ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Susan Frietsche, et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, n.2 (2006).

While the Supreme Court discarded the highly protective strict scrutiny standard of *Roe v. Wade*, the court's opinion in *Planned Parenthood v. Casey* nevertheless preserved the core of *Roe* by adopting the undue burden test to measure the constitutionality of restrictions on abortion. This article analyzes the application of the *Casey* standard nationwide over the past decade-and-a-half to assess the current status of the constitutional protection it offers. Many state legislatures have attacked the undue burden test by passing a multitude of restrictions on abortion meant to make abortion next to impossible. The author looks at how courts ranging from lower state courts to the Supreme Court have applied the undue burden test and whether the courts have been successful in protecting a woman's right to abortion. In conclusion, the author argues that the undue burden test must be clarified by the Supreme Court and reinforced by the courts so that it can effectively ensure that the core protections of *Roe* are preserved.

Angela M. Hannemann, *A New Routine: Assisting Patients in Prenatal Diagnosis*, 90 MARQ. L. REV. 337 (2006).

As prenatal testing becomes a routine feature of prenatal care, the related information and services provided to expecting parents by medical professionals and states must be examined. Prenatal testing has become routine despite some very inaccurate test results. This is due to legal, as opposed to medical, concerns of hospitals wishing to avoid wrongful birth lawsuits from parents whose children are born with birth defects. The methods commonly used to help women and their partners make informed decisions after predictions of birth defects in fetuses are ethics consultations, pastoral care, and personal counseling. These methods significantly fail to address all the issues facing such patients. Mediation is a more effective and holistic option because it considers the relationship between parties, their need for privacy, and creative or flexible resolutions, as opposed to solely medical or individually emotional concerns. Therefore, when the Prenatally Diagnosed Condition Awareness Act—whose purpose is to increase scientifically sound information and support services to such patients—is developed further, it should provide for mediation programs as a resource for patients.

Lynne Marie Kohm, *From Eisenstadt to Plan B: A Discussion of Conscientious Objections to Emergency Contraception*, 33 WM. MITCHELL L. REV. 787 (2007).

Some doctors and pharmacists claim conscientious objections to the dispensation of emergency contraception, or "the morning-after pill," making a moral distinction between the effects of the birth control pill that prevent fertilization of an egg and those of emergency contraception that prevent uterine implantation of fertilized eggs. Since there is some public and legal confusion as to the moral status of emergency contraception, there is a divide in state and federal laws that either allow pharmacists or medical practitioners to object to distributing emergency contraception, or require them to distribute it regardless of their personal beliefs. Some of the arguments made to support laws allowing conscientious objections by doctors and pharmacists include the duties to do good and not take life, religious objections, and patients' ability to change providers. Counterarguments include support of patient autonomy, privacy, and convenience, as well as providers' ability to seek employment in line with their consciences. The author argues that although marital family planning is pursued intelligently, the individualistic use of emergency contraception is not and might have negative repercussions on life and health. Thus, until a stronger medical and legal consensus on the moral status of emergency contraception is reached, doctors and pharmacists who believe that emergency contraception could harm a patient or a patient's offspring should be allowed to conscientiously object to dispensing it.

Roger J. Magnuson & Joshua M. Lederman, *Family Law: Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767 (2007).

Fetal rights and abortion law are two areas of law that concurrently deal with the status of the fetus. However, they are based on opposing logic and arrive at contrasting conclusions. Where fetal rights laws considers the fetus to be a human being entitled to all protections of the law, abortion laws consider the fetus to be potential human life, so that the mother's interests may supersede those of the fetus. In recent years, a growing number of states have been moving towards recognizing fetuses as "persons," imposing criminal penalties for the killing or injuring of unborn children, and allowing those who have been "born alive" to bring a suit for prenatal injuries. Such claims serve to emphasize the growing divide between the logic of the two areas of law—a mother may choose to abort her unborn child, but if she does not, and the unborn child is injured or killed, the perpetrator may be prosecuted for the resultant harms. Fetal rights law and abortion law should be reconciled in order to provide a consistent body of law on the legal status of the fetus.

Monica Mendes, Note & Comment, *A Low Threshold of Guilt: Interpreting California's Fetal Murder Statute in* People v. Taylor, 39 LOY. L.A. L. REV. 1447 (2006).

In *People v. Taylor*, the California Supreme Court held that if a defendant murders a pregnant woman, the defendant may be guilty of second degree murder of a fetus, even if the defendant was unaware of the pregnancy. This Note argues that the *Taylor* decision was incorrect because it went against the legislative intent of California's murder statute. The author discusses the legislative history of the pertinent California Penal Code sections considered by the *Taylor* court, and argues that the legislature intended to treat "fetuses" and "human beings" differently in the context of murder. She asserts that the *Taylor* court obliterated this distinction, which the legislature specifically entrenched in the law. The author concludes that the *Taylor* decision has the potential to undercut a woman's right to an abortion, by establishing that the killing of a fetus is equivalent to killing a human being, and in elevating the legal status of a fetus.

April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147 (2007).

When pregnant women become involved in the justice system, judges often take measures to protect the fetuses from harm. Sometimes the measures are used to protect a fetus from potential damage resulting from drug use by the mother, while at other times the goal is to effect an outcome to the pregnancy that is in line with the judge's personal views on abortion. This article questions whether incarceration or the threat thereof is a proper or effective method of protecting fetal health. The author argues that depriving women of their physical liberty to benefit the health of their unborn children violates the Due Process Clause of the Constitution. The author concludes that these coercive tactics are unacceptable rights violations, and suggests that the state's goal of protecting fetal health would be better served by preventative medical care.

Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN'S J. LEGAL COMMENT. 461 (2007).

Using the backdrop of the partial birth abortion legislation, the author posits that the revival of federalism by the Supreme Court during the 1995-2001 terms occurred in part because federalism is no longer relevant to political players, including lawmakers, interests groups, and voters. These political players are often willing to overlook the constitutional concerns about federal and state authority surrounding legislation if the legislation aligns with their personal and professional

motivations. The author asserts that political players overlooked the issue of whether the Commerce Clause was a valid Constitutional basis for viewing partial birth abortion as a federal issue because they were only focused on how such legislation would align with their pro-choice or pro-life ideologies. As a result of the increasing importance of first order preferences, the political process does not demand that the Supreme Court be consistent with its views on federalism. Therefore, the Rehnquist Court was able to decide issues using both narrow and broad interpretations of federalism without creating a political backlash.

Paige Nelson, Note, *Let the People Speak: Terrorism, the Abortion Debate, and Reduction of the Jury Award in Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 92 IOWA L. REV. 677 (2007).

In *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, abortion providers sued the American Coalition of Life Activists ("ACLA"), an anti-abortion activist group, for the threatening publication and dissemination of personal information of abortion-rights supporters. The jury returned a verdict in favor of the plaintiffs, awarding punitive damages totaling $108.5 million, which the district court upheld at trial level and again affirmed on remand. The Ninth Circuit, however, disagreed with the district court's decision, finding that that the jury's punitive damages award was excessive in light of the recent substantive due process standards. The Ninth Circuit reduced the award to around $5 million even though it specifically found that the defendant's conduct was sufficiently reprehensible to warrant substantial punitive damages and that the defendant was given notice of the possibility for uncapped punitive damages under the Freedom of Access to Clinic Entrances Act. This Note criticizes the Ninth Circuit's decision to reduce the jury award as an improper censorship of the jury's right to express condemnation of the defendant's behavior, and recommends that courts not engage in the substantive due process analysis when the defendant is afforded procedural due process and is financially unable to pay punitive damages.

Tiffany Scott, Note, *Repercussions of the "Crack Baby" Epidemic: Why a Message of Care Rather than Punishment is Needed for Pregnant Drug-Users*, 19 NAT'L BLACK L.J. 203 (2006-2007).

The punitive measures taken by South Carolina against pregnant drug users to combat the political and media fueled "crack baby epidemic" deter women from seeking proper medical treatment. The constitutionality of the punitive measures hinges on whether the mother consented to urine testing; in *Ferguson v. Charleston*, a public hospital policy that allowed the hospital to test the urine of pregnant women without their consent was held unconstitutional for violating the 4th Amendment, while in *State v. McKnight* a similar hospital policy was held

constitutional as the defendant gave written consent for urine testing. South Carolina's test to identify suspected pregnant drug users unfairly target minorities in two ways: (i) testing occurs more in public hospitals that serve poor communities resulting in a disproportionate number of minority women being charged with a drug offense, (ii) the identifiers used by hospitals to test the women, including determining whether the pregnant women had no prenatal care or late or incomplete prenatal care, target minorities who statistically cannot afford proper prenatal care. The state's policy to remove children in 100% of the cases where the mother received prenatal care and tested positive for drug use coupled with the court's refusal to look at external factors that led to the woman's drug use, lead to women delaying or refusing vital prenatal care or risk being separated from their child. The author argues that instead of maintaining its current punitive measures, the state should take preventative measures that aim to promote physical and psychological health of the mother and child by providing information about and access to health care and abortions, and creating drug programs that aim to rehabilitate the women by assessing their needs and providing adequate medical and psychological care.

BIOETHICS

Brandon Mercer, *Embryo Adoption: Where are the Laws?*, 26 J.JUV. L. 73 (2006).

Currently, there are 400,000 surplus embryos as a result of in vitro fertilization procedures. Individuals and couples with left over embryos have the option of donating them to others seeking their own family. However, there is debate as to whether such transfers should be treated as an adoption or a donation of property since each carries legal and social connotations. There are also concerns over whether the categorization of embryo transfers in the adoption context would give rise to recognition of fetuses as human beings. The author concludes that current adoption law should be expanded to cover embryo transfer where there is the intent for the embryo to become a child.

CHILDREN AND TEENS

Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?,* 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006)

In *Roper v. Simmons* (2005), the United States Supreme Court held the death penalty unconstitutional as it applied to juveniles. The unavailability of the death sentence left juveniles with the harshest possibility penalty, life without parole

(LWOP), effectively denying juveniles the availability of a proportionality test between the crime and punishment that is only available to those facing the death penalty. The author argues that LWOP is unsuited for juveniles because the weight of rehabilitation applies differently to juveniles then it does to adults. As a result, the author suggests extending proportionality review to juveniles facing LWOP and the availability of an alternate sentence of life with the possibility of parole.

Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643 (2007).

This article examines the competing rights and interests of parents, their minor children, and the state in decisions which involve the refusal of medical treatment for minors based on religious beliefs. The author evaluates two situations where this conflict arises: (1) when parents refuse treatment based on religious grounds while the child wishes to be treated and (2) when parents seek treatment for their child, but the child asserts a religious right to refuse it. While the Supreme Court has previously recognized the two competing interests of parents and the state in *Prince v. Massachusetts* and *Wisconsin v. Yoder*, *Bellotti v. Baird* was the first case where the Court recognized the additional interest of the minor in cases involving the minor's medical treatment and employed a triadic balance approach to weigh these three interests. Though the case in which these three interests clash on the issue of refusal of medical treatment based on religion has not yet appeared before courts, the author argues that *Bellotti's* triadic balance approach should be applied to such cases when they do arise. The author concludes by stating that in the case where parents refuse treatment based on religion the triadic balance approach always favors the interest of the child, while in the case in which the child refuses treatment courts should employ greater scrutiny and weigh the therapeutic benefit of the treatment against the child's interest.

Peter R. Jones, David R. Schwartz, Ira M. Schwartz, Zoran Obradovic & Joseph Jupin, *Risk Classification and Juvenile Dispositions: What is the State of the Art?*, 79 TEMP. L. REV. 461 (2006).

Assessments of the needs of youth needs in the juvenile justice and child welfare systems involve the classification of children's' risk of being re-abused. The author reports on a study comparing the results of three types of actuarial risk assessment that represent three different levels of sophistication and examines the extent to which juveniles are placed in the same risk category irrespective of the method used. The three methods are: (1) the Wisconsin Delinquency Risk Assessment Tool, which uses a dated, generic risk assessment method; (2) customized risk assessment tools developed specifically for each individual juvenile subject being studied; and (3) a customized assessment tool developed

specifically for each juvenile being studied using a complex neural networks approach. The study showed that each of the three methods produced varying results, with the neural networks approach being the most likely to correctly classify children and the Wisconsin Risk Assessment Tool being the least likely to classify children correctly. Given that the validity of these risk assessment tools is widely assumed by practitioners in the field, the author asserts that practitioners need to be educated on the realities of the methods. The author concludes by advocating for the employment of quality control standards, the use of more accurate tests with larger samples, the acknowledgment of the nuanced connections between predictor variables, and limiting the range of the tools' application based on their sample population.

Patty Chan, *Safer (Cyber) Sex with .XXX: The Case for First Amendment Zoning of the Internet*, 39 LOY. L.A. L. REV. 1299 (2006).

This article posits that The Internet Corporation for Assigned Names and Numbers' ("ICAAN") attempt to restrict pornographic websites to an ".xxx" top level domain, ensuring that children do not accidentally stumble upon pornographic websites, will not infringe on the First Amendment right to free speech. To determine the constitutionality of zoning the internet, we must determine whether ICAAN is a state actor and whether the government has a substantial interest in zoning the internet. ICAAN is a state actor because (i) the government was involved in the group's creation, (ii) the government maintains current ICAAN operations and (iii) the government's authority to delay the creation of the ".xxx" domain is indicative of its control over ICAAN. The government also has a substantial interest in protecting children from pornographic material as evidenced by the passing of land-zoning laws by many states to confine adult-entertainments stores in certain areas of the city. However, the United States is hesitant to allow ICAAN to create the ".xxx" domain as web masters can easily bypass the system by having a ".com" website that when accessed would automatically divert the web user to a ".xxx" website.

Sarah Katz, *When the Child is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535 (2006).

Children who have been involved with the child welfare system are more likely to be homeless, end up in prison, or have health problems. And if these teens become parents, too often these problems are not carefully considered by the child welfare system. This article argues that when teenage parents get drawn into the child welfare system, either as foster children or as defendants accused of mistreating their own children, judges, advocates, and social workers need to consider the unique needs and conditions affecting these young peoples' lives. To

illustrate the traumatic experiences of some teen parents and to challenge stereotypes about teen parents' inability to care for their children, the author shares the stories of some of her own clients. Too often judges assume that teen parents are unfit to care for their children. However, teen parents, like all other parents, have a Constitutional right to custody and control of their children. Therefore, the author asks courts and advocates to focus on the following areas in developing dispositional plans for teenage parents that may place unique limitations on their ability to care for their children: assisting teen parents in attaining safe housing, access to government benefits and appropriate medical care; supporting teen parents in pursuing and attaining high school and college educations; and ensuring that the legal rights of teen parents to custody and control of their children are protected.

Kelly A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging out of Foster Care*, 79 TEMP. L. REV. 557 (2006).

The current foster care system discharges youths from the system at age eighteen under most circumstances. However, eighteen-year-olds, particularly those who have been bounced around foster homes for many years, are generally unprepared to live on their own and take care of themselves. Given the mounting research indicating that young people still experience tremendous brain development into the early twenties, the author argues that the foster care system should not automatically discharge children when they turn eighteen. The author instead supports a system that would continue to provide for children in foster care until they turn twenty-one. A foster care system that provides some support for young people until they reach age twenty-one, but also allows them to gradually gain independence, will allow youth in the foster care system to transition to adulthood in the same manner as their peers, instead of being forced into it unprepared at too young an age.

Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119 (2007).

This Note discusses the flaws and deficiencies of intercountry adoption and current treaties' failure to adequately curtail problems associated with intercountry adoption, such as corruption and sale of babies on the black market. The author argues that the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption's regulations, which aim to abolish corruption associated

with intercountry adoption and implement a more uniform system of adoption in order to reduce the risk of dangerous activity at the hands of adoptive parents or adopting children to people who only want to turn a profit, have severe cost and efficiency problems for poorer countries. However, the failure to adopt uniform regulations hurts the children in need of adoption, as well as the countries with resources to adopt children and countries with minimal resources wishing to adopt-out their children. Therefore, the author argues that the Bilateral Treaty recently signed by the United States and Vietnam could be one solution to the difficulties associated with the Convention, as the treaty espouses the aims of the Convention, but does not have the cost and efficiency problems attached to it that would be crippling for a poorer country, such as Vietnam. The author concludes that the Bilateral Treaty may be a more viable solution for poorer countries, but the true resolution lies in each country's efforts to focus on the best interests of the children, while supporting other countries financially to further that goal by removing burdensome obstacles to adoption and advocating against financially motivated adoptions.

Abigail English, *Youth Leaving Foster Care and Homeless Youth; Ensuring Access to Health Care,* 79 TEMP. L. REV. 439 (2006).

This Article considers the varied and intense health needs of homeless youth and of young people who age out of foster care, and the reasons why these needs tend not to be met, among them both a lack of insurance and a lack of adequate funding for programs dedicated to filling gaps in insurance. The author reviews results of studies that document high rates of serious physical and mental health problems among these young people, including STDs, HIV, substance abuse, and pregnancy, as well as high-risk status with regard to disabling and life-threatening conditions. The author examines federal efforts that have at different times tried to address these needs are examined, such as Medicaid, passed in 1965; the Children's Health Insurance Program (SCHIP), passed in 1997 to provide insurance coverage for children and adolescents not eligible for Medicaid; recent expansions of Medicaid; and various programs administered by the Department of Health and Human Services (DHHS). However, as of 2006, six years after the FCIA expansion of Medicaid, only twelve states had implemented it, and the efficacy of the DHHS services is undercut by funding constraints. The author argues that the needs of former foster children and of homeless adolescents could be far more adequately met than they are today simply through full implementation of these policy options, which are already in place.

John J. Garman, *International Law and Children's Human Rights: International, Constitutional, and Political Conflicts Blocking Passage of the Convention on the Rights of the Child*, 41 VAL. U. L. REV. 659 (2006).

The Supreme Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," yet the current trend on the Court has been toward increasing parents' rights over children, and the status of basic rights of children in the United States remains unclear. The United States has been slow to participate in treaties pertaining to the rights of children, in particular the United Nations Convention on the Rights of the Child. This Article discusses whether the United States is moving toward adherence to a growing international call for children's rights, or is falling behind other nations in the global effort to establish international standards for human rights and children's rights. The author examines three main documents in light of both Realist and Institutionalist theories of international law: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child. Taking into account the uneven U.S. record of participation in these agreements, the author discusses their status in light of historic Court decisions concerning the Supremacy Clause and the distinction between self-executing and non-self-executing treaties, and concludes that without Congress implementing legislation or enhanced judicial involvement–both of which the author considers unlikely–the United States' participation will continue to be limited.

Thomas J. Walsh, *The Rise and Fall of an Archetype: Revisions to the "Wisconsin Model" Child Support Guidelines*, 36 U. MEM. L. REV. 1013 (2006).

Wisconsin's child support model calculates child support obligations based on the percentage of the non-custodial parent's income. To ensure compliance with the federal grant program, Wisconsin adopted percentage-expressed child support guidelines and required trial court judges to give them a presumptive force when issuing child support orders. In 2001, Wisconsin abandoned the percentage-expressed child support orders for the flat dollar amount orders because of the difficulty of monitoring compliance by payer under the former scheme. In 2004, pursuant to the federally mandated periodic review of the child support scheme, Wisconsin added special-circumstance exceptions to the standard child support calculation to attenuate the percentage burden for high income and low income payers, and revised the existing exceptions to allow judges to give due consideration to payers who have physical custody of the child for more than 25 percent of the year or have a pending child support order for an older child. The author concludes that Wisconsin's flat dollar amount scheme should be replaced by the alternative income shares model because the former fails to account for the

payer's income fluctuations and considers both parents' income only when either parent has more than 25 percent of the annual physical custody of the child.

Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006).

Effective client interviewing and counseling are essential to the maintenance of the attorney-client relationship and successful legal representation, however, the traditional rules governing these practices have proven inadequate in dealing with adolescent clients. Developmental research has proven that adolescents have an undeveloped sense of personal autonomy, are less adept at perceiving risk as compared to adults, and are unable to engage in cost-benefit analyses which reflect a totality of circumstances. Indeed, the Supreme Court has recognized the developing and malleable personalities of adolescent clients by striking down the juvenile death penalty. The authors posit that with interdisciplinary efforts, client interviewing and counseling standards can be formulated to respect both an adolescent's mental immaturity and autonomy. Using a series of hypotheticals, the authors construct ethical guidelines for adolescent clients, which emphasize a stronger dedication to attorney-client interaction and a greater internalization by the attorney of each individual client's story.

Ellen Marrus, *Can I Talk Now? Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515 (2006).

While the United States Supreme Court did a great deal to help protect adults in *Miranda v. Arizona* as far as ensuring that adult suspects are made aware of their rights, the protections accorded juveniles are insufficient. The inherent differences between children and adults mean that children should be afforded greater protections, not weaker ones. Studies indicate that many children do not fully comprehend their *Miranda* rights. Because children often cannot understand their rights in interrogation situations, the author proposes a rule that no juvenile be permitted to be interrogated without having an attorney present. Even parents and other authority figures often have insufficient understandings of what is going on and are unable to protect many juveniles. In some instances, the parents' interests may even conflict with those of the accused. Requiring an attorney present for all interrogations of juveniles would provide an impartial advisor who knows how best to look after the juvenile's interests.

Alicia M. Hehr, Note, *A Child Shall Lead Them: Developing and Utilizing Child Protection Mediation to Better Serve the Interests of the Child*, 22 OHIO ST. J. ON DISP. RESOL. 443 (2007).

There are two legal systems to deal with child abuse and neglect: mediation and litigation. Litigation can cause unwanted effects such as: lack of immediacy and permanence; stress on children and family; expense; and strain on child protection agencies. Mediation, by contrast, can provide a more immediate and permanent resolution, foster cohesiveness in the family unit, increase openness, and conserve resources. The author advocates the mediation approach with an emphasis on ensuring thorough training of mediators. Further, a system of certification would reinforce a qualified and effective force of mediators in child abuse and neglect cases.

F. James Billings et. al., *Can Reinforcement Induce Children to Falsely Incriminate Themselves?* 31 L. & HUM. BEHAV. 125 (2007).

The authors sought to test whether positive and negative reinforcement can provoke children to falsely incriminate themselves. The authors conducted a staged theft and subsequently questioned children in kindergarten through third grades about the theft. The children who received reinforcement during questioning, particularly the younger children, were more likely to make false admissions of guilty knowledge and having witnessed the theft. No children admitted having committed the actual crime. However, the authors conclude that the overall result implies that reinforcement can induce children to falsely implicate themselves in crimes, and often children are not aware of the legal ramifications of making such statements.

DOMESTIC VIOLENCE

Sarah Buel & Margaret Drew, *Do Ask, Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447 (Winter 2006).

Research shows that domestic violence victims face high risk of recurring abuse and that batterers' lawyers may be privy to information that warns of such future harm. Although attorneys owe a duty of confidentiality to their clients, in extraordinary circumstances they are allowed to breach that duty, particularly in cases where clients indicate to their attorney that they plan on committing a crime. To resolve the tension between client confidentiality and victim safety, the author argues that, in domestic violence cases, lawyers have the duty to screen clients who are likely to harm others, to advise them against carrying out such acts, and to warn

abuse victims whom their clients have threatened. The author further argues that lawyers who don't take these preemptive actions may be held liable in tort for their omissions. This article also provides suggestions for how to avoid liability while enhancing safety. The author concludes by recommending remedial statutory changes in line with notions of attorney professional responsibility.

R. Michael Cassidy, *Reconsidering Spousal Privileges and Crawford*, 33 AM. J. CRIM. L. 339, n.3 (Summer 2006).

The Supreme Court's decision in *Crawford v. Washington* revitalized the Confrontation Clause in criminal proceedings by restricting the government's use of hearsay evidence where the out-of-court declarant does not testify at trial, and has led more criminal defendants to be able to exclude out-of-court statements from evidence. However, the decision has had an adverse impact in domestic violence prosecutions because of the frequency in which victims fail to testify against batterers with which they share a relationship. There has been a push for more preliminary examinations of domestic violence cases so that hearsay will later be admissible for trial if the victim is afraid or has been coerced into not testifying. One of the major reasons that victims fail to testify is state spousal privilege rules, which provide for testimonial disqualifications; also, privileges for confidential communication are often confusing and outdated. After the *Crawford* decision, state spousal privilege rules have become too great of an impediment to domestic violence prosecutions, and therefore state legislatures must reevaluate statutes to provide an express exception for criminal cases that allege domestic violence in order to prevent batterers from escaping punishment for their conduct by disingenuous reliance on statutes designed to protect marital peace.

Rana Fuller, *How to Effectively Advocate for Battered Women When Systems Fail*, 33 WM. MITCHELL L. REV. 939 (2007).

The author begins by identifying the insufficiencies of the American legal system which serve to further contribute to the already troubled situation of many abused women. In addition, the author argues that abused women face challenges at every stage of the legal process. Prior to taking legal action, women may be subject to physical abuse or child custody issues. During court actions, women face various setbacks, including: the failure of mediation to place both parties in equal position; complications engendered by accusations of sexual abuse; interactions with custody evaluators that can adversely influence an abused party's attempt to gain custody; Parental Alienation Syndrome: a "condition" where the child's fear of a parent is assumed to be the fault of the custodial parent; the misuse of psychiatric evaluations and expert testimony; and harassing court practices. Post-court actions can also exacerbate the poor situation of many abused victims.

In conclusion, the author provides various suggestions and tips for dealing with these situations and argues that by following these suggestions, attorneys can more effectively advocate for victims of abuse and encourage belief in the system.

Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 KAN. L. REV. 269 (2007).

Dixie Shanahan was a battered woman who , after nineteen years of brutal spousal abuse , shot and killed her husband. She was found guilty of second-degree murder and, due to minimum sentencing requirements, was sentenced to fifty years in prison, even though the judge felt that the sentence was unduly harsh. The author analyzes the main theoretical justifications for criminal punishment—retribution, deterrence, rehabilitation, and incapacitation—and concludes that only retribution applies to cases like Dixie's, and that punishments for battered women like her are often unjust. The author concludes that the injustice is caused by minimum mandatory sentences, which divest judges of their power to use discretion in sentencing and disallow them from considering the context of abuse, and by judges' fear of endemic revenge against abusers. She emphasizes, that in order to make sentencing of battered women who kill more just, judges must first overcome their unwillingness to consider the context of abuse and fear of endemic revenge against abusers.

Kristen M. Ross, Note, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249 (2007).

Survivors of domestic violence suffer not only a wide range of physical injuries and psychological effects, but also discrimination by employers, landlords, and child welfare agencies. Because of such discrimination, domestic violence is one of the leading causes of homelessness, as owners and landlords evict or refuse to rent to victims of domestic violence, fearing that their presence endangers other tenants or is likely to lead to property damage. This Note examines conflicting trends in the law regarding such discrimination: on the one hand, support for discrimination by landlords in view of their responsibility to tenants for injuries caused by other tenants, whether on tort grounds of special relationship or of breach of implied warranties in the lease; on the other hand, efforts in a few states to make this discrimination illegal per se. The author also reviews possible claims that may be brought under the Fair Housing Act and under the Violence Against Women Reauthorization Act of 2005. The law of most jurisdictions currently is quite permissive toward landlord discrimination, and while the VAWA has expressly labeled unfair discrimination in public housing no longer acceptable, the

author advocates Congressional action to add to general federal housing law protected-class status for survivors of domestic violence.

Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269 (2007).

While marital rape shares characteristics with both domestic violence and non-marital rape, the issue of marital rape can not be fully understood by simply using a single one of these two analytical frameworks. The use of a domestic violence framework illustrates that marital rape survivors must overcome the lingering view that private familial issues should not be interfered with by the state in order to receive protection from their attackers, but fails to show that many survivors of marital rape do not fit the mold of a "battered wife." Using a non-marital rape framework is valuable in analyzing the effect of such an intimate violation on a survivor, but this framework does not shed light on the distinct consequences of having such a violation carried out by one's spouse, which generally includes the victim having a harder time proving that a crime occurred. One of the most serious consequences of viewing marital rape under either a domestic violence or non-marital rape view is that marital rape survivors have not received adequate protection under current laws. The author posits that addressing the marital rape issue will require a comprehensive approach including new legislation, public awareness and more effective efforts by the courts and law enforcement.

EDUCATION

James Forman Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, n.3 (February 2007).

In *Zelman v. Simmons-Harris*, the Supreme Court upheld the constitutionality of a Cleveland program that provided school vouchers to low-income parents seeking private school alternatives for their children. At the time, it was believed that school vouchers would garner huge support, but this article examines the factors of religion, race, and politics that have led to their minimal support as only three jurisdictions have adopted voucher plans and proposals have failed in thirty-four states. The original rationale for vouchers was the notion that vouchers protected the right of parents to send their child to a school that reinforced their values. This reasoning shifted to an idea of racial justice which emphasized vouchers as part of a civil rights struggle to obtain academically rigorous private education for minority parents in the years leading up to *Zelman*. The author looks at the development of the values and racial justice reasoning for school vouchers as well as the rise of the accountability movement that, specifically the No Child Left

Behind Act and how the unwanted increase in oversight of private schools and makes the ultimate prediction that support for vouchers will not be successful in the future.

Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007).

In this article, the authors argue that the Supreme Court incorrectly analyzed two cases involving affirmative action in University of Michigan's Law School and College admissions—*Grutter v. Bollinger* and *Gratz v. Bollinger*. Prior to these two decisions, affirmative action programs were required to be narrowly tailored to provide the minimum necessary racial preference to achieve the compelling government interest. These two Supreme Court decisions changed the "narrowly tailored" requirement to a requirement that affirmative action programs be "individualized." However, the authors argue that the "individualized considerations" are unclear because the Supreme Court upheld the affirmative action program at the Law School in *Grutter* which granted larger racial preferences than the program at the College that the Court struck down in *Gratz*. Finally, the authors recommend that courts return to the minimum necessary preference requirement and demand that defendants quantify the costs and benefits of granting racial preferences in order to decide whether racial preferences are narrowly tailored to the government objective of having diversity at schools.

John F. Donaldson, Note, *Life, Liberty, and the Pursuit of Urinalysis: The Constitutionality of Random Suspicionless Drug Testing in Public Schools*, 41 VAL. U.L. REV. 815 (2006).

This Note argues that recent Supreme Court decisions interpreting the Fourth Amendment have diminished American students' Constitutional privacy rights in regards to suspicionless drug testing in public schools. The author begins with a discussion of the Fourth Amendment's language protecting individuals against unreasonable search and seizure, and the judicially created "special needs doctrine," which weighs the governmental interest and special needs against an individual's privacy rights. The author argues that the special needs doctrine has eroded the Fourth Amendment protections to students subject to suspicionless drug testing, and posits that if the Court were faced with assessing the validity of a school-wide drug testing policy today, it would be upheld under the ever-broadening "special needs doctrine." According to the author, such suspicionless drug testing sends a message to students that they are guilty until proven innocent, and such a message, he argues, is counterproductive. The author proposes a four-prong balancing test for the court to employ in analyzing random school drug testing policies: (1) the nature of the student's privacy interest when subjected to

random testing; (2) the nature of the intrusion inflicted by of drug testing policy; (3) whether the government concern in implementing such a policy is compelling, and whether the policy effectively meets those concerns; and (4) the author's novel addition: the parents' Fourteenth Amendment Due Process right to control the upbringing of their children.

Sari Bashi & Mayana Iskander, *Why Legal Education is Failing Women,* 18 YALE J.L. & FEMINISM 389 (2006).

The authors of this Article conducted an in-depth study at Yale Law School to investigate how men and women are educated differently at law school, and discuss the qualitative differences they found between male and female students in areas such as class participation and relationships with law professors. The authors found that males and typical male behaviors are disproportionately rewarded by faculty in various ways, and discovered unexpectedly high levels of depression and alienation among female students. Seeking reasons why women, with roughly equal credentials and qualifications as the men, are underrepresented at higher career levels—among judges, law firm partners, law school deans, and general counsels of large corporations—the authors found radically divergent patterns of mentoring and the solicitation and issuance of letters of recommendation as between male and female students. Male professors were shown to be more comfortable relating to and furthering the careers of male students through recommendations, while female students find it harder to approach faculty, whether for discussion or to ask for recommendations. The authors argue that law schools should improve the educational experience they offer by actively promoting cognitive and behavioral skills traditionally associated with women, especially since these skills are of increasing relevance as the profession gradually shifts away from adversarial confrontation toward mediation, collaboration, and conflict resolution.

Tacasha Bingham, *Discrimination in Education: Public versus Private Universities,* 36 J.L. & EDUC. 273 (2007).

Public universities, which are within the scope of government authority, must refrain from using discriminatory practices in admission and expulsion decisions. Private universities do not have to abide by the same requirement, due to these universities' First Amendment rights of expressive association and free exercise of religion. This article uses the April 2006 expulsion of a gay student at Cumberland College, a university which received state funding that same year, to highlight that the acceptance of government funding restricts certain administrative decisions. By accepting these state funds, Cumberland College's expulsion of the student constituted a discriminatory practice, which cannot be reconciled with its status as a

public institution. The author states that universities must decide which they value more: autonomy in admission and expulsion policies or state funding.

Bran C. Noonan, *The Fate of New York Public Education Is A Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Education Article*, 70 ALB. L. REV. 625 (2007).

In 2003, the New York Court of Appeals substantially increased the minimum amount of state education funding, further muddling the already tenebrous Education Article under which the state legislature is responsible for maintaining and supporting a free, common school system. With the courts left without a clear framework with which to deal with the increasing number of poorly educated students and the rising standards of acceptable education, the author explores two different methodologies, originalism and pragmatism, as possible means to establish guidelines. While originalism emphasizes the original intent of the drafters of the Education Article, the author concludes that this approach is unsatisfactory in that it fails to adapt to changing societal goals. Pragmatism, championed by Justice Oliver Wendell Holmes, while not without its own shortcomings, offers a more practical approach to future interpretations of the Education Article through its willingness to apply law to changing societal needs. The author concludes that courts should adopt an alternative functional approach that identifies contemporary standards of education and balances the adoption of those standards against their potential degree of failure in light of the Education Article's goal to provide state-wide access to adequate education.

Alan Jay Rom, *Is There Any Parent Here?: Fixing the Failures of the Massachusetts Public School System*, 27 B.C. THIRD WORLD L.J. 159 (2007).

As the Supreme Judicial Court stated in the 1993 case of *McDuffy v. Secretary of the Executive Office of Education*, Massachusetts has a duty "to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to fiscal capacity of the community or district in which such children live." The state's attempts at educational reform have not resulted in improved educational performance, specifically not in poor districts, for racial minorities, or for students of limited English proficiency. The author discusses measures of academic performance, the failure of federal and state education reform measures, and proposes a different approach to improving student performance. One suggestion is the greater use of pilot schools, which afford administrators far greater flexibility in areas such as staffing and budget and also permit longer school days for students. The author also supports several of the

provisions of Massachusetts Senate Bill 2320, such as improved training and higher salaries for teachers.

FAMILY

James A. Kushner, *Housing, Personhood, and Dignity: Urban Planning and the American Family*, 36 STETSON L. REV. 67 (2006).

Through zoning regulations and government housing policies, communities have been planned to serve affluent, single-family homes in suburban areas, effectively excluding the poor and working classes, minorities, and extended families. Rather than subsidizing housing, community development, and assistance programs that increase the quality of life for marginalized classes, suburban planners tend to subsidize economic developments that draw jobs outside of the city and harm the environment. This article advocates for a drastic change in community design. In the short term, the author suggests making neighborhoods denser, with more efficient public transportation systems, so that city residents have easy access to commercial areas. Taking a longer view, the author suggests tax base sharing to end suburban usurpation of jobs and businesses, developing measures to curb urban sprawl, investing in infrastructure, and creating a healthy jobs-housing balance in each neighborhood to discourage the use of automobiles. The author also calls for better educational opportunities and affordable housing for poor families in cities.

Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321 (2007).

This article addresses the legal struggles of organizing and representing low-wage service employees, specifically, family child care (FCC) providers. Welfare reform in 1996 forced a surge of welfare recipients back into the labor pool, many of whom lacked sufficient funds for quality child care. Family child care centers provide a different style of child care from the more common child care centers, allowing the children to be in a family setting. Since some child care services are subsidized by states, the family child care centers who serve families receiving subsidized child care are considered de facto state employees and cannot organize as a collective bargaining unit. The author argues that FCC providers should secure collective bargaining rights and unionize in order to avoid being exploited by the state government agencies that administer child care subsidy programs.

Gary L. Voegele, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971 (2007).

This article provides family law practitioners with a broad overview of the Collaborative Law process, including key features and the ethical considerations that arise in the process. One of the most critical features of the Collaborative Law model is the disqualification agreement, which all participants must sign, indicating that the attorney will withdraw if the case proceeds to litigation. Other key features of the model include: (1) "four way meetings" between the clients and attorneys, and often other mental health professionals, child specialists, and financial experts as well; (2) "interest-based resolution," which focuses on "big picture" interests such as children and financial concerns; (3) informal discovery and requirement of full disclosure of information; (4) focus on a holistic and inclusive approach to resolving family conflict; and (5) client control of the outcomes of their case. Collaborative Law involves three main phases: (1) a beginning phase, in which the disqualification agreement is signed, client goals are assessed, and the prospect of other professional involvement is discussed; (2) holding of "four-way meetings," in which rapport and rules of communication are established between the parties, and clients' interests guide negotiations; and (3) conclusion of the process at the last four-way meeting, which requires lawyers to highlight positive accomplishments in the process, decide who will draft documents, and debrief the process. The authors also highlight several ethical considerations that arise for family law practitioners in the Collaborative Law process relating to the disqualification agreement, use of neutral experts, confidentiality, and negotiations.

Irene Hansen Saba, *Parental Immunity From Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829 (2006).

In *Broadwell v. Holmes*, the Tennessee Supreme Court held that under the parental immunity doctrine, parents could be held liable in tort actions brought by minors for injuries resulting from negligent conduct not relating to parental authority, parental supervision, or the provision of parental care and custody. In so holding, *Broadwell* failed to define parental authority or provide guidelines which the court could apply to future actions under the parental immunity doctrine. The author attempts to construct these guidelines, suggesting that abusive conduct threatening a child's physical wellbeing, injuries that occur during a parent's negligent operation of a vehicle and injuries that occur when the parent is acting in her capacity as an employee, are all outside the scope of the doctrine. Despite these possible scenarios, the *Broadwell* standard remains in flux and the author concludes that an analysis focusing on the totality of the circumstances, including the scope and purpose of the parent's conduct, should be applied. In defending the *Broadwell*

standard from allegations that it is overly paternalistic and that it sacrifices the rights of minors for those of parents, the author emphasizes its ability to safeguard notions of parental authority integral to a healthy parent-child relationship.

Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462 (2006).

The author argues that current drug laws and policies disparately impact poor women of color. Showing the disparate impact in three different ways, she first illustrates how the "war on drugs" disparately impacts women of color who are peripherally involved in drug trafficking crimes. Next, she highlights how drugs commonly used by poor women are the focus of law enforcement policies targeting pregnant drug-users. She then discusses how certain federal legislation intensifies recidivism, putting poor women of color and their children through continual cycles of poverty and incarceration. To solve the problem, Congress must realize that the policy of harsh punishment instead of rehabilitation and treatment is not working. The author also suggests that Congress gather more data and reevaluate drug laws due to the disparate effect impact they have on women.

Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples are Entitled to Inheritance Rights from Both their Parents*, 35 HOFSTRA L. REV. 857 (2006).

It is now accepted that children of non-married parents cannot be denied inheritance from either parent. Children of same sex couples, however, do not enjoy a similar inheritance right, despite the wishes of the non-related parents and the family as a whole. The author argues that this dissimilar treatment of children of similarly situated groups of children presents a potential equal protection problem. The author proposes that states allow children of same-sex couples an inheritance right by expanding on non-married inheritance statutes or creating new statutes altogether. The author suggests that children of same sex couples be given the opportunity to present evidence to prove the parental relationship, so that the determination of inheritance may be equitable.

Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

Beginning in the 1970's, Louisiana's filiation law provided a system of paternity presumptions based on conception, birth and marriage. Supreme Court decisions and new advances in science necessitated a change in this outmoded law. In 2005, the Louisiana legislature revised the Civil Code in an attempt to reflect the

decisions and advances that changed the conception of paternal and maternal status. The revision was a significant improvement for Louisiana's filiation law, although it was lacking with regard to certain issues such as assisted reproduction. According to the author, these deficiencies are overshadowed by setbacks created by conflicting federal law. The author suggests that Federal law should not control these matters of state law.

GENDER AND VIOLENCE

Katharine Ruhl, *Guatemala's Femicides and the Ongoing Struggle for Women's Human Rights: Update to CGRS's 2005 Report Getting Away With Murder*, 18 HASTINGS WOMEN'S L.J. 199 (2007).

The number of femicides—gender-motivated killings executed with extreme brutality—in Guatemala have risen sharply in recent years. In 2005, The Center for Gender and Refugee Studies at University of California, Hastings College of the Law (CGRS) issued a report that exposed the extent of this violence, the culture of tolerance and impunity surrounding such crimes, and the large amount of U.S. money being sent to Guatemala. However, despite the information published in this report, CGRS contends that Guatemalan women remain in grave danger due to the Guatemalan government's failure to investigate and prosecute these crimes, the prevalent blaming of victims by assuming their affiliation with gangs and drug trafficking, facilitating a culture of impunity, and minimal reform of Guatemalan laws to protect victims and punish domestic violence. This article provides an update to the CGRS 2005 report with several recommendations to the Guatemalan government in order to provide Guatemalan women with the safety and justice to which they are entitled. The author emphasizes the following recommendations: (1) publicly reprove the violence, especially killings of women and girls; (2) establish specific processes for investigating crimes of violence against women; (3) provide adequate financial support to, and effectively utilize the new National Forensic Institute in Guatemala; (4) create a database and search mechanism for missing women and girls; (5) reform Guatemalan laws so that they conform with international standards on violence against women and provide criminal punishment for crimes of domestic violence; (6) provide training to judges and prosecutors in issues relating to gender-based violence; (7) end the culture of impunity in Guatemala; and (8) implement all of the recommendations recently made by Amnesty International, including but not limited to increased coordination between state agencies and a uniform system to collect information on violence against women.

Valerie Oosterveld, *Gender Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49 (2006).

The crime against humanity of gender-based persecution was first codified in the 1998 Rome Statute of the International Criminal Court (ICC). Because there is no precedent in international criminal law, the author argues that the ICC, in examining gender-based persecution, should analyze international refugee law. Oosterveld suggests that the only other area of international law that has considered this type of persecution is international refugee law, which can provide valuable lessons on this type of persecution. One of the main lessons learned in the realm of international refugee law is that gender-based persecution is wide-ranging, from sexual violence and trafficking to economic, social and cultural rights. The ICC's challenge will be to ensure that criminal acts are prosecuted under the most applicable grounds; the ICC should avoid over inclusion of crimes within gender-based persecution.

Kelli Muddell, *Capturing Women's Experiences of Conflict: Transitional Justice in Sierra Leone*, 15 MICH ST. J. INT'L L. 85 (2007).

From 1991 to 2001, the country of Sierra Leone suffered through a brutal civil war in which women were particularly affected and were often subjected to extensive sexual and other abuse. The years of conflict eviscerated both the justice system and the medical community of that country. This article traces the efforts of Sierra Leone to address the gender-based injustices that occurred during the conflict and to gain an objective understanding of the extent of those injustices. Specifically, the author examines the ability of two institutions — a special court and a truth commission — to address gender-based violence and its consequences in the post-conflict period. The author concludes that while the two institutions have made great strides toward truth-seeking and accountability, it will be some time before their contributions can be fully assessed.

Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT'L L. 41 (2007).

Notwithstanding its constitution and bill of rights which place significant emphasis on gender equality and the elimination of violence against women, South Africa continues to foster misogynist ideals and female gender stereotypes. This sentiment was most recently demonstrated by the trial of Africa's former Deputy-President in which the politician was charged but ultimately acquitted of raping an HIV-positive female. Despite efforts by South Africa's Truth and Reconciliation

Commission to punish individuals guilty of violating women's rights, the trial exposed South Africa's deep-seeded traditions of violence and masculinity. The author posits that women's duplicitous role in South Africa, seen as both victims and autonomous agents, allows gender bias to exist in a country so seemingly dedicated to gender equality. Ultimately, the author concludes that the mere existence of gender equality laws accomplishes little without the necessary legal framework with which to implement them.

Rebecca E. Boon, Note, *They Killed Her for Going Out with Boys: Honor Killings in Turkey in Light of Turkey's Accession to the European Union and Lessons for Iraq*, 35 HOFSTRA L. REV. 815 (2006).

An honor killing takes place when a girl or woman's family kills her because they perceive her behavior—such as associating with men outside the family or actual sexual misbehavior—as defying societal gender norms. In order for Turkey to be admitted to the European Union, it must comply with EU human rights regulations, which seemingly prohibit honor killings. Although the country has instituted legal reforms designed to combat such behavior, the results have not been entirely successful. In lieu of the EU creating its own organizations to stop this practice, the author proposes that the EU fund existing grassroots campaigns to combat this violence, as Turks themselves are more likely to know what will work than western bureaucrats. The EU hopes that Turkey can serve as a model for a modern Muslim country with respect to its adherence to the EU regulations.

Susana SaCouto, *Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes*, 15 MICH ST. INT'L L.137 (2007).

Since 1998, levels of awareness of rape and gender-based crimes have risen dramatically. It is important to understand the mental processes that lead to such behavior because rape and other gender-based crimes may prove to have genocidal effects. Sanctions for committing genocide are often harsher than for other crimes, and prosecuting gender-based crimes as such may have a greater deterrent effect. However, genocidal intent is a difficult element to prove, and the ability to presume such intent would go a long way towards alleviating this burden. Lawmakers should take advantage of the heightened awareness of such crimes and provide tougher penalties for those groups that systematically commit these types of crimes, as well as make it easier for harsh punishments to be doled out.

GENDER BIAS

Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007).

Marketing and branding strategies today have the potential to create a "branded-service," which is a property-like interest created in employees, separate from physical or mental labor. Employers then profit from this branding without providing compensation to employees for the extra service. The law reinforces this practice particularly when the branding is sexualized. In cases of sexualized branding, Title VII claims tend not to be viable if the branding does not violate community norms of sexual stereotypes, as seen in the *Jespersen v. Harrah* case. Claims are only likely to be at all successful if they are approached from the perspective of a collective harm to workers, as opposed to that of sex-stereotyping. Other successful strategies include union organizing, collective bargaining, class actions, and community education. It is, however, important to note that they remained limited, particularly when employed to address gender-related issues, due to the conservative nature of community gender norms.

Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285 (2007).

Darlene Jespersen's case against Harrah's Operating Co. has been a positive step for equal employment rights under Title VII, although Jespersen was denied her day in court due to an adverse summary judgment order. Jespersen worked as a bartender for Harrah's casino where she was forced to comply with a "Personal Best" dress code policy that required female employees to make their faces conform to a feminine look, but imposed no similar requirement on male employees. In Jespersen's Title VII sex discrimination claim, the Court of Appeals affirmed the District Court's summary judgment order, but the court found that sex-differentiated dress codes may be challenged under Title VII. There are many LGBT individuals that cannot conform to any specific gender stereotype, such as the feminine look of Harrah's "Personal Best" policy, and this litigation has made it possible for classes of LGBT to challenge employment policies that require adherence to specific gender "norms," and will allow those individuals to be able to freely express their gender in the employment context.

Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319 (2007).

While body art has become a means for men and women to express their personal, cultural, religious, and gender identities, employers, who have wide discretion in determining dress codes, have enacted strict rule restricting or prohibiting body art in the workplace. Courts have found that unless the conduct can be traced to a biological or immutable trait, employees are not allowed to showcase there racial, cultural and in most cases religious identities through body art or modification. Contrary to the culture, race, and religious analyses, courts grounding their analysis in "community standards," take the opposite approach in demanding that employees express their gender in the form of their biological sex. The author argues that the mandate of specific employee dress and grooming codes based on biological sex continues the stereotype of a masculine dominated workplace and furthers incidents of employee harassment. Employer dress codes, including body art rules, should be tailored to reflect job performance, rather than gender performance and courts should balance the interest of employers in maintaining a professional employment site alongside employees' constitutional protections.

Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL'Y & L. 273 (2007).

Sexuality plays a key role in determining whether a work is transformative under copyright fair use doctrine. Rather then according a sexualized work de facto fair use protection, the author argues that courts should merely consider sexualization as one factor when making a fair use determination. Courts use the sexuality in a work to define markets that are within and without the copyright owner's control when determining whether the defendant's use harms the plaintiff. The author argues that sex should not equate transformation, and other kinds of transformation should not receive any less protection. Mainly, the author argues that many sexualized works that have been given fair use protection involve criticizing the female body, and criticizing a woman's body should not be the prototypical fair use.

Amanda J. Albert, Note, *The Use of MacKinnon's Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291, n. 1 (2006).

The author poses that the answer, explanation, and strategy for addressing the challenges that female attorneys face in their quest for advancement in a large law

firm rests in feminist theory. The author relies on Catharine A. MacKinnon's theory of dominance feminism, which states that women are dramatically underrepresented in large law firms due to the organizational partnership hierarchy which acknowledges the intelligence of male lawyers as normative and female lawyers' knowledge as an insignificant matter. The author, espousing MacKinnon's theory, argues that reform is possible if the firm endorses dominance feminism and not only analyzes the gender inequalities present in their firm, but also empowers women for being women on their own terms without analyzing them as similar or dissimilar to men. The article examines Title VII claims, as case law implies that female lawyers are protected from both sex discrimination in terms of advancement in the law firm and intra-firm sexual harassment, and notes that legal remedies fall short and female lawyers are affected by sexual harassment that is not prosecuted. The author concludes that progress in the workplace for female attorneys will come not only from the firm's recognition of the pervasiveness of male dominance, but also from individual female lawyers who will stand up to harassers and file Title VII claims, risk their livelihood in order to support their values, and advocate for a society that acknowledges women as people, not as women in relation to men.

HEALTH

Cleveland Ferguson III, *Incrementalism, Ideology and Social Choice: Should the United States Ratify the U.N. Convention on the Rights of the Child? – A Practical Perspective*, 1 FLA. A&M U. L. REV. 15 (2006).

Data indicate that approximately 30,000 children under the age of five die every year from causes that could have been prevented. The United States is one of two countries that have not ratified the U.N. Convention on the Rights of the Child, while countries including South Africa, Tunisia, Colombia, and Honduras have all taken legislative action to address children's rights in support of the Convention. This article suggests that there are no valid reasons why the United States has not ratified the convention, and that the U.S. should ratify the convention to aid the U.N. in meeting its Millennium Development Goals and to stop the decline of children's health. U.S. criticisms of the Convention include the argument that the Convention is "anti-family" and conflicting with state laws. Despite such criticisms, the author argues that the Convention would have no more power over the U.S. then the U.S. would allow. The author suggests that the U.S. can use the Convention to be a leader in promoting children's rights in the U.S. and abroad.

Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769 (2007).

The behavior of a small percentage of Americans has caused an epidemic of sexually transmitted diseases, imposing massive burdens on the United States health care system and society at large. The author argues that current sexual disease-related tort law has failed in its goal to prevent further infection. Under the existing tort regime, there is no clear standard of care and no uniform penalty for infected perpetrators who take on new sexual partners even though they are aware of their condition. The author asserts that the adoption of a strict liability standard will help stem the spread of sexually transmitted diseases by promoting optimal care among rational people. A strict liability standard will allow tort law to act as a deterrent to irresponsible sexual behavior and more accurately reflect social norms.

Eileen M. Kane, *Molecules and Conflict: Cancer, Patents, and Women's Health,* 15 AM. U.J. GENDER SOC. POL'Y & L. 305 (2007).

This Article examines the intersection between women's health and the patent system in the case of the development of compounds used in the prevention, diagnosis, and treatment of breast cancer, in particular Taxol, Tamoxifen, Herceptin, and the BRCA1 and BRCA2 genes. The topic combines intellectual property and antitrust law, featuring conflicts with pharmaceutical patents and transfers of private technology between government and industry, in particular with issues concerning the respective rights of generic and brand-name pharmaceutical companies to well-known medical treatments. When a compound itself is in the public domain, patent issues are often limited to processing methods. By contrast, newly created medications, often the result of federally funded research, have presented questions regarding cooperation between private companies and government. After intense competition among research groups to locate the specific genes responsible for certain cancers, success has often led to the award of patents to university researchers and to the companies they form to manufacture and market these genes, which are widely used in testing patients for genetic predisposition to and early onset of cancer. The author argues that such scientific monopolies, facilitated by patent rights, have at times limited the development of possible medical approaches, and proposes a different regime in which patents on DNA sequences could be widely available for a reasonable fee and with minimal restrictions.

HUMAN RIGHTS

Jennifer J. Rasmussen, *Innocence Lost: The Evolution of a Successful Anti-Female Genital Mutilation Program*, 41 VAL. U.L. REV. 919 (2006).

Female Genital Mutilation (FGM) is a problem that is becoming increasingly global and present in countries where FGM was not historically practiced. International treaties have been ineffective in combating FGM because they do not compel strict enforcement by their constituent countries. Regional laws have also been ineffective because they do not have adequate procedures to monitor the violation of the crime and are rarely enforced. The author points out two programs, Care International and Tostan, which have had greater success combating FGM by encouraging open communication. Care International focuses on informal workshops about health issues. Tostan encourages villagers to set goals that determine which obstacles they would like to overcome and make public declarations against them. The author concludes by suggesting that future anti-FGM movements should correct the problems cited with regional laws by providing adequate procedures to monitor, report and prosecute violations and follow the lead of the cited successful programs by creating programs that foster communication.

IMMIGRATION

Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87 (2006).

The decision in *Rico v. Rodriguez*, a 2005 Nevada child custody case, highlights an alarming trend of the courts' use of a parent's immigration status in determining child custody cases. In *Rico*, the Nevada Supreme Court states the mother's status as an illegal alien as one reason why it decided to grant the father full custody, and disregards the fact that the father had never previously supported or lived with the children. The use of immigration status, even as one of many factors, is troublesome because courts erroneously fear that lack of proper documentation is indicative of imminent deportation and systematically grant custody to the parent who is a citizen or permanent resident. Furthermore, use of immigration status as a factor leads to "double counting:" counting a person's immigration status and also counting the person's ability to procure a job and obtain health insurance even though the latter factors are directly related to immigration status. The author argues that the solution to this problem is to force courts to dismiss immigration status of a parent as irrelevant to child custody cases except in cases where deportation is imminent or where it is likely that one parent will kidnap the child.

Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103 (2006).

All countries face policy choices about how immigrants will be assimilated into society and ultimately whether they will gain eligibility for citizenship. Besides the immigrants themselves, however, consideration must also be given to the families that they have and will eventually form. This article explores the complexities of immigrant law and the various ways United States policy deals with admitting immigrants' families into the national fold. Many of the most vexing issues stem from the fact that the current law tends to look backward in time at familial relationships to establish rules for which family members may be eligible for immediate immigration. The author proposes that a desirable alternative would be to adopt a more forward-looking scheme which anticipates the bonds that an immigrant will form over time as his or her ties to the community grow, and would make it easier for an immigrant's newer family members to become eligible for immigration status.

Nicholas Cutaia, Note, *A Circuit Split on Judicial Deference: Interpreting Asylum Claims by Fiancés and Boyfriends of Victims of China's Coercive Family Planning Policies*, 80 ST. JOHN'S L. REV. 1307 (2006).

Although international norms exist regarding who should qualify for asylum, U.S. law limits the grant to "refugees," a definition that does not include every victim or maltreatment or persecution. Among those not automatically included are victims of forcible abortion and sterilization in China, to whom Congress in 1996 therefore granted per se eligibility under the Illegal Immigration Reform and Immigrant Responsibility Act. This Note examines the split that ensued among the Second, Third, and Ninth Circuit Courts of Appeals on two related issues: (1) whether to extend that grant to victims' husbands and/or boyfriends—who are not expressly included in the Act—as being deprived of their fundamental right to procreate, and (2) what degree of deference to give decisions of the Board of Immigration Appeals in interpreting the legislation. While the Ninth Circuit boldly reversed a BIA denial of asylum as contravening the intent of the Act by distinguishing between legally and traditionally married couples, in the author's view the Third Circuit, on similar facts, too easily deferred to a superficial misreading of the statute. In view of the Supreme Court's limitation on the appellate courts' power to review administrative judgments, the author endorses the Second Circuit's more balanced approach, which respected the agency's authority by remanding similar cases to the BIA for a better explanation of why it affirmed—sometimes without opinion—denials of asylum by immigration judges.

LGBT RIGHTS

Carlos A. Ball, *The Immorality of Statutory Rejections on Adoption by Lesbian and Gay Men*, 38 LOY. U. CHI. L.J. 379 (Winter 2007).

Gay rights supporters should take a more aggressive approach by making an affirmative moral case as to why lesbian and gay men merit social recognition and support, and not allow their opponents to monopolize questions of morality as they relate to public policy disputes. This approach differs from the usual strategy of arguing for the neutral treatment of same-sex relationships as it pushes an affirmative moral case arguing for gay and lesbian social recognition and support. The author examines the immorality of anti-gay rights positions that have been codified into law, looking specifically at Florida's categorical prohibition against adoption by lesbians and gay men and an Oklahoma law that prevents state agencies and courts from recognizing adoption decrees issued to same-sex couples by courts from other jurisdictions. Rather than examining whether the two statutes are constitutional, the author asks whether they are moral or immoral. Proponents of gay rights can no longer unintentionally lend credence to moral questions raised by opponents of gay rights by staying silent on issues of morality because adoption laws that make distinctions based on sexual orientation are immoral because they harm children and use children as means to an end rather than as ends in themselves.

Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415 (2006).

LGBT youths are overrepresented in the foster care and juvenile justice systems because they are often rejected by their families and school systems due to their LGBT identities. Yet under state custody, they continue to regularly face discrimination, harassment, and violence from both caretakers and other wards. In recent years, a coordinated national effort has emerged and made great strides in improving the equal treatment of LGBT youth in the child welfare and juvenile justice systems. Reformers are using a multidisciplinary approach that includes litigation, pushing for training and education on LGBT issues, and advocating for improved anti-discrimination polices. These efforts have made people aware of the problems faced by LGBT youths under state care and begun a cultural shift that continues to challenge child welfare and juvenile justice systems to live up to their missions.

Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23 (2006).

After Massachusetts' 2003 legalization of same-sex marriages, many states have moved to "protect" traditional marriage through statutes and constitutional amendments banning same-sex marriages. However, even as legislative and judicial support for same-sex marriages appears to be waning, religious support for such unions appears to be rising. The author argues that as religious support increases, a free exercise challenge to such bans may succeed even where other constitutional challenges have not. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court indicated that if a challenged regulation burdens both religious freedom and another constitutionally protected right, the government must meet a higher level of judicial scrutiny by showing a compelling governmental interest. The author believes that by simultaneously working to expand the fundamental right to marry and developing sexual orientation discrimination protection, advocates can successfully push for a religious exemption from same-sex marriage bans.

Sally F. Goldfarb, *Same-Sex Couples and the "Exclusive Commitment": Untangling the Issues and Consequences: Granting Same-Sex Couples the "Full Rights and Benefits" of Marriage: Easier Said Than Done*, 59 RUTGERS L. REV. 281 (2007).

In *Lewis v. Harris*, the New Jersey Supreme Court held that the state must provide same-sex couples with the "rights and benefits of civil marriage" afforded to heterosexual couples. The author states that, although this decision is an important step towards equality for homosexuals, the state legislature must modify laws to give practical effect to the decision. The legislature must first decide whether the decision authorizes same-sex marriage or civil unions. Moreover, the legislature also must also modify New Jersey laws on marriage consummation and parentage to apply to same-sex couples, and must remove the barriers to equality posed by federal laws and the laws of other states.

C. Matthew Hill, *"We Live Not on What We Have": Reflections on the Birth of the Civil Rights Test Case Strategy and its Lessons for Today's Same-Sex Marriage Litigation Campaign*, 19 NAT'L BLACK L.J. 175 (2006/2007).

Test case litigation is a legal strategy where an organization sponsors a plaintiff with a pre-existing case or creates a case in order to challenge an existing law for the purpose of setting a precedent for the future and oftentimes to initiate socio-political change. This strategy was a powerful tool for change in the civil

rights movement. This note begins by outlining the history of the Brotherhood of Liberty's and Baltimore NAACP's use of test case litigation and applies that history to emphasize the continuing importance of this strategy in advancing the same-sex marriage movement. The author asserts that test case litigation is a vehicle that the same-sex marriage movement can use to challenge unequal treatment, which can have a positive effect on future cases and generate public sympathies, to build the movement's support structures even if the case is unsuccessful, and to help to set new precedents and initiate legislative action.

Michael J. Perry, *The Fourteenth Amendment, Same-Sex Unions, and the Supreme Court*, 38 LOY. U. CHI. L.J. 215 (2007).

This article questions the role the Supreme Court should play in protecting constitutionally entrenched human rights by examining the construction of the Fourteenth Amendment, how it applies to the case of same-sex marriage, and the most common arguments made against the recognition of same-sex unions. Although the United States gives the judiciary the ultimate decision making power, there are two possible judicial attitudes that can be followed. The first is the nondeference model and the second is the deference model, as articulated by James Bradley Thayer. This model advocates judicial deference whenever there is not a 'clear mistake.' The author first examines the history and construction of the three parts of the Fourteenth Amendment. Using the Thayerian deferential analysis, he then argues that states' refusal to recognize same-sex unions is the result of demeaning views of gays and lesbians. Ultimately, while finding that such refusals are not especially credible from a nonreligious perspective the question of the constitutionality of same-sex unions should nevertheless not be posed to the Supreme Court in the near future. As a result of religious arguments being presently plausible, due to this country's majority Christian population, the Court could rule against these unions' constitutionality. Additionally, such a move might also prompt a constitutional amendment forbidding states from recognizing same-sex unions.

Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291 (2007).

Claims of a legal right of same-sex couples to marry have developed in tandem with important legal and cultural shifts over the past four or five decades. The author traces these past developments of increasing visibility and acceptance of gays and lesbians by looking at developments in New Jersey case and statutory law. In particular, the author compares two avenues of same-sex rights advancement, the piecemeal approach, which relies on analogy and fairness and the

wholesale approach of *Lewis v. Harris*. This struggle is exemplified in the majority and dissent opinions of *Lewis v. Harris*; the majority looked at the success of the piecemeal approach and believed that that there should be complete equivalence of benefits and responsibilities for lesbian and gay couples, while the dissent looked at the piecemeal approach and decided that they pointed to an underlying fundamental right to marry. In closing, the author argues that the piecemeal approach will continue to be the main avenue for the advancement of same-sex couple's rights even after victories such as *Lewis v. Harris* but that increased visibility of same-sex couple's and families as well as equivalent performance by same-sex couple's are also important for the advancement of same-sex couple's rights.

Diana Sclar, *Untangling the Issues and Consequences: New Jersey Same-Sex Relationships and the Conflict of Laws*, 59 RUTGERS L. REV. 351 (2007).

Section 95 of New Jersey's Civil Union Law allows civil unions created outside of New Jersey to be recognized as civil unions within the state. The author points out however, that it remains uncertain whether same-sex marriages created outside of New Jersey are to be treated as civil unions when the same-sex couple relocated to New Jersey. The author also points out that there are many uncertainties as to how other states would treat New Jersey same-sex civil unions and as a result should be clarified by the Supreme Court. Specifically, the Full Faith and Credit Clause may not apply because civil unions are not the result of a judicial proceeding. In addition, Defense of Marriage Acts seemingly encourage states to not respect New Jersey civil unions where such acts have been adopted.

Amy L. Wax, *Same Sex Couples and the "Exclusive Commitment": Untangling The Issues and Consequences: Traditionalism, Pluralism, and Same-Sex Marriage,* 59 RUTGERS L. REV. 377 (2007).

Traditionalists argue that heterosexual marriage has withstood the test of time and should continue into the future while pluralists believe that the restrictions placed on marriage should be abolished in order to promote individuals' freedom of choice and expression. In *Hernandez v. Robles*, the New York Court of Appeals found that restricting marriage to heterosexuals preserves family stability for the benefit of children. The New Jersey Supreme Court in *Lewis v. Harris* held that the state restriction on same-sex marriage was valid even though there was hardly a rational state interest in placing unequal rights on homosexual couples. Although some demographic studies show that children do poorly in non-traditional families, same-sex marriage proponents argue that children will fare better with increasing rights for same-sex couples. The author posits that while children may be at risk in a same-sex marriage, the risk may be worth it by maintaining a strong commitment to equality.

Richard A. Wilson, *The State of the Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples*, 38 LOY. U. CHI. L.J. 323 (2007).

This article examines the rights and remedies available to couples in a same-sex relationship under Illinois law. Illinois does not allow same-sex marriages, nor does it recognize same-sex marriages lawfully formed in other states. The Illinois Supreme Court decision of *Hewitt v. Hewitt* stands for the proposition that private contracts between couples—same-sex or otherwise—which include sexual relations as part of consideration, are unenforceable under state law and as a result Illinois courts will not recognize contracts which effectively create marriage-like relationships. Although there may be some rights arising under the same-sex relationship which are cognizable under Illinois law—such as rights stemming from parentage, unjust enrichment, and property—the legal rights and interests stemming from a same-sex relationship remain unpredictable and for the most part unrecognized. Absent statutory or judicial recognition of same-sex relationships, the author suggests that same-sex partners should protect themselves by creating and signing contracts, such as agreements relating to holding of property, without regard to the parties' personal relationship.

Michael W. Yarbrough, *South Africa's Wedding Kitters: Consolidation, Abolition, or Proliferation*, 18 YALE J.L. & FEMINISM 497 (2006).

In 2005, South Africa's high court formally recognized marriage between same-sex couples, making it the sixth nation in the world—and first outside "Western" nations—to do so. However, the Court's recognition is a double edged sword in that it defines marriage as the penultimate relationship two people can achieve, thereby designating all other relationships as inferior. The comment outlines the Court's approach toward gay unions, particularly its attempt to consolidate such unions within the marriage context and states its dissatisfaction with the Court's consolidationist approach, claiming that it limits the symbolic construction of human relationships. The author contrasts the similarities and disagreements of the Court's consolidationist approach with the abolitionist view advocated by LGBT critics of marriage who seek to displace marriage as the central relationship recognized by the government. In addition, the author examines the proliferationist approach of South Africa's elected branches, placing the Civil Union Bill in the context of other recent legislative developments regarding marriage and relationship recognition more broadly. Finally, the author criticizes the slash marriage proposal, which would have characterized same sex partnerships as marriage/civil unions, as a discriminatory categorization of same sex unions. The latest proposal confers this status to both homosexual and heterosexual couples, though the author remains wary. The author concludes that

the proliferationist approach suggests various new ways for displacing marriage as the normative and penultimate relationship in the eyes of the law.

Betsy Lamm, *Unprotected Sex: the Arizona Civil Rights Act's Exclusion of Sexual Minorities*, 38 ARIZ. ST. L.J. 1139 (2006).

Current Arizona civil rights legislation's binary view of sex does not take into account sexual minorities including transvestites and transsexuals, and therefore does not afford them the same protections given to those that classify themselves as purely male or female. The sex of person is a biological construct that is determined by looking at chromosomal sex, presence of reproductive sex glands, hormones, internal and external morphology, and secondary sex characteristics—breasts or facial hair, while gender is a social construct that defines the acceptable behavior and social role of both sexes. Fourteen states and many foreign countries including Ecuador and South Africa have extended equal protection rights to sexual minorities but Arizona has failed to follow suit. A sexual minority in Arizona is not without remedy for sexual discrimination; however, the claim cannot be based on one's transsexuality, but rather must be based on sex, either male or female. The author asserts that the necessary step to ensure equal protection for sexual minorities is to broaden the definition of "sex" so that it defines a person as more than simply one's chromosomal makeup, external and internal morphology, and presence of sex characteristics and takes into account "rearing, culture and expression."

John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV 19 (2007).

Heterosexual married couples have the ability to file a joint claim while homosexual couples, limited by the federal Defense of Marriage Act's ('DOMA') definition of marriage as being between a man and a woman, must file a head of household claim showing that the dependent child lives in the taxpayers' household for more than half the tax year. In previous cases, including those with heterosexual couples, the California State Board of Equalization ('the Board') has held that a child who lived with a parent could not be defined as a foster child for purposes of head of household claims for the taxpayer. However, in *In Re Heissrich*, where a lesbian attempted to claim head of household status with her girlfriend's child as a dependent, the Board held that where both parents intended and planned the birth of the child, the child could be claimed as a dependent. In *In re Heissrich,* the Franchise Tax Board limited rights awarded to homosexuals by allowing unmarried homosexuals and heterosexuals to claim head of household status only if: (i) they had used some form of alternative reproduction technology and (ii) "the taxpayer had the clear intent to parent the non-biological child,"—a

move which unfairly targets homosexuals who cannot legally marry in many states. The author believes that homosexual couples may be able to bypass this marriage requirement and claim head of household status and get a tax break, as homosexual couples are now able to adopt children and claim head of household in that manner.

Bruce Wilson, *Claiming Individual Rights through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT'L J. CONST. L. 242 (2007).

In 1989, Costa Rica created a constitutional chamber of the Supreme Court. The Court has taken on a role as protector of individual rights for even the most marginalized segments of society. The author praises the Court's judicial activism, particularly with respect to the rights it has secured for gay Costa Ricans. He argues that the Court's accessibility to all Costa Ricans and its readiness to take on an activist role has led Costa Rica as a whole to perceive discrimination against gays as less acceptable. The author suggests that a similar result might be possible in the United States if our Supreme Court was more accessible to marginalized segments of society.

MARRIAGE

Lynn D. Wardle, *Lessons from the Bills of Rights About Constitutional Protection for Marriage*, 38 LOY. U. CHI. L.J. 279 (2007).

This article arises out of the dispute over whether to adopt a marriage amendment to the Constitution to say that marriage may only be between a man and a woman. The author examines the correlation between the adoption of the Bill of Rights and the Federal Marriage Protection Amendment and argues that such an amendment would not be inconsistent with the structure of our constitutional government. According to the author, the history of the adoption of the Bill of Rights demonstrates that it is proper, or even indispensable, for a society to include in its foundational government charter an explicit recognition and protection for human rights, relationships, and institutions, including marriage. Further, while the Bill of Rights protects liberty, it does not protect autonomy that is inconsistent with the preservation of the American society. The author argues Federal Marriage Protection Amendment, by creating a legally protected unit of nongovernmental human regulation will decrease the need for greater governmental regulation, while at the same time it will reinforce the separation of powers of the judicial and legislative branches to prevent judicial law making.

George W. Dent, Jr., *How Does Same-Sex Marriage Threaten You?*, 59 RUTGERS L. REV. 233 (2007).

The author analyzes the 2006 New Jersey Supreme Court decision in *Lewis v. Harris* ordering the legislature to provide same-sex couples the same "benefits and privileges" offered to opposite-sex couples who marry. Specifically, he asserts that the case was wrongly decided because giving same-sex relationships the opportunity for identical legal status to traditional marriage would impair the benefits of traditional marriage to society. Dent argues that the New Jersey legislature should consider what is in the public interest—the preservation of the prestige of marriage. Furthermore, he states that traditional marriage between a man and a woman is more beneficial to society because children fare best when raised by their married biological parents. Finally, he asserts that the *Lewis* decision will damage society by lessening the sanctity of marriage rather than strengthening and preserving traditional heterosexual marriage.

Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265 (2007).

Mini-DOMAs—state Defense of Marriage Acts defining marriage as a union between one man and one woman—have been enacted in forty-four states. These laws are intended to prevent same sex citizens of a state that does not allow same sex marriages from getting married in a state that does allow the union and then expecting their home state to recognize the union. The author discusses how these laws do not address the various situations where states will have to determine whether to recognize same sex marriage when it is pertinent to litigation in a state where same sex marriages are generally not recognized. Earlier state statutes voiding interracial marriages for state residents still recognized interracial marriages for the purpose of litigation and the author argues that the mini-DOMAs should be interpreted the same way. He further author argues that states need to more carefully consider these situations and revise their statutes so that they do not inadvertently cover an overbroad spectrum of cases.

Thomas J. Paprocki, *Marriage, Same-Sex Relationships, and the Catholic Church*, 38 LOY. U. CHI. L.J. 247 (2007).

Due to the increasing acceptance of same sex couples and increasing divorce rates, society is gradually moving away from the notion that marriage should be between a man and a woman until death parts them. One explanation for this expanding definition of marriage is a refusal by many to adopt the Church's understanding of marriage because of a belief that adopting a particular religion's definition of this union would violate the Establishment Clause. The author argues

that marriage is a natural institution, not one created by the Church, and that the Church merely upholds the sanctity of this natural union. According to the author, the natural inclination toward marriage evolved out of people's innate desire to procreate, and we should not redefine marriage to include same sex unions, since these couples do not fit within the natural purpose of marriage. The author believes it is the Church's duty to instruct politicians on how to vote on such a sensitive moral issue.

Katie McQuaid, Note, *Divorce in the European Union: Should Ireland Recognize Foreign Divorces?*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 373 (2006).

This Note discusses Ireland's law regarding the recognition of foreign divorce, which is in conflict with the laws of the European Union regarding recognition of foreign divorce, and argues that Ireland should maintain its stringent divorce laws and refuse to recognize the European Union's less restrictive divorce laws. The author details Ireland's history of divorce law, as well as the Irish public's endorsement of anti-liberal and vehement opposition to less stringent divorce laws. Prior to Ireland's adoption of the Domicile and Recognition of Foreign Divorces Act ("1986 Act"), both spouses had to be domiciled in a foreign country in order to obtain a foreign divorce. However, with the passage of the 1986 Act, only one spouse had to be domiciled in Ireland. While the 1986 Act may be considered a more liberal move for Ireland, the Family Law (Divorce) Act of 1996 ("1996 Act") more strongly shows Ireland's opposition to divorce, by the three elements it requires spouses to meet before obtaining a divorce: 1) the couple must have lived apart "for a period of or periods amounting to, at least four years during the previous five years;" 2) "there is no reasonable prospect of reconciliation between the spouses;" and 3) "proper provisions" are made for the support of the spouses and children of the marriage," which display the Irish public's opposition of divorce. The author concludes that Ireland should neither modify its current laws (1986 Act and 1996 Act), nor adopt the Brussels II Regulation—which would force Ireland to recognize divorces in foreign member states—as such adoption or modification would not reflect the will of the Irish people and their long history of opposition to divorce.

Helen M. Alvare, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 LOY. U. CHI. L.J. 349 (2007).

The author explains that there are three fundamental differences in moral reasoning between the "Abrahamic believers"—holders of faith in Catholicism, Islam, Judaism—and the proponents of same-sex marriage. First, supporters of same-sex marriage regularly invoke anecdotal or emotional arguments, whereas the Abrahamic faiths emphasize the role of human reason in shaping normative law.

Second, advocates of same-sex marriage demote the subject of children as irrelevant, tangential at best, to the discussion of same-sex marriage, while children and procreation are the essence of marriage to the Abrahamic believers. Finally, same-sex marriage proponents argue that freedom is commensurate with the legal expansion of individual rights, when the Abrahamic faiths associate freedom with commitment, responsibility and self-control. The author fears that the widespread adoption of same-sex proponents' moral reasoning would undermine the increasing reliance on social sciences of family lawmaking to advance the interests of children, and further worries that such adoption may encourage Abrahamic believers to withdraw their meaningful participation in various community institutions such as public schools and charity organizations.

William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265 (2007).

In the face of recent attempts to redefine state marriage laws stands both the time-honored traditional understanding of marriage as well as the difficulties associated with creating a new, utopian understanding which eliminates gender inequalities. These barriers to redefinition surfaced most recently in a July 2006 decision of the New York Court of Appeals which reaffirmed the constitutionality of New York's traditional marriage law. The traditional understandings of marriage, which have rebutted most redefinition attempts include the existence of two distinct sexes and that only sexual relations between members of the opposite sex can result in spontaneous procreation without assistance from third parties. While the new utopian scheme redefines marriage based on gender equality, it simultaneously rejects the link between marriage and procreation which lies at the heart of the traditional marital concept. Ultimately, the author concludes that a satisfactory redefinition of marriage under utopian ideals will be unattainable.

Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561 (2007).

The author investigated how religious beliefs influence statutory and constitutional initiatives to prohibit recognition of same-sex civil marriage. He argues that because of the country's history of blending religious and civil marriage, and the campaign to codify religious marriage into the law, the definition of civil marriage impermissibly resulted from religious concepts without proper justification. He suggests that we move to extricate civil marriage from religious marriage, and that marriage should be thought of as a way of transferring property and wealth through families and securing legal benefits. Under the bifurcated approach which the author espouses, religious marriage will still be free to continue

as is, but in a more flexible manner. Such a policy would also permit same-sex couples to be married and would no longer subject them to such bigotry and homophobia, and would still permit those who would like to participate in religious marriage to do so.

OBSCENITY

Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth Century America*, 16 COLUM. J. OF GENDER & L. 43 (2007).

The article examines the historical context of pornography and obscenity law in America, beginning with the passage of the Comstock Act in 1873 and ending with the rise of the internet and subsequent controversy over its content. The article begins by examining the formation of obscenity law in England and its impact on American law in the first half of the eighteenth century. The article then analyzes a series of landmark obscenity cases prosecuted in New York City in the years leading up to the Civil War as well as non-legal materials regarding obscenity. The article then analyzes the social, economic and cultural consequences of the prosecutions, particularly their influence on the trade, content and visibility of obscene material during that time. Ultimately, the article concludes that the prosecutions strengthened the obscenity trade and weakened the government's attempts at suppression.

PARENTING

Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 MIN. L. REV. 710 (2007).

Currently, though all states require parents to support their children until the age of majority or graduation from high school, states deal with the issue of support of adult disabled children in three different ways: (1) following the common law which does not extend the parents' duty no matter the circumstances, (2) holding parents liable for adult children if the disability arose before the child's majority, and (3) dictating that parents have a duty to support adult disabled children regardless of when the disability arose. Although there may be a moral duty of both parents and society to support disabled persons arising out of religious and philosophical perspectives, there should not be an unqualified legal duty imposed on parents to support adult disabled children because of theoretical and practical problems. The primary practical problems include the inability of courts to adjudicate intra-family conflicts indefinitely, the inconsistency of giving such a duty to parents and not other family members when the parents die, the unfairness

of a blanket rule of duty, and the discord caused by intra-family law suits. The author connects the history of burden shifting from the state to parents to current legal developments. She then contrasts it with the changing moral perspectives on the same issue. Rather than further develop a parents' duty to adult children, that duty should therefore shift to the state to provide for even-handed support for those who need it.

Clayton P. Kawski, *Stepping In(come): Evaluating the Inherent Inconsistency of Illinois's Trend Toward Consideration of New Spouse Income in Child Support Modification*, 27 N. ILL. U. L. REV. 247 (2007).

In reviewing child support calculations, courts must assess any changes in the obligated parent's ability to pay and any changes in the child's needs. The traditional rule in Illinois is that the income of an obligated parent's new spouse should not be a factor in assessing the obligated parent's ability to pay. Illinois statutes are not explicit on the issue, using broad wording such as "financial resources" and "circumstances", thus leaving ambiguity in their application. The author notes that holdings in Illinois and other districts seem to be moving away from the traditional view to include a new spouse's income in assessing "financial resources." The author concludes by suggesting that the Illinois legislature should amend their statutes to make clear that a new spouse's income should not be a factor in assessing the obligated parent's ability to pay child support.

Anne S. McIntyre, *Isolating Past Unfitness: The Obstacle Of In Re Gwynne P. for Incarcerated Parents in Illinois*, 27 N. Ill. U. L. Rev. 281 (2007).

Detra Welch was a drug addict who eventually reformed herself and proved to be a caring and enthusiastic mother to her daughter Gwynne. However, Detra ultimately lost her parental rights solely due to her past history of incarceration. In this comment, the author examines the Illinois Supreme Court's decision in *In re Gwynne P.* and argues that the court failed to provide a clear connection between the mother's repeated incarceration and her ability to discharge parental responsibilities. The author argues that parental responsibility consists of more than just financial support or physical presence and should be defined to include intangible qualities like emotional support. Given the rising incarceration rate of women and its socioeconomic impact on families, it is important that courts do not interpret repeated incarceration as per se grounds for parental unfitness. To do so would not only undermine the state's rehabilitative interests, but also infringe on an individual's fundamental liberty interest in parenting.

RACE AND GENDER

Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173 (2007).

The highly publicized corporate fraud scandals at Enron, WorldCom, HealthSouth, Adelphia, and other public companies have led to distrust of and among corporate constituencies including directors, executives, and investors. While men base their trust on shared group status, whether a person is associated with the same particular group, (collective trust), women base their trust on whether there is a personal relationship with an individual (relationship trust). Studies have shown that women are more trustworthy then men in a variety of situations, therefore the author argues that boards of directors should diversify by incorporating more female members. However, one arguably negative attribute about female board incorporation is that women may have relational trust in corporate management, and might be less likely to question decisions that will have adverse effects on the corporation. Women are more other-regarding then males and thus would be less likely to take action, for their own personal gain, which will benefit corporate boards of directors; but more empirical and theoretical research should be conducted to investigate sex-based trust issues in the corporate context.

Margaret E. McGuinness, *Women as Architects of Peace: Gender and the Resolution of Armed Conflict*, 15 MICH. ST. J. OF INT'L LAW 63 (2006).

Women have historically been left out of the resolution of armed conflicts despite the fact that war brings particularly devastating results for women and girls. In order for these resolution processes to bring sustained peace and address a full range of post-conflict issues, they must include the active participation of women. The author rejects gender-neutral assumptions regarding warfare and examines both conflicts and their resolution processes in the context of gender. Wars are not gender neutral events, therefore their resolution should not be blind to gender and the different ways that men and women negotiate and resolve disputes. The author believes that women need "a place at the peace table" in both formal resolution settings, such as the drafting of peace agreements, and in informal processes, such as advocacy by non-government organizations and private individuals.

RAPE

Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243 (2007).

This article discusses how the media portrays the narratives of rape cases, comparing coverage of earlier rape cases that have caught the media's attention to the more recent Duke Lacrosse rape case. Research shows that past media coverage of rapes focused largely on more uncommon types of rape—stranger, gang, or interracial rapes—while perpetuating the sexist and patriarchal stereotypes and myths, such as that the woman was "asking" for it. The analysis of the Duke rape case media coverage reveals that although there has been some progress towards eliminating some stereotyping words such as girl instead of woman, and towards a more balanced coverage of both the offender and the victim, the media continues to use inappropriate words and details that continue to perpetuate patriarchal rape myths. Media and particularly attorneys working on rape cases should take care to not to simplify or stereotype the problem and instead enrich the narratives they use for rape. The public needs to be informed about frequency and nature of rapes, as well as the underlying issues that cause rapes in order for rape myths to be eradicated.

Heather Flowe, Ebbe B. Ebbesen & Anila Putcha-Bhagavatula, *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations*, 31 LAW & HUM. BEHAV. 159 (2007).

Before the 1970s, evidence of a woman's sexual history was admissible in court to undermine her credibility when she alleged she had been raped. The thinking was that if she had consented to sex in the past, she was more likely to have consented to sex in this instance, and thus her allegations that it was a rape were probably false. In the 1970s, all states enacted rape shield laws that prevent evidence of sexual history from being admitted in court unless the defendant can show that the evidence is relevant in establishing his innocence. The present study looks at the value of sexual history evidence by seeking to determine whether there is a link between a woman's sexual history and her likelihood of reporting a particular scenario as a rape. The results of the study indicate that women who have more extensive sexual histories are not more likely to report scenarios as rape.

SEX OFFENDERS

Lystra Batchoo, *Voluntary Surgical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689 (2007).

In July of 2005, Keith Raymond Fremin entered into a plea-bargain agreement approved by the Louisiana court where he would plead guilty to forcible rape and molestation and undergo a voluntary castration in return for a reduced sentence. Recent studies have shown that the recidivism rate amongst sex-offenders who have been castrated is much lower than the recidivism rate of sex-offenders who have not been castrated. However, under the framework of the Supreme Court of the United States and because the Supreme Court has consistently held that the right to procreate is a fundamental right, castration would most likely be considered cruel and unusual punishment because the means are not sufficiently narrowly tailored and disproportional. The author argues however, that the party can waive the protection against cruel and unusual punishment if it does not undermine societal interests, therefore the party may voluntarily choose castration. The author concludes by suggesting that the best implementation of voluntary castration requires the sentencing court to balance the interests of the defendant, the criminal justice system, and society.

Meghan Sile Towers, *Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 J.L. & POL'Y 291 (2007).

In recent years, many states and local governments have passed a variety of residency restriction laws that prohibit convicted sex offenders from living or working near schools and other areas typically inhabited by children. Residency restrictions raise a number of constitutional and practical issues, including a variety of property-related concerns. Primarily, such laws function similarly to exclusionary zoning—a kind of zoning that excludes persons of lower income—which has been explicitly rejected by courts. Additionally, by pushing sex offenders into less populated towns and municipalities, sex offenders become isolated from society, housing problems are aggravated, monitoring becomes more difficult, and treatment for offenders suffers. Accordingly, other methods of protecting children should be adopted, such as individualizing treatment, increasing monitoring, and encouraging neighborhood notification.

David A. Singleton, Sex *Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600 (2006).

This article argues that sex offender residency statutes—statutes which restrict the ability of persons convicted of sexual offenses to reside near places where children congregate—do not serve their purpose of protecting children and that reasons behind their enactment are largely irrational. Most sex offender residency statutes were enacted as a result of extensive media attention covering rare child abduction cases and the public outcry arising therefrom, and not as a result of a rational analysis of the issue by the legislature. The author discusses the only two studies conducted to test the effectiveness of sex offender residency statutes—one from Minnesota and one from Colorado—which conclude that the restrictions are not effective in protecting children from sex offenders. Further, the author argues that sex offender residency statutes may also be counterproductive since the instability and isolation which results from compliance with these statutes may actually increase recidivism rates or drive sex offenders into homelessness, making it difficult to track them. The author proposes a balancing test to determine whether sex offender residency statutes are impermissibly driven by fear and prejudice: whether the statute as enacted in response to a particular crime, whether media coverage played a role, the amount of time between the commission of that crime and the enactment of the statute, and whether legislation considered data bearing on necessity and effectiveness of the statute.

Douglas Griswold, *Sex Offenders in the Community: Their Public Persona and The Media's Corresponding Privilege to Report*, 15 WM. & MARY BILL OF RTS. J. 653 (2006).

In response to the growing problem of sexual assaults upon children in the United States, Congress passed a law in 1994 that required states to establish sex offender registration, and upon the amendment of Megan's Law, notification programs that identify convicted sex offenders living within their communities; by the end of 2005, there were approximately 550,000 registered sex offenders in the United States. This Note focuses on whether the media has the right to notify the community about the presence of convicted sex offenders notwithstanding the offender's right to keep these issues private, and concludes that the media does have such a right. To support this argument, the author explores two areas of jurisprudence: the First Amendment and the public figure doctrine, as articulated in the area of defamation law. The author argues that the general rule established in First Amendment doctrine, which says the media has a right to report on issues of public concern, outweighs the sex offender's privacy right when reporting is a matter of public safety. Second, the author asserts that the public figure doctrine

precludes the media from potential liability for defamation because sex offenders in the community constitute a "public controversy," and because they play such a central role in the controversy so as to warrant public figure status.

Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267 (2006).

The article casts a critical feminist perspective on Megan's Law, a New Jersey legislation aimed at controlling sex offenders through a system of registration and community notification. The author views the law as a hindrance, if not a direct attack, to the feminists' anti-rape law reforms in the 1970s that have challenged society's confined cultural outlook on what rape is and how it can be remedied. Megan's Law understands rape to be individualized instances of sexual assault committed by mentally irrational persons and thereby excludes from its reach the most common forms of sexual crimes committed by families, friends or acquaintances. As such, the author considers Megan's Law a departure from the progressive feminists' view that rape is a natural and expected outcome of gender inequality. The author urges the critics of Megan's Law to show concern not only for the law's intrusion on sex offenders' civil liberty, but also for the law's indifference to ending the systematic gender, race and class-based forms of discrimination that pervade the rape control laws across the country.

Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499 (2006).

Many states define criminal offenses in wholesale terms without regard to the age of the offender, sometimes overlooking the fact that some offenses, such as sex with minors, cause harm only when committed by adults. Consequently, many adolescents are charged with sexual crimes such as "aggravated rape" and "sexual battery" for what could be described as normal adolescent sexual exploration. These offenses carry lifetime stigma, and it is generally already-victimized adolescents who are actually prosecuted. Since only a minority of teenage offenders are actually prosecuted, the author suggests that these cases are prone to police and prosecutorial misconduct. The author recommends that advocates for teenagers accused of sexual crimes defend them aggressively, and advance any possible prosecutorial misconduct angles available.

SEXUAL ABUSE

Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007).

This article argues that prisons have a duty to protect their inmates from violence and sexual abuse. Buchanan argues that in prison, a report from a female inmate of sexual abuse by a guard is more likely to result in punishment for the female inmate than consequences to the offending guard. The article asserts that violence in prisons perpetuates a cycle, noting that the majority of women in prisons are low-income women of color who are survivors of sexual abuse. Furthermore, contemporary prison laws underscore the degraded status of women in prison and create the appearance that exposure to sexual abuse is part and parcel of the incarceration. Finally, Buchanan seeks to reframe impunity as a racialized and gendered status regime and to expose the biased legal frameworks that were designed to prevent prisoner initiated litigation.

Valorie K. Vojdik, *Sexual Abuse and Exploitation of Women and Girls by U.N. Peacekeeping Troops*, 15 MICH. ST. J. INT'L L. 157 (2007).

The 2005 Zeid Report confirmed allegations that United Nations peacekeepers sexually abused Congolese women and young girls during their 2004 occupation and in its wake, the suspected parties were either dismissed from the U.N. or sent back to their home countries. The report offered guidelines to increase the accountability of its peacekeepers and prevent similar occurrences, including improved investigatory methods and monetary funds to compensate victims. However, the author argues that these recommendations are inadequate by failing to isolate the true source of actions such as sexual exploitation and violence: poverty, gender-unequal environments, and the "hyper-masculinity" of military culture. Ultimately, the author concludes that while the Zeid Report's recommendations are commendable, preventing future outbreaks of post-conflict violence against women demands a removal of the hyper-masculine military ethos and a commitment to the elimination of gender inequality. In effectuating these changes, the U.N. should establish a permanent investigative body, conduct on-site court martials, and encourage the expansion of employment and business opportunities for host-country women.

WOMEN'S RIGHTS

Boatema Boateng, *Walking the Tradition-Modernity Tightrope: Gender Contradictions in Textile Production and Intellectual Property Law in Ghana*, 15 AM. U. J. GENDER SOC. POL'Y & L. 341 (2007).

Drawing from interviews and life histories conducted in Ghana between 1999 and 2004, Boateng discusses the relationship between gender, cultural production, and intellectual property law in Ghana. The author addresses the intellectual property laws in Ghana, namely the Textile Designs Decree, and how Ghana uses the law to protect indigenous and local cultural production of adinkra and kente woven designs and other "folklore," in effect making the State the formal owner of folklore. The law created an advantage for women in the sphere of mechanized textile production because individual women traders produce distinct cloths that are then marked as part of a female sphere of cultural production. The women's increasing dominance over the control of the cloth trade and their role in the mechanized cloth production allows women to contradict the common scenario of male appropriation of female cultural production in Ghana. Through the naming of cloths and mass-production, Boateng argues that a sphere of cultural textile production that was gendered male was appropriated by women.

Holly Taylor, Note, *The Constitutions of Afghanistan and Iraq: The Advancement of Women's Rights*, 13 NEW ENG. J. INT'L & COMP. L. 137 (2006).

Recent changes to the constitutions of both Iraq and Afghanistan purport to give women equal rights, but the interpretation of Islamic law by these countries limits the application of these constitutional amendments. Although the Koran itself generally promotes the equality of men and women by allowing women property rights, inheritance rights, and protection against domestic violence, Iraqi and Afghani societal norms restrict a woman's education and employment opportunities, as well as her marital rights. Afghanistan's new constitution, which attempts to remedy the restrictions imposed on women by the Taliban, fails to provide equal protection for women. Women are dissuaded from seeking education, voting, or running for public office for fear of reprisal from warlords, political factions, and Taliban militants. In Iraq, the new constitution allows women the right to property and travel but fails to safeguard women from honor killings, domestic violence, and pressures from religious factions to wear traditional Islamic headscarves. Possible reform methods include interpreting the Koran so as to promote gender equality and women's rights by allowing family and status courts to draw on both Islamic and statutory law, implementing procedures for citizens to complain about the lack of equality, and modeling the new

constitutions after the South African Constitution, which provides for equal protection regardless of race, gender, marital status, and other factors.

Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595 n.1 (2007).

In the United States, men and women convicted of crimes often have significantly different experiences within the prison system. While men are offered vocational training to help them re-assimilate into society upon release, women are often denied any such opportunities. This note argues that treating male and female convicts differently is a violation of the Equal Protection Clause of the Fourteenth Amendment because the two groups are similarly situated. The author explains the history of equal protection jurisprudence in order to show that courts have traditionally treated gender as a non-factor in determining whether two groups are similarly situated for equal protection purposes. The note ultimately concludes that courts need to address women inmates' claims of gender discrimination from an Equal Protection standpoint.

Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199 (2007).

This article examines the false opposition and binary position of religion and gender equality, culture and human rights. The author argues that this isomorphism—a concept that maps one idea onto another as an exact correspondence—is a misconception endorsed by Stasi Commission and the European Council on Human Rights ("ECHR"). The author analyzes this issue through a study on Muslim women's and girls' decision to wear head scarves in France and Turkey, and attempts to clarify the misconceptions relating to their choice. The author sets forth the way in which the isomorphism has been fostered by the international community through an analysis of *l'affaire du foulard* (the Headscarf affair) and the Muslim presence in France, a policy shift to a blanket ban on religious symbols from the case-by-case approach espoused by Conseil d'Etat/Jospin, and international law's endorsement of this isomorphism. The author concludes that the French and Turkish governments fail to acknowledge religious decisions and choices many Muslim women and girls make when they opt to wear a headscarf, and urges those governments and secular authorities to break the isomorphism and listen to the sentiments of the Muslim girls and women who wear the headscarves.

Sacha E. de Lange, *Toward Gender Equality, Affirmative Action, Comparable Worth and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315 (2007).

During the height of the "second wave" feminism, from the 1960s to the 1980s, the policies of affirmative action and comparative worth were separately used to further the objective of placing women on equal footing with their male counterparts. The validity of past rhetoric that affirmative action's main beneficiaries were women, as opposed to racial minorities, has come into question based on studies' findings that minority males benefited the most from this policy. According to the author, this rhetoric was largely used by feminist proponents of affirmative action to garner more support from female voters when the policy came under fire. When the expectations for affirmative action were not fully realized, the women's movement turned to the theory of comparable worth to remove the economic barriers for working-class women by switching the focus from breaking into traditionally male professions to raising wages for job known as "women's work." The author proposes that current feminist activists can learn from the triumphs and weaknesses of both these strategies in their efforts to create a unified front in the fight for gender equality.

Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 97 (2007).

Originally derived largely from a view that the sexes had separate duties within society, Israeli law has long provided for exemption from military service for women who conscientiously object to service. This message of objection was for the most part ignored, as much more attention to male objectors who were jailed in a nation that largely associates military service with citizenship. However, women had begun to channel their energy into other paths to citizenship by fighting for and gaining financial benefits for civil service as an alternative to military service. A recent Supreme Court case, Milo, abolished the distinction between men and women in terms of conscientious objection, and women are now imprisoned for draft avoidance. The author asserts that women may have achieved more of a voice with objection in favor of civil service, and that now that voice is forever silenced and women are subjected to the masculine constructs of the court and Israeli military law.

WORK DISCRIMINATION

Stephanie Bornstein & Joan C. Williams, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006).

Family Responsibilities Discrimination (FRD) is employment discrimination based on a person's care giving responsibilities for children, elderly parents, or ill partners, and includes "maternal wall" discrimination and discrimination against male caregivers. It is a growing area of liability, with many framing strategies available to lawyers and workers seeking to bring such claims, such as the use of stereotyping evidence instead of using a comparator to prove disparate treatment under Title VII. Gender stereotyping patterns held to be unlawful in FRD cases include: (1) masculine life-pattern structure of jobs, (2) role incongruity (3) benevolent prescriptive stereotyping, (4) attribution bias, (5) leniency bias, and (6) negative competence assumptions. There are seventeen different legal theories that have been successful in FRD cases, such as Title VII, the Family and Medical Leave Act, the Employment Pat Act, the Americans with Disabilities Act, the Employment Retirement Income Security Act, as well as other statutory and common law theories. Under a new institutionalist viewpoint, what may arguably bring social change to the workplace is not necessarily the litigation itself, but the threat of FRD litigation. Furthermore, given the high number of successful FRD cases for employees from all walks of life, it seems that this litigation is helping debunk the argument that gender discrimination litigation only helps the upper class of women.

William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153 (January 2007).

This article looks at employment discrimination based on appearance by examining the trend of employers preferring physically attractive individuals under the belief that they will be more successful because of their looks, and the importance of appearance in our society as a whole. The existing federal employment discrimination laws prohibit discrimination based on the following characteristics: race, color, sex (including pregnancy), religion, national origin, age, and disability. While there has been an increasing volume of appearance based and employment discrimination litigation, plaintiffs have a difficult time trying to fit there claim into one of the currently operating federal discrimination laws. The author looks not at the reasons why a discrimination law based on appearance should be passed, but at the reasons why it will not be. Problems with such as how to word and structure the law, how to identify the group of people to which the law

will apply, and other subjective issues lead the author to believe that an appearance based discrimination law will not be passed in the near future.

Sacha E. De Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315 (2007).

Affirmative action and "comparable worth," though limited in a number of ways, are two strategies that have proved necessary for the women's movement in its fight to increase wages for women in the field of employment. In particular, the push for affirmative action by women has been criticized for its focus on white, middle class women at the expense of working class, minority women. In contrast, "comparable worth," a policy that demands women receive equal pay is applied more evenly across race and class. However this strategy is also limited because instead of encouraging women to break away from subordinate jobs, comparable worth merely requests that women be paid more in their existing jobs. Despite these shortcomings, both strategies have added legitimacy to gender discourse, and the women's movement should continue to move in the direction of merging class and gender issues in order to better serve the feminist goal of "representing all American women."

Ruben Seth Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless - God Forbid - They are Religious*, 51 N.Y.L. SCH. L. REV. 618 (2006/2007).

The author begins with the story of Fereshta Ludin, a German citizen born in Afghanistan, who was refused a public school teacher position because she wears a hijab, an Islamic headscarf. Ludin filed suit in an administrative trial court, lost, and after losing multiple appeals eventually came before the Germany's highest court which held there was a lack of statutory foundation for the school system's refusal to hire her. As a result, the legislature of the German state in which Ludin resided passed a law which prohibited teachers at public schools from exhibiting religious articles on their person, while allowing the exhibition of Christian and occidental religious articles. The author argues that this and other similar statutes enacted by other German states are unconstitutional because they allow discrimination against Muslim teachers who wear a hijab, while endorsing the display of Christian religious articles by teachers at public schools. The author contends that such laws will eventually be deemed unconstitutional, and argues that the German legislature should adopt a "Permit All" approach which would expressly permit public school teachers to wear any religious articles or clothing.

Joel Wm. Friedman, *Gender Noncomformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205 (January 2007).

The author addresses a problem presented by the application of Title VII of the 1964 Civil Rights Act, namely the extent to which it constrains an employer's ability to control how its employees present themselves to the public. Specifically, there are concerns over whether employment policies or individual employer decisions, penalizing employees for the way they present themselves, in terms of attire and behavior or for other aspects of their sexual identity, are allowed under the law. The author begins by examining early cases and the formation of the "sex plus doctrine," a legal theory used by lower courts to determine whether appearance or lifestyle requirements placed on a particular gender constituted sexual discrimination. The author then examines *Hopkins v. Price Waterhouse,* a landmark Supreme Court case where the Court created a "mixed motive" analysis for determining sex discrimination. The author notes that, although the Court's evidentiary standard was later supplanted by statute, *Price Waterhouse* served as a condemnation of "sex stereotyping" actions by employers in general. However, the author points out that although these developments have allowed plaintiffs to successfully state a claim of sex discrimination based on "sex stereotyping", most courts have not accepted such actions as proof of sex discrimination, particularly in cases where homosexual or transgender plaintiffs are involved. The author points out exceptions to this general pattern but argues that the current trend reflects an unwillingness by courts to extend protection to gay and transgender individuals. The author concludes that despite occasional victories, employees claiming discrimination on the basis of workplace rules governing the way they dress, behave, and present themselves are generally unsuccessful in the legal system.

Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243 (2007).

Courts have established a strong precedent of sustaining gender-based dress codes in the workplace. The two exceptions to the rule are: (1) when the code objectifies or sexualizes women or (2) the employer allows flexible standards for male employees but requires stricter rules for women. More recently, there has been some progress involving challenges to dress codes by transgender litigants based on sex stereotypes. However, less progress has been made in challenging the above well-established precedent as courts have steadily retreated from the landmark case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), when analyzing sexual stereotyping in dress-code challenges. By comparing two recent cases, one involving a transgender litigant and one not, the author finds that courts appear to have created an additional requirement to Title VII, forcing non-transgendered plaintiffs to establish a group-based harm on top of sexual

stereotyping. The author encourages advocates to consider appealing to the personal experiences of judges in order to correct the instinctual, yet inaccurate, application of employment discrimination doctrine.

Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535 (2007).

Employers are legally permitted to regulate employees' dress, grooming habits, and personal hygiene so long as the regulation comports with the "unequal burdens" standard. Under this standard, different requirements can be applied to men and women if both groups are equally burdened by the regulation. Although courts generally consider appearance regulation to be "legally insignificant," dress codes serve to prevent certain employees from expressing their sense of gender identity and reinforce stereotypical norms about gender. Consequently, while men and women are equally burdened by such regulations, both are also injured for dress codes overwhelmingly suggest inferiority of femininity as applied to both men and women. Claims arising out of such regulation should therefore be analogized to Title VII cases for sexual harassment, in which both men and women are equally harassed, but where either sex may successfully recover in a lawsuit.

Patrick S. Shin, *Vive La Difference? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491 (2007).

In most instances, it is illegal for an employer to allow workplace behavior by one gender that is forbidden to the other. In the context of gender-appropriate clothing, however, such distinctions are routinely drawn with no legal consequences. Addressing the facial inconsistency of this state of affairs, the author discusses whether there is a principled policy distinction that can be drawn to justify the practice of treating men and women differently in terms of their personal appearance. While seeking a principled distinction, the author finds that there may be none to be had through traditional modes of thought about employment discrimination. Ultimately, the article suggests that the justifiability of such a continued distinction implies that there may be a substantive claim to the notion that there is value in preserving gender roles while seeking to attain economic equality between the sexes.

Emily Miyamoto Faber, Note, *Pregnancy Discrimination in Latin America: The Exclusion of "Employment Discrimination" from the Definition of "Labor Laws" in the Central American Free Trade Agreement*, 16 COLUM. J. GENDER & L. 297 (2007).

Over the last fifteen years, there has been a dramatic increase in the number of Free Trade Agreements (FTAs) between the nations of the western hemisphere, and increasingly, these agreements have come to include labor rights provisions. This article focuses on the frequent exclusion of employment discrimination from the FTAs' labor rights sections. The lack of protections against employment discrimination has had a particularly significant effect on women in Latin American countries, who are routinely discriminated against on the basis of their being or potentially becoming pregnant. This article sets forth the notion that excluding employment discrimination from the scope of labor rights is a method for less developed countries to acknowledge those rights while at the same time still appearing attractive to foreign investment. The author concludes that Congress and the Executive were aware of these labor deficiencies at the time these agreements were reached, and suggests that in the future such agreements should include the International Labor Organization's Core Labor Standards to ensure that women will be able to play an equal role in the workplace.

Orly Lobel, *Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work: A Response to Kim Yuracko*, 43 SAN DIEGO L. REV. 899 (2006).

In her article on employment discrimination, Kim Yuracko asserts that there are disparities among the outcomes in many sex discrimination cases that can only be explained by judges' value judgments on what types of employment represent good life pursuits. The author of this article rejects Yuracko's argument, and instead argues that the case law can be harmonized using a traditional liberal model that asserts that to understand current employment discrimination, we need to take a macro view and look to the current market situation, past wrongs done, and traditional social hierarchies. The author asserts that courts are not well situated to look at discrimination on this macro level, and believes that administrative agencies should have a more prominent role in reducing employment discrimination because they can take more of these factors into account and thus can reduce the apparent disparities that are produced when judges decide these cases without considering as broad a range of factors. The author argues that Yuracko's analysis oversimplified the issues and thus prevents us from developing a more robust understanding of how to eliminate sex based employment discrimination.

Julie A. Seaman, *The Peahen's Tale, or Dressing Our Parts at Work*, 14 DUKE J. GENDER L. & POL'Y 423 (2007).

Sex-specific norms dictate the formal and informal dress codes that exist in many workplaces. Courts have generally ruled that sex-differentiated work dress requirements do not constitute sex-based discrimination. The rare workplace sex-specific grooming policies that have been struck down as discriminatory usually invoked the stereotypical portrayal of females as sexual objects or as subordinates to their male counterparts. The author posits that the evolutionary theory of sexual selection—a process by which the males and females of a species evolve different reproductive strategies—can be a useful lens, under which workplace dress codes can be viewed as a mechanism by which humans display sexual dimorphism. In the author's opinion, although many courts have treated sex-differentiated work dress codes as trivial matters that only have a negligible effect on employment opportunities, these dress codes are a form of language that express the values and stereotypes of society.

Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257 (2007).

Las Vegas casinos exclusively hire women to serve cocktails on the casino floor and dress them in sexually appealing outfits. This article examines whether the exclusive hiring of women as cocktail servers, otherwise in violation of Title VII's prohibition against sex discrimination, qualifies for the bona fide occupational qualification ("BFOQ") defense. The current Title VII jurisprudence applies the defense very narrowly to where the sex-differentiated job qualification relates to the essence of the employer's business and is objectively and verifiably necessary to the employee's job performance. The author argues that casinos should not be afforded the BFOQ defense because the exclusive hiring of women as cocktail servers segregates women and men and reinforces the stereotypical role of men as sexual aggressors and women as sexual objects. However, casino operators, legitimately operating a business which sells entertainment and involves performance, should be permitted to hire both men and women as cocktail servers and dress them in sexually provocative outfits.

Kegan A. Brown, Note, *My Individual Acts Can Get Me Fired, But Can My Supervisor's Individual Acts Get Me Money?: Examining Individual Liability for Public Sector Supervisors Under the Family and Medical Leave Act*, 58 RUTGERS L. REV. 1023 (2006).

Federal courts are split on whether the Family and Medical Leave Act ("FMLA") extends a remedy to state employees suing public officials in their

individual capacity for violating the Act. Courts upholding individual liability in the public sector have relied on the plain language of the statute and the lack of any explicit or implicit public agency exception to the individual liability provision under the FMLA. Courts refusing to find the public sector individual liability have grounded their reasoning on the grammatical structure of the statute and the omission of public officials but inclusion of corporate officers in the relevant regulation provisions. According to the author, the split should be resolved in favor of finding individual liability in the public sector because "public agency" in the FMLA is defined as a person and the definition of employer in the Fair Labor Standards Act supports the interpretation that public officials can be individually liable under the FMLA. Finally, when the statute has a broad remedial purpose and fails to make an explicit exemption for certain employees, a court should not deny to a public employee a statutory remedy that is available to a private employee.

Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL'Y 125 (2007).

This article discusses the relevance of the dress of sexual targets in sexual harassment cases through a study of case law, feminist theory, and social science. The author examines the cases—or lack thereof—in which the way a plaintiff dressed was used as a defense for the defendant's actions. The author draws a parallel to another related area of the law, rape, and states that one reason a target's dress does not play a major role in sexual harassment cases is that victims are usually targeted for their submissive behavior rather than their dress, as in sexual harassment cases. The author states that the most prevalent cases concerning target dress and sexual harassment are those in which the plaintiff, rather than the defendant, raises the issue of her attire. The author poses that the dearth of cases regarding sexual harassment target dress may be due to many defendants' decisions not to raise the issue due to Federal Rule 412, as they do not believe their evidence will be admitted, or due to the fact that many victims were not, in fact, dressed provocatively when the incident occurred. The author asserts that sexual harassment stems from power and provocative dress may not necessarily indicate a submissive victim, but rather an assertive woman, and thus a potential harasser may not target such a woman to be his victim.