ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Misty Cooper, Comment, *Pharmacist Knows Best? Enacting Legislation in Oklahoma Prohibiting Pharmacists from Refusing to Provide Emergency Contraceptives*, 42 TULSA L. REV. 771 (2007).

An interesting legal and ethical quandary has arisen recently as pharmacists, who possess moral and ethical objections to abortion, have refused to fill prescriptions for emergency contraceptives. Many jurisdictions have either contradictory laws about the legality of these responses to legitimate medical needs or fail to address them entirely, allowing these dilemmas to be settled by administrative processes. This comment first addresses a misconception in common understanding of the difference between emergency contraceptives and chemical abortifacients that often leads to the refusal of pharmacists to fill prescriptions. Next, the article examines actual cases where this issue has arisen before excoriating the theoretical defenses to a pharmacist's right to refusal. The author then arrives at the conclusion that Oklahoma, and by extension, all states, must enact a law preventing pharmacists from refusing to provide emergency contraceptives to protect a patient's right to liberty.

Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671 (2007).

Under the Uniform Parentage Act (UPA), only the male gamete donor is addressed and this creates an inequality when a donor seeks to maintain a parental role over the child who issued from the gamete donation. The author of this article seeks to expose and correct the unequal treatment resulting from the UPA's gender based rule that seeks to prevent sperm donors from asserting parentage rights over a child issuing from their gamete donation. Two California cases, *K.M. v. E.G.* and *Steven S. v. Deborah D.*, are selected that illustrate the disparity of the UPA, where a female donor was granted the same parentage right denied a male donor merely because the female donor was not mentioned in the legislation modeled on the UPA. This note then proposes a new statute that would eliminate both gender distinctions and would prevent a court from having to discern parties' intent after the fact. The author's proposed statute would require the birth mother to state, prior to receiving the gamete donation, that she does not intend for the donor to have parentage rights in cases of a known donor.

Richard F. Storrow, *Marginalizing Adoption Through the Regulation of Assisted Reproduction*, 35 CAP. U.L. REV. 479 (2006).

Adoption law, as a well-developed legal field, should provide only a partial template for development of assisted reproduction laws because several aspects of the adoption process require that adoption and assisted reproduction evolve as distinct legal fields. The attempt to neatly fit assisted reproduction law into the adoption framework downplays the intricacies of adoption. The author finds especially troubling Professor Wardle's assertion at the Wells Conference on Adoption Law that heterosexual married couples should be given statutory preference as adoptive parents. An adoptive parent selection process that focuses on the overriding importance of marriage does not advance the needs of adopted children, especially in the case of foster children needing a home and should not automatically apply as a criterion in the adoption process. The automatic extension of adoption law to laws regarding access to assisted reproduction ignores the complexities of adoption.

Katheryn D. Katz, *Wells Conferences on Adoption Law: The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303 (2007).

The legal characterization of ex utero embryos have generated much debate, but this article argues that characterizing such embryos as human beings would strongly impact reproductive issues and adoption laws and practice. Today, the issue is becoming particularly contentious because there are approximately 400,000 frozen embryos in the United States and many differing opinions concerning what should be done with them. The author explores the legal history and implications of viewing the ex utero embryo as a rights bearing entity, property, and person. The author ultimately hypothesizes that if the embryo were viewed as a person, in vitro fertilization (IVF) may be outlawed or reduced to one egg at a time and adoption laws would be expanded to include embryos given to another couple. However, if such adoptions of embryos occur, new concerns arise, such as requiring the progenitors to supply identifying information so that the resulting child would have access to his or her genetic history.

Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies,* 80 TEMP. L. REV. 123 (2007).

This article analyzes new tort laws that reduce access to abortion, effectively destroying the otherwise constitutionally protected service. In *Okpalobi v. Foster*, for example, the Fifth Circuit held that state sovereign immunity and standing doctrines prohibited a group of physicians from challenging a Louisiana

tort statute that provides a private right of action for damages resulting from an abortion. Because the legislation does not include a cap on liability and permits a patient to sue even where she has consented to and underwent a properly performed procedure, doctors will become unwilling and/or unable to engage in otherwise constitutionally protected services. Although the court may have reasonably been concerned that taking jurisdiction would have opened the floodgates to an impracticably broad range of suits, the author posits that the solution is to adopt a new test. This test requires courts to ask whether the otherwise self-enforcing statue devises a liability scheme that deters the reasonable person from engaging in the legislated conduct to the extent that it effectively bans the conduct.

Stewart Jay, *Ideologue to Pragmatist?: Sandra Day O'Connor's Views on Abortion Rights,* 39 ARIZ. ST. L. J. 777 (2007).

This article analyzes former Supreme Court Justice Sandra Day O'Connor's views on abortion throughout her tenure on the Court. Its central focus is whether O'Connor was a pragmatist, recognizing the necessary shift in society's moral intuitions over time, or an ideologue. Rather than one or the other, one best understands her as an amalgam of the two, confident that certain aspects of abortion were appropriate for legislation, while others fell within the sole purview of a women's conscience. As a former legislator and a woman, despite her personal reservations, O'Connor was able to appreciate both the physical and emotional complexities of America womanhood and the likelihood that the judiciary would not issue the definitive decision on the abortion issue. For this reason, the author attributes any ideological underpinnings in her opinions to her own views on gender equality, rather than the Court's privacy concerns advanced in its seminal abortion decision.

Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U.L. REV. 413 (2006).

The Wells Conference on Adoption Law attempted to produce a broad and comparative overview of the world's current approach towards regulating assisted reproductive technology (ART) in the areas of law and policy. There is the distinction drawn between two types of ART policy, one in which a married but infertile couple uses it as a means to produce a child for their marriage, and a second category in which unmarried people use it to produce children who may be raised outside a typical family structure, without both a father and a mother. Across the United States, lesbian and gay adoption of children is met with assorted state laws, ranging from not allowing such adoption to states which explicitly allow them. Comparatively speaking, the world regulates ART much more closely, despite the fact that lifestyles in places like Europe tend to be more liberal. The

author attributes the chasm in the American and international views of the second category of ART policy and lesbigay adoptions to the strong American beliefs of individualism and innovation.

Traci Daffer, Comment, *A License to Choose or a Plate-Ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869 (2007).

States' specialty license plate programs have become a controversial issue because many states have issued "Choose Life" specialty license plates, which raise money for pro-life organizations. These controversial "Choose Life" plates have caused a great deal of litigation as opponents have argued that state issuance of these plates violates freedom of expression and violates the Constitution. The Fourth and Sixth circuits, as well as many state courts have addressed the merits of the First Amendment claims regarding the "Choose Life" specialty plates and have reached differing opinions. The inconsistency between the circuits is a result of the courts' option to classify the specialty license plates as either government speech or private speech. The author contends that the failure of states' efforts to avoid litigation by issuing pro-choice plates, by adopting an administrative specialty license procedure, or by abandoning the specialty license plate programs indicates that the only plausible solution is for the Supreme Court to accord an opinion on the matter.

Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

The South Dakota legislature passed a statute to outlaw abortion, except in cases where it would save the mother's life. This article considers whether the statute would still be unconstitutional under the Equal Protection Clause even if *Roe v. Wade* were overturned. The South Dakota legislature's rationale to shift the focus from fetal-protection to mother-protection rests on outdated gender stereotypes that would compel a mother to give birth. As a result, the statute creates harmful assumptions about women that would likely violate the Equal Protection Clause, which prohibits abortion bans that impose governmental regulation on women's roles. Therefore, the South Dakota statute could be found unconstitutional—despite an appeal of *Roe v. Wade*—because the government cannot use the criminal law to impose gender-based paternalism that conflicts with women's ability to make choices about motherhood.

Caroline Burnett, Comment, *Dismantling Roe Brick by Brick – The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227 (2007).

This article focuses on the Federal Partial-Birth Act of 2003, its attempts to overrule *Roe v. Wade*, and what the author perceives to be its illegal purpose. The federal ban was the first federal law to criminalize certain types of abortion. The ban stands in stark departure from those cases supporting abortion, such as *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The federal ban was argued to be unconstitutional, as its only purpose was to place an undue burden on a women's right to seek abortion, and in no way encouraged a woman's health. In the case of *Gonzales v. Carhart*, the Court should have struck down the federal ban and focused political resources on enhancing our social structure by providing healthcare and contraceptives so fewer women would be in the difficult position of deciding whether to have an abortion in the first place.

CHILDREN AND TEENAGERS

Bobbe J. Bridge, *Reflections on the Future of Child Advocacy*, 41 U. MICH. J.L. REFORM 259 (2007).

Recent trends of improvement in the child welfare system should be continued and expanded upon in the next thirty years. Successful trends have emphasized the needs of children by looking beyond the safety of children to additionally ensure children's well-being. The needs of children are advanced by strong representation in the courtroom, both by the children themselves and by independent, objective parties whose sole allegiance is to the best interest of the children. Children's needs are also addressed by clarifying the roles of the different parties in child welfare cases and by providing tools of self-advocacy to children. The author concludes that both the community and the judiciary are responsible for developing a strong child welfare system that makes children's rights equally important as, even paramount to, the needs of parents.

Danielle Diviaio, Note, *The Government is Establishing Your Child's Curfew*, 21 ST. JOHN'S J. LEGAL COMMENT. 797 (2007).

Facing splits between circuit courts, the author argues that some courts addressing challenges to juvenile curfew statutes have improperly construed juveniles' rights and parents' rights too narrowly. Originally, curfew laws were enacted as means to supposedly restrict crime and maintain social order. However,

recent studies have shown that such laws are ineffective when applied to juveniles because the majority of juvenile crime takes place during non-curfew times. Although the author recognizes that some minors' rights may be protected less vigorously than comparable adults' rights, the author argues that intrastate travel is a fundamental right and that making this right be dependent on the time of day is therefore a fundamental deprivation of minors' rights. By interpreting juveniles' rights narrowly and thereby upholding curfew laws, courts have deprived minors of their right to intrastate travel as well as their parents' right to raise their children as they see fit.

Katherine M. Swift, *A Child's Right: What Should the State Be Required To Provide To Teenagers Aging Out of Foster Care?*, 15 WM. & MARY BILL RTS. J. 1205 (2007).

Lower courts have interpreted the Supreme Court's ruling in *DeShaney v. Winnebago County Department of Social Services* to mean that children in foster care have a substantive due process right to personal safety. When foster children leave the system's care at age eighteen, they are more vulnerable to harms such as homelessness, poverty, and criminal activity than their non-foster care counterparts. This article argues that foster children need services to help prepare them for adulthood in order to avoid these types of harms. The author posits that obtaining such preparatory services should be recognized as a foster child's constitutional right while she is in foster care, and perhaps even during adulthood after she leaves the system. The author concludes that foster children should be able to sue foster care workers for violations of their constitutional rights if they do not receive preparatory services under 42 U.S.C. § 1983.

Scott Hollander and Jonathan Budd, *KidsVoice: A Multidisciplinary Approach to Child Advocacy*, 41 U. MICH. J. L. REFORM 189 (2007).

KidsVoice, an organization which provides legal advocacy services to 5000 children within the welfare system in Allegheny County, Pennsylvania, has developed a remarkably successful multidisciplinary approach to child advocacy. In 2000, when Pennsylvania law dictated that child advocacy attorneys would be required to take on further responsibilities, KidsVoice surmised that children would benefit from receiving care from social service experts along with attorneys. KidsVoice thus developed a new scheme whereby each child is represented by an advocacy team comprised of a social service specialist and an attorney, each bringing their particular expertise and diverse experience to the case as well as an increasing the number of hours dedicated to each client. According to caseworkers, judges, and service providers, KidVoice's new approach has improved the services and representation of the clients. Now that the agency has fully developed and

implemented its multidisciplinary approach, KidsVoice is working to create the necessary resources to help implement similar multidisciplinary frameworks within other child welfare agencies outside of its jurisdiction and in other counties throughout Pennsylvania.

Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 COLUM. J. L. & SOC. PROBS. 551 (2007).

This article focuses on the importance of the attorney-client relationship to the effective legal representation of children. Although communication is essential to any legal practice, the relative newness and unique challenges of child advocacy demand increased attention to the particular contours of the attorney-youth relationship. The author offers an analysis on youth client satisfaction rates, detailing the first-hand experiences of children who have received legal assistance through the juvenile justice system. The study revealed that continuous contact is both the source of highest satisfaction, where present, and the reason for the most severe disappointment, where absent. For this reason, practitioners must try to pay greater mind to each child's particular life circumstances, informing and including children in their representation, and bar associations must reformulate their codes of ethics for child representation to promote such endeavors.

Dana Beth Finkey, Note, *The Hague Convention on the Civil Aspects of International Childhood Abduction: Where Are We, and Where Do We Go From Here?*, 30 HASTINGS INT'L & COMP. L. REV 505 (2007).

The Hague Convention on Civil Aspects of International Child Abduction was a treaty composed by the United Nations in an attempt to protect minors under the age of sixteen from being wrongfully abducted from their country, and to ensure a safe return to their homes. There are two defenses for the abducting party provided for by the convention including the "right of custody," granting parents the right to determine the place of residents, and the defense of grave risk to the child's mental and physical health if returned. These defenses, however, do not give sufficient protection to the often non-custodial mothers who are victims of domestic abuse and choose to flee with their children to a foreign country. While many courts in the United States have interpreted these defenses broadly, the author contends that they afford insufficient protection. Instead, the legislature should educate itself using the data collected under the Violence Against Women Act and amend their adoption of the current convention to better respond to the needs of abused mothers and families.

Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247 (2007).

This article examines the Indian populations in South Dakota and analyzes the social and economic environment in an attempt to discover why these populations are disproportionately suffering from poverty and delinquency. An in-depth review of three government reports leads to the conclusion that drastic steps must be taken to break the poverty and lack of opportunity that plague Indian populations. Unlike the successful Indian reservations in states like Connecticut, where booming casinos have led to investment in the Indian society, the South Dakota Indian communities are isolated and poor areas, where there is insufficient housing and families are unable to provide basic human needs and sufficient medical services. The author proposes that there must be early intervention by the state in the forms of social and economic prospects. The tribes' distrust of the government requires that South Dakota take into account tribal cultural sensitivities and try to work together so as to best serve the communities.

Ann Reyes Robbins, *Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children*, 41 U. MICH J. L. REFORM 243 (2007).

There is a growing gap between the treatment of children in dependency proceedings and those in delinquency proceedings, though often the juveniles' behavior stems from the same issues. The dependency proceedings have taken a "save the children" approach, as opposed to the delinquency proceedings which since 1967 have increasingly adopted a harsher criminal justice model. Accordingly, the delinquency proceedings use probation officers with no social work background or children training, and no guarantee of special representation for the children in court, unlike in dependency proceedings. The author contends that this offers insufficient protection to juveniles in the delinquency proceedings and the system must be adjusted to be closer to the approach of dependency proceedings, specifically using the Family Group Conferencing model. These meetings allow families to discuss their problems with a social worker to determine the best way to handle the delinquent child, deciding where the child should live, who will take care of him and what social services are necessary to reform him.

Pauline Self, Note, *The HPV Vaccination: Necessary or Evil?*, 19 HASTINGS WOMEN'S L. J. 149 (2008).

The question whether states should require young women and adolescents to be vaccinated for Human Papillomavirus (HPV) has set off a dispute in the state political arena between conservative groups and medical professionals. Yet this

debate ignores the reality that HPV, which adolescents transmit through oral or vaginal intercourse, contributes to the social problem of high rates of cervical cancer in women. The author balances the arguments for and against state-mandated vaccination, reasoning that the history of American immunization laws established that states could infringe upon a family's right to choose whether its daughter gets vaccinated. Because families who object to the vaccine often do not have correct knowledge about it, families seeking an exemption should participate in an educational seminar before receiving the exemption. This type of interaction encourages families to base their decision whether to seek an exemption on their daughter's health needs rather than their myths or other misconceptions about the vaccine.

Barry J. Berenberg, Note and Comment, *Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases*, 36 N.M. L. REV. 533 (2006).

The New Mexico legislature's 2005 amendment to the state's Abuse and Neglect Act requires the appointment of a traditional lawyer, rather than a guardian ad litem, for children who are involved in protective proceedings before the children's court. While a guardian ad litem would recommend the best interest of the child, as governed by an attorney, a "youth lawyer" would recommend the expressed wishes of the child, as governed by the child. The role of the youth lawyer is examined, compared to alternative approaches, along with the analysis of past and present case law for the purposes of examining the "pending cases" clause of the New Mexico state constitution. While the clause may block children who are already in the system from obtaining a youth lawyer, a functional interpretation of the common law rights of children eliminates that problem. In conclusion, the youth lawyer system avoids the influence of the pending cases clause.

Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UMKC L. REV. 789 (2007).

Congress' 2003 amendments to the Child Abuse Prevention and Treatment Act (CAPTA) requires all doctors whose patients give birth to infants affected by illicit drug or alcohol use to report it to child protective services. Drug use among pregnant women is not discovered often enough by physicians, and when it is discovered, it is often referred to non-medical and/or non-treatment institutions. The author critiques the amendments to the legislation as the primary method of prenatal care and treatment by comparing federal and state implementation of CAPTA and its effects throughout the healthcare system. Because of its interference with delivery and prenatal care, and its inability to help children who

enter the welfare system due to their parents' drug abuse, CAPTA is ineffective. In conclusion, the CAPTA policy is rejected and an alternative health model is suggested whereby physicians respond to drug and alcohol problems with early assessment, referral and treatment in the attempt to diagnose and solve problems earlier and with greater effectiveness.

David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases,* 16 S. CAL. INTERDIS. L. J. 293 (2007).

When lawyers represent juveniles, ethical issues may arise when the client's behavior suggests that competency issues should be raised but he or she refuses to broach the issue. Oftentimes the juvenile has little recourse when counsel chooses to raise capacity issues without their consent other then Rule 1.14 of the Model Rules of Professional Conduct which, although it may provide some relief, still denies a client his or her autonomy. While Rule 1.14 allows another attorney, acting as guardian ad litem, to step in and represent the juvenile, the client is still at the mercy of a lawyer's judgment. Furthermore, juveniles cannot challenge their lawyer's motion because they don't have the capacity to file an ethics complaint with the American Bar Association. To protect juvenile rights, states should appoint a non-lawyer guardian ad litem who is better equipped to represent the client, or at least incorporate competency issues into procedural law, thereby providing the juvenile with a record that can easily be used to contest an advocate's motion.

Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J. L. & MED. 625 (2007).

Within the context of law, a person's sex can be broken down into three categories: biological sex, common law sex, and legal sex. The three defined categories of a person's sex contribute much to the debate when a person is born with "intersex characteristics." The medical term "intersex" is given to the many different conditions that can give rise to an individual showing "characteristics of both the male and female sex of the species." It has been questioned whether minors who are born with intersex characteristics have sufficient cognition to make their own decisions about sex assignments. There is an inherent danger of mistake when parents make the decision to perform an infant sex assignment solely to rehabilitate or improve aesthetics for the child.

James V. Smith II, *A Case for Kids in California: How Student Expulsion Hearings Should Preclude Subsequent Juvenile Criminal Prosecutions*, 33 W. ST. U. L. REV. 45 (2006).

Public school students in California who are accused of crimes are forced to defend themselves in both expulsion hearings and juvenile criminal prosecutions. Even when these students are exonerated in their expulsion hearings, they must once again defend themselves in Court. The author believes the schools conduct full and fair hearings which satisfy state constitutional requirements, and due to the doctrine of res judicata, the students should not have to take part in a second trial. This belief is based on the California Supreme Court decision in *People v. Sims* that applies res judicata to administrative hearing decisions. Because the school board has already litigated the student's guilt, the student should be protected from another hearing.

Brooke Kirkland, Note, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States,* 12 BUFF. HUM. RTS. L. REV. 197 (2006).

Due to recent media and political attention regarding immigration since September 11, 2001, there have been many Congressional proposals, which have attempted to curb or completely eliminate birthright citizenship of children of undocumented aliens in the United States. There is a perception that undocumented aliens give birth to children in the United States in hopes of attaining citizenship and other American rights and benefits; however, citizenship through a child is a difficult and challenging process regardless of whether or not a child is granted birthright citizenship. If the United States were to limit jus soli citizenship—citizenship granted to anyone born within a state's territory—there would be a surge in "stateless" children and generations of children and families without access to basic rights. In an example of the dangers of limiting jus soli the author discusses the result of strict citizenship laws in Germany and Japan which resulted in many Turkish and Korean residents, respectively, who were denied basic rights. Therefore, jus soli should not be severely curbed but if it is limited, it should be limited in a way that gives undocumented children at least permanent residency and access to basic rights.

Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case,* 41 U. MICH. J. L. REFORM 215 (2007).

In the Nathaniel Abraham murder case, an eleven year old was charged with murder and sentenced as a juvenile. There are three sentencing options available for juveniles; juveniles can be sentenced as juveniles, as adults or given a

blended sentence, which is a delayed adult sentence that allows freedom if the child is rehabilitated at twenty-one years old. A child offender is still a child and in need of the opportunity for rehabilitation; the juvenile justice system can afford that rehabilitation. Unfortunately, when a juvenile is sentenced as an adult, the child is robbed of that rehabilitation because the juvenile justice system often delays any rehabilitative efforts until the minor reaches the age of majority and is transferred to state prison. Law schools and attorneys should be trained to use the juvenile system and respective laws as an opportunity for rehabilitation and approach these cases with a less adversarial traditional criminal law approach.

DOMESTIC VIOLENCE

Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B. U. L. REV. 157 (2007).

The T visa was created by the Trafficking Victims Protection Act (TVPA) and has been ineffectually used due to both the law enforcement's misunderstanding of the problem of human trafficking and the nature of the act. The TVPA was passed in reaction to the human trafficking problem in the United States and seeks to provide a new method of protecting victims after their release from traffickers, the T visa, but this new visa has been ineffectual. Unfortunately, the T visa is distributed by two different agencies with different standards and requires both that the applicant be an iconic victim—a victim who had no freedom from her trafficker, who had been involved in forced sexual activity, who was liberated by authorities, and who helps in the prosecution of traffickers. The author argues that the "iconic victim" requirement allows many actual trafficking victims, in the labor, service, and sex industries, to slip through the cracks and that the dissolution of decision making allows for wildly varying standards which are inequitable. The author proposes that the TVPA be modified to better reflect the actual victims of trafficking and that decision making be placed in a central head agency to regulate the standards.

Andra Nahal Behrouz, *Women's Rebellion: Towards a New Understanding of Domestic Violence in Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E. L. 153 (2007).

Despite a lack of widespread support, Islamic feminist-scholars seek to expand interpretation of the *Qur'an* to recognize full gender equality. The traditional interpretation of Islamic texts, along with Islamic legal tradition, has served as a sanction for domestic violence in Muslim communities and an overall subjugation of women. This article discusses the approach by Islamic feminist-

scholars to retranslate and contextualize the *Qur'an* in an effort to modernize the religious text by showing how different translations and interpretations actually empower women and remedy widespread domestic violence. The author shows how a retranslation of two crucial words in verse 4:34 of the *Qur'an* actually discourages physical violence, limiting it as an act of last resort. In conclusion Muslim women need to be increasingly involved in the interpretation of religious texts, with the caveat that reform originates within the Muslim community rather than from the outside.

Tamara Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2 (2007).

Courts do not allow victims of domestic abuse to drop charges against their attackers if they feel the victim has been coerced to do so with violent threats because such threats are an integral part of domestic violence. However, victims may also face other types of coercion, such as financial coercion from their attackers or coercion from the court to not drop their charges. The author suggests that coercion needs to be better understood in order to better evaluate the victims' situations. In domestic violence cases, the ultimate goal is to restore the victim's freedom. Courts should be protecting that freedom rather than continuing to ignore it by not considering the far-reaching effects of coercion on the domestic violence victim.

Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007).

This article re-conceptualizes the crime of domestic violence by suggesting a Coercive Domestic Violence statute that requires evidence that the defendant has a history of domestic violence with the intent to gain power over the victim. Historically and still applicable in most jurisdictions today, domestic violence is not considered a separate crime but is instead classified using general criminal statutes like assault or harassment and focusing on specific events rather than a pattern of violence. The proposed Coercive Domestic Violence statute looks beyond isolated incidents of domestic violence and emphasizes the importance of the defendant's state of mind, specifically looking at the intent of the defendant rather then the effect on the victim. Focusing on pattern and intent tells a more complete story of domestic violence and will lead to more suitable punishment and judicial action. The current criminal justice system needs to change in order to incorporate the Coercive Domestic Violence statute.

Leigh Goodmark, *Going Underground; The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999 (2007).

Women who decide to go underground to escape an abusive relationship face myriad legal complications, particularly if children are involved. The legal system can sometimes divulge these women's locations to their abusers or punish them for custodial interference. Domestic violence is a complicated area of the law where court outcomes may vary from judge to judge, and battered women may have difficulty finding competent legal counsel. Lawyers must be careful not to advise abused clients to commit any criminal acts in their flight, such as taking children across state lines in violation of a custody order. Lawyers must give clients an honest and blunt analysis of the potential helpfulness of judicial intervention, and counsel them on their non-judicial options.

EDUCATION

Russell W. Rumberger, *Parsing the Data on Student Achievement in High-Poverty Schools*, 85 N.C. L. REV. 1293 (2007).

Amidst increased interest in school performance, this study of elementary students of different genders, races, ethnic groups, and economic groups compares performance on standardized math exams in private schools, low-poverty public schools, mid-range public schools, and high-poverty public schools. The study found that students performed substantially better in low-poverty schools, but that there was a duality of causes for this drastic gap—both individual personal circumstances and the schools' techniques—affected performance. While attending a high-poverty school does not have a substantial detrimental effect on student achievement, attending a low-poverty school seems to boost achievement; of students in high-poverty schools, about two-thirds of students' low achievement is based on differences—social, family, or otherwise—between the students when they entered kindergarten. The author concludes that a simple concentration of students of a particular socio-economic group has less to do with their performance than with their individual characteristics and the techniques used in schools. Therefore, it is worthwhile not just to focus on mixing richer and poorer students, but instead on improving school techniques and encouraging positive habits.

Caroline Elizabeth Branch, Comment, *Unexcused Absence: Why Public Schools in Religiously Plural Society Must Save a Seat for Religion in the Curriculum*, 56 EMORY L.J. 1431 (2007).

Discussion of religion is markedly absent from public schools in a country where church and state are separate, but where religious issues permeate all manners of secular American society. American youth are disadvantaged by receiving an education that does not address religious issues or religious plurality because at adulthood they will enter a society where religion is a major topic of debate and will be unable to productively engage in diverse communities. The author engages in an exploration of religion in a political liberalism and First Amendment context, and examines the possibility of allowing religious teaching within public school curricula. The author posits that it is possible to teach religious issues in public schools, as long as the school is willing to teach material in a secular and neutral way, although there may be many schools that are unequipped or unwilling to teach religious material in this manner. Neutrality of religious material would make students comfortable and familiar with the United State's commitment to the principle of religious liberty, an idea that is introduced to children in school.

Allison N. Crawford, Note, *Learning Lessons from Multani: Considering Canada's Response to Religious Garb Issues in Public Schools,* 36 GA. J. INT'L & COMP. L. 159 (2007).

This note discusses the recent religious garb cases that have followed the religious headscarf ban in French public schools, focusing on the *Multani* decision and Canadian religious garb issues. The author begins by describing the Canadian Supreme Court's *Multani* decision, which overturned a school board Council of Commissioners' prohibition on a student's *kirpan* wear; the court considered the *kirpan* ban a denial of a student's freedom of religion. The author then considers a similar ban in the United States and the Ninth Circuit's upholding of the right to wear a *kirpan* in the *Cheema v. Thompson* case. While other American school districts have learned from these decisions, the Supreme Court has provided schools a mix of cases regarding free speech and religious freedom that seem to conflict. In light of this, the author concludes that the guidance of the Canadian Supreme Court in *Multani* should guide the United States Supreme Court and the world when considering the rights of citizens to wear religious garb.

Danielle Holley-Walker, *The Importance of Negotiated Rulemaking To the No Child Left Behind Act*, 85 NEB. L. REV. 1015 (2007).

The No Child Left Behind Act (NCLB) was designed to provide all children with the opportunity for a high-quality education, however, the author finds that the Act has failed and has created more tension between federal and state governments. The Department of Education administers NCLB and is required by statute to use negotiated rulemaking to determine the regulations and implement the Act. Congress ordered that an "equitable balance" of program providers and beneficiaries participate in the negotiated rulemaking process because the regulations have such a significant impact on schools and students. This article links the failure of NCLB with the Department of Education's intentional decision to not collaborate with program beneficiaries, such as parents and students, despite the Congressional direction. The author concludes that Congress must clarify the definition of "equitable balance" and provide a remedy for wrongfully excluded parties in order to ensure more balanced representation.

Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps in our Public Schools*, 85 N.C. L. REV. 1315 (2007).

As currently structured, the educational system in the United States denies equal opportunities to low-income students. This is evident in the disparate funding to public schools at local, state, and federal levels, the unfavorable distribution of teachers in low-performing schools, and curriculum insufficient to prepare low-income students for college. This article argues for closing the achievement gap between low-income students and affluent students through a comprehensive analysis of the problem within legal, political, and educational schemes, and essentially, uprooting the idea that low-income students will always perform poorly no matter what opportunities are given to them. The author provides possible solutions to eliminating the gap by adopting weighted student funding, a funding program that assigns funds to each child for the amount proportional to their needs. The author also addresses the importance of equalizing teacher quality, adopting a curriculum for college preparation through policy changes and litigation, and getting those in leadership positions to see the educational gap as a serious problem in our nation.

Eleftheria Keans, Note, *Student Interrogations By School Officials: Out with Agency Law and in with Constitutional Warnings*, 27 B.C. THIRD WORLD L. J. 375 (2007).

The Supreme Court in *Ferguson v. City of Charleston* held that when a non-law enforcement actor searches a person for evidence with the intention of turning

over the evidence to the police, the searcher must give a constitutional warning. The author argues that the resulting *Ferguson* test should be applied to school interrogations, specifically in situations where a principal seizes evidence from a student with the intention of turning it over to the police. Many jurisdictions still hold that in such an interrogation, school officials do not have to give *Miranda* warnings because the principals are not acting as agents of law enforcement. However, based on an analysis of the *Ferguson* decision, as well as other Supreme Court decisions regarding school officials, interrogations, and law enforcement, the author claims that school interrogations fall within the parameters of the *Ferguson* decision. Using the *Ferguson* test within the school context would produce a uniform standard which protects constitutional rights since students will explicitly know whether their statements and evidence will be used for external investigations.

Kevin C. McDowell, *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in the Public Schools*, 40 IND. L. REV. 499 (2007).

The Establishment Clause of the First Amendment implies religious neutrality in public schools, not preferring one religion to another or no religion to religion. This has led to the misconception that the only way to guarantee neutrality is to not mention religion at all in school, and that the mention and teaching about minority faiths is an inherent exclusion of Christianity, thereby resulting in litigation. The author of this article shows the vast role that religion plays in public schools and the state of the law by discussing these cases, which revolve around observed holidays, mascots, speech and images on t-shirts, the teaching of evolution, school curriculum, the study of Islam after 9/11 and even *Harry Potter*. There exists an evolving defense strategy permitting restrictions on student speech to avoid potential Establishment Clause violations by public school districts. The Supreme Court has not officially ruled on the matter, but their avoidance of the issue, while simultaneously acknowledging its existence, permits school districts to perform a disservice to education.

Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419 (2007).

This article looks at the impact of litigation on student achievement and its ineffectiveness in improving student performance in urban public schools due to the faulty assumption that more money translates into a higher quality of learning. After exploring the historical shift in education policy and analyzing the long-term effects that school desegregation and finance litigation left on urban public schools, the author calls for a new approach that does not focus on academic achievement as a function of per pupil spending. Placing the urban public school within its social

and economic surroundings, the author criticizes the way current education policy does not ensure that students receive quality education because urban schools may lower standards to make it seem like their students are achieving. To fix this paradox, one must recognize that America's understanding of academic success fails to examine how a student's family, friends, and community affect one's academic performance. Litigation therefore fails because the judge's orders ignore the factors outside of the school environment that may contribute to a student's low academic achievement.

FAMILY

Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Content, and Parental Conduct in Determining Legal Parentage,* 15 AM. U. J. GENDER SOC. POL'Y & L. 379 (2007).

Deciding the legal parentage of adults in a child's life has fallen to the courts as the definition and conception of the "family" has changed in our world due to advances in both medical technologies and the rights of "non-traditional" families. This decision has traditionally been decided on four factors—procreative intent, genetics, the marital presumption, and parental conduct; the courts, being reluctant to find more than two parents for a child, follow these biases and risk cutting willing and caring adults out of a child's life. This article analyzes two circumstances in which a child may be raised by more than two married adults, children conceived through assisted reproductive technologies and those conceived in extramarital affairs. In both circumstances, the author presents cases where courts have rigidly held to the two parent paradigm to the detriment of the child. The author contends that this real threat to children can be avoided by accepting three parent families in situations where a child has come to rely on more than two adults.

Carole Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M,* 30 HARV. J.L. & GENDER 67 (2007).

The market for surrogacy in the state of New Jersey in the mid-1980s, coupled with the inept performance of a surrogacy broker, generated the legal and emotional uncertainty surrounding the *Baby M* case. The author discusses the similarities of commercial surrogacy to any other economic market, while also highlighting the unique nature of surrogacy that keeps this market from being regulated in the same way as a purely financial undertaking. Specifically, the deep emotional connections felt by the various parties to surrogacy cause the market of commercial surrogacy to be shaped by personal and emotional factors that are

lacking from more traditional marketplaces. The author ultimately finds that the incomplete exchange of information regarding both the surrogate and the woman who commissioned the birth of Baby M lifted this case outside of the scope of the many other successful surrogacy relationships formed by the surrogacy broker in this matter. Codification of the rights of the parties of surrogacy relationships, a common legislative response to the *Baby M* case, now prevents reoccurrence of the "legal limbo" that surrounded the seminal surrogacy case.

Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 WIS. L. REV. 489 (2007).

The landmark decision of *Loving v. Virginia* struck down anti-miscegenation laws but societal acceptance of interracial marriages and families has not progressed very far past the idea of "marrying up" or "civilizing" the partner of color as a result of a "cognitive imprint" on race and inequality. Throughout history, several racial paradigms have persisted, which place Caucasians on top and people of color underneath, to serve or to be saved, and these paradigms inform the stereotypes held about other races. The author delves into an explanation of the four paradigms she highlights, and examines *In re Adoption of A.M.H.*, a case involving a custody battle for a Chinese girl by her biological parents and her Caucasian foster parents who felt by keeping her they would save her from the negative aspects of life in China. In the author's opinion, society must acknowledge its "cognitive imprint" in order to accept interracial marriages as equal unions between two races. This would allow individuals to view interracial marriages and families in terms of racial difference and equality, instead of as a vehicle for social and racial mobility.

Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485 (2007).

The article advocates for an "engagement with" model of family-state relations regarding child welfare, which respects family autonomy while recognizing the mutual dependency of the state and families. A careful balance is necessary to keep families from becoming controlled by the state while providing them with the resources necessary to prevent child abuse and neglect. The current child welfare system is reactive to occurring or impending abuse and neglect cases, and only preventive approaches, such as decreasing poverty and providing nationalized healthcare, will help the entire family rise out of conditions that lead to poor living conditions and harm the children. The author contends that these preventive measures must be matched with state support as the centerpiece of the entire child welfare system, thus creating a mutual and beneficial relationship for both the state and families while promoting good citizenship and inhibiting child

abuse. The author concludes by examining three examples of this balanced approach: the Nurse-Family Partnership program, the Chicago School District's Child-Parent Center, and the reform of Alabama's child welfare system.

Madeline Howard, Note, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97 (2007).

Subsidized housing policies must go further to protect the non-traditional family by integrating low-income housing units into the greater community and breaking down the barriers between race and wealth. Although government-funded public housing began during the Great Depression to aid middle class families, over the decades African Americans, the elderly, and female-headed households have become the most prevalent residents of government subsidized housing. To determine the governmental housing effects on the family unit, the article describes the bedroom guidelines, policies which dictate adding a new family member into the housing unit, and the eviction policies within low-income housing facilities. Furthermore, an analysis of the Food Stamp Program and the Temporary Assistance for Needy Families Program reveals that the subsidized housing program, in comparison, is progressive and accommodating to the non-traditional family. Despite these advances, the author posits that the government should increase the amount of subsidized housing, provide services for single parent households, and amend the One Strike Policy, which dictates that a family can be evicted from a housing unit if a family member commits a criminal activity.

Kathleen L. Manley, Comment, *Birth Parents: The Forgotten Members of the International Adoption Triad*, 35 CAP. U. L. REV. 627 (2006).

The increased popularity of intercountry adoption over the last decade has presented United States lawmakers with new challenges in the prevention of illicit adoptive practices. Current federal law, which focuses on the rights of both the children and adoptive parents, does not sufficiently protect the rights of birth parents. In particular, adoption laws do not provide adequate safeguards to prevent the adoption of children who are not actually orphaned or to inform parents of their rights in petitioning for the return of their illegally adopted children. Congress must therefore ratify the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, which details criteria of adoptability and requires adoption agencies to inform carefully parents the effects of their consent. To that end, the author calls upon Congress to seek both punishments for those who fraudulently induce unwitting parents to give up their children and safeguards that better position such parents to reclaim their sons and daughters.

Judge Paul H. Mitovich, *Ohio Wrongful Pregnancy, Wrongful Birth, and Wrongful Life Law Needs to be Revisited to Obtain a More Equitable Result and Consistency of Law*, 33 OHIO N. U. L. REV 623 (2007).

Wrongful birth, death and life are three causes of action that the Ohio Supreme Court has failed to recognize. The author criticizes two Ohio Supreme Court cases which reason that damages for a doctor's negligent act should be limited to the narrow time frame of pregnancy and birth. Moreover, tort law principles of negligence and causation, which normally apply in a wrongful death cause of action, should also extend to wrongful pregnancy, birth and life causes of action. Instead of excluding these causes of action from tort remedies and unreasonably protecting the medical community, courts should allow juries to decide the proper amount of damages that the plaintiff should be awarded. However, if courts still apply current Ohio law, the State Legislature should intervene to pass legislation that considers the financial and emotional hardship that a doctor's negligent act causes a mother or child.

Joseph H. Karlin, Comment, *"Daddy Can You Spare a Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317 (2006).

State intestacy laws allow posthumously conceived children who are born nine to ten months after death of the father to receive social security survivor's benefits. Posthumously conceived children born after that time are ignored. Through analyses of case law and statutes, the author argues that the current state of intestacy laws regarding posthumously conceived children is inconsistent, unsettled and archaic in light of modern technology. Legislators should redraft current intestacy laws to balance the rights of posthumously conceived children against other interested parties. The drafters of the Uniform Probate Code, Uniform Parentage Act and Restatement (Third) of Property should rethink relevant sections, and Congress should redraft the Social Security Act in order to address posthumous conception.

Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes,* 16 LAW & SEX. 45 (2007).

Mediation is a better way to solve child custody disputes between lesbian partners than litigation in court. Methods employed by courts to settle custody disputes between heterosexual partners, such as the "best interest of the child," should not be used when dealing with lesbian partners because the standards are too vague and give judges too much discretion. The current judicial system favors feminine and private lesbian mothers, which often leads butch and public lesbians to hide their identity, causing a stunt in their autonomy and lesbianism in general.

The author suggests a lesbian-centered mediation approach to settling custody battles that would be supervised by the lesbian community and better reflect lesbian family values. Mediating in this way will better serve all the parties' collective interests in custody disputes.

Susan Harris Rimmer, *"Orphans" or Veterans? Justice for Children Born of War in East Timor*, 42 TEX. INT'L L. J. 323 (2007).

In East Timor, the mothers of the hundreds of children born of rape during the Indonesian occupations from 1974 to 1999 are imparted a degraded social status. This detrimentally impacts their children's welfare and legal rights, treating the children as though they are by-products of crime or sin. The government of East Timor has instituted an official silence on both the number and the treatment of the children born during the Indonesian occupation. The author proposes to re-characterize the mothers and their children as "veterans" of conflict, which would be in accordance with the status afforded to the former Falintil guerrillas involved in the Indonesian occupation. Due to the current social state of East Timor, the re-characterization proposal could counter both the sufferings faced by the mothers and their children and improve nationalist imagery.

Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 LAW & SOC. INQUIRY 1 (2006).

This article contrasts the outcomes that occur when a court focuses on children's rights versus parent's rights in custody disputes between biological and non-biological parents. As the definition of the family continually expands, some legal scholars and social scientists have called for legal changes to protect children's attachments by embracing these expanding definitions. The author concentrates her research on the Timmie Meldrum story as well as all the published judicial opinions in the state of Iowa to illustrate the evolution of decision-making and rationale between 1940 and 2000. The analysis of Iowa decisions shows a shift from a children's best interest rationale, based on strict definitions of the family, to a parental rights rationale, which disregards expanding definitions of the family. Although a parent's constitutional rights can never be ignored, a focus on a children's rights argument and a more open mind by the judicial system may provide the best solution in complicated custody disputes.

Margaret Ryznar, Note, *Adult Rights as the Achilles' Heel of the Best Interests Standard: Lessons in Family Law from Across the Pond,* 82 NOTRE DAME L. REV. 1649 (2007).

One of the principles that guide decision-making in family court is the "best interests" standard, which places a child's best interests above all else. However, in an attempt to litigate constitutional issues in state family law cases and champion "adult rights," federal courts have jeopardized the "best interests" standard. The author argues that by weakening the "best interests" standard and granting parents constitutional rights, federal courts fail to protect children when their interests do not match up with those of their parents. As an example, the English legal system currently faces a similar problem with the imposition of the Human Rights Act of 1998 (HRA) onto English courts, which champions adult rights over the children's rights that were protected in a previous act, the Children Act of 1989. The English struggle to balance children's rights interests with the HRA's prioritization of adult rights, acts as a warning against the federalization of family law in the United States and the importance of the "best interests" standard.

Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J. L. & SOC. PROBS. 583 (2007).

Increasing numbers of undocumented children are coming before New York City Family Courts as the number of undocumented immigrants in the city grows. Actions taken in Family Court can have serious collateral consequences: admissions made in Family Court can prevent parents from obtaining legal status and may even lead to their deportation. However, undocumented children who are "dependent" on a Family Court and are eligible for foster care due to abuse, abandonment or neglect can become legal citizens, with the help of the Court, via the Special Immigrant Juvenile (SIJ) petition process. The author argues that family lawyers, child protective agencies, and Family Courts should work to give legal status to undocumented children via the SIJ process. Family lawyers should learn about how Family Court processes can affect clients' immigration status and give their clients the best representation possible.

Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J. L. & SOC. PROBS. 301 (2007).

Current custody law, which still has not caught up with changes in the family dynamic over the past sixty years or the abolition of orphanages thirty years ago, relies on the Best Interests of the Child test. Family Courts have begun to see

arguments in custody cases that rely on the Fourteenth Amendment's Due Process Clause for a right to family integrity and a reason to keep children with their extended family rather than with foster parents because both the relatives and the child have a liberty interest in keeping the biological family together. Unfortunately, custody cases are mostly settled out of Courts and none of these cases have made it to the appellate level, thus the effectiveness of the argument cannot be properly evaluated. The author analyzes the three Supreme Court decisions that express sympathy for the family integrity doctrine and also lists several reasons why the family integrity doctrine is beneficial to the children involved, their families, and the State. The family integrity doctrine can be used to develop and strengthen the best interest doctrine and remedy its flaws.

Jessamine L. Grice, Note, *A Proposal to Increase Child Support Payments by Massachusetts State Prisoners*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 665 (2007).

Massachusetts bears a massive deficit of unpaid child support payments by non-custodial parents. One group particularly burdened in meeting this financial responsibility is Massachusetts state prisoners. Current state legislation prohibits private industries from contracting for prisoner labor, thereby severely limiting the earning capacity of prisoners still responsible for making child support payments during their incarceration, as well as limiting the skills prisoners could develop through prison sponsored employment. The author explores various states' programs for the contracting of prison labor by private industries and states how those states regulate prisoner pay so that confined parents may still meet their child support obligations while incarcerated. A blueprint for enacting such programs and regulation in Massachusetts is outlined and the impact of such implementation is explored.

Lauren F. Cowan, Note, *There's No Place Like Home: Why The Harm Standard in Grandparent Visitation Disputes is in the Child's Best Interests,* 75 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 3137 (2007).

Traditionally, the Constitution has protected and upheld parental rights in regards to child rearing. Over the past few decades, the American family has changed and the psychological benefit of a protected grandparent relationship has become an important right in the family. *Troxel v. Granville* is a landmark case regarding grandparent legal visitation rights, and the test that the courts and legislature should apply going forward in determining when grandparents should be allowed court ordered visitation. The author describes the pros and cons of the two standards that developed from the *Troxel* decision, the "best interests plus standard" and "the harm standard." The "harm standard" will arguably best protect

the parent's rights and thus the child's interest by protecting the parent-child relationship from unwanted state intrusion and court ordered grandparent visitation.

FEMINISM

Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007).

Third-wave feminists, who have distanced themselves from the generation that preceded them, approach feminism from a non-legal standpoint which has yet to be integrated into a feminist legal framework. Dissatisfied with their mothers' brand of feminism, the third-wave feminists have embraced a feminism that encourages traditional feminine appearance, pleasure, and economic empowerment, and they approach these issues with coalition building and media, without consideration of any legal modes to achieve their goals. The author surveys the second-wave and the third-wave's approaches to pornography and notes that third-wave feminists do not consider the broad social effects of pornography and the potential effects new communication media can have on it. Third-wave feminists react to the issues raised by the second-wave, as opposed to raising completely new issues. Ultimately, third-wave commentary must engage in legal analysis on the improvement of conditions for women in order to substantially alter feminist ideas.

Rachael Andersen-Watts, *The Failure of Breast Cancer Informed Consent Statutes*, 14 MICH. J. GENDER & L. 201 (2008).

Informed Consent statutes were created to affirm that doctors discuss all treatment options with breast cancer patients. The problem of medical paternalism, where doctors dictate treatments rather than discuss options, was acute in breast cancer diagnosis and treatment as doctors only suggested the mastectomy without discussing its advantages and disadvantages compared to a lumpectomy. Informed Consent statutes are not as beneficial to breast cancer patients as their creators had hoped. The statutes are designed to reduce the number of mastectomies as compared to lumpectomies even though both surgeries have their own benefits and consequences based on the patient. The author concludes that these statutes are counterproductive despite their good intentions, because patients should be getting individualistic care and make the final decision on treatment rather than standardized and generic legislated care.

GENDER BIAS

Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO J. GENDER & L. 43 (2007).

The lack of progress over the years in achieving a more gender-balanced Supreme Court, coupled with the unfair critique of female nominees as "unfit," has signaled that the time has come to enact a parity provision mandating gender balance on the Court representing the gender-balance of the nation: five women and four men. The author recognizes that many individuals of all political and social backgrounds object to what they perceive as "quotas" on the Court. Nevertheless, the author argues that such measures appear to be the best way to achieve the important goals of gender balance and equality, in the face of the inadequacy of waiting for a "market solution" to address the problem. Despite objections, the author argues that following such a mandate would actually be a return to the Framers' intent and practices, which promoted regional diversity and representation as a way of establishing legitimacy. Likewise, in the face of changing notions of diversity, such fair gender representation would promote and reinforce the legitimacy of the nation's highest court.

Pat Chew & Lauren K. Kelly-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643 (2007).

Many law journals, federal and state cases, and legal briefs still tend to perpetuate gender stereotypes by their use of gender-specific vocabulary. This article discusses the impact of gender-specific vocabulary, as measured by previous studies, and concludes that the use of male-gendered words in place of gender-neutral words actually affects the way we perceive our world. The study looks at the use of gendered words which have gender-neutral counterparts and maps the change in frequency of their usage over several decades and among several mediums. The author concludes that we must take greater steps to adopt gender-neutral vocabulary in the legal profession and promote discussion about gendered words. This is because the common perception—that insisting on using gender-neutral in place of gendered words is only an arbitrary difference or that those who insist on using such words are radicals—is a flawed and damaging assumption about the use of such gendered words.

Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429 (2007).

The work-life balance objectives of the Family Medical Leave Act (FMLA) have not been realized for men, which ultimately negatively impacts women by causing them to remain relegated to the traditional role of caregiver. Men are held to traditional standards of being "breadwinners" as well as to modern standards of being "contributing caregivers," but at the same time are discouraged from serving as primary caregivers by both society and their employers. The author focuses on how these issues affect men from all class levels, from those in the lower income levels whose families cannot survive on one income, to those earning higher incomes that face demotions and other negative consequences. The FMLA can support more men by allowing for replacement pay for those who do take leave and with more positive and consistent judicial enforcement of its objectives for men that are penalized upon returning from leave. The author posits that women would not face as much pressure to assume the role of caregivers if the obstacles discouraging men from utilizing the FMLA were alleviated because families would have a choice of who was in a better position to take leave.

Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679 (2007).

This article examines how the legal paradigm in the United States has failed to recognize the difficulty in deciphering gender based discrimination, thus defining gender discrimination narrowly to include only explicit gender bias cases. Courts, in an attempt to draw a clear line between discrimination and non-discrimination, have placed a heavy burden on the victim to identify and report gender discrimination immediately upon the occurrence of the discriminatory act. Perceiving discrimination, however, is a complicated process, shaped by various sociological and psychological factors. Thus, identifying and reporting subtle discrimination may be hindered for reasons including fear of retaliation, varying degrees of self-esteem, and the tendency to think of oneself as a non-victim living in a just world. The author urges that the courts, in determining the existence of discrimination, should pay close attention to the kinds of gender bias mixed with other factors, including possibly the flaws of the victim herself.

María Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trend*, 19 HASTINGS WOMEN'S L.J. 53 (2008).

This article focuses on the current situation of gender fairness in the legal profession and provides recommendations to help decrease the gap between male and female professionals in the legal world. A detailed study examining perceptions and practices within the legal profession show that although the number of female attorneys has increased to comprise 50% of all attorneys, there is still very limited number of female attorneys who reach partnership positions, comprising only 15% of all attorneys. Some of the factors contributing to this disparity are gender-based bias, insufficient infrastructure to help balance work and family, and an organizational culture more favorable to male than female. The author suggests that the above issues can be addressed through changing the work environment to value quality work rather than the number of billable hours and informing law students, particularly female law students, about the realities of working as a lawyer. Further, the author urges that continuing research and analysis are needed to discover the past and current patterns of gender bias.

Kathryn Keen, Note, *The Equity in Athletics Disclosure Act: Does it Really Improve the Gender Equity Landscape?*, 34 J.C. & U.L. 227 (2007).

The Equity in Athletics Disclosure Act ("EADA") is a congressional statute designed to inform prospective student-athletes of a school's commitment to gender equity in athletic opportunities. The author scrutinizes the EADA's success in fulfilling its stated purpose by presenting criticisms offered by both government and athletic officials. The EADA relies on reports that that use varying reporting standards, omit important information, and have no established oversight. Furthermore, there is no evidence that student-athletes reference EADA reports, or if they do, that the reports provide reliable comparisons. As a result, the EADA should be repealed in order to relieve the government and schools of an unjustified financial burden.

Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 679 (2007).

Sexism has a hidden side in society's unconscious bias and gender stereotypes. These biases and stereotypes act as barriers to women reaching the highest positions in their career field. The author distinguishes certain stereotypes and biases that are most prevalent and which must be addressed in order to make any meaningful progress in diminishing these barriers to professional success. Subtle sexist barriers, such as femininity, cognitive dissonance, gender bias in

support networks and in family contexts; and strategies for defeating such barriers are analyzed. Responding to the subtle side of sexism requires a three prong approach: educating women and their employers, addressing conflicts between work and family, and a focus on accountability.

Sarah K. Fields, *Intramural and Club Sports: The Impact of Title IX*, 33 J.C. & U.L. 521 (2007).

Title IX, enacted in 1972, prohibited the discrimination and barring of sports participation based upon sex; the legislation was meant to equal the playing field for educational sports opportunities regardless of the person's sex. The Act's history and initial success is outlined, followed by an examination of the mechanisms currently employed by universities and colleges throughout the Nation to keep intramural and club sports in compliance with Title IX. Many college and university intramural sports programs can, inadvertently, come under Title IX—and ultimately violate the Act—when such programs' funding is based upon tradition and history, or even varies practice field time amongst the different sexes. The author uses institutional case studies to explore methods for recruiting men and women into such sports programs, as well as analysis as to whether the techniques used would successfully keep the programs in compliance with Title IX. Continued supervision of such techniques in order to ensure that the intent of Title IX is effectuated in intramural and club sports is needed.

Benjamin P. Carr, Note, *Can Separate Be Equal? Single-Sex Classrooms, The Constitution, and Title IX,* 83 NOTRE DAME L. REV. 409 (2007).

Separate single-sex classrooms coupled with coeducational classrooms, while hard to effectuate because of costs and actual implementation, should be considered valid under the Constitution and Title IX. The skeptical scrutiny standard, used in determining the Constitutional validity of single sex programs, requires a showing of an extremely persuasive justification for the gendered distinction. The Supreme Court also enforces an anti-subordination policy which will strike down distinctions that perpetuate the subordination of men to women. Title IX requires that the separation be based on an important objective, that the activity must be implemented in an evenhanded manner, that the activity must be voluntary, and that the school must continually monitor the activity to ensure regulations are always met. The author asserts that the best system would be to have single-sex classes as well as coeducational classes to provide the benefits that single-sex classrooms afford students while meeting Constitutional and Title IX requirements.

HISTORY AND CULTURE

Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3 (2008).

This article examines wills executed in Los Angeles during the late-nineteenth century. The author uses these wills to demonstrate that the Married Women's Property Acts were having a substantial effect on many women in California and that women in the nineteenth century were surfacing as a powerful economic entity. Before the implementation of such acts, women had limited options as to how they could disperse their property upon death. Once such acts were passed, specifically in California, women's wills reflected many social changes and realities of the time—among other observations, some women had substantial personal assets and women were less likely than men to will their property to their spouse. The author argues that her observations demonstrate that women in late-nineteenth century Los Angeles were a powerful economic and social force, whose significance was reflected in the wills they executed.

Adrien Katherine Wing & Hisham Kassim, *Hamas, Constitutionalism, and Palestinian Women*, 50 HOW. L.J. 479 (2007).

This article focuses on contemplating how the status of women within Palestinian society could possibly change under a government led by the Islamist party Hamas, whose party platform is built on the Islamic law of *Shari'a*. Palestinian society is very deeply defined by cultural practices and religious beliefs that have not allowed women to assert and maintain an equal status to men. The author highlights passages from Palestine's Basic Law and Draft Constitution and suggests ways in which they can be amended by changing the wording of phrases to secure rights and equality for women. Palestine is currently facing political turmoil, however, and these issues may not receive much consideration for some time. It will be interesting, the author notes, to see how much support Hamas will continue to receive if the political situation does not calm in the near future.

HUMAN RIGHTS

Jennifer Rellis, *"Please Write 'E' In This Box" Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India,* 14 MICH. J. GENDER & L. 223 (2008).

This article focuses on intersexed people, those who are not fully male or female, and the social and legal issues that surround them in the United States and India. In America, intersexed infants are deemed medical emergencies and undergo gender-reassignment surgery to become either female or male, whereas in India they are slightly more accepted as they have a specific role in Hindu society. Indian society forces people to identify as either male or female, as does the legal system, yet intersexed people constitute a third gender that is not recognized by any legal classification. The author posits that intersexed people are subject to human rights violations, in areas such as employment discrimination and marriage, because they may self-identify with a third gender or with a gender that conflicts with their assigned legal gender on their birth certificate. The author concludes that judicial recognition of a person's self-identification as male, female or a third gender is integral to protecting that person's human rights.

LGBT RIGHTS

Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169 (2008).

The Real ID Act, passed in 2005, reveals the very real problem that transgender people face in this country when they seek official recognition of their new gender due to varying standards amongst the state and federal agencies. This new act forces everyone to show a government ID before entering government buildings or other secured areas, and the difficulty that transgender people have with proving their new gender in order to match the gender on the ID with their real gender makes compliance with this act all but impossible. England's Gender Recognition Act (GRA) is a model, though a flawed one, for overarching legislation designed to protect the rights and force recognition of transgender people after they have committed to living in their new genders. The author first explains away many misconceptions about transgender people before analyzing the difficulties and varying standards, both modern and historically, that exist in the United States and England. The author proceeds to argue that implementation on a federal scale of an act like the GRA is the only way to effect meaningful change

and offers suggestions in order to improve upon the GRA-like act that should be adopted in the United States.

Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 LAW & SEX. 77 (2007).

Dissenting judicial opinions can be viewed as a vehicle for forecasting and catalyzing legal and social change, especially with regard to controversial topics such as gay and lesbian family rights. While they hold no precedential value and may seem inconsequential, dissents serve several functions such as recording a dialogue on adjudicated and highly contested issues, providing a forum for social commentary, and creating suggestions for law-making bodies. The author surveys seventy-eight dissents from cases dealing with gay and lesbian custody and adoption issues from 1952-2004, which illustrate different methods of analysis and offer a range of alternative opinions and legal theories. Because they are not a compromise, like a majority opinion, dissents are a platform for future consideration of issues that legal frameworks are not equipped to handle at that time. The author concludes that dissents evidence a shift in social opinion and many times can be seen as the first step in a transformative process.

Leah Shams-Molkara, Note, *Crossing the Great Sexual Divide: Transsexuals Seeking Redress Under Title VII of the Civil Rights Act of 1964*, 81 ST. JOHN'S L. REV. 399 (2007).

This article addresses the gender discrimination transsexuals face today and argues that Title VII of the Civil Rights Act of 1964 should afford transsexuals protection and redress from this form of discrimination. The author describes the history of Title VII and the debate over the statute's use of the word "sex" as a description of a protected class rather than the word "gender." While early case law indicates that Title VII considers "sex" to be a purely biological distinction, more recent cases have opened the door to considering "gender" discrimination as prohibited and actionable under Title VII. The author argues that the underlying intent and spirit of Title VII favors the protection of transsexuals, since the goal of the act was to ensure equal opportunity and treatment in the workplace. Therefore, American courts must be willing to respect and adhere to the 1964 Civil Rights Act as an evolutionary legal protector of transsexuals' rights.

Kate Girard, Note and Comment, *The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community*, 36 N.M. L. REV. 565 (2006).

Intermediate scrutiny advancing beyond the law's current rational basis review is required in order to afford members of the gay community with true equal protection. In *Romer v. Evans*, the Supreme Court held a law discriminating against the gay community unconstitutional by applying an equal protection analysis for the first time. However, lower courts consistently misinterpret the *Romer* decision, focusing on the fact that the Supreme Court did not qualify members of the gay community as a suspect class, rather than seeing that the Supreme Court chose not to use a heightened lens of scrutiny because the case did not warrant it. The Supreme Court must either clarify the decision in *Romer* or heighten the level of equal protection scrutiny with regard to government practices discriminating on the basis of sexual orientation. Furthermore, the federal and a majority of state courts are reluctant to advance scrutiny; however, based on New Mexico's gay community and a history of legislation aimed at protecting their rights, New Mexico is prepared to take the necessary steps forward to ensure a higher level of scrutiny when applying equal protection under the law.

Courtney Trimaco, *K.M. v. E.G., My Two Moms: California Courts Hold That a Child Can Have Two Natural Mothers*, 38 U. TOL. L. REV. 1065 (2007).

The California Supreme Court in *K.M. v. E.G.* found that, in a custody dispute between two partners in a lesbian couple, genetic sanguinity was sufficient to determine a maternal relationship. This article argues that the increasing prevalence of the non-traditional family, combined with advances in reproductive technology require legislative action to define parental rights. The decision in *K.M. v. E.G.* to ignore a contractual agreement and to treat ova donation as different than sperm donation did not adhere to case precedent and existing statutory language. As a result, this will create greater confusion in courts when ruling on such complex parental right issues. Legislatures must pass a statute to clearly define the law as it relates to parental rights in non-traditional family settings in order to give parties greater certainty in this area.

Nikko Harada, Note and Comment, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M. L. REV. 627 (2006).

Transgender prisoners raise complex issues regarding traditional definitions of sex and gender as it relates to the prisoner's gender identity. This article

examines the classification of transgender prisoners and the argument for protection of gender-identity rights under the Eighth Amendment. In order to provide judicial remedy, the author advocates the recognition of transgender prisoners' gender identities as guaranteed by the Eighth Amendment under an evolving standard of decency. Considering the limitations of the Eighth Amendment, notably concerns for their privacy, transgender prisoners may find possible recourse via Equal Protection or Procedural Due Process. Allowing transgender prisoners to voice their self-recognized gender identity can mitigate the negative effects of automatic classification based on sex and gender stereotypes.

Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of* Loving*: Reflections on the "*Loving *Analogy" for Same-Sex Marriage,* 51 HOW. L. J. 117 (2007).

In *Loving v. Virginia* the Supreme Court held that the Virginia law forbidding bi-racial marriage was unconstitutional because it violated notions of due process and equal protection. In advocating for the judicial recognition of same-sex marriage, proponents of the cause analogize the unconstitutional law in *Loving* to laws that currently bar same-sex couples from marrying. The authors assert that applying *Loving* as precedent for legalizing same-sex marriages is "bad law" because the Supreme Court has rejected it for that proposition in *Baker v. Nelson.* Furthermore, the African American community fervently rejects the *Loving* analogy because of the distinctions between race and sexual orientation. The article concludes that to bar marriage based on race, as was the case in *Loving*, is irrational and anachronistic, however, barring one from marrying another of the same sex is consistent with the institution of marriage and modern notions of morality.

Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379 (2007).

Many "white" mainstream LGBT organizations have utilized the language of the African American civil rights struggle in support of LGBT rights, but this same-as argument is not the best approach to an interracial dialogue on LGBT issues. The author argues that homophobia and racism are different experiences with different histories, and same-as comparisons only serve, at best, to irritate the African American community. The same-as comparison also marginalizes the experiences of LGBT African Americans and overlook the existence of racism in the LGBT community. Social Identity Theory holds that people categorize themselves and others into social groups, allowing for comparisons between groups, and people view the comparison of the gay rights struggle to the civil rights struggle through the prism of their own social identity. LGBT organizations should find common, superordinate goals with the African American community, thereby advancing both groups civil rights.

John Balzano, *Toward a Gay Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 LAW & SEX. 1 (2007).

Chinese society is transforming at a rapid pace, and Chinese law and policy on gays and lesbians is also changing. China has gradually adopted laws meant to protect "vulnerable groups"—*ruoshi qunti*, such as the elderly, the economically disadvantaged, the disabled, women, children, and ethnic minorities—and laws have been enacted to give women formal equality and prevent anti-female discrimination, although these laws can be paternalistic at times. While some would protect gays and lesbians as a "vulnerable group," the Chinese government does not support gay adoption and same-sex marriage. However, certain criminal provisions applied to those who engaged in homosexual acts have been repealed, and homosexuality in and of itself is now not considered a mental disorder, although it is viewed as possibly leading to anxiety, depression, and mental anguish. Further, the Chinese government's actions combating AIDS have moved from condemning homosexual conduct to calling for outreach to and education of high-risk groups, however, laws ostensibly meant to protect gays and lesbians may serve to reinforce negative stereotypes.

Joan Catherine Bohl, *Gay Marriage in Rhode Island: A Big Issue in a Small State,* 12 ROGER WILLIAMS U. L. REV. 291 (2007).

This article focuses on the legal landscape which led to the constitutionality of gay marriage in Massachusetts and the high probability that the same will develop in Rhode Island. *Goodridge v. Dep't of Public Health* is the landmark Massachusetts case which deemed gay marriage constitutional. The case law in Rhode Island is already moving in a similar direction to Massachusetts case law prior to the legalization of gay marriage in the *Goodridge* case. In fact, Rhode Island courts have recognized that marriage laws must evolve along with society. The author discuses the accomplishments that Rhode Island has made towards legalizing gay marriage and the indicators, such as the support of parental rights for same sex parents in child visitation cases, which supports future approval of gay marriage.

MARRIAGE

Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813 (2007).

The history of discrimination against gay, lesbian, bisexual, and transgender people, especially in the context of U.S. marriage cases, reveals that illogical judicial reasoning is a major factor contributing to the ongoing discrimination against homosexual marriage. The author first provides a brief history of gay discrimination, placing the contemporary gay marriage debate into a larger context and ultimately positing that homosexual marriage is the next logical step in the fight to give the gay community full access to fundamental human rights. Marriage cases that deny access to same-sex marriage are based on flawed issue framing, for example, discussing the right to same-sex marriage instead of discussing the right to marriage. The debate over gay marriage, by asking whether marriage should be founded on heterosexual procreation, or whether homosexual partners make the best parents, asks interesting but incorrect questions. The author concludes that the only logical and constitutionally pertinent question is whether the right to marriage is fundamental, a question that has long been answered not only in seminal case law, but also in the minds of most Americans.

Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75 (2007).

This article addresses the subsequent effects of *Loving v. Virginia* on marriage and recent decisions addressing whether same-sex marriage bans violate state constitutional rights. While *Loving* is considered the seminal case that overturned bans on interracial marriage, some cases, such as the 1955 case of *Naim v. Naim* have raised questions about the lengths of the decision; *Naim* involved a Chinese man and a White woman who were married, had their marriage challenged under Virginia's anti-miscegenation statute, and saw the Virginia Supreme Court deny their marriage twice, in spite of *Loving*. Subsequent cases, such as *Zablocki v. Redhail*, have recognized the right to marry as fundamental, but they have not gone so far as to recognize the right of same-sex couples to marry. More recently, a number of state courts have entertained state constitutional challenges to same-sex marriage bans but have used interpretations of *Loving* and subsequent case law to deny these challenges. The author concludes by comparing the plight of same-sex couples seeking to marry to the interracial couple who sought the right to marry in *Loving* and states that the constitutional support for such marriages is great.

Sean Hannon Williams, *Postnuptial Agreements,* 2007 WIS. L. REV. 827 (2007).

A postnuptial agreement allows a married couple, before separation occurs, to decide what their rights and obligations would be if they got divorced. Many state courts and legislatures have placed significant burdens on postnuptial agreements, although similar burdens are not placed on prenuptial agreements. Using bargaining theory and behavioral economic research, the author assesses whether postnuptial agreements should be given different legal treatment than prenuptial agreements. The author concludes that postnuptial agreements are more equitable than prenuptial agreements and negotiating this agreement benefits both spouses more than the state's default divorce rules. Consequently, postnuptial agreements should not be subject to additional regulation since they are no riskier than prenuptial agreements and produce a more equitable outcome.

Elizabeth S. Muyskens, Note, *Married in Kentucky: A Surviving Spouse's Dower Right in Personalty,* 96 KY. L. J. 99 (2007).

Few jurisdictions retain the common law rule of dower and those that do generally limit their statutes to real estate. Kentucky, however, includes personal property in its dower laws. The author discusses Kentucky dower law as applied to personal property, specifically, how courts protect the surviving spouse's dower interest from fraud. In order to avoid the law, spouses may fraudulently transfer money *inter vivos*, thus Kentucky courts have taken steps to protect a surviving spouse from insolvency by finding fraud in inordinately large transfers of real property, even if the deceased did not have a fraudulent intent. In order to avoid a finding of fraud the article recommends that attorneys know current state law so that their client's will does not evince an intent to defraud. Failure to accurately advise one's client can lead to legal malpractice claims.

Katherine M. Forbes, *Time for a New Privilege: Allowing Unmarried Cohabitating Couples to Claim the Spousal Testimony Privilege*, 40 SUFFOLK U. L. REV. 887 (2007).

Spousal privilege is afforded to married couples, and prevents spouses from having to testify against one another, protecting confidential communication in the marriage. Spousal privilege has not yet been extended to unmarried cohabitating couples, both heterosexual and homosexual. Courts should extend the spousal privilege to unmarried cohabitating couples on a case-by-case basis, focusing more on the nature of the couple's relationship and less on the institution of marriage as a qualifying factor. The case-by-case standard of review is already used for married couples, as courts can deny spousal privilege when they deem a marriage beyond

saving. The extension of the privilege is proper because courts and society have accepted unmarried cohabitating couples as a functioning family form in many other ways, such as employment benefits and domestic violence enforcement.

Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 743 (2007).

In order to prevent immigration marriage fraud, two different tests are used to evaluate a marriage: the "Establish a Life Test," which is based on the Supreme Court decision in *Lutwak v. U.S.* and establishes the intent of the couple at the time of the marriage, and the "Evade The Law Test," which only considers whether the couple tried to evade immigration law with their marriage. Unfortunately, the "Evade the Law Test" views couples who would eventually get married but were forced to do so sooner due to the law as equal to couples who married solely for immigration status. The author argues that only the "Establish a Life Test" should be used when considering if immigration marriage fraud has taken place because it first looks at the couple's intent and recognizes that there are many reasons for marriage. This test is more useful for determining fraudulent marriages as the "Evade the Law Test" sometimes splits families apart, which is in direct opposition to Congress' goal of using immigration laws to keep families together.

PARENTING

Laura Caviness Cocus, Comment, *Louisiana's Restrictive Relocation Laws: Jeopardizing Stability in Custodial Arrangements for the Sake of Geographical Proximity Between Divorced Parents*, 53 LOY. L. REV. 79 (2007).

The law in Louisiana concerning the relocation of a custodial parent of a child after divorce is unjustly skewed against that parent. The law requires the custodial parent to prove both that the move is in good faith and that the move is in the best interest of the child. The author addresses this issue by analyzing the laws governing the relocation of the custodial parent, both by direct analysis and through the lens of two narratives where the restrictive burden of proof has negatively affected a family. The author suggests that the law's bias against the custodial parent could be lifted by rejecting the "conservative" model now in place and adopting the "combination" model which places only the good faith burden of proof on the parent and asks that the other parent prove that a move would not be in the child's best interest. This change would be more equitable to the custodial parent, whom the court already considers to be the final arbiter on all household

decisions, and would follow the recent trend of other states towards a relaxation of relocation restrictions.

Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Courts*, 40 COLUM. J.L. & SOC. PROBS. 507 (2007).

The New York City Family Courts, by paying a high level of deference to the unsatisfactory operation of the child welfare agencies, fail to meet the needs of the City's parents and families. A lack of communication between parents' lawyers and their clients outside the courtroom hinders the flow of information between attorneys and parents. The judiciary, by its hesitance to intrude upon this flawed relationship between attorneys and clients, further contributes to extensive delays in the reunion of parents and their children. The author highlights several empirical studies, involving judges, parents' lawyers, and past parties to cases in the Family Court, in order to establish a general agreement regarding the troubling status quo of parental representation in Family Court. The article concludes that the examination of practices used by New York City children's lawyers, especially the strong representation of children during out-of-court administrative proceedings, should lead to increased cooperation between parents' lawyers and their clients, and therefore more satisfactory representation of parents in Family Court.

Mindy M. Willman, Comment, *Express and Implied Limits on Juvenile Court's Authority to Order Parental Drug Tests,* 43 IDAHO L. REV. 837 (2007).

Idaho magistrate judges may elect to follow family-centered or parent-centered approaches when sentencing minors with drug use problems. While the family-centered approach attempts to involve parents in the child's treatment based on the notion that the home environment plays a large role in the rehabilitation of a child, some magistrates choose to apply the parent-centered approaches, which impose random drug testing on a parent if he or she has a history of drug abuse. The author addresses a prevalent issue faced by magistrate judges: how do juvenile courts have jurisdiction to impose drug tests on a parent without formal charges? By forcing parents to submit to drug tests without a formal charge against them, parent-centered laws are violating due process and intruding on parents' liberties. In order to avoid unconstitutional intrusion on civil liberties, courts should refrain from requiring parental drug tests unless they have a basis for jurisdiction and attempt to protect parental liberties.

Cameron C. McCree, Note, *What About the Child?: A Critique of* Linker-Flores v. Arkansas Department of Human Services, 60 ARK. L. REV. 353 (2007).

For parental rights termination cases, the Arkansas Supreme Court in *Linker-Flores v. Arkansas Department of Human Services* promulgated the no-merit brief procedure for appointed attorneys to use when trying to withdraw from appeals they find lacking in merit. In parental rights termination proceedings, the best interest of the child is the highest concern and it is in the best interest of the child to have the proceedings conclude as quickly as possible so that the child can have a permanent placement. The author argues that *Linker-Flores* should be overturned because it establishes a lengthy process, does not balance the rights of the parties, and does not address public policy concerns. A better alternative to *Linker-Flores*, the author concludes, is to use the Florida courts' approach of a no-merit letter, which promotes quick proceedings and respects the appointed counsel's judgment of the case. The author posits that this alternative method will protect the best interests of the child without compromising the rights of the parents.

Monica Hof Wallace, *Child Support Savings Accounts: An Innovative Approach to Child Support Enforcement*, 85 N.C. L. REV. 1155 (2007).

In this article, the author analyzes and addresses the problems with the current child support enforcement program, and strongly urges the government to consider Child Support Savings Accounts (CSSAs) as a solution to improving efficiency of child support enhancement. Through federal initiatives, the government has been punishing the non-custodian parent who failed to pay child support by revoking their various licenses and passport, seizing assets, and giving them jail sentences. However, those methods have proven ineffective because the percentage of custodians who receive child support has not changed over the years. The author suggests that the CSSA can address underlying causes behind failure to pay by providing non-custodian parents with an account in which they can deposit money and the custodians can use that money to support the children. This program, coupled with a federal tax credit for the non-custodian parents who decide to use this system, will not only enhance child support enforcement, but also promote psychological and emotional well-being of the children and the parents.

Rebecca J. O'Neil, *Grandparents Raising Grandchildren in Illinois – Establishing the Right to a Continuing Relationship Through Visitation, Custody, and Guardianship in 2007: Where We've Been, Where We are, and Where We Need to Go,* 38 LOY. U. CHI. L. J. 733 (2007).

As grandparents in Illinois have assumed significant child-rearing responsibilities, questions as to their legal rights in child custody matters have drawn increased judicial attention in the State. The Illinois Supreme Court's 2002 decision in *Wickham v. Byrne*, invalidating a grandparent visitation statute as unconstitutional, has yielded unmanageable standards that have paralyzed the lower courts with confusion on custody, guardianship, and adoption issues. Although the state legislature has since amended the visitation statute three times, most recently in January 2007, inconsistency in its application persists. Moreover, current law fails to account properly for the view that parental rights must be contingent on the responsibility parents have assumed for their children and the energies they have thusly devoted. For this reason, the author advocates timely legislative intervention in the hope that future decision-makers will offer clarity and pay greater deference to the important role grandparents so often play.

Dree K. Collopy, Note, *Incorporating a Hardship Factor in Asylum Cases Based on Female Genital Mutilation: a Legislative Solution to Protect the Best Interests of Children,* 21 GEO. IMMIGR. L. J. 469 (2007).

When immigrant parents face deportation, they are forced into deciding whether to take their citizen child or lawful permanent resident children with them to their homeland, or leave their children with alternate care in the United States. The decision becomes more charged for those parents who are returning to countries that practice female genital mutilation. Parents risk either subjecting their daughters to mutilation to keep the family together, or leaving their daughters behind in alternative care for their protection. Parents facing such a dilemma may fight the deportation by either qualifying for a removal cancellation, asylum or withholding of removal. Immigrant parents do not easily qualify for such status: asylum and withholding of removal are nearly impossible to achieve. The author concludes that a hardship factor should be incorporated by legislation into the status requirements for both asylum and withholding of removal for parents in such situations.

Ellen Wertheimer, *Of Apples and Trees: Adoption and Informed Consent,* 25 QUINNIPIAC L. REV. 601 (2007).

It is unknown exactly why adopted children are more likely to suffer from learning disabilities than biological children. This article surveys recent research

on the rate of learning disabilities and mental illness in adopted children and comments on the lack of research and answers on the issue. Current disclosure law in adoption centers on child-specific information, such as an individual child's likelihood for medical conditions or behavioral problems, and requires adoption centers to disclose problematic information to prospective adoptees. Potential adoptive parents need to be informed of the higher likelihood of a learning disability in adopted children, and such disclosure should be mandated by the same statutes which now demand the disclosure of child-specific information for informed consent. Potential adoptee parents' vulnerable position in relation to the adoptive agency, combined with the entitlement to any and all information regarding adopted children, demands the statutorily required disclosure of the disability and mental health risks faced by adopted children and their adoptee families.

Melanie B. Jacobs, *Procreation through ART: Why the Adoption Process Should Not Apply*, 35 CAP. U. L. REV. 399 (2006).

Assisted Reproductive Technology (ART) falls within the realm of family privacy and should not be subject to the same processes as adoption; parentage should be determined through the Uniform Parentage Act (UPA). The UPA would benefit same-sex couples by allowing parentage to be established before birth based on the intended familial relationship between parents-to-be and child. The author believes that using the adoption processes to establish parentage of a child born through surrogacy or sperm donation is an invasive process which ignores the important fact that the parents intended on parenting a child. A family or person who causes the birth of a child intentionally should not have to adopt his or her own child. The UPA sufficiently protects the rights of parents who chose ART by providing for the parentage of the child before the child's birth, thereby avoiding a less invasive process for establishing paternity than the adoption process.

RACE AND GENDER

Amit Sen, *Policing the Border: Regulating Race, Gender, and Sexuality*, 8 GEO. J. GENDER & L. 67 (2007).

In this article, the author explores the malleability of racial and gender boundaries through the lens of the complex intersection of race, gender, and sexuality. The legal and political paradigms of the United States show relentless efforts of people to control the boundary between white and the other races, evidenced by prohibiting inter-racial marriages. Although the concept of colorblindness has generated a perception that race is merely a social construction

or malleable boundary that can be eliminated, it fails to provide recourse to the reality of racial discrimination. The author's analysis of the intersection between gender and race, however, shows that the border is not permanently closed; it is capable of shifting based on one's racial identity. A person may be able to pass as another race, thus crossing the boundaries of race and gender, but the passing experience can also be painful as it generates constant challenges to one's identity.

Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs"* 2007 WIS. L. REV. 283 (2007).

In 1999, police in Tulia, Texas arrested a group of forty-seven defendants, thirty-eight of whom were black, on various drug related charges. Of the few white defendants, many were fathers of biracial children or had been engaged in interracial romantic relationships. Although convicted, the defendants eventually received pardons after the intervention of various civil rights organizations revealed that the lead investigator had falsified evidence and committed perjury. Analyzing the case's historical and social undercurrents, the author argues that the quickness with which local law enforcement officials targeted and incarcerated the defendants is a reflection of both the institutional racism endemic to the federal war on drugs and the ever-persisting taboo of interracial dating. An outlier only insofar as the defendants ultimately received justice, the Tulia incident underscores the need for broad-scale reform in the criminal justice system.

Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89 (2007).

American and British law approach discrimination in different ways. British antidiscrimination law incorporates the views of legal scholars and cognitive psychologists who have found that discrimination can be intentional, unconscious, or institutional, while American lawmakers have passed antidiscrimination laws primarily focused on intentional acts of discrimination. The Macpherson Report—a detailed analysis of the police investigation that followed the murder of a black British teen named Stephen Lawrence by a group of white teens—exposed the racial bias within British law enforcement. This type of racially biased investigation, which also occurs in American law enforcement, should serve as a wake-up call for American courts to recognize that institutional and unconscious discrimination exist. Without this change, American courts will fail to recognize unconscious and institutional discrimination while British laws look to change the behavior of public institutions and put an end to these types of discrimination.

Recent intellectual developments should at least encourage courts to approach other forms of discrimination.

Nekima Levy-Pounds, *From the Frying Pan Into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285 (2007).

As part of its fight against major drug dealers, Congress passed mandatory minimum prison sentences for people who commit minor drug offenses. However, the mandatory minimum sentences fail to achieve their intended goal of interfering with major drug dealers, as prime offender's strike plea bargains while poor women of color, who are more susceptible to "crimes of survival" because they are more likely to suffer from poverty and domestic violence, are left exposed to harsh sentences which do not match their minor involvement in the drug trade. The author exposes this paradox by showing how incarceration feeds a cycle of poverty and crime which prevents poor women of color from obtaining public benefits that might put an end to the cycle. To end this cycle, the federal government should give these minor drug offenders benefits already enjoyed by other criminals, as well as invest in programs through which the incarcerated women could find work. Above all, Congress should ensure that the punishment of these women fits the degree, rather than the kind, of their offense.

Imani Perry, *Let Me Holler At You: African-American Culture, Postmodern Feminism, and Revisiting the Law of Sexual Harassment*, 8 GEO. J. GENDER & L. 111 (2007).

Postmodern feminist theory values a woman's ability to choose whether to ignore or receive a man's sexual advances. While traditional sexual harassment law is confined to the workplace and school, an African-American cultural phenomenon called "hollering," in which a person makes an overt sexual compliment to another person to express their attraction, goes beyond these traditional spaces and spills into the street. To address the problem of how to treat sexual harassment on the street, the author demonstrates that culture and moral-based theories ignore the context of these interactions, each of which may involve people of mixed races and different economic backgrounds. As opposed to bright-line sexual harassment laws such as Title VII, the author supports a policy-oriented approach that considers the context of allowing or prohibiting "hollering" on the street. This approach must balance the negative effects hollering may have on the person receiving the sexual advance with the negative effects that limiting this type of speech would have on this unique culture.

Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation,* 2007 WIS. L. REV. 409 (2007).

This article looks at tribal miscegenation laws and how those laws affect the relationship between Native Americans and African Americans. Historically, some Native American tribes implemented miscegenation laws to prevent Native Americans from marrying or having sex with blacks. They did this to conform to the white dominant society and to maintain their sovereignty as whites permitted Native Americans to maintain tribal sovereignty if they helped keep blacks at the bottom of the racial hierarchy. Through sexual assimilation, whites influenced Native Americans so much that even after the Civil Rights Movement, Native Americans have only just started to provide for black civil rights. It is unknown whether Native Americans will hold to their traditional racial hierarchy beliefs or instead challenge racial hierarchy and break free of pre Civil Rights ideas.

Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court – the Case of the Court Ordered Investigation*, 40 COLUM. J. L. & SOC. PROBS. 527 (2007).

The author addresses the failures of the New York City Family Court, focusing specifically on how those failures disproportionately impact low-income families of color. The failures of the Family Court are perpetuated by its continued use and reliance on Court Ordered Investigations conducted by the New York City Administration for Children's Services ("ACS"). ACS, as a child protective agency, is far from neutral and its disinterest is unlikely to provide the Family Court with information that could help it reach a determination on best interests. In order to resolve the bias against families of color, the slights, tolerated shortcuts, and invisibility within the Court Ordered Investigations must be exposed and addressed. The New York City Family Court must make clear that these are not child protective investigations conducted by the ACS, and the investigations should not be presumed accurate unless there has been the opportunity to hear from the witness who prepared the report as well as cross-examination.

Paul Bender & Chelsea Sage Durkin, *Justice O'Connor's Race and Gender*, 39 ARIZ. ST. L. J. 829 (2007).

Justice O'Connor played a pivotal role on the Supreme Court and cast deciding votes in important race and gender discrimination cases. The author performed a statistical analysis of important Supreme Court race and gender discrimination cases and found that Justice O'Connor supported women's rights in over 70% of the non-unanimous women's rights cases while supporting racial minority rights in only 25% of the non-unanimous race discrimination cases.

Justice O'Connor's willingness to find for women's rights stems from her views on race and gender, which the author believes derive from her personal experiences with sexism and first-hand observation of how dramatically women have benefitted from the removal of discriminatory barriers. However, Justice O'Connor believes the Fourteenth Amendment was written to bar all racial classifications, even when the classifications are for the benefit of racial minorities. Justice O'Connor would only allow affirmative action programs in situations where the actor was attempting to remedy its own past or present discrimination, rather than general societal discrimination.

Richard Banks, *The Aftermath of* Loving v Virginia*: Sex Asymmetry in African American Intermarriage*, 2007 WIS. L. REV. 533 (2007).

After the Supreme Court's ruling in *Loving v. Virginia* legalized marriage across racial and ethnic lines, the statistical rates of intermarriage changed dramatically. However, even with the changing attitude toward intermarriage, black Americans, particularly black women, remain less likely to intermarry than other races and ethnicities. Such asymmetry has been incorrectly traced to tradition. Such a casual analysis fails to acknowledge the sustained low levels of intermarriage among white and black Americans after the ruling, even as the statistical intermarriage rate for other races and ethnicities climbed. This article explores the reasons why the intermarriage rates of black women remained static, even as those for black men climbed post-*Loving*. The author posits that the cause results from the Civil Rights Movement, which placed the responsibility of maintaining the black family unit and cultural legacy largely upon black women.

Danielle Pelfrey Duryea, Note, *Gendering the Gentrification of Public Housing: HOPE VI's Disparate Impact on Lowest-Income African American Women,* 13 GEO. J. ON POVERTY L. & POL'Y 567 (2006).

HOPE VI is Congress's response to the deterioration of the buildings and communities of urban housing developments across the country. The author's thesis revolves around the observation that the HOPE VI program has left African American women behind in its attempts to rebuild and revitalize the country's poorest communities. As the program attempted to better low income urban areas, many residents were temporarily or permanently displaced, but many residents with higher incomes moved into these newly renovated areas. HOPE VI's redevelopment plan has relocated African American women to similarly situated poverty stricken areas without addressing and providing solutions for the problems plagued by the African American women in these urban housing developments. To counter the negative effect that the HOPE VI program has had on African American women, tenants should be allowed to participate in the Department of

Housing and Urban Development project planning and planning should restructure public housing to provide holistic community solutions for residents.

SAME SEX MARRIAGE

Renee M. Landers, *A Marriage of Principles: The Relevance of Federal Precedent and International Sources of Law in Analyzing Claims for a Rights to Same-Sex Marriage*, 41 NEW ENG. L. REV. 683 (2007).

This article claims that the Supreme Judicial Court of Massachusetts correctly decided *Goodridge v. Department of Public Health*, which held that a same-sex couple cannot be denied the protections and benefits of a civil marriage. While the government passed the Defense of Marriage Act (DoMA) in 1996, barring the federal acknowledgment of same-sex marriages, the debate continues as individual states each create their own laws, either recognizing or banning same-sex marriages. The author argues appropriateness of the decision by examining prior Supreme Court cases which establish precedent for the idea that any individual, regardless of his or her sexuality, is entitled to privacy within the sphere of personal relationships and constitutional protection when creating a family. Furthermore, an examination of progressive same-sex marriage laws within the international sphere, particularly in Canada and Europe, indicates that the rights of homosexuals transcend national boundaries and the United States should look outside her border to explore this global issue. Despite the importance of the *Goodridge* decision in expanding the rights of gays and lesbians, society as a whole must take further action to ensure that homosexual rights are protected.

Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV 19 (2007).

This article considers the current debate over what constitutes a marriage and the recent *Goodridge v Department of Public Health* decision that recognizes a same sex couple's right to obtain civil marriage licenses, to reevaluate what sort of union could constitute a valid marriage. The author's survey of the evolution of marriage throughout history leads to the belief that marriage is not a static institution, but one that has historically been evolving. Even in society today, we are reevaluating our view of what constitutes a family, with courts adapting to new family structures, including non marital unions, with the prevalence of cohabitation, children born out of wedlock, and the growing acceptance of same sex unions. In a diverse society like the one in the United States, it is dangerous for the government to define marriage; marriage should be seen as a civil institution,

and each union should be allowed to define themselves based on their own religion or beliefs. While change is a slow process, as time progresses, we must evolve our image of what a marital union should constitute.

SEX DISCRIMINATION

Leora F. Eisenstadt, *Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 VAND. J. TRANSNAT'L L. 357 (2007).

There are major differences between the Israeli and American notions of sex equality in the work place that at first glance seem irreconcilable. The Israeli paradigm allows for extended maternal leave, maternal exemption from the mandatory military service of other Israelis, shorter work hours, and earlier retirement among other benefits. Though this may offend the American understanding of strict equality, an examination of the cultural, geographic, and religious realities shows that these concessions are necessary. In an attempt to explain why these concessions are necessary, the author comments on the Arab-Israeli conflict, the Jewish legal system's sanction of gender separations, the influence of European ideas, and the collectivist ideology prominent in Israeli thought. The author concludes by expressing the difficulties that exist under both systems and states that both the Israeli and American systems could learn from each other.

L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007).

Courts that apply a "reasonable person" standard to determine the reasonableness of a sexual assault victim's actions ignore the important impact of gender and case-specific circumstances on a victim's reaction to sexual assault. Though the Supreme Court adopted a bipartite affirmative defense for employers seeking to avoid liability for sexual harassment claims, subsequent judicial application of this affirmative defense has been strongly biased in favor of employers. Courts have, for example, misapplied the burden of proof requirements dictated by the Supreme Court, and applied inexplicably different standards of reasonableness to actions of employers and employees. The author highlights surveys that discuss the practical and social factors that lead reasonable women to delay filing a formal harassment complaint, such as a justified fear of retaliation and the tendency of women to first resort to informal means of conflict resolution. The author concludes that a "gender-conscious" standard of reasonableness, and judicial consideration of the specific circumstances surrounding a victim's response

to sexual assault, will create more fair outcomes in cases determining an employer's liability for an employee's allegations of workplace sexual harassment.

Rachel C. Loftspring, Comment, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV / AIDS in Uganda*, 29 U. PA. J. INT'L L. 243 (2007).

Deeply embedded in Uganda's culture are unequal inheritance rights that must be changed in order to improve the country's economic and public health prospects. The author details customary Ugandan inheritance practices—including wife inheritance, widow cleansing, and property grabbing—and discusses the practices' devastating effects not only on the nation's women, but also on the health and prosperity of the nation as a whole. Female-friendly inheritance rights are an essential step toward the improvement of Uganda's health and economy because equal treatment of the nation's women can mitigate threats posed by poverty and HIV/AIDS. Awareness of Uganda's statutory law and commitment to various international human rights treaties must be increased, and the undoing of widespread acceptance of gender inequality must begin. Addressing these large cultural hurdles will allow legal remedies, including enforcement of current laws and promulgation of new laws, to provide real solutions to the poverty and HIV/AIDS crises that are currently plaguing Uganda.

Eunice Song, Note, *No Women (and Dogs) Allowed: A Comparative Analysis of Discriminating Private Golf Clubs in the United States, Ireland, and England*, 6 WASH. U. GLOBAL STUD. L. REV. 181 (2007).

This article focuses on discriminatory practices of golf clubs in the United States, Great Britain and Ireland that currently do not allow women to attain full club memberships. Although women have achieved a lot of progress in the area of sports equality, these clubs are allowed to discriminate against women by raising arguments of First Amendment association, tradition, and non-financial damage. The author compares legislation and judicial decisions in these three countries that rule both for and against discriminatory practices in private golf clubs. Although these clubs' policies affect just a small subset of women, the larger result is that gender quality is hindered so long as these practices continue. A significant way to effect change would be to pressure corporate sponsorship to boycott high profile golf competitions which are held at these exclusive golf clubs.

Dana E. Blackman, *Refusal to Dispense Emergency Contraception in Washington State: An Act of Conscience or Unlawful Sex Discrimination?*, 14 MICH. J. GENDER & L. 59 (2007).

In the State of Washington, it is sex discrimination and a violation of the Washington Law Against Discrimination for a pharmacist to refuse to fill a prescription for emergency contraception. The Washington Law Against Discrimination was amended in 1973 to protect against various forms of discrimination, including sex discrimination, and provides everyone the civil right of "full enjoyment" in public areas. Since only women can become pregnant, refusing to provide emergency contraception constitutes sex discrimination. The author concludes that a "refuse and refer" policy where a pharmacist refers the patient to another pharmacy violates women's reproductive freedom. Parties in other states should look into their public accommodation statutes to see whether it is sex discrimination for a pharmacist to refuse to provide emergency contraception.

Shu-chin Grace Kuo, *A Cultural Legal Study on the Transformation of Family Law in Taiwan*, 16 S. CAL. INTERDISC. L.J. 379 (2007).

Family law is not simply a guidance of relationship between individual members of a family, but rather a transitional entity describing and embracing its context of law and government. Taiwanese family law, traditionally seen as the law of "Relatives" and "Succession" in the Taiwan Civil Code, has transformed from its primarily male lineage clan model to a more western and gender-neutral system, causing tension and inconsistency between family law and constitutional values. The author of this article takes an ethnographic approach in reconciling traditional Confucian sentiment and Western ideals of family law, relying on the emphasis of legal scholars upon political change, formalization and modernization. These inconsistencies can properly be examined through the stages of developing kinship as presented in the Taiwan Civil Code and how those traditional values are being ignored or completely disobeyed as Taiwanese family law is undergoing modernization. In order to properly perform a cultural analysis of family law, one must also analyze its context and take into consideration other related and distinct legal areas such as Social Movement, Feminist Jurisprudence, Comparative Law and Legal Transplant.

Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco*, 16 KAN. J. L. & PUB. POL'Y 129 (2006/2007).

Morocco has illustrated how the valid application of *ijtihad*, a method of reinterpretation of Islamic law, in the Muslim world facilitates the advancement of

legal reforms, particularly in the area of women's rights. In the Muslim world, the amendments in the area of family law, which is typically restrictive, affording women few rights or privileges, exemplifies how the *itjihad's* application is advancing women's rights. Morocco's progressive *Mudawwana* (code) embodies Islamic history and teachings of fairness and equality in the modern world. The author concludes that Morocco's *Mudawwana* shows that Islamic legal reform is a gradual process. The eventual success of Morocco's progressive legal reform is unknown; nonetheless, Morocco's *Mudawwana* shows the value of applying *ijtihad* to legal interpretation in order to bring Islamic fundamentals in accordance with the demands of modern society.

Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J. L. & GENDER 151 (2007).

The Army will only be able to eliminate sexual harassment by fundamentally changing the military justice system. The need for change was made evident by three highly publicized sexual harassment cases in the 1990's. These cases demonstrated that coming forward could expose one to personal attacks as "liars, cheats and admitted frauds," and that great weight would be given to the rank and impeccable records of Army members when deciding whether someone was guilty. Four solutions to minimize incidents of sexual harassment within the Army were proposed: that the Uniform Code of Military Justice be revised, that the *Feres* Doctrine be overruled, that sexual harassment claims be removed from the Commander's discretion, and that Title VII be amended to also include military members. An "Army of One" would be created if the four solutions were implemented, ensuring all members were treated equally with the same rights.

Terry S. Kogan, *Sex Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007).

Sex-separated restrooms are not the natural result of the physical differences between men and women, but came about in response to Victorian attitudes regarding women. Architecture serves to reinforce gendered notions of society, and women's restrooms were of a kind with women-only department store parlors and railroad cars. These women-only areas were meant to protect women from their own physical and mental weakness as well as from men while preserving women's "clean" and "pure" image. These female spaces also served to maintain "separate spheres" in a society where more women were emerging into public life. The use of sex-separated restrooms conveys the notion that there are only two sexes, harming transgendered and intersex persons, and prevents people of the one sex from entering the bathroom of the other sex, preventing an opposite-sex spouse

from assisting their disabled spouse in the restroom, for example. Exposing the historical origins of restroom separation laws would help to educate people about the harmful results to some segments of the population and the need for gender neutral bathrooms and spaces.

Mark J. Calaguas, Cristina M. Drost, & Edward R. Fluet, *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471 (2007).

Tanzania is composed of two semiautonomous regions: the mainland of Tanganyika and the islands of Zanzibar. Both regions are culturally, ethnically and religiously diverse with varied legal rights from person to person based on religion, gender and place of origin. The authors use Tanzania as an example of one country's differing approaches to legal pluralism, looking specifically at matrimonial law and the country's attempt to balance tradition and liberty. Tanzania's variance in law is due to Colonialism influence upon an indigenous culture, although the influences vary within the country itself. For example, Zanzibar, where marriage is largely controlled by tribal customs, there exists little to no documented matrimonial rights; in contrast, Tanganyika has statutorily defined matrimonial rights for both Muslims, ruled by Islamic law, and non-Muslims. Critics push abolition of the inequality of women's rights in the system without considering the potential costs, such as a reaction of increasingly strict interpretation of religious laws in response to a perceived threat, or the lost benefits of religious dedication and belief. Tanzania's differing matrimonial rights acts as a demonstration of the very real challenges in postcolonial lawmaking, and an example of the opportunity for countries to take steps to reduce problems left from the colonial rule.

SEXUAL ABUSE

Prudence B. Carr, Comment, *Playing by All the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases After* Crawford v. Washington, 97 J. CRIM. L. & CRIMINOLOGY 631 (2007).

Following *Crawford v. Washington*, which established the rule that a defendant must have an opportunity to cross-examine child witnesses in child sex abuse cases prior to trial if such witness' testimonial statements made before trial are to be admitted in trial, the author posits that states should establish systems whereby a child's testimony is videotaped, along with the defense's pre-trial questioning of the child. Prior to *Crawford*, there was a degree of uncertainty in allowing child statements. Despite confrontation clause objections to their

testimonial nature, a wide variety of statements were allowed into evidence pursuant to significant state interests. In light of *Crawford's* ruling, the author argues that states should, through statute, employ the standards used in *Maryland v. Craig*, whereby interviews with child victims may be admissible where such interviews are videotaped, conducted in a comfortable atmosphere, and where questions provided by both the state and the defendant are relayed through a third-party professional. Such a policy, the author posits, would allow defendants to cross-examine child witnesses while still protecting the child from having to testify in court.

Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships,* 48 S. TEX. L. REV. 695 (2007).

Since the prosecution's "client" is the State, rape victims seeking support from prosecutors and seeing prosecutors as their personal attorneys soon find out that the victim's own interests can be subjugated to the prosecution's legal and ethical duties. Prosecutors have a conflicting relationship with victims in that they are the often the primary message-carriers of a victim's grief, but they do not represent the victim directly, make plea bargaining assessments that conflict with the victim's desire, and have legal and ethical duties to the client. Accordingly, prosecutors should advise rape victims that they can only play a small role in addressing the victims' personal legal needs. Ultimately, prosecutors represent the State, thus precluding victims from the privilege and confidentiality rights normally afforded to a legal client. Moreover, since situations arise in the course of a prosecution that lead a victim to believe that the prosecutor is her own personal attorney, the victim should be advised that she should engage an attorney to represent her personal interests.

Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259 (2008).

This article focuses on rethinking gender stereotypes in response to a recent study by the Bureau of Justice Statistics, which revealed that a high percentage of rapes within the prison system are perpetrated by female prison staffers against male inmates. In comparison to male staffers sexually abusing female inmates, sexual misconduct by female staffers is rarely prosecuted and lightly punished. In order to sufficiently protect male inmates from such violations, the author encourages creating a new gender-neutral standard to prosecute female sexual predators, thereby abolishing the stereotype that only males are capable of sexual violence. To further ensure prison safety for inmates, judges and law enforcement officials must impose harsher penalties on prison staffers who commit sexual

crimes against inmates, instead of classifying some sexual misconduct as mere misdemeanor crimes. Implementing these new policies and standards will hopefully deteriorate the gender stereotypes in prisons and permit male victims to vocalize any misconduct, allowing for the creation of a more accurate and comprehensive database of victims and aggressors.

April Rieger, Note, *Missing the Mark: Why The Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States,* 30 HARV. J. L. & GENDER 231 (2007).

Every year, approximately 45,000 to 50,000 people are trafficked into the United States for sexual exploitation. The Torture Victims Protection Act, designed to curtail such trafficking and protect its victims, fails in achieving its worthy goal for two primary reasons: the difficulty of identifying victims and the challenges identified victims encounter in qualifying for benefits. Many law enforcement officials lack adequate training and often mistake victims for criminals or view them as prostitutes undeserving of such benefits. Advocating a conceptual shift from criminal to economic justice, the author calls on Congress to reconsider the qualification or "certification" process. In the interim, a combination of various legal tools, including contract and tort theories and class action suits may be most effective in empowering victims.

Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11 (2007).

The article explores the relationship between social science research and social change by examining three prevalent examples of gender inequality and sexual abuse: sexual harassment, acquaintance rape, and domestic violence. In past, these abuses were mostly overlooked by society and victims rarely reported incidents. While the author applauds the recent efforts at confronting these issues, she finds them substantially lacking due to: the limited scale of the research; weak connections between academic research into the area and policy communities empowered to act upon the work; the time consuming and expensive process necessary to gather substantial empirical data on an area; and the lack of proper and popular recognition for the research actually produced. While there is no exact solution, universities should earmark funds for research in the area, creating incentive for academics to explore the field, perhaps even creating policy research centers focusing on the areas which need the most attention. There should also be outreach to professional associations and law review journals to encourage publication in this field.

Shani Fregia, Comment, *Statutory Rape: A Crime of Violence for Purposed of Immigrant Deportation?*, 2007 U. CHI. LEGAL F. 539 (2007).

There is currently a circuit split in deciding whether statutory rape is considered a "substantial risk of the use of physical force," defined in 18 U.S.C. §16, which would require that an alien be deported after conviction of statutory rape—as outlined in 8 U.S.C. §1227(a)(2)(A)(iii). Most circuits, when faced with such a case, have categorically decided that statutory rape is a crime of violence, even though every state defines statutory rape differently. The Ninth Circuit, however, has decided categorically that statutory rape is not a crime of violence, claiming it can never be a violent crime. The Seventh Circuit looks at the individual facts of the case—the ages of the victim and perpetrator, the nature of the crime, etc.—to decide if the perpetrator committed a violent crime. Because the elements of statutory rape vary from state to state and because the actions of the perpetrator can either be violent or non-violent, the Seventh Circuit's approach of analysis is preferable to over-penalizing the perpetrators.

SOCIAL CLASS

Teresa Kominos, Note, *What Do Marriage and Welfare Reform Really Have in Common? A Look into TANF Marriage Promotion Programs*, 21 ST. JOHN'S J. LEGAL COMMENT. 915 (2007).

This article examines the legality of the driving force behind the Temporary Aid to Needy Families (TANF) program. The author argues that that the focus of TANF should be responding to the needs of low-income people, rather than reinforcing moral beliefs of politicians. The main motivation behind TANF, as stated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, is to promote the formation of marriages among welfare recipients. This motivation is based on politicians' assumptions that marriage can cure the problem of poverty and provide an economically stable environment for children. This assumption, however, is not only inconsistent with the reality of low-income people, that the very reason for choosing not to marry is to avoid further poverty and domestic violence, but is also violative of the constitutional rights of these citizens to choose marriage as a lifestyle.

Hatty Yip, *Double Whammy: How the New Credit Card Nondischargeability Provision and the New Means Test Hit Single Mothers Over the Head*, 15 BUFF. WOMEN'S L. J. 33 (2006-2007).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made changes in the bankruptcy system. Unfortunately the new act has had the unintended consequence of being especially onerous for single mothers, specifically, the change in credit card nondischargability provisions and the implementation of the new means test. The requirements set forth under the new means test of this act effectively work to block many debtors from filing a Chapter 7 Bankruptcy, and instead, may even force them into a Chapter 13 Bankruptcy, while making fewer types of credit card debt dischargeable under a Chapter 13 Bankruptcy. A Chapter 13 Bankruptcy severely inhibits a single mother's ability to become financially stable again. The author offers a few solutions to these problems, including keeping data about single mothers who file for bankruptcy so as to understand their needs, instituting stricter restrictions on credit card companies, and providing an exemption from the means test for single mothers to help them return to financial security.

WORKPLACE DISCRIMINATION AND HARASSMENT

Eddie A. Jauregui, Note, *The Citizenship Harms of Workplace Discrimination*, 40 COLUM. J.L. & SOC. PROBS. 347 (2007).

This Note is premised on the idea that the workplace has become a significant place for democracy as it provides an opportunity for political and moral learning at a time when Americans are withdrawing from other forms of public life. The author links the workplace to citizenship because employees interact with people from diverse backgrounds at work and gain exposure to different social and political viewpoints. Therefore, the author posits that employment discrimination goes beyond private harm to cause "citizenship harm," since discrimination hampers an employee's civic participation by denying that citizen access to an important public forum. The best remedy, the author concludes, is to use the "experimentalist" model of judicial intervention to encourage minorities to participate in the workplace. This model emphasizes deliberative problem-solving and participation by stakeholders.

Claire Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the "Because of . . . Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42 (2007).

In *Onacle v. Sundowner Offshore Services, Inc.*, the Supreme Court expanded the application of Title VII beyond opposite-sex sexual harassment cases to include same-sex sexual harassment cases in the workplace. According to this opinion, the "because of . . . sex" requirement for Title VII actions could be fulfilled by presenting evidence in at least three different ways: evidence in a same-sex harassment case that the harasser was homosexual, evidence in a mixed-sex work environment of the harasser's relation to both sexes, or evidence of a harasser's "general hostility" towards members of his or her own sex. The author finds these three examples of "evidentiary routes" to be vague and surveys subsequent interpretations of *Oncale* to assess how courts have applied the "because of . . . sex" requirement. Most courts, the author determines, would find the evidence insufficient to meet the "because of . . . sex" requirement unless it followed one of *Oncale's* three evidentiary routes. However, a plaintiff who presents evidence using a method outside of *Oncale's* three examples may still be successful because courts do not view *Oncale's* routes as an exhaustive list.

Mary Kate Sheridan, Note, *Just Because It's Sex Doesn't Mean It's Because of Sex: The Need for New Legislation to Target Sexual Favoritism*, 40 COLUM. J. L. & SOC. PROBS. 379 (2007).

Sexual harassment law does not currently address all of the problems generated by sexual favoritism, the notion that when an employer favors an employee with whom he or she is having a sexual relationship, other qualified employees are denied benefits. In particular, a third-party employee does not have a claim for sexual discrimination if he or she is affected by non-coerced widespread favoritism, a situation in which an employer sustains non-coerced relationships with more than one employee, or by isolated favoritism, when an employer has a non-coerced relationship with an employee. Sexual favoritism, a subcategory of sexual harassment, has been analyzed under Title VII of the Civil Rights Act and the EEOC's Guidelines on Discrimination Because of Sex, and currently only addresses the problem of coerced favoritism. The author analyzes specific phrases within the text of both documents to prove the ineffectiveness of the EEOC and Title VII with regard to protecting third-party victims of non-coerced widespread favoritism and isolated favoritism. The author suggests four potential solutions to the problem presented but concludes that since each is impossible, new legislation must be introduced to address these sexual favoritism problems.

Allegra C. Wiles, Note, *More Than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace,* 57 SYRACUSE L. REV. 657 (2007).

In both the professional and non-professional arena, women have had great success in achieving equality in the workplace. But even with increasing numbers of educated women entering the workforce, women are still hindered from achieving leadership positions in business. The author argues that gender stereotypes are linked to claims of workplace appearance rules as unlawful under Title VII, and thus have been improperly treated by the courts. Courts have unjustly applied the unequal burdens test, frustrating the intention of Title VII and making the statute dependent on the subjective interpretation of judges. Rather, courts should adopt the approach used in *Price Waterhouse v. Hopkins*—claims are ruled violations provided that gender stereotypes were a motivation, not necessarily the only or main motivation, for disparate treatment of an employee—in analyzing claims of workplace appearance rules as violations under Title VII in place of the unequal burdens test.