ARTICLES

The Curious Case of Dr. Jekyll and the Estate Tax Marital Deduction: Should Prenuptial Agreements Alter the Relationship?
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The tax code bestows various benefits upon married taxpayers based on the presumption that married individuals form a single economic unit and should be taxed accordingly. This article explores this presumption in cases where the married individuals’ interactions are governed by a prenuptial agreement. Should married taxpayers be treated as economic units when they have entered an agreement allowing them to deviate from the state law burdens of marriage otherwise imposed? This article explores this question in the context of the estate tax marital deduction, which allows a 100% deduction for the value of property passing from a decedent to a surviving spouse, so long as the property passes outright or in a statute sanctioned form to the decedent’s surviving spouse. The discussion requires an exploration of the historical origins of the estate tax marital deduction and a survey of common terms found in prenuptial agreements. A simple declaration that the tax benefits should be denied when the burdens of marriage are sufficiently avoided begs the questions: (1) what level of deviation from state law imposed burdens should trigger denial of the 100% estate tax marital deduction, and (2) if denied, should the predecessor to the 100% deduction be employed, or should some other deduction regime be created for this scenario? Because of the inherent complexities evinced by these follow-up questions, the article concludes that, although policy arguments may support denying the deduction in certain situations, practical considerations demand that the tax benefits not be impacted by the presence of a prenuptial agreement.

The Constitutionality of Government Fees as Applied to the Poor
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The United States Supreme Court has frequently addressed the constitutionality of government fees that indigent persons cannot afford to pay, relying on due process or equal protection principles to decide these cases. The most recent decision by the Supreme Court involving this issue, M.L.B. v. S.L.J., 519 U.S. 102 (1996), relied on a confusing analysis of the applicable constitutional principles. This Article proposes that courts should apply the traditional equal protection analysis to decide this important constitutional issue in the future.
Federal Constitutional Childcare Interests and Superior Parental Rights in Illinois

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After In re Marriage of Mancine and other recent Illinois decisions, a question lingers for Illinois legislators and judges: “Is filial love something to be dangled and then snatched away, promised and then reneged upon?” While the question is difficult, many with no natural or formal adoptive ties who have developed “familial bonds” with children should have childcare interests (and, perhaps, superior parental rights). As occurs in other family settings, like premarital and open adoption pacts, certain family-related agreements on childcare deserve explicit statutory recognition. Expanded voluntary acknowledgment and guardianship opportunities should also be available to establish new avenues of childcare interests. The Proposed Parentage Act and Proposed Marriage and Dissolution of Marriage Act are steps in the right direction. But even with enactment, more statutory guidelines (and some common law) will be required to promote “filial love” for deserving children and all who care for them. The General Assembly should address a broad array of “established familial or family-like bonds,” or invite judicial action, as courts will often “decline to go where the legislature has not led.”

When Rain Falls, Insurance Companies Should Listen: Determining “Weather” an Insurance Policy’s Exclusion or Inclusion of Property in the Open Refers to Property Simply Left Outside or Property Exposed to the Elements

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This article explores the meaning of in the open in the context of insurance policy interpretation. This issue, which has been addressed by several state and federal courts, has existed for over forty years. This Article explores the possibility that the misinterpretation of this phrase exists solely because courts have employed the wrong part of speech. For example, insurance policies generally prohibit coverage for property destroyed while in the open – the noun part of speech. Hence, in these policies, in the open is used to signify a location. However, courts have chosen to interpret the insurance policies as prohibiting coverage for open property – the adjective part of speech. This Article argues this interpretation is misplaced. Additionally, the Article concludes that courts should use the noun part of speech and find that in the open refers to property simply left outside, irrespective of whether it is protected or unprotected from the elements.

Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views

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Popular opinion regarding torture has changed significantly in the wake of 9/11 and subsequent terrorist attacks, with people in affected countries generally becoming more accepting of it as an interrogation tactic. This increase is especially notable where the torture of a few can save the lives of many, particularly where there is little time to pursue other, less-invasive means of interrogation—the so-called “ticking bomb” scenario. This Article discusses three key ethical theories of torture and compares the legal status of torture in the
United States and the European Union, concluding that circumstances may require its use when necessary to save many lives.

COMMENTS

The Man Behind the Mask: Defamed Without a Remedy
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Defamation law is a balance between the right of one person to speak and the right of another person to cure injuries to their reputation. Section 230 of the Communications Decency Act has substantially altered the careful equilibrium that is defamation law. In an effort to protect the flow of ideas and speech on the internet, Congress created a new law that upends traditional defamation law. The sweeping immunities that section 230 grants upon publishers, republishers, and distributors has had the effect of invalidating what were once otherwise legitimate causes of action in defamation. After the enactment of section 230, many potential plaintiffs in internet defamation actions are faced with a situation where they have no defendant because the potential defendants are either anonymous or immune. This Comment considers the prudence of a law like section 230, challenges the nature of defamation laws new and old, and asks whether the policies our laws are founded upon are policies that remain important to us.

Limits on School Disciplinary Authority over Online Student Speech
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When, if ever, can a public secondary school in the United States legally discipline a student for the content of a personal website, a Facebook post, a text message, or an email that the student created or transmitted from an off-campus location? The U.S. Supreme Court has never addressed the issue, and the lower courts have split on it, providing a number of different answers to the question. In answering this question, this Comment distinguishes between two kinds of off-campus internet speech: (1) threats or incitements to violence that are never protected by the First Amendment in any context ("true threats"), and (2) other kinds of speech the First Amendment would protect if the speaker were an adult in a public forum. This Comment argues that there should be limits on school disciplinary authority over both of these kinds of speech. Threats or incitements to violence serious enough to fall outside the scope of constitutional protection may always subject a speaker to criminal punishment. Therefore, this Comment argues that students should not additionally be subject to school discipline for such unprotected speech unless the speech has some connection (a "sufficient nexus") to the school. This rule has the advantage of allowing schools to discipline students for threats related to the school while also preventing school authority from a limitless extension into matters so unrelated to the school that they should only be handled by authorities. In contrast to its position on unprotected "true threats," this Comment argues that schools should never be allowed to discipline students for off-campus internet speech that would be protected by the First Amendment if it occurred outside the school context. In cases involving speech that occurred at school, the U.S. Supreme Court has stated, in Tinker v. Des Moines Independent Community School District and its progeny, that schools may discipline students for speech that causes "substantial disruption" to school activities. But, this Comment argues that, since
Tinker and its progeny were designed specifically for the school setting, the school speech rules articulated in Tinker and its progeny should never be applied to off-campus speech. Although others have made that argument, this Comment goes further by attempting to clearly define when speech occurs on campus and when it occurs off campus. It argues that speech originally created or transmitted off campus may only be considered on-campus speech if it is intentionally (re)communicated by the student while he or she is on campus. It further argues that the Spence v. Washington test for communicative conduct should be used to decide if internet speech was intentionally communicated on campus. This Comment concludes with a discussion of how the rule it proposes should apply in specific situations that schools are likely to face in the future.