ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

DOMESTIC VIOLENCE

Lydia M. Belzer, *Toward True Shalom Bayit: Acknowledging Domestic Abuse in the Jewish Community and What to Do About It?*, 11 CARDOZO WOMEN'S L.J. 241 (2005).

One concept that epitomizes the importance of family in Judaism is "shalom bayit," which means "peace in the home." For example, shalom bayit allows for the bending of Jewish law for the sake of harmony in the home. While the role of the family is of utmost importance in Judaism, instances of domestic abuse still exist. The emphasis on family compounds this problem as shalom bayit may in fact encourage women to remain in abusive relationships. Jewish women may stay in abusive relationships because of the sanctity of the Jewish home, the pressure in the post-Holocaust era to procreate Jewish offspring, and the difficulty of obtaining a divorce. Previous studies on domestic abuse within the Jewish community pointed out the lack of resources and support networks for abused Jewish women. Today the problem is not a lack of resources, but rather a problem in communicating to women about the resources available.

Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7 (2005).

Lawyers who claim to be specialists in the area of family law are held to a higher level of liability with regard to matters concerning family law, including abuse issues. Ignorance is never an excuse in a malpractice action. For that reason it is wise for family law attorneys to hire specialized counsel for certain areas that require specific expertise, e.g., tax issues or domestic abuse. Lawyers often face malpractice in domestic violence cases because they either "minimize" or "compartmentalize" the violence, or do not recognize the symptoms of abuse. Much of this article discusses the potential liabilities where an attorney represents an abused client or the abuser. The author concludes that attorneys should not take an abuse case without the help of other counsel unless they are certain that they are capable of doing so.

Jane Campbell Moriarty, *"While Dangers Gather": The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1 (2005).

Courts are reluctant to permit self-defense testimony in cases where a battered spouse claims to have killed in self-defense unless the killing occurred during an attack. The Bush doctrine of preemptive attack is an inappropriate analogy to such situations because it goes too far in aiming to remove a threat

before it even exists. The more moderate anticipatory self-defense ("ASD") model from international law should be available to battered women because it is more appropriate to examine the events surrounding the abusive relationship rather than to focus on the amount of time between a specific threat and a self-defense killing. Abusive spouses, like terrorists, instill fear and anxiety in their victims rather than make specific threats as may be observed in other types of violence. Instead of denying that defense based on a technicality, a limited form of ASD should be available to battered women, giving the jury the right to decide whether the defense was justified based on the circumstances.

Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005).

This article addresses the courts' increasing reliance on mediation as an effective tool in the context of family law disputes. Accompanying this beneficial form of dispute resolution is the possibility of grave risks that are inherently intertwined in domestic violence. Given the number of variables that come into play and the extremely sensitive nature of such cases, it is essential to create an effective screening process to determine which domestic violence cases are appropriate for mediation. The author offers the "Power Critique" to demonstrate the shortcomings in contrast to the effective nature of mediation. This critique suggests that as a result its flexibility and lack of external legal and procedural constraints, mediation can be empowering for the disputing parties. However, if not handled in a sophisticated and deliberate manner, this same flexibility can also disempower parties and exacerbate the existing power struggle. Therefore, model standards of practice for family and divorce mediation have been put in place to assist the screening process and to help facilitate sending the appropriate parties to mediation, but more volatile parties have been kept in a more formalized legal context. The article also touches on the importance of the involvement of lawyers and judges in the screening process.

Russell G. Murphy, People v. Cahill*: Domestic Violence and the Death Penalty Debate in New York*, 68 ALB. L. REV. 1029 (2005).

Historically a death penalty state, the New York state capital punishment statute is codified under section 125.27 of the New York Penal Law. In 2004, in *People v. LaValle*, the New York Court of Appeals declared the "deadlock instruction" provision of the statute unconstitutional and enjoined the death penalty. This article uses *People v. Cahill* as a case study to show the shortcomings of section 125.27 and other states' death penalty statutes. The author also recommends remedies if and when the death penalty is reinstated in New York. For example, Jeff Cahill initially abused his wife and was indicted for first degree

assault and criminal possession of a weapon. While his wife was being treated for her injuries in the hospital, Cahill disguised himself as a hospital worker, entered his wife's room, and poisoned her to death. Although the jury found Cahill guilty of first degree murder and imposed the death sentence, the New York Court of Appeals reduced the murder charge to second degree murder, and returned the case to the trial court for re-sentencing. The author urges New York to re-adopt capital punishment and proposes that the state reform its capital punishment statute in consideration of new and modified categories of death penalty crimes, including premeditated and deliberate murder, intentional killing of incapacitated or vulnerable victims, and domestic violence murder.

Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 65 LA. L. REV. 989 (2005).

The criminal law recognizes different kinds as well as different degrees of violence, perhaps in accordance with the distinct moral repugnance toward particular types of violence. The author argues that domestic abuse should be recognized as a specific offense. Domestic violence is distinguished from other types of violence because of the intimate relationship between the abuser and the victim, and because of the often systematic nature of the violence. These two characteristics together diminish a specific sort of individual freedom. Even though the creation of a separate offense for domestic violence may not have a great deterrent effect, the positive impact it can have is reason enough to create such a category in the criminal law.

EDUCATION

Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455 (2005).

In the last decade, there has been a resurgence of segregated education based on race, gender, or other affiliations. Many of the arguments in favor of the move back to segregation within the school systems have been based on the ideals of "choice" and "diversity of options." The author contends that segregation remains socially and morally wrong, even if the arguments which support it today are not blatantly racist and repressive as those in the past. Doctrinal and sociological data demonstrates that segregating schools has a negative impact on a child's educational experience. Ultimately, separate educational facilities can never truly be equal and thus the practice of segregation should not be endorsed.

Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 7 AM. U.J. GENDER SOC. POL'Y & L. 511 (2005).

The author and a number of his colleagues conducted a large empirical study on female and male experiences at Harvard Law School in order to better understand the reasons for persistent gender differences in a number of areas in law school, including grades, classroom participation, employment, and student confidence. The article first reviews literature on gender differences in legal education, placing the current study in a context of legal pedagogy. The author outlines the nature of the study itself, which included surveys, course monitoring, grade assessment, student focus groups, mental health visits, and statistics for employment and extracurricular involvement. The article discusses the findings and the implications of the results as related to legal education as a whole. Finally, the author provides short-term and long-term solutions to the problem, suggesting a "critical reevaluation of the missions and methods of legal education," coupled with a "continuing self-assessment" and a development of a "coherent set of justifications" for school practices to establish a baseline by which gender-based differences may be measured.

Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "A Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1 (2005).

The author analyzes the problem of the peer bullying in schools and the inadequate remedies provided by law. Addressing particularly the problem as related to special education children, the author proposes two legal models that would increase the legal protections for these children at school. The first model is a hybrid Title IX and Individuals with Disabilities in Education Act (IDEA) peer sexual harassment action, which enforces the equal education rights granted to special education children by IDEA. The second model is an IDEA-based § 1983 claim based on the equal protection clause. Both remedies provide monetary relief to special education children and help encourage schools to provide a harassment-free education to special education children.

Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35 (2005).

Despite the holding in *United States v. Virginia*, which forbade the exclusion of women from the state's military school, single-sex schools have continued to flourish, particularly in economically disadvantaged communities. Critics of gender segregation, including many progressive feminists, have analogized their position to that of the court in *Brown v. Board of Education* as related to racial

segregation, or in other words, "separate but equal" facilities reinforce a view that one gender is inferior to the other. Supporters of single-sex schools, such as the Black Radical Congress, liken female-only schools to affirmative action because they remedy a shortcoming in educational achievement. Both sides have conflated the issues–the critics fail to take into account the success of single-sex schools and instead voice broad concern over a policy of benefiting a small group of individuals rather than an entire system; the supporters fail to consider the fact that sex segregation has mostly been applied to low-income minority students. As a solution, critics should argue for the eradication of economic segregation and advocate for the educational improvement of all students. Schools should be integrated, accounting for the differences in students' learning styles and not reinforcing those differences through separation.

Nan Stein, *A Rising Pandemic of Sexual Violence in Elementary and Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. & POL'Y 33 (2005).

During the past few decades, sexual harassment and assault in American grade schools have been on the rise. However, the procedures and policies that have been established to combat the increase have hardly kept pace with the problem. The author criticizes the status-quo of American grade schools, which for the purpose of avoiding liability, are more likely to enforce zero-tolerance programs that suspend and expel students than it is to implement remedial measures that address and extinguish surfacing problems. In other words, risk-management supercedes resolution. Furthermore, the article proposes that an increase in discourse and policies geared towards bullying—a popular "buzz" topic in K-12 education—is creating a distraction; it generalizes, oversimplifies and dilutes the problem of sexual harassment and assault affecting grade school children and teenagers. The author argues that anti-bullying laws both "degender" and neutralize the epidemic, and that terming harassment and assault as "bullying" strategically displaces a school's legal responsibility, as well as its responsibility for creating secure and equitable learning environments. The article proposes a plan to empower both educators and students to intervene in the crimes that they witness and to implement programs that directly confront these matters, as opposed to simply suspending the perpetrators, canceling school proms, or taking other cursory measures. Finally, the author critiques No Child Left Behind policy objectives that have resulted in strategies almost entirely focused on testing enhancement instead of interpersonal relationships and violence prevention programs.

Brent Wible, *Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence in Beninese Schools*, 36 COLUM. HUM. RTS. L. REV. 513 (2005).

In Benin, a small West African country with one of the largest educational gender gaps in the world, girls are often forced to deal with sexual harassment from both students and teachers. Teachers' attempts to pressure girls for sex in return for higher grades are examples of the type of harassment that has adversely affected the academic performance of Beninese girls. This article focuses specifically on the issue of gender-based violence in Beninese schools, the reasons that gender-based violence is so prevalent in Beninese schools, and how girls and their parents perceive the problem. The remainder of the article focuses on various educational and health effects that gender-based violence has on girls, as well as strategies and policies that could be helpful in ridding Benin of such discrimination. The author concludes that in order to effectively address the issue of gender-based violence in Beninese schools, a multi-sectoral effort is required.

FAMILY

Eve M. Brank, Stephanie C. Kucera, & Stephanie A. Hays, *Parental Responsibility Statutes: An Organization and Policy Implications*, 7 J. L & FAM. STUD. 1 (2005).

This article explores the emergence of parental responsibility statutes that make parents responsible in three scenarios: civil liability for property or personal liability, criminal liability for parental negligence, and additional parental liability for other crimes committed by their children. The authors give a historical background of early parental common law responsibility for the actions of their children, as well as the modern construct of statutory law, including a discussion of the legislative intent for these laws and its implications. Ultimately, these modern statutory laws arise from the public's response to juvenile delinquency, although the juvenile crime rate has declined. The public views parental laws as a way to cure the problem of "offending" children, and to hold "negligent" parents responsible. In the end, the authors question whether these laws are actually counterproductive and confusing because it sends children the message they will be punished if they are adults and/or parents, regardless of whether they are not responsible for the offending actions.

James A. Cosby, *How Parents and Children "Disappear" in Our Courts: And Why It Need Not Ever Happen Again*, 53 CLEV. ST. L. REV. 285 (2005-2006).

This article addresses the problem of balancing children's rights and needs with those of their parents when the courts address the child-parent relationship. The courts have failed to discern the exact boundaries of the liberty interests involved, but two main doctrinal approaches to the problem are parental autonomy and the best interest of the child. These approaches are overly rigid and broad, and when courts rely on them, the interests of the parents or the children often disappear completely from the analysis. The author suggests a new approach called "Single Objective Analysis" which combines the best components of each approach, clarifying the constitutional rights of parents and ensuring that the interests of both parents and children are addressed in each case. The author brings his new theory to life by re-examining several cases using the new analysis and comparing the hypothetical outcome with the actual outcome.

Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U.J. GENDER SOC. POL'Y & L. 415 (2005).

In distinguishing American welfare policy from those of its Western counterparts, the author notes that family law in many Western nations has provided important means for enforcing the private support obligations of individuals with economically dependent family members. The U.S. lags behind many European nations in the building of an infrastructure to enforce these obligations. Although there has been growth in the area of child support enforcement, other areas of family support obligations have grown very little, and still rely heavily upon the public. Other jurisdictions have, for the purposes of enforcing support obligations and enhancing social responsibility, expanded upon the definitions of marriage, spouse, and domestic partners. The author cites the work of Grace Blumberg regarding U.S. welfare policy in relation to the absence of an expansion upon private family dependency rights and obligations. While Blumberg concludes that the point of failure in the American welfare policy is the decrease of available benefits without expansion in the law regarding private rights and obligations of family members, the author proposes that there are other relevant supplemental factors that tie into the analysis. For example, ongoing debates strained growth in family law due to conservative perspectives of the constitution of a family and conflicting opinions regarding the implementation of privatization policies and their objectives. Key conflicts in political and legal thought provides insight as to why the U.S. has achieved only partial privatization of support obligations, and the extent by which such privatization has been limited by the socially conservative concept of family that prevails in this country.

Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613 (2004).

Child protection systems focus on the mother, allowing batterers to escape responsibility for the damage they caused. Although the author favors a shift to batterer accountability, she recognizes the difficulty of such a practice. The article highlights the use of the adjudication process to ensure that batterers are held accountable and that non-abusive mothers are not responsible for the damage done to their children. Civil protection orders may be a more effective tool if social workers play a bigger role in filing the orders, as opposed to leaving it to the battered women to obtain them. Batterer accountability is more attainable in unified family courts or courts that routinely deal with domestic violence because these courts are better situated to scrutinize batterer behavior through centralized intake processes, separate calendar for civil protection order petitions, criminal domestic violence cases, and domestic violence units. The current legal system is ineffective because of the limitations of intervention counseling and the unwillingness to pursue batterer accountability; the author concludes that the legal system is able to, and should, hold batterers accountable.

Sara Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 J. LEGAL MED. 311 (2005).

Despite the research that proves that emotional and psychological abuse is devastating to children, child protection agencies and courts do not afford it the same level of seriousness as physical or sexual abuse. There have been many steps to remedy this, such as adoption or guardianship by someone other than the parent. However, considering that absent consistent, comprehensive, and understandable definitions of what constitutes psychological or emotional maltreatment, any improvements are useless because of "uncertainty as to what behaviors or consequences are encompassed by the relevant provisions." The author asserts that these measures must first determine the relevancy of the abuser's behavior or the child's injury. Second, professionals in state agencies need more training, particularly as to psychological issues. Third, all remedies must be structured to avoid re-victimizing the child.

Christie N. Love, *Not in Our Country? A Critique of the United States Welfare System Through the Lens of China's One Child Law*, 14 COLUM. J. GENDER & L. 142 (2005).

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 in the United States implicates many of the same human rights violations that China's family planning program has been criticized for, albeit less conspicuously. The author begins by describing the

history of welfare policy in the United States and of family planning in China. Both programs are implemented in a flexible and decentralized manner, and result in a disparate impact on populations across both countries. Both programs utilize incentive and sanction structures that pressure its constituents into compliance. The author compares China's one-child policy, which requires forced sterilizations, abortions of unauthorized pregnancies, and "social compensation fees" upon parents who have additional children, with the PRWORA, which imposes family caps, lifetime limits on receiving welfare, benefit reductions for recipients who do not fulfill stringent work requirements, and benefit cuts for unmarried teenagers who are not in school. While the apparent goal of China's policy is population control and the goal of U.S. policy is the protection of the nuclear family unit, both policies have similar negative effects on women and children, and increase the incidence of unwanted abortions. Specifically citing a successful family planning policy in Kerala, India as an example, the author concludes by suggesting that both policies may be structured in a way that penalizes women to a lesser degree.

Cynthia R. Mabry, *Disappearing Acts: Encouraging Fathers to Reappear for Their Children*, 7 J. L. & FAM. STUD. 111 (2005).

According to American family law, where divorce results in a child custody agreement that awards either exclusive or primary custody to a mother, the fathers are subject to limits in the amount of time that they may spend with their children upon conclusion of the divorce. The author argues that as a result, a number of fathers have a propensity to spend less and less time with their children. Furthermore, many fade entirely from the lives of their children, a circumstance that often creates an undesirable impact upon the lives of their children. After noting the number of children affected by such circumstances, the author addresses the adverse effect that the absence of a father may have upon a child under the circumstances. After exploring the motives for a father's departure, the author proposes solutions to maintain or to re-establish the ties between the father and child.

Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251 (2005).

This article encourages involving young people in their health-care decisions and discourages treating them as just bodies on which to act upon. Currently, the law does not believe that young people can make their own decisions regarding health care and degrades the autonomy of adolescents by not allowing them to decide what may be done to their bodies. The legal system's "limited offering of rights" to adolescents does little to preserve family unity and a cooperative relationship between a health care provider and a patient. The author advocates for

a change in which adolescents' decision-making abilities are based not on their age but on their cognitive skills and maturity.

Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the "Beneficial Family" and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1 (2005).

In the 1950s, television sitcoms introduced the standard suburban "beneficial family" in the form of the Andersons with the "breadwinning" father and the stay-at-home mother. Corporations served as commercial sponsors for these television programs. They adopted and advocated this "traditional" notion of the American family, and this concept dictated the structure of corporation- and employer-sponsored benefits programs. While television has moved away from the beneficial family structure to more accurately reflect a reality that includes non-nuclear and blended families, the benefits programs of corporations remain narrow and disadvantage the needs of current American households. This article encourages corporations to recognize the current non-nuclear forms of American families and to adopt employer-sponsored benefit plans that today's diverse work force needs. In particular, the article encourages the importance of looking beyond the marriage-centric programs to other adult-dependent programs that would recognize different sorts of relationships. Furthermore, the authors highlight the need for corresponding changes in laws dealing with benefits taxation and health insurance coverage.

Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FLA. ST. U.L. REV. 957 (2005).

At the turn of the twentieth century, the "elite white women's campaigns" to improve the child welfare system excluded black women from participating and failed to adequately advocacy black children's rights. As a result, black women organized through clubs and church groups to bring about improvement to the black child welfare system. They were very successful in their attempts, largely as a result of their forward-thinking vision, which the author argues policymakers should adopt in place of today's system. The focus of the black club women's approach was on the prevention of child mistreatment instead of punishment of parents after the fact; the recognition of the common interests of mothers and children rather than "pitting child protection against parents' rights;" and the understanding of black child welfare as a racial justice issue. The author concludes that such an approach is appropriate today.

Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005).

The American Law Institute's ("ALI") Principles of the Law of Family Dissolution recently restructured the conceptual basis of alimony. While recognizing that motherhood is not free, and that mothers bear a cost for the primary caretaking of children, the ALI intended to formulate alimony in a way that would compensate mothers for the loss of their ability to earn market wages. The author argues that this formulation of alimony as compensation for loss implies that mothers are "losers" and broadcasts a negative normative message. As an alternative, the author proposes an alimony model based on partnership, where the partners are obligated to "buy each other out." The mother's decrease in her market value in the employment market would be compensated by the husband's requirement to buy out her share of the partnership. Underpinning this methodology is the idea that marriage is an equal partnership in which the partners commit to fulfill mutual obligations to each other.

Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

In light of the ongoing debates concerning issues including same-sex marriage, the proposals to reduce state involvement in marriage, and the increasing financial incentives and social programs supporting marriage, the author seeks to determine whether marriage itself actually helps the children who are a product of the institution. After exploring the limitations inherent in earlier studies of family structure, the author analyzes two studies that compare married and non-married couples' investment in their children. There is a common reliance on the conclusion that children of married parents, as well as individual married fathers, make better children and fathers than their counterparts. However, one response to this argument is that marriage may have no transformative effect on a couple; instead, "good people" with certain shared characteristics are simply more likely to get married. If marriage does indeed have a transformative effect, the importance may lie in the "perception of enduringness" that creates a higher probability of investment in the relationship, which may contribute to its success and ultimately benefit the children.

Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—and Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719 (2005).

Prior to 1973, Arizona courts frequently held that a third party with a meaningful relationship to a child may seek custody of a child under a "best

interests of the child" standard, the ordinary basis for custody determination between biological parents. In 1973, Arizona adopted the Uniform Marriage and Divorce Act (UMDA), and shifted toward the "superior rights doctrine," or the legal presumption that a parent is the best person to raise a child. The UMDA prevents third-party standing in a custody dispute except when the child is not in physical custody of a parent. However, the Arizona legislature recently promulgated new laws that make it easier for third parties sharing a "meaningful relationship" with a child to obtain standing in order to seek custody and visitation rights.

HEALTH

Annika K. Martin, *"Stick a Toothbrush Down Your Throat": An Analysis of the Potential Liability of Pro-Eating Disorder Websites*, 14 TEX. J. WOMEN & L. 151 (2005).

The Internet is rife with personal websites concerning eating disorders, some of which are "pro-eating disorder" ("pro-ED") forums that not only display images of eating disorder sufferers for "Thinspiration," but also provide advice about how to avoid eating and ways to hide one's disorder from family and friends. These websites are arguably more dangerous than other forms of print media because they encourage habit formation while providing a support system for maintaining those behaviors. Action against such websites has been limited to its removal from certain free web hosting servers for alleged violations of terms of service. This limited response is largely due to the distinction between eating disorders that are "self-inflicted" harm as opposed to those psychologically "pre-disposed," making it nearly impossible to establish causation. Further, the First Amendment will likely bar most of the claims brought against pro-ED websites.

HISTORY & CULTURE

Kathryn Abrams, *Legal Feminism and the Emotions: Three Moments in an Evolving Relationship*, 28 HARV. J.L. & GENDER 325 (2005).

Scholars have long studied the role of emotions in shaping women's identity and social circumstances. Feminist legal theory benefits from this scholarly work, and the author identifies three important phases in the feminist movement when an emphasis on emotions was particularly significant: the identitarian moment, the epistemological moment, and most recently, the constructivist moment. The identitarian moment emphasized consciousness-raising and the political identity of women. This coincided with a focus in the legal realm on confronting women's exclusion from formal institutions, and professions and their exposure to sexual

violence. Experiential narratives were introduced as a vehicle for highlighting the significance of women's emotions in the law. The epistemological moment followed, characterized by serious questions about how we as a society come to understand gender and gender differences. Legal feminists began to challenge the benefits of taking on an entirely objective position on gender, whether in the classroom or the courtroom. Finally, the constructivist moment focuses on the circumstances and unique experiences that shape emotional development. While this is the newest phase in the relationship between legal feminism and scholarship on emotion, the author believes that the constructivist moment will provide insights into law and emotions that can help break down the historic dichotomy between reason and emotion and between masculinity and femininity, giving feminist scholars and their audiences a better way of understanding the female identity.

Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005).

The author questions the Supreme Court's understanding of "nude dancing." When the Court takes on cases regarding nude dancing, it must contend with legal precedent and society's preconceived notions about nudity and sex. This seems to suggest that nude dancing cases tend to be more problematic because they do not merely concern the First Amendment, as it invokes strong responses from most people in society. In fact, the author argues that cultural baggage interferes with the First Amendment which should remain unbiased.

M.J. Clark, *Deconstruction, Feminism, and Law: Cornell and Mackinnon on Female Subjectivity and Resistance*, 12 DUKE J. GENDER L. & POL'Y 107 (2005).

The deconstructionist insights of philosopher Jacques Derrida set the foundation of post-modern philosophy by attacking the hegemonic foundation at the base of Western thought and by exposing the structurally-embedded power relations that frame people's lives. In particular, Derrida's emphasis on the notions of "phallocentrism of reason" and "binary opposition," or the pairing of complementary terms in such a way that the first term holds a hegemonic position in relation to the second, e.g., man/woman, are particularly attractive to feminist theorists, including Drucilla Cornell and Catherine McKinnon. However, while McKinnon believes that women must completely reject the feminine because it is formulated in the context of masculine norms, Cornell believes that outright rejection still allows the masculine paradigm to define women's struggles. Thus, the author argues that when McKinnon employs a "pragmatic mode" of radical engagement via the outright refusal of the power structure and by practical intervention in current ways of life, she encounters the same unresolved problem of Marxist thought—transforming prevailing systems of power into new forms of social life. Conversely, the author believes that Cornell's "alterity model" of

radical engagement, which attempts to escape from the structure in a more visionary and utopian way, preserves women and femininity from being captured by the absolute hold of the reality structure.

John T. Nockleby, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOYOLA L.A. L. REV. 1435 (2005).

This article focuses on tort reform in relation to race and gender calculation of tort awards. The author states that there is a hidden race and gender bias in tort awards because race and gender tables are used frequently by expert witness in determining economic harm. The use of these tables measures plaintiffs' earning capacity in reference only to the particular group in which they are classified. The author purports that this stigmatizes plaintiffs with generalizations about their identifying group, which is in direct contradiction of anti-discrimination laws implemented against stereotyping. Ultimately the author contends that such practice is unconstitutional as it advises juries that it is acceptable to treat plaintiffs differently based on race and gender.

Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005).

This article attempts to define the so-called "moral values" that American voters claimed were determinative in shaping their vote at the 2004 election. According to exit poll data related to sexual reproduction, topics such as same-sex marriage, abortion, stem cell research, and birth control are priorities of "moral values" voters. Historically, much of the opposition to new ideas regarding sexuality and reproduction finds its roots in a specific brand of Christian doctrine. If this is the case, courts should recognize that this religious infusion into policymaking must be struck down as contrary to the Establishment Clause of the Constitution, and accordingly, these values should not be ratified by a judicial interpretation of the Constitution.

INTERNATIONAL LAW & HUMAN RIGHTS

Lisa Avery, *Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War*, 12 GEO. J. ON POVERTY L. & POL'Y 205 (2005).

Civil War and unrest severely endangers the well-being of millions of women and children worldwide. In regions affected by such conditions, much of the male population is killed, forcing many women to independently support their families. However, as a result of cultural mores and discrimination against women, women supporting their families often seem to be an insurmountable task. The author

suggests that certain forms of these "microcredit" programs may be the most effective way to reach and help these regions. "Microcredit" programs loan small sums of money to women and other people living in regions affected by conflict, so that the recipients have the available capital needed to start small income-generating businesses to support their families. The author concedes that violence against women, lack of hard currency, inflexible repayment schedules, and the general weak economies of these regions make such microcredit programs difficult to sustain, but argues that with region-specific targeted planning many of the microenterprise success stories may be duplicated. The author concludes that the international community, particularly the U.S., has the resources to help women and children living in post-conflict regions, and that implementation of such microcredit programs should be viewed as a critical investment in human life.

Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103 (2005).

Both large-scale and small-scale conflicts disproportionately affect women and children because women are often targets of sexual abuse and slavery, and children are recruited for combat. Women and children in refugee camps are no safer because refugee camps lack serious supervision and allow rampant abuse. Internally-displaced women and children, forced to leave their homes within their country, are in an even worse situation because they are denied refugee status. The author argues that the international community must come to their aid because local governments do little to help women and children. To remedy this situation, the U.S. passed the Women and Children in Conflict Act of 2003, which requires the U.S. to play a greater role in meeting the needs of women and children in conflict, and to do more to help protect them.

Larry Cata Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe, and Malaysia*, 17 YALE J. L. & FEMINISM 1 (2005).

This article attempts to articulate a transcultural methodology for gendering behavior that will be applicable to any culture. The author begins with the premise that, in many cultures, negative behaviors are often conflated with homosexuality to reinforce the unnaturalness and deviancy of the act and the non-maleness of the perpetrator. The article examines cases from the United States, Zimbabwe, and Malaysia and deconstructs the manner by which gendering is incorporated into criminality within each community. Although the context and motivations underlying this type of gendering vary from case to case, each case is an example of homosexualization used as a means to reinforce negative perceptions and influence public opinion. The author asserts that such "gendering" is part of a societal system of organization, often referred to as the patriarchy in feminist

literature. Distinct from the male/female category, gendering also defines and reinforces acceptable behavior within intertwined diverse cultures by distinguishing between men in a separate category of male and non-male.

Carmen Diana Deere, *Married Women's Property Rights as Human Rights: The Latin American Contribution*, 17 FLA. J. INT'L L. 101 (2005).

It is often overlooked that many Latin American countries acted before the U.S. or the U.K. to secure married women's property rights as human rights. The movement for attaining married women's property rights in the U.S. and the U.K. occurred partly because married women's property rights were stronger in Latin America throughout the early nineteenth century. Under the Hispanic-codified tradition in the early nineteenth century, married women kept their ownership rights, retained a civil personality, and inherited in their own name. One of Latin America's victories in the late nineteenth century was the establishment of a dual-headed household where both wife and husband manage community property. Despite this victory, Latin American countries have yet to fully apply the legal concept of the dual-headed household.

Uche U. Ewelukwa, *Centuries of Globalization, Centuries of Exclusion: African Women, Human Rights, and the "New" International Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75 (2005).

Third World women were exploited during the colonial era and even after African independence. The present era of globalization continues to put Third World women at a disadvantage. For example, globalization tends to be anti-small farmer, as demonstrated by the passage of the Agreement on Agriculture ("Act"); the problem with this Act is that small-farm agriculture accounts for sixty-two percent of women's employment. Women's difficulties are compounded by social and cultural constraints that limit their ability to own land, receive credit, and obtain access to technological training and education. While globalization is not the sole problem in the developing world—domestic reform is needed—more needs to be done at the international level to ensure improvements for Third World women.

Hugues Fulchiron, *Custody and Separated Families: The Example of French Law*, 39 FAM. L.Q. 301 (2005).

Under French law, parents are obligated to "protect the child's security, health and morality," and "ensure its education and enable its development, with the respect due to the child's person." However, the extent of parental responsibilities in post-marital or non-marital relationships has undergone

substantial changes in recent years. The courts are increasingly willing to grant joint custody to divorced or separated parents under the principle that despite the separation, the parents must continue to exercise their responsibility for the child jointly and equally. This continued responsibility similarly applies to parents of children born out of wedlock. A new French law has departed from a purely statutory regulation of the responsibilities of separated parents to their children, and now encourages the formation of a contractual relationship between the parents to formalize these responsibilities.

Cecilia P. Grosman & Ida Ariana Scherman, *Argentina: Criteria for Child Custody Decision-making upon Separation and Divorce*, 39 FAM. L.Q. 543 (2005).

Argentine courts are guided by the doctrine of *patria potestad*, a part of the Argentine Civil Code which permits only one parent to become the custodial parent and exert *tenencia*, or physical custody of the child. The idea that only one parent can have the power to teach, lead, and make major decisions concerning his or her child is in conflict with the incorporation of the 1998 United Nations Convention on the Rights of the Child ("CRC") into Argentina's 1994 National Constitution. The authors survey the various factors analyzed in court proceedings over custody including the child's age, continuity of residence, a parent's willingness to facilitate visitation, association with siblings, parental availability, as well as evidence of domestic violence. The court is bound by the best interests of the child, and some courts feel that joint custody is necessary even in light of *patria potestad.*

Louise Halper, *Law and Women's Agency in Post-Revolutionary Iran*, 28 HARV. J.L. & GENDER 85.

This article examines the ebb and flow of rights, from religious traditionalism to modern activism, that have tainted the lives of Iranian women since the turn of the twentieth century. Improvements in areas of literacy, education, labor force, health, and fertility speak to an improvement in Iranian women's place in a social framework that is heavily rooted in a misogynistic religion and culture that place a heavy burden on the modern advancement of women. The author notes that these improvements have occurred within an Islamic regime, which leads to the conclusion that it is not this formal legal framework that accounts for this progress. Rather, the crucial factor for the current favorable trends may be the action and agency of a mobilized collective of Iranian women. The article touches on the profound impact of the Iranian-Iraqi war of the 1980s on the status of women. Additionally, the author uses the family structure and traditional Islamic clothing such as the Hejab as a backdrop to illustrate the evolution of the "feminist" movement in the midst of a country that has endured a number of power struggles over the past century.

Olga A. Khazova, *Allocation of Parental Rights and Responsibilities After Separation and Divorce Under Russian Law*, 39 FAM. L.Q. 373 (2005).

Since the end of the Soviet regime in Russia in 1991, the Russian law was compelled to develop rather quickly. Under Russian law, there is no concept of custody similar to the American counterpart. After divorce or separation, each parent has a duty to the child as well as certain parental rights, regardless of which parent has physical custody of the child or how parents decide to divide responsibilities. However, since the parent with whom the child actually resides has much more power over the child, there are provisions in Russian law that guarantee rights to the absent parent, e.g., communication. Parents who disagree about allocation of parental rights may apply to custody and guardianship boards to settle the conflict.

Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597 (2004-2005).

China sends more children to other nations for adoption than any other country. The U.S. is the nation that receives the most intercountry adopted children, of which China provides more than twenty-five percent each year. This article analyzes the unique success—in the perspective of the individual children and families as well as national interest—that China has been able to achieve with its highly regulated intercountry adoption program. The Chinese adoption program is primarily based on a need to place female children who are often abandoned because of population control, allowing China to avoid the moral dilemma that many other sending countries face when the cost of adopting a child far exceeds the amount of money that the family would have needed to keep and raise the child. The Chinese adoption system is well-known for avoiding corruption and for its effective operations, but it is criticized by many Westerners who disapprove of the fact that the system excludes gay and single adoptive parents. The authors also examine the future role of China in the intercountry adoption system. While China is growing as an economic power, the U.S. is growing more dependent on the willingness of China to send orphans to U.S. families in search of children, a situation which may have a great impact on the relationship between these two countries in the future.

Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L.Q. 491 (2005).

Upon divorce in Japan, parties who do not privately agree on a settlement must attend *Chotei*, a court mediation process which aims to reach a mutual

agreement. This private process is only necessary in about 10% of divorces, involving the presence of both parties, a family court judge, and two commissioners who try to reach a resolution that is in the best interests of the child. Commissioners consider matters such as visitation rights and support, and these issues are especially problematic since relatively few divorcing parents make agreements regarding maintenance, and the amounts are often insufficient, if not left altogether unpaid. In cases of abduction by the non-resident parent, the court may under the threat of jail time order the return of the child, but enforcement may be difficult because the court may not use physical force to obtain the child's return. *Chotei* proceedings have several shortcomings, including the difficulty of enforcement, the vague language in the Civil Code, and the fact that parents do not always have the children's best interests in mind when arriving at an agreement.

David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP & INT'L L. 219 (2005).

This article uses the recent abuse of Iraqi prisoners by U.S. soldiers at Abu Ghraib as a template to discuss the problem of international sexual violence. While the crisis of international sexual abuse and torture is not a modern dilemma, the author believes that the media involvement in the exposure of these atrocities can help foster a legal discussion about sexual violence as a crime under international humanitarian law. The author defines jus cogens as "higher" or "compelling" law, and with the further coverage of international sexual violence, sexual abuse, particularly of women, may be defined as a crime under a jus cogens law. The article further analyzes domestic prohibition of rape in light of other crimes defined under the jus cogens paradigm. The author concludes that the crime of sexual violence is already under the jus cogens concept, and should be legally recognized as such.

Victor Nnamdi Opara, *Re-characterizing Abortion in Nigeria: An Appraisal of the Necessity Test*, 11 ILSA J. INT'L & COMP. L. 143 (2004).

Nigeria's Criminal and Penal Code prohibits any abortion except in defined instances where the mother's life is at risk. The language of these exceptions, however, frustrates the legislative intent and hinders the ability to obtain a life-saving abortion by creating uncertainty. The article explores the statutory construction and interpretative problems of the abortion codes, and suggests ways in which Nigeria can better address the issue. The author stresses the necessity of re-examining this issue in light of the high mortality rate and medical complications that stem from illegal abortions. Furthermore, the author criticizes the unwillingness of the Nigerian courts and legislature to confront modern reality and urges them to adopt the proposed legislation.

Alexandra V. Orlova, *Trafficking of Women and Children for Exploitation in the Commercial Sex Trade: The Case of the Russian Federation*, 6 GEO. J. GENDER & L. 157 (2005).

Trafficking of human beings is commonly referred to as "modern-day slavery." In post-communist Russia, the poor economic conditions, lack of social institutions, and rise of organized crime contribute to a growing epidemic of human trafficking. Women and children tend to be the most vulnerable to human trafficking. One contributing factor to human trafficking is the fragmentation of the Russian world; after the fall of the Soviet Union, ethnic Russians found themselves in newly-established countries where they often suffer discrimination. Additionally, anti-trafficking laws are not adequately enforced because much of the legislative and law enforcement efforts are directed at the worker and not the trafficker. Compounding the problem is that the Russian government is not taking human trafficking seriously. Only recently has the legislature passed statutes creating new offenses aimed at curtailing human trafficking. Moreover, corruption is so rampant among law enforcement officials that the human trafficking laws are rarely enforced.

Bolaji Owasanoye, *The Regulation of Child Custody and Access in Nigeria*, 39 FAM. L.Q. 405 (2005).

Emerging as an official entity in 1914, the country of Nigeria maintains a unique social and geographic composition that affects its ability to regulate child custody issues. Similar to other colonized nations, Nigeria recognizes various systems of laws within its borders—statutory, customary, and Islamic. The substantive application of law to custody disputes in Nigeria remains dependent on the set of laws that governed the original marriage of the parents. Custody determinations are based on many considerations such as equity, the best interests of the child, Nigeria's federal system of laws, and various geographic considerations based on the immensity of the country. In 2003, the federal Children's Rights Act was passed in Nigeria, and although this reflects a worthy effort to regulate child custody, additional measures are it to necessary for the goals of the law to become operative.

Patrick Parkinson, *The Law of Post-Separation Parenting in Australia*, 39 FAM. L.Q. 507 (2005).

The law of post-separation parenting in Australia is undergoing continuous change, and after a 2003 Parliamentary Inquiry into child custody issues, significant reforms are being implemented. The article begins with an overview of family law in Australia, including the division of legislative responsibility, the removal of the term "custody" in favor of language that avoids the inference that

responsibility for a child lies with only one parent after separation, and the procedures for allocating parental responsibilities after separation, including private ordering and alternative dispute resolution. At the heart of the recent reforms is the creation of a nationwide network of "Family Relationship Centers," which are intended to help parents restructure parenting arrangements after separation. Another reform involves the move towards a less adversarial system, as evidenced by a model pilot program known as the "Children's Cases Program," where the parties consent to waive most of the rules of evidence and to accept a process whereby the judge is substantially involved in trying to resolve the dispute. Lastly, the author discusses other factors courts consider in deciding post-separation parenting such as the lack of maternal preference, gender, child abuse, domestic violence, and domestic and international relocation.

Joanna Radbord, *Lesbian Love Stories: How We Won Equal Marriage in Canada*, 7 YALE J.L. & FEMINISM 99 (2005).

The author argues that the reason Canada was the first country to legally recognize same-sex marriage is twofold. First, Canada has developed a functional approach to family law which has evolved its definition of family alongside the evolution of social norms. Second, the Canadian Charter of Rights and Freedoms, as part of Canada's Constitution, has developed a robust application of equality jurisprudence, which was integral to the legal recognition of same-sex relationships. The author surveys the history of equal marriage litigation in Canada, and shares personal accounts of her work as co-counsel on equal marriage cases. Further, the article reviews equal marriage draft legislation, and concludes with a brief discussion about the international impact of Canada's equal marriage jurisprudence.

Nan Seuffert, *Nation as Partnership: Law, "Race," and Gender in Aotearoa New Zealand's Treaty Settlements*, 39 LAW & SOC'Y REV. 485 (2005).

Aotearoa, New Zealand, home of the indigenous Maori people, has been at the forefront of two significant international trends. The first is redressing historical racial injustices through reparations, and the second is "structural adjustment." The author reclassifies the post-colonial period as present-day, examining the interrelationships of law, race, gender, and nation that have come to influence current societal behaviors reminiscent of male-favoring colonial tropes. Treaty settlement negotiations for reparations have brought about conflicting effects—the first is redressing the historical injury to the Maori people and achieving economic self-sufficiency; the second is silencing Maori women on a national level, although they have a strong leadership role at the local and regional levels. The author concludes that the reparations process should take into account

historical gender dynamics so that addressing historical racial injustices does not also lead to recreating historical gender injustices.

Grace C. Spencer, *Her Body Is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503 (2004-2005).

Maquiladoras are assembly plants in Juarez, Mexico that produce goods for export to the United States, and these plants are infamous for abuses against young female employees, including starvation-level wages, child labor, forced pregnancy tests, and murder. The Alien Tort Statute (ATS) offers possible means for legal sanctions against American-owned corporations that commit human rights violations while operating *maquiladoras* in Juarez. In *Sosa v. Alvarez-Machain*, a 2004 decision, the Supreme Court held that the ATS was intended to have a practical effect the moment it became law, suggesting that abuses may be immediately actionable under the statute. However, *Sosa* does not clarify which human rights abuses are actionable under the ATS. A *maquiladora* worker would likely face obstacles bringing an ATS claim on the basis that the prohibition against torts is in violation of the law of nations, or a U.S. treaty. A broader interpretation of the ATS is needed to provide relief for the workers in Juarez.

Barbara Stark, *Women, Globalization, and Law: A Change of World*, 16 PACE INT'L L. REV. 333 (2005).

The author analyzes the changes that globalization has brought to women's lives around the world. The author focuses on how globalization forces women into the public sphere of the marketplace, weakens the public/private boundary, increases women's visibility, and engenders "feminist" consciousness. The author applies this analysis to China's One-Child Policy, the Self-Employed Women's Association, and domestic violence, specifically honor killings. The author concludes that the changes globalization brings are both positive and negative to women, depending on the context.

Edieth Y. Wu, *Global Burqas*, 14 TEX. J. WOMEN & L. 179 (2005).

The inequality of women on a global scale remains a pervasive problem and is often manifested through acts that are not universally recognized for its oppressive nature. The author analogizes insidious forms of tyranny to the burqas worn by women of the Middle East, which have become a powerful symbol of male domination over women in those cultures. Other abuses, such as domestic violence and employment discrimination, are utilized in Western cultures to keep women in an inferior social position. Through the illustration of five specific rights

that women are still denied, the author exposes the extent of the continuing struggle women face in fighting for equality. A call to action should be made through a World Trade Organization or United Nations type policing model to remedy the current situation.

MARRIAGE

Richard Arneson, *State Efforts to Facilitate Friendship, Love, and Childbearing*, 42 SAN DIEGO L. REV. 979 (2005).

The transformation of Western societies that brought about equality of legal rights and opportunities for men and women calls into question the relevancy and sustainability of the traditional institution of marriage. The author discusses whether marriage can be replaced by a Lockean contract, and concludes that the instability and risk involved in a purely contractual view of a marital union would militate against this approach. As to non-traditional forms of cohabitation, such as polygamy, the question of their legal recognition would largely depend on the understanding of the societal goals, the notion of "well-being," and the relative prevalence of egalitarian ideas in a given society. In particular, the view of relationships would hinge on whether one accepts a welfarist consequential view of existence that requires the pursuit of general societal good, or a non-welfarist view that stresses the pursuit of subjective personal goals. The legal framework of marriage in the future will develop in accordance with changing social priorities, as well as inherent similarities and differences between the sexes.

Lynne M. Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U. L. REV. 261 (2004-2005).

Despite the drastic rise of unmarried cohabitation since 1970, most women and men agree that marriage is one of the most important decisions in life. Studies have shown that cohabitation often has adverse effects on children, including decreases in the amount of time children spend with their cohabiting father and higher rates of child abuse and sexual abuse. Contradictory court holdings and domestic partner legislation have brought about an unstable legal system regarding this issue. The authors devote a large section of the article to the advantages of marriage as opposed to cohabitation, noting the decrease in disruptions children will experience and the likelihood that as compared to the unmarried couple, the married couple will value familial relationships more. In conclusion, the authors emphasized that couples should seek marriage instead of cohabitation.

Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. FAM. STUD. 135 (2005).

After the California Supreme Court's widely publicized ruling in *Marvin v. Marvin*, which recognized for the first time the economic claims of a woman against her cohabiting partner upon the dissolution of their relationship, many scholars believed that a piecemeal process of legislation would slowly widen the rights and privileges of opposite-sex cohabiting couples. However, this process did not occur—indeed very little progress has been made in this area since *Marvin*. The author compares this lack of progress for opposite-sex couples to the current gathering momentum for legal recognitions of same-sex cohabiting couples. She argues that this divide involves a difference between the legal recognition of cohabiting same-sex couples as a substitute for a disallowed marriage, as opposed to the recognition of cohabiting opposite-sex couples as an alternative to a legal marriage. The article traces the concerns about the institution of marriage that have slowed the development of the recognition of cohabiting opposite-sex couples, but not cohabiting same-sex couples.

Joseph W. McKnight, *Annual Survey of Texas Law: Family Law: Husband And Wife*, 58 SMU L. REV. 877 (2005).

The article surveys developments in family law pertaining to marriage and its dissolution in Texas. Texas courts do not recognize non-traditional unions such as same-sex marriage or parenting contracts. Additionally, despite the legal arguments about the recognition of the institution of same-sex unions, there has been no meaningful legal discussion of the issues pertaining to the dissolution of such unions. The courts strengthened the community property doctrine by imposing a heavy burden of proof to overcome the presumption that all marital acquisitions are community property and by clarifying the definition and scope of homestead and personal property exemptions. In cases where ex-spousal maintenance is requested by a party, a divorce court must inquire as to whether the petitioning party has exercised due diligence to become self-supporting while dissolution was pending. This requirement is dependent upon the party's ability to be self-supporting, and courts are fairly sensitive to injuries or extenuating circumstances that render the party incapable of doing so.

Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605 (2005).

European studies show that "marriage is slowly dying in Scandinavia," and the author attributes this to gay-marriage campaigns that seek to separate civil marriage from the legal rights and duties involved with raising children. Covenant

marriage, which requires couples to attend mandatory pre-marital counseling, creates a legal obligation to preserve marital status and restricts grounds for divorce. Louisiana is one of the few states to adopt covenant marriage legislation, and couples there are not choosing this marital option, largely due to the more stringent divorce rules and a general lack of awareness. Religious organizations and governmental entities should promote covenant marriage as a means to strengthen the institution of marriage by engaging in mass public education efforts, and by mandating clerks' offices to emphasize and explicate the choice between "standard" and "covenant" marriage available to all couples seeking marriage licenses.

Cory D. Sinclair, Gibbons v. Gibbons*: A How-To Guide for Achieving an Efficient Valuation and an Equitable Distribution of Stock Assets in Divorce Proceedings*, 7 J. L. & FAM. STUD. 205 (2005).

Utah courts should utilize the efficient method used by the Oregon Court of Appeals in *Gibbons v. Gibbons* to properly value and equitably distribute minority interest in stock holdings, where the holdings have been determined to be marital property in divorce proceedings. In *Gibbons*, both the trial court and the court of appeals used a valuation method that reflected the minority interest of the stockholder, and the court of appeals ordered a more equitable distribution of assets. Conversely, Utah law is difficult to follow because Utah courts have not issued consistent holdings with regard to asset distribution and failed to acknowledge that minority owners of stock have fewer economic rights. The author suggests that applying a minority discount in Utah would serve as insurance against in-kind distributions, which require divorced parties to remain in business together. While present Utah divorce law contradicts basic principles of law and economics, the author proposes that adopting the *Gibbons* model of efficient valuation and equitable distribution may help to achieve a more peaceful resolution to a divorce proceeding.

J.R. Trahan, *Glossae on the New Law of Marital Donations*, 65 LA. L. REV. 1059 (2005).

In a uniquely structured article, the author chronicles the revisions that a group of law professors made to Chapters 8 and 9 of Title II of the Louisiana Civil Code in the area of marital donations. The group's work updated the code to account for changes in substantive law, procedures, practices, and terminology, and their work was approved by the state legislature and became law. The law of marital donations is heavily related to contract law and encompasses donations between spouses in all aspects of the relationship from courtship to death. The goal of the professors' work was to help clarify and facilitate the legal consequences of donations between spouses which occurred prior to the revisions when the law was

antiquated and ambiguous. The old version of the code is juxtaposed against the revisions to show the changes as well as the reasoning for each change.

REPRODUCTIVE RIGHTS & TECHNOLOGY

Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045 (2005).

This article examines the rights of a father to seek damages in tort in the event of a woman's misrepresentation concerning her fertility or use of contraception. The author notes that *Roe v. Wade* and related cases resulted in the women's gain of more procreative rights than men, and that men become financially responsible for offspring based on genetic tie. In the event that a man is deceived into thinking that he does have a genetic tie to a particular child, courts have not allowed the deceived to seek relief in tort. These courts have used reasoning that places the child's need above the deceived man's, and that does not allow recovery for reliance on contraception. The author concludes that because the protective policies regarding procreation apply to the traditional theories of tort law, neither maternal nor paternal misrepresentation of fertility claims should have relief in tort.

Matthew T. Grady, *Extortion May No Longer Mean Extortion After* Scheidler v. National Organization For Women, Inc., 81 N.D. L. REV. 33 (2005).

The Hobbs Act prohibits "[i]nterference with commerce by threats or violence," and defines extortion as "the obtaining of property from another, with his consent, by wrongful use of actual or threatened force, violence, or fear, under color of official right." In *Scheidler v. National Organization of Women, Inc.*, anti-abortion protest groups were charged with extortion in violation of the Hobbs Act for blocking access to clinics, destroying clinic equipment, and attacking clinic staff and patients. The Supreme Court held that the act was not violated because the protest groups did not physically obtain property. However, the author contends that a violation occurred when the protest groups "obtained" the abortion providers' lost profits, right to conduct their business free from unwanted and wrongful fear, and right to solicit perspective business clients. Courts should construe *Scheidler* narrowly until Congress overturns the decision by amending the Hobbs Act.

Lucy Jane Lang, *To Love The Babe That Milks Me: Infanticide And Reconceiving The Mother*, 14 COLUM. J. GENDER & L. 114 (2005).

One explanation for the existence of infanticide in the United States is that women lack the freedom to decide whether or not to become mothers because of social pressures and a lack of alternatives. The author posits that women may endure two different types of suffering: positive suffering and negative suffering. Positive suffering is chosen or accepted because it has a purpose for the sufferer, whereas negative suffering is inflicted on the sufferer "by people or circumstances that are outside the sufferer's control." Although many women have a choice in whether or not to become mothers, this choice is not so simple. Society negatively views decisions, such as not having children, having an abortion, or giving up children for adoption. The author suggests that infanticide "provides the most extreme proof of the fact that not all women willingly choose the suffering motherhood entails." Although one way to combat negative suffering is through improved health care and education about sex and birth control, the only way to truly alleviate negative suffering is to change the way motherhood is generally perceived. The public must understand that suffering comes with care-giving work, that a child is not the sole responsibility of the mother, and that choosing not to have children is not a negative decision.

SAME-SEX MARRIAGE

M. V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience to the United States*, 17 YALE J.L. & FEMINISM 71 (2005).

The author attempts to explain why and where legal changes towards recognition of same-sex couples began to occur in the United States. The author analyzes the experience of incremental, "small changes" in the Netherlands and a variant theory that focuses on the social and political effects of these incremental changes. The author also examines various social conditions indicative of society's receptiveness to increased legal status for gay and lesbian couples. The article then applies and compares the incremental and conditions-for-change approaches, and finds that the conditions-for-change approach provides a better fit for predicting legal recognition of same-sex couples.

Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345 (2005).

The gay rights movement is premised on acquiring recognition of equality and autonomy for gays and lesbians. In the early days of the gay rights movement, autonomy for gays and lesbians was framed as freedom from oppression and

harassment by the state. This framework has since changed, and the view of autonomy by members of today's gay rights movement is strangely one in which the government recognizes and regulates the ultimate relationship of gays by affording them marriage rights. The author argues that this view of autonomy is directly in line with the feminist definition of autonomy, which is premised not on self-sufficiency, isolation, and independence, but rather on choices influenced by relationships and dependence on others. Using the latter view, the author concludes that by not recognizing and regulating the relationships of gays and lesbians, the state deprives certain individuals from making the autonomous decision of entering into a particular relationship of their choice, namely marriage.

Alison Beck, *Taking the Long View: Reflections on the Road to Marriage Equality*, 20 BERKELEY J. GENDER L. & JUST. 50 (2005).

The issue of same-sex marriage is currently one of the most divisive topics in the American political landscape. Choosing the most effective approach in the fight for equality under the law is one of the most important strategic decisions faced by same-sex couples. Though right-wing Christian fundamentalists are the most vociferous opponents of same-sex marriage rights in the U.S., the author suggests that same-sex couples should not frame their fight for rights as one against religion. The author reminds same-sex couples that although they will achieve some victories in the legal arena, they must also win the opinions of those who are not familiar with same-sex couples. This may be done, not by rejecting religion, but by embracing the progressive wings of religious sects and traditions, and by making faith-based equality arguments for the acceptance of same-sex families.

Daniel Borillo, *Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J.L. & FEMINISM 89 (2005).

Despite the popularity of analyses to the contrary, the legal recognition of same-sex couples is not a concept that conflicts with the foundation of modern family law in France. The author cites the origin of this modern law to the French Revolution and the introduction of the Napoleonic civil code, two elements in French history that shifted the concept of marriage from a union established by religious sacrament to an institution based on a civil contract that reflects the will of two people. Despite its development during an age of free choice and individual autonomy, the concept of modern family law, as interpreted by majority opinion in France, is that of adversity towards same-sex couples' right to marry. Although a political movement has secured limited legal rights for same-sex unions, French legislators have successfully dodged the opportunity to address the question of equality between heterosexual and homosexual couples. The author proposes that the focus of the discourse on modern marriage law should be equality between

couples as opposed to the sex of each partner. Furthermore, by interpreting the civil code with a focus on the latter, the French judiciary departs from arguments based on the law and imposes Judeo-Christian morals and heterosexist ideology upon what is a diverse population—contrary to modern French values. After discussing the struggle for legal recognition of same-sex couples, and the consequent political movement, the author argues that the political claims of the homosexual community in France are consistent with the model of modern French family law.

Kenyon Bunch, *If Racial Desegregation, then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment*, 28 HARV. J.L. & PUB. POL'Y 781 (2005).

This article examines legal scholars' reactions to *Brown v. Board of Education* in terms of an originalist approach to the Fourteenth Amendment, and argues that such an approach need not necessarily invite other judicially-initiated social changes, such as same-sex marriage. The author focuses in particular on the Privileges and Immunities Clause, both with regard to the original understanding of the words "privileges and immunities" and with regard to the prohibition against state action to abridge these privileges and immunities. The author argues that the most likely originalist conception of privileges and immunities was limited to fundamental rights and that the *Brown* precedent fits well within this originalist framework, whereas treating same-sex marriage as a fundamental right does not align with this understanding. Finally, the author rejects the claim that Fourteenth Amendment precedent renders originalism obsolete. Rather, originalism has shaped the Supreme Court's Fourteenth Amendment jurisprudence and do not necessarily require the conclusion that laws against same-sex marriage are unconstitutional.

Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Insect Taboo*, 99 NW. U.L. REV. 1543 (2005).

This article proposes a boundary violation theory in response to the persistence and structural features of the slippery slope rhetoric, which invokes the inevitable disaster that is sure to follow when any given law is passed. The slippery slope that leads to incest promotes taboos that influence public opinion and legal approaches. The author argues that because incest varies significantly in definition, same-sex marriage is unlikely to venture down this much-feared slippery slope. The article also analyzes the disgust that incest provokes and how it is linked to other sexual taboos and the construction of the family. The boundary violation theory's descriptive and prescriptive functions suggest that the repulsion that conservatives and liberals feel towards incest can serve to unite the two camps

and lead the legal system towards a more rational approach regarding sexuality and family.

Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005).

This article advocates for a closer look at polygamous marriage as way to aid both same-sex marriage advocates and those in the smaller movement supporting polygamous marriage. The author believes that both camps would benefit from an alliance and merger of arguments; however, there is still a great distance between the groups. Historically, those in the same-sex marriage movement have used polygamy to weaken a slippery slope argument against their cause. Same-sex marriage advocates cite polygamy as being so dangerous and distinct from same-sex marriage that allowing same-sex marriage would not even approach polygamy. There is also a perception of polygamy as being oppressive to women, which the author refutes. The author cites many arguments that supporters of polygamy have advanced with the hope that same-sex marriage movements will adopt them, such as the long tradition of polygamy in the Bible as well as in the Latter Day Saints religion, the societal dissatisfaction with marriage, and the need to challenge the state to create alternative forms of marriage. If both groups united and pushed for a liberalization of civil marriage, they are more likely to receive the recognition they both seek.

Donald A. Dripps, *Three Tensions, and One Omission, in the Case for the Federal Marriage Amendment*, 42 SAN DIEGO L. REV. 935 (2005).

This article takes an exacting look at the pros and cons of the proposed Federal Marriage Amendment (FMA) and questions the views of one of its adamant supporters, Professor Christopher Wolfe. FMA proponents argue that gay marriage weakens the idea of marriage as a union, that the law needs protection against activist judges seeking to expand the historical definition of marriage, and that proper Constitutional protection of people's religious freedom must include the prohibition of same-sex marriage. The author criticizes this argument and challenges the reader to question whether the Constitution's founding fathers intended to sanction one religious ideology, whether it is necessary for the current conservative caucus to fear the effects of liberal "activist" judges, and whether a union as historically stalwart as marriage could ever effectively be imperiled by the addition of same-sex marriage. Heterosexual marriage has survived generations of war, famine, disease, women's emancipation, the escalation of wealth, and recreational sex; and therefore. same-sex marriage will be an incidental and by no means fatal blow to the institution. Points of tension within the FMA itself suggest a spurious evil is being prevented; furthermore, defining marriage as only a "union

of a man and a woman" would relegate questions of family law and consent to marry to the judiciary, rather than to the legislature.

William C. Duncan, *The Case for a Federal Marriage Amendment to the Constitution, Civil Rights, Religion & Same-Sex Marriage: Where Are We Going?*, 7 T. MARSHALL L. REV. 145 (2004).

In this article, the author focuses on the controversy concerning same-sex marriage and the proposed Federal Marriage Amendment (FMA) considered by Congress in 2004. The author first discusses the impact of the two decisions which predicated a context by which the FMA came about: *Lawrence v. Texas* and *Goodridge v. Department of Public Health*. The author asserts that a federal marriage amendment defining marriage as "the union of a man and a woman" is required as the most effective way to prevent states from redefining marriage to extend to same-sex couples, or to require one state to recognize a same-sex marriage contracted in another state. The author also critiques what he deems to be the three most important objections: the argument that an amendment is not necessary, federalism concerns, and arguments based on discrimination.

Hugh Eastwood & Jason J. Smith, *Do Same-Sex Couples Have a Right to Marry? The State of the Conversation Today*, 17 YALE J.L. & FEMINISM 65 (2005).

This article is based upon the debate of same-sex marriage and possible legal implications. The Massachusetts decision of *Goodridge v. Dept. of Public Health* and President George Bush's stance against same-sex marriage in 2004 inspired the article and symposium for which it was written. The authors explored questions such as which right allows same-sex couples to be married, for whom and for what outcome are the rights being asserted, what the international approach to same-sex marriage is and how it can be applied to the U.S., how racial and sexual discrimination laws apply to this debate, as well as whether it should be a federal or state power to decide whether same-sex marriage should be legal. Overall, the article explored the ideas and views of scholars from different socio-economic backgrounds and experiences as related to the civil rights of same-sex couples.

Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

There is a enduring battle to gain equality for the lesbian, gay, bisexual and trans-gendered ("LGBT") community. The issue of liberal morality looms large as gay rights opponents claim that the granting of rights to this subset of people will imply government endorsement, which is contrary to the moral fiber of most states. Gay relationships, which have generally been built outside of the normal social

structure and in the midst of oppression, have much to offer heterosexual couples and society in general. Champions of LGBT rights must proceed with strategic caution in order to protect themselves from judgmental discourse. The author encourages people to engage directly in moral argumentation, and hopes that with the right amount of awareness, people will one day accept those who live in LGBT relationships.

Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004).

The issue of same-sex marriage has gained momentum in the past few years, despite obstacles such as the Defense of Marriage Act (DOMA) and "mini-DOMAs" adopted by individual states. A number of states and/or jurisdictions have bestowed either marital rights and privileges or comparable rights accompanying civil unions to those desirous of same-sex marriage. The article examines whether the parental rights that marriage or alternative marriages provide would survive a move to a different state that does not recognize same-sex martial-type relationships, specifically the rights of spouses who are not related to the child by blood or adoption. The author concludes that in spite of states' mini-DOMAs, the Uniform Parentage Act, precedents regarding the legitimacy of children, and general choice of law principles are strong arguments for maintaining a same-sex partner's parental rights.

Rebecca K. Glatzer, *Equality at the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-of-Life Decisions*, 13 ELDER L.J. 255 (2005).

In *Flanigan v. University of Maryland Medical System Corp.*, Flanigan was denied the right to visit his partner or to make medical decisions despite the fact that he had a durable power of attorney. The author highlights the need for state legislatures to alter their surrogacy statutes, and for the time being, allow same-sex couples to take steps to protect themselves. Surrogacy statutes become effective when no advanced directive exists for end-of-life decisions. Among several state statutes discussed, New Mexico's system best protects individuals in nontraditional families because it places the decision-making power in the hands of a person who is the functional equivalent of a spouse, while in other states, a partner would be relegated to the end of the surrogate list as a "close friend." In states other than New Mexico, same-sex couples should protect themselves by executing durable powers of attorney and by listing partners as "next of kin" in living wills.

Jack B. Harrison, *The Future of Same-Sex Marriage After* Lawrence v. Texas *and the Election of 2004*, 30 U. DAYTON L. REV. 313 (2005).

This article begins by discussing the case of *Lawrence v. Texas* and its overturning of *Bowers v. Hardwick* by prohibiting the enactment of sodomy laws by individual states. This leads to the question of how much the government may truly control decisions such as marriage, and same-sex marriage in particular. The author proposes that a civil union is a contract between two people that should not be denied to same-sex couples, while religious marriage should remain a personal decision not controlled by the state. The Constitution makes clear that states that do not permit same-sex marriage must still honor same-sex marriages or civil unions made in other states. Same-sex relationships should not be subject to moral majority, particularly one that only recognizes gay relationships when it is convenient for the state.

Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133 (2005).

Media coverage on February 12, 2004, the date Mayor Gavin Newsom began to issue marriage licenses to gay and lesbian couples in San Francisco, elicited empathy for gay issues from many Americans. However, the media's comparison of the events that took place in San Francisco and the civil rights struggles of African Americans illustrated the invisibility of minorities among the gay population and contributed to its stereotype as both rich and white. The divisiveness assumed by this stereotype implies that a civil rights framework for gay liberation is groundless, and makes gay issues such as the right to marry illusory. Thus, the author recommends that white queers must acknowledge white privilege and passing privilege. The author concludes that in order to liberate all queers, gay people should abide by a social contract, which requires all gays to support each other regarding issues that exploit or oppress based on all identity characteristics.

Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J. L. & FEMINISM 205 (2005).

Same-sex marriage is a controversial issue in American society today, as evidenced by the states laws that recognize same-sex or civil unions in Massachusetts and Vermont, and the twelve state referendums that explicitly ban such unions. As a result, a problem arises when same-sex couples decide to move or travel between states. The determination of the state law that applies to the same-sex relationship becomes difficult, and the status of the relationship is restricted and uncertain. Furthermore, the Federal Defense of Marriage Act, and

the state statutes in forty states, indicate that there is a blanket rule of non-recognition of marriage licenses granted to same-sex couples by other states. The author concludes that a blanket rule is unworkable because it creates "absurd and cruel results" that is inconsistent with federal rights; it constitutes a Fourteenth Amendment equal rights violation, and there is no justification for the rule.

Mari Matsuda, *Love, Change*, 17 YALE J.L. & FEMINISM 185 (2005).

The author argues that morality is the inclusion of all as humans, and all of whom are entitled to "the deepest love and care." Under this premise, the author discusses substantive equality and how love is the driving force that can break homophobia and other evils. Within this context, critical race theory elucidates the fight for same-sex marriage, as couples are struggling for true equality and grappling with the social meanings created by law. The author argues that what opponents fear will be lost—the good old days of community and traditional family—has already been taken by the corruptive and selfish ideology most evident in globalization, and that gay marriage is not the culprit. The author warns that while formal equality is important, it should not be the end of the struggle. The article concludes that whether the struggle is about marriage or some other cause, the common element remains love.

Leslie J. Moran, *What's Home Got to Do With It? Kinship, Space, and the Case of Family, Spouse and Civil Partnership in the U.K.*, 17 YALE J.L. & FEMINISM 267 (2005).

This article explores the emergence of the legal recognition of same-sex marriage in the U.K. It sets up an analysis of the definition of "home" and "marriage," as well as the anxieties that same-sex marriage may destroy these two constructs. The author purports that the recognition of same-sex marriage changes the characterization of what is traditionally considered a marriage and recognizes the different dynamics of family types. Ultimately, it is asserted that the recognition and examination of homosexual partnerships may lead to wide-ranging effects to civil rights.

R. Stephen Painter, Jr., *Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?*, 36 SETON HALL L. REV. 125 (2005).

Eighteen states have adopted state constitutional amendments that prohibit same-sex marriage, presenting the potential for tension with those states' pre-existing constitutional equal protection or privacy guarantees. While it is a well-settled canon of statutory construction that when two provisions speak to the same

subject, the later and more specific provision governs, there is both judicial and theoretical basis for rejecting this statutory canon in the context of marriage. In its Twenty-first Amendment cases, the U.S. Supreme Court has articulated an alternative approach to resolve competing provisions that consisted of weighing the constitutional interests at stake without regard to the timing and specificity of the provisions. Since sexual norms and attitudes about gay and lesbian families are constantly changing, courts might be better advised to follow this alternative conceptual framework rather than simply assume that marriage amendments trump equal protection and privacy provisions.

Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 LEWIS & CLARK L. REV. 363 (2005).

Congress, through its Article III power to limit or exclude federal court jurisdiction, may constitutionally remove certain issues from the jurisdiction of the federal courts. So long as Congress abides by the limitations on this power—due process, the doctrine of separation of powers, and equal protection—the author argues that there is no constitutional bar to limiting the role of federal courts. Thus, in the case of same-sex marriage, the author concludes that Congress may restrict the federal courts as long as: (1) the state courts remain open to hear the issue in accordance with due process; (2) Congress does not violate separation of powers by adjudicating the issue, preventing federal courts from interpreting the law, directing the outcome of a particular case, or overturning individual cases or class of cases; (3) the limitation is generally applicable and does not target minorities as is required under equal protection. Nevertheless, the author contends that Congress is unlikely to implement such a change to the court system because it would risk their credibility, and undermine the interests of the federal courts as to its expertise in determining federal law. Moreover, Congress will avoid the resultant uncertainty of congressional action that would make state courts the final arbiters of federal law and create chaos throughout the system.

Laura Spitz, *At the Intersection of North American Free Trade And Same-Sex Marriage*, 9 UCLA J. INT'L L. & FOREIGN AFF. 163 (2004).

While the state governments in the United States and the Canadian federal government oppose the inclusion of same-sex couples in the definition of marriage, the nature of the debate has shifted with economic integration, which has in turn render traditional, societal, geographical, and political categories largely irrelevant in the discussion of the issue. The increasingly integrated world challenges traditional legal norms pertaining to the personal status and the purely national basis of legal thinking. Transnational connections among legal and economic systems have been brought about by the globalization of the capitalist system,

creating a new field of "economic sociology" which is becoming an increasingly significant consideration in the legal argument about the definition of marriage.

Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555 (2005).

Because marriage has a powerful educative role in society, it is often a target for those seeking to advance purposes unrelated to marriage, such as those of white supremacists and of the gay/lesbian rights movement. As such, the *Perez/Loving* analogy–that because it is unconstitutional to prevent a black from marrying a white, it is also unconstitutional to prevent a man from marrying a man—is flawed by superficiality, betraying the court's refusal to allow the marriage institution to be employed for non-marriage ends. The author suggests that the gay/lesbian movement seeks to redefine marriage in order to attain its ultimate objective of creating a society that accepts gay and lesbians, affording them equal opportunities and freedom from adverse treatment. This is true because statistics and reports from Canada, the Netherlands, and because accounts from American gay and lesbian communities illustrate that few same-sex couples marry when it is legal and that few plan to marry if it were legal. The author concludes that although one may assert that the ends justify the means in the fight for the legalization of gay and lesbian marriage, the means encompass the ultimate demise of the present day conception of marriage, a critical social tool that will not be recognized by future generations.

Jeffery J. Ventrella, *Square Circles?!!: Restoring Rationality to the Same-Sex "Marriage" Debate*, 32 HASTINGS CONST. L.Q. 681 (2004-2005).

This article contends that same-sex marriage would not be permitted if debate about the issue contained good lawyering and logic. After defining the rules for logical debate, the author concludes that marriage between two people of the same sex cannot be legal because there is strong historical precedent from a variety of sources that clearly state that marriage occurs between a man and a woman. The author points out that *Lawrence v. Texas* protects the right to privacy that is fundamental to marriage, but that privacy does not create a right to marry. The author also notes that same-sex marriage cannot survive an Equal Protection argument based on discrimination because each sex is permitted to marry on the same basis as the other. The author concludes by arguing against the public policy of same-sex marriage, citing studies that state that children raised by people in a same-sex marriage do not perform well in school and arguing that because men and women can procreate, there are biological reasons to support only man-and-woman marriages.

Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005).

Two common arguments advanced against the legalization of same-sex marriage are that it will lead to the sanction of polygamy in the future and that the recognition of same-sex marriage will result in a flurry of gay rights legislation that will injure religious groups and others who are morally opposed to homosexuality. Both of these positions are classic "slippery slope" arguments in which one asserts that a certain type of action will inevitably lead to another. This note objectively analyzes the potential validity of these arguments and the likelihood of such results in the event of the legalization of same-sex marriage. Although the author claims not to advocate for or against same-sex marriage, he concludes that the slippery slope arguments are generally defensible and that these specific arguments may be valid.

Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005).

The debate about same-sex marriage and the proposal of the Federal Marriage Amendment (FMA) is bringing the issue of federalism in family law to the forefront. The author argues that those in favor of same-sex marriage are the latest in a series of socio-political movements—such as that of the white supremacists—that have attempted to co-opt or change the institution of marriage to further their own political ends. Moreover, this particular movement threatens to undermine the concept of federalism in family law because it is attempting to force this change through judicial fiat. The author supports the FMA because it is consistent with the goals of federalism and the Framers' implied intention of placing family law under the purview of the states. Furthermore, the author argues that marriage, as a fundamental institution of society, must be insulated from judicial interference and left to the people.

Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005).

Current commentary and legal materials fail to provide a unified, systematic exposition of the anti-gay marriage position. Drawing on the work of Edmond Burke and Michael Oakeshott, two leading conservative political philosophers, the author illustrates conservatives' resistance to novelty and emphasis on experience as the best guide to action, effectively preventing change except in situations that demonstrate the prerequisite need for such change. The conservatives' failure to recognize the changing social reality—that marriages are now less about procreation given the population's longer life expectancy—makes their theories less convincing. The conservatives' attempt to preserve marriage in its traditional

form while also creating a "menu of alternatives" to solve the problem of unmet need is one that will arguably backfire.

Craig Willse & Dean Spade, *Freedom in a Regulatory State?* Lawrence, *Marriage and BioPolitics*, 11 WIDENER L. REV. 309 (2005).

The authors begin by examining the status granted to the gay community by the Supreme Court decision in *Lawrence v. Texas.* The case stands for the rule that a state cannot ban a consensual sexual act between adults based on morality. The Lesbian, Gay, Bisexual and Transgender ("LGBT") organizations aggrandize *Lawrence* in their work towards achieving formal legal equality. By catering to the legal system under *Lawrence*, LGBT groups move away from the commitment to promote political change and to oppose legal systems that perpetuate inequality. The authors encourage LGBT organizations to move from the "disciplinary" rights based advocacy to a "biopolitical" model that characterizes populations based on statistical collections of data such as birth, death, production, or illness. The current disciplinary model advocates individual rights predominantly for economically- and educationally-privileged white gays and lesbians. A biopolitical model will focus on the struggles of the poor or minority queer and transgendered people who have been abused in juvenile and criminal systems.

Christopher Wolfe, *The Meaning of Marriage: Why the Federal Marriage Amendment is Necessary*, 42 SAN DIEGO L. REV. 895 (2005).

The Federal Marriage Amendment (FMA) is an opportunity to reaffirm marriage as a fundamental social institution essential for the stability of society. The FMA, defining marriage as a union between one man and one woman, is also a chance to reinforce the original design of the Constitution by curbing illegitimate and unchecked judicial power, and to end judicial exaltation of sexual autonomy. Though most supporters of the FMA are political conservatives, some conservatives oppose the amendment on the grounds that it violates principles of federalism. However, FMA supporters do not aim to radically change the form of government, but rather to resolve one issue decisively, and they consider this a sufficiently profound issue to justify the rarely invoked constitutional amendment. Conservatives, who claim that the issue should be left to the states, and the consequent differences in state policies, are essentially saying that gay marriage is not a fundamental issue worthy of uniform resolution.

SEX CRIMES

Michelle J. Anderson, *Negotiating Sex*, 78 CAL. L. REV. 1401 (2005).

The common law traditionally defined rape as a man having sexual intercourse with a woman by force and without her consent, requiring that victims resist their attackers vigorously in order to prove their lack of consent. Most rape statutes have abolished the common law requirement of physical resistance but still usually require that the assailant use force and that the victim not consent. Many academics feel that the laws should go further in protecting women, using either the "no model," which requires that a woman say no in order to express that she does not consent, or the "yes model," which requires that a woman express consent of some kind. The "yes model" would seem to put the onus on the man, except for the fact that it allows men to infer consent from a woman's nonverbal communications. The author suggests a new model of negotiation which requires that a couple engage in a communicative exchange about whether they want to have sex beforehand, and nonverbal cues will only be acceptable when decided in advance by the couple.

Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447 (2005).

Criminal law gives little weight to emotions, save the exceptions of the male-identified and simple emotions that are immediate and instinctive. Since women act emotionally in a different way than men, the law must be modified to take into account the reality of how women react in many situations. The author argues that the law of rape and domestic violence highlights the law's inability to recognize complex emotional states. Rape law now considers the omission of "no" to be "yes" and therefore ignores the reasons why a woman who does not want to engage in sexual relations might not give an unequivocal "no." The law of domestic violence only affords women the option of "flight or fight," which ignores the emotional complexity of relationships and the reasons why battered women might be unable to break from the relationship. The law needs to better reflect the reality that women's emotional reactions differ from those of men.

Anne Bloom, *Rupture, Leakage, and Reconstruction: The Body as a Site for the Enforcement and Reproduction of Sex-Based Legal Norms in the Breast Implant Controversy*, 14 COLUM. J. GENDER & L. 85 (2005).

This article uses American jurisprudence on breast implant rupture litigation as a means of exploring more generally the extent to which the American legal system reinforces and recreates traditional gender norms. The author begins by

providing the theoretical background for the discussion, focusing on the traditionally distinct definitions of the terms "sex" and "gender" and arguing for an understanding of the terms as interlinked biological and cultural processes. The article provides a background on the controversy regarding breast implant rupture litigation and investigates the law's response to ruptured implants. The author argues that this response not only enforces and generates a conception of womanhood in which real or natural-appearing breasts are highly favored, but also refutes the counterargument that breast implants are a challenge to rigid, biology-based notions of womanhood and that it is the law's role to protect this practice. Finally, the author offers the legal community alternative approaches to questions of defining sexual identity.

Jennifer K. Bukowsky, *The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 MO. L. REV. 813 (2005).

In *State v. Long*, the Missouri Supreme Court changed state rules of evidence by allowing extrinsic evidence of prior false accusations for the purpose of impeaching the credibility of the witness to be introduced at trial. Though the defendant had been convicted of forcibly raping and sodomizing the plaintiff, the Court reversed the conviction on grounds that excluding evidence of the plaintiff's prior false accusations of assault deprived the defendant a full opportunity to present his defense. Because the Court's decision was not limited to crimes of sexual assault and gave no absolute requirements for admissibility, trial courts will frequently be forced to consider whether to admit such evidence with little guidance. Although this presents many practical problems, the case was correctly decided because the defendant carries the heavy burden in not being allowed to introduce such similar evidence. However, the Court should have provided a list of factors affecting admissibility to guide trial courts, and should have been more specific regarding the procedural application of this type of evidence.

Susan S. Kuo, *Officer Indiscretion: Considering Sex Bargains with Government Informants*, 38 U.C. DAVIS. L. REV. 1643 (2005).

Law enforcement's use of informants for sex tasks is a new crime-fighting tactic that raises both legal and ethical concerns. Although the Supreme Court ruled that the use of secret informers is not per se unconstitutional, the use of informants for sexual tasks may bring different issues into play. This article discusses the differences between "typical informant tasks" and "informant sex tasks," particularly with respect to the consent that is required when an informant is required to partake in a sex task. Because someone who is in the position of being asked to participate in a sex task is already in a vulnerable legal situation, safeguards must be implemented to ensure that the informant is not unlawfully coerced into consenting to the sex task. The author concludes by expressing her

dissatisfaction with the government's use of informants for sex tasks and states that this practice will not be removed from the system without public outcry.

Robert J. Levy, *The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies*, 7 J. L. & FAM. STUD. 57 (2005).

The author examines *Gibson v. State*, and the prosecution and conviction of Ramon Garcia. These two cases arose under "capital sexual battery"—a crime punishable by a mandatory minimum sentence. The author focuses on the high-stake tactical decisions of the prosecutors and defense lawyers. *Gibson* illustrates how rules of evidence influence the jury, and how dangerous it is for defendants to rely upon appellate review of jury findings. *Garcia* illustrates how pre-trial lawyering, rules of evidence, and prosecutorial practices affect defendants' chances of jury acquittal. Both cases illustrate the value of "mandatory minimums" to prosecutors in coercing plea bargains, and how these "mandatory minimums" may cause idiosyncratic results on a case by case basis.

Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1 (2004).

The use of penile plethysmography ("PPG") as a condition of parole, probation, and supervised release of convicted child sex-offenders presents a number of constitutional challenges and policy concerns. The author begins with a description of PPG, its background, development, administration, scientific validity, and the evidentiary questions caused by its use, to cast doubt on its reliability and offer less harmful alternatives. Although courts have upheld the use of PPG for convicted sex offenders, people who are required to undergo PPG may have a claim that it constitutes an unreasonable search under the Fourth Amendment, or that it violates the general principle of freedom of mind protected by the First Amendment. Additionally, requiring individuals to undergo PPG examinations may infringe on the free exercise of religion depending on the person's beliefs, and may be a violation of the Religious Land Use and Institutionalized Persons Act of 2000, though it has yet to be challenged under that law. Lastly, the procedure is unethical and against public policy because it further exploits children and gives the government too much power over one of the most intimate areas of a person's life.

Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005).

This article attempts to reconceptualize the law's mens rea requirement to account for the problem of self-deception in the context of rape. The author uses the controversy surrounding Kobe Bryant's alleged rape to articulate the theory of self-deception which he describes as the moment when a rapist "consciously, but incorrectly, believes that he has a women's consent, when, at some less-than-fully conscious level, he knows otherwise." The author proposes an increasing need, as a result of science, for a more complex analysis of human thoughts and behavior than the criminal law now embraces. The article argues that self-deception is best understood as a form of negligent conduct but explains that it is morally far more reprehensible than other sorts of negligence. Contrasted with the current mens rea requirement of negligence, the author advocates for an objective test that would punish men who have acted *like* self-deceivers. The author concludes that understanding the workings of the brain helps to illuminate the negligence standard and the severity of penalties for negligent rape.

Paul F. Theiss, *Constitutional Law—The Eleventh Circuit Fumbles the Supreme Court's Recognition of a Due Process Right to Sexual Intimacy*, 58 SMU L. REV. 481 (2005).

The U.S. Supreme Court held in *Lawrence v. Texas* that the Due Process Clause of the Fourteenth Amendment creates a substantive right to sexual intimacy. The author cites *Williams v. Attorney General of the State of Alabama*, arguing that the Eleventh Circuit misconstrued the extent of the privacy right announced in *Lawrence*, thus disregarding its propositions that (1) sexual intimacy is a due process liberty interest; (2) state concerns with public morality is not a legitimate state interest to the extent that it warrants the criminalization of private conduct; and (3) a *Glucksberg* analysis would be inappropriate where applied to claims of sexual intimacy. Whereas *Lawrence* touched upon a Texas law prohibiting certain sexual acts as criminal conduct, *Williams* involved Alabama's Anti-Obscenity Enforcement Act which, save certain exceptions, criminalizes the sale of anything created for use as or marketed towards use as a sexual device as criminal conduct. Further, while the liberty interest announced in *Lawrence* stops short of prohibiting statutes that merely burden sexual intimacy, the author finds the *Williams* decision troublesome for requiring the *Glucksberg* instead of the *Lawrence* analysis in lower courts. The author argues that, in applying *Glucksberg*, the Eleventh Circuit unduly limits the Due Process privacy interests of citizens subject to the circuit's jurisdiction. It confines protected interests to that which is narrowly defined by the courts, or that which is construed as a fundamental privacy interest embedded in American history. Finally, the author argues that such an approach is likely to impede the legal discourse on sexual intimacy, and per *Lawrence*, demean sexual

intimacy by drawing attention towards particular sexual acts and away from the lasting relationships in which sexual conduct constitutes but one element.

Dana Vetterhoffer, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 ST. LOUIS U. L.J. 1229 (2005).

The author claims that sexism is rampant in rape law because perpetrators are almost exclusively male and the laws reflect a bias in favor of the male rapist. Post-penetration rape occurs when consent is initially granted and then withdrawn during the sexual act. A post-penetration rape statute would mitigate some of the sexism inherent to the laws, but large-scale reform of the laws would still be necessary to cure the anti-victim attitudes. The author traces the history of rape law and illustrates a pro-rapist bias, as evidenced in the heavy burdens of proof, as well as resistance and corroboration requirements. In 2003, Illinois became the first state to make a post-penetration rape claim actionable under law. This statute is helping to increase public awareness and to counter some prevalent "rape myths," which many believe as fact. However, there is still a very long way to go in bringing rapists to justice and changing the way society conceives of rape.

SEX DISCRIMINATION

Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449 (2005).

This article explores the different reasons for the insufficient number of legal and academic scholars that focus on gender issues as related to the Internet. The author analyses the effects of online libraries and urges legal scholars to pay greater attention to the differences between men and women when importing data from the "real space" to "cyber space." Real space libraries have a feminine mystique; librarians are women and the libraries are social ground for patrons who want social contact, free access to books, and a comfortable chair on which to sit and read. Online libraries are masculine; they are transactional and linear and spaces where people choose not to disclose their sex. Oftentimes with non-disclosure comes an assumption that users are men because they would prefer the quick and efficient use of an online library as opposed to a crowded and leisurely feminine real space library. Frequent users of virtual online activities such as Internet gambling also tend to assume that most players are males. Copyright law and "protection"-based Internet filter programs further limit information and web logs for female users because such programs discourage women from posting information, narratives, and stories on the Internet for fear of copyright infringement actions. Furthermore, Internet filtering software used by many schools and online libraries has text-based content search to determine which cites

will have obscene visuals and, as a result, the software filters out web log entries where women disclose personal information. These examples highlight the importance of considering the effects on women in the area of cyberspace law.

Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in* Leyla Sahin v. Turkey, 91 CORNELL L. REV. 129 (2005).

The European Court of Human Rights was established by the European Convention on Human Rights to enforce international rights and freedoms of individuals against their states. In *Leyla Sahin v. Turkey*, the Court upheld a ban on religious headwear in Turkish Universities. The plaintiff was no longer allowed to attend medical school when she continued to wear a headscarf rather than abandon her religious beliefs. The case represents one of many potential situations where religious women may be forced to choose between educational or religious adherence. This decision is far-reaching both in precedence and scope. Under the guise of promoting secularism, nations infringe on religious freedom and discriminate against women by denying access to education and equal opportunities.

David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217 (2005).

To compare the way in which Title IX and the Equal Protection Clause function to protect against discrimination, the author poses the situation of a pregnant female college athlete. Offering examples and solutions for legal issues that result from the comparison of the two federal statutes, the author argues that Title IX has a broader doctrinal scope and uses more prohibitive language than the Equal Protection Clause, resulting in Title IX being closer to the ideal of guaranteeing educational equality for females. The author concludes that although Title IX is not perfect, it is the preferred avenue for reform and may serve as a model for future progress in other areas of sex discrimination.

Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285 (2005).

This article examines how subconscious biases affect medical and legal perceptions of women and how these biases result in legal doctrines unresponsive to women's needs. The authors explain a number of psychological studies that show that people form prejudices based on their egocentric perception of the world and suggest that these prejudices result in gender discrimination. After noting the

psychological origins of gender discrimination, the authors examine state laws that prohibit the sale of female masturbatory devices, demonstrating how these attitudes result in legal rules that are inattentive to female sexual needs. The authors further illustrate the effect of the subconscious bias against women by showing how scientific data detailing the distinction between psychological and genetic parenthood are overlooked in favor of judicial presumptions that favor men over women in conflicts involving frozen embryos. The authors conclude by stating that the difficult task of correcting the biased views of legislators and judges may be aided by confronting them with data that show their prejudices, because before the biases may be corrected, they must be known.

Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859 (2005).

The author surveys the legal and cultural barriers to women entering the practice of law in the nineteenth and twentieth centuries. The author presents a series of pioneering women who attempted, and sometimes succeeded, in becoming lawyers, whether through apprenticeships or law school. Once admitted to the bar, these women continued to face many hurdles in practicing law. The author then challenges the idea that women have attained equality in the profession of law today, and provides a series of studies and anecdotes illustrating the continuing inequality of women in the law. Not only are existing patriarchal attitudes and the difficulties of balancing personal and professional lives a challenge, but also the economic reality of legal practice today makes it difficult for law firms to embrace a more "feminine" culture of the profession.

SEXUAL IDENTITY

Alycia T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 13 MICH. ST. J. INT'L. L. 197 (2005).

This article recounts and analyzes past failures to include the mass killing of homosexuals within the definition of genocide, and advocates for an expanded definition that would include such killings. The author recounts the Nuremburg trials, describing the tribunal's neglect of crimes against homosexuals and how this neglect led to further exclusion from the discussion at the Genocide Convention. The author also describes the status of homosexuals before, during, and after the Nazi regime, showing how their lives were affected both by the active discrimination of the regime and the subsequent neglect at the Nuremburg trials. The author then advocates for an expansion of the Genocide Convention's definition of genocide to include sexual orientation. Finally, she notes that there exists a need for such an expansion in order to provide true reconciliation for those affected.

Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150 (2005).

This article begins with a vivid account of transgender discrimination in America today. Josh, a white female-to-male transgender, serves as the author's muse in the exploration of the social framework that shapes the way that many people, unknowingly, view gender and identity. As articulated by Sigmund Freud, Leo Bersani, and Judith Butler, the evolution of the jurisprudence relating to the transgender community is heavily rooted in ideas of normalcy and traditional views of the body. The author explains how these very notions affect those who seek to find an identity outside of the guise of traditional male and female roles. Because this social framework is deeply engrained in the culture, transgender individuals face discrimination with little recourse on all levels, including employment, housing, credit, and marriage. The author uses a current anti-discrimination case to demonstrate the unreasonable burden of proof the law places on the transgender plaintiffs. Additionally, the author tells the story of a young transsexual woman who, in her most honest moments, speaks of her own life as a tortured monster much like the one in Mary Shelley's *Frankenstein*. In sum, this article sets forth the fundamental principles that underlie the stagnant evolution of thought and jurisprudence in this country regarding the rights and liberties of the transgender community.

Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491 (2005).

This essay examines the sexual doctrine developed by the Supreme Court between 1965 and 1973 from a cultural and historical as opposed to a constitutional perspective. The analysis focuses mainly on the decision in the case of *Boutilier v. INS*, which ruled that the "psychopathic personality" exception of the Immigration and Nationality Act supported the deportation of homosexuals. While many people believe that the sexual doctrine developed by the Court during this time period was one based in libertarian and egalitarian ideals, the author argues that the doctrine was based rather on heteronormative sexual expression, which included adult, heterosexual, monogamous, marital, familial, domestic, private, and procreative acts. The *Boutilier* decision, which dealt with neither the right to privacy nor free speech, fits easily into the heteronormative doctrine. The author argues that the Court's decision in *Lawrence v. Texas* was not a consistent application of the privacy precedents from the 1965 to 1973 era, but rather a shift away from the heteronormative doctrine developed to regulate sexual activity that was considered dangerous and disorderly by the homophobic majority.

Roy Whitehead, Jr., & Walter Block, *The Boy Scouts, Freedom of Association, and the Right to Discriminate: A Legal, Philosophical, and Economic Analysis*, 29 OKLA. CITY U. L. REV. 851 (2004).

On First Amendment freedom of association grounds in *Dale v. Boy Scouts of America*, the Supreme Court upheld the right of the Boy Scouts to exclude Mr. Dale from being a scout leader because he was a homosexual. The authors argue from a libertarian perspective, advocating for the abolition of discrimination laws based on how contrary they run to philosophical and economic information. Philosophically, the application of the laws in this case was incorrect for being morally offensive and disrespectful of private rights. Economically, data shows an economic advantage to those practicing discrimination, also called "rational discrimination." Ultimately, the authors believe that only through completely free association, in the absence of discrimination laws, will there truly be freedom for all individuals.

WORKPLACE DISCRIMINATION & HARASSMENT

Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30 (2005).

To capture the diverse experiences of women of different classes, races, sexual orientations, and disabilities, the anti-essentialism movement seeks to expand the traditional narrative that explains the experience of being a woman. The author draws on two examples to illustrate the need for an anti-essentialist approach in policy making. First, the Family and Medical Leave Act (FMLA) is problematic from an anti-essentialism standpoint because its leave policy primarily benefits white, middle-class working women. While short-term unpaid leave is legally protected, the FMLA only applies to employers with fifty or more employees, and does not cover leave to care for domestic partners. Furthermore, the FMLA does not address the additional hardship many women face when they become pregnant and work in potentially toxic industrial environments. Secondly, the author argues that the recent article by Lisa Belkin that suggests women are "opting out" of demanding careers to spend more time with their children is based on a similarly narrowly-focused narrative. It presupposes that there is a quality inherent to women instead of a flaw in the work environment that compels women to choose to opt out. The author argues that opting out is only a "choice" that an elite group of women are able to make, and Belkin's article obscures the fact that even at the highest level, employers often limit choices women are free to make regarding their workload and schedule. The author recommends institutional changes that take into account the needs of and pressures on women from diverse backgrounds.

Anna M. Archer, *Shopping for a Collective Voice When Unionization Is Unattainable: 1.6 Million Women Speak Up in* Dukes v. Wal-Mart, Inc., 42 HOUS. L. REV. 837 (2005).

A longstanding problem for female workers is the inability to be heard by management and to remedy discriminatory practices. Unionization has alleviated this problem in many instances, but this problem persists for women working for Wal-Mart. Wal-Mart has an "open door" policy intended to solve communication problems without unionization, but to date, the policy has failed. Because of the limited effects of individual lawsuits, the best way for women to make themselves heard at Wal-Mart might be through class-action litigation. The main issue in this litigation is whether Wal-Mart, through its far-reaching central control practices, is responsible as a corporation for the allegedly systemic discriminatory practices of individual managers. Because of the enormity of the Wal-Mart organization, the results of the lawsuit could have extremely widespread effects and potentially improve the working conditions of millions of women.

Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561(2005).

Government-sponsored child care is necessary in order to remedy gender inequality. As it stands, women are the primary caretakers of children and their disproportional domestic responsibilities often lead them to choose jobs that continue to perpetuate gender inequality by forcing them to take lower salaries. Where child care legislation is common, such as Europe, gender inequality is usually less pronounced. A similar program may be created under Article V of the Fourteenth Amendment to enforce remedies for past discrimination. Moreover, publicly- funded child care benefits society by removing the disincentive to childbearing faced by women who wish to further their careers. Publicly-funded child care also benefits children by creating a uniform standard of parenting that allows all children to be equally prepared to become productive members of society.

Joan T.A. Gabel & Nancy R. Mansfield, *Sexual Harassment in the Eye of the Beholder: On the Dissolution of Predictability in the* Ellerth/Faragher *Matrix Created by* Suders *for Cases Involving Employee Perception*, 12 DUKE J. GENDER L. & POL'Y. 81 (2005).

In 1988, the decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, created a new matrix for determining sexual harassment liability claims which focused on employer behavior and involved a simple and predictable analysis that creates an incentive for employers to implement effective sexual harassment policies and complaint systems in the workplace. However,

when employees either fear retaliation or are faced with constructive discharge, i.e., when an employer deliberately creates intolerable working conditions to the extent that the employee must quit, the matrix is focused on employee perception rather than employer behavior. The authors argue that in this area of aggrieved employee perception, the simplicity and predictability of the matrix breaks down, creating circuit splits and unsettled law. The article examines the process by which this breakdown has taken place amongst the circuits, analyzes the different approaches taken by the circuits, and offers insights on how to mend the fundamentally problematic issues in sexual harassment law. The authors propose an approach similar to that taken by the EEOC, namely that a constructive discharge exists when the employer imposes intolerable working conditions that violate Title VII if the conditions would foreseeably compel a reasonable employee to quit, regardless of whether the employer specifically intended to force the victim's resignation.

Rebecca K. Lee, *Pink, White and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677 (2005).

Hostile environment sexual harassment is a pervasive form of harassment that results in disparate treatment of women in the workplace. Some courts have tailored Title VII sexual harassment law around class distinctions, applying different standards to employers and individual employees depending on whether they are engaged in "blue collar" or "white collar" work. The author argues that there is virtually no difference in the conduct of blue collar workers and their white collar counterparts. The male-dominated culture and norms present in the workplace are the cause of sexual harassment of women at work, and a uniformed standard for workplace harassment determination should be applied regardless of class. The author concludes that the only way to help women achieve occupational equality is if courts recast the sexual harassment discussion to focus on the masculine culture of the workplace, which inevitably results in disparate treatment of women.

Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

This article evaluates the issue of publicly-provided paid family leave, which allows workers to take paid time away from work for the purposes of family caregiving. The author begins by exploring the reasons why private markets do not already provide paid family leave insurance. The author argues that the costs of paid family leave should be spread across society and that such costs may be justified by the goal of achieving greater workplace participation by women while also addressing the objections to government-subsidized paid family leave. The author supports the argument by presenting theoretical predictions and empirical findings regarding the effect of paid family leave programs on the labor market.

The article concludes with a discussion of the various methods available for financing such a benefit program and explores the viability of different reform options.

Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. REV. 643 (2005).

The decisions of *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, as well as the laws prohibiting employment discrimination against gays enacted by thirteen states and the District of Columbia, nineteen cities, and numerous municipalities, give gay rights activists hope that the Employment Nondiscrimination Act (ENDA) will be passed. This federal statute prohibits sexual orientation employment discrimination nationwide. In order to assess whether ENDA will be an effective tool for combating workplace sexual orientation discrimination, the author conducted a pilot case study assessing the effectiveness of an analogous state statute, the Fair Labor Act, in Massachusetts. Utilizing a survey, the author examined the relationship between claimant satisfaction and litigation of employment discrimination suits before the Massachusetts Commission Against Discrimination (MCAD). While the sample was not large enough to test for statistical significance, the author concludes that 62% of claimants were dissatisfied or very dissatisfied with the outcome of their claims, that winning had a lot to do with satisfaction, that it may be strongly inferred that experience with pre- and post-claim retaliation affected overall satisfaction with the process, and that 44.8% of claimants would file a claim again. In addition to enacting ENDA, the author recommends eliminating damage award caps, instituting anti-discrimination policies and training programs in companies, ensuring confidentiality of claims, extending the statute of limitations for making a claim, increasing MCAD's and the Equal Employment Opportunity Commission's budgets, mandating investigatory testing programs, creating financial scholarships for claimants, and utilizing non-legal forms of support for discrimination victims.

Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005).

There is a debate regarding the current system of antidiscrimination laws between critics supporting employers and those supporting employees. Using empirical data, the authors found that although there is a high perceived threat of employer liability, it stems from a few highly publicized cases. In reality, there is a dramatic amount of under-claiming by employees who believe that they are victims of discrimination. As a result, the authors believe that a new system is in order; one that would ensure that employee rights are protected. To achieve this goal, the

authors offer a number of suggestions, such as enhanced regulation of employment decisions, new workplace mechanisms to allow workers and managers to create discrimination-reducing policies, augmentation of EEOC resources to monitor potential violations, immunity to the employers that proactively evaluate and try to redress discrimination in the workplace, and relaxation of burdens on employers who engage in affirmative action programs.

Cassie Springer-Sullivan, *The Resurrection of "Female Hysteria" in Present-Day ERISA Disability Law*, 20 BERKELEY J. GENDER L. & JUST. 67 (2005).

The author represents disabled people seeking long-term disability benefits under the Employee Retirement Income Security Act (ERISA). Many of her clients are women suffering from fibromyalgia syndrome, or FMS, a physical illness whose symptoms include debilitating muscle aches, fatigue, and sleep disturbance. Even though FMS is recognized as a legitimate medical condition by the American College of Rheumatology, the American Medical Association, the World Health Organization, and the National Institutes of Health, women who complain of its symptoms are often diagnosed by doctors and insurance companies as suffering only from a psychological disorder, and as a result, many women are denied disability benefits. The author suggests that those loathe to accept the real and physical nature of FMS treat the disease as if it were a modern form of "female hysteria," which is an antiquated belief that women invent medical conditions to gain needed attention because they are psychologically weak. Courts have taken the opposite position, generally refusing to characterize FMS as a mental illness, and awarding female patients benefits under ERISA. Insurance companies have responded by rewriting policies to make it harder for self-reporting of pain and fatigue to qualify as evidence of disability. Nonetheless, the author is confident that the courts will continue to be a source of redress for women suffering from FMS.