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DOMESTIC VIOLENCE

Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27 (2006).

Men who commit domestic homicide out of jealousy, possessiveness, and rage, and women who commit domestic homicide by killing their batterers both often assert the partial defense of provocation. However, while a jealous killer can argue provocation when the victim did nothing illegal, most battered women who kill their batterers are not fully excused by this defense. The author examines the laws of provocation as relating to domestic homicide cases in the United States, Canada, and Australia. She argues that the reason some Australian jurisdictions have abolished provocation and have woman-friendly doctrine is because, unlike the United States and Canada, it does not have minimum mandatory sentences for murder and manslaughter. In all three countries, the decrease in willingness to make concessions for male anger and the empathy for battered women who kill has led to substantive changes in provocation law.

Amanda J. Jackson, Nicholson v. Scoppetta*: Providing a Conceptual Framework for Non-Criminalization of Battered Mothers and Alternatives to Removal of Their Children from the Home*, 33 CAP. U. L. REV. 821 (2005).

Agencies such as New York's Administration for Children's Services (ACS) are required to follow specific guidelines when removing or returning children to homes in which domestic abuse has taken place. Though the children themselves are not the victims of abuse, sometimes ACS may fail to return them, stripping the battered wife of her parental rights to her own child. The case of *Nicholson v. Scoppetta*, currently on appeal in the Second Circuit, illustrates the situation in which a battered wife has been prosecuted for neglect for exposing her children to domestic violence, even though she was not the abusive party and was herself a fit parent. Current policies and practices such as this ACS action further victimize battered wives and their children. The Second Circuit Court of Appeals should develop a conceptual framework for ACS and other child welfare agencies which protects the welfare of the child and the constitutional rights of the mother.

Adele M. Morrison, Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor, 39 U.C. DAVIS L. REV. 1061 (2006).

The discourse in the law surrounding domestic violence is centered in white norms and does not adequately include and protect women of color. The discourse as it has emerged focuses around the white idea of victim-hood, which often excludes women of color who are more likely to fight back against their abuser and whose claims are hampered by racial stereotyping. A new view of the victim of domestic violence must emerge, where women of color and women in non-heterosexual relationships take center stage. There needs to be a shift from the disempowered role of "battered woman" to the empowering role of "survivor." This new vision of domestic violence will not only aid women of color but will positively impact all women, regardless of race.

Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 AM. J. CRIM. L. 291 (2005).

Paternity assurance, the idea that men further their chances of reproductive success through discriminatory support of genetically related offspring and exhibition of sexual jealousy, is an evolutionary based theory that attempts to explain male behavior in reproductive relationships. The author argues that this theory has high correlation with existing data on domestic violence and that it best explains patterns of domestic violence. Beyond explaining and providing models to understand aggressive male behavior in domestic relationships, the patterns established by the notion of paternal assurance also provide clear, easily discernable factors that provide a practical guide to law enforcement officials, lawmakers and the courts as to when and how to intervene.

EDUCATION

Derek H. Davis, *Character Education in America's Public Schools,* 48 J. CHURCH & STATE 5 (2006).

While many agree there is a need for instruction of ethics and morals in America's schools, there is little certainty as to how to incorporate it into our educational system. Those who try to teach morals from a religious perspective find themselves severely restricted by US Supreme Court decisions, while others who teach character formation from a sophisticated, philosophical perspective are not reaching students. This article explores several methods of moral education other than biblical morality and philosophical foundationalism. However, the author ultimately believes that teaching morals through literature is the ideal way of presenting character education. A character in either a fiction or non-fiction book can serve as a practical illustration of theoretical and philosophical methods, and thus, students will be able to better understand them.

Susana Garcia, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 247 (2006).

United States immigration policy has failed to address the needs of undocumented children with respect to higher education. The Development Relief and Education for Alien Minors Act (DREAM) would reduce tuition, provide access to financial aid and facilitate permanent residency. While the United States has refused to ratify the Convention of the Rights of the Child, the "best interests of the child" standard it requires is a fundamental part of child immigration policy. The DREAM Act would repeal sections of U.S. immigration law that restrict higher education and frustrate immigration relief for undocumented youth. The Act would require that the immigrant child be in the country a continuous period of at least five years—preventing the possibility that parents will immigrate to the United States specifically to take advantage of the Act. This would have a minimal effect on federal spending, and would be a general benefit to society.

Nina A. Kohn, *Cambridge Law School for Women: The Evolution and Legacy of THE Nation's First Graduate Law School Exclusively for Women*, 12 MICH. J. GENDER. & L. 119 (2005).

The Cambridge Law School for Women is the only women's law school in the history of the Unites States and this article is the only work solely dedicated to exploring its history. The school, founded in 1915, is a product of the suffrage movement, and although it closed two years later, it was not due to the misconceived notion that the students and lead professor lost interest in women's study of law, as it actually briefly reopened several years later. The school was located at Radcliff and modeled after Harvard Law School, though neither school wanted to be associated with the Cambridge Law School for Women. The few women who went to the school went on to live varying lives, some taking up traditional roles in their families, while others put their education to use professionally after finishing their degrees at other schools. The school was a result of the convergence of, the suffrage movement and the move toward the "elite model" law school, and this combination drew bright students who were willing to take a risk.

Maria Pabon Lopez, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373 (2005).

Latino children in general, and undocumented children in particular, are suffering the consequences of a renewed nationwide concern over a perceived

"immigration crisis," which has lead to increased restrictions on immigrant rights, and especially, on their access to education. *Plyler v. Doe*, which held that undocumented children are entitled to state-funded primary and secondary education, though a good beginning for immigrant education reform, unfortunately did not catalyze further changes and a perpetual underclass of undocumented and uneducated immigrants has emerged. Through an examination of the current situation of undocumented Latino students through census and other statistical data, the author shows which factors prevent students from achieving educational success, and specifically how the combination of the lack of educational access and the impossibility of gaining legal status creates a feeling of hopelessness in undocumented Latino youth. Reflecting on both the *Plyler* decision and on the idea that education is the great equalizer, Congress should do more to reform educational access for undocumented immigrants and enact legislations that allow them to eventually achieve work authorization upon the completion of a certain level of education.

Wendy J. Murphy, *Using Title IX's 'Prompt and Equitable' Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

Harvard's policy that required victims of sexual assault to provide an independent corroboration as a prerequisite to a full investigation and adjudication of their complaints was discriminatory and did not comply with due process or Title IX. Although accused students at universities are not entitled to due process as a constitutional matter, universities are still subject to anti-discriminatory governmental regulation. The author analyzes the various problems with Harvard's corroboration requirement, and concludes that its sexual assault policy was clearly inequitable and contrary to Title IX.

Ingvill T. Plesner, *Legal Limitations to Freedom of Religion or Belief in School Education*, 19 EMORY INT'L. L. REV. 557 (2005).

The definition of legal limitations on religious freedom grants a wide margin of appreciation to state bodies in deciding what constitute "necessary" means to limit this freedom in public schools. The vague idea of a "neutral" state is used to restrict the rights of parents, teachers, and students to express their religious beliefs and to determine when to tolerate expressions or exempt otherwise compulsory education. A discussion of how the U.S., Canada, and several European countries approach this right reveals conflicting standards and practices that may lead to violations of minority rights to freedom of religion and belief. The article identifies a trend among international institutions towards creating more concrete definitions than those currently provided, as evidenced by the General Comment of the U.N.

Human Rights Committee and the case law of the European Court on Human Rights, United Nations and European Union. State bodies' margin of interpreting how religious freedoms are best protected in public schools should be weighed against individual fundamental rights and the best interest of the child.

James E. Ryan, *A Constitutional Right to Preschool?* 94 CAL. L. REV. 49 (2006).

In light of the recent increase in state programs creating free public preschools, and advanced knowledge about the importance of early childhood education, the author argues that the next big issue in education law and policy is whether or not there is a right to publicly funded preschool. There are three main objections that states either have made or could make in opposition to this claim. The first objection is that separation of powers prohibits it, as education is a state issue. The second objection is that there is not yet enough evidence showing the importance of preschool to justify a court mandate requiring it. Finally, the third objection is that if the court decides to increase access to preschool then there will be an issue regarding increased access to public colleges and universities. The best approach may be to broaden access to preschool instead of making it mandatory, and to do this by carefully increasing funding while cutting other programs deemed less important.

Eric J. Segall, *Internet Indecency and Minors: The Case for Parental and School Responsibility not Congressional Regulation*, 110 PENN. ST. L. REV. 615 (2006).

In 2004, the Supreme Court upheld a preliminary injunction against the enforcement of the Child Online Protection Act (COPA), a law carefully drafted by Congress to restrict minors' access to indecent sexual content on the World Wide Web in conformity with the Court's First Amendment Internet jurisprudence. While COPA was Congress' second failed attempt to draft legislation to restrict children's access to sexually explicit materials on the Internet, the Court held that its decision did not prevent Congress from making laws to protect minors from indecent materials. The author argues that the Court's dicta are misleading because even narrowly drafted Internet regulation would violate the First Amendment's right to freedom of speech without an overriding government interest. Children's access to sexually explicit material should not be regulated, as it would also prevent their ability to benefit from socially beneficial, albeit sexual, content, such as Internet sites related to prevention of sexually transmitted diseases and contraception. Therefore, not only would it be unconstitutional for the government to regulate sexually explicit Internet content, it would also be unwise, as parents, schools, and communities should be the arbiters of young people's Internet access.

Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2005).

Privacy, as it pertains to students, can be more protected by following state, rather than federal law. There is an increasing number of students seeking privacy protection under these state laws. At the same time, state educational systems are looking at federal law. State educational systems are concerned about this dynamic because, historically, they have looked to federal laws when confronting a privacy issue, where there is no explicit mention of any privacy right. This can be very dangerous, because educational systems may actually be breaking state law, which conflicts with what the educators believe they may do under the U.S. Constitution, as well as other federal statutes.

FAMILY

Elizabeth Bartholet, *Under-Intervention Versus Over-Intervention,* 3 CARDOZO PUB. L. POL'Y & ETHICS J. 365 (2005).

States may serve families and the interests of the child more efficiently by seeking to intervene sooner rather than later upon claims of neglect and abuse towards children. Currently, all fifty states are debating whether state intervention on behalf of the child occurs too quickly or too slowly in their respective welfare systems. By viewing state child welfare systems in light of the United Nations Convention on the Rights of the Child, various comparative systems of child welfare, statistics of child welfare, and incidents of abuse/neglect of children, children may suffer long term damage if they are not removed from harmful situations. These harmful situations may consist of drug abuse in the home and parents that are isolated and unequipped to deal with the challenges of child-rearing. While foster care is often criticized, the rates of abuse/neglect are lower in foster homes such that a child may better develop from the early stages of state intervention rather than having to stay in or return to a harmful home environment.

Joan Catherine Bohl, *That "Thorny Issue" Redux: California Grandparent Visitation Law in the Wake of* Troxel v. Granville, 36 GOLDEN GATE U. L. REV. 121 (2006).

Prior to *Troxel v. Granville*, grandparental visitation decisions were divided into two categories, namely, grandparental visitation statutes that were upheld because they served a legitimate state interest, and grandparental visitation that were struck down because they intruded on a parent's right to childrearing

autonomy, requiring a compelling state interest that grandparent visitation failed to meet. The Washington Supreme Court framed the issue in terms of a fundamental parental right to determine who may associate with the child and thus requiring that the state show a compelling interest when infringing upon that right. The United States Supreme Court upheld the Washington court's decision but limited its holding to the specific facts of *Troxel*, stating that intervention in parental decisions rests on the specific facts in the case and "special weight" is to be given to the parental determination of what is in the best interest of the child. California courts have interpreted the "special weight" determination to mean that intrusion on parental decision making may only occur in situations that are harmful to the child. As a result, the California decisions are very similar to pre-*Troxel* grandparental visitation law in that they support a parent's right to resist visitation, however, the "special weight" determination introduced by *Troxel* might require a showing that the child would suffer in the absence of grandparental visitation.

Rosemary Cabellero, *Open Records Adoption: Finding the Missing Piece*, 30 S. ILL. U. L.J. 291 (2006).

With a few exceptions, adoption laws nationwide require closed records and the replacement of the child's original birth certificate with one bearing the adoptive parents' names. Closed records adoptions are designed to protect the confidentiality of involved parties and reduce the "shame" of unwed motherhood, infertility, and illegitimacy. However, closed records adoptions also deny adoptees access to important information about their siblings, medical histories, and ethnic or cultural identities. The author considers and rejects the typical arguments for closed records adoptions that inappropriately place the interests of the biological parents, adoptive parents, and the state ahead of those of the adoptee, and inaccurately reflect the risks of moving towards an open records system. Noting that adoptees have not had much success challenging closed records on constitutional grounds, the author describes statutes in five states that now allow for open records and argues that Illinois should follow suit.

Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535 (2005).

Studies have shown that although parents may have mild intellectual disabilities, there is no direct correlation between such disability and the ability to become good parents. Therefore, mental deficiencies should be one of many factors considered before terminating parental rights of intellectually disabled parents. However, many states terminate parental rights based solely on the mental capacity of the parent irrespective of their abilities to be good parents. Sampling state

statutes on parental rights terminations demonstrates that the ultimate focus should be on what is best for the child and family as a whole, not simply mental IQ of the parent. Thus, statutes need to evolve to reflect the ultimate goal of protecting the child's welfare.

Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165 (2006).

Employers and governments must take action to ensure healthy family lives in today's world. Both birth rates and fertility rates are declining in developed countries in part because of the global economy. The authors use empirical data to demonstrate the decreased emphasis on family as a result of the longer hours men and women are working. Through a comparison of the United States, Japan and several European nations, this article offers an array of suggestions to promote more parental activity in child-rearing.

Sally Day, *Mothers In Prison: How The Adoption And Safe Families Act Of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217 (2005).

This article examines how, because of recent legislative changes, mothers in the criminal justice system, including those currently incarcerated and those recently released from prison, have greatly reduced the chance of retaining parental rights. Through legislative analysis from the Adoption Assistance and Child Welfare Act of 1980 to the Adoption and Safe Families Act, this article analyzes the policy shift towards adoption with respect to achieving homes for foster children. The termination of parental rights law, while passed without consideration of its impact on incarcerated mothers, inevitably increased the number of obstacles in maintaining their rights. This is in addition to pre-existing challenges that exist in the mother-child bond during incarceration, for which this piece of legislation fails to consider when removing these mothers' parental rights, by ignoring more innovative sentencing possibilities for non-violent crimes committed by mothers. As such, this article concludes that the constitutionality of the procedures in Wisconsin to determine the unfitness of mothers is overwhelmingly questionable due to influences of race, gender, and social class.

Benyomin Forer, *Juveniles and The Death Penalty: An Examination Of* Roper v. Simmons *and the Future of Capital Punishment*, 35 SW. U. L. REV. 161 (2006).

The Constitution's ban on the death penalty for juveniles is based on two ideas: evolving standards of decency and an examination of a national consensus.

Specifically, this article examines whether *Roper v. Simmons*, in which the Supreme Court concluded that the juvenile death penalty was unconstitutional, was properly decided. The author argues that the Supreme Court was incorrect in instituting a bright line rule in regards to their over-reliance on the contention that minors do not have the level of maturity to appreciate the crime committed and are therefore less culpable. The national consensus standard that is used by the Supreme Court following *Roper* is argued to be both arbitrary and subject to change, which would create uncertainty for states and lower-court judges. The article conclusively determines that the best approach would be that legislatures should impose the juvenile death penalty on a case-by case basis, where juries would determine whether the death penalty is warranted. Finally, judges should decide if that conclusion would meet the Eighth Amendment's standards against cruel and unusual punishment.

Mary Ellen Gill, *Third Party Visitation in New York: Why the Current Standing Statute is Failing Our Families,* 56 SYRACUSE L. REV. 481 (2006).

New York State will better serve a child's best interest by granting standing to non-biological parents of children through reform of current standing statutes so that non-biological parents may advocate for legal rights normally granted only to biological parents. Unlike other states that confer standing to functional parents, New York currently only grants standing to an individual who is a biological parent, sibling, or grandparent. Case law from the New York Court of Appeals has laid a framework that declines to confer functional standing or to grant exceptions to the biological standing requirement, a framework lower courts must follow. Standing based on biological relationships does not recognize the changing family unit in New York and may serve to separate a child from loving non-biological, but functional, parents. A four-factor test that takes into account the length of time the child and non-biological parent have spent together, living arrangements, support provided, and existence of a parent-child bond, is advocated as a guide to confer standing upon a non-biological parent.

Martin Guggenheim, *Issues Surrounding Initial Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 359 (2005).

Many of the shortcomings of the child welfare movement can be attributed to society's incorrect framing of the underlying problematic issues. Since the latter part of the twentieth century, the purpose of child welfare has been narrowed to protecting children from abusive parents, rather than also focusing on children whose parents are too poor to maintain them. Our lack of distinction of subcategories within the overarching child welfare movement has resulted in a lack of monetary contribution towards the cause. The United States actually has the

highest child poverty rate of all the industrial nations. If we can conceive of child welfare as a public health problem (not just a child abuse problem), we will be able to better develop polices that more appropriately address the health and welfare of poor children in the United States.

Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067 (2006).

The author calls for an establishment of a state juvenile competency legislation that defines "the juvenile competency right as supported by scientific, developmental, and psychological evidence." The article summarizes the history of the juvenile justice system which stems from the doctrine of *parens patriae*, which gives juvenile courts powers to tailor justice to each juvenile delinquent, examines several key Supreme Court decisions, and addresses the origins of the adult competency assessment. The author argues for the need of state juvenile competency statutes which will ensure that "juveniles...adequately understand the proceedings against them as the...juvenile's right to be found competent is vital" to the outcome of adult punishment. To support his argument, the author also examines modern biological and developmental psychology research that shows critical brain systems do not fully develop until young adulthood. Accordingly, juveniles should be tried as incompetent until they reach young adulthood. The author concludes with a "Model Statute for Juvenile Competency Determination" constructed by combining "existing legislation, developmental research, and comprehensive provisions."

William H. Jordan, *Protecting Speech v. Protecting Children: An Examination of the Judicial Refusal to Allow Legislative Action in the Realm of Minors and Internet Pornography*, 57 S.C. L. REV. 489 (2006).

Children are accessing sexually explicit material on the Internet at a very high volume from a very young age. Yet, statutes that aim to restrict electronic dissemination of such material have repeatedly been struck down on First Amendment and Commerce Clause grounds. The author examines one recent example from the District Court of South Carolina, *Southeast Booksellers Ass'n v. McMaster,* as well as the United States Supreme Court opinion, *Ashcroft v. ACLU*, that informed the *Southeast* court's reasoning. Applying strict scrutiny to the statute at issue, the *Southeast* court found it to serve a compelling state interest – protecting children from viewing obscene material – but concluded it did not achieve that interest through the least restrictive alternative. Specifically, the court determined that filtering, whereby adults control access to illicit content on their home computers, would be less burdensome than the age verification and labeling methods proposed by the statute. The author argues that the court should have

more fully examined the material in question before applying the strict scrutiny standard and that the court misapplied the least restrictive alternative test by relegating the regulation of Internet content to private actors.

Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006).

In situations where grandparents are raising their grandchildren because their parents cannot care for them, intestacy statutes should allow dependent grandchildren to inherit directly from their grandparents instead of allowing the children's living parents to inherit and leaving them nothing. This Article discusses the benefits and disadvantages of existing and proposed doctrines that allow dependent grandchildren to inherit upon the death of their grandparents, including the doctrine of equitable adoption, pretermitted heir statutes, family maintenance systems, trusts in a will, and gifts under the Uniform Transfers to Minor Act. A "bright-line" rule should be adopted by the United States to allow all minor children dependent on the decedent grandparent to inherit in intestacy as such a rule would permit the grandchild to inherit a "child's portion" of the estate, equal to what the child's parent would receive. However, the "bright-line" rule is not without disadvantage as foster children and stepchildren could automatically inherit, possibly discouraging fostering children. Thus, not only should intestacy statutes should redefine "parent" and "child," making the Uniform Transfers to Minor Act simpler and less intimidating, the problem would be avoided altogether if grandparents would write a will or transfer to the child under the Uniform Transfers to Minor Act.

Amy Kosanovich, *One Family in Two Courts: Coordination for Families in Illinois Juvenile and Domestic Relations Courts*, 37 LOY. U. CH. L.J. 571 (2006).

The adoption of the United Family Court Model (UFC) in Illinois may solve the problem that arises when a family is involved in two proceedings in two different courts where the issue at stake in one court is disregarded in the other court even though it may have an effect on the proceedings. Currently, under Illinois law, a proceeding for the dissolution of marriage and a child abuse claim within the same family have to be tried in two separate courts where the courts may have different standards for the two proceedings leading to inefficiency, a waste of court resources, and conflicting decisions. An unified family court is a court with jurisdiction over a variety of family-related issues, both civil and criminal, encompassing divorce and dissolution of marriage proceedings as well as abuse, domestic violence, and delinquency. Although there are financial barriers to implementation of the UFC because of the potential cost required to overhaul the current system, and critics argue that there is little more that anecdotal evidence of

its success, the author posits that it is nonetheless a positive solution to the problems that currently plague the system. The author proposes that Illinois state leaders strongly consider implementing the UFC model whether in whole, if fiscally possible, or at least in part, as a way to ensure that judges make informed decisions with all the information available to them, avoiding inefficiency and conflicting decisions.

Carolyn Kubitschek, *Reforming the Child Welfare System*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 383 (2005).

An investigation of the ineffectiveness of the New York City Administration for Children's Services (ACS) suggests that ACS is incapable of change through self-monitoring. Oftentimes, foster care is more harmful to children than the problems in their own homes which sent them to foster care in the first place. Because of ACS's misconception that intervention is appropriate in all of its investigations, there is an outrageous mismanagement of resources which should instead be channeled to children in need. Statistical evidence, alongside a review of the cases of *Tenenbaum v. Williams* and *Nicholson v. Williams*, prove that the consequences of ACS's failure are too great to warrant self-help as an appropriate means of reform. Alongside further accusations that ACS hides behind a veil of indemnification rather than owning up to its constitutional responsibilities, judicial intervention may be the only solution to ACS's unwillingness for change.

Alexandra Lowe, *Long-Term Solutions for Children in the Child Welfare System Families for Teens*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 413 (2005).

The New York Administration for Children's Services has a successful "Families for Teens Initiative" that aims to combat the unfavorable futures of teens under the Services' control. The prospects for children who age out of foster care are bleak, as about half don't finish high school, and often become unemployed and homeless. In order to fight these alarming tendencies, "Families for Teens" aims to reunite teens who have fallen out of touch with their families, or who never have contact with them. Resuming contact with these families that are "hiding in plain sight" often brings happy reunions and permanent placement after the teen is allowed to identify someone they desire to live with. The goal is not to discount any past ties, but rather to try to work with the teens in achieving independent living at the same time.

Rayee Lumer, Yarborough v. Alvarado*: Why is the Supreme Court Pretending that "a Child is an Adult or that a Blind Man Can See?"*, 38 LOY. L.A. L. REV. 2297 (2005).

The Supreme Court's decision in *Yarborough v. Alvarado,* which determined the custody status of a juvenile, failed to follow precedent, and thus deteriorated juvenile's Miranda rights. Previous decisions have allowed for consideration of a person's age in determining whether the person felt free to leave and therefore was not considered to be in custody. The Court in this case settled on a "reasonable person" standard that does not take age into consideration. Although it chose to make daily police work easier by picking a more objective test, the Supreme Court failed to safeguard the procedural rights of juveniles. The Court's decision was based on a failure to give past cases their due weight.

Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006).

The law should recognize the important, though not financial, contributions that poor fathers make in the lives of their children. At this time, the law does not distinguish between deadbeat fathers who choose not to pay child support and those who cannot do so due to unemployment or underemployment, and further, non-financial contributions to a child's welfare are not recognized by the law. Poor fathers are unlikely to pay child support, but studies show that involvement with children is very important to the child's development. Many fathers who cannot pay child support do spend time with their children and are very involved with their upbringing, and also prefer to contribute to the children with goods and toys. The law should credit fathers for both time spent with the children, and "in-kind contributions" of clothing, toys, and the like.

Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415 (2006).

Although the law no longer bars transracial adoption, white parents continue to adopt fewer African American children, favoring international adoptions despite the availability of African American children and the higher costs and bureaucratic obstacles involved. American adoptive parents—who are predominantly white—often cite the unavailability of healthy American children and a cheaper, easier, and safer process as reasons for seeking international adoptions. In reality, this is true for white adoptions only; adoption agencies report plenty of available nonwhite children, and domestic nonwhite adoptions are often cheaper, faster, safer and more humanitarian than international adoptions. This suggests another factor behind the popularity of international adoptions: race. Despite federal laws forbidding the use of race as a consideration in placing children, opposition from groups such as the National Association of Black Social Workers, the concern of society's racist reaction, and widespread implicit preferences for non-African American children contribute to the low transracial adoption rate. To combat these race-based

preferences, the author proposes a law that would impose a mandatory one-year waiting period on international adoptions unless the adoptive parents can show that they have been unable to adopt a similar American child without regard to race or can otherwise rebut the presumption that their reasons for adopting internationally are race-based.

Alex R. Piquero et al., *Developmental Trajectories of Legal Socializing Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267 (2005).

Legal socializing is the process by which adults form opinions and attitudes concerning the legal systems in which they live and is comprised of two aspects, legitimacy and cynicism. While there have been many studies on legal socializing of adults, this article addresses the subject in adolescents, an important undertaking because it is during adolescence that one's nature and character are most susceptible to change. By analyzing data from juvenile courts, the authors found that over an eighteen month period, there was little change in the opinions of juvenile offenders on the law. Not surprisingly, the study found that those with the highest levels of cynicism regarding the law also demonstrated the lowest levels of belief in its legitimacy, and vice versa. The authors attribute the static results to the facts that the subjects had repeated contact with the law and that instability in legal socializing is more often seen either before the age of fourteen or in adulthood.

William A. Ramsey, *Rethinking Advertising Aimed at Children*, 58 FED. COMM. L.J. 361 (2006).

The Children's Television Act was passed by Congress in 1990 in an attempt to direct the FCC to create standards on the amount of children's programming and to limit the amount of commercial advertising during this programming. However, both the constitutionality and the effectiveness of this Act have been questioned. While the Act is likely constitutional after considering the Court's test regarding regulations on commercial speech, it does not seem to reach the goal of reducing the harms of advertising. The author concludes that, instead of reducing the amount of advertising, the content of advertising should be regulated to avoid confusing messages to children.

Jennifer R. Racine, *A Dangerous Place for Society and Its Troubled Young Women: A Call for an End to Newborn Safe Haven Laws in Wisconsin and Beyond*, 20 WIS. WOMEN'S L.J. 243 (2005).

Safe haven laws have failed to capture the proper measures necessary to curtail the associated problems of unwanted childbirths. Specifically, newborn safe haven laws are ineffective because they do not reach those most at risk for committing neonaticide or reckless abandonment. Furthermore, the author argues that the laws may actually encourage those who might consider giving up a child for adoption or parenting to choose abandonment instead. The article additionally focuses on how choosing a safe haven over traditional adoption procedures may increase the amount of time before the child is placed in a permanent home because permanency planning does not begin until after birth and the anonymity provisions further slow the placement. The provisions also prevent the child from gaining access to potentially life-saving medical and genetic information. This article concludes that rather than safe haven laws, governments should institute hotlines to help educate and provide assistance for would-be mothers.

George Rutherglen, *Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust*, 12 VA. J. SOC. POL'Y & L. 673 (2005).

The recently deceased Judge Robert R. Merhige, Jr.'s Dalkon Shield Trust and its system of payout approximations, which was in the basis for the September 11th Trust's approximations, sought to achieve the necessary mass-tort claims goals of reducing litigation costs and leaving claimants no worse off than would individual litigation. Although the two cases were vastly different in terms of the type and severity of the injuries involved and the specific legal remedies available, they both involved trusts designed in response to the combination of sufficient assets and the threat of insolvency in the face of such large payouts. The formation of the trusts was similar substantively in that they both involved easing the requirements for establishing eligibility for compensation and excluding punitive damages from being awarded, and different in that the September 11th Trust also excluded payments from collateral sources and most noneconomic losses while the Dalkon Trust did not. Procedurally, both cases involved placing control of the trusts in the hands of a central administrator or judge and limited opportunities for individual litigation. Even though such procedural deviations from standard corrective principles has the potential for abuse, in both cases administrative costs were remarkably low and claimants were compensated quickly and accurately. The author acknowledges, however, that the success of these two trusts operating without the usual safeguards does not guarantee that future trusts would be equally successful; these cases represented ideal scenarios involving capable trust administrators, strong public sentiment, adequate funding, and relative ease in determining eligibility.

Honorable Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide,* 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395 (2005).

Family court judges are constantly flooded with cases pertaining to drug addiction, domestic violence, and other familial problems. In order to deal with these difficult and often reoccurring cases, family court judges have had to alter their existing practices. For example, New York has developed courts that specialize in certain areas of law, such as domestic violence courts, drug courts, juvenile drug treatment courts, family courts, and permanency courts, which seek to find permanent placements for foster children. Through paternalistic measures, these problem-solving courts take a new "coercive" approach to adjudication which judges hope will prompt people to constructively change their behavior. Ultimately, these non-traditional courts have made and hopefully will continue to make great progress in serving families and promoting justice.

Cynthia E. Szejner, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?,* 5 WASH. U. GLOBAL STUD. L. REV. 211 (2006).

The increasing popularity of intercountry adoption has opened the door to a debate concerning the biological parents' rights in the adoption process. International agreements such as the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the U.S. Intercountry Adoption Act, and the Adoption Law of the People's Republic of China, have specific provisions that protect the children in the adoption process. For instance, a child over the age of ten must give his or her consent if either the biological or adoptive parent wishes to terminate the adoption process. In contrast, biological parents have no recourse once they give permission for an adoption to take place. International adoption laws should be modified to conform more to U.S. adoption laws, which provide a revocation period for the biological parents and protects their fundamental right to protect and care for their own children.

E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006).

According to the labor-with-consent theory of biological paternity, because the biological mother carries the child in her womb and endures the danger and pain of childbirth, she is the initial constitutional parent of the child and has the right to decide who is allowed to co-parent her child. The constitutional protection for a biological father-child relationship depends on the consent of the initial constitutional parent to the addition of a parental relationship and the biological father's labor as a parent, which must have a positive influence on the child's development. Biological paternity assists courts in correctly concluding whether the initial constitutional parent consented to allow the biological father to co-parent her child, and the biological father's parental rights vest after he performs sufficient parental labor comparable to the biological mother's labor in gestating and delivering the child. Also, when the child's constitutional parent invites a nonparent, a person that is not a biological parent to the child, into the child's life to act as a co-parent, the new parent's right to sustain a relationship with the child is constitutionally protected. The labor-with-consent theory will provide constitutional protection for the biological father's relationship with the child as long as the court finds that the circumstances surrounding the intercourse imply that the mother consented and that the father sufficiently labored as a parent before the biological mother revoked her consent to the father's co-parenting.

Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

Courts have relied on the "best interests of the child" test to justify the restriction or denial of parents' rights in custody disputes. This test is rooted in the theory that parents should not expose their children to conflicting systems of belief, or divisive behavior by one parent, which negatively impacts the child's relationship with her other parent. However, this test is vague and subjective. The question presented is whether court restriction on parent speech is constitutional. The author contends that speech restrictions typically should not be permitted; however, there should be an exception if the restriction is intended to preserve the child's relationship with both of her parents. The author argues that courts should limit the application of the best interests test under the Free Speech and Establishment Clauses to protect parents' rights to speak freely to their children and children's rights to listen. If parent speech is unprotected now, it will remain unprotected in the future—particularly in times of widespread aversion to a minority viewpoint.

Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005).

In recent years there has been an increase in step-partner adoptions, where unmarried partners adopt the child of their other partner. The distinctions between stepparent and step-partner adoption rules highlight that children of unmarried couples are being discriminated against because they are not afforded the same legal inheritance rights as those children with married parents. In *Trimble v. Gordon*, the Supreme Court found that state intestate schemes cannot invidiously discriminate and thus these schemes are subject to the Equal Protection Clause of the Fourteenth Amendment. Using the decision of *Trimble* as a foundation of analysis, the author concludes that the failure to apply the stepparent rule to step-partner adoptions is in violation of the Equal Protection Clause. The author suggests that adoption rules should be amended to afford children of unmarried partners the same rights as the children of married parents.

Steven J. Wernick, *Constitutional Law: Elimination of the Juvenile Death Penalty – Substituting Moral Judgment for True National Consensus*, 58 FLA. L. REV. 471 (2006).

While Eighth Amendment prohibits cruel and unusual punishment, the Court does not consider the death penalty itself to be cruel and unusual punishment but has instead found it to be cruel and unusual punishment for certain types of crimes and offenders. As more challenges against the death penalty arise, the Court has increasingly shown a tendency to apply its own moral judgment as to the suitability of the death penalty. The Court first indicated reliance on its own moral judgment in *Coker v. Virginia* where it gave authority to its own moral judgment in determining whether the crime of rape should be punishable by death. In *Stanford v. Kentucky*, the Court declined to rely on its own moral judgment, but years later in *Atkins v. Virginia*, the Court indicated there might be reason to turn against the judgment of the state legislature in deciding whether the death penalty was suitable for a mentally retarded criminal. The author concludes that in *Roper v. Simmons*, by disregarding the objective criteria in determining national consensus – traditional deference to the legislature – the Court has expanded the scope of *Atkins* and has created an Eighth Amendment subject to the individual beliefs of the justices.

HEALTH

Diana O. Aguilar, *Using SCHIP to Offer Prenatal Care to Undocumented and Non-Qualified Immigrants in Wisconsin*, 20 WIS. WOMEN'S L.J. 263 (2005).

In 2002, the federal government revised the definition of "children" to include unborn children in its State Children's Health Insurance Plan (SCHIP), ostensibly to allow states to provide prenatal health care coverage to the unborn children of immigrants with federal aid. Pursuant to this re-definition, on January 1, 2006, the State of Wisconsin started providing prenatal care to pregnant immigrant women through its SCHIP, BadgerCare. Pro-choice advocates worry that this redefinition will result in the erosion of *Roe v. Wade*, where the U.S. Supreme Court held that unborn children have never been holistically recognized as persons in the law. Despite the valid concerns that the redefinition elevates fetuses over women, the author argues that the Wisconsin program is cost effective, humane, and eases the burden on overworked community health centers.

Cori S. Annapolen, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 VA. J. SOC. POL'Y & L. 744 (2005).

Despite the many documented negative physical, behavioral, and neurological health effects to fetuses that result from mothers smoking during pregnancy, there is still no remedy available to unborn children for the harm caused by prenatal smoking. Courts have allowed recovery for battery in cases involving second hand smoke intentionally inflicted on another, family courts have considered the negative effects of parental smoking in determining the custody of children, and parties injuring fetuses—including mothers—have long been subject to both civil and criminal liability when the child was later born alive. The author argues that these principles should be extended to impose liability on mothers who smoke while pregnant because of the physical harm inflicted and the intentional infliction involved. Because of the clear harm prenatal smoking inflicts on unborn children, mothers' right to smoke should end when they become pregnant, with tort remedies, family court consequences, and criminal liabilities established. These legal consequences in favor of infants' rights do not unconstitutionally interfere with mothers' right to privacy—there is no fundamental right to smoke—or their right of parental autonomy—the state may interfere with parents' decisions in the interest of children's health.

Lisa C. Ikemoto, *In the Shadow of Race: Women of Color in Health Disparities Policy*, 39 U.C. DAVIS L. REV. 1023 (2006).

In the 1990s, the federal government launched a series of initiatives aimed at population-based differences in health status and health care, also known as "health disparities." The health disparities initiatives sought to reduce differences in race, ethnicity, gender, education or income, disability, geographic location, and sexual orientation. This multi-axis approach intended to stimulate an examination of how

sociopolitical differences correlate with health risks. However, it failed to induce the examination of anything other than the role of race, and as a result, women's health initiatives and minority health initiatives have, for the most part, remained separate endeavors. An analytical approach that combines the strengths of structuralism and critical cultural inquiry should be employed.

Connie Lenz, *Prescribing a Legislative Response: Educator, Physicians and Psychotropic Medication for Children*, 22 J. CONTEMP. HEALTH L. & POL'Y 72 (2005).

State legislatures must enact laws governing the roles educators, physicians, and parents play in placing children on psychotropic medication. Federal law requires educators to evaluate the learning impairments of students, while medical industry standards are only loosely followed by practitioners. The author analyzes the issue from all three perspectives, relying on state law in Colorado and Texas as examples. She concludes that states must limit teachers' coercion and allow parents and physicians to consider the risks, benefits, and alternatives to psychotropic medication.

Lainie Rutkow, *Optional or Optimal?: The Medicaid Hospice Benefit at Twenty*, 22 J. CONTEMP. HEALTH L. & POL'Y 107 (2005).

This article advocates a Federal law requiring hospice benefits as part of Medicaid. The author provides an overview of the history of hospices in the United States and the origins of Medicare and Medicaid. Citing variances in hospice benefits from state to state, the author seeks to ensure humane treatment for the terminally ill. After addressing several reasons in opposition to such an act, the article concludes that Congress must pass such legislation.

HISTORY & CULTURE

Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941 (2006).

Black female identity tends to be skewed by formal legal narratives and hierarchies of dominance that distort their true identity in the criminal legal process. The stories of two black women exemplify how minority identities are slanted to the point of rendering black women either invisible or hyper-visible stereotypes in criminal proceedings. Both socio-legal and critical race theory use narrative to establish black women's status and identity. Narrative methodology presents the best opportunity to expose the true identity and experience of black women and to move their stories to the forefront of public consciousness.

Interdisciplinary use of narrative will offer credence to the stories of the disenfranchised and may lead to positive social change in the future.

Edward Behrend-Martinez, *Female Sexual Potency in a Spanish Church Court, 1673-1675*, 24 LAW & HIST. REV. 297 (2006).

In the seventeenth and eighteenth centuries, rural women in Spain were viewed as having unique sexual powers that led to proceedings against them for afflictions and treatments that are now considered unique to men, such as impotence and castration. The author notes that the influence of these proceedings is continually felt in the Spanish language today. This paper explores eight suits in local church courts in Northern Spain between 1650 and 1750 in which husbands accused their wives of being impotent. Furthermore, it illustrates how rural couples turned to the local church courts to deal with their marital issues. The author concludes that these suits and other examples illustrate the power rural women derived from their sexuality before the nineteenth century.

Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189 (2006).

Through an exchange of letters between the authors, Professors Robert Chang and Adrienne Davis explore various facets of Critical Race Feminism. Critical Race Theory and feminist legal theory, with a specific emphasis on various border crossings of race and gender, guide the exchange. Within the letters, the authors outline scholarly debates surrounding a wide range of texts and popular culture as a springboard into Critical Feminism. In this manner, the letters solicit a greater understanding of the role race plays in shaping identity. The authors examine the interrelationships of gender, sexuality, race, and politics and offer various theories relating to Critical Race Feminism.

Frank R. Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006).

Applying intersectionality theory on popular representations of heterosexual black men reveals society's binary view of heterosexual black men that is both inaccurate and harmful towards the development of black men. Intersectionality theory predicates that identities are formed where "categories of identity meet," and for heterosexual black males, this is at the intersection of race and gender. The first representation of the heterosexual black man is that of a "bad black man" that is

hypersexual and prone to criminal behavior , while the second is that of a "good black man" that separates himself from other blacks and assimilates into white society. The result of such a dominating bipolar view is that heterosexual black males accept this imposed false categorization along with the current power hierarchies in existence, which they may even come to believe are the norm. Furthermore, this bipolar view may cause heterosexual black males to engage in "compensatory subordination," thus subordinating other classes of people they feel are lower in the assumed hierarchy.

Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth Century America*, 24 LAW & HIST. REV. 245 (2006).

An exploration of the homestead exception statutes of the nineteenth century reveals how state court judges dealt with modern concepts, such as the notion of a social safety net and the definition of family. The point of the homestead exception statutes, which existed throughout the United States in the nineteenth century, was to protect families from destitution. Judges who were confronted with the dilemmas regarding the homestead exemption were forced to make public policy issues regarding the definition of family, and the impact of divorce on the statute and many other issues. The author concludes that the way that state court judges dealt with the statutes has foreshadowed the paternalistic tint of some welfare state programs, such as social insurance programs, and has helped the term 'family' to be thought of primarily in the nuclear family context.

Dana Neacsu, *The Wrongful Rejection of Big Theory (Marxism) by Feminism and Queer Theory: A Brief Debate*, 34 CAP. U. L. REV. 125 (2005).

Feminist and queer theory initially dismissed Marxism because it did not address women's or queer issues; however, theorists might have been too quick to denounce Marxist theory. Marxism, traditionally based on economic identity issues and focusing on the exploitation of the impoverished masses, can also serve as a basis for any other progressive identity theory – even those like feminist and queer theory – that aim for social change. The current social climate favors politics that speak to the masses. Therefore, allowing a discourse on economic and social rights into the discussion on human rights will communicate to the masses that the Left understands their alienation, lack of proper health care and education, and other anxieties. This discourse could resuscitate progressive politics.

Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321 (2006).

The system of racial segregation consists of both racial and gender subordination. While racial school segregation and gender inequality are often regarded as distinct forms of racial discrimination, there is a great deal of interaction and correlation between race and gender. As a result of the essentialist language we use to analyze such issues, we have disregarded the gendered aspects of racial segregation. For example, treating the seminal U.S. Supreme Court case *Brown v. Board of Education* as a case that deals solely with race and racial segregation obscures the fact that racial segregation in public schools has always been about both race and gender. Our blindness to the gendered nature of racial segregation prevents us from fully understanding racial subordination and thereby undermines our ability to develop effective strategies to resolve the problem.

INTERNATIONAL LAW & HUMAN RIGHTS

Nicholas Bala et al., *Regulating Cross-Border Child Support Within Federated Systems: The United States, Canada, and the European Union*, 15 TRANSNAT'L. L. & CONTEMP. PROBS. 87 (2005).

Child support formulae and the enforcement of child support orders is particularly difficult in the United States, a problem which does not exist in Canada, where there are uniform child support laws. The enforcement of child support orders in the United States is confusing and allows parents to relocate to other states or E.U. Member States if they wish to take advantage of more favorable child support laws. Recently, the European Union has tried to reform their system to allow for mutual recognition and enforcement of child support laws between different member states. While Canada's system may be ideal, there are still some safeguards in the U.S. child support system, such as the practice of giving priority to a child's "home state," or the concept that the rendering state must have "personal jurisdiction" over the obligor which limits parental forum shopping, both ideas that might be more useful for the European Union. Nonetheless, there are great advantages to Canada's uniform system because it ensures financial security and consistency for children who have already been traumatized by the break-down of their family unit.

Kimberly Sowders Blizzard, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 CORNELL L. REV. 899 (2006).

Because of the current state of Immigration Law, parents that will be deported to a country in which there is a likelihood that their children will be forced to undergo female genital mutation are faced with the unbearable choice of leaving

their children behind in the US in the custody of strangers or taking the risk of their children being subjected to female genital mutilation. Regarding this result as inhumane and inconsistent with the emphasis on family unity in Immigration Law, this Note examines the various arguments that have been and can be made to acquire a right for the parents to remain in the country. Unfortunately, current law provides little hope for such parents, because statutory requirements would allow the possibility of relief in only two narrow circumstances, and with only one exception, courts have been unwilling to look beyond the language of the relevant statutes. The author proposes two statutory changes that would provide virtually all parents in this predicament relief and argues that these changes are more in line with the values of family in Immigration law. Protecting the integrity of the family should trump consideration regarding a general policy of limited immigration.

Bridgette A. Carr, *We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants*, 33 PEPP. L. REV. 535 (2006).

The United Nations High Commissioner for Refugees (UNHCR) and all of the signatories to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees should modify their approach regarding the subjective apprehension element of the well-founded fear analysis. The current approach of the UNHCR, as well as most countries, is irrational and fails in its purpose because some child refugee applicants are denied protection because they are unable to conceptualize or convey their subjective fear. In order to fully guarantee this protection, the UNHCR and signatories to the Convention and Protocol should formally exempt all child refugee applicants from the subjective apprehension element. Transforming well-founded fear analysis into a singular objective risk test for child refugee applicants will give efficacy to the promises of protection granted by the Convention and Protocol. This modification has been accepted incrementally by the UNHCR, Canada, and the United States, among other countries, and will eliminate the risk of denying protection to child refugee applicants simply because they failed to communicate their subjective fear.

Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of the U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006).

The Victims of Trafficking and Violence Protection Act of 2000 has been instrumental in creating greater awareness in the United States of the issue of human trafficking. However, while the Act is intended to protect the victims of trafficking, create harsher criminal penalties for the traffickers, and encourage international efforts to end trafficking, the Act has had little effect. The failure of the Act stems, in part, from the broader failures of U.S. immigration policy and the

desire of Congress to limit the recipients of statutory protection to "innocent victims." Also, the Act incorporates past legislation and case law that contributed to the trafficking problem, and thus facilitates trafficking and exploitation. The abolition of human trafficking in the United States requires a law that provides protections and remedies for all victims.

Angelica Chazaro & Jennifer Casey, *Away With Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 HASTINGS WOMEN'S L.J 141 (2006).

In Guatemala, there is widespread violence against women, particularly domestic violence, which is accompanied by a prevalence of gender-based murder, known as femicide. The threat or experience of such violence has caused Guatemalan women to seek refuge in the United States because they are unable to find protection within their home country. The judicial system in place in Guatemala does not adequately protect women, nor does it deter or punish such violence. The authors of this report argue that instead of focusing on the immigrant women who flee to the United States for asylum, the U.S. government should do more to force the Guatemalan government to take responsibility for the failure of its legal and judicial systems. The authors propose a number of recommendations for the United States and Guatemalan governments, respectively, to develop sound and transparent systems that eradicate violence against women in Guatemala and punish perpetrators of such violence.

Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006).

The international community's approach to human trafficking over the past decade has fallen short of ending this deplorable practice. While nations have focused on the criminal aspects mainly associated with sex-related trafficking, the broader socioeconomic conditions that lead to illegal smuggling remain largely unaddressed. This article, focusing on the trafficking of women, explains current global initiatives and offers two approaches that may reduce these migrations. The author advocates an examination of current counter-trafficking policies and correcting the underlying causes of human trafficking. She concludes that with a more concerted effort against poverty, discrimination and violence in under-developed countries, the global community may better address this issue.

Alison Cole, *Reconceptualizing Female Trafficking: The Inhuman Trade in Women*, 26 WOMEN'S RTS. L. REP. 97 (2005).

Female Trafficking is a global problem, with many different proposed solutions and prevention methods. Currently, the international effort to fight this problem is far too fragmented, as different states and nations are too autonomous in their fight against female trafficking. While there is a substantial amount of international law in place to curb the trafficking of women, these laws must be reconceptualized. By bringing different nations together in the fight against trafficking, not only will it be easier to fight trafficking, but it will also send the message that trafficking is an enormous problem. The most promising way to bring the international community together to fight this problem is through the International Criminal Court and the treatment of female trafficking as a crime against Humanity.

Kristi Deans, *Less Than Human: Children of Couple in Violation of China's Population Laws and the Barriers They Face in Claiming Asylum in the United States*, 36 CAL. W. INT'L L.J. 353 (2006).

Codified in 2002, China's one-child policy and enforcement stratagem have caused flagrant violations of human rights and widespread persecution within the country, subjecting their citizenry to mandatory sterilization, abortions, physical abuse, and the decision to abandon children. As a consequence, China's policy has also caused the incidental effect of Chinese fleeing to the United States seeking asylum. Paradoxically, while the U.S. provides a safe-haven for couples of forced sterilization through U.S. asylum statutes which grant automatic eligibility for asylum; U.S. statutory and case law have been interpreted in a way that hinders children from seeking refuge within our borders. *Lin v. Ashcroft*, *Wang. v. Gonzales*, and *Zhang v. Gonzales*, held that children of forcibly sterilized parents "may not, as a matter of law, claim automatic asylum in the U.S." The author argues that children of forcibly sterilized parents, as members of a social group that have suffered severe human rights deprivations, should be granted asylum in the U.S and points to Australia and Canada as examples of countries that accept this proposition.

Leslie F. Goldstein, *Constitutionalism and Policies Toward Women: Canada and the United States*, 4 INT'L J. CONST. L. 294 (2006).

The United States and Canada have sharply contrasting political histories, political and constitutional structures and political cultures. Despite these contrasts, the end results of the fight for women's rights in these two neighboring nations are remarkably similar. The author tracks the case law, legislative histories, political culture, social contexts, academic movements as well as the constitutions of the respective countries. She argues that the women's rights movement in the United States, U.S. law schools and legal scholarship, along with

changing social context, both domestic and global, largely account for the similarity in the evolution of women's rights in these two nations.

Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87 (2005).

In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to address the growing trend of human slavery in which women and girls are disproportionately trafficked into commercial sex activities. While the TVPA's tri-fold purpose of preventing trafficking, punishing perpetrators and protecting trafficking victims is a commendable improvement over the piecemeal anti-trafficking legislation of the past, the Act has striking deficiencies. For instance, the TVPA allows the "consent" of the victim as a defense to the crime of trafficking, which prevents many prosecutions under the Act. The problem with the consent defense is demonstrated by the so-called *Crazy Horse* case, in which Alaskan prosecutors struck a plea bargain with defendant traffickers after investigations produced evidence that the seven young trafficking victims might have known they would be expected to dance nude in strip clubs upon their arrival to the United States. The author offers several proposals to improve the efficacy of the TVPA, including: abolishing consent as a legal defense to trafficking, allowing a broader definition of "coercion" that takes into account the psychological and economic elements of a trafficker's control over the victim, recognizing the centrality of transnational criminal organizations to global sex trafficking, educating and punishing "johns," or purchasers of commercial sex, educating law enforcement and prosecutors about the sex trade, and providing rescue and support service for the victims of sexual slavery.

Tina R. Karkera, *The Gang-Rape of Mukhtar Mai and Pakistan's Opportunity to Regain Its Lost Honor*, 14 AM. U. J. GENDER SOC. POL'Y & LAW 163 (2006).

Regional tribal councils, although not legally acknowledged by Pakistan's judicial system, compensate for many of the inconsistencies of the formal judiciary, but its abuses of power can be more deadly than the crimes they intend to punish. In 2002, a Pakistani tribal council ordered the gang-rape of Mukhtar Mai to reinstate balance to the community after it had been disrupted by her brother, who allegedly had an affair with an older woman from another tribe. Tribal councils provide quick and trusted proceedings compared to the inconsistency of the formal legal system, which many citizens do not trust because of police corruption, language barriers, failure to punish perpetrators, and huge dockets. Tribal councils often become an after-the-fact criminal, further persecuting the victims by using its

powers to provide retribution to the community, instead of the victims. Pakistan must end its ignorance of the practices of the tribal councils, which knowingly operate in violation of law and interfere with the safety of victims, present, and future.

Amy G. Lewis, *Gender-Based Violence Among Refugee and Internally Displaced Women in Africa*, 20 GEO. IMMIGR. L.J. 269 (2006).

The vast majority of refugees in the world are women and children. While many of these persons have fled conflicted regions because of gender based violence, the experience often does not end when they reach a refugee camp. Recently, it has come to light that many are subjected to rape and abuse at the hands of military and immigration personnel while seeking refuge. It becomes increasingly necessary for countries and organizations that are providing aid to recognize and address these problems. The author examines some of the specific programs currently in use in Africa, then concludes by suggesting that the United Nations High Commissioner for Refugees better ensure that its promulgated guidelines are followed, that donor organizations specify that their funds be used to prevent gender based violence, and that existing programs better coordinate by communication.

Dawn Lyon, *The Organization of Care Work in Italy: Gender and Migrant Labor in the New Economy*, 13 IND. J. GLOBAL LEGAL STUD. 207 (2006).

This article focuses on Italy's trend of transferring care of elderly from family to migrant workers. Traditionally, women within a family served as the primary caregivers. However, migrant female workers now provide an affordable alternative while allowing family to manage the labor. After defining what is meant by the term "care," the author evaluates the various entities from which care is given to the elderly, and examines the impact of this practice on the migrant women workers. The author concludes that further research is needed to properly asses the role of the migrant care giver in the global economy.

Catherine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws,"* 4 INT'L J. CONST. L. 181 (2006).

Equality in law in India is addressed by looking at both India's Constitution and international law. The practice of men and women being treated in different manners and evaluating equal treatment based on the degree of "sameness" versus "difference" is criticized. However, India's Supreme Court has developed a different model based on dominance and subordination. Unfortunately, this practice has yet to be applied to family law cases. The author advocates the use of the

West's traditional approach of equality, as well as the model granted by India's Constitution, which grants equality, yet is still at odds with the judicial branch.

Christina A. Madek, *Killing Dishonor: Effective Eradication of Honor Killing*, 29 SUFFOLK TRANSNAT'L L. REV. 53 (2005).

The United Nations Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) was, among other things, aimed at stopping the practice of honor killings. Honor killings are responsible for the deaths of thousands of women throughout the world, although exact numbers are unknown because of under-reporting. Some countries, such as Jordan and Pakistan, although having signed the Convention, still have laws that violate it, and in practice turn a blind eye to honor killings. The Treaty is not only ineffective because nations fail to change or enforce their laws to conform to CEDAW but because in many countries the population views it as a foreign and Western influence. The best way to stop honor killings is not through continued reliance on the Convention for the Elimination of All Forms of Discrimination Against Women, but rather by changing laws in individual countries.

Rachel Rebouche, *Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235 (2006).

The Protocol on Women's Rights seeks to compel African states to withdraw from their antiquated cultural practices towards women and promote feminism. In Kenya, for example, inherited land passes only to the male heir, while in most Sub-Saharan African nations women work in small-scale agricultural practices meant to fulfill the needs of their families and are discouraged from more ambitious agricultural careers. The Protocol seeks to disjoint these cultural practices, but fails to address these issues specifically, falling short of its goal of actual action and promotion of women's rights throughout Africa. The problem with the Protocol, and its predecessor the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), is that they take broad aim at the problems facing women in Africa without enforcing specific legislation to affect change. A protocol focusing more on actual problems facing Sub-Saharan African woman and that works with existing laws that promote the roles of women, would do more for the progress of women then a broad, sweeping order.

Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161 (2006).

On November 20, 1989, the Convention on the Rights of the Child (CRC) was adopted by the United Nations and by 1997, 191 states had become party to the Convention. However, the United States remains the only modern government that has not ratified the CRC. The CRC purports to secure the rights of children to adequate levels of nutrition, education, physical protection and a life free from religious, sexual or racial persecution. Despite the fundamental rights that the CRC seeks to protect, the United States has not ratified it because of sovereignty concerns (U.S. legislative bodies should dictate U.S. law, not an international convention), states' rights issues concerning family law, and opposition by parents' rights organizations. The authors suggest that the United States could advance its prosperity by participating in multi-lateral agreements that are in-line with its policies, as United States reservations to international treaties generally contain federalism clauses enabling the states to have a final word and because the CRC does not seek to proliferate illicit information to children in contravention with a parent's right to monitor their child's upbringing.

Elisabeth J. Ryan, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs to Go Farther, as Evidenced by Implements in Romania and the United States*, 29 B.C. INT'L & COMP. L. REV. 353 (2006).

In 1993, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention) convened to address issues surrounding international adoptions. With the best interests of the child as the central objective, the Hague Convention made a "significant step" in establishing minimum standards in international adoption procedures and called for the creation of Central Authorities in each member country. However, the author argues that the convention is not without its deficiencies, as exhibited by the implementation issues which arise in Romania and the United States, two member nations. Romania, ravaged by orphaned and abandoned children, failed to institute the Hague Convention and passed an outright ban on international adoption. The author urges other convention members and the EU to compel Romania to change its policy. The United States' experience shows that in order to effectively implement and uphold the convention's objectives, changes need to be made to the Hague Convention itself, so that it can be a document that truly "fosters the best interests of the children by facilitating international adoption."

Roxana M. Smith, *Asylum for a Minor Child of Persecuted Parents in* Zhang v. Gonzales, 36 GOLDEN GATE U. L. REV. 69 (2005).

When Ms. Zhang arrived in Los Angeles in 2000 following government persecution as a result of China's population control policies, the INS detained her for removal. The Board of Immigration Appeals held that Ms. Zhang was not eligible for asylum based on her status as a child of an individual who has been forced to undergo sterilization. Thus, in *Zhang v. Gonzales*, the 9th Circuit held that parental resistance to coercive birth control practices did not grant automatic eligibility for asylum to the resisting parents' children. The court found that had Ms. Zhang herself suffered persecution as a result of her father's involuntary sterilization, she would be eligible for asylum. While the court, in its insistence that Ms. Zhang's persecution claim stand on its own merits, reached the correct decision, the court should have defined what specific hardships reach the level of persecution.

Justin Wagner, The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions, 37 GEO. J. INT'L L. 193 (2005).

Since 1983, Sudan has been embroiled in an Islamic-Christian religious civil war which has displaced over six million people to date. The situation is particularly severe in the Darfur region, where rape and other violent tactics have been used to terrorize women and girls throughout the war. These crimes must be stopped and the perpetrators brought to justice, especially those in the Sudanese government who are in part responsible for these atrocities. There is an urgent need to begin formulating the framework for an international prosecution of Sudanese government officials responsible for both the Darfur crisis and for crimes against women and girls. Criminal prosecutions here may provide insight as to why rape was used as a war tactic and set the legal precedent for further preventing rape crimes in the context of war.

Ian Ward, *Headscarf Stories*, 29 HASTINGS INT'L & COMP. L. REV. 315 (2006).

This article tells the story of three women who were discriminated against because of their decisions not to conform to standards of dress at institutions of education. The article begins with the story of Shabina, a London schoolgirl, who choose to wear a jilbab, as opposed to the traditional kameeze. Sent home from school, Sabina brought suit and won a decision in the Court of Appeal. This story is contrasted with that of a medical student in Turkey who was forced to continue her studies in Austria because of religious persecution. The author contends that a better understanding of multiculturalism can be reached through narratives and literature, rather than of legal reform.

Laura A. Weingartner, *Family Law & Reform in Morocco – The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status*, 82 U. DET. MERCY L. REV. 687 (2005).

The 2004 reforms of Morroco's *Mudawana* by King Mohammed VI are a step forward in the combination of Islamic law with modern views of women's rights and privileges widely shared by democratic countries. The *Mudawana* is based on Islamic *shari'a* law and governs domestic law, including marriage, polygamy, divorce, child custody, and inheritance. While reforms to the *Mudawana* had been enacted in 1993 by royal decree, it was the 2004 reforms that brought Morocco's domestic law closer in line with the domestic laws of democratic countries. Through these changes, Islam has remained important to Morocco, as the King is also known as "Amir Al-Muminin", or "Commander of the Faithful". Morocco is an example of an Islamic society that can modernize its laws and expand the rights of women and families, all while adhering to Islamic ideals.

Adrien K. Wing & Monica N. Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006).

France's 2004 ban on "ostentatious" religious symbols in public schools that disproportionately affects female Muslims who wear headscarves, or *hijabs*, reflects France's unique historical interpretation of human rights with respect to the separation of church and state. The article analyzes Muslim females from multiple perspectives to show that their views on the ban range across the spectrum, from those who support it to those who categorically oppose it. To mitigate the negative effects of the ban, in the future France may consider the legal choices of other countries regarding this ban, contemplate remedies for the "spirit injury" that will inevitably touch the entire French population, and empower Muslim females. The ban and its perceived social effects have largely been shaped by men in the public eye. Therefore Muslim women need to become more educated and politically and economically involved in French society in order to influence the resolution of these sensitive issues that so considerably affect their community.

Margaret Y.K. Woo, *Law, Development, and the Rights of Chinese Women: A Snapshot From the Field*, 19 COLUM. J. ASIAN L. 345 (2005).

At first thought one might think that China's increasing embracement of free market principles would lead to great personal freedoms, and therefore a greater number of rights for women. However, this is not the case, and there has yet to be such an increase in rights. Statistical data demonstrates that Chinese women

generally have less confidence in the courts and believe themselves to be treated unfairly in the Chinese Court system. The reason for this remaining gender inequality may be because, due to the increase in market freedoms, there is a greater need for courts due to an increase in litigation to solve market disputes. These new legal rights may be increasingly limited to men and other wealthy groups who are in power.

Anna Zalewski, *Migrants for Sale: The International Failure to Address Contemporary Human Trafficking*, 29 SUFFOLK TRANSNAT'L L. REV. 113 (2005).

The explosive increase in human trafficking over the last twenty years corresponds with a similar increase in the use of migrant labor. In recent years, the human trafficking problem has been attacked on two fronts: rights for migrant workers as embodied in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and criminalization of trafficking itself, as required by the United Nations in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. The Protocol adequately addresses the criminalization of trafficking but affords few rights to trafficked persons themselves. The Migrant Workers Convention provides ground-breaking protections to migrant workers and their families, but has yet to be ratified by any major developed country. These new approaches are both excellent first steps towards solving the human trafficking problem, but a comprehensive and integrated system is needed to protect the rights of trafficked people while the traffickers are prosecuted criminally.

MARRIAGE

William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233 (2005).

In recent years, there has been an increasing momentum to redefine the meaning of marriage, while at the same time there has been an increase in opposition to redefinition. The author identifies two sources that give rise to objections to state marriage amendments. The first source, "readers in bad faith," are those individuals who oppose amendments because their broad readings of the amendments foster fears of improbable outcomes such as denial of rights to same-sex couples. Another source, closely related to the first source, are those who impliedly oppose the amendments because they think they would yield extreme results. By providing procedural, substantive and philosophical answers to the many objections raised by the two sources of opposition, the author concludes that objections to the marriage amendments are without merit.

Stephane Mechoulan , *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143 (2006).

The widespread movement toward no-fault divorces in the 1970's has been blamed for increased divorce rates, while in fact no-fault laws seem to have affected the divorce rates of only those couples who were married before the change in the law. The couples who married after the law was in place took the new regime into account when planning their lives, and were more likely to wait and marry later, which resulted in a decrease in divorce rates. Furthermore, those living under even more liberal regimes, such as those that allow unilateral divorce, have even lower rates of divorce. The key to this seemingly backward trend is that of better "sorting" or "matching", where the couples, knowing that either can easily undo the marriage contract, find more compatible partners. Based on an analysis of divorce rates across the country, reverting back to requiring fault in order to divorce would produce a sharp, but short-lived decrease in divorce rates until a new wave of not-so-well-sorted couples, arising out of the fault-required laws, sought divorce.

Cara C. Orr, *Married to a Myth: How Welfare Reform Violates the Constitutional Rights of Poor Single Mothers*, 34 CAP. U. L. REV. 211 (2005).

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 interferes with a single mother's right not to marry, her right to not intimately associate, and discriminates against her children on the basis of legitimacy. The PRWORA requires a single mother to work outside of the home in order to receive welfare benefits, but does not require a married mother to do the same. This takes the only parent out of the home of illegitimate children and constitutes an improper interference with the right not to marry and the right to not intimately associate. The Supreme Court has recognized these as constitutional rights, and further, marriage is a poor remedy to the problem of poverty. The purpose of welfare reform is to reduce poverty, and at best the PRWORA improves nothing, and at worst makes the situation bleaker.

Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006).

When the Defense of Marriage Act (DOMA) was passed in the 1990s, many scholars questioned its constitutionality, but no social practices necessitated finding a quick answer. However, recent events, such as Massachusetts' decision to allow same-sex marriages and the Supreme Court's opinion in *Lawrence v. Texas* decriminalizing sodomy between same-sex couples, have brought the question of

DOMA's constitutionality back into the spotlight. The author addresses the question by considering DOMA pre- and post- *Lawrence*. He asserts that *Lawrence* did not invalidate DOMA largely because *Lawrence* explicitly did not decide the constitutionality of same-sex marriages. The author devotes the remainder of the article to critiquing other scholars' arguments that DOMA exceeded Congress's power with respect to the Full Faith and Credit clause.

Laura A. Rosenbury, *Two Ways to End A Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (2005).

This article examines the benefits of civil marriage as they relate to both divorce and death. In particular, it discusses how all fifty states have not only long regulated martial dissolution, but how these default rules have been affected with respect to changing social norms. The article offers an in-depth analysis into the current default rules for all fifty states, and explains that despite minor variations between the rules, they are all in existence for the purpose of effectuating the equitable distribution of property accumulated during marriage. However, this partnership theory espoused in these default rules only exists with regards to the rules governing divorce. The author determines that many surviving spouses would be entitled to more property through divorce rather than via inheritance after the spouse's death. She concludes that while marriage may be a partnership when determining division of property in divorce, the default inheritance rules require a surviving spouse to sacrifice property for the good of other family members.

Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189 (2005).

This article seeks to answer the question of whether marriage is an institution identified by a state license, or simply a social practice based in the customs of society. Specifically, the author determines that when marriage is viewed as a product of the state, these state actors are ill-equipped institutionally to handle any disputes over social meaning. Through a historical analysis on the rise of non-marital obligations, this article notes how *Marvin v. Marvin* began a trend where courts would find obligations between unmarried cohabitants in long-term stable relationships. Following *Marvin*, these kinds of relationships would no longer be labeled as an example of "marriage." Additionally, this article examines state responses to individual attempts to receiving the social benefits conferred by the institution of marriage without actually gaining a license from the state. Through case analysis where marriage was practiced without license or consent, same-sex couples that were living with each other and gaining social recognition as being married, and the license controls the marriage label despite the absence of normally expected social practices, this article concludes that there is currently more state

government management of the social and cultural practices of marriage than is appropriate.

Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971 (2006).

The author argues that the remarriage-termination rule, which terminates alimony upon the recipient's subsequent remarriage, is irrational and unfair and should be revoked. The historic rationale for the remarriage-termination rule stems from the belief that women are the man's burden, and once the woman remarries she becomes the burden of the second husband. The author argues that even modern alimony rationales such as the investment partnership theory which "casts spouses as equal investors who are equally entitled to share the financial rewards of marriage," and the tort liability theory, which "compensates a spouse for... economic losses suffered as a result of the 'accident' of divorce," do not provide an adequate reason for the termination of alimony upon remarriage. Moreover, judicial rationales for the remarriage-termination rule which include: inappropriateness in allowing a woman to collect support from two men, wife's selection of relinquishing alimony by remarrying, and disorder that would be created if a woman is able to collect multiple alimonies from multiple divorces are also unpersuasive.

Margaret Berger Strickland, *What's Mine is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989 (2005).

Louisiana's unique policy of not having a notice requirement for reserving the fruits of a spouses' separate property is problematic. Community property states, like Louisiana, recognize the right of a spouse to own property. Louisiana follows the civil law rule that the fruits of a spouse's separate property shall be allocated to the community in a divorce unless the owner of the separate property reserves the fruits to be separate. As the law currently stands in Louisiana, a spouse who has separate property benefits from acting deceitfully and selfishly toward the non-owning spouse. Thus, the author concludes, the Louisiana legislature should step in and adopt laws that at the very least incorporate a notice provision for reserving the fruits of a spouse's separate property.

REPRODUCTIVE RIGHTS & TECHNOLOGY

Khiara M. Bridges, *An Anthropological Meditation on Ex Parte Anonymous – A Judicial Bypass Procedure for an Adolescent's Abortion*, 94 CAL. L. REV. 215 (2006).

An anthropological analysis of abortion law reveals many cultural assumptions about gender, pregnancy, sex and emotion as well as the dialectical relationship in which law and culture exist. In *Ex Parte Anonymous*, a judicial bypass hearing, the court uses inferences from the composure of the minor, her perceived analytic ability, as well as her appearance, thoughtfulness, tone of voice and ability to articulate her reasons as the basis for its decision to deny her petition for a waiver to the parental-consent requirement. Pregnant minors in Alabama are less likely to receive waivers than minors in other states, which, along with the holding in *Ex Parte*, suggests that the Alabama judiciary is more opposed to abortion than other states. There are a variety of problems in judicial bypass hearings, and trials in general, in that they are overly-susceptible and overly-influenced by cultural assumptions, as well as by judges' personal opinions about whether or not testimony is credible and whether or not young women are mature enough to fall within the meaning of the parental consent statute. Trials in general would benefit from more historical and anthropological fact-finding, instead of relying on the fake atmosphere of the court room or the printed record that a reviewing judge receives.

Catherine M. French, *Protecting the "Right" to Choose of Women Who are Incompetent: Ethical, Doctrinal, and Practical Arguments Against Fetal Representation*, 56 CASE W. RES. L. REV. 511 (2005).

This note evaluates the legitimacy of fetal representation as it applies to a situation where the guardian of a pregnant mentally retarded woman seeks an abortion. The author argues that allowing fetal representation in this specific circumstance, where a woman is adjudicated incompetent, undermines a woman's autonomy to exercise her choice, albeit simulated, and promotes the continued "invidious institutional discrimination" of women diagnosed with mental retardation. In addition, she argues that present guardianship statutes do not provide valid representation for the fetus; instead it creates an artificial conflict between mother and fetus. Existing case law and abortion statutes act as an adequate safeguard of the state interest in protecting potential life and health of the mother. As a result, legislation that incorporates fetal representation in this context should not be passed and if so passed, courts should decline to uphold it. Instead,

legislation should focus upon providing effective guardians to the mentally incompetent so that they may provide a "voice" for such women's right to choose.

Erin Heller, *The Fated Legal Birth Definition Act: Fought for the Sake of Fighting*, 83 U. DET. MERCY L. REV. 115 (2006).

Michigan's Legal Birth Definition Act (LBDA)—the state legislature's third attempt at banning partial birth abortion in the past twenty years—defined a fetus as "born" as soon as any part of it was delivered vaginally, and required physicians to perform any reasonable action to save these born fetuses unless the mother's life was imminently in danger. In *Roe v. Wade*, the Supreme Court held that the regulation of pre-viability abortions requires the showing of a compelling state interest, and that post-viability abortion must include an exception for the life and health of the mother. The LBDA, like the Infant Protection Act before it, was overturned in federal court because the definition of born fetuses was too vague and the health exception was insufficient under *Roe*. The federal Partial-Birth Abortion Act of 2003 and similar state statutes have also been held unconstitutional in federal and state courts for their vague descriptions of medical procedures and for inadequately providing for the health of mothers. Ohio's ban was upheld by the Sixth Circuit Court of Appeals because it defined the procedure properly and allowed a greater mother's health exception, but the dissent raised important, valid concerns that the health exception is still too narrow and may therefore violate the constitutional right to privacy. The attempts by Michigan and other jurisdictions at banning partial-birth abortions will—and should—continue to fail until they adequately provide exceptions for mothers' health.

Charles I. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. DET. MERCY L. REV. 51 (2006).

The current view that fetuses are not human beings is a departure from early laws and social values in both England and the Untied States. As early as the fifteenth century, English common law assumed life—and legal protection—began for unborn children at "quickening," or the time a pregnant mother first felt a child move inside her, particularly when "such consideration would be to his benefit," in the words of one historical commentator. Killing an unborn child was considered homicide, and fetuses were even given rights of inheritance. Therefore, under this view, women were prohibited from aborting their pregnancies on demand. Developments in medical science in the 1900's supported both the view that the killing of a fetus was the taking of human life and the extension of the prohibition on abortion to cover the entire period from conception to birth. Similar laws and medical ethics in the United States supported prohibitions of abortions at any point during a woman's pregnancy. Therefore, the author concludes, laws that fail to

treat fetuses as human beings and legal persons are contrary to common law and tradition and should be reevaluated.

Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17 HASTINGS WOMEN'S L.J. 187 (2006).

The author analyzes the Supreme Court's response to motherhood over the years from four perspectives: unmarried mothers versus unmarried fathers, unmarried mothers who are dependent on government support, mothers who are in the workforce, and women who choose not to be mothers. The Court's view of motherhood differs, as society's view of women and mothers varies from one context to another. When unwed mothers are compared to unwed fathers, unwed mothers are deemed to be the primary caregivers with innate maternal instincts; however, in the context of mothers who are dependent on government funding to support their families, mothers' parenting skills and capabilities are highly scrutinized. Although mothers in the workforce are more respected than those dependent on society for support, they are respected so long as pregnancy and motherhood do not interfere with gender neutrality in the workplace. Finally, although abortion rights cases have upheld a woman's right to refuse motherhood, these cases have never prioritized the health of the woman, regardless of whether she chooses to become a mother. Although the current climate in our country is not one that supports change, it is important to respect women in society, whether they choose the role of mother or carefully decline, opting for abortion instead.

Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

Infant Safe Haven laws, which provide for the legal abandonment of newborn babies while providing immunity from prosecution for the mother, were enacted in response to publicized cases of mothers killing their newborn babies in the hopes that if given the right incentives they would give up, rather than kill their baby. There are four possible reasons that these laws have not been very successful including, lack of publicity, the practical problem of getting the newborn to the safe haven, concerns that anonymity may not be protected, and the characteristics of the women that are the target of the legislation. Yet despite the relative lack of success, Infant Safe Haven laws have been enacted quickly and in virtually every state. To explain this anomaly, the author delves into the connection between these laws and a culture that is increasingly concerned with protecting unborn life, suggesting that these laws can be explained "within the sociological framework of a "'moral panic'... linking newborn death with moral concerns about abortion." Several decades of pro-life achievements aimed at re-criminalizing abortion culminated in the "culture of life," a belief system that life starts at conception and ends at natural

death and is an "umbrella concept under which all regulated aspects of sex and reproduction... are now lodged," including Infant Safe Haven laws.

Krista Sirola, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131 (2006).

In this article the author argues against the adoption of a "gestational motherhood standard" for surrogacy situations for courts and the legislature in Pennsylvania. In a Pennsylvania case, *J.F. v. D.B.*, even though the court held that the gestational surrogate was the birth mother of the triplets to whom she gave birth, the court did so based on the terms of the contract she had executed with the sperm donor, rather than because it favored the adoption of a gestational motherhood standard. Adopting a gestational motherhood standard would run contrary to Pennsylvania's judicially recognized state interest in maintaining and promoting stable family units because the surrogacy standard relies on biology, as opposed to the "intended parents' standard," which relies on the fact that awarding custody to the intended parents of the child will most likely create a stable family unit. Additionally, adopting a "gestational motherhood standard" is probably unconstitutional both on due process grounds and equal protection grounds because the presumption that the surrogate is the mother of the child infringes on an infertile couple's right and ability to have a child. Thus, the Pennsylvania courts and legislature should not adopt the "gestational motherhood standard" in surrogacy situations but should adopt the "intended parents standard."

Richard F. Storrow, *The Power of Stories: Intersections of Law, Literature, and Culture: Family Tales: The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception*, 12 TEX. WESLEYAN L. REV. 189 (2005).

In The Handmaid's Tale, novelist Margaret Atwood envisions a "pronatalist," religiously-dominated society, in which women's roles are governed primarily by their fertility status. In her work on contemporary Egypt, anthropologist Marcia Inhorn examines Egyptians' struggles with infertility in a society marked by strong religious, class, and gender identities. In this article, the author outlines the parallels between these fictitious and actual societies and describes how Atwood's novel can broadly be used as a lens to understand how gender, religion and self-worth intersect around the issue of fertility. He discusses the significance of fertility in cultural contexts in which the marital relationship is valued predominately for child-rearing. In these contexts, infertile couples must engage in "fertility tourism" to seek medical treatment from others within or

without their society; those who are fertile, like Atwood's protagonist, become the "passports" that allow infertile couples to achieve their goals.

Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patient's Procreative Liberty*, 51 LOY. L. REV. 549 (2005).

Infertility affects about ten percent of Americans of reproductive age and has resulted in an increased reliance on medical technologies like in vitro fertilization (IVF). The IVF procedure creates a number of preembryos, some of which are implanted and some of which are frozen—the subject of much social, legal, and ethical debate. Current Louisiana law affords preembyos substantial legal rights not given to their progenitors. Progenitors do not have total control over their preembryos; the latter can never be destroyed because of their procreative potential. Accordingly, progenitors who do not want to use their preembryos can only choose between donating them or leaving them frozen permanently. To fully maintain progenitors' rights, the author proposes using the correct medical definition of "preembryo," giving preembyos respect but not status as persons, and instituting pre-IVF written agreements regarding progenitors' rights with respect to their preembryos.

SAME-SEX MARRIAGE

Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws,* 29 HARV. J.L. & PUB. POL'Y 949 (2006).

The author argues that marriage laws that govern heterosexual couples do not reflect the needs, characteristics, and incentives of homosexual couples, hence providing a poor fit for homosexual marriages. An economic incentive analysis shows that procreation is a primary behavior which marriage laws for heterosexual couples regulate. Procreation ability, however, is fundamentally different for gay and lesbian marriages, and the current marriage laws are insufficient to govern those unions. The author further argues that the modification of current marriage laws to accommodate homosexual couples would lead to instability in heterosexual marriages. The author concludes that since a single marriage law is inappropriate to address the unique incentives of heterosexual, gay, and lesbian marriage unions, a separate body of law is necessary.

Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

This article re-evaluates the presumption of legitimacy, the doctrine which traditionally accepts a woman's husband as a child's legal father at birth, within the context of same-sex couples. It does so because of the doctrine's apparent erosion, a consequence of modernizing views of what constitutes a couple, the recognition of same-sex marriages, the development of gender neutral parentage rules, along with a changed attitude toward illegitimacy and the availability of paternity tests. The author shows that by adopting a "functional reality" as opposed to "biological reality" in analyzing the doctrine, the presumption of legitimacy should be preserved for traditional heterosexual couples, extended to lesbian couples, but not extended to homosexual male couples. An extension to homosexual male couples would entail either "trivializing the parental functions performed by the woman who gestates the pregnancy" or "recognizing three legal parents." Such a result raises issues that can only be addressed after further analysis.

Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165 (2006).

In 1964, an interracial couple was found guilty of violating a Florida statute against "Adultery and Fornication" because they were not allowed to raise a defense that they were married at common law. This decision was later overruled by the Supreme Court in *McLaughlin v. Florida*, and the author posits why it was not considered a watershed moment in interracial marriage litigation. Instead, *Loving v. Virginia* has become the landmark case. The author compares *McLaughlin* and *Lawrence v. Texas*, noting their importance in the regulation of otherwise prohibited non-marital sexual relations. *Lawrence v. Texas* was decided in 2003, and hopefully will be viewed as a jump towards same-sex marriage like *Loving*, instead of overlooked like *McLaughlin*.

Dwight G. Duncan, *The Massachusetts Experience: Attempting to Amend Its State Constitution Regarding Marriage?*, 7 FLA. COASTAL L. REV. 221 (2005).

The historic 2004 *Goodridge v. Dep't of Pub. Health* decision declared that anything less than legal recognition of same-sex marriage was unconstitutional. Before this decision, the first Massachusetts constitutional amendment regarding marriage, proposing to define marriage as the union of a man and woman and forbidding other relationships to be the legal equivalent of marriage, was never voted on because politicians sought to avoid controversial social issues. After *Goodridge*, during the debate about a second amendment proposing to recognize marriage as only between man and woman while recognizing civil unions for same-sex couples, the author proposed that the amendment be split in half, one regarding marriage and one regarding civil unions, anticipating that gay marriage proponents

would vote no on both amendments while gay marriage opponents would vote yes for the definition of marriage and no on civil unions, but instead the amendment as a whole was voted down. The latest amendment, while not attempting to repeal existing same-sex marriages, proposes to define marriage only as between man and woman and does not address civil unions. In the meantime, gay marriages continue, and this social experiment declaring that two moms or two dads are as good as one of each, will most likely prove harmful for the children involved.

Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEX. 11 (2006).

This article takes an in-depth analysis of two case—the Massachusetts case *Goodridge v. Department of Public Health*, and the Vermont case, *Baker v. State*—that address state courts' use of remedial delay when issuing their decisions regarding same-sex marriage and civil unions. The use of remedial delay allows the legislature time to become involved in the process resulting in a public less reluctant with a controversial judicial decision. In addition, the author argues against the predominate view that the *Goodridge* and *Baker* decisions caused a backlash against same-sex marriage and civil unions, leading to President Bush's "moral values" campaign and victory in 2004 over John Kerry. The author notes that many of the states that passed constitutional amendments during the 2004 election were already conservative states; further, Pew Research Center and Gallup Organization have conducted extensive polls indicating that the majority of Americans are not opposed to civil unions. The author concludes that analyzing the judicial tactic of remedial delay will surely aid in attempting to predict judicial outcomes with other controversial issues, such as, stem cell research, assisted suicide and terrorism.

Nancy J. Knauer, *The September 11 Relief Efforts and Surviving Same-Sex Partners: Reflections on Relationships in the Absence of Uniform Legal Recognition*, 26 WOMEN'S RTS. L. REP. 79 (2005).

After the events of September 11, 2001 a compensation fund was set up to financially support relatives of those died in the attacks. In some instances this fund is able to reward surviving same–sex partners, however these payouts are inconsistent, and are not carried out in the same manner as other relatives receiving compensation. For instance, these surviving partners are usually not given aid because they were the victim's partner, they are given aid if they can prove that they were the beneficiary of the victim's estate, or because of certain financial ties to the victim. There are numerous surviving partners who have received substantial benefits for various reasons, but numerous surviving partners have not been able to receive anything. These difficulties found by surviving partners can be looked at as

a reflection of the complex, and sometimes diverse way our country's legislatures handle same-sex relationships.

Judith E. Koons, *"Just" Married?: Same-Sex Marriage and a History of Family Plurality*, 12 MICH. J. GENDER & L. 1 (2006).

The same-sex marriage movement has brought debates over the meaning of marriage, sexuality, and family to the forefront of social discourse. The discourse has pitted "traditionalists" who object to same-sex marriage for religious and cultural reasons against proponents of same-sex marriage who argue that justice requires civil marriages regardless of the genders of the partners involved. Locating the debate over the meaning of marriage at the intersection of religious and political arenas, the author posits that traditionalists' attempt to root opposite-sex marriage and nuclear family arrangements in the "history of Western civilization" is inaccurate, as same-sex and non-nuclear family relationships have long existed and are even evident in Hebrew and Christian scriptures. The article dislocates marriage from prevailing religious-political assumptions by pursuing three themes: the principle of "justice" in equal access to marriage, the centrality of "just" marriage as an institution in the movement for same-sex marriage rights, and the need to shift discourse of sexual morality from homosexuality versus heterosexuality to positive forms of sexuality versus abusive forms of sexuality. Pointing to the tension inherent in same-sex marriage proponents' simultaneous demand for marriage rights and criticism of marriage as an unjust and historically patriarchal institution, the author calls on gays and lesbians to reject oppressive family structures in favor of an understanding of marriage defined by equality in relations and connections to the larger community.

Sabrina A. Perelman, *A Step in the Right Direction: How* Kansas v. Limon *Indicates a Brighter Future for Gay Rights Under* Lawrence v. Texas, 7 GEO. J. GENDER & L. 217 (2006).

Anti-gay sentiments continue throughout the country even though the landmark case of *Lawrence v. Texas*, decided almost three years ago, protects gay sexual conduct from criminal prosecution. Because the *Lawrence* court was not conclusive in determining whether to use the Due Process or the Equal Protection as a framework for analysis or even what level of scrutiny to apply, it left ambiguities in its reasoning, which some fear will allow lower courts to ignore the decision to the detriment of gay rights. However, the recent decision of the Kansas Supreme Court in *Kansas v. Limon* may close some of the loopholes left by the *Lawrence* court. Specifically, the *Limon* court concluded that the appropriate framework was the Equal Protection Clause and that the level of scrutiny applied should be a rational basis review. In conclusion, the author hopes that although

the *Limon* decision is not national in scope, it will provide a clearer basis for how courts will address gay rights in the future.

Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271 (2005).

The movement among some United States judges to establish "free sex"—sex without legal, physical, or social repercussions—as a constitutional right has significant relevance to same-sex marriage. *Baker v. State* and *Goodridge v. Department of Public Health* conclude that same-sex marriage is permissible; not on the basis of an established "right to marry" but because the right to free sex excludes any consensual, non-violent, and private sexual activity from regulation. Recognition of the right to free sex forecloses many of the arguments in favor of traditional marriage—for example, the immorality of same-sex sexual conduct—and shifts the presumption of constitutionality away from traditional marriage. However, the presumption, based on the right to free sex, that same-sex individuals have a right to marriage allows the court to avoid making a positive social policy argument for such marriages. State constitutional amendments in response to positive same-sex marriage case law return the issue to the political sphere, where society decides the issue rather than the court.

Jill Louise Ripke, *Employee ERISA Benefits After* Goodridge v. Public Health*: Do Same-Sex Marriages Qualify as Legal Marriages Under Employer-Created ERISA Plans?*, 31 J. CORP. L. 267 (2005).

The author presents two readings of the Employee Retirement Income Security Act (ERISA) to determine whether the plan, which provides retirement and welfare benefit plans, includes the legal marriage of same-sex couples. Under the broad reading of ERISA, a court would look towards federal law, the Defense of Marriage Act (DOMA) which specifically excludes same-sex marriage, and find that ERISA does not encompass same-sex couples. Under a narrow reading of ERISA, however, the court is not required to look to DOMA for this determination, and same-sex marriage would qualify as a legal marriage if the underlying state law does not, through its own mini-DOMA provisions, exclude it. For example, in Massachusetts, the only state that in *Goodridge v. Department of Public Health* held same-sex marriage legal, ERISA benefits would be provided to same-sex couples irrespective of the plan's limited reference to marriage of heterosexual couples. Because marriage is a state law issue, because DOMA prevents states from giving effect to out-of-state same-sex marriages, and because it is the employer and not Congress that creates the ERISA plan, the author recommends that courts adopt the narrow reading of ERISA and look to the applicable state law in determining whether same-sex couples qualify under ERISA.

Katherine Shaw Spaht, *State Constitutional Amendments Prohibiting Same-Sex Unions: Winning the Dual Object Argument*, 7 FLA. COASTAL L. REV. 339 (2005).

In affirming the Defense of Marriage Amendment to the Louisiana Constitution, the Supreme Court of Louisiana stated that the Amendment had one singular goal, to reinforce the traditional view of marriage as between a man and a woman. Because Louisiana applies a "single object" test to constitutional amendments it liberally construed the Marriage Amendment to give much deference to the state legislature. While this decision was taking place, other states such as Massachusetts and Vermont, and the American Law Institute, were joining Canada and many Western European nations by conferring rights to same-sex couples. The rights of same-sex couples to be legally recognized appear to be confined to the Northeast and West coast states, and since the Louisiana decision, twenty-three states have passed legislation confining marriage to the traditional heterosexual definition. The author concludes that the fate of same-sex marriage rights will hinge on what Congress and the United States Supreme Court decide.

James A. Sonne, *Love Doesn't Pay: The Fiction of Marriage Rights in the Workplace*, 40 U. RICH. L. REV. 867 (2006).

The debate surrounding "benefits" extended to opposite-sex marriages versus those extended to same-sex marriages will be better served by clarifying exactly what benefits currently exist for married couples in the workplace. While marriage has traditionally been encouraged by society, in the workplace individual rights vis-à-vis the employer are arguably more important than the benefits a married couple may receive. Federal and state statutes conferring benefits to married couples and denying them to same-sex couples do exist in regards to areas such as Social Security and income tax, but these statutes apply to a more traditional model of marriage, such as one-income households, and are not relevant to many modern marriages, regardless of whether they are same-sex or opposite-sex. Rather, the benefits employers offer to their employees and spouses are not mandated by state or federal law, but arise out of market demand for an employer to provide such benefits. While other areas of the law may deny benefits to same-sex couples, given the current debate it may be helpful to analyze what benefits are given and denied to married couples in the workplace to clarify the current realities of this debate.

Mark Strasser, *State Constitutional Amendments Defining Marriage: On Protections, Restrictions, and Credibility*, 7 FLA. COASTAL L. REV. 365 (2005).

Many states have passed constitutional amendments banning same-sex marriage. Because the rationales given in support of these amendments are undermined by preventing same-sex couples from marrying, the author expresses doubt that the reasons given for the amendments are in fact the real reasons for their adoption. Rather, it is more likely that misinformation, animus, or failure to adequately consider one's position, is at the heart of the same-sex marriage ban. The author discusses the usual rationales for the ban, such as protecting marriage, and demonstrates how they are logically incoherent. While bans on same-sex marriage are not going to strengthen marriage or provide other benefits, they will continue to be used to disadvantage a disfavored minority group and force innocent families and children to bear unnecessary burdens.

David M. Wagner, *Marriage and Banking: Examining Miscegenation Laws to Test the Proposition that* Loving v. Virginia *Leads to* Goodridge v. Dept. of Public Heath, 7 FLA. COASTAL L. REV. 389 (2005).

Changes in miscegenation laws in the 1960's should not be used as an argument to allow same-sex marriage today. An examination of the history, development and rationale for miscegenation laws in the United States demonstrates that miscegenation laws evolved not from marriage laws but from race laws and the caste system between races that had developed. Because those laws were created in order to serve the public good and not because of a sense that race was an inherent component to marriage, the change in those laws cannot be compared with the proposed change in same-sex marriage laws today. The author uses a fictional case, which upholds an African-American's protest against a bank's refusal to allow him to deposit money as compared to a white artist's protest against the bank's refusal to allow him to deposit items of no monetary value, in order to illustrate that while race is irrelevant to banking and by analogy marriage, depositing money is essential to banking and by analogy, the sex of the couple is highly relevant to the institution of marriage. The author concludes that sex complementarily is an essential component in marriage in a way that same-race was not and therefore the change in miscegenation laws cannot serve as a reason to change same-sex marriage laws.

Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents and Significance,* 7 FLA. COASTAL L. REV. 403 (2005).

State Marriage Amendments (SMAs) are perfectly appropriate due to the structure of the American government and the current socio-political climate. While the common theme in other countries constitutions is that of protecting family and marriage, the United States Constitution lacks the discussion of family and marriage because, at the time the Constitution was written, the composition of

a family and marriage was not a relevant socio-political issue. Further, family and marriage are not discussed in the Constitution because America is a federalist system in which family law is relegated to the states. Thus, SMAs are a tool for the public to combat state courts and judges who use their judicial power to "amend their state constitution by interpretation in order to impose their personal preference for legalizing same-sex marriage or unions upon the people of their jurisdiction." The author concludes that the adoption of SMAs are a constitutionally valid way for the public to announce their desire for marriage to be between a man and a woman.

Camille S. Williams, *State Marriage Amendments, Essentialist Arguments, and the Non-Essential Woman*, 7 FLA. COASTAL L. REV. 453 (2005).

Because females are losing their place in the home, workplace, and culture, public policy dictates that marriage should be restricted to heterosexual couples. Historically, the only important social and legal institutions that required and valued the presence of women were family and marriage. If the family form can exclude the female or the male from the marriage, procreation and child rearing will be separated from the marriage relationship; this will inevitably devalue the traditional role of the woman in giving, creating, and sustaining the human life. Moreover, allowing same sex marriage between two males would let males dominate yet another social institution, inevitably sending the message that women are no longer required for the survival of the family. The fact that public consequences result from sexual activity provides a reason for the government and individuals to determine which sexual activities are beneficial or detrimental to society.

SEX CRIMES

Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006).

Recently, an increasing number of sexual assault victims have sought redress in civil courts, rather than criminal courts. The question the author posits is whether sexual assault victims should or can rely on the civil process for relief in lieu of the criminal process. In some instances, victims have succeeded where prosecutors have not; however, whereas victims face a lower burden of proof, autonomy over their cases, and more liberal pleading and discovery standards, victims are confronted with different obstacles in civil court. In particular, while ordinarily not relevant in criminal suits, third party liability is significant in civil suits. The author encourages continued dialogue in unresolved issues, such as a third party's duty to prevent sexual assault, the means for determining

apportionment of liability to appropriate parties, the existence of a system facilitating compensation to victims, and protection of victims' privacy.

Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295 (2006).

With public safety as the primary goal, the existence of sex offender registration and community notification statutes have been widely accepted, albeit at the expense of offenders' rights. However, this article focuses upon sex offender registration of a particular group—the statutory rapists convicted under a strict liability framework—where the intrusion upon the offender's rights raise disconcerting constitutional issues because criminal intent need not be proven. Circumstances of mistake of age and the lack of uniformity in state statutes regarding statutory rape highlight the issues raised. The author argues that the constitutional requirement that regulations be "crafted to limit its punitive effect" is not met when evaluating mandatory registration as applied to the strict liability statutory rapist. Due process is denied these offenders, and the liberty interests as expounded by *Lawrence v. Texas* demonstrate that the consequence of social stigma and reputational damage are unjustifiable. The punitive impact on strict liability offenders, notwithstanding the regulation's intention to create a civil remedy, "outweighs the regulatory nature of the registration statute," rendering it unconstitutional. To withstand constitutional scrutiny, states must either provide the strict liability offender with due process guarantees through hearings to assess dangerousness before requiring registration or reject the strict liability framework altogether and require proof of criminal intent.

Tamara Larsen, *Sexual Violence is Unique: Why Evidence of Other Crimes Should be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177 (2006).

Sexually violent crimes are unique in that they involve underreporting or delays in reporting, lack of physical evidence, social stigma associated with the crimes, and social bias against victims, who are often women and children, as not credible. These factors can hinder effective prosecution of sexually violent crimes. The author argues that although sound reasons exist for excluding defendants' prior criminal history at trial in non-sexually violent crimes, Minnesota should admit such evidence in criminal cases involving sexual assault and child molestation by specifically adopting Federal Rules of Evidence 413 and 414, and not by merely broadening Rule 404(b) exceptions. The Proposed Minnesota Rule of Evidence 413 would mirror the Federal Rule and allow the courts to admit prior criminal history in a sexual assault crime in evaluating the "proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct;

frequency of other acts; surrounding circumstances; relevant intervening events" and other relevant factors. Acknowledging strong policy reasons for admitting previous evidence of bad acts can help alleviate inherent difficulties in effectively prosecuting sexually violent crimes by addressing recidivism, overcoming victims' inherent credibility problems, inherent for victims, encouraging victims to come forward,, and "successfully prosecuting and neutralizing the damage done by rapists and child molesters."

Megan McCune, *Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws*, 14 COMMLAW CONSPECTUS 503 (2006).

The inherent nature of the internet crosses state and national boundaries as a matter of course. As a result, internet luring statutes, written by state and federal legislators to protect children from sexual predators online, are often struck down by virtue of dormant commerce clause violations as well as failure to pass First Amendment scrutiny due to overly broad language and failure to provide least restrictive means. The author believes that the Sexual Predator Punishment and Control Act: Jessica's Law, proposed by the California legislature in August 2005, while likely to be struck down due to state autonomy challenges, will likely win challenges based on the dormant Commerce clause and the First Amendment due to its specificity in defining criminal conduct and exclusion of commercial transactions. The author opines that this specificity provides an excellent guide for Congress to propose similar federal regulation.

Mary E. Reilly, *Expert Testimony on Sexually Abused Child Syndrome in a Child Protective Proceeding: More Hurtful than Helpful*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 419 (2005).

In the late twentieth century, a large increase in child abuse accusations led to legislative intervention. Additionally, many states, such as New York, amended their courtroom procedures to facilitate the government's ability to support a claim of child sexual abuse. In *Matter of Nicole V.* the New York Court of Appeals further expanded the State's prosecutorial powers by holding that expert testimony on Sexually Abused Child Syndrome (SACS) may be admitted to corroborate a child's out-of-court statements. The author argues that while the state has a strong interest in protecting the welfare of children, the admission of SACS testimony is not a means to that end, as it does not satisfy the requirements for corroboration set forth by the New York Family Court Act. Moreover, constitutional and evidentiary principles should not be violated simply because incidents of child sexual abuse are widespread and difficult to prove.

SEX DISCRIMINATION

Peter C. Alexander, *"Herstory" Repeats: The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571 (2005).

Scholars have long recognized that American bankruptcy laws, while appearing gender-neutral on their face, actually contain provisions, such as in the discharge of marital debts, which negatively affect women and children. Gendered interpretations of the U.S. Bankruptcy Code made exceptions for things such as alimony, maintenance, or support from discharge, which left women and children with little financial relief. The new bankruptcy code of October 2005 purports to reform the system and prevent bankruptcy abuse. However, the new code has removed the option previously available to the person filing for bankruptcy to choose which form of relief is most appropriate, and has replaced it with a convoluted system that favors those with the financial means to obtain an expensive attorney to explain the nuances of the new code. Thus, the new code favors people who, financially, do not need to file for bankruptcy, and leaves women and children who find themselves in financial distress out in the cold.

Katherine A. Macfarlane, Derungs v. Wal-Mart Stores: Another Door Shut – A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection, 38 LOY. L.A. L. REV. 2319 (2005).

In deciding *Derungs v. Wal-Mart,* the Sixth Circuit had to reconcile a vague Ohio anti-discrimination public accommodation statute with Title VII to determine that requiring women to breast feed in public restrooms is not a discriminatory practice. However, by applying federal law in a diversity action where state law should have been used, the Court behaved intrusively and as such, its federal interpretation should not be persuasive. The Sixth Circuit should have sought certification from the Ohio Supreme Court to guide it on whether a federal analysis should extend to the Ohio public accommodations statute. This error consequently abridged the development of state anti-discrimination law. Unwarranted federal intrusion into state matters here jeopardizes the protection that should be allotted to future plaintiffs in breastfeeding anti-discrimination suits.

Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006).

Electoral gender inequality poses a problem for democracies trying to balance group equality and the idea of a neutral state. Quotas do not necessarily depend on

the essential identity of women and thereby violate the neutrality of the state. The Parity Law enacted in France in 2000, mandating that half of all candidates running for office in a political party be women, reflects a gendered democracy. While the United States opposes electoral quotas, the Parity Law provides a new model for balancing neutrality and group inequality. Remedies of electoral gender inequality should address the political and cultural exclusion of women; as creating fluid remedies would dismiss most objections to the institution of quotas.

Susan P. Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243 (2005).

Courts have largely deferred to public school administration with regards to administrative decisions due to their greater expertise on issues of pedagogical concern. These issues are enmeshed with cases of peer sexual harassment in public schools as they involve judgments on the reasonableness and efficacy of school decisions—or lack thereof—in the face of such harassment. Through methodical analysis of the tests laid out in cases such as *Davis ex rel. Lashonda D. v. Monroe County Board of Education* and *Gebser v. Lago Vista Independent School District*, as well as explanation of school environment, the author suggests tools litigators should use when litigating peer sexual harassment cases.

Valorie K. Vojdik, *Beyond Stereotyping In Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303 (2005).

Though *U.S. v Virginia* was an important case for women and gender equality, it is also an example of an anti-stereotyping principle that limits the Court's ability to fully use gender equality jurisprudence. The reason for this inability is because the case stays consistent with the supposed dichotomy between anti-subordination and anti-classification principles in the Supreme Court's equal protection doctrine. A more effective strategy to prevent gender discrimination is to focus on ways in which different institutional practices enforce gender segregation in the workplace and how these practices reinforce the idea that some institutions are more male and masculine, while others are more female and weak. The dissolution of the dichotomy between anti-classification and anti-subordination is an important step in beginning to recognize how we can better combat other forms of state-sponsored discrimination, whether related to gender or not. The Supreme Court has broadened its view of equal protection to show concern for state action that demeans women as an inferior class and hopefully in time will embrace the anti-subordination analysis in its entirety.

Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36

RUTGERS L.J. 1201 (2005).

During the past thirty years, although state equal rights amendments have often been criticized as ineffectual, they have in fact been an important tool in the fight against sex discrimination. In the void created by the failure to enact a federal equal rights amendment, and the fairly narrow jurisprudence interpreting the fourteenth amendment, many states have enacted equal rights amendments. These amendments have been under-utilized by litigators, but have proved effective in a variety of contexts. Also, the interpretation of these amendments has been hampered by an over-indulgence in federal equal protection jargon, which is not especially apposite to the particularities of the state amendments. In order to give these amendments "vitality and potency," lawyers, judges, and legislators should endeavor to give them a life of their own, independent of the federal context.

SEXUAL IDENTITY

Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115 (2006).

The author argues that the right "to define one's own concept of existence," as recognized in *Lawrence v. Texas*, is an interest that speaks directly to intersex people in regard to their struggle to gain control over their sexual anatomy from parents and doctors and to their efforts in realizing their gender identity. Equal protection requires the state to provide intersex people with the protections and social structures necessary for them to realize self-definition. Additionally, any good government, aiming to ensure that all people are treated with the dignity and respect as equals, should "rectify the tilts" on which intersex people are currently placed. By failing to conform to ordinary gender expectations, transgenders face various adversities, and at the minimum, the government must make discrimination on grounds of transgender status illegal. While change in society's moral assessment of intersex people is necessary in order for intersex people to fully enjoy their right to self-definition, transgender people should not have to wait for social or market forces to change the rules, as if the government is to take the liberty interests of transgender seriously, it must change society's rules and where this is not possible, it must make the necessary exceptions to the rules.

Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation To Improve Treatment,* 15 LAW & SEX. 91 (2006).

Contrary to most policies today, author Rebecca Mann argues that universally, all preoperative Transgender prison inmates—regardless of gender identity or sex—should be housed in female facilities. The author discusses the history and treatment of Transgender persons, namely, Gender Identity Disorder and the Harry Benjamin Standards of Care that suggests a "triadic therapy" including real-life experiences as the opposite gender, hormone therapy, and sex reassignment surgery. Comparing the prison polices of the United States, Australia and Canada, the author illuminates strengths and weaknesses in each countries polices such as the share policy of the use of protective custody for inmates identified as particularly vulnerable. However, this protective custody is not the best solution to the problem of vulnerable inmates. The author concludes that while many countries strive to promote gender symmetry by housing prisoners based on their genitalia, the universal approach should be to protect the vulnerable prisoner, and therefore, all preoperative prisoners should be housed in female facilities, while postoperative prisoners should be placed based on their new sex.

Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006).

Through cases like *Romer v. Evans*, which strengthened the rational basis equal protection analysis, and *Lawrence v. Texas*, which strengthened the liberty guarantees of substantive due process, the Rehnquist Court has had a tradition of respect for fundamental rights to privacy and autonomy in one's intimate relations. Through gay rights decisions such as *Romer* and *Lawrence*, the Court affirmed substantial Fourteenth Amendment protections for individual autonomy. There has been an evolution of the right to privacy in one's intimate life choices from a negative right to be left alone to an affirmative liberty interest in equal respect and autonomy in intimate relationships and equal protection. The evolution of Fourteenth Amendment jurisprudence through time expanded the focus and strengthened the standards of Fourteenth Amendment procedural review; the court will review the substantive rights at stake rather than allowing narrow categorization to determine the results preemptively. Thus, even though the Rehnquist court contradicted itself by handing down decisions striking down civil rights protections while upholding private autonomy and liberty interests, future cases in the new Roberts court may not only ensure individual privacy regarding intimate life choices but autonomy in self-identity and relationships in both the private and public contexts.

Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEX. 135 (2006).

Lesbian, gay, bisexual, and transgender (LGBT) people coming to the United States to escape persecution based on their sexual orientation must prove to immigration officials that they are "gay enough." This often means that they must mold their identities to fit U.S. norms and expectations of what it means to be LGBT. The author argues that the current system discriminates against LGBT asylum seekers who do not conform to the racialized sexual stereotypes and cultural norms. This discrimination results from unconsciously employing white gay essentialism and racialized sexual stereotypes to making admission decisions. A solution to this problem would be to provide training on the diversity of LGBT identities around the world, as well as creating concrete guidelines in making decisions on whether someone should be granted asylum based on sexual orientation.

Laura H. Norton, *Neutering the Transgendered: Human Rights and Japan's Law No. 111*, 7 GEO. J. GENDER & L. 187 (2006).

While advocates of Japan's Gender Identity Disorder (GID) Law No. 111, assert that the law promotes progress, the statutory response to transgender people in reality harms them by violating their human rights. Shortly after World War II, the Supreme Commander of Allied Powers set up a constitutional democracy much like the Western Democracies' in Japan, such that Japan's constitution mirrors America's in many ways, including it's guarantees of equal protection. However, Law No. 111 violates equal protection for transgendered people because it mandates that they undergo Sex Reassignment Surgery (SRS) and do not procreate in order to be acknowledged by the government as their chosen gender identity. In particular, this law violates equal protection because forty percent of transgender people do not wish, or cannot afford, to undergo SRS, and, it essentially neuters the transgender population. The author concludes that gender and sex cannot be thought of as binary, and, more importantly, gender and sex should not be subject to definition by the courts or legislatures.

Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity,* 15 LAW & SEX. 59 (2006).

This article responds to and attacks Michael A. Scaperlanda's article, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, by arguing that asylum law is not sympathetic to Lesbian, Gay, Bi-sexual and Transgender (LGBT) asylum applicants and asylum law will not inevitably affect constitutional law. Written before the Supreme Court's decision in *Lawrence v. Texas*, Scaperlanda argued that immigration judges were unwittingly assisting in the erosion of American family and cultural values by allowing LGBT asylum seekers

into the United States because the immigration judge had no "official role in the larger cultural context within which the [asylum] case is adjudicated." However, a close examination of the *Lawrence* decision illustrates that Scaperlanda is wrong, as the *Lawrence* holding is quite narrow, including a disclaimer explaining the many issues the case does not address, such as minors, coerced relationships, and public conduct. Further, an analysis of the aftermath of the *Lawrence* decision illustrates that lower courts interpret *Lawrence* very narrowly, resulting in a curbing of progress for the LGBT community in America. In conclusion, while Scaperlanda's theory of LGBT asylum seekers' effect on constitutional law is incorrect, the movement should take a lesson from his theory: connecting discrimination of American LGBT people under American law to the persecution of LGBT people abroad provides a persuasive argument for changing American laws.

Lara Schwartz, Ithti Toy Ulit & Deborah Morgan, *Straight Talk About Hate Crimes Bills: Anti-Gay, Anti-Transgender Bias Stalls Federal Hate Crimes Legislation*, 7 GEO. J. GENDER & L. 171 (2006).

Although most people understand that expressing disapproval of gays, lesbians, bisexuals and transgender people through violence is unacceptable, federal hate crimes legislation has yet to be enacted. The authors demonstrate that federal hate crimes law is needed and that opposition to its passage is unwarranted. Enacting a federal hate crimes law would send a symbolic message that violence against people based on actual or perceived sexual orientation will not be tolerated by society. The authors suggest that legal arguments used to oppose legislation are pretextual disapproval of gays, lesbians, bisexuals and transgender people. In essence, opposition to federal hate crimes laws is based not on constitutionality, as some argue, but on the substance of the law itself.

John Tuskey, What's a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy, 21 TOURO L. REV. 597 (2005).

In the aftermath of *Lawrence v. Texas*, the Seventh Circuit faced a difficult choice in deciding *Muth v. Wisconsin* and although the Supreme Court's broad construction in *Lawrence* did not extend the right to adult private sexual conduct to apply to incest, its decision does not negate this right either. Since this decision presents a practical dilemma for lower courts, the only realistic option is to read *Lawrence* very narrowly as to prevent it from extending to incest. The author continues to explain that the notion of liberty embodied in *Lawrence* is inconsistent with history and precedent. In addition, moral value judgments may prevent *Lawrence* from being applied to other areas of consensual sexual activity and acts, such as prostitution. As a result, because the lower courts have been unwilling to interpret *Lawrence* beyond the confines of its narrow holding, the

Supreme Court will be the only way to extend *Lawrence* and to continue to shape this controversial area of the law.

WORKPLACE DISCRIMINATION & HARASSMENT

Hillary J. Brouchard, Jespersen v. Harrah's Operating Co.: *Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203 (2006).

The Ninth Circuit does not apply a liberal enough unequal burden test for cases of sex discrimination filed under Title VII. In the *Jespersen v. Harrah's Operating Co.*, the court applied an undue burden test; essentially a cost-benefit analysis of the burden of the casino's policy on its employees to a disparate gender treatment claim. However, the Supreme Court in *Price Waterhouse v. Hopkins*, a case decided before *Jespersen*, held that it is of legal importance whether an employer engaged in gender stereotyping in employment decisions. The *Jespersen* court very narrowly distinguished itself from *Hopkins* by noting that *Hopkins* only applied to sexual harassment cases under Title VII. In order to bridge the gap of inequality between men and women, Title VII must be given broader effect.

Miriam A. Cherry, *Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers*, 39 U.C. DAVIS L. REV. 787 (2006).

Although feminist theory has traditionally pitted itself apart from corporate law, theoretical grounds are developing that call for a reexamination of this relationship. The free market has been oftentimes blamed for the problems that face low-wage immigrant women workers, but a pragmatic acceptance that the free market is here to stay allows for the possibility of a market-based solution to these problems. By situating these issues within Critical Race Feminist dialogue, the author suggests that the recent development of the Limited Liability Company offers a business structure that can avoid many of the problems commonly faced by low-wage immigrant workers. Through the LLC ownership structure, the intermediary, who oftentimes exploits low-wage immigrant women workers, can be circumvented, resulting in higher wages for immigrant workers. Although workers will face ordinary profit-sharing business risks, they stand to gain great benefits by being organized, such as the possibility for participation in group insurance plans, the ability to learn business skills, an elimination of common immigration tax-filing problems, and a possible change in attitude toward immigrant workers.

Sumi Cho, *"Unwise," "Untimely," and "Extreme": Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change*, 39 U.C. DAVIS L. REV. 805 (2006).

We are living in a post-civil rights era in which gender-based and race-based discrimination is largely believed to be a relic of the past. The consequence of this misconception in employment-related discrimination cases is that protected employees who seek redress for adverse employment decisions based on discrimination encounter difficulties in convincing courts that they were in fact the victims of discrimination. The author addresses courts' uncritical deference to employers' explanations of adverse employment decisions based on the seemingly neutral ground of the employee's lack of collegiality, as defined by those holding power in the workplace. An exploration of ten employment discrimination cases reveals how racism and gender discrimination become cloaked in neutral language of "uncollegiality," stymieing the ability of victims of employment discrimination to contest inequitable power relations in the office. A more critical approach should be used that replaces the "hegemonic" definition of collegiality, which normalizes inequitable workplace relations, with a "transformative" definition of collegiality that enables employees to challenge the instances of race and gender-based employment discrimination that are currently "censored" by the hegemonic collegiality discourse.

Tanya K. Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006).

Women of color are more likely than white women to report sexual harassment to the Equal Employment Opportunities Commission (EEOC), rather than go through their companies' internal complaints procedures. The author explores the reasons for and implications of this racial disparity in reporting trends through an intersectional approach that combines an empirical study of women's sexual harassment reporting and a Critical Race Feminism (CRF) analysis, which focuses on the law's relationship to women of color. A CRF analysis helps illuminate the reasons that Women of Color might prefer to report sexual harassment to an outside governmental agency, such as dearth of women of color in human resources departments and general distrust of internal grievance structures. For whatever reason women of color are disinclined to use reporting procedures, they face a serious yet little known risk in reporting complaints to the EEOC, as the Supreme Court has held that an employer has an affirmative defense to a sexual harassment claim if the victim unreasonably failed to make an internal complaint. The author recommends a "CRF praxis intervention" to educate women of color about the law, re-orient the judiciary to consider how recent court decisions

disparately affect women of color, train human resources departments to engage employees of color, and build employee confidence in human resources departments.

Emily M.S. Houh, *Race, Sex, and Working Identities: Toward Praxis*, 39 U.C. DAVIS L. REV. 905 (2006).

The author discusses her pursuit to develop a good faith common law antidiscrimination claim that is coalescent with critical race feminism and critical race theory. Specifically, the author discusses the good faith doctrine, which is rooted in contract law, in terms of the obligations and rights that surround an employer-employee relationship. Analyzed through the lens of race and gender issues, the need for such a good faith antidiscrimination claim is apparent, as civil rights statutes are often inadequate and as good faith may be used to outlaw discrimination based upon race, gender, sexual orientation, and age. Integrating critical race theory with the good faith claim, the author also references Carbado and Gulati's "workplace identity" theory to explain how a good faith common law may be necessary in the workplace because the formation of a "workplace identity" may actually promote discrimination by causing certain members to feel like outsiders. This good faith claim can be used to rectify discrimination endured by women and outsiders in the workplace when other forms of antidiscrimination law, such as Title VII, fail to provide a remedy.

Courtni E. Molnar, *"Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163 (2005).

Since its enactment, varying legal interpretations of the Pregnancy Discrimination Act of 1978 have sparked a debate between the "equality approach" and the "difference approach" as to how pregnant women should be treated in the workplace. In an attempt to challenge pregnancy discrimination, the author thoroughly outlines its history, which courts oftentimes overlook when examining related cases. Through this lens, it is possible to unearth the harms posed to individual women and society at large by using both the equality and difference approaches. As an alternative, pregnant workers should be evaluated on an individual basis in the workplace, given their personal physical and vocational circumstances. An analysis of historical attitudes towards pregnancy, and its related traditional gender roles, advances an understanding of the underpinnings of modern day discrimination and suggests that women must have the ability to make choices based on the individual circumstances that surround their pregnancies and careers.

Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817 (2006).

Currently, society is working under an "individual model of workplace sexual harassment," in which the employer is ultimately not responsible for the creation of sexually hostile environments. Instead, the model focuses on the individuals in question. This springs from the way the Supreme Court framed the issue of workplace sexual harassment. The development of the individual model is traced from the first case to come before the Supreme Court—*Meritor Savings Bank v. Vinson*—to the creation of an affirmative defense where a supervisor harasses. The reasons this model is ineffective and why the Supreme Court settled on it are discussed, and a new model that holds employers liable for actions that promote workplace hostility is proposed.

William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357 (2006).

Jespersen v. Harrah's Operating Co. demonstrates that courts have yet to devise an effective means for determining whether grooming policies, imposed on employees by their employers, rise to the level of discrimination. In *Jaspersen*, the United States Court of Appeals for the Ninth Circuit applied a burden comparison test to determine whether the employer's policy, requiring female employees to wear makeup, imposed unequal burden on male and female employees. The author argues that this test is ineffective in recognizing sex discrimination because it permits courts to cancel out discriminatory practices by demonstrating comparable burden on both genders, and it neglects to identify injurious gender stereotypes, which permit courts to justify discriminatory policies. Instead, the author offers a different test for analyzing employer grooming policies under Title VII. He suggests that first a court should determine whether it is relying on a societal norm to justify the existence of a gender-specific policy. If the court determines that it is relying on a custom that is rooted in a disparaging gender stereotype, the policy shall be deemed to be discriminatory, and thus a violation of Title VII. Finally, the court should identify the injury imposed by such grooming policy, such as the effect such policy has on the employee's ability to perform her job.

Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55 (2006).

The author writes about the "Maternal Wall," a form of discrimination that women experience in the workplace due to pregnancy, maternity leave, and other

related issues in the context of the legal profession, because it is a transparent work environment and an area in which she has personal experience. The article establishes that the problem does indeed exist, that women are genuinely disadvantaged as compared to working fathers or non-parent men and women, and that this constitutes discrimination. Thus, rather than focus on litigation, which is not usually a viable option, there must be changes to traditional legal culture and in women's perceptions of themselves. First, firms must change their attitudes and polices so that being a part-time lawyer is a viable option, such that the work assigned to part-time lawyers resembles that of full-time lawyers and not paralegals, ensuring that women remain in the profession. Women must also work hard, efficiently, establish a schedule that works, learn to stand up for themselves, and most importantly, must stop feeling guilty about everything from not being a good enough mother or lawyer and find enjoyment in having a career, as having it "all" is possible, if it can be redefined to mean a career and a family without the idea of having to be the best or perfect.

Meredith Render, *The Man, The State and You: The Role of the State in Regulating Gender Hierarchies*, 14 AM. U. J. GENDER SOC. POL'Y & L. 73 (2006).

In describing a friend's realization during a recruiting lunch that in her first few years at the firm she had been giving mainly administrative work while her male colleagues had been given interesting and stimulating writing and research assignments, the author highlights that gender discrimination still occurs in the workplace in the form of disparate treatment. The problem is that this kind of gender discrimination is hard to detect and somewhat accepted in society because it is not overt, making it difficult to trace the subconscious factors that underlie this kind of workplace discrimination. The author claims that this kind of discrimination in the workplace harms women as a class enough for the state to intervene and regulate. One of the problems facing women and those who wish to alter the gender hierarchy in the workplace is that law firms like the one mentioned in the opening anecdote, do not necessarily perceive a problem because they view disparate treatment as the result of individual work rather than as a function of harming women as a class. The author concludes that we should look to the civil rights model where disparate practices between private parties have legal consequences rather than just being seen as unfair because such a threat of litigation might coerce big law firms into negotiating with women in order to eradicate gender discrimination.

Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31 (2006).

The "Maternal Wall," a form of discrimination that women experience in the workplace due to pregnancy or other related factors such as maternity leave and part-time or flexible schedules, is yet another obstacle to women's advancement in the workplace. This article demonstrates that recent broad judicial interpretations of the scope of protection of several federal statutes, such as the Family and Medical Leave Act, the Equal Pay Act and Title VII of the Civil Rights Act, serve as important precedent for women facing "maternal wall" discrimination because such broad interpretations bring these women within their purview and provide an opportunity for recovery. Where courts have narrowly construed statutes, or otherwise imposed barriers making it difficult to obtain relief, the authors provide strategies for plaintiff's lawyers to overcome these hurdles. Additionally, recovery may be available via existing statutes by challenging long held views that are not necessarily applicable anymore, but which disadvantage those in caretaking positions, such as that work must be done in the office and only during the traditional workday hours. Because women are increasingly bringing lawsuits to vindicate their rights, these developments and strategies can provide women with means to challenge negative stereotyping of mothers, differential treatment between part and full-time workers and adverse treatment due to past, present or future pregnancies.