

Updates for LGBTbib.org

June 2009

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1. *General Works*

Seidman, Louis Michael, *Gay Sex and Marriage, the Reciprocal Disadvantage Problem, and the Crisis in Liberal Constitutional Theory*, 31 Harvard J. L. & Pub. Pol'y 135-150 (2008).

Writing from the perspective of the journal issue's theme of "Law and Morality," Seidman inquires into the over-the-top rhetoric of opponents of gays' rights, such as Justice Scalia, who think that "the case for gay rights is outside the range of reasonable constitutional argument." After demonstrating that a moral argument can be fielded for gay marriage, he returns to the question of why Scalia insists that such defenses are not simply wrong, but illegitimate. Generously taking him at his word that he is not motivated wholly out of pure animus, Seidman interestingly suggests that the dilemma lies in the problematic relationship between law and morality. If "it is true that constitutional questions are inextricably tied to moral questions [as liberal constitutionalism presumes], and if it is also true that moral questions cannot be resolved by reasoned argument [as the debate over gay marriage suggests], then it follows that constitutional questions cannot be so resolved either. But then it would be true that our polity is not founded on principles that all of our citizens are bound to respect and that the ambitions of liberal constitutionalism would have failed." This outcome, he notes, would be "a very big deal" for one such as Scalia, and at least offers an alternative explanation for his lashing out "at people who, he perceives, are attacking the very foundations of the Republic, not to mention his self-conception of how he performs his job."

2. *First Amendment*

Strasser, Mark, *Marriage, Free Exercise, and the Constitution*, 26 *Law & Inequ.* 59-108 (2008).

Strasser ventures onto intellectual white water in this piece due to its controversial topic. Not that the reader would realize this from the seemingly innocuous title. His argument is first that those who would dismiss same-sex marriage by invoking the slippery slope to polygamy argument err by blurring distinguishable activities. Reasonable enough. Hackles will raise in the next sections which point out that, even so, "current plural marriage bans are not narrowly tailored enough to withstand the close scrutiny that should be given to statutes that target religious practices." In other words, while gay marriage does not lead to polygamy, the dispassionate reevaluation of the grounds on which both those practices are prohibited leads to the conclusion that "the Free Exercise Clause requires an exception be recognized for some same-sex marriages and for some plural marriages involving consenting adults." His thesis should be taken seriously by anyone interested in what the law actually requires, rather than merely the legal supports for the things they prefer.

3. *Privacy, Equal Protection, Due Process*

Wieland, Steven P., *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme court Can Use the Rational-Basis Test to Address Varnum v. Brien*, 94 *Iowa L. Rev.* 413-448 (2008).

This case note was written in the interim between the lower court ruling in *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), which upheld the right of six same-sex couples to be issued marriage licenses, and the decision by the Iowa Supreme Court upholding that outcome (763 N.W.2d 862 (Iowa 2009)). Wieland hoped that a decision using the rational-basis test -- the lowest level of scrutiny in equal protection analysis -- would "shift the debate away from the divisive issue of marriage back to human equality -- from 'Do homosexuals deserve the traditional privilege of marriage?' to 'How should we provide equal access to government benefits and protections to all people, including homosexuals?'" The Iowa court has in the past employed a "rational-basis-with-bite test," or a "bare animosity review," and the authors believes that this would be the more appropriate path in the present instance. History has overtaken his arguments, however, as the court chose to uphold the right to same-sex marriage by relying upon an intermediate level scrutiny which requires that "a statutory classification must be substantially related to an important governmental objective." This standard the state could not satisfy.

4. *Full Faith and Credit / DOMA*

Savastano, Gennaro, *Comity of Errors: Foreign Same-Sex Marriages in New York*, 24 *Touro L. Rev.* 199-221 (2008).

The student author argues for the recognition of extraterritorial same-sex marriages by New York under the comity doctrine. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) serves springboard for this commentary, wherein the New York Court of Appeals denied that the state constitution compelled recognition of same-sex marriages. *Hernandez*, which dealt with the question of issuing licenses of New York citizens, influenced later cases ruling on the question of recognition of marriages in foreign jurisdictions, such as *Funderburke v. New York State Department of Civil Service*, 822 N.Y.S.2d 393 (Nassau County Sup. Ct. 2006), *Godfrey v. Spano*, 836 N.Y.S.2d 813 (Westchester County Sup. Ct. 2007), and *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (App. Div. 4th Dep't Feb. 1, 2008), which disagreed over whether *Hernandez* had changed the law as concerned comity. This outcome is allowed, he says, because "the spirit of New York law safeguards citizens with respect to matters of sexual orientation, rendering the public policy arguments [for exemptions from comity obligations] untenable."

E. Foreign / International Law

1. *Other than USA*

Stychin, Carl F., *Faith in Rights: The Struggle over Same-Sex Adoption in the United Kingdom*, 17 Const. Forum 117-125 (2008).

"Rights talk," writes this author, are a double-edged sword. Those claiming rights (in this case, for same-sex couples to adopt) are often met those opponents also claiming rights (Catholic adoption agencies seeking an exemption from a requirement to consider same-sex couples). Such conflicts show the inherently rhetorical nature of the claim to rights, which constitutes Stychin's primary point. The idea of the right, from this perspective, one upon which much of gay activism depends, from this perspective becomes less of a trump than merely one device among many, a perhaps necessary but not sufficient claim in the public marketplace since it is so easily parried by countervailing claims framed in equivalent terms.

2. *International Law / Human Rights*

Mittelstaedt, Emma, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 Chicago J. Int'l L. 353-386 (2008).

Many nations that have signed international agreements protecting the rights of sexual minorities (e.g., ICCPR) maintain domestic laws in blatant contradiction to those commitments. The author reasons that such situations leave rights advocates with two choices: either use the international legal obligation as a lever to force local changes, or minimize such pressures to allow "incremental change toward human rights for sexual minorities." Differentiating local laws that predate the treaty, those that predate but have been "reinforced to further violate those obligations," and those that have been newly added since the treaty was signed, she concludes that a mix of strategies will be most

effective, but that "in situations where the offending legislation predates the treaty, legal arguments will likely be less effective."

Wardle, Lynn D., *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 *Indiana Int'l Comp. L. Rev.* 113-152 (2008).

Coming from a law professor whose sole claim to fame rests on his vigorous and varied attacks on gays' rights, this particular article is remarkably restrained. The basic question he asks is whether U.S. ratification of the Hague Convention on Intercountry Adoption contains any hidden requirements to allow adoption by gay men and lesbians, something he would view as a regrettable outcome. His analysis suggests -- not least because at the time of the HCIA's writing (between 1988 and 1993), the social landscape concerning homosexuality was markedly different than it stands today -- the treaty contains no such stipulation, and in fact leaves much of the details about adoption to the local law of the countries involved. While this result is perhaps not as positive as gay couples would like, neither is it as negative as the author would prefer, a cause for some encouragement.

3. *Comparative*

4. *Immigration / Refugees*

III. Discrimination

A. Private Employment

1. *General*

2. *Harassment / Title VII*

3. *Benefits*

4. *School / Teachers*

B. Public Employment

1. *Military / Campus Recruitment*

Correales, Robert I., *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 *Cal. W. L. Rev.* 413-476 (2008).

Incoming President Obama has promised to make a revision of the "Don't Ask, Don't Tell" policy that excludes open homosexuals from military service a top priority. Correales examines the legal infrastructure of the ban and its real-world consequences. This review leads him to believe that "the true last-remaining reason for the policy is a level of legislative and administrative animus toward homosexuals as a group," and thus serves as "the prototypical case of invidious discrimination against a politically unpopular group." As such, the policy should be revoked and U.S. military practice brought in line with that of the other civilized nations.

2. Non-Military

C. Hate Crimes

Pugh, Catherine, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law that Prosecutors Will Actually Want to Use*, 45 Cal. W. L. Rev. 179-233 (2008).

Pugh serves up an engrossing argument for improving state prosecution of hate crimes. The touchstone account reappearing through the text is the story of Megan Williams, who, for more than a week in September 2007, was beaten and sexually abused by six men and women. Although at least two abusers admitted that the fact that Williams was black as an precipitating cause of the attack, only one defendant was charged with a hate crime. While the prosecutor may wish to avoid the added complications of proving a hate crime motive, and be satisfied that the defendants earn stiff penalties on other charges, Pugh believes this deprives the victims and society in general of valuable closure on the hate motivations of the crime. Among her suggested improvements in hate crime legislation is the removal of the "double-intent" requirement that limits concurrent jurisdiction over hate crimes (i.e., "Under current law, to establish a 245(b) violation, the government must prove beyond a reasonable doubt (1) the intent to commit a crime of violence that was motivated by racial, ethnic, or religious hatred, and (2) the intent to interfere with a victim's enjoyment of at least one enumerated federally protected activity." It was the lack of the second element that prevented federal involvement in the Williams case.). She also favors including Victim-Offender Mediation procedures in any new legislation, which in some cases can circumvent the problem of proof in a courtroom, and allow catharsis through confrontation between the victim and the offender, which benefits both parties as well as society.

Woods, Jordan Blair, *Ensuring a Right of Access to the Court for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 Chapman L. Rev. 389-431 (2008).

The Matthew Shepard Act seeks to amend the federal hate-crime law to include sexual orientation and gender identity. Although the act passed the Congress in 2007, then-President Bush threatened to veto the Defense appropriations bill to which it was attached if it came to his desk including that section. Hopes are high that the bill will become law early in the Obama administration. Woods argues that the constitutional authority to pass such a law is to be found not in the Commerce Clause -- an increasingly sketchy basis on which to exert Congressional power -- but in the Fourteenth Amendment's Section 5 enforcement power. He reaches his result by pointing out that the effect of the hate crimes is to prevent victims "from reporting their crimes to the police, influence police officers not to categorize or investigate their crimes as bias crimes, and prevent prosecutors from prosecuting their crimes as bias crimes," the remedy for which falls to Section 5 "to ensure a right of access to the courts."

D. Housing / Sports

E. Other

IV. Family Issues

A. General

B. Couples

1. *General*

2. *Marriage*

a. *General*

Eskridge, William N., Jr., and Lawrence Rosenthal, *Same-Sex Marriage*, 12 *Chapman L. Rev.* 1-22 (2008).

Transcript of an accessible and at times even entertaining conversation on same-sex marriage. Eskridge argues for strict scrutiny of a form of sex discrimination when same-sex couples are denied marriage licenses. There is perhaps not enough disagreement between Eskridge and his principle discussant, Lawrence Rosenthal, to make this a page-turner, which in itself says a lot about how far the issue has come.

Langbein, Laura, and Mark A. Yossi, *Same-Sex Marriage and Negative Externalities*, 90 *Social Science Q.* 292-308 (2009).

A common argument against same-sex marriage invokes fears that its practice would incur "negative externalities," or costs borne by those outside the marriage (see, e.g., Charles Murray, "Love Has Nothing To Do With It," 50 *S. Texas L. Rev.* 77 (2008)). These authors attempt to test this claim empirically, specifically that "same-sex marriage will have negative impacts on marriage, divorce, abortion rates, the proportion of children born to single women, and the percent of children in female-headed households." They compare data from all fifty states for the years 1990, 2000, and 2004, and conclude that no adverse outcomes follow from permitting same-sex marriages or civil unions, and indeed there may be signs of positive outcomes on these criteria. As the depth of data is quite shallow -- gay marriages being allowed in only two states in 2004 -- it is possible that more extensive data covering more years and more gay-friendly states will show a different result. But work such as this represents a welcome relief of solid data in an arena better known for its baseless assertions.

Poirier, Marc R., *The Cultural Property Claim within the Same-Sex Marriage Controversy*. 17 *Columbia J. Gender & L.* 343-418 (2008).

In the well-trod path of arguments over same-sex marriage, it is rare to come across a piece that strikes the reader as presenting something new. Here, Poirier refigures the traditionalist arguments against gay marriage in a way that not only makes them more intelligible, and may mark a path toward new and more effective counterstrategies. His

thesis is that these claims are of the same sort "as is often made by Native Americans, indigenous, and other culturally-subordinated groups to certain cultural resources -- a right to exclude others in order to protect sacred objects, places, and rituals, so as to preserve and perpetuate group identity over time.... Access to marriage by same-sex couples is understood by traditionalists to threaten the desecration of this ritual, status, and identity" in much the same way that Native Americans believe allowing tourists into areas sacred to them reduce them to the mundane, ordinary, and profane. Poirier does not believe that such traditionalist claims should be determinative -- any more, one might observe, than Native American claims have proven successful in most instances in which they have been asserted -- but the insight offered by the comparison, he hopes, will open up "a different line of potential progressive responses to the traditionalist claim."

Symposium, *Gay Marriage in the Conservative Movement*, 50 S. Texas L. Rev. 1-127 (2008).

A surprisingly balanced presentation of the range of conservative arguments, not all of which will, of course, please gay readers. **Jonathan Rauch** begins by making a Burkean argument for incrementalism which balances a respect for tradition with acceptance of "gradual, bottom-up social evolution." For him, "the question is not whether same-sex marriage is a conservative policy, but whether it is being implemented in a conservative way." **Jesse Choper** and **John Yoo** (of torture memo fame) next argue that while under "existing judicial interpretation, neither the Due Process Clause nor Equal Protection Clause creates a federally-protected right of individuals of the same sex to marry when prohibited by state law," which they do not think states should do. **Robert Nagel** would unjustly reverse the burden of proof to show that same-sex couples are entitled to the public benefits of marriage. Rather than demanding the state to show why they should be excluded, he believes that "proponents of homosexual marriage must establish ... is that homosexual couples are as entitled as heterosexuals to the public recognition and respect that is an aspect of these legal entitlements." The best article in the series is that by **Gerard Bradley**. He identifies three liberal "mistakes" put forward in defense of same-sex marriage: that "the law of marriage does not rest upon a view of marriage as, in some basic or essential way, 'procreative'; that biological parents provide the optimal setting to raise children, and that "the law must recognize same-sex relationships as marriages because equal respect for the self-constituting choices of homosexuals and lesbians requires it." The quality of this argument comes not because he is right -- indeed, each of his three arguments can be turned aside rather easily -- but from the lack of evident disdain for gay men and lesbians and the seriousness of his discussion. Both of these admirable qualities are missing in the piece by **Charles Murray**, best known for *The Bell Curve*. He states that because "marriage's role as an institution depends upon its function of perpetuating culture and civilization through the birth and nurturing of children," and therefore "gay marriage is an oxymoron." He is at least consistent in that for similar reasons he would deny marriage to sterile heterosexuals. **David Frum** wonders what the big deal is, since gay couples have not rushed to get married in those jurisdictions where it has become available. **Dale Carpenter** provides the final formal presentation, in which he points out that the Burkean conditions for social change are being met, and that, as gay and lesbian couples "are saying 'yes' to a traditionalizing

institution...the question for conservatives at the end of the day is, why can't they take 'yes' for an answer?" The transcript of the symposium Q&A is fairly unremarkable, although it did allow one antigay spokesperson to show how unnuanced prejudice can be. When rhetorically asked, "But if the question is, 'Does somebody who has doubts about gay marriage, therefore become hostile to all efforts at being fair and receptive to the more particularized problems gay face?'" , **Teresa Stanton Collett** pipes up, "Perhaps I might."

b. *Pro*

Alquist, Amanda, *The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue before the California Supreme Court*, 12 Chapman L. Rev. 23-46 (2008).

In such a fast moving area of the law, there is always the likelihood that events will overtake articles. Here, the author is writing before the California Supreme Court has affirmed that then-current state law banning same-sex marriage violated the state constitution (which she favors), and before the subsequent passage of Proposition 8, which amended the constitution to reinstate the ban. Still, works such as this can be helpful to readers looking for a review of the lay of the legal land as it stood at that time.

Cox, Barbara J., *"A Painful Process of Waiting": The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand that "Same-Sex Marriage" Is Not What Same-Sex Couples Are Seeking*, 45 Cal. W. L. Rev. 139-178 (2008).

Opinions in four states have recently upheld their bans on same-sex marriage: *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); and *Conaway v. Deane*, 932 A.2d 571 (Md. 2007). Cox first argues that the reference by both sides to "same-sex marriage" appears to be asking for a new fundamental right, one that is easier for opponents to dismiss than if the case were framed as a denial of a fundamental right to marry. She then looks at the dissenting opinions in these four cases, showing how it is these that "best protect marriage and [how it is that] the dissenting justices[' understanding of marriage] best explains why individuals in same-sex couples seek the right to choose it for ourselves."

c. *Con*

3. Civil Unions / Domestic Partnership

Rosich-Schwartz, Damaris, *Tenancy by the Entirety: The Traditional Version of the Tenancy is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 N. Dakota L. Rev. 23-58 (2008).

Tenancy by the entirety -- recognized by about half the states -- provides for the "non-divisibility of interests in the property, unless agreed upon by both spouses, or after a decree of divorce, or the death of one of the spouses.... Neither an individual creditor of

one of the spouses nor a unilateral transaction can sever the tenancy." This arrangement can be contrasted with other types such as "joint tenancy" -- which allows each tenant "the right to unilaterally sever the tenancy without the other's knowledge or consent" -- and "tenancy in common," which may be severed at any time by either cotenant and does not provide any survivorship rights [and is thus] useless for couples seeking to protect their property from outside creditors and individual conveyances, while also avoiding the probate process." While many writers are urging the elimination of tenancy by the entirety, the author argues that this form of shared ownership serves vital interests not only for married couples, but can be meaningfully expanded to include property protections for common law spouses, same-sex couples, and other "quasi-marital" relationships.

4. Dissolution

C. Parenting

1. *General*

2. *Custody / Visitation*

Huffman, M. Blake, *Out of Step: Why Pulliam v. Smith Should be Overruled to Hold All North Carolina Parents -- Gay and Straight -- to the Same Custody Standard*, 87 North Carolina L. Rev. 257-304 (2008).

Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998), "took custody away from a father who had been raising his two sons alone for years, merely because he was involved in a committed relationship with another man," and remains good law in the state. Huffman "aims to bring fresh attention to *Pulliam* and proposes a better standard for determining child custody in North Carolina when one parent is homosexual." He proposes the overturning of *Pulliam* "to return North Carolina to a true nexus test" that requires a proof of a connection between the alleged changed circumstances and the welfare of the child, and that would require "specific evidence of harm to the child from the sexual activity of the parent, thus reflecting the same standard for all North Carolina parents."

3. *Adoption / Fostering*

Ross, Spencer B., *Finstuen v. Crutcher: The Tenth Circuit Delivers a Significant Victory for Same-Sex Parents with Adopted Children*, 85 Denver U. L. Rev. 685-700 (2008).

While some authors are skeptical about the obligation of states to recognize same-sex adoptions from other states (see, for example, the review by Rhonda Wasserman, "Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians," 58 Am. U. L. Rev. 1-83 (2008)), the Tenth Circuit finds in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) just such a requirement in the Full Faith and Credit Clause.

Wasserman, Rhonda, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 American U. L. Rev. 1-83 (2008).

Are states required by the U.S. Constitution to recognize an adoption decree in another state regardless of the parents' sexual orientation. At least one state -- Oklahoma -- and one high-profile commentator -- Lynn Wardle -- say no, that, in the latter's words, "in many situations nonrecognition of lesbian adoption decrees would be proper and permissible." Wasserman examines four different rationales to support such a conclusion, finding all to be flawed. Wardle's antigay posture, she argues, is contrary to "both Supreme Court precedent and an overriding policy favoring permanency in parent-child relationships."

4. *Pregnancy / Insemination*

Fiser, Harvey L., and Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 *Cardozo J. L. & Gender* 1-31 (2008).

Artificial insemination [AI] poses a range of legal unknowns for lesbian couples. Attempts to clarify the relationship (or intended lack of one) between the semen donor and the recipient are not always enforced by courts. "Contracts for the donation of sperm may not be enforceable and the recipient of sperm may not be able to ensure that the donor will not seek custody at a later time. Similarly, the donor of sperm would be unable to terminate his parental rights or obligations through these contracts." The legal vehicle intended to resolve some of the issues, the Uniform Parentage Act, has been unevenly adopted by the states, leaving disputes arising from AI transactions difficult to resolve. The authors hope for clarifications to the UPA, as well as acceptance "of contracts between sperm donors and donees."

D. Wills, Trusts, Estates / Elders

E. Domestic Violence

V. GLBT Youth / Student

Garner, Daniel R., *Open Attendance: The First Amendment Implications of Fighting Discrimination against Homosexuals in Law School Student Organizations*, 52 *St. Louis U. L.J.* 1249-1290 (2008).

Educational institutions are prone to experience disruptive collisions between their nondiscrimination policies and the First Amendment rights of expressive association. Law schools -- already sensitized to the problem due to actions to exclude military recruiters that was litigated against them in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) -- experienced a new face to this controversy in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, a Christian club at the Southern Illinois University Law School successfully challenged the revocation of their recognition as an official organization because they would not allow gays to hold office or become voting members. The author hopes that some strategy can be found, such as a school policy requiring open attendance at all

organizational meetings, that will allow schools to fight discriminatory prejudice, without infringing upon the protected expressive association described in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Squatriglia, Heather, *Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 *Cardozo J. L. & Gender* 793-817 (2008).

"Given that sexual orientation and gender identity are intricately intertwined with issues of truancy, the commission of survival crimes, substance abuse, and suicide, it is not possible to treat and rehabilitate youth without providing counseling and programming that includes LGBT identities." Due to the causal nexus pointed out by this author -- LGBT youth require social services often because they are LGBT youth -- this dimension of their personhood cannot be ignored. She recommends appropriate placement options, sensitization of social workers to the underlying issues, including to the fact that they should not presume heterosexuality, and positive social outlets.

VI. Health Issues

VII. Prison(er)s, Corrections, and Criminal Justice

VIII. Gender Identity

A. General

B. Legal Status

Benson, Christi Jo, *Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society*, 30 *Whittier L. Rev.* 41-66 (2008).

An interesting section on this article documenting the treatment of transgender aliens seeking asylum in the United States asks whether, on the basis of the U.S. criteria, an American transgender would be entitled to asylum in a foreign country. According to those criteria, an applicant must prove that he or she was: (1) outside his or her home country; (2) a member of a particular social group, or had such a membership imputed onto them by his or her persecutor; and (3) persecuted in the past or has a well-founded fear of persecution in the future. A fourth criterion is that past or future persecution must be the basis of the applicant's real or perceived membership in the particular social group. The point is to test "United States asylum ideals against the reality of its domestic society," a test on which the U.S. is not likely score well, with a likely result that "another country applying United States asylum law would grant asylum to a transgender applicant based on his or her persecution in the United States."

Newlin, Alice, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 Columbia J. Gender & L. 461-503 (2008).

In the hypothetical posed by the author, a male-to-female transsexual who has legally changed her birth certificate to reflect her newly recognized status becomes male again should she venture into Tennessee, which is not obliged to honor the Illinois birth certificate. Such inequities pile onto one another in quick succession, leading Newlin to propose a model act to help create a "seamless system for recognition, amendment, and declaration of a person's legal sex."

Rellis, Jennifer, *"Please Write 'E' in This Box": Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 Mich. J. Gender & L. 223-258 (2008).

Intersexed persons are born with external genitalia that are fully neither male nor female, creating problems for a system of "allocating rights on the basis of sex," especially in the areas of employment and marriage. Rellis contrasts the treatment of those born intersexed in the United States -- usually triggering emergency "corrective surgery aimed at 'normalizing' external genitalia to fit societal expectations" -- with those in the India, the hijras, a group she describes as "beginning to gain legal recognition in India when they self-identify as a third gender." The "E" mentioned in the title is one example, an official third-gender designation allowed (referring to "eunuch") for documents such as passports. The author urges reforms that ensure "a constitutional right to self-identify outside the gender binary based on the fundamental right to privacy and bodily integrity derived from the Fourteenth Amendment's Due Process Clause," and identifies some statutory efforts such as the International Bill of Gender Rights adopted by the International Conference on Transgender Law and Employment Policy as important first steps.

C. Discrimination

Koch, Katie, and Richard Bales, *Transgender Employment Discrimination*, 17 UCLA Women's L.J. 243-267 (2008).

In light of recent acts of discrimination against transgenders (the article highlight the case of the Largo, Florida, city manager fired a week after revealing his transsexuality, but one could also point to *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008)), the authors present an argument that "the Title VII definition of 'sex' should be expanded and thus interpreted to include transgender." To achieve this outcome, they confront earlier case law representing the alternative view of a narrow definition of the term such *Ulane v. Eastern Airline, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (pilot fired after changing sex), and analyze newer decisions that have extended sex stereotype protection in at least some jurisdictions, e.g. *Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004) (firefighter diagnosed with Gender Identity Disorder forced to resign on account of "no longer acting

'masculine enough'); see also *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391 (N.Y.Sup. Ct. 1995).

McCarthy, Brian P., *Trans Employee and Personal Appearance Standards under Title VII*, 50 Arizona L. Rev. 939-966 (2008).

According to McCarthy, two strands of Title VII jurisprudence are headed for collision, with transgenders caught between them. He first describes the supportive ruling of *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), which allowed a male-to-female transsexual firefighter to proceed with a wrongful termination suit against the city's fire department. On the other stands *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), affirming an employer's right to impose a physical appearance standard on a female casino bartender who refused to comply with orders "to wear stockings and nail polish and to wear their hair 'teased, curled or styled" and to wear "face powder, blush and mascara," as well as "[lipstick] . . . at all times." McCarthy reasonably sees a conflict here, and worries that, because on "the one hand, *Smith* stands for the proposition that trans employees are entitled to the same basic rights as other employees [while on] the other hand, *Jespersen* tells us that employers may set strict, gender-based personal appearance guidelines," future legal battles clarifying the rights of transgenders are assured.

Perifimos, Cathy, *The Changing Faces of Women's Colleges: Striking a Balance Between Transgender Rights and Women's Colleges' Right to Exclude*, 15 Cardozo J. L. & Gender 141-168 (2008).

Contrary to what some might have expected, the review offered by Perifimos suggests that women's colleges are more comfortable dealing with female-to-male transsexuals than with male-to-female. Her major complaint is that such schools -- she provides specific information on Smith, Mount Holyoke, and Barnard -- have no explicit policies on transgender students, making them vulnerable to the inequities of case-by-case determinations. If nothing else, their application and enrollment is unnecessarily stressful because they do not know in advance how the schools will respond to their presence. Taking a proactive role in this area, writes Perifimos, "will ensure that colleges preserve their own missions as well as the dignity of transgender students."

D. Family

E. Health

F. Prisoners

Lee, Alvin, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Surgery*, 31 Harvard J. L. & Gender 447-471 (2008).

Transsexual prisoners are caught in something of a Catch-22. Access to adequate treatments -- therapy, hormones, or surgery -- often require asserting a medical need the denial of which would trigger an Eighth Amendment bar against cruel and unusual punishment. Transsexual advocates, however, cringe at this reliance upon the medical model, sensing with good reason that its use, among other problems, creates and perpetuates "an image of trans people as mentally diseased or somehow ill-fitted to participate in 'normal' society." The author argues that medical evidence is not an illegitimate strategy, but is rather "both justified and compelled by unique aspects of the prison context.... [As] long as courts adhere to the general principle that individual liberties should be restricted in prison and as long as they continue to construe this principle to require the Eighth Amendment's high standard of objective seriousness, then trans advocates will have to demonstrate that the care they are requesting is indeed serious and necessary and not merely preventive or elective. It follows, of course, that the best way to make such demonstrations is through the use of medical evidence." While conceding that, outside that limited venue other kinds of arguments may serve better, he stops short of marking a course that would keep these independent lines of argument from undermining one another, always a potential danger.