ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families*, 62 ARK. L. REV. 29 (2009).

Adopting a universal intent-to-parent approach regarding children born from assisted reproductive technology could prevent current confusion and legal controversy over parentage. Presently, courts use four different theories when determining the legal parents of a child born with the assistance of reproductive technology: genetics; gestational primacy, which asks who carried the child; the best interests of the child and the parties' intentions. Although the author argues for an intent-based approach, she shows that historically, regardless of the test used, the end result is generally just. In the few cases with unjust results, the courts highlighted the inadequacy of the result and encouraged the legislature to change the law. As science progresses and individuals travel more frequently across state lines to obtain medical treatment, a national approach would promote comity and consistency.

Jennifer Baker, Note, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671 (2009).

The use of the term "adoption" for the decision of one couple to donate an unused embryo to another couple for implantation is an example of pro-life rhetoric used explicitly to chip away at reproductive rights. United States Supreme Court abortion jurisprudence has carefully used certain terms to describe an unborn child. Intra vitro fertilization ("IVF") is exploding in popularity, spawning conflicting characterizations about these "clusters of cells." Organizations like Snowflakes—a pro-life organization that focuses on embryonic life to advance a pro-life agenda—could have a lasting effect on American jurisprudence. This is representative of many pro-life organizations, which use technically unimportant terms with underlying meanings and an unsuspecting topic to influence more controversial political issues.

Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15 (2008).

In an attempt to better ensure that abortion laws withstand legal challenge, moral opinions are disguised as scientific fact and thereby given deference. Laws such as the Partial-Birth Abortion Ban Act and informed consent statutes are seemingly concerned with women's health, but moral justifications constitute the true foundation of such laws. Courts endorse theories such as the post-abortion

syndrome without necessary scientific fact-finding, and by considering morality, the court overlooks precedent such as the Supreme Court decision in *Gonzales v. Carhart*. The legislative fact-finding that does occur is goal-oriented, driven by deadlines, and cannot be seen as completely comprehensive or unbiased in relation to the subject of abortion. Fact-finding that is so heavily impacted by moral bias should not be relied upon as the basis of abortion legislation, which has the potential to infringe upon individual rights.

Charla M. Burrill, Note, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals an Indefinite Solution*, 54 WAYNE L. REV. 1365 (2008).

With the increasingly common use of in vitro fertilization ("IVF") as a procreational method, judicial determinations regarding what should be done with cryopreserved embryos upon separation or divorce of the partners are yielding inconsistent outcomes. Prior to undergoing IVF treatments, couples usually sign cryopreservation agreements, which incorporate parents' chosen disposition method for any unused embryos. However, courts have inconsistently upheld cryopreservation agreements, relying on public policy concerns instead of traditional contractual analysis. The author suggests formulation of default rules for use by intended parents, namely that the embryos should be: (1) donated to other potential parents; (2) donated to research; or (3) thawed and disposed of. The default rules would guide the intended parents' decision regarding what should be done with unused cryopreserved embryos and would also ensure that any decision about the embryos remains with the mutual parents rather than the courts.

Kansas R. Gooden, *King Solomon's Solution to the Disposition of Embryos: Recognizing a Property Interest and Using Equitable Division*, 30 U. LA VERNE L. REV. 67 (2008).

After initiating the expensive procedure of in vitro fertilization ("IVF"), a couple that later dissolves their marriage and disagrees on what to do with their embryos arrives at a crossroads. State civil courts, which oversee embryo disposition disputes, currently take one of two approaches—the procreational theory or the contract theory—but both approaches fall short of being effective. The procreational theory favors the male's wish to destroy the embryos for fear of forced parenthood, while the contract theory attempts to enforce contracts signed prior to IVF, forcing couples to anticipate marital dissolution issues before even considering divorce. The author offers a property theory solution that would treat the embryos as marital assets and divide them through equitable distribution upon divorce. Unfortunately, this resolution adds complication to already complex

divorce proceedings and creates a problem of forced parenthood, which can only be avoided by state legislation that addresses the termination of parental rights.

Mary Beth Hickcox-Howard, Note, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 TEX. J. WOMEN & L. 317 (2008).

Fetal homicide laws are fairly ubiquitous in the United States, yet many problems within fetal homicide laws remain unaddressed. For example, statutory drafters in some states criminalized the harming or killing of a fetus without the consent of the pregnant woman, failing to explicitly exempt abortion from criminalization. Pro-choice groups disagree about whether such statutes actually affect women's right to choose. Even so, creative prosecutors have brought cases utilizing these statutes to charge pregnant women for harming their own fetuses. The author recommends that pro-choice groups change tactics and focus on advocating for properly drafted laws, acknowledging that a poorly drafted fetal homicide law is more harmful than a properly designed law with the same purpose.

Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009).

The commercial surrogacy industry in India is not unreasonable, provided that India establishes laws to protect surrogate mothers from abuse and give surrogates greater bargaining power within their contractual relationships. Recently, many foreigners venture to India to engage in "fertility tourism"—traveling abroad to use reproductive technologies because fertility procedures cost significantly less and India has fewer relevant regulations. The author examines the current surrogacy industry in India, exploring various scholarly and legal issues involved in considering gestational surrogacy as a commercial transaction. Controversial elements of commercial surrogacy include economic exploitation of the surrogate mothers and informed consent with regard to the surrogate mother's physical and psychological health. India should institute labor rights and protect biological mothers from exploitation in their surrogate arrangements while permitting potential surrogate mothers to independently exercise their reproductive rights.

Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008).

Reproductive rights advocacy is not liberating for women because the abortion debate insufficiently focuses on a woman's interests in motherhood. Women choose to abort for a variety of reasons, ranging from financial

considerations to maternal medical concerns. Analysis of the legal right to obtain an abortion balances a woman's right to protect her health against the state's interest in ensuring the safety of an unborn child; significantly, this analysis overlooks any consideration of women's equality and feminist rights. Abortion rights faced a major blow from the Supreme Court decision in *Gonzalez v. Carhart*, which upheld the Partial-Birth Abortion Act of 2003 and severely limited women's ability to obtain an abortion during the second trimester of pregnancy except in cases of danger to maternal health. Abortion jurisprudence will continue to discourage women's interests in motherhood until the United States Supreme Court acknowledges the importance of maintaining independent choice on when to start a family.

Mary Ziegler, *The Framing of A Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281 (2009).

While the dramatic change in the abortion debate during the 1970s cannot solely be attributed to *Roe v. Wade*, the Supreme Court's landmark decision undoubtedly played an important role in its evolution. Before *Roe* was handed down, groups advocating for abortion reform not only relied on rights-based arguments such as privacy and choice, but equally relied on policy-based arguments. For instance, organizations like NOW, NARAL and Planned Parenthood advocated using abortion as a means to control population growth. Similarly, anti-abortionists, prior to *Roe*, in addition to invoking rights-based arguments such as a fetus' right to life, also articulated policy-based arguments including characterizing abortion as "black genocide." This article traces the evolution of the abortion debate with respect to the parties involved in it and how *Roe* changed the content of various proffered arguments from being policy-based and rights-based to *only* rights-based.

Heidi S. Alexander, Note, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381 (2009).

The rationale for creating anti-abortion "trigger laws" violates American constitutional democracy because it raises issues concerning separation of powers, equal protection, and due process. Trigger laws initiate bans on abortion that would spring into effect the instant after *Roe v. Wade* is overturned. In order to safeguard reproductive rights against trigger laws in the event that *Roe* is overturned, advocates should follow the example of other states and propose new state legislation and constitutional amendments that expressly prohibit the state from interfering with women's abortion rights. Moreover, since these trigger laws express a future interest of the legislature that wrote them, the laws should not be automatically enacted because a law should only be enforced if approved by the

future legislature for that particular time if *Roe* is overturned. People have a right to know the laws that dictate their conduct, yet allowing trigger laws would potentially dismantle a citizen's ability to control his own decisions.

M. Scott Serfozo, Comment, *Sperm Donor Child Support Obligations: How Courts and Legislatures Should Properly Weigh the Interests of Donor, Donee, and Child*, 77 U. CIN. L. REV. 715 (2008).

The author proposes factors that courts should consider when determining whether a donor should be relieved of support liability where assisted reproductive technology was used, and suggests a statutory scheme that states should adopt to address this issue. These factors include the children's best interest; the relationship of the parties; when the agreement was reached; when the support suit was filed; the relationship between the child and the donor; and any documentation proclaiming the donor to be the father. In *Ferguson v. McKiernan*, the Pennsylvania Supreme Court considered these factors and held that an oral agreement that relieved the sperm donor from parental responsibilities was valid. The National Conference of Commissioners on Uniform State Laws attempted to create a uniform standard for donor obligations with the approval of the Uniform Parentage Act in 1973 and a subsequent amendment in 2002, but only a limited number of states adopted the Act, and the laws regarding liability of donors have continued to vary from state to state. A legislative response to the liability of donors should include medical personnel to assist donors and donees in reaching an agreement of each other's rights and responsibilities prior to any reproductive procedure, and it should be adaptable to changes in reproductive technology.

Christen Blackburn, Note, *Family Law—Who is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349 (2009).

Tennessee's parentage laws do not reflect successful developments in reproductive science, leading to many unforeseen difficulties in determining legal parentage in surrogacy agreements. The article discusses traditional surrogacy, where a surrogate is impregnated with the sperm of an intended parent; gestational surrogacy, where the intended parent's egg and sperm are used and the embryo is implanted into a surrogate; and donor surrogacy, where an embryo is created from the egg or sperm of an intended parent and the egg or sperm of a donor. Under these arrangements, many individuals can be considered a parent, thereby leading states to utilize three tests to determine parentage: 1) the intent test, which recognizes those who intended to create and care for the child; 2) the genetics test, which recognizes those who contribute genetic material; and 3) the gestation test, which considers the woman who gave birth to the child to be its legal mother. In

the matter of *In re C.K.G.*, Tennessee utilized a four-part test—intent, genetics, gestation, and controversy—to resolve the genetic father's challenge to the surrogate mother's parentage, thereafter holding that the surrogate was the legal mother where she carried the embryos in her womb, and had the intention for the children to be born, despite not contributing genetic material, and having no knowledge of her egg donor. Tennessee should enact a law to create certainty by requiring judicial pre-authorization for surrogacy agreements to emphasize their significance.

Teresa Stanton Collett, *Whose Life is it Anyway? Texas Public Policy and Contracts to Kill Embryonic Children*, 50 S. TEX. L. REV. 371 (2009).

In the Texas case *Roman v. Roman*, a recently divorced couple fought over whether the cryogenically frozen embryos they previously intended to use for in vitro fertilization would be destroyed or given to Mrs. Roman for implantation. The Texas Court of Appeals applied the clauses requiring the embryos' destruction under the Cryopreservation Form—the contract each party signed prior to harvesting the embryos—based on public policy that contract law governs frozen embryos in the event of divorce. The author contends that public policy concerns actually called for the preservation of the potential lives represented by the frozen embryos; the Court's misapplication of contract law resulted from a mischaracterization of the embryos as property, and not as potential human lives. The Texas Court of Appeals should have recognized Texas' general concern with the preservation of human life at all stages, and found the Cryopreservation Form void as against public policy and ruling in favor of Mrs. Roman. Unfortunately, the *Roman* standard ignores the potential lives that frozen embryos represent, and it stands against the rights of the intended parent in favor of the other party's newfound desire to rid itself of the prospect of parenthood.

Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275 (2009).

The practice of gestational surrogacy, in which surrogate mothers carry to term a child with whom they have no genetic relationship, has grown into an international industry. Today, India is the most popular destination for surrogate-seeking families, yet its government does not adequately address the legal, political, and ethical issues created by gestational surrogacy. For example, the gross disparity of the typical fee for this service—less than $10,000 in India versus more than $100,000 in America—encourages middle-class American couples to outsource their surrogacy needs to India without considering the lack of government regulations to protect the many uneducated and poor Indian women forced into surrogacy for their benefactor's profit. Surrogacy issues exist in the

United States as well as Europe, yet the framework for any regulation of the commercialization of surrogacy in the developed world invariably relies too heavily on the moral debate concerning the practice of surrogacy rather than the realities that arise from it. Fortunately, Israel serves as a model for successful state regulation of commercial surrogacy through a highly organized system that ensures the medical and psychological suitability of the surrogate, and through overall governance by the state's public health care system.

CHILDREN AND TEENAGERS

Rose L. Amandola, Note, *Forgetting Someone? New York Permanency Legislation of 2005 Fails to Address the Needs of Juvenile Delinquents in Foster Care*, 83 ST. JOHN'S L. REV. 465 (2009).

New York's Permanency Legislation of 2005 represents a significant improvement in the way the child welfare system addresses the needs of children in foster care. The two most important aspects of the new legislation—permanency hearings and continued jurisdiction over the child's case—attempt to provide children who were placed out of their homes with timely judicial review that promotes safety and stability in their lives. The drawback of the New York Permanency Legislation is that it fails to provide coverage to juvenile delinquents, a demographic group that constitutes a large percentage of children in foster care. Absent the protection of Article 10-A, children who commit delinquent acts while in foster care are at risk of getting lost in the system and aging out of that system without having their needs properly monitored or their living conditions stabilized. The author concludes that effectively expanding the scope of the Permanency Legislation to include juvenile delinquents would involve New York restructuring its lower courts into one Supreme Court to provide a forum for children to tell their complete stories and work with one judge on a permanency plan.

Matt Davis, *A Knife in a Gunfight: The Inadequate Protection Provided To West Virginia's Foster Children By Statutory and Common Law*, 111 W. VA. L. REV. 979 (2009).

In West Virginia, the foster care system is unsuccessful due to inadequacies of Child Protective Services ("CPS") and the Department of Health and Human Resources. As a result of this negligence, children in foster care suffer abuse and injury and should have legal redress, which currently eludes them because of a lack of legislation. Under common and statutory law, the author proposes that the state owes these children a duty that gives rise to a claim if that duty is breached.

Several issues—such as CPS workers' qualified immunity and the absence of liability insurance coverage—stand in the way of a successful litigation, yet recognition of foster children's claims may prove attainable, as evidenced, for example, by case law regarding the duty of the state to care for inmates. Possible solutions should include legislative reform to impose a duty of care on CPS workers, declare CPS investigations ministerial, and mandate the purchase of liability insurance.

James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009).

Infants, like older children, have a constitutional right of protection from placement with parents or adults who pose a risk to the infants' safety. Legal scholarship and various court decisions have maintained constitutional rights for adults with regard to reproduction and child custody instead of focusing on protecting children from legal family placements with unfit parents. However, previous judicial determinations have interpreted the Constitution as providing substantive rights to infants pursuant to the Fourteenth Amendment Due Process Clause, and state child protective agencies have occasionally used such interpretation to assume custody of newborn babies. It would be reasonable for courts to recognize that newborn babies have substantive due process rights against being placed into legal relationships with birth parents who have demonstrated an inability to provide care for their children. While such a system would place a great burden on the state to identify unsafe conditions for newborn babies and act upon such information, the system would more adequately provide for infant safety and improve these infants' life expectancies.

Ericka S. Garcia, Comment, *Where do Foster Children with Disabilities Fit? How the State Legislatures Must Create the Programs for Specialized Services to Ensure the Proper Fit*, 30 U. LA VERNE L. REV. 131 (2008).

Disabled foster children aging out of foster care are a particularly challenged and underserved population. As of 2006, lengthy waiting lists for government assistance have caused 147,000 disabled foster children to remain without help. The author explores this topic first by addressing the lack of resources for foster children with disabilities, and then by discussing federal and state efforts to alleviate this problem, concluding with possible solutions to provide help for this disadvantaged group. While state and federal efforts to date have been commendable, especially in New York—the only state to offer a program with specialized services for disabled foster children—this underrepresented population remains neglected. Studies are needed to reveal more about the nature of this problem and the number of individuals that need help, and federal and state

responses need to be coordinated to allocate funds and implement an effective solution.

Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, a Four-Year Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543 (2009).

DeShaney v. Winnebago County involved a divorced mother who brought suit pursuant to 42 U.S.C. § 1983, claiming that the county's failure to protect her son Joshua from his father's abuse, which the county was aware of, violated his right to liberty without due process under the Fourteenth Amendment. The Supreme Court affirmed summary judgment for the county Department of Social Services, observing that the state did not owe an affirmative duty to Joshua merely based upon the county's knowledge of Joshua's abuse. Rehnquist's decision in *DeShaney* has been criticized countless times, but very little scholarly work analyzes Rehnquist's factual, legal and psychological assumptions. The author examines the "sandy" foundation on which Rehnquist based his assumptions and argues that the Court's analysis is factually and legally invalid. The Court abandoned its constitutional role, gave an advisory opinion that interpreted the Due Process Clause of the Fourteenth narrowly, and made a number of unsupported assumptions that constitute cause for the court to reconsider and overrule its decision.

Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts are Failing Our Children*, 30 U. LA VERNE L. REV. 3 (2008).

This article examines the history of Title IX school sexual harassment litigation, which has established the duty and the liability of schools where students are sexually harassed by teachers or peers. Recent studies show that teachers or peers sexually harass an extraordinary number of students during the years from kindergarten to high school graduation. Current judicial interpretation of Title IX dictates that schools are only liable for sexual harassment of students where actual notice and deliberate indifference are shown. Students with sexual harassment claims can only recover against schools where they can demonstrate that an appropriate school official had actual notice of the sexual harassment, and the school's response was unreasonable under the circumstances known to the school. Thus, Title IX gives students recourse to the legal system when they have been sexually harassed, while simultaneously affording schools a crucial opportunity to take swift action when they learn of the sexual harassment.

Tai Vivatvaraphol, Note, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 FORDHAM L. REV. 3325 (2009).

Courts around the world, particularly in the United States, must alter the standards applied in child abduction cases in order to better achieve the objectives set forth by the creators of the Hague Convention on the Civil Aspects of International Child Abduction ("Child Abduction Convention"). U.S. Courts emphasize the notion of habitual residence of the allegedly abducted child when determining the best place for that child to live, since the law of the habitual residence dictates where a parent's custody has been violated, and since the child must be returned to the country of habitual residence. Yet the U.S. Courts of Appeals have not applied consistent and uniform standards when dealing with the issue of habitual residence, as some courts focus on parents' shared intentions while other courts concentrate on balancing parents' intentions with evidence of the child's acclimatization. The author asserts that a uniform standard focusing solely on the child's experiences leading up to the alleged abduction would better serve the purpose of the Child Abduction Convention. Other approaches create uncertainty and are inconsistent with the intent of the Child Abduction Convention's drafters.

Katherine Barrett Wiik, *Poverty Law: Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875 (2009).

Congress responded to concern about the educational rights of homeless children by passing the McKinney-Vento Homeless Education Assistance Improvements Act, which allows schools to enroll children who are missing necessary documentation, requires educational agencies to provide transportation, and prohibits establishment of segregated schools for homeless children. Unfortunately, this legislation does not fully consider child homelessness, the root cause of the educational imbalance that exists between children with steady homes and homeless children. By a conservative estimate, every year over one million children in the United States are left without adequate nighttime residence. The author advances a rights-based approach to manage child homelessness in this country, an approach emphasizing the right to shelter for all children. Advocacy groups should draw from international human rights materials as well as state constitutional law in order to successfully articulate and promote the concept of a child's right to housing as a fundamental right.

Amanda M. Willis, *Mutiny in the Nursery: Sexual Harassment Liability for Young Children*, 38 J.L. & EDUC. 245 (2009).

Many schools discipline children for engaging in innocent sexual conduct, due to the fact that they adhere to the Department of Education's ("DOE") comprehensive meaning of sexual harassment, which includes any unsolicited sexual behavior. Studies show that it is normal for a child to engage in harmless sexual activities, and have also shown that a child should not be chastised for such activities because this criticism could negatively impact their sexual development. When courts are faced with sexual harassment cases in which the defendant is a child, some courts will not convict the child unless the child understood the illegality of the sexual act and intended for it to cause harm. The author asserts that since the decision in *Davis v. Monroe County Board of Education*—where a harassed student received damages from a school that did not reprimand the harasser—schools have tried to avoid liability by overly disciplining children for sexual conduct that the DOE might deem sexual harassment. The DOE should define sexual harassment as unsolicited and intentional sexual behavior, a definition that would encourage schools not to punish children for harmless sexual acts and would better accord with courts' tendency to refrain from convicting a child for unintentional sexual harassment.

Stacie Schmerling Perez, Note, *Combating the "Baby Dumping" Epidemic: A Look at Florida's Safe Haven Law*, 33 NOVA L. REV. 245 (2008).

In response to ever-increasing incidences of "baby dumping," many states, including Florida, have adopted legislation to provide safe, legal alternatives for unwilling parents. Although Florida's Safe Haven Law allows parents to surrender an unwanted child at any hospital, emergency service location, or fire station anonymously and with no questions asked, instances of unsafe abandonment of newborns continue to occur. Upon abandonment, these children are taken into the custody of the state and no legal action is taken against the abandoning parents. Critics of the Florida Safe Haven Law claim that it encourages the concealment of pregnancy and that it is largely ineffective because it remains obscure, despite the State's efforts to publicize the law's effectiveness. The author posits that through additional funding for advertisement of the Safe Haven Law's benefits, coupled with improved education programs designed to remove the stigma of unplanned, unwanted pregnancy, the well-intentioned Florida statute will improve its effectiveness.

Micah N. Bump, *Treat the Children Well: Shortcomings in the United States' Effort to Protect Child Trafficking Victims*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 73 (2009).

In October 2000, Congress passed the Trafficking Victims Protection Act of 2000 ("TVPA") to eradicate the evils of human trafficking. Despite the fact that the drafters of the TVPA included provisions to provide extra protection for child victims, federal prosecutors and investigators continue to pressure child trafficking survivors to testify in court against their will. These forced interviews incorrigibly damage the emotional well-being of the survivors and deteriorate the relationship between law enforcement personnel and social service providers. This article argues that a "victim-centered" approach to prosecuting trafficking cases should be adopted to ensure that the prosecution of crimes does not come at the expense of the protection of victims. Both sides can work together to fight human trafficking while protecting a child survivors' physical and emotional security.

C. Theodora van der Zalm, Comment, *Protecting the Innocent: Children's Act 38 of 2005 and Customary Law in South Africa—Conflicts, Consequences, and Possible Solutions*, 22 EMORY INT'L L. REV. 891 (2008).

Laws attempting to protect children's rights have been met with resistance in South Africa as cultural and tribal groups continue to perform such practices as female virginity testing, male circumcision, child abuse, and "muti murders," which is killing for the purpose of harvesting body parts for traditional healing practices. Groups such as the Zulus view these practices as revered customs and refuse to change their traditions to accommodate the law. The South African Constitution—called one of the most advanced in the world—attempted to recognize the unique traditions of its many cultural groups by providing that groups have the right to practice their culture in manners that are not inconsistent with the Bill of Rights, which has resulted in conflicts because many cultural practices are contradictory to the Bill of Rights. In passing the Children's Act of 2005 and the Children's Amendment Bill, South Africa took progressive steps toward protecting children by ensuring their rights to protection from abuse and maltreatment as well as basic nutrition, shelter, social services and health care. The author suggests that the courts must act as the guardian of all children and enforce these laws even when they conflict with cultural practices.

Rebecca Worthington, Note, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules Are Affecting Potential Parents and the Best Interests of Children*, 19 DUKE J. COMP. & INT'L L. 559 (2009).

A number of countries adopted the Hague Convention to protect abandoned children from child trafficking and to encourage domestic adoption. To achieve these goals, the Hague Convention implemented strict procedures on intercountry adoption for any country that is a party to the Convention. Despite the Convention's well-meaning intentions, its attempt to restrict intercountry adoption may not be in a child's best interests because children are more likely to remain unprotected and without care of a family. This article looks at several countries that have restricted intercountry adoption, such as Romania—a country that has banned intercountry adoption entirely—where the low domestic adoption rate has left the majority of abandoned children in orphanages or on the streets. It is important for the Hague Convention to address the harm that occurs when countries stop intercountry adoption, and for countries and international organizations, such as UNICEF, to re-examine their attitude toward intercountry adoption.

DOMESTIC VIOLENCE

Tim Donaldson & Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After Giles v. California*, 36 LINCOLN L. REV. 45 (2008/2009).

The Supreme Court in *Giles v. California* held that a defendant could confront a missing witness unless the defendant caused the witness to be absent in order to prevent the witness from testifying. Under this interpretation of the forfeiture by wrongdoing exception, the Court refused to adopt a broader rule that the exception applies *anytime* that the wrongful acts of a defendant are responsible for the absence of a witness; instead, it must be shown that the defendant intended to prevent a witness from testifying in order to forfeit his/her right to cross-examine a missing witness on hearsay testimony. Furthermore, the *Giles* Court emphasized that even in cases where a defendant caused a witness's absence, the right to confront that witness still exists unless there is a showing that defendant specifically intended to preclude the witness's testimony. Despite this heightened evidentiary standard, the author asserts that the decision in *Giles* is significant for family violence cases because the proof of a defendant's intent to prevent a witness from testifying can include evidence of an abusive relationship between a defendant and a missing witness or evidence that the defendant sought to keep a victim of domestic abuse from seeking protection. The Supreme Court also found

that a defendant's intent-to-silence can be shown by circumstantial evidence such as an ongoing criminal trial where the missing abuse victim would have proven a likely witness.

Margaret E. Johnson, *Redefining Harm, Reimaging Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009).

In most states, domestic abuse victims find recourse under civil protective order laws. Though a civil protective order may be obtained for physical abuse, there is no remedy for emotional and psychological abuse in most jurisdictions. Civil protective orders have been shown both to decrease abuse and to provide injunctive relief, thereby positively rearranging the abused woman's relationship with her abuser. The author calls for a legal system that provides abuse victims with a more complete remedy that acknowledges harm beyond physical abuse. Reforming the civil protective order would allow women to more comprehensively address abusive relationships and cope with domestic violence.

Babak Lalezari, Note, *Domestic Violence: Enough Is Enough, Any Force Is Enough*, 1 PHOENIX L. REV 295 (2009).

Congress has sought to address the increasingly prominent problem of domestic abuse by enacting legislation such as the Lautenberg Amendment, 18 U.S.C. § 922(g)(9), which prevents domestic violence offenders from owning a gun. Courts have not arrived at uniform results when interpreting this statute because of differing notions regarding the quantum of force that is necessary to preclude the domestic violence misdemeanant from owning a gun. The majority of circuit courts considering this question have held that any show of force triggers application of the Lautenberg Amendment. The Ninth Circuit's decision in *United States v. Belless* confirms that different state statutes remedying this issue do not cause the relevant circuit split. The author instead suggests that the problem stems from uncertain congressional intent behind the Lautenberg Amendment, causing need for the Supreme Court to grant certiorari and resolve this circuit split by holding that any use of force toward another person in a domestic relationship should bar a person convicted of a domestic violence misdemeanor from owning a gun.

Julie A. Morely, *A Silver Lining in Domestic Turmoil: A Call for Massachusetts to Adopt the UCCJEA'S Emergency Jurisdiction Provision*, 43 NEW ENG. L. REV. 135 (2008).

Domestic abuse is becoming an increasingly inter-state issue as abused spouses or partners flee with children to out-of-state locations. Forty-six states have adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which has an emergency jurisdiction provision that allows the state to protect the child, sibling or parent from abuse. Massachusetts still follows the Massachusetts Child Custody Jurisdiction Act ("MCCJA"), which protects the child, but not parents or siblings, from abuse or neglect. Massachusetts needs to enact UCCJEA as soon as possible. Enacting UCCJEA will better protect abuse victims, allow for broader coverage by the including parents and siblings of a child being abused, and achieve greater national uniformity of child custody laws.

Jane K. Stoever, *Stories Absent From the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157 (2009).

By addressing domestic violence in the context of HIV and AIDS, the American legal system could better protect domestic violence victims while attending to the health and safety issues surrounding HIV and AIDS. Currently, both domestic violence victims and HIV-positive individuals are often unwilling to share their experiences in the courtroom in fear of the social stigmas associated with both. This concern arises not from the fear of sharing personal experiences with the judge; rather, it is the large public audiences that most domestic violence cases are subject to given the scheduling of these cases. If, however, domestic violence cases could be scheduled throughout the day or if fewer cases could be assigned to particular courtrooms, then judges would be able to pay better attention to individual litigants while subjecting such litigants to far less intimidating audiences. Furthermore, if more domestic violence victims dealing with HIV/AIDS could come forward, then judges and legislators would better understand the complexity of this ever-increasing problem, while litigants would gain the necessary therapeutic benefits of reporting their experiences.

Johnna Rizza, Comment, *Beyond Duluth: A Broad Spectrum of Treatment for a Broad Spectrum of Domestic Violence*, 70 MONT. L. REV. 125 (2009).

Many families that are victims of domestic violence are placed into programs that provide a one-size-fits-all approach to treatment, with little regard for the broad spectrum of causes and problems associated with domestic violence. The traditional Duluth Model—introduced in the early 1980s in Duluth, Minnesota, and which quickly became the most common for state-mandated intervention—focuses

primarily on the notion that domestic violence stems from a male-specific form of power and control. However, the Duluth Model was largely based on ideology, not scientific evidence, and empirical research has since shown that the model oversimplifies domestic violence and fails to consider additional causal factors, such as substance abuse problems, psychological problems, female-perpetrated violence and a host of other factors. Cognitive-Behavioral Treatment ("CBT") and the 100% Responsibility Model provide a more holistic approach by focusing on motivations, attitudes and responsibility as a means of modifying behavior. In order to provide more effective treatment, the author argues that families ought to be provided services that cater to their needs, including CBT, couples counseling, mediation and treatment for victimized spouses and children.

EDUCATION

Michael K. Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431 (2009).

Recently, a number of United States public high schools have embraced a day of silence where students are silent in order to oppose the mistreatment of gay students. During these days, students who support gay rights have taken to wearing t-shirts with supportive slogans such as "gay: fine by me," while students who oppose gay rights started wearing t-shirts with slogans such as "It is not fine to be gay; to be gay is shameful, sinful, and contrary to revealed Biblical truth." Free speech in public schools has been the subject of debate since the decision in *Tinker v. Des Moines Independent Community School Distric*t, where the Supreme Court held that public schools can restrict free speech when it causes material disruption to the learning environment. The author contends that school administrators could do four things in regard to the t-shirt duelers: they could ignore the issue; allow pro-gay speech and ban speech that opposes gay rights; allow speech that both supports and opposes gay rights; or come up with an alternative form. An approach that comprehensively exposes both sides to the issues and plights of the opposing viewpoint might be the best approach to take.

Julia Goode, Note, *Gillman v. School Board for Holmes County: A Student's Challenge to her High School's Ban on Pro-Gay Messages*, 18 LAW & SEXUALITY 209 (2009).

After Ponce de Leon High School's principal prohibited pro-homosexual expressions, Heather Gillman brought a lawsuit against the School Board of

Holmes County, Florida for violating her First and Fourteenth Amendment rights. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court utilized the First Amendment to protect free speech in public school environments, holding that schools can censor student speech only if the speech would significantly hinder appropriate discipline as necessary for the functioning of the school. The Court also determined that the First Amendment protects people from viewpoint-based discrimination where the opinion or perspective of the individual speaking is the basis for restriction. The *Gillman* court found no justification for the School Board's ban of pro-gay expression by its students, first because the expression did not substantially interfere with the operation of the school and also because the School Board failed to provide an acceptable reason for banning Ms. Gillman's speech. The author asserts that the recent broadening of LGBT rights in Florida public high schools is significant because the classroom is a central point of ideas where students are exposed to differing viewpoints.

Carolyn Depoian, Comment, *Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech*, 18 TUL. J.L. & SEXUALITY 163 (2009).

The inclusion of homosexuality in a school curriculum raises two First Amendment issues: (1) Establishment Clause concerns, for those who object to homosexuality on religious grounds; and (2) freedom of speech and censorship concerns. Regarding religious objections, banning the topic of homosexuality from being included in the curriculum would be unconstitutional if the purpose of the ban was because homosexuality conflicts with religious doctrine. On the other hand, if homosexuality were banned on purely secular concerns, the issue would be one of freedom of speech and the Supreme Court has similarly held that the First Amendment protects against such secular bans. Beyond statutory regulations, the Court held in *Hazelwood School Dist. v. Kuhlmeier* that decisions to include or exclude topics as part of the curriculum need only be reasonably related to legitimate pedagogical concerns. On this basis, school board decisions to include homosexuality in the curriculum have been upheld thus far, and parents who object have the option of removing their children from the public school system or challenging the school board through the political process.

FAMILY

David D. Meyer, *Gonzales v. Carhart and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57 (2008).

This article explores the impact of *Gonzales v. Carhart* on future opinions involving constitutionally protected rights, family, and intimate association. Review of the major Supreme Court cases from *Roe v. Wade* to *Carhart* marks the evolution from strict scrutiny to a later approach of "muddled scrutiny," which is a mix of rational basis review and intermediate scrutiny. Depending on one's viewpoint, it may appear that *Lawrence v. Texas*, a case that used rational basis review, may be an outlier in this line of cases. However, *Carhart* does not explicitly reject *Lawrence* since the *Carhart* court emphasized the Supreme Court's weakness in its approach to protecting privacy rights. Despite the inconsistency in this line of cases, it fortunately appears the Court is starting to recognize a broader range of family interests in a diverse society.

Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 357 (2009).

According to studies, rehabilitation and reentry of prison inmates is greatly improved when correctional facilities allow inmates to have extended visitations with their partners. In 1993, seventeen states allowed extended family visitations to same-sex partners. Today, however, only six states authorize extended family visitations and most allow only immediate family or legally recognized opposite-sex partners to visit. The author advocates for correctional agencies to allow all inmates access to extended family visitations. By not allowing same-sex partners to have extended family visitations, states are likely violating state law or infringing upon fundamental rights such as state laws banning discrimination and constitutional laws requiring equal protection.

Vivian E. Hamilton, *Expressing Community Values Through Family Law Adjudication*, 77 UMKC L. REV. 325 (2008).

Two schools of thought have largely shaped United States family law: Biblical traditionalism and liberal individualism. Because the former has, from an historical perspective, more dramatically affected ideas of marriage, sex and childrearing, the contemporary definition of "good family life" can be found to comport with the New Testament and its prescription of the accepted family norm. Thus, those family structures that do not conform to the accepted norm, such as polygamy, enjoy fewer rights, as legislators are wary of upsetting the status quo by uprooting entrenched moral and legal viewpoints. However, given that statutory

family law provides broadly worded, flexible standards—as opposed to rigid rules—judges are afforded an opportunity to exercise a level of discretion not often found in other forms of civil litigation. Using *Sanderson v. Tryon* and *In re Sara Steed* as examples, the author argues that courts should be cautious in using that discretion as a means to further community values, and suggests that there should be a distinction between two types of cases: private law cases, in which judges may be justified in furthering community values, and public law cases, in which courts should endeavor to refrain from doing so.

Syeda Ali Iman, *Bringing Down the "Maternal Wall": Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers*, 27 LAW & INEQ. 181 (2009).

Scholars maintain that although the Family and Medical Leave Act ("FMLA")—which provides twelve weeks of unpaid leave from employment for life changes, such as childbirth—has benefited the workplace, it has failed to fulfill its purpose. The FMLA's purpose was to offer employees reasonable leave to balance one's family needs with workplace demands, while concurrently minimizing employment discrimination and promoting equal opportunity employment. Recent litigation on discrimination issues of care-giving responsibilities, the notable differences between men and women in managerial positions, and the gender implications of the FMLA's text prove that the FMLA has not fulfilled its purpose. A recent study of the legal profession demonstrates that the FMLA perpetuates stereotypes underlying discrimination against women in the workplace, as seen from a vast underrepresentation of women in partner positions at law firms, and the tension between women's obligations to her family and billable-hour requirements. To overcome these gender stereotypes, Congress should implement a system of mandatory paid parental leave for men *and* women, which will undermine the stereotype that woman are primary caregivers, address the implication that women are dependent on men, and allow men and women to take leave without any financial concerns.

June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267 (2008).

In a time when the United States public has become increasingly ideologically polarized, federal and state courts' role in deciding and mediating moral issues is rife with conflict and partisanship. Often these moral debates are shaped and decided in the context of family law and the general public is subject to the common law's development and evolution of moral views. Unfortunately, the moral authority of the courts is questioned when judicial outcomes are framed as one view's win over the other's, which often occurs in the context of the Northeast

region's more liberal model of deferred family formation in contrast to the South's more conservative desire to police against non-marital cohabitation. However, if these morality disputes can be left to the states, then local courts can best meet regional social norms, rather than a federal system struggling between two polar family systems. Moreover, by allowing for a greater judicial role in the morality debate, state courts can better protect individual litigants, police against broad prohibitions by state and federal legislators, diffuse controversial issues by framing them in small contexts, and better reflect broader social changes on a case-by-case level.

Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559 (2009).

Since Congress passed the Family and Medical Leave Act ("FMLA") in 2003, which allows eligible employees to leave work to care for a family member with a serious health condition, employers and courts have been struggling to define and determine who should be granted FMLA protection. Furthermore, although the Department of Labor defines what "to care for" means, the definition's lack of clarity and depth has led to overinclusion and underinclusion by the courts in application of the FMLA protection. Given that Congress has never amended an act to address a definition, the author suggests that the Department of Labor should address this issue and offer courts a bright-line rule. Courts will be able to better determine when FMLA protection should be granted by addressing whether an employee's close physical proximity to the family member is necessary to care for the ill family member, whether the employee is actually medically needed, whether the ailing family member must actually be aware that the employee is caring for him, and finally, whether the care is immediately necessary. With a clearer definition of "to care for," both courts and employers will be able to uniformly apply and offer FMLA protection to needed family members.

FATHERHOOD

Margaret Ryznar, *Two To Tango, One in Limbo: A Comparative Analysis of Fathers' Rights in Infant Adoptions*, 47 DUQ. L. REV. 89 (2009).

The principle goal of American and British family law in adoption and custody proceedings is to serve the child's best interests; however, by allowing infants to be adopted without the biological father's consent, both these legal systems actually injure the child's interests. Neither the British nor the American legal system afford the opportunity for a father to contest an adoption upon finding

out that he is the biological father of a recently—or soon-to-be—adopted child. Consequently, biological fathers are denied the chance to raise their own children, and children are denied the possibility of knowing and perhaps growing up with their paternal families. As a response to this problem, the author advocates establishment of a court-protected right to the father-child relationship that could be claimed by either the child or the biological father. This would not only protect the interests of individual children and fathers, but would also encourage biological fathers to become more involved in their families, increase gender equality by giving men and women the same parental right, and conserve public resources by decreasing the number of children up for adoption.

FEMINISM

Alison I. Stein, *Women Lawyers Blog for Workplace Equality: Blogging as a Feminist Legal Method*, 20 YALE J.L. & FEMINISM 357 (2009).

Today, an increasing number of women in the legal field are blogging to connect with other women lawyers and to advocate for gender equality in the workplace. Despite their familiarity with the law, many women blog rather than turn to the legal system to solve their problems either because the law does not favor their position, because their grievance stems from non-legal roots such as cultural biases, or because their grievances have no legal recourse. The author views blogging as a new feminist legal method and argues that it improves on feminist consciousness-raising methods of the past in that it connects women from everywhere, encourages diverse viewpoints and gives access to anyone with a computer. On blogs like "Ms. JD," female lawyers blog on all issues concerning women in the legal profession, such as balancing work and family life, unequal pay, gender roles in the home, and strategies for professional advancement. Blogging has assured women lawyers that their workplace grievances are shared by others and encouraged women to think critically about their experiences in terms of gender.

Susan Ekberg Stiritz, *Cultural Cliteracy: Exposing the Contexts of Women's Not Coming*, 23 BERKELEY J. GENDER L. & JUST. 43 (2008).

Western society has historically depicted female sexuality—as represented by the clitoris—as a perverse thing that should be dominated and destroyed. Women's internalization of this negative depiction results in a fear of sexuality that Nancy Kulish, a psychoanalytic clinical researcher and author, identifies as being innate. To show the fallacy of Kulish's assumption that this fear is natural and unalterable,

the author presents the developmental history of the fear of female sexuality from the time of the Ancient Greeks to the present day. In fact, this fear can be overcome through "cultural cliteracy": being educated about and familiarized with positive representations of the clitoris, such as those put forth by Virginia Woolf, Emily Dickinson, and Zora Neale Hurston. Increasing cultural cliteracy will enable women to celebrate their sexuality, increase sexual knowledge, and break down the double standard that encourages men but discourages women from fully experiencing sexual pleasure.

GENDER AND VIOLENCE

Allison W. Reimann, Note, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199 (2009).

The United States grants asylum to people who have a well-founded fear of persecution by either their government or by an individual their government is unwilling or unable to control, on account of race, religion, nationality, membership in a particular social group or political opinion. Rodi Alvarado, and many other women like her, fled her home country of Guatemala, hoping to obtain asylum in the United States in order to escape domestic abuse by her husband, which her government would not take action to prevent. However, the requirements for asylum in the U.S. have been interpreted such that being a woman does not qualify a person as a member of a protected class under the statute, rejecting arguments that womanhood equated to membership in a social group. Consequently, Alvarado and many other women are left without recourse or shelter from those that would rape and abuse them with impunity in their home country. The author proposes amending the asylum requirements to recognize women as a protected class under United States law, and further suggests that a bifurcated analysis be adopted that allows a person seeking asylum to establish a causal nexus between the persecution and the petitioner's protected characteristic by linking the characteristic with the motivation of the persecutor.

Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa*, 15 MICH. J. GENDER & L. 291 (2009).

Although the Refugees Act of 1998 and other scholarship indicate that women are advantaged in South African asylum proceedings, a careful examination of South Africa's system demonstrates the need for a greater focus on gender guidelines. On its face, the proposed Refugees Act includes gender as grounds for asylum, but the author determines that this amendment is not enough based on

South Africa's current and historical state of gender-related claims. A detailed analysis of client files and screening interviews reveals that while South Africa has recognized some gender-based persecution, such as rape, other grounds for claims are rarely granted, including sexual orientation, domestic violence, and forced sterilization. These findings demonstrate that a simple legislative amendment is insufficient to remove the administrative obstructions that prevent individuals from seeking the protection that they need. Alternatively, the implementation of the special provisions outlined in the United Nations High Commissioner for Refugees ("UNCHR") guidelines could rectify these issues by working with the UNHCR to train officers and decision-makers and to improve maintenance of case records involving gender-related persecution.

HEALTH

Stacey Tovino, *Remarks: Neuroscience, Gender and the Law*, 42 AKRON L. REV. 941 (2009).

Advances in neuroscience have inspired new strategies for healthcare stakeholders and lobbyists when promoting access to, treatment of, and payment for women's mental health care. Laws enacted more than fifteen years ago evidenced the legislature's tendency to deny comprehensive health coverage by classifying mental diseases such as postpartum mood disorders as conditions without a physiological or organic basis. In the last eight years, policies increasingly support mental health care coverage for women, reflecting federal and state legislatures' exposure to lobbyists and stakeholders familiar with neuroscience of the physiological bases of mental disorders. While educating legislatures on neuroscience can help to develop effective policies, some stakeholders inappropriately emphasize neurological differences between men and women, even differences that may not constitute a health condition that requires protected status or treatment. The author anticipates that judges and juries less familiar with neuroscience will be charged with the task of ascertaining stakeholders' claims to determine which structural and functional differences are health conditions that warrant legal protections and benefits.

HISTORY AND CULTURE

Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue*, 714 FAM. L.Q. 713 (2009).

Since the establishment of the American Bar Association Section of Family Law over fifty years ago, the American family has become more mobile, compelling courts and legislatures to address a variety of complex family-law issues ranging from international abduction and custody to recognition of gay marriage. As a result, the federal government has enacted laws to address traditionally federal issues such as international child abduction and international adoption, in addition to enacting laws in spheres traditionally considered within state domain, such as domestic violence and child welfare. An increase in family mobility has motivated the states to enact more uniform laws in the area of family law to ensure more stability and predictability for families moving from one state to another. Further, with several states now allowing same-sex marriage, the mobility trend has led more and more couples to approach state courts to seek recognition of marriage, divorce, and child custody in states that do not officially recognize same-sex marriage. The authors anticipate that increasing popularity of alternative dispute resolution and collaborative law will eventually help more couples find solutions to their marital disputes rather than solve them through the court system.

Ummni Khan, *A Woman's Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, 18 LAW & SEXUALITY 79 (2009).

Examination of sadomasochism ("SM") in the legal and cinematic contexts posits SM as taboo but acceptable under certain criteria. The author compares the movies *9½ Weeks* and *Secretary* to highlight differences in the portrayal of SM, where the former film depicts SM as the evil that leads the main character into a downward spiral, and the latter film shows SM as a liberating outlet for the main character. Case law that addresses SM shows a drift into acceptance of different sexual practices, although it is subjected to the strictures of marriage and monogamy. For example, in *Twyman v. Twyman*, a husband is punished for seeking the sexual gratification of bondage outside of his marriage, although the court does not directly attack the sexual practice of bondage. These cases and the movie *Secretary* show that full acceptance of marginalized sexual practices like SM require the hegemony of whiteness, heterosexuality, marriage and monogamy.

Vincent Stark, Note, *Public Morality as a Police Power After Lawrence v. Texas and Gonzalez v. Carhart*, 10 GEO. J. GENDER & L. 165 (2009).

In addressing the origin of public morality legislation—laws based on society's moral restrictions—within the context of police powers, the author addresses constraints placed on public morality legislation by the Fourteenth Amendment and the publicity requirement. Given that the Fourteenth Amendment precludes the limitation of specific fundamental rights, case law confirms that the use of police powers to regulate public morality gives rise to a genuine public interest pursuant to the publicity requirement. Although recent Supreme Court decisions concerning public morality laws appear to be facially inconsistent with the role of public morality as a legitimate governmental purpose, *Lawrence v. Texas* and *Gonzales v. Carhart* are consistent with the publicity requirement for regulating public morality. Under this analysis, the *Lawrence* and *Carhart* decisions are consistent on the issues of specific fundamental rights and public versus private sphere. In *Lawrence*, public morality failed as a legitimate purpose because the challenged police power concerned a specific fundamental right—individual right to privacy—whereas the challenged legislation upheld in *Carhart* concerned harm to the public's collective morality, a justifiable public purpose.

Leah Sullivan, Comment, *Press One for English: To Form a More Perfect Union*, 50 S. TEX. L. REV. 589 (2009).

A federal law to make English the official language of the United States needs to be implemented, and at the same time a strict English language requirement for persons seeking naturalization needs to be put into practice. Many Americans still do not speak English, a phenomenon that can be attributed to several factors, including the existence of language requirement exceptions and the lack of an official language for the United States. To attain unity and integration in America, the English Language Unity Act of 2007 ("the Act") was introduced in Congress to make English the official language of the United States and promote a uniform English language rule for naturalization. Opponents proffer several arguments against the Act: (1) it discriminates against Hispanics; (2) it would hinder national unity by stigmatizing groups; (3) those who support official English are actually worried of a political threat from those they perceive as inferior; and (4) contrary to what official English proponents think, bilingual ballots and bilingual education do not reinforce divisions. The opposition, however, fails to realize that official English policies seek to integrate people from various racial ethnic and racial groups into one equal group and English language skills are path to achieving a better quality of life for immigrants.

HUMAN RIGHTS

Elizabeth Shura, Note, *New Strategies for Progressive Realization Assessments of Economic, Social, and Cultural Rights: Cambodian AIDS-Related Orphans and Vulnerable Children as the Hard Case*, 32 FORDHAM INT'L L.J. 1657 (2009).

This article discusses Cambodia's AIDS-related orphans in order to highlight the failure of the progressive realization standard to improve human rights in Cambodia, and then proposes two possible solutions. Pursuant to the International Covenant on Economic, Social and Cultural Rights, progressive realization requires a country to take steps to improve human rights to the extent of their available resources. Many AIDS-related orphans face severe obstacles accessing healthcare and education, yet according to the progressive realization standard, human rights violations may not exist even in such severe circumstances. The concern is that progressive realization allows a country like Cambodia—with limited resources to cope with disease and a long history of human rights violations—to excuse human rights violations as long as the country is taking some steps towards full implementation of human rights. The remedy for this low human rights baseline may involve pursuing key rights not subject to the progressive realization standard, such as the right to life, or reinterpreting the existing standard to strive for comprehensive rather than piecemeal human rights improvements.

IMMIGRATION

Pooja Gehi, *Struggles From The Margins: Anti-Immigrant Legislation And The Impact On Low-Income Transgender People Of Color*, 30 WOMEN'S RIGHTS L. REP. 315 (2009).

Transgender individuals within the United States face compounded problems when they are also immigrants, due in part to the dire consequences that transgender immigrants face should citizenship attempts fail. Transgender immigrants tend to be poor and may therefore resort to survival crimes, causing a cycle of poverty and generating criminal records that reduce chances of gaining legal status within the United States. U.S. immigration policies have increased the likelihood that transgender immigrants will be deported, first by enlarging the scope of offenses that trigger deportation proceedings, and also by broadening the amount of discretion granted to immigration judges when adjudicating asylum claims of transgender immigrants. Heightened national security has been a major force affecting the formulation of relevant policies and the disproportionate impact that such policies have on transgender immigrants seeking asylum within the

United States. The author formulates suggestions for Congress, state governments, and legal advisors in hopes of shaping a more effective immigration reform that would eliminate the discriminatory policies of detention and deportation of transgender immigrants.

Jason Ullman, Note, *Kadri v. Mukasey*: *A Legal Blueprint for Extending Asylum to Homosexual Aliens Who Have Not Suffered Physical Persecution*, 18 LAW & SEXUALITY 197 (2009).

This note examines the treatment of asylum applicants seeking refuge in the United States as a result of their inclusion in a particular social class and highlights the high burden placed upon such immigrants to prove severe economic distress and mental anguish before a U.S. court. *Kadri v. Mukasey*—a case in which an Indonesian doctor battled for asylum after facing sexual orientation-based discrimination—provides a framework for use by homosexual aliens needing to offer proof of persecution in immigration proceedings. Pursuant to the Immigration and Nationality Act, the Attorney General may grant asylum to illegal immigrants when the persecution of an alien in his home country results in extreme economic disadvantage or deprivation of basic liberties. The court in *Kadri* determined that a persecution claim based on sexual orientation was valid and Kadri was therefore entitled to asylum. Though some U.S. courts have more lenient standards regarding economic persecution than others, all U.S. courts heavily scrutinize the level of persecution experienced by these homosexual individuals in an attempt to keep the practice of granting asylum from becoming a solution for large numbers of homosexual aliens.

LGBT RIGHTS

Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 LAW & SEXUALITY 143 (2009).

When defining sex in transgender marriage cases, the majority of courts have applied a rigid approach, classifying gender based on the biological determinants of gonads, chromosomes and genitals present at birth. This definition creates a paradox when approaching the issue of public transgender toplessness, and exemplifies the injustice in the heterosexist view of sex and the female body. The author first reviews case law involving equal protection challenges to top-free equality, and then discusses how current sex definitions outlined in transsexual marriage cases would apply to the issue of male to female transgender topless exposure. Although courts have not yet addressed the issue of transgender topless

exposure, when the courts do so, courts that have adopted the "sex as determined at birth" classification will finally see the inadequacy of that approach. By using the issue of top-free inequality, one can see the unjust result that occurs when courts adopt rigid gender categorization.

Courtney Megan Cahill, *(Still) Not Fit to be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never be 'Equal'*, 97 GEO. L.J. 1155 (2009).

In states that have seriously considered granting marriage rights to same-sex couples in the form of domestic partnerships and civil unions, the issue of the official name applicable to such state-approved relationships remains at the forefront of the battle for marriage equality. Marriage equality advocates maintain that by creating a distinction between the "marriages" offered to individuals of different sexes and the "marriage-like" unions offered to some same-sex couples, the government is unconstitutionally inventing a separate status for same-sex couples. This article argues that intentionally giving separate labels to gay and straight partnerships is a morally troubling and discriminatory practice. Since several states have already chosen to create a nominal distinction between gay and straight partnerships, and since courts have so far refused to require that same-sex partnerships be afforded the benefit of being called "marriages," it is probable that other states will continue to perpetuate this harmful practice of relegating same-sex partnerships to a lower status than straight relationships. By maintaining this separate nominal categorization for same-sex couples, the government promotes unacceptable societal taboos associated with same-sex relationships.

Daniella Lichtman Esses, Note, *Afraid to be Myself, Even at Home: A Transgender Cause of Action Under the Fair Housing Act*, 42 COLUM. J.L. & SOC. PROBS. 465 (2009).

Because of the bias that Americans direct toward the transgender population, transgender persons—individuals that would prefer to live as members of the opposite sex—may have trouble finding housing and may be harassed by landlords and neighbors after finding housing. U.S. courts have heard few claims asserting violation of the Fair Housing Act ("FHA") due to sex discrimination, so courts have turned to Title VII cases, which provide guidelines for determining if a person has been exposed to sex discrimination in the workplace. Only some courts permit transgender individuals to file Title VII claims, leaving transgender persons unsure if they will be protected from sex discrimination when courts rely on Title VII case law to resolve FHA sex discrimination cases. The author asserts that courts should create legal standards separate from those used in Title VII cases to decide if an individual has a claim of sex-related bias under the FHA. If courts use the medical

meaning of sex when interpreting the FHA, which includes one's sexual organs and one's self-conception as male or female, and if courts adopt a wider view of sex discrimination, transgender individuals could start to successfully file FHA sex discrimination claims.

Félix E. Gardón, *The Real ID Act's Implications for Transgender Rights*, 30 WOMEN'S RTS. L. REP. 352 (2009).

The implementation of the REAL ID Act of 2005 poses numerous obstacles and complications for transgender immigrants who are seeking to become part of U.S. society. Transgender individuals attempting to secure a legal identification card will encounter difficulty because the REAL ID Act requires that an applicant provide identification that matches their gender identification and name. Creating an additional barrier for transgender immigrants, the newly implemented Systematic Alien Verification for Entitlement Program jeopardizes immigrant opportunities for employment, drawing some individuals to sex work where they are subject to police brutality and a high level of criminalization. The CLEAR Act, which would give local police the power to enforce immigration laws, would add yet another obstacle for transgender immigrants seeking access to basic medical and economic benefits. In light of these new laws, it is imperative that changes be made to the legal system in order to afford transgender immigrants the equality and opportunities they so desperately seek.

Jaime E. Hovey, *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95 (2009).

LGBT elders face the same discrimination and abuse that they have endured their entire lives. However, when a LGBT individual becomes old enough to require comprehensive care, opportunity arises for additional types of abuse if a LGBT elder is dependent upon the supervision or control of a biased caregiver. Unfortunately, state and federal statutes largely ignore this type of abuse. A number of solutions might better protect LGBT elders, including higher detection and abuse reporting standards and statutory remedies that protect elders who are discriminated against based upon sexual orientation or gender identity. The author recommends that relevant federal and state statutes or provisions should include protection for LGBT individuals whose advanced age might cause helplessness.

Emily R. Lipps, Note, *Janice M. v. Margaret K.: Eliminating Same-Sex Parents' Rights to Raise their Children by Eliminating the De Facto Parent Doctrine*, 68 MD. L. REV. 691 (2009).

A legal battle ensued after the separation of Maryland couple Janice and Margaret because Janice alone had adopted the couple's child, leaving Janice with custody and Margaret with no definitive right to custody or visitation. Maryland courts assert that a third party can obtain child custody or visitation only if the third party demonstrates that custody or visitation is in the child's best interest due to parental ineptness or exceptional circumstances. One Maryland court held that a de facto parent—a person acting as a parental figure to a child with their parent's agreement and encouragement—must show that visitation is in the child's best interest, but the Court of Appeals disagreed. Maryland de facto parents should be held to a lenient best interest standard because the parent controlled a de facto parent's entrance into their child's life, and because third party cases were referred to when choosing a standard for de facto parents, despite the groups' differences. The best interest standard is also proper for de facto parents because Maryland prohibits both members of a same-sex couple from adopting, and thus, the standard may help a de facto parent that left such a couple more easily gain the right to spend time with a child.

Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297 (2008).

The Tenth Circuit held in *Etsitty v. Utah Transit Authority* that Title VII and the Equal Protection Clause of the Fourteenth Amendment do not afford protection to Krystal Etsitty, a transsexual UTA employee, who was fired from her job for using public female restrooms while on duty. Architecture has always played an important role in reinforcing rigid male and female gender identities. Maintaining segregated bathrooms allows our society to buttress harmful prejudices about vulnerable women, predatory men, and transgender and transsexual populations. Scholars have proposed various methods to fight mainstream gender stereotypes, including mandatory unisex restrooms or creation of a restroom category labeled "Other." The author ascertains that spreading awareness of the harm done by segregated bathrooms and challenging the fundamentals of our society's views on gender roles is necessary before any real improvement occurs in the treatment of women, transsexual, and transgender people.

Nancy D. Polikoff, *Updating the LGBT Intracommunity Debate Over Same-Sex Marriage: Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529 (2009).

Beginning in the early 1990s, two movements started to impact LGBT rights: one movement advocating for same-sex marriage, and the other blaming societal problems on the decline of heterosexual marriage. Prior to the 1990s, LGBT advocates commonly aligned with unmarried couples, single mothers and the poor to promote diverse family forms. However, the most visible part of the contemporary LGBT rights movement stands together with proponents of sex marriage, degrading familial forms that are not based on marriage. The author argues that rather than focus on same-sex marriage, LGBT advocates should focus on broader legal reform that values all families and relationships. The LGBT movement should not advocate for a system that permits same-sex marriage while maintaining legal and economic privileges for married couples, because the goal justice and equality is best accomplished by promoting an approach that values all families.

Christopher A. Scott, Case Note, Cook v. Gates: *Don't Ask, Don't Tell Remains a Legal Option for the Military, But the End May Be in Sight*, 18 LAW & SEXUALITY 183 (2009).

While the decisions in *Cook v. Gates* and *Witt v. Department of Air Force* upheld The Don't Ask, Don't Tell Act ("the Act"), this article focuses on optimism surrounding future challenges to the military statute in light of *Lawrence v. Texas*. In *Cook*, the First Circuit found that *Lawrence* required application of an intermediate standard of review to laws regulating homosexual intimacy. Despite dismissing the plaintiffs' challenges to the Act in *Cook*, the First Circuit's determination that substantive due process challenges require review under an intermediate level of scrutiny is a major step in the fight to eliminate the Act. This conclusion was furthered in *Witt*, where the Ninth Circuit adopted heightened scrutiny after agreeing that rational basis was no longer the appropriate standard of review. Although the Act remains a legitimate military practice, future due process challenges will benefit from this heightened level of scrutiny.

Michael Silverman, *Issues in Access to Healthcare by Transgender Individuals*, 30 WOMEN'S RTS L. REP. 347 (2009).

There is a common misconception that hormones and transition-related treatment constitute the two most important aspects of access to healthcare for transgender people. However, the more serious problem involves the discrimination that the transgender population experiences while trying to access

primary healthcare. Discrimination on the part of medical providers discourages transgender individuals from seeking mainstream medical care and turns them to an illicit market for substances like hormones and industrial grade silicone. The author argues that healthcare is an important civil right that should no longer stay in the shadow of other civil rights of the transgender population. Ultimately, extensive cooperation with healthcare providers can remedy many of the problems that transgender people face when attempting to access healthcare.

Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288 (2009).

Recent transgender law reform strategies have, perhaps counter-intuitively, been placing a burden on the transgender community. Transgender law reforms have often ended up empowering the systems they sought to change. For example, hate crime legislation unwittingly brought negative attention to transgender individuals rather than positively helping transgender individuals in their communities. Many nonprofits have started moving toward service-based and policy reform work rather than concentrating on the unique needs of the transgender community. The author suggests that to effect change, transgender reform must recruit directly impacted individuals to advocate for legal strategies that pursue real, as opposed to merely symbolic, change.

Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle For Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009).

Though the lesbian, gay, bisexual and transgender ("LGBT") community has experienced significant improvement in regards to their social and legal treatment by the courts throughout the past twenty years, LGBT people are still the subject of extreme discrimination and are continuously refused the right to marry. This article reflects on the contributions and perspectives set forth in the 1989 essays of two LGBT activists: Tom Stoddard, who advocated an aggressive approach to seeking marriage rights for the LGBT community, and Paula Ettelbrick, who argued for a broader strategy of altering society's notion of "the family" and reworking the institution of marriage as a whole. Though only four states have made the change to recognize same-sex marriages, one might argue that efforts reflecting Stoddard's position have resulted in a number of positive gains for LGBT people. Ettelbrick's functional approach, though not fully successful, has brought about expansive recognition of LGBT parenting relationships as well as the progression of laws concerning domestic partnerships. While neither Stoddard's nor Ettelbrick's approach has been wholly adopted by the LGBT community, both of their goals

have found some success over the past two decades, which suggests that a dual approach, encompassing both Stoddard and Ettelbrick's ideas, might offer the best chance of achieving ultimate equality for LGBT people.

Mark Strasser, *A Little Older, a Little Wiser, and Still Committed*, 61 RUTGERS L. REV. 507 (2009).

Obtaining a nationwide right to same-sex marriage should be one of the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community's most important objectives, because acquiring this privilege would generate many societal benefits in addition to decreasing the inequity between LGBTs and heterosexuals. For example, accepting same-sex marriage could facilitate the adoption process for same-sex couples, since a common assumption is that a child is more likely to flourish if adopted by a married couple. Legalization of same-sex marriage could also eradicate the stereotype of marriage as an institution in which the female is subordinate to the male. The author emphasizes that once same-sex marriage is recognized, opponents may try to destroy marital privileges so that same-sex and opposite-sex marriage are not perceived as similar institutions deserving of the same privileges. The resulting new method of distributing federal benefits will hopefully allow more people to enjoy them, due to the fact that individuals will no longer be denied benefits because they are not married.

Joanna E. Saul, *Of Sexual Bondage: The "Legitimate Penological Interest" in Restricting Sexual Expression in Women's Prisons*, 15 MICH. J. GENDER & L. 349 (2009).

In *Turner v. Safley*, the Supreme Court articulated the necessary legal framework to employ when determining the validity of prison rules: they must be reasonably related to legitimate penological interests and must not be exaggerated responses to such objectives. Using the aforementioned rubric, this article explores the restrictions United States prisons impose on sexual expression within the confines of women's penitentiaries, specifically studying the advantages of allowing unfettered sexual expression and, conversely, the disadvantages of this approach. Despite potential benefits associated with permitting certain forms of sexual expression within female prisons, such as increased protection, emotional support, and stability, these are outweighed by the inherent problems, including public health concerns, security issues, and increased burdens on already thin prison resources. An additional obstacle in allowing sexual expression within jails is the issue of consent and the particularly thorny questions that arise therefrom, such as discerning which inmates are mentally healthy enough to give full consent. Ultimately, the current prison system is not amenable to reform permitting certain instances of sexual expression; in the interim, however, prisons would do well to

increase the level of communication between its staff and inmates in an effort to produce workable alternatives that promote both prison and inmate interests.

Rachel Sinness, Note, *The Best Interests of the Child and the Rights of the Parent: Damron v. Damron and the Future of Parenting and Child Custody in North Dakota*, 84 N.D. L. REV. 999 (2008).

Historically, courts in North Dakota have ruled that homosexuality of a child's parent negatively impacted the child, and consequently that homosexual parents were less likely to retain custody of their children. However, in *Damron v. Damron*, the North Dakota Supreme Court ruled that a parent's homosexuality was not a *per se* reason to modify child custody. There, the court held that the interests of the child as well as the rights of the homosexual parent should be taken into consideration when making any determination regarding custody. The *Damron* decision is indicative of movement towards a legal standard that attempts to minimize the effects of bias against homosexuals and to be mindful of their rights as parents. The author proposes that, in furtherance of the court's goal of minimizing bias against homosexual parents, the legal standard applied to custody cases should be one that is totally silent on the matter of a parent's sexuality.

Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII*, 18 TUL. J.L. & SEXUALITY 1 (2009).

Schemas, or sets of beliefs, enable individuals to make judgments about the world. Legal reasoning uses a particular form, called "schema-matching," which allows judges to apply precedent to cases with similar fact patterns. However, while useful at times, "schema-matching" has prevented judges from appropriately applying the Title VII civil rights doctrine to issues surrounding homosexuality—such as same-sex sexual harassment in the workplace—because they transform these gender-based claims into claims based on sexual orientation. This article argues that because Title VII requires strict division of sexual orientation and gender, judges apply "schema-matching" techniques that classify people in ways that fail to incorporate current gender roles, including transgender or bisexuality. The legal system needs to recognize the limitations of schemas, and incorporate them into a framework that does not require strict classification of gender and sexuality.

Jason Scott, Comment, *One State, Two State; Red State, Blue State: An Analysis of LGBT Equal Rights*, 77 UMKC L. REV. 513 (2008).

The struggle between individual rights and the political and moral expression of different regions is highlighted by the debates concerning LGBT rights in various social and legal contexts. The political and regional ideologies of the more Democratic "blue" states and the Republican "red" states help shape the opinion and contentions of many state and government officials, thereby affecting individual rights of LGBTs. The author examines recent decisions concerning child custody and same-sex adoption in order to delineate how the cultural, religious and moral backgrounds of different regions have affected LGBT case law. Despite the opposition and the generally conservative movement against LGBT rights, recent cases, such as *Finstuen v. Crutcher*, indicate incremental changes that have broadened LGBT civil liberties by invalidating statutes that prevent same-sex adoptions. Ultimately, by analyzing the influences behind the opinions affecting LGBT groups, LGBT litigants can address human rights concerns by balancing the individual rights with the expression of cultural values.

Andrew L. Weinstein, Comment, *The Crossroads of a Legal Fiction and the Reality of Families*, 61 ME. L. REV. 319 (2009).

Despite scientific evidence that the sexual orientation of parents does not relate to the development, social adjustment and well-being of children, state legislatures and courts continue to deny same-sex couples the right to adopt. These courts often base their decisions on statutory interpretations or the Due Process clause in order to avoid addressing Equal Protection arguments, since the equal rights of homosexuals is such a controversial and politically-charged issue. By examining state and federal court cases that recognized non-traditional parentage and advanced the rights of same-sex couples, the author proposes a national standard that considers the child's best interests with a blind eye toward parental sexual orientation. Such a standard would ensure equal protection and lead to greater societal acceptance of same-sex adoptive parents. With so many children waiting to be adopted, it is clear that children would benefit from a modernization of the definition of parenthood.

Kathleen A. Doty, *From Fretté to E.B.: The European Court of Human Rights on Gay and Lesbian Adoption*, 18 TUL. J.L. & SEXUALITY 121 (2009).

The 2008 decision by the European Court of Human Rights ("ECHR") in *E.B. v. France*, held that by denying a lesbian the right to adopt, France had violated the Convention for the Protection of Human Rights and Fundamental Freedoms. Interestingly, just six years before *E.B.*, the ECHR in *Fretté v. France*

held under similar facts that such a denial for a gay man to adopt did not violate the Convention. After a brief overview of the Convention and the ECHR, the author argues that despite attempts by the ECHR to distinguish *E.B.* from *Fretté*, it seems clear that *Fretté* has been effectively overruled. The short time span between the two seemingly opposite decisions can be attributed to several factors, including a new protocol which strengthens the Convention's prohibition of discrimination, a report by the Working Group on Adoption, which suggests that states extend the scope of adoption laws to same-sex couples, and scientific studies that have demonstrated no differences in the psychological adjustment between children of same-sex and heterosexual families. While the consequences of the *E.B.* decision may provoke a negative backlash by some European states, evidence would seem to indicate that the opposite has been true, as states will have to change their laws regarding same-sex adoption.

Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009).

Despite much research into gay and lesbian parents, scholars have largely neglected focusing on the way gender can influence perceptions of such parents within society. By focusing on existing stereotypes of both gender and sexual preference, the author argues that the gender of parents, children and even judges involved in proceedings involving gay and lesbian parents can have a strong impact on creating and perpetuating negative stereotypes of same-sex parents. Males overwhelmingly take the brunt of the negative stereotyping as HIV agents, child molesters and recruiters who encourage their children to also be homosexuals. By failing to address the impact that gender has on stereotypes and perceptions, advocacy for gay and lesbian parents is compromised because the underlying causes of such negative perceptions are not being adequately countered. While some organizations, such as the Family Pride Coalition of Washington, D.C., have begun to address such perceptions, homophobia will continue to persist unless gender issues are pushed to the forefront of advocacy efforts.

MARRIAGE

Donald R. Collins, *A Legal Doctrine for the Starter Marriage*, 33 OKLA. CITY U. L. REV. 793 (2008).

Contemporary marriage has more in common with a private contract between merchants than did nineteenth century marriage, which existed primarily as a public institution regulated by the state. The historical evolution of marriage toward

contract law stopped short of affording marrying couples the same liberties available to merchants' agreements. In fact, merchants have infinitely more options when making agreements, and merchants' contractual relationships exist with significantly less interference by the government. That nearly half of marriages today end in divorce supports the notion that the law dealing with marriage has failed to develop as quickly as society would allow, and the popularity of the no-fault divorce should encourage the development of variations on the traditional marriage. The author recommends combining the no-fault divorce regime with antenuptual agreements to create a "starter-marriage," which would allow couples in short marriages, with no children and no protracted legal obligations to end their marriages simply, while conversely increasing societal protections for longer marriages.

Benjamin K. Erlick, *Varying Levels of Protection Afforded: Disinherited Spouses in the Marital Property and Community-Property States*, 1 PHOENIX L. REV. 501 (2008)

States have created varying levels of protection for disinherited spouses. Community-property states give each spouse a portion of assets obtained during marriage, while common-law states give the disinherited spouse his or her elective share upon the death of a spouse. A problem arises when couples that live in common-law states migrate to a community-property state, because depending on the particular law of the specific community-property state, a disinherited spouse may not be protected. The author advocates for Arizona, Nevada, New Mexico, and Texas to better protect disinherited spouses by adopting laws similar to elective shares. An alternative solution is to follow other community-property states that shield migrating spouses that have been disinherited as the result of establishing residency in a community-property state.

Robert E. Shepherd, *A Comment on Wrongs Committed During A Marriage: The Child That No Area of the Law Wants to Adopt, by Michelle L. Evans*, 66 WASH. & LEE L. REV. 515 (2009).

The American Law Institute's proposal to utilize tort law to deal with intra-family issues—including child custody, visitation rights, the distribution of assets and domestic violence—is a step in the wrong direction. A spouse should be held accountable for damaging behavior, but fault should not be considered under tort law but during division of assets collected during marriage. The assessment of fault should stay within a family law context, as tort law does not allow appropriate recovery. Additionally, divorce litigation should take priority in the courts because of its potential to dramatically affect families and children involved. Because a solution has not yet been reached regarding how to approach the complexity of

divorce, the continued study of alternative dispute resolution and mediation tactics is necessary to move forward.

Sanjay T. Tailor, *Better Civil Practice in Dissolution of Marriage Litigation*, 40 LOY. U. CHI. L.J. 911 (2009).

In Illinois, parties seeking pre-judgment relief in dissolution of marriage proceedings—such as child custody or child support—are best served by filing a petition rather than a motion. The Illinois Marriage and Dissolution of Marriage Act explicitly states that any request for pre-judgment relief in a pending case is a motion, yet this instruction is regularly and improperly disregarded. Such disregard exemplifies a trend in this area of law where procedural customs directly conflict with procedural law, which is perpetuated by seemingly more relaxed standards in dissolution of marriage cases. The author describes more than a dozen conflicts between procedural customs and Illinois Procedural Law, concluding that even small deviations from appropriate procedural law could have large implications for the parties and the courts. When a court improperly treats a pre-judgment relief petition as a pleading, the responding party must also treat it as a pleading, making the proceedings lengthier and more costly, and causing procedural error for the parties and the court.

Rebecca Probert, *Control Over Marriage in England and Wales, 1753-1823: The Clandestine Marriage Act of 1753 in Context*, 27 LAW & HIST. REV. 413 (2009).

Contrary to popular assumption, the nearly seventy-year period in which the Clandestine Marriage Act of 1753 ("CMA") was in force was *not* a dynamic change to the status quo with regard to its controls over marriage, especially the requirement of parental consent. In fact, canon law had regulated marriage for centuries prior to 1754; the CMA merely codified rules which had previously existed, such as requiring marriages to be preceded by the calling of banns, stipulating where and when marriages should take place, and compelling ministers to keep registers. Additionally, a close analysis of the statute itself, as well as certain social behavior prevailing from 1754 until the Marriage Act of 1823 was passed, reveals that the CMA was not as restrictive as some historians currently believe. In fact, parents continued their efforts to prevent mésalliances—even after the passing of the CMA—by imposing conditions on the devising of property, further reinforcing that they did not feel their powers under the CMA were absolute. Lastly, as final proof for the author's contention that 1754-1823 was not an historical irregularity, the Marriage Act of 1823, which some historians contend vitiated the requirements of the CMA, did not drastically alter or reduce parents' control over marriage when viewed in light of the relevant late eighteenth century

case law, which showed that courts were still willing to invalidate marriages challenged by non-consenting parents.

Darcie Cobden, Comment, *"Ms. Placed" Presumptions in the Texas Election Code: Texas Legislature Tightening the Old Ball and Chain on Political Contributions Made by the Spouses of Lawyers*, 50 S. TEX. L. REV. 529 (2009).

Policy considerations concerning the potential impartiality and corruption that stem from judicial campaigns and elections have led some states to completely eradicate the process, while other states have only placed limitations on who may donate to different judicial platforms. An example of such a limitation is Texas' "Imputed Contribution Statute," which rules that the prohibition on lawyers from making private donations in excess of fifty dollars to a judicial candidate's election campaign also applies to a lawyer's spouse. The article addresses whether the limitation of this statute passes constitutional muster under the First Amendment, as it may prevent a lawyer's spouse from contributing and freely engaging in political speech, simply due to a marital association. The issues with the constitutionality of these statutes have led some states to attempt to mitigate the concerns of ceilings on campaign contributions by introducing disclosure requirements, but such requirements most likely conflict with the First Amendment, so subjecting them to strict scrutiny review would extinguish the provisions. Ultimately, a careful analysis concludes that this archaic, offensive and misplaced statute could not be upheld against the Constitution because it restricts political speech, and it is an uneven and overbroad invasion of associational freedoms.

Hailey H. David, Note, *The Revocation-Upon-Divorce Doctrine: Tennessee's Need to Adopt the Broader Uniform Probate Code Approach*, 39 U. MEM. L. REV. 383 (2009).

Revisions made in 1990 to the Uniform Probate Code contemplate the regularity with which divorcees fail to amend their wills, such as a provision that automatically upon divorce revokes any provisions that remain in a will leaving property to former spouses or their relatives. However, Tennessee law is ineffective to remedy wills that have gone unchanged after divorces as it does not yet provide for the revocation of provisions that leave property to a former spouse's relatives. Therefore, the author argues that Tennessee should apply the revocation-upon-divorce doctrine to both probate and non-probate means of distributing property because the decedent's intent is the same in both cases. Though current Tennessee law and the UPC are default rules only applied when a decedent does not leave specific instructions to the contrary, the provisions of the UPC better protect the average decedent's intent than Tennessee's current law. The

revocation-upon-divorce doctrine aims to protect the decedent's interest and permits him to leave property to whomever he wishes, including a former spouse's relatives, but creates protection against the common failure to modify one's will after divorcing.

Michelle L. Evans, Note, *Wrongs Committed During a Marriage; The Child that No Area of Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465 (2009).

At common law, courts considered parties' marital conduct in determining how to equitably distribute marital property, thereby giving spouses a remedy for the tortious conduct of their former partners. Since the rise of no-fault divorce, however, spouses must bring tort claims separately from divorce proceedings to be compensated for financial, emotional, or physical harm that occurred during marriage. The American Law Institute recommends maintaining this separation between divorce and tort actions because doing so simplifies and expedites divorces. However, traditional tort procedure involving the statute of limitations, joinder rules, and *res judicata*, often bars tort claims after divorce settlement, leaving injured parties with no redress. To better address the needs of divorcing parties through tort law, states should allow courts to consider marital misconduct during divorce proceedings, establish a new cause of action specifically for marital misconduct, and integrate alternative dispute resolution into divorce proceedings so parties can simultaneously pursue tort claims and divorce.

Karin Carmit Yefet, Comment, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441 (2009).

Despite the progress of constitutional law in Israel, Jewish women continue to receive unequal treatment in the area of divorce law. The Israeli divorce system is shaped by Judaism—and its belief that men hold exclusive power to obtain a divorce—which causes women to become "agunot" or "chained" wives. The current system requires mutual consent or establishment of a recognized divorce ground by either spouse; however, the rabbinical court grants limited grounds to women and incentivizes husbands to withhold permission to legally sever their marriages. This article analyzes several leading reform models—one that maintains fault-based divorce, and another that establishes no-fault divorce—and proposes that freedom of divorce should be protected under the Israeli constitution because it is necessary to ensure the "dignity" and "liberty" guarantees even absent provisions that call for freedom of religion and equal treatment. Israeli legislative and judicial action ought to be taken to create a no-fault divorce regime that gives fundamental rights to women seeking divorce from their non-consenting spouses.

Abraham L. Wickelgren, *Why Divorce Laws Matter: Incentives For Noncontractible Marital Investments Under Unilateral and Consent Divorce*, 25 J.L. ECON. & ORG. 80 (2009).

Unilateral and consent divorce laws affect the bargaining and investment decisions of both marital partners. Since the 1970s, the majority of states have adopted unilateral divorce laws as opposed to consent divorce laws, which require both spouses to agree to a divorce unless "fault" could be proven. The author develops a model to analyze the incentives under unilateral and consent divorce laws for a spouse to make a "noncontractible selfish investment"—an investment that affects the utility of the investing spouse only—and a "cooperative marital investment"—one that solely affects the utility of the non-investing spouse. The model seeks to explain empirical data that suggests that the shift from consent to unilateral divorce law has increased the divorce rate in the short term, but in the long run, the divorce rate is no higher than what it would be under a consent divorce regime. Unilateral divorce laws do not necessarily increase the divorce rate in the long term because cooperative investments become more common where a spouse has to compensate his partner to stay married, as evidenced by the recent significant decrease in the rate of spousal abuse.

Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Continues to Matter to (Some) Wronged Spouses*, 66 WASH. & LEE L. REV. 503 (2009).

In a time where fault-based divorce is beginning to disappear in American jurisdictions, and where the American Law Institute has published a report that would have legislatures generally remove fault from divorce proceedings, the author provides reasons why fault divorce ought to remain an option for spouses. First, the transaction costs of showing fault can be more financially and/or emotionally sound than having to resort to separate tort or criminal proceedings as a remedy. Second, unjust results can arise from a no-fault divorce proceeding where the lesser-earning spouse is the tortfeasor, leaving the wealthier spouse with the most to lose. Finally, if judges and/or juries are trusted to make determinations in criminal and civil proceedings, they ought to be trusted to make similar determinations in divorce proceedings. Taking these three factors into consideration demonstrates that fault-based divorce provides certain spouses with a method of securing a more equitable dissolution of a marriage than could be provided by a no-fault proceeding.

PARENTING

Heather Britton, *Standing in the Wake of In re Cesar L.: The Effects on Parents' Rights After Termination*, 19 GEO. MASON U. CIV. RTS. L.J. 663 (2009).

A parent is deemed a legal stranger upon termination of that individual's parental rights. The Supreme Court of Appeals of West Virginia held in the case *In re Cesar L.* that people whose parental rights were voluntarily or involuntarily eliminated did not have standing to file a petition for modification of their child's disposition. The *Cesar* court interpreted the West Virginia statute as stating that a biological parent is not a parent after termination proceedings and thus has no standing to contest the termination of parental rights. The author argues that the court's ruling is overly broad because it extends its holding to involuntary termination and does not correctly interpret the West Virginia statute. The decision in *In re Cesar L.* neglects the best interests of the child because once parents terminate their parental rights, they cannot challenge the termination in the event that they later decide to restore their parental rights.

Gabriel T. Thornton, Case Comment, *School's Use of Books Depicting Same-Sex Couples Does Not Violate Parents' Constitutional Rights*, 42 SUFFOLK U. L. REV. 329 (2009).

In *Parker v. Hurley*, the United States Court of Appeals for the First Circuit determined that a public school did not violate parents' constitutional rights when it exposed young students to picture books portraying same-sex couples without giving parents the option to exempt their children. Parents maintain a fundamental constitutional right to control the upbringing of their children, such as choosing between public or private education for their children. However, several federal court cases, including the First Circuit in *Brown v. Hot, Sexy and Safer Productions*, held that this right does not extend to a control over the educational methods or materials used by a public school. The author believes the First Circuit decided the case correctly by refusing to force public schools to give parents notice or opportunity to exempt their children from discussions of homosexuality in the classroom. Parents can teach their children their views about homosexuality in their own homes, but the Constitution's substantive due process protections do not allow parents to dictate a public school's education agenda.

Meir Weinberg, *The Fourteenth Amendment Due Process Right of Companionship Between a Parent and His or Her Adult Child: Examination of a Circuit Split*, 43 NEW ENG. L. REV. 271 (2009).

Under the Fourteenth Amendment, no state can "deprive any person of life, liberty, or property without due process of law." Section 1983 of the Civil Rights Act gis individuals the right to sue for violation of due process rights. The federal circuits remain split on whether there is a due process right to companionship between a parent and his adult child. The author contends that the Supreme Court needs to rule on this issue so that there will be a uniform rule applicable to all circuits. Section 1983 should be actionable only if the government action has purposefully disrupted the parent-child relationship and when the action complies with the Supreme Court's enumerated and unremunerated familial rights.

Jennifer K. Smith, Comment, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 SEATTLE U. L. REV. 769 (2009).

The state of Washington's current Visitation Statute must be amended to demonstrate the Juvenile Court Act in Cases Relating to Dependency of a Child and the Termination of a Parent and Child Relationship's ("Dependency Act") aims of protecting the best interest of a child. Throughout history, parental rights have been derived from Christian values that operate under the assumptions that parents love and care for their children and only want what is best for them. The Dependency Act presents a point of contention between this traditional view of parental rights to maintain family autonomy and the right of the state to step in and protect a child's best interests in cases of abuse. The author suggests that the legislature change the statute to safeguard the children's long-term best interests, thereby limiting parents' ability to subject children to emotional harm while also providing juvenile courts with clear guidelines in determining visitation rights. In addition, the statute should be refashioned to define "best interests of the child" in order to give juvenile courts specific guidelines to consistently evaluate the child's health, safety, welfare, and interests.

Allyson B. Levine, Note, *Failing to Speak for Itself: The Res Ipsa Loquitor Presumption of Parental Culpability and its Greater Consequences*, 57 BUFF. L. REV. 587 (2009).

Evidence of parental abuse is difficult to obtain because such actions ordinarily occur in the privacy of the home. In an effort to better protect abused children, the New York State family court system adopted the *res ipsa* doctrine to create a presumption of abuse that can be rebutted if a parent presents a reasonable

and satisfactory explanation for their child's injuries. Courts consider six different factors to determine whether a parent has rebutted this presumption in an effort to maintain the balance between child safety and parental rights: (1) a consistent and plausible account of events; (2) corroborating expert testimony; (3) a diligent effort to seek medical treatment; (4) a single injury with no other marks that are suggestive of abuse; (5) the expression of emotion at the fact-finding hearing; and (6) a plausible alternative explanation for the injury. The author argues that while the presumption of abuse is critical to ensuring the protection of children, *res ipsa* reforms are needed to encourage a more consistent application in certain cases, such as those involving multiple caretakers and indigent parents. Through efforts such as the mitigation of socio-economic biasing and the incorporation of the abovementioned six factors into case law, New York State can increase its efforts to protect children from abuse and neglect.

Linda C. Fentiman, *Pursing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389 (2009).

Since the late 1980's, scores of American women—overwhelmingly poor and/or racial minorities—have been prosecuted or civilly committed for "fetal abuse" or child endangerment due to the use of alcohol or drugs during pregnancy. These prosecutions are part of a social and legal "fetal protection" movement for the recognition of legally cognizable fetal rights, which is proposed by American prosecutors, physicians, public health officials, advocacy groups, and media. The fetal protection movement is unique to the United States; other countries, like Canada and France, have refused to attach an independent legal identity to the fetus and do not punish women for endangering their fetuses. As recognized by Canada and France, effective child protection does not result from punishing a mother, but from giving her the social, health, and economic support that will enable her to properly care for both her child and herself. Accordingly, the author recommends a two-part approach to more effectively protect children: (1) federal and local prosecutors must agree to stop fetal abuse prosecutions; and (2) federal and local governments must increase pregnant women's access to healthcare, substance abuse treatment programs, and economic support.

RACE AND GENDER

Kelly Sarabyn, *Racial and Sexual Paternalism*, 19 GEO. MASON U. CIV. RTS. L.J. 553 (2009).

Numerous scholars have examined two polarized strands of jurisprudence of the Supreme Court Justices when deciding cases involving issues of race: the more conservative Justices who stringently employ an "anti-classification" or "colorblind" approach, and the more progressive Justices who adhere to an "anti-subordination" principle, which reflects a cynical attitude towards racial classifications that perpetuate the subordination of some racial groups. This article examines this jurisprudential tension as one between racial and sexual paternalism rather than anti-classification and anti-subordination. Progressives have worked to extinguish laws founded in sexual paternalism, arguing that sex-based classifications have no place in a society where sex shows little to no correlation with one's ability to function successfully in civilization. Conservatives, however, have expanded upon the progressives' approach in the post civil rights era by proscribing laws with a basis in racial paternalism—a dangerous tool that is based on a prejudicial theory that blacks are a substandard race. Viewing the conservatives' equal protection principle as founded in racial paternalism might narrow the distance between the progressive and conservative equal protection analyses, and may compel progressives to defend the principle of anti-subordination as the best means of responding to race based cases.

Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879 (2009).

Many statistical studies investigating race, gender, and the length of criminal sentences focus solely on the direct effects of legally irrelevant factors, such as a criminal's education, vocational skills, race, gender, and marital status. However, few studies explore the *indirect* effect of those factors on sentence length. The author's statistical research suggests that there is a strong positive correlation between pre-trial detention and the severity of the sentence received by the criminal, and that pre-trial detention is heavily influenced by factors such as race, gender, and socioeconomic status. The study performed found that black defendants were more likely to have been detained before trial than white defendants and that males were more likely to be detained pre-trial than females. These findings illustrate the importance of investigating both direct and indirect factors in statistical research, thereby illuminating the inability of some studies to demonstrate the effects of racism and sexism on criminal sentencing.

Ann C. McGinley, *Hilary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709 (2009).

Social norms still dictate our judgment, and the personality characteristics demonstrated by our nation's leaders must be carefully negotiated to mimic the public's expectations. Notably, society continues to demand that women "negotiate a double blind," thereby balancing their feminine and masculine attributes to appear both affable and competent. As women continue to take on roles in the public spotlight, it will be interesting to see whether the United States can accept them as political candidates without requiring them to adequately balance their masculine and feminine characteristics. This article uses Hilary Clinton, Sarah Palin, and Michelle Obama to explore the issues of gender and race in the political arena. The evaluation of their diverse backgrounds, and the impact of their identity performances on public reception, demonstrates a growing acceptance of women as political candidates.

Verna L. Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833 (2009).

The First Lady has always been considered the public archetype of the traditional domestic woman serving as the nation's hostess to the world. Michelle Obama is now challenging this stereotype with her working class parentage and sassy attitude, and forcing the nation to redefine what it means to be a woman in our modern society. She is defying the construction of femininity based on white privilege, and the patriarchy that this construction supports by exemplifying the new standard of the "Black lady": a woman who is neither overly assertive nor oversexed, and who allows the Black man to assume the role of the strong leader, yet who is still an attractive and successful professional. Furthermore, her emphasis on work-life balance sets a new standard for the role of First Ladies—no longer must motherhood and the traditional responsibilities of a wife be the sole, defining quality of an ideal woman. Instead, promoting those values of most importance to families—such as equal pay, assistance for military families affected by frequent deployment, and providing paid leave for workers with family obligations—can now serve to emphasize the importance of the domestic domain, while still providing an outlet for a substantive, meaningful work role for First Ladies, and the women who see them as role models.

Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633 (2009).

Although associating specific character traits with one gender merely reflects society's understanding of gender roles, and is therefore subject to change and

evolution, the media tends to perpetuate these traits as somehow definitive, and use them to judge public figures as being more or less masculine or feminine than society desires. Barack Obama's lack of conformity with media stereotypes about black men have led some to joke that he may be our "first female president." This perception is linked to the theory of "bipolar black masculinity"—defined by the media's portrayal of black men as either dangerous, violent individuals with criminal propensities (the "Bad Black Man") or as a token member of the corporate or conservative political community (the "Good Black Man"). Applying theories about self-identity, race, and masculinity to news stories that mention Obama and femininity illustrates the construction of Obama as our first "unisex president." Concluding that Obama's feminization may contribute to a new identity of black men that envisions a calm demeanor instead of an angry individual, the author suggests that Obama's success may remove some of the stigma of femininity and, on a grander scale, allow people to embrace identities that contradict the media-supported, traditional gender roles that have so long been engrained in our society.

RELIGION

Lauren C. Miele, Note, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody?*, 43 NEW ENG. L. REV. 105 (2008).

Courts should utilize the best interests of the child standard—in addition to examining the behaviors accompanying religious beliefs in polygamy—when determining child custody. In *Reynolds v. United States*, the Supreme Court upheld regulation of polygamous marriages on grounds that it did not violate the Free Exercise Clause of the First Amendment. After *Lawrence v. Texas*, polygamists hoped to challenge regulation of polygamy based on the court's holding that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment; however, *Lawrence* is a narrow holding which courts are still hesitant to expand. In light of the harmful psychological and physical impacts the children may suffer, such as the prevalent sexual abuse and rape in this environment, the courts should address concerns that polygamous parents may encourage children to perpetuate an illegal lifestyle. As it relates to polygamy and child custody, the issue is not merely religious belief, but rather religious conduct, which entitles the government to regulate polygamous relationships when determining the best interests of the child.

Kelly Elizabeth Phipps, Note, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887*, 95 VA. L. REV. 435 (2009).

With the advent of the Republican Party in 1856, American political rhetoric inextricably shifted towards the moral issues of the day: slavery and polygamy. However, this party's political motivations for citing polygamy as a barbaric practice equal to slavery were not rooted in a moral call to monogamy, but rather the political necessity of the time to assert federal power over the states and to reconstruct the nation after the Civil War. This initial strategy of analogizing polygamy to slavery failed; Southern congressmen simply did not agree with the radical Republican notion that the Mormon husband was equivalent to a slave owner, and the multiple wives were his oppressed slaves. After the failure of Reconstruction, Congressional Republicans recognized the need of Southern support for anti-polygamy laws and therefore shifted the rhetoric of debate to more sympathetic issues. With a resurgence of white cultural nationalism, Congressional Republicans reframed polygamy as an impurity in need of elimination—consistent with the ideology behind Southern congressional support for the Chinese Exclusionism movement and the rise of the Jim Crow South—and thereby succeeded in their initial goal of adopting federal legislation that treated polygamy harshly.

SAME-SEX MARRIAGE

Amanda Alquist, Comment, *The Migration of Same-Sex Marriage From Canada to the United States: An Incremental Approach*, 30 U. LA VERNE L. REV. 200 (2008).

The United States should allow same-sex marriages by following Canada's lead and using an incremental approach that would give same-sex couples federal equal protection rights. Canada's common law definition of marriage changed when Canada adopted the Civil Marriage Act, which allowed for same-sex marriages and gave them equal rights under the Canadian Charter of Rights and Freedoms. In contrast, only a minority of American states permit same-sex marriage, and recognition of same-sex marriage remains barred beyond the state level pursuant to the Defense of Marriage Act ("DOMA"). A doctrinal struggle continues between the migration model, with its belief that recognition of same-sex marriages in other cultures will pervade U.S. law, and the negative migration model, which deflects the legalization of same-sex marriage back into Canada and blocks American judges from using international law in U.S. decisions. The incremental approach argued in this article would change sexual orientation

discrimination laws, grant state civil unions, and take incremental steps toward full recognition of the rights of same-sex partners.

Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509 (2009).

Flawed societal assumptions—including the necessity of marriage to promote responsible procreation—establish the viewpoints of the federal government and a majority of states regarding a proper definition of marriage. Traditionally, Indian tribes were more concerned with an individual's contribution to the community rather than focusing on specific gender roles like those accepted in American society. Because of tribal sovereignty, tribes have broad authority to establish their own marriage laws, which in turn, creates a problem when confronted with the federal Defense of Marriage Act. In Oregon, the Coquille tribe legally recognizes same sex marriages, while Oregon itself allows couples that file for domestic partnership status to legally obtain benefits, protections, and responsibilities available to married partners. These conflicting jurisdictions create issues that should be dealt with while the spouses are alive via a living will or execution of an advance directive.

Judith E. Koons, *Engaging the Odd Couple: Same-Sex Marriage and Evangelicalism in the Public Square*, 30 WOMEN'S RTS. L. REP. 255 (2009).

A definite correlation exists between the political shift in the evangelical community and the continued movement towards the acceptance of same-sex marriage, although traditional deep-rooted beliefs within these two communities still show pervasive differences. Both evangelicalism and same-sex marriage have undergone movements that are the products of cultural change. The author advocates for an agonistic approach to same sex-marriage, where communities may solve the same-sex marriage debate but continue to hold adversarial positions based upon the fundamental principles of freedom, equality, individual autonomy and the importance of marriage as it can promote the public good. These principles provide the common bases for both evangelicals and same-sex couples and their beliefs. Supporting the right of same-sex couples to marry would be a positive change for society in many ways, providing equal benefits to children of same-sex and opposite-sex couples and ensuring that young Americans do not have a tarnished view of the institution of marriage.

Richard Salas, *In Re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and The Effects of Proposition 8*, 36 HASTINGS CONST. L.Q. 545 (2009).

Proposition 8 does not amend or overrule some of the more basic fundamental rights recognized by *In re Marriage Cases*, a case wherein the California Supreme Court recognized the right to marry as one of the basic, inalienable civil rights assured to an individual by the California Constitution. The court articulated that the state's distinction between same-sex couples and opposite-sex couples raised constitutional concerns pursuant to the state constitution, including the right to marry and the equal protection clause. Moreover, the distinction drawn by the statutes impinges upon a same-sex couple's constitutionally protected privacy interest, which could result in unfavorable consequences for same-sex couples and their families. However, the state's passing of Proposition 8, which overruled this case, is now subject to many legal challenges. The author argues that the contention surrounding Proposition 8 should be finally resolved via pending litigation.

Judith A. Young, *Same-Sex Marriage In California: After Proposition 8 Passed and Before the California Supreme Court Decision on the Challenge to Proposition 8*, 36 LINCOLN L. REV. 131 (2008).

Review of the history and development of California law portends the likely outcome for the pending decision on the challenge to Proposition 8, a California statute that stipulates that only opposite-sex couples may be married. On May 15, 2008, the California Supreme Court invalidated Proposition 22's statutory provision, a predecessor to Proposition 8 that limited marriage to a union between a man and a woman. Following the Court's decision that the provision was unconstitutionally discriminatory based on sexual orientation, proponents collected signatures to include Proposition 8, which received a majority of votes in the 2008 general election. The California Supreme Court, when hearing the case against Proposition 8, must determine if the revision to the California Constitution violates equal protection rights, if Proposition 8 violates the separation of powers doctrine under the California Constitution, and finally, if the new language in the Proposition is not unconstitutional, whether Proposition 8 will take effect retroactively. The Court's decision in the pending case should turn on whether the Court views Proposition 8 as denying the equal protection rights of same-sex couples.

Louis Thorson, Comment, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?*, 92 MARQ. L. REV. 617 (2009).

While the recognition and formation of same-sex relationships has received a great deal of press, the heated debate regarding their dissolution has been virtually unacknowledged. Wisconsin, like many states, faces many legal challenges when same-sex couples, who form legally-recognized unions in other states like Massachusetts, relocate to Wisconsin and later wish to dissolve their union. This article suggests several alternative methods that courts, particularly those in Wisconsin, a state that does not recognize same-sex unions, can use to handle these dissolutions. First, Wisconsin can choose to deny access to it courts by couples seeking to dissolve same-sex marriages; second, it may apply its own divorce statutes to homosexual divorces as it would apply them to heterosexual divorces; third, it may allow access by same-sex couples to its courts, but apply the law of the state in which the union was created when handling the divorce proceedings. While none of the solutions presented will satisfy both parties in the debate because of the uncompromising nature of the parties involved, they are intended to encourage discussion about a growing legal issue in the United States.

Michele Reichlin, *Civil Unions Under the Maryland Era: How the Illusion of Equality is an Equal Rights Avoidance*, 38 U. BALT. L. REV. 305 (2009).

Throughout the 1970s, fourteen states adopted an Equal Rights Amendment ("ERA") to their constitution to protect against sex discrimination. While litigants attempted to use ERA amendments to argue that the ban on same-sex marriage is unconstitutional, the majority of states denied this effort and offered civil unions as a substitute for marriage. *Conaway v. Deane* serves as a paradigm to explore Maryland's statewide fight for civil rights recognition, and the judicial system's misinterpretation of the ERA when denying same-sex marriage rights. Equal Rights Amendments demand that legislatures enact laws that do not discriminate on the basis of sex, yet civil unions do not offer the same protections to same-sex partners that marriage offers to heterosexual couples. Due to the fact that there is no constitutional justification for denying marriage rights to same-sex couples, Maryland should embrace equality and grant these individuals civil marriage.

Linda C. McClain, *Red Versus Blue (and Purple) States and the Same-Sex Marriage Debate: From Values Polarization to Common Ground?*, 77 UMKC L. REV. 415 (2008).

This article considers the degree to which the courts and political majorities should have a role in protecting the values and morals of a population. The labeling of "red" and "blue" states greatly contributes to "values polarization," a

means by which states are connected to the defense of specific values in direct opposition with values of other states. By focusing on two contrasting views of the "values polarization" issue, one by philosopher Ronald Dworkin and the other of June Carbone and Naomi Cahn, the strengths and weaknesses of each are revealed. Dworkin seeks to look beyond the red and blue distinctions to focus on national morality issues, whereas Cahn and Carbone focus on the advantages of permitting different states to promote different values. Finally, the California Supreme Court's *In re Marriage Cases* is used to test the two interpretations; the case corresponds with Dworkin's model, which views dignity as a uniting factor between red and blue states, whereas Carbone and Cahn's view of a new paradigm for the family is somewhat suitable but may in fact perpetuate conservative values regarding marriage.

SEX DISCRIMINATION

Judith D. Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473 (2009).

An increasing trend towards gender-neutral language has had important effects in the legal profession. Language scholars, psychologists, and framing theorists have demonstrated that biased language affects individual's perceptions of themselves and the world. Since the 1960s, empirical evidence shows more frequent use of gender-neutral language by judges in federal appellate opinions. While evidence of more gender-neutral language is significant, some biased nouns and pronouns continue to appear. Studies should continue to track the trend and educate people about the importance of gender-neutral language.

Dr. Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153 (2008).

Modern interpretation of the Fourth Amendment focuses on reasonableness and objectivity. From the author's perspective, traditional Fourth Amendment analysis deems jurisprudence to be objectively reasonable when it is reasonable from a white elitist male's perspective. Such objectivity and reasonableness fail to take into account the differing life experiences of women and different racial ethnicities and classes. The pretense of reasonableness and objectivity must be discarded for a more functional and realistic Fourth Amendment. Thus, an interpretation of the Fourth Amendment that allows different cultural perspectives and allows for a personal narrative form is needed.

Danielle C. Beasley, *De-Clothing Sex-Based Classifications–Same-Sex Marriage is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1 (2009).

Judges should decide sex discrimination cases according to a strict scrutiny standard because such cases involve violations of the Equal Protection Clause under the Fourteenth Amendment. In today's society, same-sex marriage is not the only prevalent form of sex discrimination; rather, sex discrimination extends to other areas of our daily lives, including school sports, public bathrooms, and use of sex-specific pronouns. The author suggests that removing a focus on legally-sanctioned sex-based classifications and creating a more sex-neutral environment through co-ed sports teams, co-ed bathrooms, and sex-neutral pronouns will alleviate the pressures of individuals to feel the need to fit into gender stereotypes. Adopting these views would ensure that people develop their individual capacities and potential without having to deal with the pressures and legal burdens that come with gender stereotypes and prejudice. It is imperative for society to adopt these views as it continues to grow and evolve in order to achieve formal sex equality.

Yvonne A. Tamayo, *Rhymes With Rich: Power, Law, and the Bitch*, 21 ST. THOMAS L. REV. 281 (2009).

"Bitch," a term used to consistently degrade women who behave in a way that society deems as outside of the gender norm, is used in the political realm and the workplace to harass and subordinate women. In the political realm, members of both sexes publically denounced Hillary Clinton as a bitch as she sought the historically male position of Democratic Presidential nominee. Similar reactions can be found in male-dominated workplaces, but have slightly been curtailed by the finding that workplace sexual harassment falls under the protection of Title VII of the Civil Rights Act, which defends against discrimination based on sex. However, difficulties remain in protecting against discrimination based on sex as the male-dominated judiciary does not perceive the term bitch as expressing hostility towards females. To remedy this, more women should embrace powerful positions to reduce the ability of others to insult women for overstepping society's imposed definitions of gender roles.

Lindsay Niehaus, *The Title IX Problem: Is it Sufficiently Comprehensive to Preclude §1983 Actions?*, 27 QUINNIPIAC L. REV. 499 (2009).

Title IX is a federal statute that prohibits gender discrimination in federally-funded educational institutions. As an enforcement mechanism, Title IX explicitly provides for termination of federal funds to institutions that violate the statute and implicitly provides a private right of action for individuals seeking redress for

injuries caused by Title IX violations. Circuit courts are split on whether individuals can also enforce Title IX through §1983, which gives individuals a private right of action against anyone acting under "color of state law" that has violated an individual's federal rights. In *Fitzgerald v. Barnstable School Committee*, the United States Supreme Court resolved the circuit split and held that individuals can sue public schools for gender discrimination under §1983, as well as under Title IX. The author asserts that *Fitzgerald* was wrongly decided because allowing individuals to enforce Title IX protections under §1983's broad prohibition of discrimination is contrary to the remedial purpose of Title IX, which contains sufficient enforcement mechanisms to adequately and efficiently redress harm to individuals.

Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409 (2009).

The Title VII provision banning sex discrimination under the Civil Rights Act of 1964 was introduced by Representative Howard Smith—an opponent of the civil rights law—only two days before the bill was passed. Thus began the "stock story"—the theory that Rep. Smith sought to sabotage the passage of the entire bill with this proposal. In reality, Rep. Smith was a supporter of women's rights, and The National Woman's Party had played an active role in pushing for the addition of sex discrimination to Title VII. The author traces the stock story's development and argues that the Equal Employment Opportunity Commission, news media, and judges, amongst other actors, were responsible for perpetuating the myth that the sex provision was added by accident. The stock story demonstrates that legislative history is socially constructed, and the social environment in which a law is enacted influences the interpretation of such history.

SEX INDUSTRY

Kristen Fasullo, Note, *Beyond* Lawrence v. Texas: *Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997 (2009).

The Fifth and Eleventh Circuits have recently split on whether statutes that ban the sale of sexual devices may be invalidated by invoking the individual right to sexual privacy, which is established by case law—although not explicitly found in the Constitution. The author examines the historical and statistical background of sexuality in America, including the initial use of sexual devices as a method to clinically treat hysteria, and its recent popularity as a way of facilitating and

increasing sexual pleasure. A determining factor for the constitutionality of anti-sexual device statutes is the ruling in *Lawrence v. Texas*, where the United States Supreme Court held that a Texas statute classifying adult homosexual intercourse as illegal sodomy violated the Fourteenth Amendment because adults have the liberty to freely conduct their private sex lives. The decision in *Lawrence* demonstrates that any anti-sexual device legislation that restricts the sale, distribution, manufacture, and promotion of sexual devices infringes upon an individual's sexual autonomy, and is thereby unconstitutional. In order to substantiate this contention and guarantee Fourteenth Amendment protection for an individual's sexual privacy, a broad interpretation of *Lawrence* must be recognized along with consideration of the current social and statistical data revealing the prevalence of sexual devices.

Melissa Holman, Comment, *The Modern Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT'L L.J. 99 (2009).

In light of the causal connection between legalized prostitution and the increase in sex trafficking, the United States should amend the minimum standards of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") to require countries to have strong anti-prostitution laws. As the law stands now, the United States places countries into tiers based on their efforts to combat sex trafficking and those in Tier 3, the lowest tier, risk losing all non-humanitarian, non-trade-related assistance from the United States. Several countries, including Germany and the Netherlands, have been listed as Tier 1 countries, despite having legalized prostitution. In countries with legalized prostitution, traffickers—looking to meet the increased demand for prostitutes—are able to use the legitimacy of the trade as a shield by forcing women to refer to themselves as independent sex workers so they can obtain a work permit to enter the country. In recognition of the fact that legalized prostitution increases the demand for sex trafficking, the United States should assign any countries who have legalized sex markets to Tier 3, putting them at risk of losing United States aid until they adopt laws banning prostitution.

Monica R. Moukalif, Note, *See No Evil: Applying a Labor Lens to Prostitute Organizing*, 20 HASTINGS WOMEN'S L.J. 253 (2009).

Although prostitution is both criminalized and stigmatized, sex laborers face similar challenges as other marginalized workers, in that these groups are often unable to earn a stable living and deal with abuse from clients and law enforcement. Moreover, sex, domestic and day laborers fit neither the Fair Labor

Standards Act nor the National Labor Relations Act definitions of "employee," thereby obstructing these groups from any form of legal protection and the ability to formally organize. However, domestic and day workers have responded to these bars by employing non-traditional tactics and community-based organizing, such as occupational unionism, worker-run cooperatives and worker centers. Although sex workers differ in some of their organizing goals—mainly because prostitutes are less concerned with job procurement—the balance of the industry's goals are the same, including outreach, health and safety, legal and employment services, and advocacy. While prostitution remains illegal and is still deemed immoral by society, sex workers need support in their continued fight for the same labor rights as other marginalized groups.

Onki Kwan, Note, *From the Protection of Children Against Sexual Exploitation Act of 1977 to the Adam Walsh Child Protection and Safety Act of 2006: How Congress went from Censoring Child Pornography to Censoring Protected Sexual Speech*, 36 HASTINGS CONST. L.Q. 483 (2009).

Congress has enacted and amended several statutes in an attempt to protect children from sexual exploitation. Many of these statutes have been struck down as unconstitutional, due to onerous requirements that force pornography producers to keep meticulous and somewhat excessive records that account for every alias that their actors have ever used, and to obtain documentation of the age of these actors. These laws generally have not been tailored in a sufficiently narrow manner for the purpose of stopping child pornography, thereby frequently infringing upon the constitutional rights of affected individuals. The author suggests that lawmakers recognize the economic and health-related value of pornography, revise the existing legislation to remove the requirement that producers ascertain all the alias used by a performer, remove the requirement that any producer of sexually explicit material place his real name and business address on any visual depiction of sexual acts, and eliminate the burdensome record-keeping requirements for secondary producers. Furthermore, adding an intent requirement to the existing laws and adopting a totality of the circumstances standard when evaluating whether a pornography producer has violated anti-child pornography laws will continue to protect children from sexual exploitation while also protecting the First Amendment rights of those in the adult entertainment industry.

SEX OFFENDERS

Adam Doeringer, Comment, *Rehabilitating Juvenile Sex Offenders with a Life* Sentence, 42 J. MARSHALL L. REV. 187 (2009).

State laws requiring juvenile sex offenders to register as child molesters forever are perhaps too harsh of a penalty for young delinquents, many of whom may not actually present dangers to their community. In reaction to the brutal rape and murder of a young girl, Congress enacted Megan's Law, legislation best known for mandating that sex offender registries be made public. Many argue that state versions of Megan's Law, when extended to apply to juvenile sex offenders, prevent rehabilitation of these troubled youths. State versions of Megan's Law ignore the numerous factors in a juvenile's life that may influence that youth's sexually violent activity and mark these adolescent offenders for life instead of attempting to rehabilitate them. As evidenced by the recent Illinois decision to limit the time period to ten years that youth offenders must be registered, some jurisdictions are taking necessary steps to distinguish between those juvenile offenders who should be subjected to lifelong registration and juvenile offenders who may not deserve such severe punishment.

Sara J. Lewis, Note, *Legislating to Keep Children Safe at School: Are Sex Offenders Really Worse Than Murderers?*, 20 STAN. L. & POL'Y REV. 203 (2009).

New York law mandates automatic and immediate decertification of teachers and other educators who are convicted of any sex offense. Governor Paterson and the New York legislature enacted the statute to protect against the rehiring of educators convicted of a sex crime or remaining on school payroll once a sex crime is committed. Legislatures focused specifically on sex offenders in response to public concern about keeping sex offenders out of the classrooms in order to keep children safe. The statute's limited focus on sex offenders, however, is misguided. The scope of the statute should be expanded to automatically revoke a teacher's license upon conviction of any serious crime that put children at risk of psychological or physical harm.

SEXUAL ABUSE

Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277 (2009).

Within the context of sexual assault disciplinary proceedings on college campuses, schools need not choose between protecting the rights of the accused student or the rights of the student complainant. The author argues that the Due Process Clause and Title IX work together to protect the rights of both parties, with Title IX protecting the victim and due process safeguarding the rights of the accused. Although based on different foundational principles, both the Due Process Clause and Title IX protect the accused student's and the claimant student's interest in secondary education. Additionally, due process and Title IX guarantee both the accused and the victim the right to an impartial hearing process with adequate notice. Courts remain divided on the question of whether due process guarantees the accused a right to counsel at disciplinary hearings, but Title IX makes clear that whatever rights are afforded to the accused must also be available to the student complainant.

Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant Fix*, 93 MINN. L. REV. 1902 (2009).

Rapes of Native American and Alaskan Native women occur at a disproportionately high rate compared to women of other ethnicities in the United States. Additionally, due to jurisdictional difficulties that prevent or limit the prosecution of sexual assault of Native Americans by non-Native American aggressors, their perpetrator is likely to go unprosecuted and uninvestigated. The decision in *Oliphant v. Suquamish Indian Tribe*—which held that tribes have no criminal jurisdiction over non-Indians—created jurisdictional confusion and in most situations the decision now precludes Native Americans from prosecuting non-native American perpetrators. Although tribes have been able to exercise jurisdiction in some areas of law, they have not had such success in criminal justice. An opt-in program for tribes to assume criminal jurisdiction, while facing many political and practical hurdles, is the most effective solution to the current problem.

Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 (2009).

This article argues that American universities, and ultimately society, have failed to adequately address the increasingly pressing issues of student-athlete rape and sexual assault. American culture reveres college football players for their violent domination of one another; each game is a celebration of the mythical status of male hegemony. However, when these student gladiators turn their aggression towards women, institutions fail to provide any meaningful protections because the National Collegiate Athletic Association does not prohibit sexual assault by student-athletes and district attorneys rarely prosecute student-athletes for rape since most often accusers are acquaintances of the athlete. The societal acceptance of student athlete imperviousness exists even under federal laws such as Title IX, in which an accusing female student must prove that the school she asked for help actually knew of the harassment and deliberately ignored it. While this evidentiary standard seems insurmountable, civil litigation may be the best avenue for reform: under certain state constitutional provisions prohibiting sexual discrimination, plaintiffs can sue for injunctive relief against state institutions, such as large schools with prominent football programs, thereby making civil litigation a possible avenue for reform.

Anthony Marino, Note, *Bosnia v. Serbia and the Status of Rape as Genocide Under International Law*, 27 B.U. INT'L L.J. 205 (2009).

In 1993, Bosnia filed suit in the International Court of Justice ("ICJ") against the former state of Yugoslavia, claiming it consented to the genocidal war of non-Serbian Christians against Serbian Muslims in Bosnia. In its 2007 ruling, the ICJ referred to The Convention on the Prevention and Punishment of the Crime of Genocide, ratified after World War II, and discussed many potential atrocities that would constitute genocide, but failed to find that the systematic rape of Serbian women fell within the Convention's definition. The author argues that the ICJ's failure in this regard irresponsibly diluted the status of rape as genocide under international law. The ICJ's refusal to acknowledge acts of sexual violence against Serbian women—some allegedly perpetrated for the specific purpose of forced impregnation—prohibited the Court from recognizing a primary element of the Convention's definition of genocide, which is specific intent. By choosing to ignore evidence that the requisite specific intent is seemingly inherent in such crimes of rape, the ICJ achieved its goal of finding no state-sponsored genocide in Bosnia.

SOCIAL CLASS

Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338 (2008).

The author proposes that in order to have a more complete understanding of how the law affects rural women, legal scholars should include the geographical tools of space, place, and scale in their studies. "Space" includes the physical space and its impacts on individual's lives in the social sense; "place" is a subsection of "space" and considers the distinguishing qualities of a specific location; and "scale" is the measurement of both "space" and "place." The rural "space" of women is relatively concealed as they typically remain inside the private home and their invisibility is compounded by the fact that the rural community itself is considerably more private than the urban community. While analysis of the rural "place" provides details about the characteristics of rural regions and "scale" recognizes the many vantage points from which rural life can be studied, both promote a deep understanding of the community. It is important for scholars to utilize these geographic tools to better understand the law's impact upon the "space" of rural women, and also determine how the rural women's "space" propagates injustice and subjugation committed against them.

WOMEN'S RIGHTS

Patricia Palacios Zuloaga, *The Path To Gender Justice In The Inter-American Court Of Human Rights*, 17 TEX. J. WOMEN & L. 227 (2008).

Despite efforts of the Inter-American Court of Human Rights—the largest international organ of human rights protection—human rights issues involving women victims are still inadequately addressed, in part because of the commission responsible for selecting the case docket for this highly influential court. The author traces the court's progression toward recognition of women's human rights issues, highlighting various practical reasons for the gender-sensitive deficiencies of this court. For instance, the patriarchical view dominant in many countries crystallizes the subordinate status of women in international law, especially when the court, dealing with women's human rights issues, has no sitting female justice. The court has made strides by drafting specialized human rights treaties to address often ignored human rights issues unique to women, yet these instruments are often political and symbolic gestures rather than practical solutions. Treaty enactment should continue for awareness-raising purposes, but effective treaties should be coupled with more concrete measures, such as enforcing state obligations to

address women's human rights issues and ensuring that female justices start to sit on the Inter-American Court of Human Rights.

Kristin Davis, Note, *The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination*, 42 VAND. J. TRANSNAT'L L. 949 (2009).

The African Protocol on Women's Rights ("Protocol") was added to the African Charter on Human and Peoples' Rights to address gender issues that are unique to African women, thereby recognizing that many social, economic, and cultural processes still exclude them. Since the Protocol came into force in 2005, forty-three African states have signed the document and twenty-three countries have ratified it. The Protocol has been praised and regarded as progressive in its comprehensive inclusion of guaranteed rights, but its ambitious provisions may instead lead to further marginalization of African women where the obligations are left unmet over time and discriminatory behavior becomes legally acceptable. More specifically, this article argues that the Protocol's over-specific language, provisions on affirmative action, and failure to consider conflict of laws will pose problems for the instrument's enforcement and implementation. As one possible solution, African states should adopt a grassroots approach to better understand how to reconcile the Protocol with that of customary tribal law.

WORKPLACE DISCRIMINATION AND HARASSMENT

Christine Elizer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1 (2009).

Courts generally interpret the Equal Pay Act—a law geared to correct the fact that women are paid substantially less than men—to preclude recovery for women who earn less than men because the men negotiated for higher salaries. In 1963, Congress enacted the Equal Pay Act in response to several factors that contributed to the gender discrepancy in salaries, such as historical discrimination and cultural attitudes about women in the workplace. Gender differences in negotiation explain at least part of the gap in pay, as research indicates that women feel more uncertainty about asking for higher pay and that more employers may react negatively to women who do ask for salary increases. The Equal Pay Act should recognize salary negotiation as a valid factor in considering the different treatment of female employees. Employers should not be able to use gender differences in negotiation as an excuse to pay men more than women who perform the same job.

Valkyrie Hanson, Note, *A Social Label for Social Dialogue: A Proposal to Improve Working Conditions for Women in the Guatemalan Apparel Industry*, 10 GEO. J. GENDER & L. 125 (2009).

The Guatemalan apparel industry mainly consists of female employees, who work in factories, or maquilas, and are subject to sexual harassment and an unsafe workplace. Female workers tolerate the maquila environment for a variety of reasons, including the need for a salary and lack of worker participation in labor unions. Although Guatemalan laws and private company codes of conduct forbid the sex discrimination that occurs in maquilas, authorities do not require strict adherence to relevant laws, and companies do not actively demand code of conduct compliance. The author proposes the Trade Fair Label scheme, which would assist female maquila employees, since it would create a Social Dialogue Unit ("SDU"), or group of maquila managers and female employees, to formulate standards such as maximum work hours for the maquila. A maquila obeying SDU standards would be permitted to label its apparel, notifying stores to charge more for such apparel and funneling extra revenue to maintain the Trade Fair Label scheme.

Ruthann Robson, *A Servant Of One's Own: The Continuing Class Struggle in Feminist Legal Theories and Practices*, 23 BERKELEY J. GENDER L. & JUST. 392 (2008).

While it is no longer commonplace for households to have servants, the class and gender distinctions that arise out of a system of servitude still persist today for domestic workers. The author reviews a book by Alison Light, which first explores feminist icon Virginia Woolf's contradictory views of her own servants and then analyzes the decisions in *Long Island Care at Home, Ltd. v. Coke* and *United States v. Sabhnani*, illuminating how the mostly female domestic workforce is left out of mainstream feminist determinations of which groups of women warrant protection. Currently, domestic workers are not assured safe work conditions, minimum wage standards, or health insurance benefits—benefits that are often granted to the predominantly male manual labor workforce. Although one possible solution is to allow domestic workers to unionize, courts have sought to prevent the public labor model from being incorporated into private domestic services. Domestic workers are no longer called servants, yet as long as women cannot remedy the work environment concerns, a large segment of the female population will remain unaddressed by feminist theory and discussion.

Matthew L. Williams, Note, *Let 'em Work, Let 'em Nurse: Accommodations for Breastfeeding Employees in West Virginia*, 111 W. VA. L. REV. 1017 (2009).

By passing legislation to require that employers provide at least minimal accommodations for breast-feeding working women in West Virginia, the state will take a step towards reversing its rank as the worst in the nation for health and poverty. Studies suggest that breast-feeding promotes both newborn and maternal health. Twenty-one states and the District of Columbia have already responded to these studies by passing various statutes encouraging breast-feeding in the workplace. Promoters of similar legislation in West Virginia may succeed either by arguing in the courts that breast-feeding is covered under Title VII or by requiring breast-feeding accommodations under the West Virginia Human Rights Act. The author analyzes the consequences and likelihood of succeeding under each approach and finally concludes that encouraging the legislature instead of the courts to take action is the best way to achieve the desired result.

C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409 (2009).

New Jersey's recent addition of "gender identity or expression" to the Laws of Discrimination's list of protections has left many employers confused about how to properly accommodate transgender and non-transgender rights with regard to bathroom access. Together with employers, transgender and non-transgender employees struggle with whether transsexuals should use facilities that align with their birth sex or their gender identity. OSHA and nearly every state require sex-separated bathrooms, and while most women find sex-separated bathrooms to be safer, transgender men and women often face harassment and violence as a result of sex-segregated restrooms. Despite this potential danger to transgender employees, workplace instability is likely to ensue if employers defy the traditional practice of sex-separated bathrooms. Alternatively, many employers have successfully integrated transgender-friendly policies in the workplace, such as permitting transgender employees to use the restroom aligned with their current gender identity, keeping open lines of communication with non-transgender employees, adopting clear, written policies that discrimination will not be tolerated, and offering remedial procedures should discrimination occur.

Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience about Law and Social Change?*, 61 ME. L. REV. 1 (2009).

Women who graduated law school after women had the right to vote, but before litigation forced law firms to hire women on equal terms with men, faced

unique challenges in each successive decade, and found unique solutions to overcome the obstacles in their paths. By focusing on the stories of three individual women, the author seeks to address the chronological development of the role of women in the legal profession. These women experienced the guilt of applying for the scarce jobs during the Depression; the temporary welcoming of women into the legal profession that occurred during World War II; the repeated pattern of discrimination when these men returned from the war and once again took up their civilian legal jobs; and finally, the Title VII victories of the 1970s that forced employers to finally accept the many talented and educated women in the legal field. Women in the legal profession today should take note of the struggles and victories of these women, as their independent spirits can inspire modern female lawyers still facing many of the same issues—namely balancing work with the demands of family and working in a male-dominated and male-structured work environment. The law has been, and can continue to be, an extremely valuable tool for promoting women's equality in the legal workplace, especially when used in conjunction with feminist activism, intergenerational connections among women, relationships with supportive men, and the promotion of equality based on class, race, and sexual orientation.