

Alphabetical Listing of  
Presenters  
and  
Abstracts

**“The New Rhetoric of Reproductive Marriage”**

In *Goodridge v. Dept of Health*, the Supreme Court of Massachusetts declared that same-sex couples are constitutionally entitled to the same access to marriage as heterosexual couples. But *Goodridge* provided the seed for a string of state supreme court opinions in other states denying same-sex couples access to marriage. One of the dissenting *Goodridge* justices, Justice Cordy, made what was then a novel argument for limiting marriage to opposite-sex couples: the purpose of marriage, he argued, is to provide a protection against accidental reproduction. Without marriage, heterosexual people will be under the impression that reproduction is acceptable without long-term commitment to parenting. By limiting marriage to opposite-sex couples – people who might accidentally reproduce through their sexual relations -- the state can send a message that marriage is proper space for reproduction. Marriage, in these opinions, is viewed as a constraint on an unwieldy and dangerous male sexuality run amok.

The enthusiasm with which other state supreme courts have adopted Justice Cordy’s rationale made us curious about its origins and logic. Our paper canvases anthropological theory, history, literature, and constitutional law and concludes that marriage has meant many very different things at different times, but never has it been solely – or even primarily – a protection against accidental reproduction by heterosexuals. Except in very limited circumstances, the primary purpose of marriage does not seem to have been to constrain *men’s* sexuality, but rather to allocate women among men, and to ensure the legitimacy of children whom men wanted to be considered legitimate.

Toward the end of his *Goodridge* dissent, Justice Cordy asserts that by limiting marriage to “opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor . . . . If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation” (at 1002). It’s interesting that at the last Cordy sees marriage as a message. In Cordy’s view, it is of course a message of necessary sociosexual discipline, the exercise of the state’s repressive power over a potentially anarchic sexuality. But if that’s the message, it clearly has many discontents—has had them for centuries—and leaves many readers wanting to read an alternative text. We suspect that the more courts insist on a reproductive definition of marriage, the more the marriage message will end up in the dead letter office.

### **Beyond Status and Contract**

Marriage has traditionally been the legal vehicle used to create and mediate rights and obligations in intimate partnerships. Yet many intimate partners do not marry and so exist outside the marriage framework. Some such couples are barred from marrying, since in most American jurisdictions only heterosexual unions qualify for marriage. Even absent a legal impediment to marriage, some object to marriage on ideological grounds, finding marriage repugnant as a patriarchal institution valorizing male dominance. A growing number of poor and working class couples forego marriage because they see lack of financial resources to be a temporary or permanent impediment to marriage. In addition, since marriage is a bright-line status that one either enters fully or not at all, the not-yet-married are legally unprotected despite the emotional and economic investment in a relationship prior to the moment it is officially recognized by state through marriage.

The use of contract as a vehicle for the regulation of intimate relationships presents its own problems. Courts have often been reluctant to enforce bargain contracts between partners in non-marital intimate relationships, creating uncertainty as to their ultimate legal efficacy. Contracts between intimate partners can sometimes unfairly favor the interests of one party, when the economic and psychological dominance of one partner over the other result in contract terms that protecting the interests of the party holding the whip hand. In theory, promissory estoppel could ameliorate the problem of unequal bargaining power and provide a fairer allocation of rights and duties. The intimate partner asserting promissory estoppel has two serious doctrinal obstacles, however. First, it is unlikely that an intimate partner will make the kind of clear and unequivocal promise needed for enforcement. But, even if such a promise were made, courts are unlikely to find that reliance on promises made between intimate partners is *reasonable* reliance.

Because marriage and contract, together or separately, are inadequate to provide an adequate legal framework for many intimate partnerships, an additional legal remedial tool is called for. I am calling this third leg of the remedial stool “relational estoppel,” which would permit courts to assign rights and duties to intimate partners in accordance with their behavior in the course of their relationships. This remedy allows courts to protect the interests of parties who have been induced to rely on the other party by behavior within the relationship. Being equitable in nature, it is flexible and highly sensitive to context and to individual variation in circumstances and aspirations.

Courts looking at difficult questions of child visitation and property allocation in the wake of non-married partnership dissolution are beginning to use language consistent with the concept of relational

estoppel. For example, in *Connell v. Francisco*, the Washington Supreme Court held that when parties dissolve unmarried relationships whose scope and duration made them marriage-like, equitable principles should be used to determine the property rights of each partner. Similarly, in *In re Parentage of L.B.*, the same court held that a woman who was neither the biological or adoptive parent of a child conceived by her partner during their intimate relationship could be considered to be a de facto parent. In large measure, the court based its decision on whether the legal parent consented to and fostered a parent-like relationship between the non-biological partner and the child. In each case, the court looked to the behavior of the parties during the relationship to conclude that legal consequences ought to flow from that behavior. Other courts, too, are groping their way towards an over-arching equitable framework based on party behavior within the relationship as a source of rights and obligations within non-marital intimate partnerships.

Atwood, Barbara

### **Representing the Indian child: Lessons from Tribal Traditions and the UN Convention on Rights of the Child**

Jurisdictional and substantive law in child welfare matters involving American Indian children in the United States is largely regulated by the Indian Child Welfare Act, but very little scholarly attention has been given to the role of the Indian child in such child protection proceedings. The ICWA authorizes the appointment of counsel for the Indian child in state court proceedings, 25 USC § 1912(b), and also acknowledges the potential significance of the child's own wishes as to placement. *See* 25 USC § 1915(c). Other federal law, moreover, requires the appointment of a guardian ad litem for every child who is the subject of an abuse or neglect proceeding as a condition of receiving federal child welfare funding. *See* Child Abuse Prevention and Treatment Act, codified at 42 U.S.C. § 5106a(b)(2)(A)(xiii). Nevertheless, the voice of the Indian child is a neglected dimension in ICWA litigation and ICWA scholarship.

In this paper, I explore the potential benefits and challenges of giving more emphasis to the voice of the Indian child. I examine the traditions and contemporary practices of several Indian tribes within the United States that are relevant to the role of the child in child protection proceedings and custody disputes. Navajo and Sioux traditions, in particular, reveal a deep respect for the child's voice and, to some extent, the child's autonomy. I argue that the customs and practices of the child's tribe with respect to the child's right of participation should inform the state court's approach to ICWA cases, just as the ICWA itself already mandates that state courts select placements for the child that reflect the child's cultural background.

A second section of the paper explores the right of participation in Article 12 of the UN Convention on the Rights of the

Child as it has been applied around the world to indigenous children. I explore the interpretation of that provision in selected nations, focusing on its implementation in child protective and adoption proceedings where such information is available.

A third section of the paper explores the challenges facing the child's appointed representative, whether a lawyer or guardian ad litem. The representative's understanding of her client and her own role will necessarily shape her advocacy and may significantly influence the outcome of the court proceedings. In this section, I focus on the unique importance of presenting the Indian child's viewpoint and circumstances to any decision-maker.

Bailey, Martha

### **Family Law and Normative Pluralism**

The paper compares the context and nature of current debates on religion and family law in India and Canada. A question raised in both countries is whether there should be one family law for all, or whether resolution of family law disputes in accordance with religious laws should be sanctioned by the state. A primary focus of the debate in both countries has been gender equality. A major objection to religious laws and traditions relating to the family is that they discriminate against women and perpetuate inequality. Christianity, Hinduism and Islam all have a history of discrimination against women. The extent to which the problematic practices of each religion are an inextricable part of the faith or simply historical practices that can be jettisoned or reformed without compromising religious integrity is a matter of current debate.

The question of whether there should be one family law for all despite the differing religious traditions and practices has been long debated in India. India's debate arises from its maintenance of the colonial system of "state-law pluralism" under which there are separate positive laws for each religious community. Article 44 of India's Constitution directs Parliament to move towards a uniform civil code and abandonment of religious laws. Parliament has yet to follow this Directive article, and the issue of a uniform civil code remains a matter of heated debate today, 60 years after independence.

The same question was posed in Canada recently in relation to "faith-based" arbitration of family law disputes. After extraordinary protests against permitting such arbitrations, the government of Ontario enacted a law that requires family law arbitrations to be governed by Canadian law. Arbitral awards that are not consistent with the new law will not be enforceable by the courts. When the new Act was passed, the Attorney General of Ontario said, "The Bill reaffirms the principle that there ought to be one law for all Ontarians."

In considering these issues, this paper takes into account the changing role of the state, the increase in "global souls" with "multiple

loyalty references,” the evolution towards greater autonomy, and the situation of normative pluralism in multicultural societies.

Blair, Marianne

### **Expanding Notions of Sovereignty in International Support Enforcement: A Modest Proposal**

Although the United States did not participate in the earliest international efforts to facilitate international enforcement of family support orders, over the past two decades both the federal and state governments have devoted significant attention to this issue. Federal legislation in the mid-1990s authorized the negotiation of bilateral foreign reciprocating country agreements by federal officials and reciprocity agreements by individual states; the 2001 amendments to the Uniform Family Support Act (UIFSA) incorporated amendments that ease enforcement of foreign orders in U.S. courts; and U.S. State Department representatives are in the final stages of negotiations with representatives of over forty other nations to create a new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Nevertheless, differing requirements for personal jurisdiction remain an obstacle to seamless enforcement of foreign family support orders in U.S. courts. American courts, bound by the strictures of UIFSA § 607 and the U.S. Supreme Court's opinion in *Kulko v. Superior Ct.*, 436 U.S. 84 (1978), recognize foreign orders only if the issuing court exercised jurisdiction consistently with U.S. notions of due process, based on a defendant's consent, service or domicile in the forum state or nation, or minimum contacts with the forum. Many other nations, including most member nations of the European Union, permit their courts to exercise jurisdiction over family support matters based on factors such as domicile or habitual residence of the maintenance creditor (the recipient spouse or parent), Council Regulation No. 44/2001, 2001 O.J. (L 12) 4, art. 5, or in some instances, nationality of the spouses, 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, 1021 U.N.T.S. 209, which do not satisfy U.S. standards. While many scholars have urged that the U.S. Supreme Court revisit *Kulko* and broaden due process limitations, particularly in child support actions, such reform has not yet occurred.

My presentation considers whether the European Union should be regarded by U.S. courts as one sovereign for purposes of application of U.S. jurisdictional standards in maintenance recognition and enforcement proceedings, until such time as the U.S. Supreme Court is ready for more far-reaching reform. While not a panacea for all international jurisdictional quagmires, the expanding membership of the European Union provides the opportunity to reduce some jurisdictional conflicts if minimum contacts with the European Union, rather than the forum nation, would suffice. Given that the European

Union is the source of jurisdictional law in family law matters for member nations, and is now becoming a member itself of the Hague Conference, its relationship with its own citizens and other nations might justify such an approach. In addition to exploring the maintenance contexts in which such an approach might be fair and possible amendments to UIFSA to effectuate it, the topic provides an opportunity to explore the extent to which traditional notions of sovereignty and fairness that underlie U.S. jurisdictional jurisprudence might intersect with emerging international entities in perhaps broader contexts as well.

Borgmann, Caitlin

### **The Meaning of “Life”**

This paper will address the contested values underlying the regulation of abortion. The argument made by conservatives that abortion is immoral because the fetus is a person appears to be gaining increased acceptance. More and more laws, such as fetal homicide legislation, seem to acknowledge fetal personhood. Some considered the abortion ban enacted last year in South Dakota (but ultimately defeated by voters), which contained only a limited life exception for the woman, to be a vivid demonstration of an irrevocable slide toward a public consensus that the fetus is a person.

This perceived public shift has led some pro-choice commentators to revive arguments, famously made by Judith Jarvis Thomson in the early 1970s, that abortion should be permissible even if the fetus is a person. When pro-choice commentators assume for the sake of argument that the fetus is a person, however, they in fact evade the moral question. They in effect say, “The personhood of a fetus is immaterial. Whether the fetus is a person or not, abortions should be permitted.” The Supreme Court has also purported to deflect the moral question whether the fetus is a person. In *Roe v. Wade*, the Court claimed that “[w]e need not resolve the difficult question of when life begins.”

These pro-choice arguments and the Court’s position in *Roe* mirror the liberal position on abortion articulated by Thomas Nagel, who argues that liberals choose to “bracket” the question of the morality of abortion, and that the question need not be answered in order to determine that women’s liberty demands the right to choose abortion. Michael Sandel, on the other hand, argues that to “bracket” the question is to deny the validity of a belief in fetal personhood, for if a fetus is a person, abortion must be prohibited in all cases.

In this paper, I agree with Sandel that the question of fetal personhood must be addressed head on. Otherwise, I assert, the constitutional right to abortion as it currently stands could not be defended. I further argue that there is a public consensus that the fetus is not a person. The views of even staunch abortion opponents are consistent with this view. They often employ vague terms that do not

clearly commit to the position that the fetus is a person. Saying that the fetus is a “life” or even a “human being” is not that same as saying that the fetus is a person in a legal, constitutional sense. The same politicians’ frequent support of rape and incest exceptions, and perhaps even of life exceptions, further undermines their suggestions that fetuses are persons. Interestingly, conservative opponents of abortion, including Justice Scalia, seem implicitly to adopt the liberal view on abortion when they assert that the question of fetal personhood should be left to the states to decide. In refusing to demand that the fetus be given constitutional protection as a person, they adopt a position inconsistent with fetal personhood.

While this paper does not purport to answer completely the question of the morality of abortion, it does assert that the Court’s implicit denial of fetal personhood accurately reflects public consensus. Given this consensus, the Court was correct to conclude that a woman’s liberty interest in deciding to terminate her pregnancy must be constitutionally protected.

Boyd, Susan B.

### **Marriage or Naught? Reinscribing a Distinction between Marriage and Unmarried Cohabitation in Canada?**

Canada has recently witnessed potentially contradictory developments related to marriage and cohabitation. Despite being a country that has accorded increasing legal recognition to unmarried relationships since the late 1970s, the Supreme Court of Canada has stemmed this tide by permitting a distinction to be drawn between married and unmarried couples in relation to matrimonial property division. The result is that unmarried partners can be excluded from statutory provisions regarding matrimonial property division without offending the Constitution. To this extent marriage has retained its special status as the ‘gold standard’ of intimate partnerships. At the same time, the struggles of gay men and lesbians for the right to legally marry have been successful, based in part precisely on the argument that marriage *is* the gold standard.

This paper takes these trends as its starting point. It first reviews literature on state regulation of married and unmarried relationships in order to consider the role of marriage and unmarried cohabitation in Canadian law and society in the 21<sup>st</sup> century. To what extent has traditional familial ideology been challenged or reinforced? A case study of spousal support jurisprudence is then used to question whether a distinction is drawn between married and unmarried cohabitants. Or is it a story of sameness, which excludes those who do not fit a marriage model? The study suggests that the way in which cohabitants are discursively constructed in spousal support law reflects reaffirmation of a marriage model that plays a particular role in a neo-liberal system of governance.

Brinig, Margaret F.

### **Legal Status and Effects on Children**

One of the haunting claims of each poor, unmarried mother in Edin and Kefalas' "Promises I Can Keep" is that at least she can guarantee she will love her child, even though she cannot promise to make a lifelong commitment to a mate. That love, each young mother says, will be a sustaining gift both to her and the child. Similarly, in work done by sociologists McLanahan and Garfinkel to counteract the claim that it was not single parenting that made children's prospects dim, but poverty, sociologists have found that many of the bad effects of single parenting "go away" when wealth is taken into account.

So, is love the answer here, or is it wealth? Does a legal marriage (let alone a two-tiered marriage) even matter, at least insofar as children's welfare is concerned?

My recent empirical work with sociologist Steven Nock indicates that in fact love, measured in terms of parental warmth, is important to children's psychological well-being. We are using the Child Development Survey of the University of Michigan, which contains nearly 2700 children in a nationally representative sample. Love continues to remain important both in terms of impact and statistically though other variables are added. Wealth, measured in terms of total family wealth divided by the census needs standard for a family of that size, initially seems important to child wellbeing (on measures of depression, acting out, self-esteem and self-efficacy). However, unlike love, wealth's significance entirely disappears once family structure and particularly legal status like marriage and adoption comes into play.

"Tis better to have loved and lost than never to have loved at all," wrote Tennyson, and, we find, better to have married even if the marriage does not work out than never to have married. Children do better if they are in two parent, married homes, but are worse off in homes where their mothers never married even than in cases where the mother married, divorced, remarried and was widowed. Similarly, children do better where their fathers are living in the home, but less well with stepparents unless the stepparents adopt them. Children who live with relatives (let alone foster parents) do less well than those who are adopted by third parties.

These rather dramatic findings suggest that law and public policy (as an instrument of law) should encourage and support marriage, particularly marriages that last. (They also suggest supporting adoption rather than foster care, though that is not the subject of this conference. Law can do this in part merely by leaving well enough alone—by NOT adopting domestic partnership laws that equate unmarried, cohabiting couples with those that are married, and by NOT getting rid of special "privileges" enjoyed by the married when academics clamor that such benefits not fair. Law ought also to make pre-marriage counseling and skills building more attractive and

affordable, as some states have done through lower license costs, and some sort of real counseling effort requisite to divorces on non-fault grounds, as the covenant marriage movement suggests. Laws can be written to require mutual consent for divorce, or to become two-tier on the birth of children, so that the waiting period for no-fault separation divorce lengthens.

If pressed, I claim that marriage by itself is not worthy of two tiers, but marriage with children is “real marriage,” as C.S. Lewis put it.

Brito, Tonya

### **Beyond Deadbeat Dads: Child Support Policy Confronts the Complexities of Fatherhood in America**

When a parent has a second and even a third family and additional dependents, who should bear the post-dissolution costs of maintaining separate households: the first family, the subsequent families, or all families equally? The current child support guidelines, developed to assure greater uniformity in the calculation of child support orders and to increase predictability for families who seek orders, are most effective when they are applied in the least complex cases, and are not designed to fully address the complexities of the serial families that are commonplace in the United States today. This paper identifies and analyzes cross-state variation in how guidelines treat additional dependents resulting from multiple-partner fertility.

Burns, Angela J.

### **The Civil Partnership Act 2004: A Case of “No Sex Please, We’re British”**

The Civil Partnership Act 2004 came into force across the United Kingdom on 5 December 2005; it is disappointingly asexual. Despite being designed to regulate a government recognized same-sex relationship (same-sex partners are prohibited from entering into marriage) there is not a single express reference to sexual intercourse and the Act offers no justification for the omission. The Act has been censored with the proverbial fig leaf.

Analysis of legislation governing marriage shows that sexual intercourse is the pivot upon which marriage balances: marriage gives spouses the right to exclusive sexual intercourse within the relationship and sexual intercourse (or lack of it) can end the marriage through annulment or divorce. In stark contrast there are no corresponding provisions that apply to civil partners notwithstanding the Act mirroring the grounds for annulment and divorce in most other respects. The Act refuses to acknowledge that civil partners engage in sexual intercourse and that same-sex couples should be entitled, like spouses, to legal remedy where there has been extra-relationship sexual intercourse or no sexual intercourse at all.

The Civil Partnership Act is billed as the Government’s answer to the “insidious practice” of discriminating against same-sex

partners because their sexual orientation prevents them from obtaining the legal rights conferred by marital status. The House of Lords and House of Commons Joint Committee on Human Rights confirmed that the purpose of the Act is to, “remove all examples of differential treatment between same-sex couples and opposite sex couples in areas which engage Convention rights, unless and to the extent that there are serious and weighty reasons to justify such differential treatment”. The Civil Partnership Act has, in its prudish approach to sexual intercourse, failed to achieve this fundamental aim. This Article will demonstrate that civil partners, on the basis of their sexual orientation, will suffer discrimination under Article 14 in conjunction with Article 8. This is no academic exercise; practical effect already resonates through the Church of England. The House of Bishops have issued a Pastoral Statement acknowledging that civil partnership is not “intrinsicly incompatible with holy orders” provided the member of the clergy is willing “to give assurances to his or her bishop” that he or she does not practice a sexual relationship with his or her partner. The House of Bishops justify this view on the basis that entering into civil partnership is not, “predicated on the intention to engage in a sexual relationship” because, “there is no equivalent of the marriage law provision either for annulment on the grounds of non-consummation or its dissolution as a sexual infidelity”. Such a requirement of married clergy would be unthinkable!

This article will demonstrate that the government’s attempts to justify the “differential treatment” are flawed. Each response will be analyzed in turn. Consideration of the Act’s own dichotomous nature, the English common law, European Court of Human Rights judgments and international comparison will be used to illustrate that each justification is defective and never amounts to the required “serious and weighty reasons”. Shockingly, it will be shown that the government’s attempts at justification do not, as would be expected, discredit inherent societal prejudices but instead reflect them. Finally, in considering how to rectify the situation it will be concluded that the only way to extinguish the unjustified differential treatment of civil partners is to place civil partnership and marriage on an equal footing thereby challenging (rather than endorsing) society’s innate prejudices head-on.

Calder, Gillian  
E. Llana Nakonechny

**‘Smells like Family Law’: Critical Reflections on *Dickie v. Dickie***

On February 9, 2007 the Supreme Court of Canada rendered its decision in *Dickie v. Dickie* a seven paragraph judgment with broad ramifications for non-payors of child support and spousal support in Canada. The case put the complicated questions of judicial discretion and imprisonment as a remedy for contempt of court before the Supreme Court of Canada, on the relatively simple facts of Dr. Dickie

whose flagrant disregard for the orders of the lower courts was beyond dispute. Despite the brevity of the judgment, however, some important, and controversial questions remain for women and children in Canada seeking to enforce family law court orders in the face of systemic discrimination in the Canadian family justice system at the breakdown of relationships.

This paper will look at the ramifications of the Court's endorsement of the dissent at the Ontario Court of Appeal, and what that means for women seeking recourse for non-compliance with family court orders. We will look at two of the key outcomes of this case, first, the implications for women of an endorsement of judicial discretion in the civil contempt of court context, and what a substantive equality lens brings to the question of discretion. Secondly, we will consider the significance of bringing a textual, contextual and purposive approach to statutory interpretation in a context in which parties in non-compliance with family court orders could face incarceration.

Even when women are successful in obtaining orders of support for their children and themselves at the end of a spousal relationship, they still face serious, sometimes insurmountable difficulties enforcing those orders. The authors will examine what the Supreme Court of Canada's resounding denunciation of non-payers will mean on the ground for women, children and the feminization of poverty so often faced at relationship breakdown in Canada.

Carbone, June

### **Red Families v. Blue Families: Federalism in an Era of Family Law Polarization**

Two different systems of family law are emerging in the United States that start from different normative premises, intersect the life cycle at different ages, and produce different "pressure points" for the creation of understandings about acceptable family life. This paper argues that the two systems underlie the "values" debate in the last presidential election, and pose challenges for a federal system that combines state administration of family law with constitutional "trumps" that operate on a national basis. It concludes that the debate is particularly intense not just because of the clash of ideals, but because "red families" are living different lives from "blue families," complicating the communication and understandings between them.

The paper argues that "blue states," the ones that voted Democratic in the last presidential election, have moved toward a new family law model built around delayed childbearing, and investment in the educational and workplace opportunities of both men and women. It produces later ages of marriage, deregulation of sexuality, more egalitarian gender roles, fewer children, and larger portions of the population who never marry. "Red states," the ones that voted Republican in the last presidential election, have said "no" to the new

family model. They continue to favor a more traditional family system that places a premium on the control of sexuality. As a result, they emphasize marriage relatively soon after the beginning of sexual activity, abstinence education over birth control, the shut gun wedding rather than abortion as the solution for the improvident pregnancy, and responsible childbearing as a product of family form, rather than economic self-sufficiency or emotional maturity. The blue states have lower overall fertility, higher abortion rates, and higher percentages of non-marital births. The red states have higher divorce and teen pregnancy rates.

This polarization poses serious challenges for federalism. Family law is state law; it does not need to be uniform across the many states. Nonetheless, state family law is also mediated by constitutional decisions, federal legislation, uniform acts and interstate transactions that transcend state boundaries. How does the role of these bridging devices change when the states are in fundamental disagreement on the purposes of family regulation and the values underlying it? We maintain that the differences among family systems are as profound as the differences among religions, and managing their coexistence within a liberal, federal, democracy is likely to be as challenging.

This paper provides a summary of the forces driving the two systems apart, the demographic differences between them, and a discussion of the symbolic clash between the different value systems. Then, the paper examines legal differences in each group of states in the regulation of teen sexuality, same-sex marriage, and non-marital cohabitation. It concludes with an examination of the institutions that inflame versus those capable of defusing the cultural clash between the two models.

Dwyer, James G.

### **Improving Family Formation Decisions by the State**

I am now directing a law reform effort aimed at improving family formation decisions by the state at the time children are born. A significant percentage of children are born each year to birth parents who have previously demonstrated unfitness as parents, by abusing or neglecting prior offspring, or who are manifestly unable to care for a baby because of substance abuse or incarceration. Most of those children do not come to the attention of the state unless and until after the birth parents abuse or neglect them. Among the children of whom child protective agencies do become aware at birth, most the agency can do nothing to protect under current laws; parentage laws make no distinction among birth parents based on qualifications or disqualifications of any kind, and child protection laws contemplate agency and court action (e.g., investigation and removal) only after there is a founded report of abuse or neglect. And among those for whom removal can be accomplished based on risk of abuse or neglect, most cannot or will not be freed immediately for adoption against the

wishes of the birth parents, even if that would be best for the children; agencies must or do undertake rehabilitation efforts in the great majority of those cases even if they are sure to be futile, because the ASFA grounds for termination without reasonable efforts are quite narrow.

My position is that current child protective law insufficiently reflects distinctive characteristics of newborns. Among the many reasons for attempting rehabilitation with unfit parents of, say, a ten year old, even if the parents' unfitness has been long-term – for example, that the child likely has a bond with that parent despite the abuse or neglect, that the child is likely embedded in an extended family and community, that the child has little chance of being adopted, and that the child has a biological tie to the birth parents – only the last of those applies in the case of newborns. And there is a compelling reason to be more cautious about placing a newborn in the custody of unfit parents than there is to be cautious about returning an older child to the custody of birth parents – namely, that the newborn is about to traverse a developmental stage of monumental importance to the course of his or her entire life, the period when attachment should occur.

In my presentation and paper, I will identify distinctive facts about newborns that the law and scholarly discussion of TPR fails to reflect, facts that make decision making about the families of newborns arguably the most important thing the state does in connection with family life. I will critique ways of reasoning about the choice between rehabilitation of birth parents and termination/adoption that draw false inferences from evidence about adoptees who search for birth parents. I will explain why involuntary TPR immediately after birth almost never happens in the U.S., even with birth parents who have done the most horrible things to prior children, and even though ASFA-driven state laws create some opportunity for doing so. I will also identify the ways in which that opportunity needs to be expanded – that is, what additional 'no reasonable efforts' grounds states ought to adopt. I will explain why changes need to be made as well to reporting, removal, and adjudication rules in most states, if 'no reasonable efforts' rules are to have any real impact. And lastly, I will describe the legislation I have drafted and had placed on the legislative agenda in Virginia for 2007, in order to move this state toward sounder family formation decision making for newborns.

Eichner, Maxine

### **Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults**

During the last generation, political, social, and legal developments have spurred a conversation over the state's role with respect to marriage and family relationships. This conversation has

been complex – this is not an issue that can be framed in terms of a simple set of dichotomous choices. Some have argued that the state should continue to privilege marriage because it is the best framework available in which to raise children. Others argue that the state properly supports marriage, but that principles of justice require it to expand that institution to include same-sex marriage. Still others contend that fairness requires that the state should support a broad range of relationships, not simply marriage. And finally, others suggest that the state has no business privileging relationships between adults at all, either because civil marriage violates principles of liberal neutrality, or because of the sex inequality that continues to pervade marriage.

How should we evaluate these conflicting views regarding the state's position with respect to relationships between adults? I take as a starting point for my paper that the goods and purposes of a liberal polity are inevitably manifold. I argue that each of the positions in this debate focuses on legitimate but limited purposes. The reason that this issue is such a difficult one is because fundamental goods that the liberal polity should seek to pursue – caretaking for children and adults, individual justice, fairness, gender equality – stand in considerable tension in this area. In my paper, I therefore seek to develop an approach to the state's treatment of adults' relationships that, to the extent possible, harmonizes the important but competing principles at stake. To the extent that this tension cannot be eliminated, I then lay out a framework that attempts to give each of these important principles and goods the respect it is due.

Elrod, Linda

### **Making Family Law: Drafting Legislation to Prevent Child Abduction**

This paper is based on my forthcoming article about the drafting of the Uniform Child Abduction Prevention Act. As the Reporter for the National Conference of Commissioners on Uniform State Laws (NCCUSL) Drafting Committee, I have recently been through the process of exploring all aspects of the facts, values and practicalities of trying to write legislation to prevent child abduction. Child abduction cases inevitably involve contested facts and controversial values. Most agree that child abduction is a serious problem; few realize that family child abductions comprise 78% of abductions.

The purpose of the Uniform Child Abduction Prevention Act (UCAPA) is to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others. The Uniform Child Abduction Prevention Act is premised on the general principle that preventing an abduction is in a child's best interests. Even the general principle can be debated

because some children who are being abused by a parent might actually benefit by removal from the abusive situation.

The theory behind UCAPA is that abductions may be preventable through the proper early identification of risk factors and the imposition of appropriate preventive measures. There are practical problems drafting the list of “risk factors” because many activities that an abducting parent may engage in are similar to those of a domestic violence victim preparing a safety plan or a parent planning a legitimate relocation. There are other potential issues that can arise if courts allow “profiling” of parents from other countries.

This paper will discuss the facts, values and practicalities involved in drafting this new, important legislation. UCAPA was adopted by NCCUSL in July, 2006, and by the American Bar Association in February, 2007. By May 1, 2007, UCAPA had already been enacted in four states, with legislation pending in seven other states.

Estin, Ann Laquer

### **Official and Unofficial Family Law**

In the unitary legal systems of Europe and North America, religious law and religious courts have no official role in the regulation of marriage and divorce. Some proponents of multiculturalism argue for a pluralist approach to personal law matters, in which the state delegates some aspects of its legal authority over families to religious minority groups. The recent debate over “Sharia arbitration” in Ontario demonstrates some of the practical and political difficulties of constructing even a modest and carefully constrained legal pluralism at the state level. But even when religious law has no officially-sanctioned role in regulating marriage and divorce, many members of minority religious groups, including Roman Catholics, Jews, and Muslims, rely on religious law and religious institutions to shape their family roles and responsibilities and to provide an alternative forum for resolution of their disputes. This paper discusses the important functions of unofficial or non-state family law within these communities, and investigates circumstances in which unofficial law serves either to support or undermine the official policies of state family laws.

Ferguson, Lucinda

### **The Children’s Rights Myth: The Theory Gap and the Potential for an Argument from Virtue Jurisprudence**

In any legal dispute affecting children, the value of children’s rights and the weight to be placed upon the particular right before the court comes into question. In this paper, I discuss and respond to confusions that have arisen at two stages in the consideration of disputes involving children’s rights. As a result of my analysis, I suggest that we need a fundamentally different account of children’s legal entitlements and our responsibilities towards children. I outline

one possible such an account, namely an approach that draws on the principles of virtue ethics and the idea of eudemonia (flourishing or happiness). My legal examples are drawn primarily from Canadian law, but contain some comparative analysis with the current English position.

The first site of confusion is at the “framing” stage of value-based disputes involving children’s rights concerns. There are two alternative ways in which the value of children’s rights is generally understood to come into play in a legal dispute: either as the framework principle or value, through the interpretive lens of which all (other) competing values must be considered; or as one value to be weighed (directly) against other values, such as parents’ rights and broader social concerns. I argue that, in legal disputes affecting children, it is justifiable only to consider children’s rights as the overarching value; direct balancing of children’s rights against other rights and interests cannot be justified.

The second site of confusion over the nature of the value of children’s rights relates to the “content” ascribed to children’s rights. When determining the content of children’s rights in a particular dispute, the court’s reasoning operates within the confines of one of two conventional theoretical accounts of rights, the “will theory” and the “interest theory.” I argue that both of these theories, including attempts to modify one approach with insights from the other, fail as accounts of children’s rights. The currently available conceptions of children’s rights are no more real than myths. As a result, judges are foreclosed from being able to adopt a justifiable approach to determine the content of children’s legal entitlements.

My analysis draws on leading Canadian decisions and legislation governing birth registration, custody and access, adoption, child support, and child protection, including protection from corporal punishment. Surprisingly, rather than clarifying the role of children’s rights in legal disputes, the *Charter*, more particularly its judicial interpretation and application, has added to the confusion, particularly at the second “content” site.

In response to the confusions illuminated in relation to the value of children’s rights, I suggest that we need to adopt a fundamentally different model of children’s legal entitlements. I outline one such possible model, an argument that draws on the field of virtue jurisprudence. In particular, I propose that individuals interacting with children need to be held to the standards of the virtuous individual, whose interactions with children are characterized solely by the motivation to ensure that that child flourishes on her own terms.

FitzGibbon, Scott

### **No-Fault Divorce and Respect for Marital Honor**

This paper criticizes no-fault divorce law on the grounds that it detracts from marital honor and, more specifically, that it involves judges, and the legal system as a whole, in the moral offenses of mendacity and detraction. This thesis involves three basic elements. First, the paper proposes that the marriage and marital conditions of husband and wife are components of what can be called “social honor”: that is, socially established and recognized positions which accord their holders a certain status and afford an entitlement to honor and respect. This aspect of the paper is based on my earlier articles, notably *The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage, and the Family* (2006).

Second, the paper proposes, as one basic precept for the conduct of judges and other legal officials, and for the legal system as a whole, that they tell the truth. Legal reformers usually emphasize consequences, for example the benefit or harm to the economy or the wealth or security of the parties to a lawsuit. This paper proposes – in addition not instead – a nonconsequentialist, “deontological” standard. It proposes a duty to tell the truth; at least not to speak falsely; especially when addressing the status and condition of citizens who come before a court.

Third, the paper proposes that the duty to speak truthfully is especially strong when addressing the social position – the honor – of a citizen. False speech on those topics may be wrongful not only on grounds of mendacity but also as imposing a certain basic sort of social harm.

If a judge should – for no sufficient reason other than precedent and statute – pronounce from the bench that a wife has never been or even no longer is a wife, and has no right to be treated as such by society, and no right to call upon the husband for conduct appropriate to the marital relationship, the judge offends against these fundamental doctrines. So in a way does the entire legal system in some instances – perhaps a great many instances – of divorce based on “irretrievable breakdown.”

This paper proposes a fundamental revision to the law to avoid this criticism while avoiding a return to the traditional fault-based system.

Freedman, Ann

### **Staying Productively Engaged When Child Custody Debates Become Polarized**

Parental disputes about child custody, especially where there are hard issues such as geographical separation between parental households or domestic violence or child abuse, are notoriously challenging for all concerned. Over the years, scholars have identified many reasons that such disputes tax the legal system’s capacities, and it is not surprising that controversy still rages -- about individual case

outcomes, how best to ascertain the facts, what facts and values are most important, and what legal standards and procedures should be adopted systemwide. The system-level approaches advanced by researchers, advocates, judges and legislators are quite various. Familiar elements include mediation to foster parental agreement about parenting arrangements; rules to encourage significant contact with both parents; domestic violence presumptions; primary caretaking as a factor; and permissive and restrictive parental relocation rules. There are also many combination systems, such as the ALI Principles of Family Dissolution. Often, however, debates about appropriate standards and procedures are acrimonious and reductive, and extreme proposals are sometimes adopted. How can scholars and advocates encourage wise choices among different standards and procedures, and help legal system participants work effectively with a broad spectrum of families and their varied disputes about custody?

In my law school classes, I have experimented with exercises in perspective shifting and the development of expanded awareness as a way to work with the polarization typical of debates about custody rules. Initially, many of us settled on overly simplistic solutions and divided into warring camps, providing temporary relief from the messiness and suffering we experienced in discussing various custody battles. Our shared commitment to listening to each other and attending to both gaps in our own accounts and relationships between apparently opposed views eventually softened our individual positionality, and created a more open texture in our explorations. Reformers and legal system participants also often experience personal resonance with parental conflicts about custody, resonance which if not acknowledged may lead to reduced awareness on the legal observers' parts of the humanity of the parents' struggles, and fuel polarized positions and reductive approaches to custody dispute resolution, both at the individual case and system level. Indeed, there may be something of a parallel process. Legal system participants and custody disputants are both charged with duties of care (legal system to parents and children; and parents to each other and their children), both find the duties challenging, and both may respond with defensive maneuvers when more lively and productive responses seem out of reach. The legal system's ability to aid rather than impede the parents who come to them is likely to be enhanced when legal system participants are able to look with curiosity both at the disputants and at themselves, and in so doing, to see, in themselves, parallel emotional, cognitive and psychological processes that are triggered as they set about debating and reforming, coming to see their own participation in the struggle. Moreover, just as front line participants in the legal system respond to individual cases more productively when they have the tools needed to recognize over-identification with one of the parents or the child, being locked into judgment, or a self-protectively

distant stance, people engaged in the work of system reform who have the tools to support greater self awareness may be less discouraged when debates within the legal system about custody standards become polarized. Better yet, changes in discussion practices to foster self-awareness and mutual curiosity may enable legal system participants on the front lines and those involved in reform efforts to stay involved, even when people are talking past each other, and to have energy and tools to work on re-establishing communication – just what we so often wish custody disputants would be able to do. Other potential dividends of consciously promoting expanded awareness on the part of legal system participants are worth exploring.

Garrison, Marsha

### **The Decline of Ceremonial Marriage: Reasons and Recommendations**

All over the industrialized world, formal, ceremonial marriage is in decline. Cohabitation, which has waxed as ceremonial marriage has waned, is both less stable and less capable of clearly signaling a couple's understandings about their relationship. In the United States, half of all cohabiting relationships dissolve within eighteen months; demographers have identified six or seven different cohabitational types, ranging from a substitute for being single to a substitute for formal marriage.

Cohabitation thus presents public-policy and fact-finding challenges that formal marriage does not. Because cohabitation is not invariably, or even typically, the equivalent of marriage, many marital-status classifications appropriately divide the married from the unmarried; however, because marital decision making may be affected by (dis)incentives produced by these classifications, policymakers face difficult choices in deciding whether, and to what extent, they should revise statutory classifications to avoid marriage disincentives. If the law allows cohabitants to show marital understandings in order to obtain benefits associated with marital status, fact-based assessment by some decision maker – with all the delay, expense, uncertainty, and potential inconsistency that this entails – will be necessary. If the law does not allow such a showing, potential inequity will result. Cohabitation's instability may also pose risks to children that do not arise when children are born within marital relationships.

Because ceremonial marriage offers public advantages that informal unions do not, public policies designed to encourage couples who have marital understandings to formalize their unions through marriage are desirable. In order to effectively design such policies, however, we need to understand why formal marriage is in decline.

This paper critically examines current economic and cultural explanations for the decline of marriage. Based on that examination, it explains what we know about the marriage-decline phenomenon and what we do not. It then analyzes the public-policy implications of the

available evidence and lays out an agenda for research to explicate the missing pieces of the puzzle.

Giardini, Federica

### **New perspectives and traditional problems in Italian family law: cohabitation (outside marriage).**

The Italian legal system has recently also become quite seriously involved in the debate on civil unions, both heterosexual and homosexual, and on the question of whether they require legal protection. Up to the present day, the legal concept of ‘family’ in Italy has been based on the institution of marriage; the single circumstances where protection is granted to cohabiting partners on a piecemeal basis are not grounded on the protection of cohabitation itself, but rest instead on the protection of different rights, such as safeguarding the right to the family home, rather than the rights of the accused in a criminal proceeding, and so on.

The outlook for Italian legislation that seems to be developing combines both lack of awareness on the part of the legislator of the real problems underlying the situations requiring protection and a lack of investigation into foreign legal experiences through comparative law assessments of other legal systems.

The lack of an appreciable legislative technique inevitably leads the Courts to try to compensate, when applying the law, for the deficiencies and imperfections of the rules; viewed from the angle of general legal theory, this means modifying the traditional process of formation of the rules of law within a civil law legal system like the Italian one.

Glennon, Lisa

### **Family Law Policy and Practice in the UK - Moving from ‘Form’ to ‘Function’?**

It was observed at the end of the twentieth-century that in UK family law policy the ‘parent-child relationship is the only clearly ascertainable family relationship to which legal consequences can be attached’ and some predicted that, in relation to obligations between adult family members, the contractual approach would “*assume greater significance in future legal policy as a means of embracing marriage, homosexual relationships and other intimate associations within a unified model of adult relationships, with little to privilege one over another*’ (Douglas). However, policy and practice has undergone change since the beginning of the twenty-first century, particularly in the area of relationship obligations. At the level of practice, the House of Lords’ decisions in *White v White* (2000) and *Miller v Miller/McFarlane v McFarlane* (2006) clarified the conceptual basis of ancillary relief distributions. At the level of policy, the Civil Partnership Act 2004 and the recent proposals of the Law Commission of England and Wales on unmarried/unregistered cohabitants extend the range of persons to whom familial obligations

attach. The purpose of this paper is to consider the interaction between these mutually informing discourses and to suggest that rather than developing a more function-based approach to the imposition of intra-familial obligations, relationship status continues to carry determinative weight. Considering situations of divorce and relationship breakdown, it will be argued that rather than merely extending a marriage-like family law regime to unmarried cohabitants, we must start to engage in a comprehensive review of the obligations created by 'human co-operation' where the underlying question becomes 'what do we owe to each other?' (Selmi).

Hall, Margaret Isabel

### **Other People's Children: Child Death Inquiries and the Lesson of Failure**

The communal interest in the well being of children in general -other people's children- has been delegated to the State for discharge through the mechanism of State child protection. The power and authority of the State requires its weakness in this context, given the high social value of family privacy, and the overall effect of the delegation has been to increase individual (adult) freedom by reducing community scrutiny and reprobation of private behaviours. The "liberal compromise," that the State is permitted to inspect the family provided that its agents make the best of what they find, is effected through a professional "rule of optimism" which frames events and circumstances so as to avoid the need for sanction. The dual reports of the Maria Colwell Inquiry reveal the significance of this frame through the very different accounts provided by the professional social worker and by the non-professional "outsiders" conducting the inquiry. The "liberal compromise" arises from the dictates of law and culture, protecting key social values of individual freedom and privacy; the inquiry narratives describe the structural limits of child protection and a focus on professional error is inappropriate. State child protection, while important and necessary, is not in itself a sufficient replacement for the security previously provided by communal oversight; structured third places for children (nurseries, daycare, recreation clubs, and other social institutions) are also needed. This is the ultimate lesson to be learned from the experience of persistent failure that is provided through the painful repetition of the child death inquiries.

Hall, Margaret Isabel

### **Autonomy and Exploitation: Capacity, Duress and Undue Influence in Late Life "May-December" Relationships**

Increased awareness of the financial abuse of older adults has also increased concern about the targeting of older adults by exploitative individuals taking advantage of the relatively low level of capacity required for marriage. Contemporary social and economic trends may have created a context conducive to exploitation through

marriage, as rapidly escalating property values have created a relatively large group of “house wealthy” older adults and increased life spans mean greater numbers of the vulnerable “very old.”

Older adults are not, of course, the only people who are married for their material worth. Are there any special reasons to be concerned about their interests, as opposed to the 40 year old who marries the financially motivated 20 year old? It would be false to stereotype all older adults as weak, dependent, and in need of protection from younger persons. In some relationships, indeed, the older person may be the dominant figure. The decision to enter a late life transaction marriage, in which companionship and (possibly) sex and exchanged for material security during and after marriage may be freely taken, wanted, and enjoyed (despite the objections of adult children concerned about future inheritances).

There are other situations, however, in which the transaction seems less evenhanded and the choice less free; where the older participant is vulnerable (although capable for the purposes of marriage) and where the other party appears to have manipulated and exploited that vulnerability. Consider a case like *Banton v Banton* (1998), 164 D.L.R. (4<sup>th</sup>) 176 (Ont. G.D.), in which a 40 year old woman (Muna) “befriends” a recently bereaved 85 year old (George) in poor physical health. Muna, a waitress at the retirement home where he lives, isolates George from others and convinces him that his children mean him harm. Secretly, the two are wed; soon afterwards George makes a new will in which everything is left to Muna, and his children are disinherited.

Do we feel uneasy about the marriage of Muna and George? Examining our own reactions, what factors account for this unease? If George is mentally capable of entering into a marriage (as he was in this case) why question his decision? By questioning George’s decision, are we infantilising him, seeking to replace his judgment with our own about what is in his best interests? Or is our concern primarily with Muna, that she not be permitted to benefit from her actions in this case- and that to allow Muna to “get away with it” would encourage others? Or (on either a subliminal or conscious level) are we concerned with George’s “squandering” of his children’s inheritance- the idea that, in the absence of filial misbehaviour, money and property should stay within the bloodline? This paper will consider these questions, and how the inter-related issues of duress, undue influence, capacity and exploitation may apply in these circumstances.

Harris, Leslie J.

### **Voluntary Acknowledgments of Paternity: Judgments or Creations of Status Relationships?**

Federal law, which mandates that states have voluntary acknowledgment of paternity statutes, provides that a voluntary

acknowledgment is to be analogized to a judgment of paternity, at least for purposes of its finality. This paper examines what it would actually mean to treat a voluntary acknowledgment as a judgment of paternity for purposes of three recurring questions that have commonly arisen regarding voluntary acknowledgments.

The paper argues analogizing voluntary acknowledgments to paternity judgments is inapt. First, the federal and state legislation regarding voluntary acknowledgments provides that in some circumstances acknowledgments are treated very differently from judgments. Further, if standard principles of the law of judgments were applied to voluntary acknowledgments to resolve issues that are not resolved by the federal statute, sometimes the results are controversial, even unacceptable. Finally, a judgment is a resolution to a dispute that has escalated to the point of “going to court,” but couples who execute voluntary acknowledgments almost certainly don’t understand this process as one that ends a dispute.

The paper argues that voluntary acknowledgments should be analogized, instead, to marriage. Two people execute a voluntary acknowledgment of paternity to establish a parent-child relationship between the child and the man and the familial relationship of co-parents between themselves. The acknowledgment is much more similar to a marriage than to a judgment in terms of how the parties understand it. In some situations, analyzing issues that arise in interpreting and applying acknowledgments by analogy to marriage/family results in outcomes that are very similar to those that follow from an analysis of acknowledgments as judgments, but in others the results are quite different. Regardless of the outcome, looking to rules regarding the validity of marriage and the consequences of ending marriages to resolve these issues acknowledges that issues involving family relationships are at stake and allows explicit consideration of them.

Hatcher, Daniel L.

### **Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State**

This Article examines the government policy of seeking reimbursement of welfare costs through child support enforcement. Under our welfare program, Temporary Aid to Needy Families (TANF), custodial parents applying for benefits are required to establish child support obligations against the absent parents and to assign the resulting child support payments to the government. As a result, half of the \$107 billion in national child support debt is owed to the government rather than to children. The government’s fiscal interests are in direct conflict with the best interests of the children - the controlling legal standard in child support matters. The conflict results in legal confusion, and the welfare cost recovery efforts harm children, families and society. Children in welfare families struggling

to become self-sufficient lose out as their support payments are redirected to the government. Fragile relationships between mothers, fathers and children are often broken. The fiscal benefit to the government is minimal, at best. And the social fabric is torn, as significant numbers of low-income fathers retreat from the workforce and their families. The conflict has existed since child support's beginnings and raises important legal and policy questions that go to heart of what child support is, or should be about. However, little attention has been paid to the tension or the questions that result. This Article explores the history of the competing interests and purposes of child support in America, describes the framework and impact of the current government welfare cost recovery system, addresses the long ignored and unresolved legal questions that result from the conflicting missions, and concludes with suggestions for reform including the Article's primary conclusion that welfare cost recovery is a failed effort - and should therefore end.

Huntington, Clare

### **“Love, Hate and Reparation”—A Law and Emotion Perspective on Family Law**

Scholars in the emerging field of law and emotion have paid surprisingly little attention to family law. This gap is particularly unfortunate because this emerging field has the potential to bring great insights to the substance and practice of family law. This article begins to fill this gap by exploring the relevance to family law of a theory of human intimacy first articulated by psychoanalyst Melanie Klein and now widely accepted in modern day psychology and disparate other fields. According to Klein, the natural cycle of human intimacy is to love another, inevitably experience a transgression with the other rooted in the hate and aggression we all feel, even toward those we love, feel guilt about the transgression, and then seek to repair the damage. People experience this cycle repeatedly throughout their lifetimes, with transgressions ranging from the minor, such as a parent raising her voice to a child, to the more egregious, such as an extramarital affair.

This article argues that the legal process embodied in the substance, procedure, and practice of family law is fundamentally at odds with the human process of love, hate, guilt, and reparation. In contexts as far-ranging as child welfare, divorce, and adoption, family law is predicated on a binary model of love and hate, omitting the key elements of guilt and the drive to reparation. With this omission, family law short circuits the natural cycle of intimacy, greatly diminishing the opportunity for reparations among family members. To replace the Love-Hate model of family law, this article proposes a Reparative model that would incorporate and encourage the human tendency toward reparation. Moreover, by engaging family law on a theoretical level to ask how the law can better account for the

emotional reality of human relationships, this article inaugurates a larger debate about the role of emotion in family law.

Kelly, Alicia

### **Unmasking Interdependence: Reconceptualizing Property Relations During Marriage**

There is an acute and unresolved tension between community and individualism evident in the laws governing the financial relationship between spouses during marriage. Partnership marriage, the dominant theory in divorce law characterizes marriage as a shared enterprise in which spouses intermesh their lives both socially and economically. Yet, paradoxically, the law of intact marriages in common law states in important respects views spouses as if they were single. Title controls property ownership. The spouse without title has no entitlement. This same phenomenon occurs to a lesser degree in community property states. Formal title does not necessarily control ownership of assets, but typically management power over assets follows title. Unilateral—even secret—conduct by one spouse can diminish or eliminate the property rights of the other, often with no or little legal recourse. Similarly, income earned by spouses is owned individually, not jointly. But there, alongside these highly individualistic laws, the law imposes a mutual duty of support upon spouses. The duty of support recognizes, at least to a degree, a financial connection. However, unlike creditors, a spouse does not have the power to enforce the duty of support while the parties remain married. The explanation? A couple is conceptualized as a family unit—a community—so much so that even the request of one of the spouses for intervention—will be refused as undue interference in the relationship.

The current legal regime governing married couples is a confused and conflicted hybrid of laws that are much in need of reexamination and reform. My presentation aspires to do so. I will suggest that a marital property regime that explicitly recognizes and prioritizes the joint nature of marital wealth acquisition is far preferable to the current state of the law.

Kupenda, Angela Mae

### **Learning from Family Law to Address America's Family-Like Race Dysfunction**

This paper uses family law as a lens to address the conflicts in the broader American family. A judge was overheard saying that she did not understand why anyone would want to remain in a marriage with physical, emotional, verbal and financial abuse. As I thought over her remarks, I thought about the state of African Americans in the family called America. In many ways, the condition of African Americans is analogous to the condition of a spouse in an abusive relationship. And, an abused partner has four choices: to leave and to change; to leave and not change; to stay and not change;

and to stay and change. Most African Americans are not in a position, nor desire, to leave America permanently, which eliminates two of the options. And, if African Americans are going to stay, they need to change the dynamics of their family like relationship with America.

In this paper, I will use domestic violence and battered women literature and theories to evaluate whether some of the precepts for abused partners in the traditional family context can be transformed to precepts to help African Americans change their relationship with America and address the family-like race dysfunction.

Lind, Craig

### **A Global Family? Culture, Sexuality and Family Regulation**

In this paper I wish to examine the interaction between a diversity of cultural norms and values, and legal family regulation. I am interested in the way in which varying family norms found within individual legal jurisdictions are reflected in their legal regulatory regimes. How does the legal system cope with real, lived, family forms which the majority in a particular society would prefer not to see embraced? And what effect does this interaction of law with family norm have on the lived family lives and the individual self identities of those living in multicultural societies?

While the paper is unlikely to resolve the problems that will be posed, it will seek to reflect critically on some alternative strategies that appear to be available to the legal system in regulating the family where culture come into conflict on the issue of family form. The paper will use as its paradigm examples same-sex family regulation and polygamous family recognition. It will consider these family forms in the light of the legal and social positions operating, principally, in South Africa where most of the research for this paper has been conducted. But it will also reflect on the parallel problems that have arisen in the UK, Canada and the USA.

Maldonado, Solangel

### **Cultivating Forgiveness in Divorce Actions**

In recent years, legal scholars have begun exploring the role of emotion in legislative proposals, individuals' motivation to litigate, and in judges' and juries' decisions. Although there is a rich literature on the role of emotion in the criminal context, few scholars have examined the role of emotion in family law, specifically divorce law. Exploring the role of emotion in family law is important for two reasons. First, family law, more than any other area of the law, is often fraught with emotion. Second, most of the law and emotion literature has focused primarily on negative emotions such as anger, disgust, and vengefulness and much less so on positive emotions such as love, hope, and forgiveness. To the extent that the law's purpose is not only to reduce harmful behavior, but also to facilitate positive behavior, it is worthwhile to explore its ability to facilitate positive emotions amongst its citizens.

Although most divorce actions do not go to trial, relatively few divorces could be described as amicable. Many divorcing spouses feel betrayed and angry and want to punish the other spouse for leaving them, hurting them, or betraying their trust. As a result, divorce actions are often fraught with negative emotions. These emotions influence the parties' interactions and negotiations not only during the divorce process, but for years after their marriage has been legally dissolved. This is particularly problematic for couples who have minor children together and are often unwilling or unable to disguise their negative feelings about the other parent or to communicate with him or her in a civil manner. Parental conflict harms children in many ways—emotionally, academically, and developmentally.

Lawmakers have tried to eliminate contentious divorces and the emotions that often underlie them. This was one reason behind the no-fault revolution. However, parties' negative emotions have not disappeared but merely shifted to the financial and custody aspects of divorce. This article argues that until parties can forgive each other, their emotions will continue to negatively affect them and their children. Thus, the law has a responsibility to cultivate forgiveness in divorce actions. Relying on lawmaker's attempts to cultivate forgiveness in other contexts such as the Truth and Reconciliation Commission in South Africa and victim-offender mediation in the U.S., this article proposes a model for "healing divorces." These proceedings, although similar to mediation and collaborative divorce in many ways, would focus on enabling divorcing couples to forgive each other for their benefit and for the benefit of their children.

Oldham, J T (Tom)

### **Marital Property Rights of Mobile Spouses at Divorce**

Marital property rules in the U.S. vary greatly. In some states, all property is divisible, regardless when or how acquired. Most limit the scope of divisible property, but don't agree what is included in the divisible estate. In a few states, the divisible estate must be divided equally; in most, it is to be divided fairly, based on various factors.

So, a divorce property division can be substantially impacted by what law is chosen to apply to the couple's rights to property when they divorce. An increasing number of couples who divorce in the U.S. live in more than one state or country during marriage. It is curious that little attention has been given in the U.S. to how one should determine the applicable law in such instances.

In this article I summarize the primary European approach accepted in this situation, and compare it to what U.S. courts have done to date. I propose an approach for American courts to use to determine the rights of mobile spouses at divorce.

Papke, David

### **“Classifying” Adoption Law**

It is conventional for family law commentators to “triangulate” the adoption process, pointing to the conflicting interests of three groups: adoptive parents, biological parents, and children. While the interests of these groups can in fact collide, the socioeconomic class affiliations of those involved in adoption create an even more fundamental divide. For both domestic adoptions and rapidly increasing international adoptions, class serves as the social flooring of the process, and law and legal standards are designed to protect the interests of the upper classes.

The importance of class is evident at every stage of adoption. Almost all adopters are members of the middle and upper classes, and those with the greatest assets are increasingly turning to so-called “private adoptions” rather than non-profit agencies, county departments, and government offices, all of which would be less likely to merely accommodate those with money. Birth mothers, meanwhile, come almost entirely from the working class, the underclass, or – in the developing world – the rural peasant class. Consent to the adoption from the young, uneducated, and poor biological mothers, who are normally absent from the proceedings, is virtually impossible to withdraw. The familiar “best interests of the child” finalization requirement is a “paper standard” because, by the time an adoption petition comes to a judge, lawyers have moved adopters through all the character and financial checks, and children are often already in their new homes. Furthermore, states have come to use putative fathers’ registries to protect middle and upper-class adopters from late-surfacing biological fathers, most of who are themselves from the working class or underclass. Fathers who fail to place their names in the registries, even though they had absolutely no concrete knowledge of the registries, are deemed by the law to have waived their rights to notice, hearing, and consent.

In general, adoption prompts sympathetic, tender thoughts. Birth mothers, after all, make wrenching decisions to place their children for adoption, and some adopters look and hard for the children they want. In the end, adoptive parents in most cases provide warm and loving homes for their adoptive children. But still, socioeconomic class serves as the foundation of the process, and the tilt of the process toward those with assets is clear. Failure to recognize the role of class in adoption or, even worse, the concealment of that role constitutes troubling duplicity.

Piatt, Rosanne

### **Age of Marriage**

In 2005 the Texas Legislature passed numerous laws to punish polygamists and prevent them from forcing young females into polygamist marriages. Among the laws it passed was a provision which makes void marriage by persons under the age of sixteen.

Further, a parent of a person younger than sixteen who provides parental consent for a marriage license commits a third degree felony. At first glance, these provisions address the harm to female children in polygamist communities. However, in practice, they do not prevent the harm because polygamists do not obtain state-issued marriage licenses to enter into polygamist marriages. As applied to non-polygamists in Texas, the provisions seem harsh. Prior to 2005, a person younger than sixteen could marry if that person was older than fourteen and had parental permission. Also, a person, no matter how young, could marry with court permission. Thus, after 2005, no child under sixteen could marry with parental permission—the parent committed a felony if he or she consented. The language of the new statute made the marriage “void.” However, the provision which allowed a court to grant permission was not changed.

As the title to my 2005 article for the *St. Mary's Law Journal* suggests, I think the legislature went too far. In *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger Than Sixteen and Criminalizes Parental Consent*, I question the reasons for, and application of, the new legislation. Prior to the legislation, Texas' public policy had always been to recognize underage marriages as valid unless good reason was shown to invalidate them. Because some Texans force children into polygamist marriages, is not good reason to invalidate all marriages by persons younger than sixteen. Parents had enjoyed the presumption that they act in their children's best interest. Because some parents force their children into polygamy, all Texas parents should not be punished. Traditionally, if there was a conflict between the rights of the state, the rights of the child, and the rights of the parent, the rights of the state came last. Now, a court could decide the best interest of a child seeking to marry while a parent committed a felony if he or she tried. I sent a copy of my article to each Texas legislator.

In its 2007 biannual session which concluded this May, the Texas Legislature amended the underage marriage provision by adding a phrase. Now, a marriage by a person younger than sixteen is void unless a court order has been obtained for the license. So ‘void’ does not mean ‘void’ if a court gives permission. This is a clarification of the law rather than a change. Now it is clear that a court decides when it is in the best interest of a person younger than sixteen to marry, and the marriage is not void. However, in Texas a parent of a child under age sixteen still commits a felony if he or she tries to decide that it is in his or her fourteen or fifteen year old child's best interest to marry. Polygamy aside, is this necessary or right? Is Texas in the main stream when it comes to underage marriage? I have obtained the statistics on the number of females under the age of sixteen who obtained marriage licenses in Texas between 2002 and 2005. Most

have Hispanic sounding surnames. How does the new legislation affect Texas' Hispanic population? My paper, *An Age Old Question: How Young Is Too Young to Marry (and Who Decides)?* will address these and other related issues.

Polikoff, Nancy D.

### **Valuing All Families: Law Reform for the 21<sup>st</sup> Century**

Martha Fineman has advocated law reform that recognizes the relationship between a caretaker and a dependent, paradigmatically a mother and child, as the core family relationship. Grace Blumberg has advocated assimilating unmarried couples in the legal regime of marriage, as other countries have done.

My paper draws from these scholars to develop a more comprehensive approach to the law of families. The principles of this approach are as follows:

1. The needs of children should trump those of able-bodied adult partners: As an example, the military death benefit that goes to a spouse should be revised so that it goes to a surviving child if there is one. If the deceased servicemember has a child who is in the care of someone other than his spouse (normally because the spouse is not the child's other parent), the child now gets nothing. This is wrong.
2. Treat children in all caretaking units equally. Status as a nonmarital child is no longer a basis for distinguishing between children. This principle should be extended so that children are treated equally regardless of their legal relationship to their caretaker.
3. Recognize adult interdependent relationships.

Do not ever make marriage the dividing line for any legal rule or policy. Rather, identify the rule's purpose and tailor the included relationships to the purpose. This will treat some unmarried relationships the way marriage is now treated, and it will also distinguish among marriages so that not all marriages are treated the same. Some examples of this now are the New Zealand dissolution rules which distinguish between marriages of less than or more than three years, and the California Domestic Partnership law which provides a different dissolution route if the relationship was less than five year and there are no children and limited property.

Reilly, Marie T.

### **The Boundary Between Individuality and Partnership Within Marriage**

The boundary between spouses' collective and individual interests was once a simple and invariable attribute of marital status. Marriage is no longer a merger of two individuals into a single legal persona. Spouses can hold property and incur liability as individuals or as agents for each other and their marital collaboration. On divorce, a court characterizes a couple's wealth as marital or separate to

achieve an equitable distribution. While a couple is married, the scope of their collaboration becomes a critical aspect of their relations with creditors. The individual is the basic legal actor for purposes of liability. If a spouse incurs liability as an individual, only he is liable, and only his property interests are subject to the creditor's recourse. If, however, a spouse incurs liability as agent for the other spouse within the scope of their shared project, then the basic unit of liability expands beyond the individual. The other spouse is vicariously liable and the creditor's recourse encompasses the other spouse's interest in property.

Whether a married person acted as for himself or as agent for his spouse depends on a complicated interface between property, agency and marital law. In this paper, I explore how change in the law governing marriage has changed spouses' responsibility for each other in credit relationships with third parties. As we debate legal regulation of marriage and other personal relationships, it is useful to consider the ways agency and other law historically has privileged a couple's collaborative investment in marriage against the claims of creditors. Even after the late twentieth century marriage revolution, marriage remains *sui generis*, and a partnership only in metaphor. Courts continue to interpret marital collaboration with sensitivity to its unique social value. By understanding how law defines the responsibility of spouses for each other to third parties, we can better understand the instrumental potential of law towards achieving a socially optimal allocation of control, dependency and trust in marriage and in other collaborative relationships.

Rosettenstein, David S. **Choice of Law in International Child Support Obligations: Hague or Vague, And Does It Matter?**

The paper will consider the optional choice of law protocol for the proposed Hague convention on the International Recovery of Child Support that currently is under development. With a choice of law rule linked to the claimant's habitual residence the convention potentially offers a different set of premises than those dictated by traditional American doctrine. Against this background, the paper will examine some of the outcomes in international contexts generated by current American rules and contrast them with the consequences of analogous concerns in interstate contexts. With due regard to traditional conflicts of laws analysis, the paper will deal with themes such as the child's needs, claimant's resources, cost of living, and standard of living. The appealing, but destructive, motivation to achieve system efficiency also will be considered.

Ryrstedt, Eva

### **Family Law and National Registration in Sweden; Fact as Proxy for Reality?**

The national registration of the inhabitants in Sweden – with its’ origin in the 16<sup>th</sup> century - is formal, but it has an impact on various rules within the field of family law and social law. In one way it can be said (as I argued at the ISFL conference in Salt Lake City) to determine what family a child belongs to.

National registration in Sweden is a system of public regulation of something that appears to be a fact, determined by an authority, but at the same time a regulation that in a sense takes its’ standing point in the outcome of the regulation of family law. As it also has an impact on private rights and obligations concerning children, the public regulation in this area is closely intertwined with the rules on family law in a way that sometimes makes it difficult to establish how the different regulations affect each other.

This paper deals with how the national registration is constructed in comparison with similar systems in other countries, but also how countries without a similar system, deal with issues that in Sweden are solved by means of mapping its’ inhabitants. With the concept of family rapidly changing, it must be of great importance to build a system that is on the same time flexible and in conformity with modern demands, as it is secure and easy to apply.

The most important question will subsequently be whether a system, as mechanical as the Swedish one, is suited to determine for example who will be the recipient of a certain benefit. If the answer is negative, there seems only to be two alternative solutions. One way could be to separate the public system of national registration from rules on family law and social law and therefore from the effects on for example benefit transfers. If, on the other hand, the interaction between the systems is to be maintained, the regulation of national registration in Sweden instead needs to be revised. Instead of being a technical system, based on certain inflexible facts, it would be founded on material and more realistic considerations.

Schechter, Lowell

### **The Family: “Victim” or “Villain” of U.S. Immigration Policy?**

United States immigration law impacts millions of families each year. Some provisions of the Immigration and Naturalization Act enable individuals to preserve, re-unite, or even create new, family units; Other provisions have the opposite effect: preventing individuals from re-uniting their families or prompting the disintegration of intact, functioning family units.

There is an intense debate currently underway in the Congress and in the nation over how to “reform” our current laws. It is a debate marked by as many “contested facts” and “clashing values” as any other policy debate in recent history. It is a debate where the same measure which is hailed by one side as promoting

“traditional family values” is reviled by the other as further bedeviling us with the evils of “chain migration.”

In order to engage in a more reasoned debate as to how the current law should be changed, it would seem necessary to first ascertain “the facts” as to the actual impact of current law on family unity. But, here too “the facts” are not all that easily ascertainable. For, while there are a number of provisions, especially those establishing the priorities for family-sponsored immigration, that appear to be very “family friendly”; there are others, such as the provisions narrowly defining family membership and imposing national quotas, which may undercut the former.

Furthermore, there are other provisions, such as the ones mandating deportation of long-term residents for relatively minor crimes with little or no allowance made for the negative impact of the deportation on other innocent family members. – that have resulted in the arguably unnecessary destruction of many existing family units. The primary objective of my presentation will be to explore both the ways that current U.S. immigration law is supportive of and the ways it, perhaps unnecessarily, undercuts, family unity.

My secondary objective, which is heavily dependent on how the ongoing debate in the Senate over the Comprehensive Immigration Reform bill evolves over the next few weeks, is to explore the possible impact of the proposed “reforms” on family unity. In pursuing these objectives. I would like to compare, U.S. rules for family-sponsored admission with those of other common-law countries with large immigrant populations, such as Canada and Australia. I will also compare the restrictive U.S. approach to waiver of deportation in order to preserve family unity with the much more expansive approach taken in Europe under Article 8 of the European Convention on Human Rights.

Scott, Elizabeth

### **A World Without Marriage**

Legal marriage has become a highly politicized issue, the subject of fierce ideological debate. Critics on the left point to the history of marriage as a religious and patriarchal institution that was the source of women’s oppression, and some argue that marriage as a state-sanctioned and privileged institution should be abolished outright. Conservatives lament the decline of marriage and argue for government reinforcement of traditional marriage. The marriage debate also rages on another axis, as advocates for gay and lesbians seek access to this socially and legally distinctive status. In recent years, support has grown for allowing same-sex couples to enter civil unions, a status that carries the legal attributes of marriage, but opposition to same-sex marriage remains strong.

In this presentation, I argue that marriage functions quite well as a family form and that arguments for abolishing or de-privileging

the legal status (without more) are shortsighted. I then ask whether, instead, lawmakers should substitute for marriage a civil-union status for *all* couples seeking to undertake legal commitments as long term intimate partners. Many of marriage's advantages as a stable family form that enhances individual and social welfare derive from formal *ex ante* commitments to undertake substantial, long-term family care obligations. These obligations are subject to legal enforcement upon divorce through property division and spousal support. To a large extent, the benefits of formal unions can be captured by allowing both same- and opposite-sex couples to enter civil unions.

Although it may seem that this legal move is simply changing the name of marriage, it may accomplish several goals, while retaining many of the benefits that follow from formal commitment. First, civil unions do not have the historic associations that surround marriage as a religious institution grounded in gender hierarchy. Thus, a society in which civil unions are a core family form may be more likely to achieve the goal of equality in intimate unions. The new institution is also likely to be more palatable to those who are troubled by state sanctioning of an institution with deep religious roots; civil unions are clearly secular, as is appropriate for a status that carries legal privileges. Finally, abolishing marriage and adopting civil union status goes a long way to defuse the debate about gay marriage. The argument for excluding gays and lesbians from the legal marriage rests precariously on religious and moral tradition; ultimately, in my view, this differential treatment is destined to be struck down as unconstitutional discrimination. Supporters of traditional marriage are likely to face a hard choice – legal marriage open to all couples who are ready to make the commitment or a secular legal status that is not marriage. In a world without legal marriage, religious organizations can continue to preserve the traditional version of marriage, while state-sanctioned civil unions are open to all. This seemingly radical proposal may become the most attractive choice among the available options to a wide range of people.

There may be costs to this approach. The stability of marriage derives, in part, from culturally embedded norms that define spouses' behavioral expectations. These norms may be diluted with the transition to civil unions; how these norms can be adapted and reinforced presents an important challenge. Moreover, it is possible that civil unions will not attain the respect as a core social institution that marriage enjoys, and thus it will be less attractive to couples in intimate relationships, some of whom may enter religious marriages but undertake no legal commitment to one another. Nonetheless, this proposal deserves serious consideration as a progressive move that retains many benefits of an important traditional institution.

Shapiro, Julie

### **What it Means To Be “Marriage-Like”: Enforcing Gendered Dependence in Unmarried Couples in Washington**

Washington state law has provided some legal recognition to different-sex non-marital partnerships for over thirty years. Parties to “meretricious relationships,” as the courts call them, are entitled to limited equitable protections upon termination of the relationship. This same protection has been extended to same-sex couples by at least some courts for over a decade.

While the benefits afforded meretricious relationships are distinctly partial, they are significant enough to have been the subject of recurrent litigation. In each case the court must determine, as a threshold matter, whether the parties are in the appropriate sort of relationship. The criteria, while flexible, requires that the relationship be “marriage-like.”

Increasingly, the factors courts look for in different-sex couples relate to enactment of familiar gendered patterns of domestic responsibility. Thus, the woman who works and has her own checking account is viewed less favorably than is the woman who maintains the home. More generally, courts favor relationships that embody a traditional homemaker/breadwinner organization, even where the parties are the same sex. Equitable remedies reward conformity with traditional gender roles and the accompanying economic dependence they bring.

This trend is consistent with the critique of legal doctrines dependent on recognition of functional family units. Theorists have asserted that these doctrines will generally require conformity with traditional norms. Individuals who live in non-traditional forms that do not maintain these norms will not attain recognition and protection. This paper will examine the ways in which the Washington meretricious relationship cases do and do not confirm this critique.

Strasser, Mark

### **The Rights of the Unmarried Father: A Jurisprudence in Disarray**

Over the past few decades, state courts have been deciding the conditions under which it is necessary to secure an unmarried man's permission before the child that he has fathered is adopted. Some cases are quite clear, e.g., where the father has neither had contact with nor paid any support for the child over a period of several years. Yet other cases are much less clear, e.g., where the mother of the child disappeared without a trace during the pregnancy and then placed the child after misrepresenting the identity of the father. As is perhaps unsurprising, the courts have varied greatly with respect to what the father must have done in such a case in order to block or undo an adoption.

The variation in the case law is due in part to variations in local law but also in part to the Courts' jurisprudence in this area, which is even more confused than might first appear. While the Court

has established that mere biological connection will not suffice to establish parental rights under the Constitution, the Court has failed to make clear what will suffice, for example, in a case involving a father who had not yet established a relationship with his child, possibly through no fault of his own. Indeed, the Court has consistently sent mixed signals with respect to what a father must or even can do to preserve or establish his parental rights in this kind of case.

Any discussion of paternal rights in a context in which the father has never established a relationship with the child that he helped produce requires consideration of a number of potentially competing interests—those of the biological parents, would-be adoptive parent(s), the child, and the state. Precisely because such important interests are implicated and because these issues are extremely thorny, reasonable legislatures might adopt very different policies in an attempt to achieve the best results. Yet, any legislation designed to address these issues should be drafted and adopted in light of existing constitutional guarantees. Regrettably, the Court has made it very difficult to know just what the Constitution requires in these kinds of cases, although the best understanding of the Court's current jurisprudence seems to be that a father who has neither had custody of his child nor a formal relationship with the child's custodial parent does not have a constitutionally protected interest in maintaining or preserving the parent-child relationship.

Wardle, Lynn D.

### **Reconceptualizing Alimony: Balancing Values and Practicalities in an Era of Social Change**

There is much confusion and conflict regarding alimony in the United States of America. That is primarily due to the erosion of theoretical foundations for requiring the payment of alimony upon divorce. The theoretical basis for awarding alimony that existed in days of fault grounds for divorce no longer apply in most divorces today. Nineteenth century fault justifications have been undermined since marriage can be dissolved without regard to fault. Likewise, the economic justification for divorce during the mid twentieth century divorce reform in the United States no longer applies to conditions in the 21<sup>st</sup> century. Economic dependence of wives upon husbands is no longer socially expected or economically compelled, and traditional husband-earner, wife-homemaker family labor division no longer characterizes most marriages.

The search for a theory to make sense of and justify alimony in the 21<sup>st</sup> century requires reconceptualization of the purpose of alimony. That requires a reassessment of the public policy interests alimony is intended to promote and practical realities of marital-family life in the 21<sup>st</sup> century. In this paper I propose that alimony is best understood as an incentive to promote and protect investment by spouses in critical social functions relating to child rearing and family

maintenance. It is not designed so much to protect the individual economic interests of the spouses, as they live in a society in which economic individual adult self-sufficiency is not only possible, but it is the standard. Rather, alimony is designed to secure and promote public values rather than private interests. The public values relate to increasing factors that correlate with marital stability, couple happiness, and child well-being. Fostering and maintaining those factors requires an investment that may diminish individual economic productivity. Alimony is designed to protect that investment for the sake of supporting and encouraging strong families. A review of the theoretical, economic, and demographic data will show that this reconceptualization of alimony balances these important public policy values and changing practical realities of family life in 21<sup>st</sup> century America.

Weiner, Merle H.

### **Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation**

This paper is based on my forthcoming article of the same name (40 UC Davis L. Rev. 1747 (2007)). It focuses on the following rather provocative question: Should a noncustodial parent be able to stop a custodial parent from relocating with the couple's child when it would be best for the child if the noncustodial parent simply moved with them?

It is critical to address the significance of the noncustodial parent's mobility now because a new Uniform Relocation Act will soon be drafted. The Program and Scope Committee of the National Conference of Commissioners on Uniform State Laws approved the project in July 2006. Prior model acts by the American Academy of Matrimonial Lawyers and the American Law Institute have ignored the noncustodial parent's mobility. Most courts and legislators disregard this consideration too. Scholars that argue the law should discourage custodial parents' relocation skew the debate about relocation policy as they ignore noncustodial parents' mobility.

The inattention to the noncustodial parent's mobility is somewhat surprising since the supreme courts of New York, New Jersey and Texas have recognized its importance to the relocation analysis. These decisions have not received the attention they deserve for a variety of case-specific reasons; however, collectively they are ignored because the justification for the inquiry lacks a strong theoretical foundation. The paper explains why the noncustodial parent's mobility must be central to any relocation adjudication. It suggests that the omission undercuts the ability of courts to resolve these disputes in children's best interests. In fact, judges all over the country lament the "irreconcilable conflict" between custodial parent's desire to move and a noncustodial parent's desire to maintain a vibrant relationship with the child, but fail to recognize that the best outcome

for some children would be for the divided family to relocate together. In addition, the norm of equality demands that the noncustodial parent's mobility be considered. The omission perpetuates gender stereotypes and undermines any attempt to provide equal rights of mobility to the custodial parent (usually the mother) and the noncustodial parent (usually the father). Finally, the omission undercuts the law's attempt to promote postdivorce parenting as a partnership. The inclusion of the noncustodial parent's mobility as a legitimate consideration in relocation cases will capitalize on law's expressive function; it will encourage parents to consider new solutions that may be best for children.

The paper also addresses the interesting practical questions that flow from its argument. How much significance should the court give to the noncustodial parent's convenience? Once a court decides that the noncustodial parent should follow, should the court restructure visitation to permit a recalcitrant parent to visit with the child on that parent's own terms? What if the noncustodial parent has engaged in domestic violence and it is safer for the custodial parent and child to be distant from the noncustodial parent? Finally, the paper suggests that this new focus on the noncustodial parent's mobility may affect the application of a variety of laws that impact custodial parents' travel, including constitutional law, criminal law, and other civil law provisions.

Wilson, Robin Fretwell **The Perils of Privatized Marriage**

This paper will examine several proposals to give greater deference to religious understandings of family relations. Numerous scholars now argue in one way or another that we should accommodate multiple understandings of marriage by religious communities—whether by enforcing religious contracts or ceding jurisdiction over marriage to religious authorities and enforcing the decisions of those authorities. This paper argues that the effect of these proposals is to pull the state out of marriage. State law plays an important protective function. Binding persons, usually women, who want to exit these relationships to the religious community's norms undermines this protective function. Giving deference to religious understandings of marriage and family will raise the costs of exit, lower the chances that the victim is able to exit, and prevent her from privately regulating the conduct in her own relationship and conduct with respect to her children. Of course, deference would raise little concern if we could predict that members of the community will not experience family violence. Yet social science evidence tells us that domestic violence and child abuse will occur in these communities—like they do in any other—and when this occurs, the victim may have few avenues of support if we enforce private religious norms about family and marriage.