ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION

Chad M. Gerson, *Toward An International Standard of Abortion Rights: Empirical Data From Africa*, 18 PACE INT'L L. REV. 373 (2006).

Although the African Union has established a woman's right to an abortion in cases of rape or incest or to preserve a mother's health, countries that are hostile to abortion are indifferent to or unable to provide services for women who have abortion-related consequences. The author offers empirical data that demonstrates that as access to abortion is increased, infant and mother mortality declines, using Africa as an example of the least healthy country that would benefit the most from the liberalization of abortion policies. The article offers criticism for the "Mexico City Policy," which denies U.S. funding to any foreign NGO's that promote abortion, which is contrary to the current U.S. constitutional law regarding abortion. Even though President Bush has somewhat backed down from the Mexico City Policy, the author argues that the policy should be eliminated entirely and the international community should offer support for foreign countries, especially those in Africa, who develop family planning policies. In conclusion, the author argues that poverty-stricken foreign countries where the population is in excess and where families do not have the resources to adequately care for their child would benefit from liberalized abortion policies. Therefore, international communities should promote the liberalization of abortion laws in such poverty stricken countries.

Sarah A. Huff, *The Abortion Crisis in Peru: Finding a Woman's Right to Obtain Safe and Legal Abortions in the Convention on the Elimination of All Forms of Discrimination Against Women,* 30 B.C. INT'L & COMP. L. REV. 237 (2007).

In Peru, abortion is illegal except when necessary to save the mother's life. As a result, a great number of women have sought illegal, unsafe abortions that have a high incidence of negative health consequences. Further, if a woman who has received an abortion seeks medical attention for any resulting complications, she could be arrested. The author suggests that the CEDAW, to which Peru is a signatory, mandates safe access to reproductive health services, and therefore implicitly authorizes access to safe abortion. Further, the author recommends that individuals and women's groups write letters in accordance with the complaint protocols in the CEDAW to demand safe access to reproductive health services to Peruvian women and others similarly situated.

Lauren Treadwell, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869 (2007).

Currently, twenty-three states require parental consent for a minor to get an abortion and thirteen states require parental notification. In these states, a judicial bypass must exist as an option for minors, and restrictions may not impose an "undue burden" on the right to choose to have an abortion. However, in cases where minors have petitioned the court for waiver of parental consent or notification, judges have increasingly been recusing themselves on grounds that they do not morally agree with abortion. Problematically, if state judges continue to recuse themselves, the judicial bypass system will become ineffective, and an undue burden will result, thereby creating the potential for procedural due process violations for the minors. Therefore, states must take action to ensure that minors have a meaningful opportunity to get a judicial bypass in order to maintain the constitutionality of the parental consent and notification laws.

Ashley A. Wenger, *Fetal Pain Legislation: Subordinating Sound Medical Findings to Moral and Political Agendas*, 27 J. LEGAL MED. 459 (2006).

Proponents of fetal pain legislation, which requires doctors to notify a woman seeking an abortion after 20 weeks gestation about fetal pain and anesthesia, continue to rely on *Planned Parenthood v. Casey* and refuse to acknowledge recent medical findings showing that fetal pain does not exist prior to 28 weeks. *Charles v. Carey*, which held that requiring doctors to inform patients seeking an abortion about fetal pain was unconstitutional as it unnecessarily infringed on the doctor patient relationship, was effectively overturned by *Casey* which upheld an informed consent clause of a Pennsylvania statute. If Congress passes the Unborn Child Pain Awareness Act (UCPAA), doctors will be forced to provide women seeking abortions with brochures about fetal pain and require the women to sign a form expressly asking for or refusing fetal anesthesia. State and federal interest in preventing pain to the fetus during abortion is undermined by the recent AMA findings that a fetus is unable to feel pain until after 28 weeks. The AMA findings, combined with issues of medical privacy, and the ordeal women may experience when forced to learn about the medically unsubstantiated concept of fetal pain, provide no rational basis for the federal government to enact any fetal pain legislation.

Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus,* 56 EMORY L.J. 693 (2007).

Since *Roe v. Wade*, the Supreme Court has limited the restrictions state laws may place on the right of a minor to terminate a pregnancy, approving as an alternative to the veto power of parental consent the approval of a judge in a court proceeding. The article addresses novel announcements by elected judges in three states of their refusal to hear any of these cases, and contrasts them with traditional recusal; these declarations seem at variance with the judicial oath to uphold the law regardless of personal feelings, and both endanger the impartial reputation of the judiciary and further the politicization of judicial elections. Some commentators have labeled these public recusals as political maneuvers geared toward clogging other judges' dockets with unpopular cases and stigmatizing them as supporting abortion. However, the Supreme Court has held that censure of such a declaration would amount to an unconstitutional limitation on the freedom of political speech. Thus, a minority petitioner may be seeking constitutional protection from a judge who hopes not to offend an electoral majority whose sympathies are against her; the author hopes the Court will revisit these issues so that judges unable to apply the law objectively will not be obligated to hear them, and minors will not have to appear before judges whose decisions are conditioned by their campaign platforms.

BIOETHICS

Nancy Pham, *Choice v. Chance: The Constitutional Case for Regulating Human Germline Genetic Modification*, 34 HASTINGS CONST. L.Q. 133 (2006).

Although intentional use of Human Germline Genetic Modification ("HGGM") is not yet a scientific reality, many find that its precursor technologies are too close to eugenics for comfort. The author examines whether access to HGGM technology is a fundamental right protected under the Constitution. Using a traditional substantive due process analysis, the author argues that HGGM is not a fundamentally protected right under existing Supreme Court precedent because it is not considered a traditional form of reproduction. In which case, the Court will likely employ "the less demanding rational basis review" in order to determine the constitutionality of state regulations regarding HGGM. In addition, even if HGGM use were deemed a fundamental right, states could still satisfy strict scrutiny by showing a compelling state interest in the safety and mental well-being of the child, the sanctity of life, the protection of the child's Fourteenth Amendment rights, the protection of the unborn child's property and inheritance rights, etc. The author provides a series of regulatory alternatives and cautions that given the rapid advance of biotechnology, governments must act quickly to address the issue and provide legal guidelines before ethical nightmares become realities.

CHILDREN

Anthony W. Austin, *Medical Decisions and Children: How Much Voice Should Children Have in Their Medical Care?*, 49 ARIZ. L. REV. 143 (2004).

This article addresses a child's role in determining his or her own medical treatment, particularly in cases involving life-sustaining medical decisions. The author argues that a child becomes competent and is able to make rational decisions around the age of fifteen, however that competence may be limited. The author also discusses the judicial standards used to resolve disputes regarding medical treatment of incompetent individuals, including children, arguing that since a child's competence is an evolving one, these may not always be appropriate. Children competent to make decisions about their medical treatment should be allowed to do so, however in cases of life-sustaining treatment, the wishes of parents and the physician should also be taken into account. Moreover, if no single course of action can be reached by an agreement, the author suggests to either implement a voting system where the child, parents, and the doctor all have one vote, or resort to an arbitration committee to resolve the dispute. As for incompetent children, the best-interests standard should be used to determine the appropriate medical treatment, modified to take into account the parents' wishes as well as the nature of the treatment.

Michael T. Flannery et al., *The Use of Hair Analysis to Test Children for Exposure to Methamphetamine*, 10 MICH. ST. J. MED. & LAW 143 (2006).

Children who are exposed to methamphetamine use at home suffer a variety of harms to their health and well-being. Since methamphetamine use has become a national crisis, states have taken a number of measures to combat its use, including laws that mandate reporting of child exposure to methamphetamine. Typically, children are tested for exposure to the drug through the use of a urine sample. However, hair analysis provides a larger window of time for indicating drug exposure, and is neither invasive nor likely to be tampered with or contaminated, as is common with urine samples. Accordingly, hair analysis provides the most effective means for testing for methamphetamine exposure in children, and should be regularly used.

Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323 (2007).

Hundreds of thousands of children under the age of eighteen have participated in armed conflicts, and have been involved in the perpetration of

genocide, war crimes, and crimes against humanity. These "child soldiers" enter conflicts either involuntarily by conscription, threats of violence, or abduction, or voluntarily due to poverty, feelings of vulnerability, or for revenge. Both male and female child soldiers are traumatized as a result of their involvement, with boys being exposed to all the dangers associated with armed conflict girls exposed to sexual exploitation. As a result, the author argues that these children should be treated as victims deserving rehabilitation and reintegration, rather than perpetrators of human rights violations subject to criminal prosecution. Nevertheless, if a state does choose to prosecute a child under the age of eighteen, the author argues that the state should maintain procedural safeguards in order to consider the best interests of the child.

R.H. Helmholz, *Children's Rights and the Canon Law: Law and Practice in Later Medieval England*, 67(1) JURIST 39 (2007).

In response to a general lack of public interest in the history of children's rights before the twentieth century, Helmholz offers a study of the rights of children, and especially their right to be free from domestic violence, in canon law. Children with disadvantaged status were granted special protections under canon law. All children's legal rights, however, included the right of the child to receive sustenance from their parents and even from an illegitimate father, the right to free choice in marriage, and the right to receive family property. The right to be free from violence, however, was less clearly articulated. Some features of canon law permitted intervention to protect children at risk, but obedience to parents was strongly articulated and enforced, and no particular conduct toward a child on the parents was mandated. Overall, Helmholz posits that canon law and practice did afford children some rights and protections, but rarely at the expense of the stability of family.

Jonathan-Anderson L. Meyer, *"Tis a Consummation Devoutly To Be Wished:" Towards Consistency in End-of-life Treatment Decisions for Comatose Adults and Imperiled Newborns*, 10 MICH. ST. U. J. MED & L. 321 (2006).

The author questions the federally mandated treatment requirements under the Child Abuse Prevention and Treatment Act (CAPTA) and the Emergency Medical Treatment and Active Labor Act (EMTALA) for severely imperiled newborns, and concludes that both are inadequate in respecting human life and providing beneficial medical care. Nonmalfeasance, one of the most common maxims governing medicine and the most relevant to this discussion, is translated best as "first, do no harm" and summed up by the idea that "patients should not leave an encounter with a physician worse off than before." The author argues that the EMTLA has the effect of forcing non-beneficial treatment on anencephalic infants who have relatively little capacity or no hope of gaining consciousness and

similarly, CAPTA forces death-prolonging medical treatment on imperiled newborns for whom all other medical treatment has been found futile. By comparing comatose adults at the end of their lives and severely compromised newborns at the end of theirs, the author exposes the inconsistency of allowing the withholding of treatment for one and not the other. Ultimately, the author proposes that the federal requirements should afford a dying infant the same medical treatment and respect as they do a dying adult.

Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims under the Americans with Disabilities Act*, 73 TENN. L. REV. 641 (2006)

This article traces the evolution of wrongful birth and wrongful life claims and concludes that children born with congenital defects should be protected under Title II of the Americans with Disabilities Act ("ADA"). Allowing compensation for a doctor's failure to prevent the birth of a disabled child is inherently discriminatory. The author argues that these "genetic torts" cannot be reconciled with the ADA's "prohibition of discrimination against individuals with disabilities by public entities." By focusing on "quality of life" issues in the recognition of these torts, the law is being inconsistent in its treatment of individuals at the beginning and at the end of their lives. The author critically examines the policy rationales behind genetic torts and offers alternatives, including the reaffirmance of living with disabilities. In refusing to recognize genetic torts, the author believes that we would be advocating for an end to discrimination against disabled individuals in every stage of life.

Frank E. Vandervoort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. CRIM. L. & CRIMINOLOGY 1353 (2006).

Sexual abuse alleged by a child is often difficult to prove, and videotaping interviews with the child is often crucial to proving the allegations. Debate has been fierce among two poles, prosecutors and defense attorneys, as to whether interviews with children alleging abuse should be videotaped. However, this debate is largely guided by prosecutors' and defense attorneys' particular positions and therefore fails to take into account the interests of the community at large. The author looks to St. Mary County as a prototype of a community where videotaping is used as part of a multifaceted investigatory and enforcement effort with community consent and involvement. The author contends that if a community agrees that videotaping interviews with children is beneficial, and such videotaping is part of a broad investigatory effort, it can serve the interests of the child and the community.

Virginia Garrard, Note, *Sad Stories: Trafficking in Children—Unique Situations Requiring New Solutions*, 35 GA. J. INT'L & COMP. L. 145 (2006).

Human trafficking is an international humanitarian crisis, and approximately one-half of the international human trafficking victims each year are children. Children are uniquely vulnerable because of their physical inferiority, poverty status, and in the case of young girls, repression due to gender prejudice. While there have been a number of notable international efforts to prevent human trafficking and protect children, including the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000), the author argues that these efforts are insufficient to protect children. The author concludes that a new international instrument should be developed to address child trafficking, and suggests that this instrument possess four elements, which current international agreements lack. First, it should stand alone, centering specifically on child trafficking, and should be developed in a human rights framework; second, it should concentrate on those issues specifically related to children, including their unique vulnerabilities; third, it should enhance the role of NGOs already working in this area; and fourth, it should create strong enforcement mechanisms, such as extra-territorial legislation.

Sheryl L. Buske, *Foster Children and Pediatric Clinical Trials: Access Without Protection is Not Enough*, 14 VA. J. SOC. POL'Y & L. 253 (2007).

In the late 1980s approximately half of the children in the United States known to have HIV/AIDS were in foster care, and New York was one of a few states that decided to enroll foster children in HIV/AIDS pediatric clinical trials. The author first discusses New York City's Administration for Children's Services' (ACS) controversial choice to enroll foster children in HIV/AIDS clinical trials in the late 1980s and 1990s, and outlines the current federal regulatory framework for, and IRB oversight of pediatric clinical trials. She argues that foster children should have the same access to clinical trials as other children, but that the current federal regulations must be changed in order to ensure that foster children are adequately protected in clinical trials. The author offers five suggestions to improve current federal regulations: (1) assign advocates to foster children enrolled in clinical trials; (2) require disclosure to the child's representative and the court when a child is enrolled in a clinical trial; (3) create a single, federal definition in which children are "wards" of the State; (4) include child welfare specialists on all IRBs when foster children are involved in clinical trials; and (5) keep any compensation beyond token gestures in a trust for the child until he/she leaves the foster care system. The author concludes that although an epidemic of HIV/AIDS magnitude may not be imminent, many foster children continue to be affected by life-threatening illnesses, and current federal regulations are inadequate to protect the safety and rights of these children in clinical trials.

Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

Childrearing in respect to family law is firmly entrenched in the doctrine that parental authority rules at home while state authority rules at school. Childrearing is not exclusive to these spheres and family law has yet to identify the other spheres and actors which play a role in childrearing outside the home and school. As an example, the author explores *Boy Scouts of America v. Dale* and the problems it exposed in limiting a child's spheres of influence to either the parents or the state. One solution is for family law to formally recognize outside influences and attempt to define the role they play in childrearing. A pluralistic approach, which recognizes the dual goals of both parents and the state, guarantees that children will be exposed to a more diverse and encompassing sphere that surpasses that of the home and school alone.

David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006).

Child laundering, where a child is taken away from his birth parents and put up for adoption as an orphan, is financially incentivized by intercountry adoption systems and legitimized by legal processes which make it easy to traffic these children into the United States. Adoption agencies gain access to these children in a variety of ways including: (i) buying children from parents under the pretense that they will have continued communication with their children; (ii) kidnapping children from orphanages, hostels and schools, where they are placed by their birth parents with the expectation of being unified at a later date; (iii) putting lost children up for adoption without attempting to locate their families; and (iv) traditional kidnapping. Each child is sold for anywhere from $15,000-$20,000 and even after all expenses, the agencies still receive a substantial sum for every adopted child. Meanwhile, the United States government continues to approve visas for adopted children even while conducting child laundering investigations. Possible solutions to this child laundering problem include setting limits on adoption fees, requiring itemized lists of fees and mandatory donations, licensing and regulating adoptions agencies, and changing federal law so that kidnapping and stealing children for adoption is a federal crime.

Bob Tarantino, Note, *A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers,* 29 HASTINGS COMM. & ENT. L.J. 45 (2006).

Canadian law on contracting with minors has long been confused and uncertain, particularly in the television and film industries, where considerable losses can be caused by later abrogation of contracts based on the common law right of minors to void a contract around the time they achieve majority. The article compares the state of relevant law in four jurisdictions: New York, California, Ontario, and British Columbia. Some legislative action has been taken to hold minors to the contracts they enter into; when such a contract in the entertainment industry is approved by a court or government agency proceeding, the minor's power to disaffirm becomes circumscribed and the agency or the parent/guardian puts some of the earnings into a trust account. In the more uncertain common-law Ontario context, the author counsels producers on how to argue that contracts are for "necessities" or are of "benefit" to the minor. The author also explores regulations that a Canadian performers' union imposes on contracts entered into by its members, and advises on contract drafting aimed at obtaining a guarantee or indemnity from the parent or guardian of the child in case of default on the contract.

Emily A. Bishop, Note, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment,* 82 N.Y.U. L. REV. 531 (2007).

"Intersexed children," children born with genitalia that do not have the characteristics of most males or females, are generally assigned one or the other gender at birth and undergo immediate invasive genital surgery to match the physical appearance to the gender choice. Some of these children reject the assigned gender, however, and experience strong impulses to change to the other gender. The author examines the harms caused by parental resistance to such a child's desires, evidence of negative physical and psychological effects of the surgeries, and envisions a new statutory framework, where the constitutional support traditionally given to parental control over childrearing would be balanced by support for a child's freedom to choose gender. One possible statute might allow a finding of neglect when parents resist the natural needs and tendencies of their children; another might mandate minor consent in seeking gender transition counseling, an extension of consent laws regarding sex-related health care or drug treatment. The author reviews Supreme Court decisions that suggest there is no constitutional protection for parental choices that harm the child, and reasons that since intersexed children who have not had surgery often experience healthy psychosexual development, the traditional compulsion to assign a gender may be a

matter of cultural stereotyping that brands anything between the two genders as abnormal – an attitude possibly ripe for revision.

Vanessa L. Kolbe, Note, *A Proposed Bar to Transferring Juveniles with Mental Disorders to Criminal Court: Let the Punishment Fit the Culpability*, 14 VA. J. SOC. POL'Y & L. 418 (2007).

In recent years, many states have reformed the juvenile justice system to allow juvenile offender transfers to criminal court more readily, in efforts to curb the public's misconceived notion of a youth violence epidemic. Juvenile courts in the United States were created based on the belief that juvenile offenders do not have the thought and decision-making abilities attributed to adults, and therefore their sentences should focus more on rehabilitation. However, many states do not factor in a juvenile offender's mental disorder when determining whether to transfer that juvenile offender to criminal court. The higher recidivism rates among juveniles sentenced as adults, compared to those offenders that stay in the juvenile system, suggests that the transfer of juvenile offenders to criminal court has the effect of making these offenders more dangerous. The author proposes that juvenile offenders with serious mental disorders remain in the juvenile system, where these offenders are more likely to receive treatment for the mental disorders that likely contributed to their criminal behavior.

John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57 (2006).

The author proposes reforming the Interstate Compact on the Placement of Children ("the Compact") adopted by all fifty States and the District of Columbia as an enforceable contract between the States in an effort to remedy the inability of the judiciary to ensure a child's care in an out-of-State home. Instead of waiting for the approval by the Compact administrator, the dependency judge often places the child in an out-of-state home of kinship without formal inspection, when the court, allegedly acting in the best interests of the child, determines that an immediate out-of-state kinship placement is necessary to avoid potential harm to the child from in-state foster care placements during the period of waiting for approval. Criticizing the recent amendment and current proposals for reform that attempt to merely shorten the processing time for approval, the author proposes that a provisional interstate placement is needed to incentivize the courts to comply with the Compact. Only a provisional placement—for 120 days or less—pending a final approval would expedite the eventual permanent placement with an out-of-state home of kinship. The author finds that a provisional placement provision will minimize harms done to a child from multiple foster placements and probable

separation from siblings, without foregoing the precautionary steps necessary to ensure that the out-of-State kinship placement provides sufficient safety and care for the child.

Sarah Gerwig-Moore & Leigh S. Schrope, *Hush, Little Baby, Don't Say a Word: How Seeking the "Best Interests of the Child" Fostered a Lack of Accountability in Georgia's Juvenile Courts*, 58 MERCER L. REV. 531 (2007).

The author examines how Georgia's juvenile justice system lacks accountability and procedural safeguards to adequately protect children's rights. Although the Georgia Juvenile Code entitles children to legal representation, it fails to mandate legal counsel to represent the expressed wishes of a child when they conflict with the interests of the parent acting as the child's representative, or differ from the perceived "best interests" of the child as represented by the guardian ad litem in deprivation proceedings. Under the guise of protecting children against undue embarrassment of publicity, juvenile court proceedings are closed to the public and media and are heard without a jury, thereby depriving children of the public oversight of judicial processes. Furthermore, a meaningful appellate review is rare in juvenile proceedings because judges have wide discretion to enter a ruling non-appealable in the "best interests" of the child, third parties have little access to confidential records to file amicus briefs even when appeal is pursued, and the appeal on the merit may become "moot" after the child has already served the relatively short sentence. The author urges that Georgia's juvenile justice system couple its mission to provide a flexible and protective forum to children with meaningful public oversight, a ready access to appeal and the availability of competent, conflict-free counsel.

Jennifer E. Rutherford, Comment, *Unspeakable!* Crawford v. Washington *and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137 n.1 (2005).

This article discusses the prosecution of child sexual assault and the damaging effects on children who testify in light of the *Crawford v. Washington* decision which most often requires a child victim to testify in court in order for her statements to be admissible. The author argues that it is imperative to reduce ubiquitous occurrences of child sexual assault. While one significant way of working to reduce the child sexual assaults is through prosecution, the author examines two reasons as to why such prosecution is problematic. First, the prosecutor has to be concerned with the well-being of the child victim, who has clearly suffered a traumatic experience, and must decide whether to protect the child from another sort of trauma—namely, providing testimony; second, the prosecutor is faced with a lack of physical or corroborating physical evidence and the child is usually the only witness. The author concludes that while *Crawford v.*

Washington effectively requires the victim of child molestation to confront his or her abuser and testify in court there are alternative methods that the prosecutor can employ, such as shielding, which will reduce the child's psychological trauma he may suffer as a result of testifying in court.

CIVIL DISORDER

Ashley J. Craw, Comment, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829 (2007).

The aftermath of Hurricane Katrina, which involved disaster-affected areas being thrust into chaos, is an effective tool for examining the Posse Comitatus Act. This Act was enacted in 1875 to quash the military's increasing role as domestic law enforcement officers. During the ensuing years, courts have held that the military's indirect participation in civilian law enforcement is acceptable and Congress has created twenty-five exceptions to the Posse Comitatus Act under which the military is allowed to actively enforce civilian law. However, since none of these exceptions allow military forces to enforce civilian law after a natural disaster, areas devastated by Hurricane Katrina were allowed to descend into civil disorder. The author argues that the creation of an exception to the Posse Comitatus Act pertaining to large-scale natural disasters would most effectively restore law and order to affected areas and prevent some of the most alarming effects of Hurricane Katrina.

Rebecca Eaton, Comment, *Escape Denied: The Gretna Bridge and the Government's Armed Blockade in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV.127 (2006).

Days following Hurricane Katrina, evacuees were prevented from leaving New Orleans via the "Gretna Bridge", the only roadway exit out of the city, by an armed blockade set up by City of Gretna police officers, under the direction of the municipality of Gretna. The typical evacuee denied entry across the "Gretna Bridge" was representative of the New Orleans residents who remained in the city during this national disaster, the poor and disabled African-Americans residents. The author examines several cases dealing with limitations placed on the right to travel and posits that the use of the armed blockade at the "Gretna Bridge" violated due process since the right to travel is a fundamental right. This blockade unreasonably restricted these evacuees' right to travel since no alternative travel route was available to these residents and such a measure was not reasonably necessary even after a national disaster. The author concludes that the municipality and the individual officers should be held both civilly and criminally liable for their

involvement in the implementation of such an overly restrictive policy.

DOMESTIC VIOLENCE

Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877 (2006).

Lawyers for victims of domestic violence often must confront particularly difficult ethical dilemmas. There are situations where the lawyer may feel that for her client's own safety, she should intervene or contact authorities. However, the lawyer must also take care not to risk a breach of client confidentiality, or even worse, put the client in worse danger by aggravating an abuser through her intervening efforts. The author notes that Rule 1.14 of the Model Rules of Professional Conduct allows the lawyer to intervene on behalf of a client when the client has a "diminished capacity" to make a reasoned decision. However, the author recommends that the lawyer, when deciding whether to intervene, give serious consideration to the countervailing interest of client autonomy.

Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World*, 27 PACE L. REV. 199 (2007).

Protection of victims suffering from domestic violence remains problematic in this country largely due to pressure from defendants and victims who refuse to testify at trial or rebuke their statements because of fear of violence or other action by the defendant. The refusal to testify leaves prosecutors without a victim to explain what happened and lead many prosecutors to utilize victimless prosecutions, which involve reliance on hearsay exceptions to admit evidence regarding the case. However, *Crawford v. Washington* practically eliminated victimless prosecutions by holding cross-examination as the "sole constitutionally relevant determinant of reliability," requiring testimony of victims. To further complicate such matters, the *Federal Rules of Evidence 801(d)(1)(A)* imposes a requirement that prior statements be made under oath. Therefore, the author proposes the following solution—allowing the jury to consider prior inconsistent statements of a testifying witness as substantive evidence of the charged crime.

Nicole M. Quester, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391 (2007).

This article discusses the judiciary's historical unwillingness to enforce legislation capable of providing recourse for women who have suffered from

spousal abuse. The courts have interpreted laws narrowly, and ignored the legislature's intent when dealing with spousal abuse, maintaining a trend in the courts dating back to the doctrine of coverture, when husbands exercised power of their wives through violence. In *Town of Castle Rock v. Gonzales* for example, the Supreme Court held that the State has little or no responsibility in protecting women from abuse, even when mandated by court order. The author argues that the court ignored the clear intent of the legislature because of its own policy concerns, thereby preventing the victims of domestic abuse from using a legal remedy. In conclusion, the author argues that the legal system has still not provided victims of domestic abuse with a meaningful remedy and *Caste Rock* serves as an example for why more affirmative efforts need to be made by all three branches of government to promote social change in the area of domestic violence and enforcement of legislation without questioning by courts.

Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113 n.3 (2007).

This Note argues that current approaches to disarming batterers are ineffective and leave women in danger. At the state level, gun laws banning ownership by batterers are either non-existent or difficult to enforce. The federal government's recent attempts to hold states accountable for gun violence against women are inadequate because they do not explain how batterers must be disarmed. Congress can amend federal laws to include financial incentives to states that enact federal gun bans as state statutes for a consistent national approach for disarming batterers. Finally, Congress can require states to report information about batterers to federal law enforcement.

Nat Stern & Karen Oehme, *Increasing Safety for Battered Women and Their Children: Creating a Privilege for Supervised Visitation Intake Records*, 41 U. RICH. L. REV. 499 n.2 (2007).

In cases of domestic violence where children are involved, the abusive spouse is usually granted visitation rights. Because of the potential dangers involved in scheduled visitation sessions, most states now have supervised visitation centers in an effort to ensure the safety of both the children and the victim spouse. Upon the first visit to a center, the victim spouse must provide basic intake information ranging from her name and address to the details of the abuse she has suffered. The information provided is not confidential, and this lack of confidentiality can make public information which may put the victim or her children in danger of retaliation by the abuser. The author argues for the creation of a statutory privilege for intake information at visitation centers which would serve both to protect the parties

involved in the visitation sessions and enhance the utility of the relationship between the centers and the battered spouses.

Jennifer Robbins, Note, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature,* 16 TEX. J. WOMEN & L. 129 (2006).

This note examines the relationship between domestic violence and cruelty to animals; since in Texas, as in other states, pets are regarded as personal property, only under certain circumstances is cruelty to or even killing pets regarded as a punishable offense. The author shows how many domestic abusers have used the torture and maiming of animals, especially their spouses' and children's pets, as a means of control and psychological torture in typical domestic violence scenarios. Changes to Texas law are recommended, among them the inclusion of animals in protective orders and the inclusion of non-physical abuse as entitling a petitioner to an order. The author points out that recent Texas case law interprets the need for animal control officers to apply for a warrant for the seizure of an animal that is being cruelly treated as discretionary, and argues that peace officers and Child Protective Services agents should also be able to seize animals at the first sign of abuse, even without a warrant. Finally, agencies devoted to animal welfare and those concerned with domestic violence need to work together by sharing information, training animal control officers to recognize and report child and partner abuse, and by utilizing animal shelters to provide care for pets so that victims of abuse do not have to fear for their pets when they seek help for themselves.

Myrna Dawson, *Intimacy and Violence: Exploring the Role of Victim-Defendant Relationship in Criminal Law*, 96 J. CRIM. L. & CRIMINOLOGY 1417 n.4 (2006).

The author argues that due to various assumptions and beliefs held by criminal justice officials, courts treat incidents of domestic violence between a victim and a defendant in an intimate relationship more leniently than occurrences of violence where the victim and the defendant have a more distant relationship. The author examines the perspectives about intimate violence around three focal concerns: (1) defendant culpability; (2) protection of the public; (3) practical constraints of the criminal justice system. The author posits that while an array of legislation has been passed recently in response to the court's tendency to treat the different forms of domestic violence differently—i.e., intimate violence and violence between a stranger and the victim—the common assumption that the criminal justice system treats intimate violence more leniently remains. Through this discussion of the current perspectives on intimate violence, as well as an examination of assumptions held by officials in the criminal justice system—such

as a person who commits an act of violence in an intimate relationship is likely to otherwise be a peaceful individual—the author argues that the criminal justice system's leniency in intimate violence cases may be justified.

Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39 (2007).

This article discusses difficulties of the American legal system in the realm of domestic violence, especially in regard to the effect of protection orders on the child of a domestic violence victim. Advocates and policymakers are faced with conflicting principles as to what the appropriate legal response should be when a court has a domestic violence case before it. States have adopted statutes authorizing courts to enter civil protection orders (CPOs) in order to protect women from batterers; CPOs are fairly easy to obtain, yet harder to get vacated due to public policy reasons. Other than public policy, there is a lack of criteria for a judge to use in analyzing a victim's motion to vacate her order. When confronted with a victim's motion to vacate her CPO, judges may be influenced by their desire to be safe rather than sorry; but it is imperative that judges listen to the victim's wishes, because greater risks may be posed if the judge does not do so, such as possible endangerment of the victim and her child.

EDUCATION

Debra Moss Curtis, *Teach The Children Well: Incorporating Cultural Literacy Into The Law School Learning Process*, 37 CUMB. L. REV. 177 (2007).

Law students are constantly tested on their analysis of legal concepts which often calls on their prior contextual knowledge. This article addresses the question of "How responsible are law professors for their students' general background knowledge?" Cultural literacy, often defined as the experience and understanding needed to become educated, is directly related to how law students succeed in law school. Law professors often plow through cases without explaining the cultural or social background of the facts, leaving law students bewildered by foreign concepts. The author suggests alternatives to the case method of teaching, including skills based teaching and context teaching where the case is thought about in a more general sense as opposed to just the facts and the legal analysis.

Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707 (2007).

Some public schools seek to make race-conscious school assignment decisions or to teach racial literacy. The Supreme Court strictly scrutinizes such decisions and presumes them to be invalid under the Equal Protection Clause, unless the school establishes that the race-based treatment is "narrowly tailored to achieve a compelling interest." The author however takes a difference stance, emphasizing that race-conscious school assignments and racial literacy are beneficial to students and the Supreme Court has in fact recognized the benefits. The author concludes that these race-conscious decisions should satisfy the Supreme Court's strict equal protection scrutiny, but implores courts to defer to the judgment of local educators on these matters and to recognize that black and white students are not "alike" in their educational opportunities.

William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why it Matters*, 56 EMORY L. J. 545 (2007).

Over the past twenty years, education policy and rhetoric has shifted from a focus on providing equal educational opportunities to providing "adequate" education to all children, regardless of the economic inequalities between schools or students. Recent focus on "adequacy" has shifted attention away from equity and attention on the neediest students to "one-size-fits-all" standards-based policies aimed at ensuring "excellence," or basic "proficiency" among all students. The authors argue that while this policy shift to adequacy offers the possibility of improving students' performance across the board, this type of accountability may actually exacerbate inequality in the long term since it provides no mechanism for ensuring "vertical equity," or in other words, that educational resources are targeted toward the neediest students. The authors posit that education is a "positional good," wherein the value of education attained by those at the bottom is reduced as those at the top gain more education. The authors advocate that education reformers endorse equality over adequacy in shaping education reform in order to ensure that focus remains on preventing inequalities, even where a threshold level of proficiency has been attained.

Harry Hutchinson, *Shaming Kindergarteners? Channeling Dred Scott? Freedom Of Expression Rights in Public Schools*, 56 CATH. U.L. REV. 361 (2007).

There has been a recent push to remove all religious references from the public sphere. This attempt to protect society from religion has spread all the way

to elementary school classrooms, where children are often reprimanded for something as simple as drawing a picture with a religious theme. The author posits that this trend developed to ensure the strength of the liberal belief that citizens should focus on their own needs rather than what is best for the society as a whole. Because religious thought tends to be focused on conveying the exact opposite message, religious references threaten this secular belief. The author argues that religion is being vilified in an attempt to ensure a unified liberal society that is not divided by debates over whether citizens should be motivated by their own self-interest or a desire to contribute to the common good.

Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, are Bad Public Policy, and Should be Overturned*, 21 WIS. WOMEN'S L. J. 291 (2006).

Current abstinence-only federally funded programs are ineffective against preventing teen pregnancy, the spreading of STD's, and the spread of HIV. Therefore, the author argues that a more balanced method of comprehensive sex education, including contraception and abstinence is not only favored by public opinion, but would eliminate many of the problems linked to the abstinence-only approach. Such problems consist of attempting to control sexual behavior through guilt, shame, and fear; teaching medically inaccurate information; using religious messages to prevent students from having sex; and marginalization of gay and lesbian students because who are unable to have sex because they cannot marry. Furthermore, the author outlines actions that should be taken by those who believe the abstinence-only programs should be overturned. In conclusion, the author asks special interest groups, the government, and Congress to work together to overturn these programs and to begin funding comprehensive sex education.

Jason Nance, *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*, 36 J.L. & EDUC. 33 (2007).

To protect children from sexual abuse by school employees, every state imposes liability on a school district if a child sexually abused by a school employee reports the abuse to a school official and the school official fails to notify the proper authorities. Ohio is the only state however, to extend this cause of action to a third party student victim—a second student who has been sexually abused by a school employee after school officials failed to report the initial incident of abuse of the first child by the same employee. Third party student victims have a cause of action under several federal statutes, but the author argues that Ohio's approach offers greater protection to students because it employs a less stringent requirement about what the abused student must prove in order to make a successful claim. Because it is easier to hold a school district liable under the Ohio approach,

however, the author is concerned that school officials will report all accusations regardless of whether or not they have merit simply to protect themselves from potential liability. To avoid some of the costs that may be associated with the Ohio approach, the author suggests that school officials be trained by the proper state authorities on how to make an appropriate investigation into child abuse allegations.

Brook Bristow, Note, *King Solomon: Did the Supreme Court Make a Wise Decision in Upholding the Solomon Amendment in* Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*?*, 58 MERCER L. REV. 815 (2007).

The Solomon Amendment, enacted in 1994 as a response to the widespread banning of military recruiters from law schools that felt the military's "Don't ask, Don't tell" policy discriminated on the basis of sexual orientation, was upheld by the 2006 case, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (FAIR). While the 1994 Solomon Amendment prohibited schools that banned military recruiters on their campuses from receiving Department of Defense funding, the 2004 amendment prohibited *any* federal funding from going to institutions that did not afford equal process to military recruiters. The Supreme Court rejected FAIR's claim that the recent revision of the Solomon Amendment violated their First Amendment rights to protection against government compelled expressive conduct. The court also found no compelled speech or violation of freedom of association because the schools were not required to spout government rhetoric nor were they prohibited from banding together to protest the military and its message. These narrow interpretations of First Amendment rights may have lasting repercussions on the rights of Americans as these limited definitions of what constitutes expressive conduct, compelled speech, and freedom of association serve to limit the scope of the First Amendment.

Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity On and In the Court*, 21 WIS. WOMEN'S L.J. 175 (2006).

Title IX of the Education Amendments of 1972, enacted to prevent all types of gender discrimination in education programs, has had a significant impact on high school athletics. A non-uniform interpretation of the act has spurred the Director of Health, Welfare and Education, the Office for Civil Rights, and the Department of Education to establish and clarify criteria for determining a violation of Title IX. Federal courts, who have also played a large part in interpreting the act, found disparities in scheduling, athletic opportunities, and equipment to violate Title IX. The Supreme Court decision in *Jackson v. Birmingham*, written by Justice O'Connor, carved out a private right of action for individuals who report Title IX violations and are consequently victims of retaliation. Although the Supreme Court has generally favored gender equality, the recent additions of

Justices Alito and Roberts combined with the loss of Justice O'Connor signals a possible change in future interpretations of the statute, as both Justices Alito and Roberts have a history of attempting to limit the scope of Title IX.

Kristen L. Safier, *Improving Teacher Quality in Ohio: The Limitations of the Highly Qualified Teacher Provision of the No Child Left Behind Act of 2001*, 36 J.L. & EDUC. 65 (2007).

The article examines the implementation by the State of Ohio of the No Child Left Behind Act of 2001 (NCLB), mandating that each district receiving federal funds ensure that all teachers are "highly qualified." Empirical analysis using district-level data shows that urban schools are less likely than rural schools to have teachers considered "highly qualified" under the NCLB. At the school-level, using data on the Southwestern Ohio region, middle and high school students are less likely than elementary school students to be taught by a "highly qualified" teacher. The region's data on school expenditures show that increasing teacher salaries and staff support expenditures, such as professional development programs, does not tend to increase the percentage of class hours taught by highly qualified teachers. The author presses the need for further research using a larger data set, but advises as an initial matter that the federal and local policy-makers give particular attention to the urban middle and high schools and possibly reallocate resources away from teacher salaries and staff support expenses.

Elizabeth R. Schiltz, *Motherhood and the Mission: What Catholic Law Schools Could Learn from Harvard About Women*, 56 CATH. U. L. REV. 405 (2007).

The Church and the secular feminists alike recognize the importance of balancing family and work. However, our legal structure and the workplace do not provide enough support for women to both raise children and contribute to work in the public sphere. Addressing academia as both her audience and subject matter, the author surveys the status of women participation in higher education teaching faculty and notes that current and prospective mothers are disadvantaged in securing tenure because of its unrealistic time commitment and the lack of family-friendly policies. Pointing to the empirical evidence that Catholic law schools are no more reformed than non-Catholic law schools in adopting broad measures of support for motherhood, the author reminds the audience that Catholic higher education institutions have a particular mission to reconcile the tension between the legitimate family duties and the expectation for quasi-total commitment to work in high-powered workplaces, as illuminated by the former President of Harvard University. The author challenges Catholic universities to be at the forefront of experimenting with various family-friendly policies such as temporary teaching relief, on-job child care services, and part-time tenure track options.

EMPLOYMENT DISCRIMINATION

Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007).

The author observes that workplace discrimination claims are at the juncture of tort law and civil rights law and explores whether, and to what extent, tort law should import discrimination and equality principles embedded in civil rights law to provide for tort remedy. More specifically, this article considers whether workplace harassment claims involving neither economic loss nor physical contact may amount to "extreme and outrageous" conduct redressable under the intentional infliction of emotional distress tort theory. Currently, courts are divided on how to treat intentional infliction claims involving workplace harassment and employment discrimination. Twelve states treat tort claims as pre-empted by alternative statutory remedies while others consider tort remedy only if no other legal theory can redress the injury. Since workplace discrimination is now widely recognized as undisputable harm to its victims, the author opines that tort law should provide private remedy to victims of "outrageous" discrimination and reinforce civil rights protection of workplace equality.

FAMILY

Gaines B. Brake, Comment, *Ethical Issues in Dealing with Families of Elderly Clients*, 30 J. LEGAL PROF. 103 (2005).

Attorneys practicing in the area of elder law have a special ethical obligation which includes identifying the elderly client and spotting any potential conflicts of interest between the client and his family members. When family members help an elderly relative seek legal assistance, the attorney must clarify who is the decision-maker and what the relationship is between the attorney and each family member involved. Elder law presents attorneys with unique ethical dilemmas involving situations including will-drafting when a beneficiary of the will also wants to pay for the attorney's fees. Another challenge in elder law is the need to anticipate any potential conflicts of interest in order to determine whether multiple representation may be appropriate. Ultimately, the elder law attorney's goal should be to provide representation that will preserve the elderly client's autonomy while allowing input from the family members in the decision-making process, while maintaining his ethical obligations.

Nat Stern & Karen Oehme, Note, *Defending Neutrality in Supervised Visitation to Preserve a Crucial Family Court Service,* 35 SW. U.L. REV. 37 (2005).

Supervised visitation in family court cases provides a setting for contact between a parent who has been accused of harmful misconduct and children in the presence of a third person responsible for observing and ensuring the safety of those involved. The importance of neutrality of providers is strongly reaffirmed in the face of a growing tendency to tolerate or even encourage a counterproductive, even dangerous, partisanship among these court servants that often stems from their lack of legal training. Women's advocates have often led the attack on neutrality, feeling that abusing fathers are often favored in court proceedings and also take advantage of the neutrality principle to continue their malign manipulation of the family situation. But a visitation program will lose its effectiveness and safety if it favors one party over another: the court will be unable to credit reports generated by the visits and the disfavored party will have a reason not to cooperate with court supervision. The authors note that the neutrality principle does not entail failure to draw conclusions from observed behavior or to restrain harmful conduct, or failure to make recommendations to promote impartiality, like a neutral setting and the avoidance of conflicts of interest.

GENDER BIAS

Cynthia Alkon, *Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak About the Barriers of Entry into the Field,* 6 APPALACHIAN J. L. 195 (2007).

While women comprise approximately 30% of the legal profession, the National Academy of Arbitrators (NAA) is only 15% female. Surveys given to female NAA members in 2002 and 2006 show that the NAA is working to address the problem, while the 2006 results show that women now view the field as being more open to them. The survey respondents offered several suggestions on how to bring more women into the arbitration profession, such as more monitoring, more training programs, more female NAA speakers at conferences, further NAA studies, and altering membership criteria. Many respondents also felt that females are perceived as being less competent than males in this area. The author concludes that the 2006 survey results are demonstrative of a greater number of opportunities for female arbitrators.

I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203 (2006).

The author takes a "highly personal" look at the iconography behind Justitia, the blindfolded, female representation of justice that appears throughout our legal system. The essay examines the possible symbolism behind Justitia's blindfold, particularly in a society where race plays such a significant, pervasive role. Looking at Justitia through the perspective of a "black gaze," the author raises questions about the effects that a blindfolded, white female icon has on the participants in the justice system. Through this essay, the author hopes to open up dialogue regarding the "interplay between art and law" and suggests that it is perhaps time to remove sex and race from our representation of justice. By changing the way we depict justice, the author posits, the way we see our justice system may also change.

Andrew Gilden, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 MICH. J. GENDER & L. 237 (2007).

Prior to Euro-American assimilation and subordination, it was common in Native American culture for tribes to recognize a gender role, referred to as berdache, and defined by the acquisition of the socioeconomic role of the opposite sex. The article begins by examining the ways in which Euro-American domination resulted in the demise of this important tradition. Specifically, the author notes that traditional berdachism was incompatible with colonial rule's strict notions of sex and gender. More recently, as Native American tribes gain greater political and legal sovereignty, they have tried to recapture previously lost cultural traditions and in particular, there has been a reemergence of the berdache tradition within the Navajo court system in administering contemporary jurisprudence. Nevertheless, there are substantial obstacles to a true reemergence of traditional gender diversity, such as scarcity of employment, prevalence of domestic violence and rape on contemporary reservations, as well as the continuing influence of American culture on tribal life because several generations of Native Americans have been alienated from tribal society due to the use of American boarding schools.

Kathleen O'Connor Ives, Note, *Out of the Loop: Female Federal District Court Candidates Disadvantaged by a Nomination Process Imbued with Favoritism*, 16 TEXAS J. WOMEN & L. 103 (2006).

Although 35% of law school graduates in 1980 were women, women are drastically underrepresented in the federal district courts, composing only 23% of active federal district court judges. District court nomination hearings are largely

ceremonial, involving very little questioning and concluding quickly, with Senators playing a large role in initial candidate selection. The author analyzes a sample of nomination hearing transcripts and finds that women's and men's testimony were largely similar in tenor and content, and that they were treated equally during the nomination hearings. She posits that the personal connections between male senators and male judicial nominees "edge out" qualified female candidates from getting nominated in the first place. The author suggests five possible strategies to remedy this nomination process which currently favors male candidates: (1) change the seniority system on the Senate Judiciary committee; (2) elect more women to the U.S. Senate; (3) have women strengthen ties with their local politicians; (4) have more women participate in organizations that recommend nominees; and (5) have a future president put policies in place to ensure more women and racially diverse candidates get nominated.

Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207 (2007).

Since its introduction in 1968, sex testing at the Olympic Games has been a source of controversy. Sex verification tests were originally instituted to prevent Olympic competitors from gaining an unfair advantage over one another. However, as notions of gender have extended beyond one's physical characteristics, the International Olympic Committee now uses drug testing as a means of determining the sex of its participants. This article discusses the history and development of sex and drug testing and makes the argument that both are linked. In addition, the author examines the current Code and argues that hormone testing protocols are merely an extension of the discriminatory sex test. The author concludes that without recognizing the role sex hormones play in the proper biological and social context, the International Olympic Committee cannot maintain a fair and equal anti-doping policy.

Dianne Otto, *A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325*, 13 MICH. J. GENDER & L. 113 (2006).

In 2000, the UN Security Council adopted Resolution 1325 to address the unique impact of armed conflicts on women and to create a broader role for women in the global peace process. Using the examples of Afghanistan and Timor-Leste, the author examines the Resolution's slow progress toward its stated goals and notes two main problems as the cause. First, the enduring stereotype of women as "pacifying" agents may translate in some instances into the fear that women will betray a society's weakness, thus hindering the negotiation process. Second, the Resolution's deployment of women as a biological category may serve to legitimate rather than disrupt gender hierarchies. The author suggests that if the

Resolution is to succeed, the presence of women in the global peace process must be an "empowered" one, and must resist the misconception that women represent only a narrow category of self interests.

HEALTH

David Burnett, Note, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic,* 14 VA. J. SOC. POL'Y & L. 357 (2007).

Obesity, associated with a whole range of fatal illnesses as well as psychological and social harms, has been recognized as possibly the leading cause of preventable death in the United States, and lawsuits against fast-food companies have been regarded as one way to address the problem. The author views the obesity epidemic as a public-health problem that must be addressed by a grand coalition, including all levels of government, employers, insurers, health-care providers, and food companies, to educate consumers, require restaurants to list ingredients, encourage food companies to produce and schools to serve healthier food, and promote exercise and better diet among individuals. Although limited suits regarding issues such as false advertising have succeeded, no lawsuit directly blaming a restaurant for consumer obesity has yet been successful, and problems of proof will continue to foreclose success for this type of litigation. Nevertheless, the author argues that the issues should be able to be heard in court, and he points to good results from the publicity surrounding such lawsuits, as when McDonald's decided to improve the healthfulness of their offerings and the FDA passed new regulations requiring that food labels contain figures for artery-clogging trans-fat content. The author also analyzes typical arguments blaming personal choices for the problem, showing that, as with smoking, such choices are conditioned by many factors beyond the individual's control, and urging greater national focus on solutions to a serious national social and political problem.

Catherine Chou, *Insuring Medically Uninsurable Individuals: An Examination of Different State Approaches*, 27 J. LEGAL MED. 443 n.4 (2006).

Millions of Americans are unable to acquire private health insurance because they are considered to be uninsurable due to a preexisting health problem. In an effort to provide coverage to these people, Congress passed the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which requires state governments to provide guaranteed health coverage for people unable to obtain private insurance. This article sets out the four types of programs that states have adopted in response to HIPAA, and evaluates the advantages and disadvantages of each. The four approaches are state risk pools, open enrollment periods,

guaranteed-issue community rated policies, and guaranteed-issue non-community rated policies. The author concludes that state risk pools are most desirable because they effectively absorb the costs of insuring the unhealthy, while community rated policies are least desirable because they place the burden of insuring the uninsurable on the healthy citizens of the state.

Max Dehn, *How it Works: Sobriety Sentencing, the Constitution, and Alcoholics Anonymous*, 10 MICH. ST. U. J. MED. & L. 255 n.1 (2006).

Increasingly, courts are mandating defendant participation in Alcoholics Anonymous (AA) programs in the sentencing of alcohol-related offenses. The author argues that judges must understand the nature, history, effectiveness, and religiosity of AA, that they seek to avoid violating the defendants' constitutional rights under the establishment clause when they mandate participation in AA, and that they do not look to AA as the only possible treatment or program for such defendants. Using cases in Northeastern Ohio, Dehn outlines the history, philosophies, structures, composition, and methods of AA, evaluating various opinions on its effectiveness overall and specifically court-mandated attendees. Dehn then surveys the Supreme Court's evolving definitions of religion, applying current tests to conclude that while AA is not a religion in and of itself, it uses religious practices and methods with which individuals cannot be compelled to participate. Finally, to determine whether mandating AA attendance violates the Establishment Clause, Dehn outlines and applies the coercion test, the Lemon test, and the endorsement test to conclude that, at minimum, mandatory AA attendance does not violate the Constitution if the court offers non-religious, alternative programs, does not require affirmation of AA principles, and does not require defendants to attend AA meetings in the long term.

Tamara Jeanne Dodge, *Raging Hormones?: The Legal Obstacles and Policy Ramifications to Allowing Medical Monitoring Remedies in Hormone Replacement Therapy Suits*, 21 WIS. WOMEN'S L.J. 263 (2006).

In 2002, approximately thirty-eight percent of postmenopausal women were undergoing hormone replacement therapy (HRT) with many taking the drug Prempro. The Women's Health Initiative (WHI) conducted a study and reported that HRT, and Prempro in particular, could cause a variety of serious, adverse health effects. This article focuses on the suits for medical monitoring that HRT users have been filing against HRT makers. Medical monitoring claims seek payment of diagnostic testing in compensation for exposure to a hazardous substance caused by defendant's negligence. The author argues that claims for medical monitoring may be detrimental to HRT users, because their claims are based on the WHI study which is of questionable validity, because such suits may bankrupt the defendants before all plaintiffs have recovered, and because courts

may apply claim preclusion which will estop plaintiffs from filing suits if they develop actual diseases.

Orianne Yin Dutka, *Turning a Weapon into a Shield: Using the Law to Protect People Living with HAV/AIDS in China from Discrimination*, 38 COLUM. HUM. RTS. L. REV. 421 (2007).

Individuals living with HIV/AIDS in China face tremendous challenges in the form of discriminatory treatment by the government, stigma placed on them by society, and the lack of adequate educational resources. Human rights organizations estimate that 1.5 million Chinese have HIV/AIDS and that by 2010 that number may balloon to 15 million, which is especially troubling given the Chinese government's refusal to address HIV/AIDS issues since many of those afflicted are homosexuals, drug users, and sex workers. The author argues that current laws and international agreements regarding HIV/AIDS do little to combat discrimination by the government or private individuals. The author suggests that more effective methods for fighting discrimination must be put in place, such as the adoption of legislation which would make HIV/AIDS a human rights issue as opposed to a health issue, though the author believes that such a law would probably never be passed. The author also recommends the implementation of an institution similar to Hong Kong's Equal Opportunity Commission to root out discriminatory practices at both the public and private level, the use of education and the law to correct stigma surrounding HIV/AIDS in the general public, and the education of attorneys and judges about HIV/AIDS law so as to empower them to recognize and strike down discriminatory practices.

Alicia Ouellette, *Disability and the End of Life*, 85 OR. L. REV. 123 (2006).

Activists and scholars in the disability rights community argue that courts and legislatures should prevent surrogates from denying disabled patients nutrition and hydration, as well as other end-of-life medical treatment, because denying this care amounts to a message that a disabled life is not one worth living. The author argues that the disability community's crusade is dangerous because it is paternalistic, implying that there is one single answer to end-of-life decision-making, rather than providing opportunities for autonomous decision-making and respecting individual values. The author argues that the disability community's theories are flawed because they equate dying with disability in describing a persistent vegetative state as a form of disability that merits life. The author poses challenges to both sides of the current debate: she asks disability rights activists to reconsider the identification of persistent vegetative state as a disability, where social support is unavailable and life may no longer be meaningful. She asks scholars, judges, and policymakers who support autonomy to stop immediately

labeling a refusal to continue treatment with devaluation of life, and instead to focus on informed consent and patient autonomy.

HUMAN RIGHTS

Elizabeth M. Bruch, *Whose Law is it Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669 (2006).

In a series of recent cases, the Supreme Court has invoked international human rights law as a basis for settling questions of fundamental rights in the context of privacy. However, the incorporation of international law in the United States is controversial, raising issues regarding the legitimacy of the Supreme Court's use of such an approach. In large part, the controversy stems from the fear that international norms will be imposed on Americans, and the author examines the role that "outsiders" should play in the development of domestic law. Specifically, the author focuses on the "internal discourse - cross-cultural dialogue" model as it is used by Professor An-Naim, which suggests that international human rights standards of the west should be reconciled with Islamic law. The author extends An-Naim's model, concluding that if Americans accept values of the global community, then laws reflecting these values are more likely to be executed, both internationally and domestically.

Annie Danino, *Dodging the Issue of Physician Assisted Suicide: The Supreme Court's Likely Response in Gonzalez v. Oregon*, 10 MICH. ST. J. MED. & LAW 299 (2006).

In 1994, Oregon passed the Death with Dignity Act, which legalized physician assisted suicide (PAS). *Gonzales v. Oregon*, an upcoming Supreme Court case, is set to test the constitutionality of the act and determine the existence of a right to die. In recent years, the Court has rejected a constitutional right to die based on substantive reasons. However, the author argues that based on previous decisions, individual rights under the Constitution, and the potential alliances of the court on this matter—particularly Justices O'Connor, Breyer and Stephens, who would most likely recognize a liberty interest in the right to die— the Court will most likely uphold the Oregon statute. The author also notes the death of Chief Justice Rehnquist and the departure of Justice O'Connor as reasons for causing a change in the Court's decision. In addition, the author also recognizes that increased media coverage of the right to die, such as the Terri Schiavo incident, might also influence the Court's decision. Ultimately, the author believes that the Court will dismiss *Gonzalez v. Oregon* on administrative grounds and posits that such a "result oriented" approach would ignore the substantial constitutional

questions concerning the right to die in favor of the Justices' own ideological beliefs.

Margaret E. McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007).

Although the United States has always been governed and organized somewhat differently than other countries—a phenomenon known as exceptionalism—this separation from other countries has deepened in recent years as the United States has begun to reject many of its international ties. The wisdom of the choice to separate this country from the international community has, in many instances, been left for courts to decide. One example of this is the *Sanchez-Llamas* decision, where, when asked to determine whether a treaty that the U.S. was a part of created judicial enforceability of individual rights, the court explicitly rejected the International Court of Justice's interpretation that the treaty did in fact allow judicial enforceability of individual rights. Amidst the controversy surrounding the wisdom of completely abrogating international standards, the author argues that a middle-of-the-road approach—one where we accept international standards that increase protection of human rights but reject standards that do not afford greater protection to citizens than our own standards—is most appropriate in this situation. Although the transition away from pure exceptionalism will not come easily, the author is confident that because the United States benefits from participation in an international system, the country will gradually become more accepting of moving toward a middle-of-the-road approach.

Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).

This article discusses legal recognition of the freedom of dress, a right defined as the clothing, hair, jewelry, makeup, tattoo, and piercing choices of an individual. The author believes that freedom of dress should be a new separate liberty and explains the problem of most legal scholarship addressing the issue—treating the freedom of dress as a problem of antidiscrimination law. Instead, the author argues for a rights-based approach. Freedom of dress is important because it ranges from a person's ability to create a personal identity, to religious and political beliefs, and even to choice of job and friends. The author explores the freedom of dress in four different legal contexts, namely the private workplace, the street or public square, public schools, and prisons to illustrate the importance of balancing individual appearance choices against other interests. The author concludes that freedom of dress should be considered a right, rather then as an anti-discrimination

problem because of its importance in the self-determination of how a person defines and restructures their identity.

IMMIGRATION

Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113 (2007).

In response to the attacks of September 11, 2002, the Office of Legal Counsel for the Attorney General issued a memorandum which empowered states to make arrests for criminal and civil immigration violations, which departed from the 1996 standard of only allowing states to make arrests for criminal immigration violations. This new standard led to controversy because of the potential for civil rights violations including racial profiling by state and local law enforcement due to lack of training in the field of immigration law. However, the Immigration and Nationality Act allows states to receive immigration law training if they enter into a Memorandum of Agreement (MOA) with the Department of Defense. The author claims that despite the use of MOA's, racial profiling will continue to occur at the state and local level because they do not participate in the MOA program. To avoid racial profiling and other civil rights violations, MOA's should be used in the prisons and jails where racial profiling is less likely to occur because inmate information is gathered from fingerprints and date of birth.

Jennifer Gordon, R. A. Lenhardt, *New Dimensions of Citizenship: Contribution: Citizenship Talk: Bridging The Gap Between Immigration And Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007).

The idea of citizenship has been analyzed through various theories and frameworks that would greatly benefit from interaction with each other. The authors offer analysis of citizenship through the Critical Race Theory, which discusses the United States failure to offer equity to citizens of color, and the perspective of immigration theorists, who analyze citizenship in terms of international migration and globalization. Exploring citizenship in various ways such as governmental policy and human expression will help to bridge the gap between the Race and Immigration theorists. With the convergence of these two theories, the study of citizenship, not as formal classification, but as a sense of belonging, will ultimately be enhanced.

Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?* 14 VA. J. SOC. POL'Y & L. 119 (2007).

Women who claim gender asylum in the United States face much opposition, despite the recent trend of allowing these claims. Musalo illuminates this opposition with the example of the continuing uncertainty in the decade-long case of Rodi Alvarado, a Guatemalan woman claiming asylum after fleeing domestic violence and a society that is permissive of it. Using the positions of the United Nations High Commissioner for Refugees, Musalo refutes the argument that the Refugee Convention and Protocol was not meant to extend protection to women suffering gender-persecution because women's persecution arises from cultural norms, because the violations are privately inflicted, and because gender is not a convention ground. Musalo argues that allowing gender asylum will not result in floodgates by citing the Canadian experience wherein there was a documented a decrease in such claims after allowing them, explaining that women facing domestic violence, who could make such claims are frequently unable to leave their families, communities, and abusers to come to the U.S. She also calls attention to the U.S.'s current anti-immigrant attitude which may be driving some people's fear of a flood of women claiming asylum. Finally, Musalo explores the merits and American history of the practice of treating the root causes of asylum-seekers claims as an alternative, or in addition to granting asylum, citing particularly President Clinton's policies toward Haiti.

Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. 387 (2007).

This note explains the role of the Attorney General in improving the lives of immigrants, highlights the positive impacts state-sponsored immigration-related initiatives can have on immigrant experiences, and explains how these initiatives can extend beyond state and federal borders. The examples of state regulation of Notario, housing, and credit card fraud victimizing immigrants, as well as approaches to granting illegal immigrants access to in-state tuition at public universities demonstrate ways in which state attorney generals may have positive impacts on immigrants' experiences. Communication between attorney generals, particularly through the Attorney Generals Border Conference (AGBC) is offered as a means by which such policies may proliferate. Thompson concludes that the Attorney General must balance the interference with the control of immigration by the federal government with the states' public interests, offering that while the former may control who may enter the country, the latter is increasingly defining the experiences of immigrants.

Milton Vickerman, *Post 1965 Immigration and Assimilation: A Response to Randy Capps*, 14 VA. J. SOC. POL'Y & L. 206 (2007).

The author posits that what it means to be an "American" is shaped by both traditional and multicultural influences resulting in conflict between an older vision of America and one being born. Although the 1996 immigration acts and laws passed following the September 11th terrorist attacks embody anti-immigrant sentiments, American immigration policy has been significantly influenced by the liberal sentiments of the 1965 Immigration and Nationality Act. The author's analysis begins by summarizing the primary demographic characteristics of this post-1960s period illustrated by Dr. Capps. Specifically, the author points out that Dr. Capps cited the composition of the post-1965 immigrant stream and its sheer magnitude as two of the most important characteristics of modern-day immigration to America. The author concludes that unlike so-called "straight –line" assimilation, second generation immigrants face multiple outcomes.

The Center for Children, Families and the Law Interdisciplinary Conference, *"Welcome to America: Immigration, Families and the Law": US Immigrant Workers and Families: Demographics, Labor Market Participation, and Children's Education*, 14 VA. J. SOC. POL'Y & L. 170 (2007).

The United States is currently undergoing one of the largest waves of immigration in its history. As a result of this inundation, the American economy has become reliant on the ever growing population of foreign-born laborers who occupy the lower paying spectrum of the workforce. However, immigrants also present challenges to the government on local, state and federal levels, particularly in the arenas of government services and education. This has resulted in a deadlock on the federal level, leading to state and local authorities pursuing remedies that often conflict with each other. In conclusion, the author argues that the divergence between state and local responses is likely to continue as pressure mounts on Congress to overhaul the nation's immigration system.

INTERNATIONAL LAW

Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VT. L. REV. 565 (2006).

This article examines whether, and to what extent, international law protects the diversity of indigenous cultures and enables the survival of indigenous peoples. The author charts the emergence of indigenous peoples in the international legal arena and describes the existing protections afforded them under various human rights conventions and specific instruments that detail "obligations on the

protection of biological or cultural diversity or on public participation." However, the degree of protection actually conveyed by these piece-meal agreements depends largely on the "willingness, ability, and policies of the relevant judicial (or quasi-judicial) bodies." For there to be enhanced protection and elevation of the legal status of indigenous peoples in the long run, the author advocates the creation of a "global legal framework" that recognizes the synergistic relationship between the rights of indigenous peoples to life, land, natural resources, and environmental protection.

Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT'L. L.J. 155 (2006).

Sovereignty is defined in this article as territorial independence subject only to the legal constraints of international law. Asking whether the sovereignty of indigenous peoples exists in international law, Lenzerini argues that though many states recognize or grant some sovereignty rights to indigenous people, there is no foundation for sovereignty claims and State-obligations of indigenous people under customary international law. Recent developments, however, such as the Human Rights Committee adopting the U.N. Draft Declaration on the Rights of Indigenous Peoples, which expressly recognizes the right to self-determination of indigenous peoples, suggests a potential change in this practice. While this article determines that there is no model of State delegation of indigenous sovereignty in present international law, it also finds that indigenous peoples are a subject of international law with rights and duties, to whom States owe a limited recognition of sovereign power. This sovereignty then consists of, at minimum, the right to live in and maintain ownership of traditional lands without external influence, the right to identity and culture, the right to self-government of internal affairs, and the right of effective participation in decisions which affect them. Lenzerini concludes that practices have developed or are developing toward a provision of customary law that binds States to grant a degree of sovereignty to indigenous peoples, and that such development represents a positive step in the development of a just, fair, and pluralistic international legal system.

Katherine Sohr, *Difficulties Implementing the Hague Convention on the Protection of children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559 (2006).

This article discusses current international adoption laws in Guatemala and the changes proposed by Ortega's Law in light of the requirements set out by the Hague Convention. The current Guatemalan international adoption laws follow a notarial process where a Guatemalan attorney deals with both birth parents and adoptive families, thus creating a potential for conflict of interest and corruption.

The proposed Ortega's Law seeks to replace the current system with a judicial one, and to largely follow the international adoption standards set out by the Hague Convention. However, the author argues that this proposed law is inadequate because it fails to allocate sufficient financial resources and lacks a realistic timeframe to implement the new system. Instead, the current notarial system should not be completely eradicated, but should gradually be improved to reflect the Hague Convention standards.

LGBT

Stefan H. Black, *A Step Forward: Lesbian Parentage after Elisa B. v. Superior Court*, 17 GEO. MASON U. CIV. RTS. L.J. 237 (2006).

In *Elisa B. v. Superior Court*, the California Supreme Court became the first high court in the nation to accord the same rights and responsibilities on lesbian co-parents as their heterosexual counterparts. The author argues that the importance of the ruling lies in its focus on the welfare of the child and that the court rightfully overturned a line of precedent refusing lesbian parents standing in parentage suits. The author examines California's parentage statutes, co-parentage precedents, and delves into the details of the case, eventually reaching the conclusion that the court should go one step further to declare lesbian co-parents "natural parents" if they satisfy provisions of California's Uniform Parentage Act. In closing, the author evaluates the standing issue faced by lesbian co-parents after *Elisa B.* and argues that since it is unclear whether the result in *Elisa B.* was mandated by the Fourteenth Amendment, this case calls for legislative action to rectify the lingering ambiguities.

Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141 (2007).

This article examines the treatment received by homosexual court users and employees, and how it is affected by the visibility of their sexual orientation. Empirical evidence of the daily experiences of sexual minorities in the court system is lacking, but the few studies that exist generally report that these individuals' experiences in court are more negative than their heterosexual counterparts. The author encourages continued examination to create a more comprehensive understanding of the treatment of these individuals. The author suggests a two-part framework for this discourse that includes examining the differing perceptions of this treatment by heterosexual and homosexual people, as well as studying the visibility of that identity at different levels of interaction with the courts.

Elaine Craig, *Trans-phobia and the Relational Constructions of Gender*, 18 HASTINGS WOMEN'S L.J. 137 (2007).

When individuals transgress gender norms, it creates uncertainty and disruption because it conflicts with the predominant social understanding of gender. As a first step to reducing oppression of those whose gender is non-conformative, the author analyzes why gender transgression is experienced by so many people as disruptive. Most societies embrace a binary construction of gender and the dominant response to any disruption of that construct is to reinforce the gender binary. The author proposes that legal reforms can help gradually change the way society thinks about gender by deemphasizing gender distinctions in situations where it is not necessary. Additionally, acknowledgement that gender is dynamic would lead to an understanding that gender is not always a static, biologically determined binary and thus, reduce discrimination against transgendered individuals because it would not only result in more legal rights, but also greater self-understanding.

Cyrille Duvert, *Private Law: Diversity Tools in Private Relationships: A French Point of View*, 30 VT. L. REV. 883 (2006).

In 1999, France enacted a law that established a new civil institution for same-sex couples comparable to the civil union in the United States. This law generated a great deal of controversy, and the author presents a number of arguments that were made both for and against its ratification. Notably, proponents for the law considered the illegality of same-sex marriage a denial of homosexuals' full citizenship rights, and adopted methods similar to those used by anti-segregationists. Groups opposed to the law, considered it to be contrary to the spirit of national unity as was established during the French Revolution, and argued that the law would create precedent for other communities to marry in their own ways, such as under Hebrew or Muslim law. Despite the enactment of the law, controversy continued to surround the issue, and supporters of same-sex marriage have resumed campaigning, considering the civil union as secondary to marriage.

Nancy Kubasek and Christy M. Glass, *A Case against the Federal Protection of Marriage Amendment*, 16 TEX. J. WOMEN & L. 1 (2006).

Over the last several years, states have addressed the same-sex marriage issue through the passage of civil union statutes granting homosexual couples rights and benefits equal to those of heterosexual couples, and through state court decisions examining claims to a right to marry. In response, Congress attempted to pass the Marriage Protection Amendment to limit marriage to heterosexual couples. The Marriage Protection Amendment seeks to exclude gay couples from marrying and prevent them from reaping economic or social benefits derived from domestic

partner statutes. The author argues that passage of such an act would deny gay couples equal protection under the law, contradict notions of state sovereignty, and violate the First Amendment and Free Exercise Clause. Moreover, passage of such an amendment would present a formidable obstacle to any future attempts at obtaining equal protection for same-sex couples, therefore it must be prevented.

Ryan Martin, Comment, *Return to Gender: Finding a Middle Ground in Sex Stereotyping Claims Involving Homosexual Plaintiffs Under Title VII*, 75 U. CIN. L. REV. 371 (2006).

Despite the general trend toward illegalizing discrimination against minority groups, courts have held that discrimination based on sexual orientation is not prohibited under Title VII, which protects employees from being discriminated against on the basis of race, religion, sex, national origin. Recently, however, some courts have begun to give legal recourse to people discriminated against based on sexual orientation on the theory that their "gender nonconforming" behavior should be protected. Analyzing courts' application of the gender nonconforming behavior doctrine, the author notes that some courts readily place all homosexuals into this category while others refuse to use this doctrine to get around the clear legislative intent not to include homosexuals in the protected class under Title VII. The author proposes a uniform standard whereby all homosexuals will be allowed to bring a claim under Title VII if they can show that they were discriminated against specifically because of gender nonconforming behavior or appearance. The author argues that until Congress fully extends protection against discrimination to homosexuals, this middle ground approach will be effective in extending protection to homosexuals while still staying true to Title VII's original intent.

Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007).

The Supreme Court's 1989 landmark decision in *Price Waterhouse v. Hopkins* has allowed transgender Americans to make significant progress in federal courts. The author contends that the logical extension of *Price Waterhouse* is to categorize employment discrimination against a transgender person as "*per se* sex discrimination" under federal employment discrimination law. This comment uses detailed examinations of the "gender-stereotyping theory" set forth in *Price Waterhouse*, as well as comparisons of pre and post-*Price Waterhouse* decisions, to respond to criticisms of the theory. While the Supreme Court has not spoken on whether transgender employees can claim protection under Title VII of the Civil Rights Act of 1964, the author believes that further reinforcement of the *Price Waterhouse* line of precedent should eventually lead the Court to utilize its gender-stereotyping theory to extend such protection.

Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007).

This Comment argues that bathroom access for transgender individuals is a vital right for the transgender community and deserves legislative attention. Bathroom access should not be based on a transgender person's biological sex, nor should employers be forced to have gender neutral bathrooms. The author discusses what constitutes being transgender under medical and psychological guidelines and describes the current state of the transgender community within the constitutional framework of equal protection under the law. There are important individual liberty implications in allowing bathroom access based on gender identity. In light of judicial reluctance to protect transgender rights, Elkind proposes that reform start at the local legislative level and should be modeled after regulatory guidelines passed in New York and San Francisco.

Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 WIS. WOMEN'S L.J. 145 (2006).

In Africa, violence against those believed to practice witchcraft is widespread. In the United States, violence against homosexuals incited by non-violent sexual advances is common. Both witchcraft and homophobia as motives for violence have historical provocation defenses under the common law, and this article asks the question, "Should individuals who voluntarily kill innocents be entitled to a self defense based upon an empirically unfounded superstitious, religious, or cultural belief?" In an attempt to answer this question, the author looks at the historical and legal roots of these defenses, as well as legislative attempts to curtail these deeply-rooted problems. The article concludes that it is unacceptable to allow cultural defenses at the expense of the lives and safety of persecuted minorities.

MARRIAGE

Jennifer A. Drobac, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007).

This article questions the continued ability of marriage to secure economic and domestic benefits for modern households, as divorce, single parent households, and nontraditional families are increasing in number. However, unmarried couples are even less likely than their wedded counterparts to attain long term success. As

an alternative to marriage, the authors propose the Universal Domestic Partnership Act (UDPA), a domestic partnership that mirrors the fiduciary aspects of business partnership law, the Universal Partnership Act. The UDPA would encourage partners to plan ex ante their domestic and economic structure, while securing the continued parentage and welfare of children and stepchildren. By providing for various partnership forms based upon partner negotiation and agreement, the authors maintain that the UDPA could provide domestic and economic benefits for the wide range of family units that comprise today's society.

Lisa R. Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & L. 45 (2006).

This article focuses on whether marital joint bank accounts truly ensure equality between spouses. The author argues that contrary to conventional wisdom, joint bank accounts inhibit equal sharing between spouses because they do not provide for equal ownership and allow one spouse to control all of the marital income. The author suggests that joint bank accounts are detrimental to women because they do not offer women the support they need in a world of social inequality. Instead, the author proposes a new model where each spouse has a separate account and there is a joint account for family household expenses. The author concludes that the only way to truly achieve equal sharing between spouses is to give sole control to each spouse over equal amounts of money.

Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135 (2007).

This article proposes the idea of a multi-tiered marriage system—a system which recognizes more than one type of marriage under the law—as an alternative to the current marital laws in the United States. A multi-tiered marriage system would be more accommodating of the pluralistic American society and has the potential to reduce high divorce rates by recognizing that our citizens may have differing concepts of marriage. Some states, particularly Louisiana which has a two-tiered system of contract and covenant marriage, and New York, which has a "ghet" statute to alleviate some of the difficulties of civil divorce for Jewish women, have already begun to implement varying versions of such a system and may serve as a precedent for a multi-tiered idea of marriage. The United States should also look to countries such as India, Kenya, and South Africa, which have developed national multi-tiered marital legal systems to accommodate their religiously plural societies. While continuing to retain control over family law, the states should recognize that there is more than one conception of marriage and consider alternatives to the unitary marriage system.

Daniel Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA WOMEN'S L.J. 97 (2007).

The institution of marriage has an uncertain future in the United States, and a variety of alternatives have been proposed to expand marriage or replace it altogether. In the debate about how to best reform marriage, two main approaches have been proposed: the "diversity of forms" approach focuses on creating alternatives to marriage, while the "equal inclusion" approach focuses on making the traditional notion of marriage available to more people. The author notes that although they try to achieve the goal differently, both approaches share the goal of trying to gain state support for the large variety of less traditional couples now prevalent in our society. In spite of this similarity, however, the author predicts that friction will continue to develop between these two approaches, particularly in addressing issues of how to handle same-sex couples and whether heterosexual couples should be allowed to have different forms of marriage. The author asserts that as society becomes more accepting of alternatives to the traditional notion of marriage, the debate about marriage reform will shift from being an argument on whether or not marriage should be reformed to being about which approach to reform is the correct approach.

Amanda Barkey, Note, *The Application of Constructive Fraud to Divorce Property Settlements: What's Fraud Got to Do With It?*, 52 WAYNE L. REV. 221 n.1 (2006).

The author argues that courts should stop applying a constructive fraud analysis to determine whether or not a divorce property settlement constitutes a fraudulent conveyance. If a divorce settlement appears fair, and the parties agreed to it, then there should not be further contention outside of state court. Courts should only avoid divorce property settlements upon a showing of actual fraud. Divorces can have significant effects on the rights of the spouses' creditors. However, the issues in divorce and bankruptcy cases are different and thus, the application of fraudulent conveyance laws in constructive fraud as applied to divorce property settlements causes undue hardship to non-debtor spouses, infringes on state court authority, and destroys carefully negotiated property settlements.

Michael T. Flannery, *Military Disability Election and the Distribution of Marital Property Upon Divorce*, 56 CATH. U. L. REV. 297 (2007).

A 2005 survey of United States Army soldiers and spouses revealed that their greatest concern as a result of a soldier's deployment is divorce. The divorce rate among military personnel has increased 78% from 2003 to 2004. One of the main reasons underlying this statistic is due to the war in Iraq and Afghanistan. The

author argues the divorce rate must be understood in relation to the inconsistency among state courts and the way they handle distribution of military retirement benefits upon the dissolution of marriage, "particularly the portion of retired pay that is waived for disability benefits." The author examines two cases, *McCarty v. McCarty* and *Mansell v. Mansell*, as well as the effect of Congress's enactment of Uniform Services Former Spouses Protection Act ("USFSPA") in order to elucidate the restrictions state courts have when distributing retired pay as marital property upon the dissolution of marriage. The author posits that state courts, afforded authority by Congress under USFSPA, can offset with other marital property the portion of retired pay which was waived for disability pay and remedy any remaining inequity between the military spouses resulting from this issue. The author posits that state courts can still adhere to the underlying federal objectives of the USFSPA and provide equity for military spouses by treating disposable retired pay as any other material property under the principles of property distribution in the state, thus protecting former spouses of military personnel's economic security.

PARENTING

Ann Cammet, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313 (2006).

Cammet addresses the effects of prisoner child support obligations on children and parents, arguing that current child support policies amount to *de facto* collateral sanctions for parents who already have limited resources prior to incarceration. Such parents collect no income and continue accruing debt during incarceration and face other sanctions, which are prohibitive toward regaining the employment, housing, and benefits that would aid in repayment of debt post-incarceration. Welfare reform has also shifted some of the focus of child support from support of the child to repayment to the government for services provided to the child and family by the state, therefore placing an even heavier burden on families relying on child support payments. Ultimately, Cammet advises several specific changes to the current child support system, on top of broad policy changes, that could prevent the growing arrears of incarcerated parents: (1) tolling or suspending child support obligations for incarcerated parents, (2) creating an intake procedure for prisoners needing to modify support orders upon entry into the correction facility, (3) waiving some support debt owed by prisoners to the state, (4) basing the amount of child support on actual income of parents rather than imputed income, (5) collaboration between civil legal services and public defenders, (6) public education on the legal sanctions that face convicted criminals, and (7) the use of lay advocacy by incarcerated parents.

Annie Pelletier, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547 (2007).

The Family and Medical Leave Act of 1993 guarantees workers the ability to take twelve unpaid weeks from work for the birth or adoption of a child. Although the Act does much to place the United States on equal footing with the parental leave policies of most other nations, it nonetheless leaves 60% of Americans without a guaranteed right of parental leave. Of the 40% of Americans who are eligible for parental leave, many cannot afford to take advantage of it since the leave is unpaid. The author examines the ways in which France, Germany, and Sweden have enacted more successful models for parental leave by providing broader coverage, longer leave periods, and paid benefits.

Robin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws that Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39 (2006).

Due to state procedures including putative father registries and safe haven laws, unmarried fathers have a difficult time adopting their infant children. The author argues that states should strengthen their laws to facilitate putative fathers' adoption of their children when the mother supports adoption. The Supreme Court has supported the right of unwed fathers to raise their children through the biology plus doctrine, which requires that the father be the biological parent in addition to a showing that the father has taken responsibility for the child. Despite support from the Supreme Court, many states have statutes that grant custody of the child to the preadoptive parent instead of the biological father, which arguably violates the father's constitutional due process and parental rights. The author recommends that in order to support unwed fathers' right to adoption of their children, mothers should be encouraged to reveal the biological father and states should focus on a child's interests in being raised by their biological parent.

Nanette Reed, *Sacrificing The Child's Best Interests: Judicial Custody Awards & Parental Alcohol Abuse.* 35 SW. U. L. REV. 111 (2005).

Parental alcoholism can have a devastating impact upon children, and contentious divorce and custody proceedings often augment the negative effects. States take different approaches to alcoholism in custody determinations, but whether a state has a specific statute dealing with alcoholism, or has only vague statutory references, most states are similar in giving wide discretion to Family Court judges. The author suggests that a bright-line rule regarding parents' alcoholism and custody awards would better deal with the problem, create

consistency, and help keep personal opinions from creeping into judicial discretion. There is ample medical evidence suggesting the importance of reducing the impact of parental alcoholism on children. Accordingly, the author suggests that if one parent is found to be alcoholic, the child should be placed with the non-alcoholic parent.

Pamela Gershuny, *Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Employment-At-Will Doctrine Based Upon Mandatory Parenting Duty*, 21 WIS. WOMEN'S L.J. 195 (2006).

This article argues that courts should reform the current Family and Medical Leave Act (FMLA), Temporary Aid to Needy Families (TANF) and employment-at-will doctrine, in order to recognize the mandatory public policy of parenting duty. The author examines the cause of action of wrongful termination and argues that the existing doctrines must be reformed in order to improve the well-being of children and families. This public policy concern justifies the extension of the FMLA to incorporate the changing demographics of employees, which include more working mothers. The author examines the negative consequences of employers who force employees to choose between mandatory parenting and work and the need to avoid punishing parents whose children's illnesses do not fall within the FMLA limitations. She suggests a judicial remedy for wrongful discharge when a parent is terminated for engaging in parenting duties.

Jennifer Goulah, Comment, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479 (2006).

This article chronicles Michigan's controversial approach to collecting overdue child support payments from noncustodial parents. When Mike Cox became the Michigan Attorney General in 2002, he instituted a policy which sought to jail so-called "deadbeat dads" as a means of forcing payment. The author illustrates a variety of flaws with this approach, ranging from inaccuracies in the computation of the amounts owed to constitutional due process concerns. The author goes on to show that most of the money in arrears is actually owed by fathers without the means to pay, whether because of unemployment or disability, and that jailing them only exacerbates the problem because of their inability to earn income while incarcerated. The author concludes that changes in the state policy for child custody as well as the standards used to calculate support payments are necessary in order to create a system which is fair to both the noncustodial spouse and the children they support.

Adrienne McKay, Comment, *Termination of Parental Rights in California: Why a Temporary Prohibition on Conception Would Have Better Served Ethan N.*, 35 SW. U. L. REV. 61 (2005).

This article focuses on the California's Court of Appeals decision in *In re Ethan N.*, in which a mother with a long history of child abuse and child neglect had her parental rights over her one-year old son terminated. While the California Juvenile Court system generally focuses on family reunification, the Cal. Welf. & Inst. Code § 361.5(b) provides that when a court finds by clear and convincing evidence that a parent has engaged in behaviors outlined in the statute, the county does not have to provide reunification services. In *In re Ethan N.*, the mother had engaged in these behaviors and could only be provided reunification services if there was clear and convincing evidence that reunification was in the child's best interests. The author suggests that the making a "temporary prohibition on conception" option available to the juvenile court system, as a condition to providing reunification services to parents who have that have engaged in those statutorily defined behaviors, would be a useful tool in determining whether family reunification would be beneficial. In the author's opinion, temporary bans on conception, used in the child welfare context, would foster family reunification by allowing a parent to demonstrate proof of commitment to her existing child.

Sydney Mehringer, Comment, *The Meaning and Role of "Good Faith" in Relocation Law with Respect to Child Custody and the Impact of* In Re Marriage of LaMusga, 35 SW. U. L. REV. 83 n.1 (2005).

A pressing issue in divorce law is the problem that arises when the custodial parent wishes to move away from the non-custodial parent. Social scientists have differing opinions as to whether custodial parents should be permitted to relocate. Prior to *Lamusga*, there was a presumption in California that children should remain with their primary caretaker. However, California now requires explicit reasons for the move and that the move be based on a legitimate purpose. While the role of "good faith" in the analysis is currently unclear, the author advocates that good faith be made a separate requirement to be proven by the custodial parent in the analysis in order to safeguard the interests of the child.

RACIAL DISCRIMINATION

William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007).

This article discusses how the Supreme Court interprets the Thirteenth Amendment to prohibit slavery and involuntary servitude and to give Congress the

power to prohibit lingering badges and incidents of slavery. However, the Supreme Court has failed to define what those terms mean absent congressional action, which has led lower courts to interpret the term slavery only to mean literal enslavement. The author posits that since badges and incidents of slavery remain so undefined, courts have chosen not to interpret Thirteenth Amendment to its fullest extent due to fear of judicial policymaking. One of the ways in which the Amendment may be interpreted is in an evolutionary manner that is mindful of the detrimental effects of slavery on those who were and are the victims of such discrimination, namely, African-Americans. While the Thirteenth Amendment does not offer the judiciary *carte blanche* to end all sorts of discrimination, it does offer the judiciary concurrent power with Congress to define and redress lingering badges and incidents of slavery.

Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615 (2006).

When analyzing racial harassment in the workplace, many judges and scholars base their analyses on the sexual harassment model. However, there are great differences between racial and sexual harassment which intuitively seem to merit a distinctive analysis for each type of claim. While there has been far more research on sexual harassment claims than on racial harassment claims, studies show that African Americans alleging sexual harassment are twice as likely to succeed with their claims as they are on racial harassment claims. The victims of sexual and racial harassment generally have greatly differing characteristics, and the underlying motivations for the harassment itself are generally different as well. The author argues that judges and commentators should treat racial harassment claims with a unique analysis and not simply defer to sexual harassment models when assessing racial harassment claims.

Yoonjo J. Lee, *White Privilege or Blessing? Standing to Sue as Non-Targeted Bystanders of Racial Discrimination in Housing and Employment*, 28 HAMLINE J. PUB. L. & POL'Y 557 (2007).

In *Trafficante v. Metropolitan Life*, the Supreme Court ruled that the white non-targeted plaintiff had standing to sue for the loss of interracial associations as a result of discriminatory acts of a landlord who refused to rent to black tenants. Although this seems like a victory for civil rights activists, the author argues that the decision actually perpetuates white supremacy by empowering and encouraging those with resources to pursue remedies instead of those actually targeted. The author believes that non-targeted whites do not have standing to sue under Civil Rights statutes since they only have a "generalized grievance" in being deprived of interracial interactions and because they would normally be considered third parties. The author also considers the challenges and disincentives that minorities

face when pursuing such cases, as well as the affirmative efforts of whites to combat racial discrimination, by relating them to modern understandings of race, racism and interracial association in light of *Trafficante*. The author concludes that the ruling of *Trafficante* perpetuates bias towards white non-targets rather than vindicate a civil rights policy that empowers minorities while simultaneously evoking an unjustified protection of whites.

Janai S. Nelson, *The Law of Politics: the Role of Law in Advancing Democracy: White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287 (2007).

Although majority-minority districts were initially designed to ensure fairness in the political process for minorities, they possess an intrinsic limitation which frustrates their original purpose. Majority-minority districts are designed to concentrate members of a minority into a voting district to enable that minority group to elect a candidate of their choice. However, the author argues that the system fails to provide protection against vote fragmentation when there are multiple minority candidates. This may result in an election of a non-preferred candidate, especially in cases where a white candidate is also running in the election. In the absence of a judicial or statutory resolution to this problem, minority voters have to attempt to resolve the problem themselves by either increased political organization within the community to ensure a single candidate gets elected or by advocating the use of an alternate voting system to achieve a similar result.

LeRoy Pernell, *Reflecting on the Dream of the Marathon Man: Black Dean Longevity and Its Impact on Opportunity and Diversity*, 38 U. TOL. L. REV. 571 (2007).

This piece focuses on a blog posted for discussion by Professor Terry Smith about the challenges of being a dean of color at ABA approved law schools in the United States. The author lays out the statistics showing the small and dwindling number of deans of color and the implications of not maintaining long-term tenure or extended experience for those who choose to become deans. The author focuses on African American and Latino deans because of the United States Supreme Court decision in *Grutter v. Bollinger*, which addressed the issue of race, diversity, and legal education. Additionally, the author points to the political and racial culture of legal education as causing the denial of those wanting to become deans and wanting to impart their personal knowledge and experience on the legal world. In conclusion, the author argues that the lack of deans of color will have a trickle down effect and limit the number of faculty members of color because of the belief

that a faculty position will be a dead end and they will be unable to advance their careers and become deans in the future

RAPE

Nghiem L. Nguyen, *Roman Rape: An Overview of Roman Rape Laws From the Republican Period to Justinian's Reign*, 13 MICH. J. GENDER & L. 75 (2006).

The modern concept of rape is significantly different from that of ancient Rome, where there was no specific criminal charge for the act of rape itself, and where the victim's status determined the legal charge as well as the punishment for it. This article provides a historical overview of Roman rape laws and the remedies available to the victim from the Republican period through Justinian's reign. The author argues that the subservient social position of women in Roman society, as well as the importance of a woman's chastity to ensure paternal certainty substantially influenced Roman rape laws. The existence of a legal remedy for rape also depended largely on a woman's status—if the victim was of a certain social class in Rome, such as a freeborn woman, the rape was punishable by law, however if she was a prostitute or a slave, she had no remedy. While Roman rape laws differ significantly from the modern rape laws, they help provide a background for some of the modern Western rape laws, as well as put other countries' modern rape laws, such as those based on honor and shame, into contexts from which these laws can be better understood.

Rachel A. Van Cleave, *Rape and Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273 (2007).

In Italy, rape victims must make a formal request, called a querela, in order for the state to prosecute the suspected rapist, and once this request is made the victim cannot change her mind. A longstanding debate within Italian government has been over whether or not to require prosecution by querela. In 1996, reforms to Italy's rape laws maintained the querela requirement for sexual assault, the primary rationale being that this requirement protected victim's "agency or self-determination." The author argues that the definition of agency, which supporters of the 1996 reforms relied on, is too limited to protect rape victims because it does not take into account the barriers that rape victims face in choosing whether to pursue a querela, nor does it incorporate the fact that querela has historically been an impediment to rape prosecution. The author concludes that these considerations demonstrate that querela cannot be an effective way to protect victim agency, and she recommends that efforts be made to educate Italian criminal justice officials order to dispel myths about rape, and to expand notions about victim agency beyond the initial choice of whether to prosecute.

Daniel P. Sulmasy, *Emergency Contraception for Women Who Have Been Raped: Must Catholics Test for Ovulation, or Is Testing for Pregnancy Morally Sufficient?*, 16 KENNEDY INST. ETHICS J. 305 (2006).

Health care facilities associated with the Roman Catholic Church have historically allowed rape victims to use emergency contraception so long as conception has not already occurred. In order to test for conception following a rape, the facilities use either the ovulation or pregnancy approach. The ovulation approach, strongly supported by the Church, warrants emergency contraception only when the rape victim has a negative pregnancy test and has not yet ovulated immediately following the rape. In the alternative, the pregnancy approach warrants emergency contraception when the victim has a negative pregnancy test only. While the ovulation approach is more efficient in effectuating the Church's goal of preventing possible abortions, there are insufficient grounds for mandating this test over the pregnancy approach. Due to the large number of health care facilities affiliated with the Church, an exorbitant amount of rape victims would be denied treatment if the ovulation approach was exclusively adopted.

Carli J. Wilcox, Comment, *Is South Carolina's New Capital Child Rape Statute Unconstitutional as Cruel and Unusual Under the Eighth Amendment?*, 1 CHARLESTON L. REV. 315 (2007).

Using the Supreme Court's language in *Coker v. Georgia*, which held that a death sentence for the rape of an *adult* woman is unconstitutional under the Eighth Amendment, South Carolina and other states have enacted laws that make the rape of a *child* a capital offense. Although rape has historically been a capital offense, the Supreme Court has consistently held that the death penalty is disproportionate punishment for any non-homicide crime. Opponents of the death penalty urge that the death penalty for rape would not serve as a deterrent, as rapists would murder their victims in order to eliminate the victims as witnesses. Objective evidence used by the court to determine whether the death penalty in child-rape cases would be unjust includes national consensus, current legislation, and international opinion. Since only a minority of states and countries have capital child rape statutes and there seems to be national and international consensus against the death penalty for child rape cases, the author predicts that the Supreme Court will likely declare such statutes unconstitutional.

Russell L. Christopher & Kathryn H. Christopher, *Adultimpersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75 (2007).

The authors coined the term "adultimpersonation," which occurs when a juvenile below the statutory age of consent falsely represents herself as being above the legal age of consent. In an innovative analysis, the authors advocate that "adultimpersonation" is a form of rape by fraud, under the circumstances where the adult was induced by the juvenile into reasonably believing that the adult was engaging in lawful sexual intercourse. The authors' detailed analysis of states' views on rape by fraud results in the conclusion that "adultimpersonation" qualifies as rape by fraud under the standards used for determining rape by fraud in more than thirty states. According to the authors, these juveniles should be held criminally liable for their false representations, which were likely to result in severe punishment for a statutory rape offender, since the potential for this degree of harm is absent in the existing forms of rape by fraud. The authors conclude that "adultimpersonation" should be allowed as a defense to the strict liability offense of statutory rape to avoid situations where adult victims are criminally punished for rapes perpetrated by juveniles.

Vera Bergelson, The *Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007).

The case involving Armen Meiwes and Bernd Juergen Brandes, where Brandes permitted Meiwes to kill him and then eat several of his body parts, exemplifies the problems associated with consensually inflicted harm in society. American criminal law's failure to fully recognize a consent defense is inconsistent with prevailing moral and political theory. The author points out that while consensual sex is a defense to rape, causing death with the victim's consent is not a defense to murder. The solution espoused by the author is to broaden the modern definition of harm to include violations of a person's dignity. This solution will cause consent to be valid as a partial defense and require that the defendant show that he did not violate the victim's dignity or interfere with their interests.

RELIGION

Eric Alan Isaacson, *Traditional Values or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations,* 17 GEO. MASON U. CIV. RTS. L.J. 1 (2006).

Although the Boy Scouts of America claim to be a secular organization, its expulsion of any member who will not swear an oath to God—including Unitarian Universalists, who helped found the Scouts—has prompted numerous court actions

on the grounds that the federal government's endorsement of the Scouts violates the Establishment Clause. In *Winkler v. Rumsfeld*, a district court judge held that the Department of Defense's expenditure of millions of dollars on the Scouts' quadrennial "jamboree" was unconstitutional. While the government's appeal was pending, Congress enacted the Save Our Scouts Act of 2005, directing the Secretary of Defense to continue funding the jamboree. The author argues that the government's endorsement of an institution that discriminates on the basis of religion is a clear Constitutional violation.

REPRODUCTION

Rebecca Kathleen Atkins, *Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Responsibility,* 40 VAND. J. TRANSNAT'L L. 233 (2007).

This note explores the notion that reproductive health is a basic human right that multinational corporations have a responsibility to protect in the workplace. While it has traditionally fallen to the individual state to regulate activities of companies within its borders, few regulatory schemes are capable of reaching multinational enterprises. The author discusses how emergent notions of corporate social responsibility can surmount this problem. Specifically, the author suggests that the UN should create standards by which multinational corporations must research potential hazards to reproductive health in the workplace, disclose these hazards to employees, and eliminate the hazards on a non-discriminatory basis.

Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection,* 16 UCLA WOMEN'S L.J. 1 (2007).

Legislated into law in 2004, Canada's Assisted Human Reproductive Act (the Act) bans sex selection techniques from being used on zygotes not yet implanted in utero, while making an exception for those techniques used to detect disability in pre-implantation zygotes. Using an "intersectional feminist approach," this article analyzes the potential problems of the Act by considering not only gender, but also racial, cultural and disability factors. The author suggests that the while the Act purportedly has equality in mind, such equality is defeated by its allowance of disability selection and disallowance of gender selection. Additionally, the Act appears to rely on characterizations of non-western culture in its implication that sex selection is offensive to Canadian society and therefore disallowed. Finally, the authors take issue with the criminal penalties for Act violations, and the potential for adverse affects, such as an increase in post-implantation abortions and unregulated, illicit sex selection techniques.

SEXUAL HARASSMENT

John Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007).

Under the heading of sexual harassment is a somewhat amorphous cause of action for hostile work environments. The broad nature of the hostile work environment cause of action has led to much protest from people supporting the First Amendment right to free speech. Supporters of a hostile work environment claim have made several arguments attempting to justify why speech should be less protected in a work setting. The author asserts that previous arguments are inadequate, and instead proposes that, because it is more like an act than like communication, speech that creates a hostile work environment constitutes a "verbal act" and is thus not even protected by the First Amendment. The author states that looking at the conflict from the perspective of the dichotomy between speech and actions will help resolve the clash between the two warring factions.

Jill Maxwell, *Sexual Harassment at Home: Altering the Terms, Conditions and Privileges of Rental Housing for Section 8 Recipients*, 21 WIS. WOMEN'S L.J. 223 (2006).

Sexual harassment at home is a largely underreported incident of sexual harassment by landlords against their female tenants. Infrequent incidence reporting is the result of victims being mostly low-income individuals who rely on federally subsidized housing. Without the financial means to feel comfortable lodging complaints against landlords, in addition to marginal state and federal oversight, the actions of landlord perpetrators go largely unnoticed. The Department of Housing and Urban Development's (HUD) Fair Housing Act provides the most comprehensive method of protecting victims of sexual harassment at home. The author offers a number of policies which if implemented by the HUD, would create greater protection for those women living in low-income housing. Furthermore, state anti-discrimination statutes and tort law can and should be used to hold the HUD liable for any further inaction.

SEX OFFENDERS

Kassandra M. Bentley, *Lost or Just Bewildered?: The Exception in Hamm v. State, and the Pervasion of the Independent Relevance Standard in Davis v. State*, 59 ARK. L. REV. 917 (2007).

Arkansas common law, later codified in the state's rules of evidence, prohibits prosecutors from presenting evidence of a defendant's prior convictions unless such evidence is "independently relevant" to prove a material issue in the case under review, or in trials involving sex crimes against children if the evidence demonstrates the defendant's proclivity for pedophilia. However, the Arkansas Supreme Court's recent decision in *Davis v. State*, a case involving the rape of an adult, threatens to expand the exceptions to the evidentiary rule to the point of swallowing it. The author argues that the Arkansas Supreme Court must reaffirm its commitment to the evidentiary rule in order to protect the due process rights of defendants in criminal trials and avoid the elements of unfair surprise and undue prejudice.

Mark E. Chopko, *A Response to Timothy Lytton: More Conversation is Needed*, 39 CONN. L. REV. 897 (2007).

This article is a response to Timothy Lytton's article on the way tort litigation has defined the discourse on sexual abuse in the Catholic Church. The author praises Lytton for his work on this topic but suggests that Lytton's article should be a starting point for more broadly focused inquiries. The author is critical of Lytton's description of church leaders as reluctant to face the charges and warns that litigation against the Church will detract from the Church's effectiveness in religious, educational and social missions. He applauds the Church's effort to decrease child abuse and encourages scholars to recognize that abuse is not a Catholic problem, but is a pervasive problem in many societal institutions.

Christina Locke and Dr. Bill F. Chamberlin, *Safe From Sex Offenders? Legislating Internet Publication of Sex Offender Registries*, 39 URB. LAW. 1 (2007).

Megan's Law, which makes sex offender information available to the public, was prompted by the rape of a child by a sex offender who lived across the street. States have used either active approaches, where the government notifies the community of sex offender information, or passive approaches, where the community members seek out this information themselves. The National Sex Offender Public Registry links the sex offender internet registry of all the states, but will not be useful unless states incorporate language into their sex offender statutes, which provide for accurate updates to this internet database. States tend to

leave the details of the online registry, including site security, user registration, and site warnings to the administering agency. The author concludes that in order to maintain the effectiveness of online registries, states should take a more active approach to disseminating sex offender information by increasing awareness of online sex offender databases and ensuring their accuracy.

Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder that Societal Progression Continues Through Action, Not Idleness,* 58 S.C. L. REV. 509 (2007).

With the passage of the Sex Offender Accountability and Protection of Minors Act of 2006, South Carolina joined a handful of states that impose the death penalty on convicted child rapists. Although the Supreme Court has yet to hear a challenge to the constitutionality of such statutes, the Court has held that the death penalty is excessive punishment where the rape victim is an adult in *Coker v. Georgia*, and cruel and unusual punishment when applied to minors in *Roper v. Simmons* and the mentally disabled in *Atkins v. Virginia*. Distinguishing child rapists from these other categories of offenders, the author argues that if the South Carolina law comes before the Supreme Court, the Court should uphold it in light of the developing trend in the states toward seeking a harsher penalty for child rape.

Joseph L. Lester, *Off to Elba!: The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, (2007).

Sex offenders are subject to strict zoning ordinances that prohibit them from living or working near areas mainly populated by minors, such as schools and playgrounds. The author argues that the restrictions prevent offenders from effectively reassimilating into society and that the restrictions are too overbroad to rationally further the government's interest. The rate of recidivism for sex offenders is low, and keeping sex offenders away from particular areas does not further the interest in preventing future sex crimes. The author notes that if there is a rational desire to maintain zoning violations, then they should be narrowed. Further, he suggests that if society does not trust that sex offenders are rehabilitated after they have served their sentences, then there should be a more rigorous sentencing and rehabilitation plan in place, rather than usage of employment and residency restrictions as added punishment.

Merrill A. Maiano, Comment, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989 (2006).

Most convicted sex offenders face probation with mandatory treatment programs that compel them to admit guilt of the crime where admissions of guilt may be used against them in further proceedings. There exists, therefore, a serious conflict between three compelling interests, the probationers Fifth Amendment rights, their capacity for rehabilitation, and public policy to protect against sex offenders. The author examines the cases, *United States v. Antelope* and *McKune v. Lile*, and concludes that the best way to safeguard all three interests would be through legislation that protects probationers' Fifth Amendment rights while also ensuring that offenders receive appropriate rehabilitation and penalties. Until legislative action is taken, courts should use a "purpose based approach," which prohibits compelled statements made in rehabilitation from being used for prosecutorial purposes.

Marc W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure*, 85 NEB. L. REV. 575 (2007).

In response to the "sexually violent predator" statutes in Washington and Kansas, Nebraska adopted the Sex Offender Commitment Act authorizing the civil commitment of sex offenders who are incapable of abating their sexual transgressions. While these statutes purport to protect against sexual violence and have been validated by the U.S. Supreme Court, a serious concern is that they also further the court's inability to classify sexual predators as either criminals or persons suffering from psychological instabilities. The contrasting goals inherent in criminal and civil punishment exemplify that by validating these statutes, the Supreme Court has further muddled the dividing lines. A question remains as to whether convicted sex offender commitments are justifiable in that they are a punishment that cannot be classified as either wholly criminal or civil.

Stephen C. Rubino, *A Response to Timothy Lytton: Staunch Resistance to the Inclusion of Laity in Priest Discipline has Stymied Permanent Change to the Structure of the Roman Catholic Church*, 39 CONN. L. REV. 913 (2007).

Although the Catholic Church took significant steps following the revelations of systematic sexual-abuse by catholic priests, in reality the Vatican has blocked the vast majority of reforms and focused on its primary goal of maintaining the power of the clergy. This article argues that the idea of clerical hierarchy and clericalism has led the Vatican and the clergy to believe that they have a moral superiority over the laity and therefore do not need to heed the laity's voice. The author points to the removal of Cardinal Law and argues that the Cardinal was not removed because of his shuttling of predatory priests from parish to parish, but rather because a group of priests in the hierarchy did not support him. Additionally, Cardinal Law still serves a number of functions within the clergy, even sitting on councils charged with dealing with the sexual abuse crisis. The

author concludes that the Vatican has, and will continue to block reforms brought by the laity, and that enacted reforms have only served to pull American bishops further away from the laity and place them farther under the control of the Vatican.

Eric W. Buetzow, Note, *Ignoring the Supreme Court: State v. White, The Civil Commitment of Sexually Violent Predators, and Majoritarian Judicial Pressures*, 58 HASTINGS L.J. 413 (2006).

Despite the holding by the Supreme Court in *Kansas v. Crane* that a sexually violent predator's civil commitment after incarceration without a determination that the individual has serious difficulty controlling his behavior would be unconstitutional, eight states do not adhere to this volitional impairment requirement. In 2004, the Florida Supreme Court in *State v. White* held that a volitional impairment determination was not constitutionally required for Florida's Sexually Violent Predator Act since the statute's language requiring that the offender suffering from a mental abnormality or personality disorder has the same effect as a volitional impairment determination. In the author's opinion, the rationale used by the *White* court is illogical or tenuous at best. Florida's statute is almost identical to the statute deemed unconstitutional in *Kansas v. Crane*. The author suggests that the state judicial system's close ties to the political system may be a crucial factor in these courts' decision to disregard the plain-meaning of *Kansas v. Crane*.

Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 n.1 (2006).

State regulations governing certain subclasses of convicted criminals and where they may reside when released are threatening the principle of constitutional collectivism, the idea that citizens of all fifty states are citizens of the United States as a whole. Residential exclusion laws have greatly constrained the rights of these ex-criminals, as eighteen states now mandate that convicted sex offenders may not live within certain distances from schools and other places where children congregate. Although many of these laws serve to effectively banish sex offenders from states entirely, courts have rejected challenges against these laws. The author compares cases that struck down statutes prohibiting classes of people from living in certain areas in the name of collectivism and the statutes involving ex-convicts that courts refuse to strike down today. Because of the inherently political nature of this issue and the lack of a constitutional provision barring such laws, prospects for curtailing this political practice are bleak.

Ronnie Hall, Note, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of "Sexually Violent Predators" in Texas*, 13 TEX. WESLEYAN L. REV. 175 (2006).

The state of Texas is unique in that it provides an outpatient commitment program for sexual offenders who are released from prison, as opposed to inpatient psychiatric hospitalization. Texas law also provides that any breach of the commitment "contract" imposed on these ex-convicts is a third-degree felony. The provisions have been oft-challenged on constitutional grounds, but have been upheld. There is great debate as to whether the purpose of the statute is punitive, in which case those affected by it should be accorded criminal due process rights. The author proposes several solutions as far as how to treat such ex-convicts, including longer prison terms for sex offenders, reducing plea-bargaining opportunities, and a provision for inpatient commitment.

SURVEY OF LAW & DEVELOPMENT

Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUMAN RTS. L. REV. 321 (2007).

Historically, issues relating to socio-economic rights, such as education, housing and healthcare, have been viewed as issues belonging to the political system, and therefore non-justiciable. In recent years, a growing number of countries, including South Africa, have incorporated socio-economic rights into their constitutions. Nonetheless, the South African Constitutional Court's treatment of socio-economic rights is unique. In most of the countries that have incorporated socio-economic rights into their constitutions, the judiciaries have not found the rights to be fully justiciable, and none but South Africa have developed a comprehensive case law on the issues arising from the enforcement of such socio-economic rights. Consequently, South Africa's approach is considered both ground-breaking and controversial in its approach.

Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: ERISA, Jurisdiction, and Third-Party Cases Multiply*, 40 FAM. L.Q. 545 (2007).

This article provides an overview of family law cases for 2006, which involve issues such as ERISA beneficiaries, adoption, child custody, cohabitation, divorce, and same-sex partnerships. Particularly the article focuses on the courts' attempts to balance procedural issues such as jurisdiction and conflict of laws in family law as families move across state and country lines. The article also focuses on how different states deal with expanding concepts of marriage and parentage, as

well as nontraditional living arrangements, specifically when they have to reconcile custodial rights of parents or guardians with other persons such as sperm or egg donors, cohabitants, and same-sex partners. For example, a Florida court held a co-parenting agreement between lesbian partners void, thus affording the biological mother superior rights to her former lesbian partner who supported the children during the partnership, while a Pennsylvania court awarded custody of twins born to her lesbian partner. Due to the enormous volume of cases which involve a broad range of family law issues as well as conflicting decisions, family law has become more multifaceted and complex and it becomes ever more important for practicing family law attorneys to keep up with the new laws and regulations in this area.

WELFARE

Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

The author argues that the Earned Income Tax Credit (EITC) is headed for extinction because the trend has been to equate the EITC with welfare benefits. The author posits that low-income taxpayers are more likely to be audited than any other taxpayer group and are under attack because they are being singled out as poor and perceived to be black. However, an examination of the race and class of EITC recipients reveals that the vast majority are white. The author suggests that if empirical data concerning the racial demographics of EITC are made known to the American public, the EITC can be saved from elimination because studies reveal that where the public believes that most welfare beneficiaries are white, they are much less likely to oppose welfare. The author therefore concludes that when considering tax policy, an analysis of empirical data concerning race and class can offer improvements to the lives of the working poor.

WOMEN'S RIGHTS

Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L. L. 367 (2007).

The author asserts that the debate over allowing Muslim women to wear headscarves in public schools extends beyond a debate concerning religious freedom. Equality based on sex is a fundamental human right that should be recognized as much as the right to religious freedom. These garment restrictions must be re-examined in order to emphasize the pressure put on women to either wear or not wear such garments. The author examines international law and its application to human rights and the right to religious freedom in the context of

Muslim women wearing headscarves in public places. She challenges the European Court of Human Rights' decision that the veiling of women reflects gender inequality and critiques the limitations imposed on religious expression in public universities.

Yakaré-Oulé Jansen, Note, *the Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311 (2007).

While the concept of sexual freedom is by no means limited to the human capability of procreation, the concept of women's sexual freedom has centered exclusively on their reproductive capacity. Three treaty bodies, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, have sustained this idea that a woman's sexual freedom pertains only to her reproductive capacity. The U.S. Supreme Court has also faltered in its attempts to expand these rights by adopting doctrine focusing solely on women's ability to procreate and freedom to choose her sexual partners. What the three treaty bodies and the U.S. Supreme Court ignore is that women's sexual freedom is defined not only by their right to reproductive health, but by the concept of sexual self-determination. This involves recognizing that women should be free to not only procreate, but to enjoy their sexuality in an equal and unfettered manner.

Molly Stark, Comment, *Derivative Asylum Claims in the FGM Context: Protecting Family Unity and Women's Rights in the New Millennium,* 83 U. DET. MERCY L. REV. 543 (2006).

Current immigration laws do not allow parents to seek asylum based on the refugee status of their children; this relatively rare derivative claim is important in cases where the child seeks asylum for fear of Female Genital Mutilation (FGM). The United States has not done an adequate job in setting a standard for derivative claims. In *Abay v. Ashcroft*, the Sixth Circuit granted asylum to a child who would be ostracized for not undergoing FGM and also granted the mother's derivative claim, while the Ninth Circuit, in *Abebe v. Ashcroft* and *Abebe v. Gonzalez*, rejected ostracism as a basis for asylum and refused to address the derivative claim issue in the case. Alternatively, Canada has consistently allowed derivative asylum claims from parents for the sake of preserving family unity, prompting many to seek asylum in Canada. Immigration laws passed after 9/11 force parties to "seek asylum in the country landed in," preventing those who land in the United States from seeking the protections of the more liberal and uniform derivative asylum claims in Canada.

Alexandra Murray, Note, *Marriage - The Peculiar Institution: An Exploration of Marriage and the Women's Rights Movement in the 19th Century*, 16 UCLA WOMEN'S L.J. 137 (2007).

In seeking gender equality and personal autonomy, the women's rights movement in the 19th century sought to reform a number of rights such as suffrage, divorce, and property instead of questioning marriage as a legal institution responsible for sustaining male dominance. The author gives several explanations for this failure to challenge the unequal structure. First, women's lack of voting rights severely restricted their ability to bring about any reform that would be too radical to be supported by the franchised class, that is, the male constituency. The mainstream activists also feared that any overt repudiation of marriage would risk associating themselves with the more radical movements that society perceived as a threat to family values and social order. Ultimately, the author concludes that women at the time were reluctant to reject marriage because the contemporary emancipation of slaves destroyed the society's racial hierarchy and a new emphasis was placed on marriage as the state's mechanism to control the new class of citizens and maintain male dominance within the institution of marriage.