

Articles

John Balzano, *Towards a Gay Friendly China?: Implications of a Changing China for Gays and Lesbians*

Yale China Law Center fellow, John Balzano, examines how due to an increasingly visible international debate and the removal of constraints of the past, Chinese society is beginning to understand and discuss issues related to homosexuality, and Chinese law on gays and lesbians is developing as well. This discussion and development is taking place in the context of a larger debate on equality, antidiscrimination, gender, and sexuality in China. This Article examines the development of the debate on gay issues and the development of law and policy on gays. It argues that based on a series of "protection laws" that the Chinese government has enacted for other groups, law and policy on gays may take a similar course and discusses the advantages and disadvantages of that potential development. The Article then concludes that there will continue to be progress on gay issues, but that progress may be slow and not always smooth.

Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*

Gartner addresses the challenges lesbian motherhood presents to the American legal system in the context of child custody disputes. Applying traditional family law doctrines to custody battles between lesbian parents is problematic as they stem from models of heterosexual marriage, and lead courts to "force the queer peg into the square hole" providing individual judges little actual guidance. Especially troubling for the author are some women who disregard their lesbian identity to take advantage of the court's structure and biases. As a solution, the author proposes an alternative framework for settling child custody disputes among dissolved lesbians. Founded upon lesbian legal theory, jurisprudence that places lesbians at the center of its analysis, the author suggests a mediation model because it reflects lesbian family values and avoids the difficulties of litigation and attendant biases. Her model not only serves potential litigants, but also serves the broader goals of the lesbian community.

Kimberly D. Richman, *Talking Back: the Discursive Role of Dissent in LGBT Custody and Adoption Cases*

Professor Kimberly Richman examines the counter-hegemonic discourse in LGBT family law cases through a comprehensive analysis of dissent. Judicial dissent is a form of institutionalized counter-speech that can appeal to regressive or progressive elements of the law. It can lay a foundation for a view that will ultimately carry the day in later cases. Professor Richman identifies the currents of regressive and progressive thought about the ability of LGBT persons to adopt and obtain (or retain) custody of children. Taking all 318 reported LGBT adoption and custody cases at the appellate level from 1952 through 2004, she isolates those where a dissent was filed. Then, using narrative analysis of those seventy-eight, which were decided between 1975 and 2004, she groups the cases thematically and emphasizes the practical and discursive roles of the dissents. The author

supplements these textual analyses with interviews of thirty-six litigants, attorneys, and family court judges involved in the cases. With these techniques, the author demonstrates how in the regressive and progressive dissents, the “gap” between the “law on the books” and the “law in action” is exposed and unnecessarily broad majority opinions can be limited. This dialectic, then tension of growth from law on the books, being pulled by the law in action, countervailed by the constraining influence of dissent, plays an important role in the evolution of an area of law. Prof. Richman convincingly explicates the nuances of this approach in LGBT custody and adoption cases.

Anthony D. Romero, *Introductory Remarks: Presentation of 2006 Dan Bradley Award to Urvashi Vaid*

Anthony D. Romero, Executive Director of the American Civil Liberties Union reviews the accomplishments of the 2006 Dan Bradley recipient, Urvashi Vaid. Romero emphasizes Ms. Vaid’s dedication to social justice and notes that has spent her twenty-five year career as an attorney and activist struggling for equality. Romero explains that Ms. Vaid has been on the boards of the ACLU and the National Gay and Lesbian Task Force, she has worked for the Ford Foundation, and currently is the Executive Director of the Arcus Foundation, a philanthropic foundation with a special focus on the Gay, Lesbian, Bisexual and Transgender programs and organizations.

Urvashi Vaid, *Dan Bradley Award Acceptance Speech*

Urvashi Vaid, Executive Director of the Arcus Foundation recalls the status of the GLBT movement when she was introduced to it and reviews how far it has come over the last twenty-five years. Vaid shares some of her observations about the movement and where it is now. She begins with reviewing how money and funding have affected the movement and urges the audience not to allow the funders set the agenda. Vaid also highlights the critical work that lies ahead for the GLBT movement including fighting the moral biases against GLBT people by working with religious organizations and educating the public. Vaid encourages the audience to engage more fully within the GLBT community around the issues of racial injustice. And finally Vaid closes with a warning that the new rising progressivism should not and cannot continue to disregard GLBT issues and human rights.

NLGLA Writing Competition

Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*

Anne C. DeCleene, a University of Wisconsin Law student, examines the difficulties and injustices transgender individuals face in attempting to receive adequate healthcare. DeCleene suggests that a step toward better addressing transgender individuals’ access to health care is to reconfigure the current two-sex paradigm within the legal and medical professions. She begins her analysis by introducing philosophers, physicians, and psychiatrists, among other scholars, who have focused on the reality of gender ambiguity

in order to demonstrate the solid academic support for the transgender community. She then explores the effects that the legal community's continued insistence on a two-sex division of male and female has on the ability for transgender individuals to access adequate healthcare, while also demonstrating the discrimination transgender people experience within the medical community and lack of legal remedy. Finally, DeCleene concludes by arguing that the only way to achieve transgender health care inclusion is to continue to redefine gender within both the legal and medical professions.

Case Notes

J. Colin Heffernan, *Note*, *Morrison v. Board of Education: A Road Map to Constitutional Diversity Training in Schools*

Heffernan examines an Eastern District of Kentucky case deciding whether students had the right to unilaterally "opt out" of a school anti harassment policy that differed from their moral and religious views toward homosexuality. The court held that because the anti harassment program did not violate student free speech rights or religious freedoms students could not choose to "opt out" of the training without suffering the consequence of an unexcused absence. Further, the court held that because the training was reasonably related to school safety, the program did not impermissibly interfere with the parents' right to direct their children's upbringing. The author felt that while this decision provides useful guidance to other school boards looking to develop anti harassment plans, the court confused the constitutional standards for different types of school speech, resulting in a higher than necessary burden for the defendant school board and diminishing the decision's impact for gay rights activists.

Sarah Eaton, *Note*, *Lewis v. Harris: Same-Sex Marriage Is a Question for the Legislature, Not the Courts*

Eaton examines the New Jersey Supreme Court's decision on same-sex couples' right to marry. In its decision, the court concluded that, given New Jersey's outstanding history of combating discrimination based on sexual orientation within its borders, committed same-sex are entitled to all of the same rights and privileges of marriage as married opposite-sex couples. The court stopped short, however, of deciding that committed same-sex couples should be allowed to marry, stating that this was a matter of public policy that should be left to the legislature. The legislature, the court ordered, was to either amend the current marriage statutes to include same-sex couples or create a separate but equal civil union statute for same-sex couples that would grant all of the rights and privileges of marriage. In response to this decision, the New Jersey legislature passed a civil union statute in December, 2006.

Bonnie E. Dye, *Note*, *Miller-Jenkins v. Miller-Jenkins: Recognizing Former Lesbian Partner's Parental Rights Over Non-biologically Connected Child.*

Dye examines the Supreme Court of Vermont's review of a Virginia court order precluding a former lesbian partner from having visitation rights with her former partner's biological child, despite a previous Vermont lower court's decision allowing for visitation. The court held that the Parental Kidnapping Prevention Act prevented the Virginia Court from making a custody determination that should be granted Full Faith and Credit. Furthermore, the court recognized legitimate parental rights of a non-biological lesbian mother over a child that the former couple, who had a valid civil union, had conceived after a consensual decision to artificial inseminate one of the partners. The author notes a trend by courts to recognize parental rights of both lesbian partners and how the trend will clash with jurisdictions that do not follow the same findings.