effectively tell parents how they should grieve and whether a law enacted exclusively to provide solace is appropriate. Stillborn birth certificates also raise demographic concerns because two legal documents are issued for one event;

babies that were never alive outside of the womb are now categorically joined to living children. Finally, stillborn birth certificates could have an impact on future abortion regulation by blurring the line between fetus and child; in response, some states have deliberately included language explaining that stillborn birth certificates are issued therapeutically and not meant to confer personhood on unborn children. While it is difficult to argue against a mourning parent who seeks ameliorative legal recognition of his or her stillborn child, lawmakers must tread carefully when seemingly benign legislation could have serious, long-term reverberations.

Jessica Jean Hu, *No Knights in Shining Armor: Why Separation of Powers Benefits Children and Social Services Systems*, 21 B.U. PUB. INT. L.J. 1 (2011).

Under Section 255 of the New York Family Court Act ("Section 255"), family courts are broadly authorized to supersede the executive decisions of both public and private organizations by ordering them to render aid to families and children in need. This Article examines whether judges act in the best interests of children when they apply Section 255 through the hypothetical story of Johnny: a thirteen-year-old, autistic, wheelchair-bound child, whose foster mother seeks judicial intervention after being denied money to purchase a special van. The author believes that while judges frequently grant funding to families like Johnny's, these rulings have the unintended effect of depleting agency resources and thereby harm other similarly situated children in need. Children whose parents or guardians cannot afford to go to court do not receive the benefits of Section 255, and children whose impairments are not as easily discernible as Johnny's face the added hurdle of convincing judges even though their situations may provoke less sympathy. In 1980, the New York Court of Appeals warned that when a family court compels an executive agency to act it may be violating separation of powers principles, but left open the possibility that Section 255 could still be applied in certain situations. Since Section 255 cases are rarely appealed, judges broadly apply the statute without considering the overall effect their decisions have on all New York children. Judges should receive additional guidance in applying the statute, focusing on preventing organizational abuse of discretionary power to distribute funds and establishing a minimum standard of care required.

Veena Srinivasa, Note, *Sunshine for D.C.'s Children: Opening Dependency Court Proceedings and Records*, 18 GEO. J. ON POVERTY L. & POL'Y 79 (2010).

Repeated, yet preventable tragedies visited upon children who within the purview of the Washington, D.C. child welfare system illustrate deficiencies in the system's operations and the need for D.C. to increase transparency in dependency courts. Dependency courts have traditionally followed the confidentiality model employed by juvenile delinquency courts in adopting a presumptively closed

system: dependency courts are closed to all persons who lack a legitimate or proper interest in the proceedings. However, even under this historical rationale, a presumptively closed system may not be justified when the general public has a legitimate interest—such as community oversight—in the proceedings. The author argues that a presumptively open system—one which would permit the public to attend dependency proceedings while reserving discretion for judges to close certain proceedings or records—will effectively protect the privacy of the parties involved, while looking after the best interests of children and promoting both public education and accountability. By observing proceedings, concerned persons can critique the child welfare system and become aware of otherwise untold narratives; this public education can fuel advocacy and help spur other reforms in the child welfare system. Increased accountability would help combat bias and power imbalances affecting clients; this overall oversight, in turn, fits squarely within democratic principles of due process and transparency in government systems. As evidenced by developments in federal law protecting children from maltreatment, existing case law on open courts, and pilot programs in other states, the time is ripe for D.C. to switch to a presumptively open system in dependency courts.

DOMESTIC VIOLENCE

Nikolette Y. Clavel, Note, *Righting the Wrong and Seeing Red: Heat of Passion, the Model Penal Code, and Domestic Violence*, 46 NEW ENG. L. REV. 329 (2012).

The composition of the extreme emotional or mental disturbance ("EEMD") defense available in the Model Penal Code, a codification of criminal law advanced by the American Law Institute, allows for possible negative effects on women, particularly those who are victims of domestic violence. Feminist scholars argue that this defense—which allows juries to mitigate murder to manslaughter in certain circumstances—expands the traditional common law's adequate provocation standard to the extent that abusers might be able to argue that their victims provoked their own murders. However, since the EEMD defense can also protect women—for instance, it could be utilized by a mother who has been provoked into murdering her child's sexual abuser—justice would best be served by revising the Model Penal Code's version of this defense, rather than abolishing it. These revisions include the creation of categories of exclusion that outline situations in which the defense may not be used—for example, in situations in which the killing is not the first act of violence in the history of the relationship between the killer and his or her victim. The author concludes that such a designation would preclude the EEMD defense from being applied in situations where the homicide is a result of domestic violence.

EDUCATION

Amy M. Reichbach & Marlies Spanjaard, *Guarding the Schoolhouse Gate: Protecting the Educational Rights of Children in Foster Care*, 21 TEMP. POL. & CIV. RTS. L. REV. 103 (2011).

Students in foster care are exceptionally vulnerable to unjust and illegal breaches of their due process rights when threatened with suspension or expulsion from school as a result of misconduct. Because foster care students are more likely to change schools than children living in traditional families, schools are often less informed of special education needs, if any exist, and they are less likely to address those needs; student misconduct and school discipline often result from this lack of understanding. In *Goss v. Lopez*, a student challenged his short-term suspension and the United States Supreme Court ruled that students threatened with exclusion have due process rights by means of a hearing and notice about the specific misconduct to their parents. However, because foster care students often have many parental figures, these protections are easily violated when schools give notice to an unqualified adult, such as a caseworker. Additionally, some state laws regarding school hearings fail to guarantee the protections mandated by *Goss*: schools have the right to deny students the opportunity to cross-examine witnesses, or provide evidence to contradict the school's assertions. Lawyers and parental figures can combat these breaches of due process rights for foster children by ensuring that the school knows who to notify in a case of misconduct, familiarizing themselves with special education laws and school policies, and informing faculty about the realities of the student's life; by increasing safeguards, advocates can diminish many of the frequent issues affecting foster children, including unemployment, criminal misconduct, and even homelessness.

Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275 (2011).

Otherwise qualified students who are not legal residents of the United States are often unable to attend American colleges and universities because their undocumented status prevents them from receiving financial assistance. In order to curb this inequality, California passed Assembly Bill 540, allowing any student who attends California high schools for at least three years and receives a California high school diploma to pay in-state tuition at its public universities; the bill applies to all United States residents, even those who no longer live in California. If and when the constitutionality of such legislation reaches the United States Supreme Court, the justices should follow the principles set forth in *Brown v. Board of Education*—the seminal 1954 case desegregating public schools. The integrative egalitarianism espoused in *Brown* supports government intervention that

aims to help persons overcome minority-based inequalities; conversely, the colorblind constitutionalism doctrine finds such actions unlawful under the Equal Protection Clause of the 14th Amendment because they favor one group over another. The Supreme Court's recent preference for colorblind constitutionalism in equal protection education cases—traced and discussed in detail by the author—disregards the Fourteenth Amendment's original purpose: protecting minority rights from the will of the majority. Opponents decry California's conferring of benefits to those with no legal status, but California has recognized the economic wisdom in continuing to invest in students who have shown a desire to learn and become valuable members of society.

Sarah Mazzochi, Comment, *A New Twist on an Old Idea: How Year-Round Schooling and Revamped Out-Of-School Care Can Improve the Lives of Women in Washington, D.C.*, 19 VA. J. SOC. POL'Y & L. 109 (2011).

Transforming the current school system to a year-round model and simultaneously improving afterschool programs will enhance the lives of women, particularly the low-income, single, working mothers of Washington, D.C. The typical school schedule in Washington, D.C. does not afford working women—who tend to be financially and practically responsible for their children—the opportunity to work nine-to-five jobs, and it often forces women to accept positions that are part-time, lower-paid, and closer to home. In a year-round system, school would change from a nine-month, 7:00 AM to 3:30 PM schedule, to one that runs in three-month blocks followed by a break of several weeks, with out-of-school programs available until 8:30 PM. This proposed plan, supplemented by improved out-of-school and community-based programs, promotes efficacy by focusing on academic and social activities in small group settings. In turn, these changes will allow women to accept full-time, higher-paid positions, lifting families out of poverty. Women will be provided with affordable childcare during working hours and will be better able to accept higher paid jobs farther from home. Although some have argued that a year-round system would be too costly, the author asserts that reduced expenditures in the criminal justice system and the decreased need for new schools built to compensate for overcrowding will, in the long-term, outweigh the upfront costs of implementing a new system.

Jonathan Feldman, *Racial Perspectives On Eligibility For Special Education: For Students of Color Who are Struggling, Is Special Education a Potential Evil OR a Potential Good?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 183 (2011).

The Individuals with Disabilities Education Act ("IDEA") guarantees students with disabilities the right to an appropriate education and affords their parents protections to enforce those rights. Though the Act still has some

shortcomings—under-enforcement of the law can lead to improper placement of students—IDEA undoubtedly benefits students in need of special education in many ways, including providing them with individualized transition assistance to help move from schools into the workforce. Some critics of special education programs, as it is currently implemented, argue that students of color are over-represented, as only fifteen percent of students nationwide are African-American, yet students of color comprise twenty percent of such programs. Special education, it is contended, imposes a double stigma on students of color, who are already subject to greater scrutiny and lower expectations. This proposition is supported by an ugly history of African American students being placed in special education programs as a means of segregation by schools not willing to comply with Supreme Court-mandated racial desegregation. This Article argues that the use of special education as a method of segregation no longer occurs, but the risk is quite high that students who may greatly need special education may not receive it. Therefore, Congress should amend IDEA to declare explicitly that special education eligibility must be interpreted generously—so that entrance is not predicated on how disruptive a student's behavior is, but rather is based on the child's individual needs—and that past judicial decisions, which interpreted IDEA narrowly, ought to be overruled.

Ronald J. Coleman, Note, *Stratification, Inequality, and the SAT: Toward an SAT Optional Movement*, 18 GEO. J. ON POVERTY L. & POL'Y 507 (2011).

The author asserts that the SAT, a standardized exam used in the college admission process, is a flawed test resulting in the solidification of racial and socioeconomic biases. Though the test aims to provide an equal opportunity to all students, studies have shown that certain minority groups and children from low-income families consistently underperform on standardized tests. Among the rationales for such performance include unequal access to preparation materials, lack of guidance, and subject matter bias. While a number of these pre-test inequalities help explain substandard performance, the multiple intelligence theory provides an additional explanation. This theory posits that intelligence exists in at least eight forms, suggesting that the SAT's reliance on linguistic and mathematical skills improperly excludes those possessing additional forms of intelligence. In ignoring musical, spatial, bodily, and interpersonal forms of intelligence, standardized tests overlook the future Mozarts, Michelangelos, Michael Jordans, and Gandhis of future generations. To effectively combat these disparities, colleges must fall in line with the recent SAT-optional trend, whereby Advanced Placement test scores are accepted in lieu of the SAT; such tests equalize many pre-exam student discrepancies and legitimize many intelligence forms not recognized by the SAT. Though the transition to an SAT-optional system raises potential concerns regarding the availability of admissions statistics and the resulting

burdens on institutions, a cost-benefit comparison illustrates that not only would such a change be possible, it would be successful.

FAMILY

Amy M. Pellman, Robert N. Jacobs & Dara K. Reiner, *A Child-Centered Response to the Elkins Family Law Task Force*, 20 WM. & MARY BILL RTS. J. 81 (2011).

The Elkins Family Law Task Force: Final Report and Recommendations ("Elkins Report") contains important proposals to increase access to justice in family court matters, however, both the Elkins Report and the legislation that incorporated its recommendations fail to protect the due process rights of children in California. The Elkins Report evolved from *Elkins v. Superior Court*, a case in which the California Supreme Court overturned a lower court ruling because the pro se litigants had been unfairly disadvantaged by complicated procedural rules. In a footnote, the court requested that the Judicial Council of California create a task force to improve access to justice in family courts. California adopted two bills incorporating parent-focused recommendations, but it did not include safeguards for children. The authors offer a child-focused response, arguing that to protect due process rights, additional bills, and Judicial Council rules, must be established to ensure that children are represented by an attorney when necessary. Children's attorneys provide critical advocacy for their vulnerable clients, inform the court of relevant information that parents may omit, and can assist in mediation in place of traumatic litigation. Given the importance of children's attorneys, and in accordance with the importance of protecting due process rights, California's recently adopted bills should be construed liberally, emphasizing evidence-based advocacy. Anecdotal evidence demonstrates the importance of recognizing and protecting the due process rights of children so that their rights do not become secondary to those of their parents.

GENDER BIAS AND DISCRIMINATION

Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167 (2011).

The societal undervaluation of mothers stems from a disconnect between the praise bestowed upon the virtues of motherhood and the comparatively low status mothers retain in law and policy, coupled with the deeply rooted myth that mothering is a labor of love, not real work. As a result, mothers face financial penalization and professional marginalization, referred to by the author as the Mothering Effect. Employer expectations of the ideal worker are often based on a 1950s work-family dynamic, in which workers were either single or were men with

stay-at-home wives responsible for child rearing. Yet today, the majority of those in the workforce are also caregivers. Eliminating the mothering effect requires a shift in the modern misconception that motherhood is easy, unskilled, and delegable labor of little tangible value. Indeed, mothering not only has economic value—stay-at-home moms sacrifice hours of paid labor and enable their spouses to pursue more rigorous, high-income jobs—but also qualitative worth, since consistent and attentive childcare yields productive and successful adults. New legislation enabling women to attain economic autonomy while still mothering their children is imperative; curative legislative attempts have had limited success due to their failure to accommodate the challenges faced by workers who simultaneously raise families. Creative proposals—some combination of which must be adopted in order to achieve a healthy national work-family balance—include legislated flexible work hours for parents, universal preschool, tax credits for at-home caregivers, and affordable child care options.

Mary L. Heen, *From Coverture to Contract: Engendering Insurance On Lives*, 23 YALE J.L. & FEMINISM 335 (2011).

Prior to 1840, the insurance industry standard used gender-merged mortality tables and unisex premium rates in life insurance contract pricing because of the belief that mortality rates were based on geographic and environmental—rather than biological—factors. Under common law marital unity and coverture, a woman's legal rights disappeared upon marriage, leaving married couples to be treated as a single entity legally represented by the male. The result was that married women were unable to contract, rendering them legally non-existent and vulnerable to destitution. This Article discusses the emergence of gender-distinct insurance rates—based on natural gender differences—during the period of women's rights activism beginning in the antebellum period and concluding with the enactment of Nineteenth Amendment to the United States Constitution, which gave women the right to vote. Beginning in the 1840s, state legislatures introduced insurance-related statutory exceptions to coverture, which allowed women, and more specifically widows, to enter into insurance contracts to protect them from their late husband's creditors. The insurance industry's usage of gender-distinct mortality rates in pricing for life annuities gave women the right to contract and resolved the conflict posed by statutory exceptions to coverture and traditional gender roles in the home.

Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1 (2012).

Low-wage employees are frequently the victims of workplace discrimination when their caregiving responsibilities to children or elderly family members

interfere with work responsibilities. The author posits that lower-wage workers face more severe discrimination as a result of their caregiver status. Factors for this disparity include: the prevalence of single parenthood among the poor; the inflexible timetables and meager benefits of low-wage jobs; and the high cost of obtaining care for children and elders. A series of case studies demonstrates the intolerant treatment experienced by pregnant, low-wage women: employers have fired women for being pregnant, sexually harassed them, set impossible goals as a pretense for firing them, and failed to inform them of or penalized them for using their right to unpaid leave under the Family and Medical Leave Act. Further examples indicate that employers tend to favor white mothers over mothers of color and that low-earning men with caregiving responsibilities are often subject to ridicule and stereotyping by their employers and co-workers. Although each of the cases discussed concludes with a successful lawsuit on behalf of the employee, workplace policies that discourage caregiver discrimination would decrease the need for costly litigation and would markedly improve the lives of workers who are also caregivers.

HEALTH

Mark Velez, Comment, *AIDS/HIV+Inmates: A New Standard to House Infected Inmates Based on Objective, Proactive Criteria that Balances the Needs of the Infected Inmate While Protecting Non-Infected Inmates and Prison Staff*, 41 SW. L.J. 171 (2011).

In 2010, approximately 1.5% of prison inmates were infected with HIV/AIDS, a rate much higher than that of the non-incarcerated population. The virus is likely to spread at a faster rate within prisons due to the prevalence of intravenous drug use and unprotected sexual activity. This Article examines the constitutionality of separating HIV-positive inmates by evaluating the fairness and effects of different segregating practices. Some jurisdictions utilize a reactive approach, segregating inmates only after they have infected others. In contrast, other states automatically segregate infected individuals upon arrival to ensure that uninfected inmates are not exposed to the virus. This method has led to numerous lawsuits charging that such quarantining deprives prisoners of their constitutional rights to privacy, due process, and may constitute cruel and unusual punishment. The Author argues that each HIV-positive inmate should be evaluated on an objective basis, by looking at the crime being punished, any statements of intent to infect others, and past violent acts while incarcerated. Those determined to be at risk of infecting others should be segregated upon reception, while those deemed unlikely to spread HIV should remain in the general population. By taking a case-by-case approach, correctional facilities can strike an appropriate balance between safeguarding the general prison population while also protecting the constitutional rights of inmates.

Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699 (2011).

Despite being hailed as a bipartisan success, the Healthy Hunger-Free Kids Act of 2010, signed into law by President Obama in December 2010, falls short of remedying the core cause of unhealthy school food and childhood obesity: farm subsidies as prescribed by the Farm Bill. One out of every three American children is overweight or obese, putting them at higher risks for a myriad of health problems—such as an increased risk for type 2 diabetes, high cholesterol, and cardiovascular disease. In an effort to combat this crisis, the federal government altered the school meal program, which both provides free or low-cost meals to needy children and funnels surplus commodities from the United States Department of Agriculture to be used in school lunches. The changes reduced sodium content and increased servings of fresh fruits and whole grains for school meals. However, because farmers are incentivized by government subsidies to produce large amounts of products that can be highly processed—such as soy, wheat, and corn—and because schools can only afford to purchase the cheapest products, school lunches still fall short of providing children with the recommended nutrition. If the 2012 renewal of the Farm Bill included subsidies for the production of fruits and vegetables and limited the subsidies for current surplus crops, healthier food would be more readily available to the schools. Ultimately, the necessary changes to the Farm Bill will face stiff competition from the agricultural sector unless farmers understand that they are not being told to stop growing altogether, but rather must plant new and different crops.

HUMAN RIGHTS

Deborah M. Weissman, *Feminism in the Global Political Economy: Contradiction and Consensus in Cuba*, 41 U. BALT. L. REV. 221 (2012).

As an illustration of the influence of the global economy on feminism and feminist legal theory, this Article explores several ways in which globalization has impacted the struggle for women's rights in Cuba beginning in the twentieth century. For example, cultural ties with the United States brought the influence of the American women's movements—such as the struggle for suffrage—to the Cuban shores, bolstering an already active awareness of feminism in Cuba. In addressing violence against women, Cuban feminists and scholars have framed the issue as a global human rights problem endemic to all modern societies. This allows Cubans to tackle gender violence in a manner particular to the Cuban culture, focusing less on criminalization, and instead on change through social and community programs. Economic factors, such as the U.S. sanctions against Cuba,

migration, and the current global financial crisis have led to greater burdens on women as they maintain the role of primary family caretaker while contributing to household income. Recent capitalistic economic reforms have moved some jobs from public to private arenas and have already begun to show a gendered effect towards the progress of women. While these trends are shared in many capitalist countries around the world, feminists remain cautiously optimistic about maintaining many of their gains towards gender equality within the framework of the unique Cuban community and culture.

Sarah Primrose, Note, *Killing the Messenger: The Intersection Between Sex Trafficking, Planned Parenthood & the Marginalization of Youth Victims*, 22 FLA. J.L. & PUB POL'Y 299 (2011).

The domestic sex trafficking of children has escalated substantially in recent years, and due to a dearth of adequate resources, lack of awareness, and inconsistent state approaches to criminalization, American victims of trafficking continue to be exploited. Planned Parenthood has recently been criticized over allegations that the organization aids sex traffickers by violating mandatory reporting requirements—a transgression practiced at most by only a few negligent employees. The reporting requirements are governed by the general policy of the organization itself and by the Health Insurance Portability and Accountability Act, which mandates patient privacy but provides an exception if the medical provider suspects criminal activity. Due to Planned Parenthood's policy of treating minors, an accommodating payment system—which enables poor women to receive medical care at low costs or for free—and the unwillingness of traffickers to spend money on medical services for their victims, the organization is uniquely suited to provide health care to trafficking victims nationwide. Although pimps do not often permit enslaved girls to receive medical care, they will send young women to clinics for abortions or in cases of serious illness. In those situations, if providers are trained to look for signs of trafficking, more girls can be taken off the streets and rehabilitated. States and the federal government must work together to implement a victim-centered approach—already utilized by Planned Parenthood—to create awareness, effectively prosecute traffickers, and fund and create centers to provide sexually transmitted disease treatment for young, marginalized women.

Jessica Grunberg, Comment, *The Torture Victim Protection Act: A Means to Corporate Liability for Aiding and Abetting Torture*, 61 CATH. U.L. REV. 235 (2011).

The definition of "individual" in the Torture Victims Protection Act ("TVPA") should be interpreted to include both natural bodied persons and nonliving entities so that corporations may be held liable for assisting in the

violation of human rights. Corporations contribute to human rights violations by providing terrorists with the equipment and chemicals needed to commit chemical and military attacks. There is currently a federal circuit divide as to whether Congress intended the TVPA, enacted in 1992, to extend liability to corporations. Legislative history shows that Congress drafted the TVPA to be an expansion of the Alien Tort Claims Act ("ATCA")—a statute that already permitted corporate liability for violations of the law of nations, or of an international body of treaties. Congress could have expressly ruled out corporate liability; that they did not strongly suggests a desire for legal actions against corporations to continue. The TVPA clearly defines the human rights violations for which plaintiffs may seek relief—torture and extrajudicial killing, or the illegal killing of leading social figures by state authorities—which signals Congress's intent to broaden the reach of the TVPA and its permitted causes of action. Corporate accountability is essential to providing remedies for human rights violations. Without it, victims of heinous atrocities may not have a cause of action or potential remedies. Highly resourced corporations are well suited to provide victims with adequate compensation. Further, corporate liability can act as a strong deterrent for human rights violators, furthering the United States' interest in combatting terrorism.

LGBTQ RIGHTS

Jennifer V. Sinisi, Note, *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX May be an Appropriate Remedy for the NCAA's Transgender Student-Athletes*, 19 VILL. SPORTS & ENT. L.J. 343 (2012).

Transgender athletes seeking to join sports teams face many hurdles to inclusion, but athletes joining college teams—most of which are bound by the rules of the National Collegiate Athletic Association ("NCAA")—may find a remedy under Title IX's protections against discrimination in federally funded education institutions. The NCAA rules state that an athlete may play on the team that matches his or her state gender classification, which is usually listed on a government-issued identification card. But every state has its own policy regarding changes to gender markers—a necessary step for a transgender individual who wishes his or her gender identity to be legally recognized—leading to disparate treatment of athletes who attend school in a state with onerous laws for gender marker modifications. Further, discriminatory treatment can be found in the NCAA policy that allows women to play on a male team, but would strip the championship title from a women's team that was found to have allowed a male athlete to play. The author examines the separate, but related, legal claims of sex and gender discrimination and looks to Title VII employment discrimination victories for instruction on how the argument could be crafted. Other athletic organizations, such as the International Olympic Committee and the Ladies Professional Golf Association, have also discovered their policies on gender

identity to be antiquated or insufficient, suggesting that the time has come for all athletics organizations to draft non-discriminatory policies that embrace the complex nature of gender identity.

Amisha R. Patel, Note, *India's Hijras: The Case for Transgender Rights*, 42 GEO. WASH. INT'L L. REV. 835 (2010).

A shroud of mystery surrounds India's hijra community. Often referred to as the "other gender," hijra are biological males who undergo ancient ceremonial rituals in which they wholly denounce their masculinity for a female-oriented way of life. Possessing few civil rights, hijra are effectively invisible from society at large—they live quietly amongst themselves and subsist primarily on earnings from prostitution. They are further ostracized by India's anti-sodomy laws, which force the hijra's work underground and subject them to a myriad of abuses, including police brutality without legal redress and an unrelenting HIV/AIDS epidemic that has largely been left untreated. Recent developments—including the Delhi High Court's condemnation of anti-sodomy laws and the election of India's first hijra mayor—are hopeful signs of progress, but substantial protections have yet to be effected. The author proposes that the Indian Supreme Court abolish anti-sodomy laws and that India enact legal protections for its transgender citizens, including targeted HIV/AIDS education and prevention. As a country with an already established transgender social class, India is in a unique position to be a human rights leader among developing nations.

Rebecca J. Kipper, Comment, *Just a Matter of Fairness: What the Federal Recognition of California Registered Domestic Partners Means in the Fight for Tax Equity*, 15 CHAP. L. REV. 613 (2012).

An Internal Revenue Service ("IRS") Chief Counsel Advisory Memorandum issued on May 28, 2010 ("CCA") recognizes same-sex registered domestic partners ("RDPs") in California and allows them to split their income for federal tax purposes as opposite-sex married couples do. This decision is a result of California's strong domestic partnership laws, namely the State Income Tax Equity Act of 2006, which treats RDPs' earned income as community property. However, the CCA creates inevitable discrepancies between RDPs in community-property and common-law property states, and its unclear relationship to the Defense of Marriage Act ("DOMA")—which prohibits joint tax-filing for same-sex couples—complicates the way these RDPs file their taxes. Nonetheless, this development represents a significant step towards nationwide tax equity for same-sex couples, in spite of DOMA. Geographic disparity of treatment has a history of catalyzing change under the tax code; previous dissatisfaction gave rise to *Poe v. Seaborn*—a 1930 Supreme Court case that provided the potential for income-splitting to

married couples who held equally vested property interests—and the Revenue Act of 1948, which allows all married couples to split their income for federal tax purposes. If the IRS is pressed to expressly define the rules put forth in the CCA, and if other community-property states follow California's example in crafting domestic partnership laws, then the new disparity under the CCA will be emphasized and, this comment argues, potentially build support for familial tax equity nationwide.

MARRIAGE AND DIVORCE

June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49 (2011).

The United States Constitution endowed states with the power to regulate domestic relations. Congress has attempted to centralize certain aspects of family law, but the country's disparate beliefs about marriage and divorce continue to frustrate that goal. In fact, many states are in favor of even more decentralization and have suggested ways that municipalities might champion same-sex marriages, even if those unions are not legally recognized at the state level. One option for a couple in a state that does not grant marriage licenses to same-sex couples is an E-marriage, which connects the couple via the internet to a gay marriage friendly jurisdiction. States vary as to what degree they recognize out-of-state same-sex marriages, and these differences affect how much support a municipality can offer. In a state like New York that recognized out-of-state same-sex marriages even before gay marriage was legalized within the state, an E-marriage would have given same-sex couples access to all the same rights and benefits as married heterosexuals, but in states that prohibit recognition of same-sex marriages, like Michigan, E-marriages would likely not confer any greater rights to gay couples. The author recommends that the latter municipalities can still endorse same-sex unions by offering comprehensive counseling in the areas of federal tax, wills, and property to help couples replicate or approximate the benefits automatically conferred through marriage. Some states may seek to prevent cities from helping their citizenry in this way, but by acting in support of same-sex unions, local governments can advance the conversation and push states to recognize all marriages.

Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57 (2011).

What is the best way to divide property between spouses after they divorce? This Article suggests that studying the moral intuitions of a cross section of the general population will yield better answers than doctrinal analysis or historical reflection alone. Conceptions of marriage have shifted over time, from pre-modern

patriarchy in which women were excluded from possessing their husband's property, to individualist models in the nineteenth century—in which women retained property rights to what they owned at the outset of the marriage—and, finally, toward contemporary notions of shared resources and mutual support. Current law governing property distribution during divorce is divided between jurisdictions that apply clear rules of equal distribution, and those that allow courts to determine property division based on the circumstances of each marriage. The author designed a study in which subjects were presented with four hypothetical divorces and asked how the property should be distributed; the scenarios were designed to test notions of fairness in light of the length of the marriage, financial contributions of both partners, and participation in childcare and domestic duties. The data—comprised of responses from U.S. and Israeli law students—suggests that there is a general preference for equal division of assets, with room for adjustment if warranted in individual cases. They also suggested that the level of financial contribution to the marriage is more important than nonmonetary misconduct such as infidelity. Building on the success of this study, further research should be conducted with broader samples, to better understand the fairest way to allocate property.

Sarah L. Eichenberger, Note, *When for Better Is for Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067 (2012).

The United States policy against polygamous immigrants—barring admission to anyone who intends to continue practicing polygamy—has disproportionate consequences for women seeking asylum. In the mid-nineteenth century, the Mormon Church integrated polygamy into its doctrine, marking the beginning of America's challenge with plural marriage. In the immigration context, women in polygamous marriages can only immigrate if their husbands choose them to the exclusion of other wives; women who are not selected are sent back, often to face persecution in their home countries. Although Canada and the United Kingdom share America's public policy against polygamy, these countries have more equitable, family-centered models: the UK will deny entrance to any child whose mother is not admitted, and Canada affords polygamously married immigrant women the option to divorce and benefit from the laws that protect monogamous spouses. The author advocates giving U.S. immigration officials greater discretion to waive the polygamy bar in the asylum context, while also applying the putative-spouse doctrine in all states, such that polygamous wives who married in good faith would be entitled to divorce benefits like alimony and property division. Congress can adopt these humanitarian remedies while maintaining a stance against plural marriage, ensuring that more women who fear persecution will be granted sanctuary in the United States.

PARENTING

Keith W. Barlow, Comment, *"Can They Do That?": Why Religious Parents and Communities May Fear the Future Regarding State Interests and Custodial Law*, B.Y.U.L. REV. 281 (2012).

Each state has interpreted the congressional guidelines for child removal and parental rights termination differently, leading to confusion over what protections religious communities may have when the government intervenes. In April 2008, the Texas Department of Family and Protective Services ("DFPS") raided the Church of Jesus Christ of Latter-day Saints Yearning for Zion Ranch in an effort to rescue an allegedly sexually abused sixteen-year-old girl. Although the victim was never found, 468 children—nearly all of the minor residents—were taken from Zion Ranch. DFPS justified its actions, citing dangerous living conditions stemming from the Church's practice of underage marriage. While the Supreme Court has largely upheld parents' rights to determine the upbringing and religious instruction of children, most cases have been decided on a fact-specific basis, making it difficult to predict which practices will be protected. At the state level, due process protections—such as individual, adversarial hearings—are available, but have become increasingly difficult to attain because juvenile courts frequently ignore or delay custody orders. Absent compelling evidence, it is unlikely that a parent's religious beliefs will warrant permanent child removal without proof of serious abuse, but Zion Ranch should serve as a warning to those who value religious liberty and separation of church and state.

Devon D. Williams, Comment, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181 (2011).

Postmortem sperm retrieval ("PMSR")—the removal of sperm from a recently deceased man for the purpose of impregnating a woman—is controversial due to multiple, and possibly competing, legal interests. Before proceeding, medical facilities must consider the rights of the child, the deceased sperm donor, and the individual requesting to be impregnated. The author, while acknowledging current medical community guidelines permitting PMSR if the couple was actively engaged in fertility treatments, proposes adding a legal layer to the process. In the 1990s, the California Court of Appeals reasoned in *Hecht v. Superior Court* that a deceased man should be given a posthumous voice, and that because he left written consent for his girlfriend's use of his sperm, there was no public policy reason to prevent the conception. But post-*Hecht* cases have struggled when the donor's intent is not explicit, especially in cases involving single parents or unmarried couples. Further complications arise regarding the deceased's estate and what

benefit rights a child has to the father it never met. A statute requiring written documentation of the deceased's consent or intent to consent would clear up much of these concerns and would require couples to actively plan for PMSR.

SEX INDUSTRY

Grant Wahlquist, Note, *Achilles' Heel: Revisiting the Supreme Court's Nude Dancing Cases*, 20 S. CAL. INTERDISC. L.J. 695 (2011).

In *Barnes v. Glen Theatre* and *City of Erie v. Pap's A.M.*, the United States Supreme Court held that the regulations forcing exotic dancers to wear G-string or pasties while performing did not violate constitutionally protected free speech because the regulations were meant to curb conduct, rather than expressive content. However, the justices do not explain how they reached the conduct conclusion; in fact, it can be difficult to draw a line between content and conduct, because the delivery method—dance—may constitute content in and of itself. This Note questions the assumption of some legal scholars and judges that the meaning of dance is transparent, by reading *Barnes* and *Pap's* as pieces of dance criticism. The majority opinions in both cases are dismissive of free speech protections for strip club performances, but nude dancing is undoubtedly communicative—it demonstrates a woman's control over her own body, challenging male audience members to confront a woman's form in its entirety. When viewed in the context of *United States v. O'Brien*—the draft card burning case that established the conduct versus content test—the nude dancing cases demonstrate the complex nature of non-verbal forms of speech and the challenges ahead for future free speech cases.

SEX OFFENSES

Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161 (2011).

Due to public safety concerns about the recidivism of sex offenders, thousands remain in custody after serving their prison terms due to civil commitment programs—which can detain individuals indefinitely—once it is determined the offender presents an ongoing danger to the community. In determining the risk of recidivism for a sex offender, courts employ clinical judgment and actuarial risk assessment instruments, the most common of which—the Static-99—uses statistical data about offenders to ascertain the likelihood that they will reoffend. The Static-99 uses a ten item test, assessing the age of the offender, relationship history, relationship to the victim or victims, the nature of prior convictions, and incidences of violence, awarding points for each category, and then totaling the points to place the offender into a category of risk. However, even the highest category of risk that can be determined by the Static-99—a 52%

likelihood of reoffending—does not meet the standards for civil commitment in most states. The highest possible Static-99 result is only 2% above the "more likely than not" assessment employed by most jurisdictions, which must be compared to the statistical margin of error. The author proposes several improvements to the Static-99 to increase its accuracy, but finds that even with these improvements, the highest risk category would not be accurate enough to guarantee that only those who truly present a risk are confined, raising questions about the use of civil commitment for sex offenders.

Eric J. Buske, Note, *Sex Offenders are Different: Extending Graham to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417 (2011).

Many states have broad residency restrictions—laws prohibiting convicted sex offenders from living within a certain distance of locales frequented by children—meaning that persons who made errors in judgment, such as texting a naked photo, will be subject to the same constraints as child molesters or rapists. The author argues that in order to limit residency restrictions to offenders who warrant such measures, the restrictions should be characterized as punitive rather than regulatory; the Eighth Amendment prohibits cruel and unusual punishment but only if the conduct is retributive in nature. Many lower appellate courts, applying the underlying purpose test laid by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, have deemed statutory residency restrictions punitive; however, the issue has yet to reach the United States Supreme Court. In analyzing Eighth Amendment claims, criminal sentences are scrutinized for the proportionality of the punishment to the crime; gross proportionality looks at the specific sentence of the individual in question, while the categorical approach examines whether an overall sentencing practice is appropriate for the class of crimes to which it applies. The Supreme Court has not used gross proportionality to strike down a prison sentence in many years, but in 2010 the Court employed the categorical approach in overturning a life sentence for a teenager convicted of robbery. Because few legislators are willing to support a bill that helps some sex offenders, the only hope for a change in residency restrictions is judicial intervention that recognizes the wide range of cases and culpabilities encompassed with in sex offender crimes.

Jane Kim, Student Article, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J. L. & GENDER 263 (2012).

Despite advances in rape law reform, the prevalence of rape impunity within the United States reveals a steadfast adherence to misguided, outdated notions. While statutory definitions of rape have been broadened to minimize focus on force and emphasize non-consent, convictions at the local and federal level remain

surprisingly low. Rape that occurs in the absence of force or weapons is not treated with the same level of seriousness as rape that occurs in the presence of force or weapons. The distressing result is that the element of force in rape—and not the crime of rape itself—is what dictates a rape's legitimacy; in effect, rape is inefficiently investigated and prosecuted at a local level. Since local legislation has proven ineffective at providing viable prosecutorial tools, the federal government should target this widespread problem by characterizing rape as a form of slavery subject to the protections of the Thirteenth Amendment. Rapists enslave their victims by eliminating freedom of movement and choice, and by exerting control over their persons through violence. Federal rape legislation would provide victims with an avenue to more effectively prosecute perpetrators and obtain convictions that can ultimately help deter rape nationwide. Furthermore, such protection by the federal government would increase the seriousness of rape in the public eye and decrease societal tolerance.

WOMEN'S RIGHTS

Pamela Laufer-Ukeles, *Cross-Dressers with Benefits: Female Combat Soldiers in the United States and Israel*, 41 U. BALT. L. REV. 321 (2012).

Although United States military laws appear to hinder gender equality by excluding women from the draft and prohibiting them from engaging in direct combat roles, the practical effect of U.S. law is more progressive than Israel's military policy, which calls for a mandatory draft, allows women to participate in combat forces, and affords women sex specific benefits. While some of the Israeli benefits are necessary for achieving equality—mainly those recognizing biological differences concerning gestation—others are problematic and actually promote gender inequality: for example, women encounter shorter draft periods and are released from reserve duty in the event of marriage or pregnancy. As a result, the Israeli military rarely accepts women for training intensive military roles; they have found it is not cost effective to expend resources on women who are free to leave for familial reasons. Moreover, the Israeli military only extends parental leave to women, evincing a clear message of preference for child rearing. In contrast, the U.S. military's absence of gender specific laws—aside from the prohibition on women in direct combat—means that women's roles are not as clearly defined, and women can more easily pursue any position. The author recommends that in moving forward, the U.S. should ensure that any proposed gender-specific legislation creates a necessary benefit and does not promote continued discrimination.

Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW. L. REV. 1 (2011).

Caregivers, most of whom tend to be women, face discrimination and marginalization in the workplace, are often financially penalized for their dual roles, and encounter a persisting pay gap between men and women. The gendered division of labor has real societal costs and some scholars have proposed changing gender norms by incentivizing men to take more leaves of absence and women to increase work outside of the home. The author, however, views these approaches as unrealistic and unwarranted, and suggests reform through gender-neutral practices. Mandated flexible working conditions would have workers propose arrangements to accommodate their caregiving duties, and government protections would prevent employers from dismissing employees who made such requests. Improving the status of part-time workers—by ensuring they receive commensurate benefits and pay—and offering more paid sick leave would also help employers retain valuable employees while elevating the status and capacity of such workers. Changing deeply entrenched gender norms is an onerous task—complicated by the possibility that many women embrace their primary caretaker status—and one that is not necessary to achieve equality in the workplace for caregivers.

Shené Mitchell, Note, *Falling Far From the Tree: How Forestry Practices in Bangladesh Leave Women Behind*, 24 GEO. INT'L ENVTL. L. REV. 93 (2011).

The practices of deforestation, forest cover removal, and agroforestry—the planting of fast growing trees in place of old growth forests—in Bangladesh have critically depleted the country's forest cover over the last half century, and have had a disproportionately negative effect on women. In response to the dangerous decline in forest cover, the Bangladeshi government nationalized forests and amended the National Forestry Policy to better manage resources and to address the disparate impact of forest loss on women. This government initiative, however, continues to favor men and has only further disenfranchised women who rely on the trees as a source of shelter, food, fuel, medicine, and other basic necessities. The deprivation of women's land ownership and the new restrictions on forest gathering also frustrate female autonomy. The author offers the Bangladeshi government a number of proposals that would both halt the further decline of forests and safeguard women's rights: women must be assured decision making power and equal participation through mandated involvement, and must be educated about their legal rights. While recognizing that cultural shifts are difficult and take time, Bangladesh has shown willingness to address systemic problems and implement innovative solutions.

Marie Ashe, *Women's Wrongs, Religions' Rights: Women, Free Exercise, and Establishment in American Law*, 21 TEMP. POL. & CIV. RTS. L. REV. 163 (2011).

The Supreme Court's preference for patriarchal religions—established through jurisprudence that endorses government support and financial incentives for such institutions—has often been expressed at the expense of American women. The author examines constitutional case law from three historical periods to measure the disparate way in which Supreme Court decisions have allocated power to religious institutions and to women. Although the Court's views on religion and religious activity have developed and changed, its opinions present a consistent implication that women are subordinate to men and in need of government protection. Starting with *Reynolds v. United States*—an 1879 decision renouncing polygamy—the Court wrote that it was acting to save Mormon women in Utah, but the opinion contains no inquiry into the actual lives of female members of the church and instead offers broad statements about female purity and a wife's sense of duty; the case also ignores Utah's seemingly progressive stance on female equality, as demonstrated by the extension of women's suffrage in Utah fifty years before the United States Constitution guaranteed such a right. This patronizing approach can be traced all the way through 2007's *Gonzales v. Carhart*, which justified upholding a ban on partial birth abortions since women who terminate may later come to regret their decision. A survey of this kind is a sobering reminder that although the women's rights movement has achieved much towards gender equality, efforts continue to be undercut by our highest judicial body's determination to shelter and define the societal role of women.