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In this article, the author responds to Professor Bruce Pardy's article, Changing Nature: The Myth of the Inevitability of Ecosystem Management, which appeared in Pace Environmental Law Review's Spring 2003 Edition. The author criticizes Pardy's characterization of change nature policy and, as an advocate of Ecosystem Management, seeks to posit his views on the policy.

The IUCN Academy of Environmental Law: Seeking Legal Underpinnings for Sustainable Development .............. Nicholas A. Robinson 325

Professor Nicholas Robinson describes the most recent meeting of the IUCN Academy for Environmental Law, which convened on November 4, 2003 at Shanghai Jiao Tong University in China. As Professor Robinson explains, the goal of this consortium of law schools from around the world is to examine how the study of law may advance environmental conservation.
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FOREWORD. MEETING HUMAN NEEDS: EXAMINING THE SOCIAL SAFETY NET FOR WORKING AMERICA
Stephanie M. Wildman ........................................ 961

THE NEEDS OF MEMBERS IN A LEGITIMATE DEMOCRATIC STATE

This article focuses on the "needs" of members in a legitimate democratic state by exploring different models. While the needs of members of any state may seem obvious, the question "what are needs exactly?" in fact begs further attention. Examining first what "need" is becomes paramount to discern whether or not members of a legitimate democratic state are having their particular need met. Two questions are asked to highlight whether the state is meeting the needs of its members: First, what should count as a need and how does context help us both frame and answer this question? Second, what is the role of the government in meeting or addressing this identified need? Powell asserts that the need of any citizen is to be a member first and that associated with membership is the right and ability to further address and define needs. Ultimately, different states have and generate different needs. Accordingly, the significance becomes the recognition of those needs and also what role the state plays in meeting those particular needs. Three approaches to discern exactly what constitutes "need" are utilized as a constructive framework: comparing definitions of what need is to the "need for what," a human capabilities approach that is centered on human choice and freedom, and a reconception of the citizen in terms of civic freedom and equality. The article asserts need is a social concept that takes on meaning in a particular social political context. The primary need then is membership.

John A. Powell .............................................. 969

BEYOND WELFARE REFORM: CAN WE BUILD A LOCAL WELFARE STATE?

The American welfare state is being downsized: national welfare policies for the poor have been greatly weakened, safety net programs for the working and middle classes are likewise under attack, and responsibility for the safety net has been increasingly left to state or local governments and the private sector. Advocates for the poor and excluded are seeking new strategies in a hostile national political environment. Many have retraced the steps of prior generations of poverty advocates to their roots in community development and risk sharing. Scholars are beginning to explore the implications of a revitalized community advocacy movement.

This essay describes the weakening national safety net and incipient community advocacy movements. The foundation for these movements may be found not only in Progressive Era and Great
Depression advocacy, but also in contemporary welfare evaluation studies that emphasize the importance of social capital and spaces for "maneuverability" in individual lives. Three types of community based programs are described: market oriented, private provision of public benefits, and political coalitions to influence local state resources. The last seems particularly promising, yet it may be problematic if viewed only as an alternative to advocacy at the national level. The essay concludes by arguing that achieving important gains for the poor still requires grounding in rights and resources that are provided most effectively at the national level. The present political climate favoring devolution of responsibility and resources may be turned to the advantage of locally based programs of redistribution and risk sharing.

Frank Mungen .................................................. 999

WELFARE REFORM AND ECONOMIC FREEDOM: LOW-INCOME MOTHERS' DECISIONS ABOUT WORK AT HOME AND IN THE MARKET

This article examines the impact of welfare reform on low-income women's "economic freedom," or their ability to make decisions about caregiving and paid employment. Recognizing that both caregiving and paid employment have economic value and affect women's economic welfare. It first provides a historical context by exploring both welfare policy and feminist theorizing on mothers' work at home and in the market. The welfare system has shifted since its inception from supporting single mothers' care for their children to pushing mothers into the workforce. There is a parallel tension between feminist approaches to women's economic equality that emphasize increasing mothers' workforce participation versus those that advocate state support for caregiving. Professor Roberts suggests as an alternative approach the welfare rights movement's rejection of the care/work dichotomy and its advocacy of poor mothers' freedom to choose between the two. She next demonstrates how welfare reform denies economic freedom to low-income women. Although the PRWORA facilitated recipients' entry into the paid workforce, it fails to provide the resources mothers need to care for their children and to earn a livable income at the same time. Moreover, welfare reform's incentives are lopsided: they devalue and penalize poor mothers' care work. Finally, the article considers the resources low-income mothers need to make decisions about working at home or in the market. A guaranteed income, greater access to advanced education, and increased subsidized child care are critical means for mothers to have economic freedom.

Dorothy E. Roberts ........................................... 1029

CONSUMER BANKRUPTCY AS PART OF THE SOCIAL SAFETY NET: FRESH START OR TREADMILL?

When families try and fail to borrow their way out of a financial crisis, bankruptcy ends up functioning as part of the middle class social safety net. Limited public and private insurance to deal with unemployment, disability and illness are thus part of the explanation for increased use of bankruptcy, along with explosive growth of easy consumer credit after deregulation of interest rates beginning in the 1980s. If the social safety net remains incomplete and consumer credit unregulated, then changes in consumer behavior, including
less borrowing and spending and more saving, will be needed to reduce use of bankruptcy and also to make a real fresh start after bankruptcy more likely.

This article calls for basic research to better understand the attitudes and behaviors of consumer borrowers, both before and after bankruptcy, and to assess the prospects for change in demand for credit. Why are Americans increasingly carrying high debt loads even before they run into a financial crisis? Why are many families failing to save? How do bankruptcy filers fare over the long run? Do they quickly get back in debt? Only with more knowledge can we hope to put in place programs, such as effective financial education in or out of bankruptcy, that lead to greater financial security. Furthermore, such research may lead to the conclusion that a realistic prospect of reducing bankruptcy filings will require structural and not just personal change.

Jean Braucher ...................................................... 1065

UNEMPLOYMENT INSURANCE REFORM FOR MOMS

The last fifteen years have seen a sharp rise in the labor force engagement of young women with young children. Although they needed these employees, few employers have changed their practices to help mothers and other caretakers navigate their dual responsibilities at home and at work. My argument is that the recent changes in federal public benefits and tax expenditure policies have, in effect, insulated employers from doing what they otherwise would have had to do to lure these women into the paid labor force and keep them there. Because employment practices have not become family-friendly, parents performing caretaking responsibilities lose their jobs or are forced into the part-time job market. If they were eligible for unemployment insurance (UI), their economic loss would be less. UI is largely unavailable, however, to people whose job problems arise from meeting their family responsibilities. Given the benefits enjoyed by employers in getting young mothers into the workforce without paying the full cost, employers should not be able to avoid the relatively low cost of increasing unemployment insurance coverage for these workers.

The public benefit programs at issue are Temporary Assistance to Needy Families (TANF), Food Stamps, State Child Health Insurance Program (SCHIP), child care subsidies, and public housing. The principal tax expenditure policy is the Earned Income Tax Credit (EITC). All of these programs have a work requirement applicable to some or all participants, or they provide subsidies to people with earnings. All of the programs are targeted at low-income parents. All of them can have an impact on increasing the labor pool and on enhancing the value of the wage that the worker receives. All of them demand worker discipline because losing a job means losing eligibility for vital aid as well as earnings. As the result of the combined effect of programs such as these, employers have a larger pool of workers from whom to choose and employers can resist pressure to increase wages and benefits. Employers, on the other hand, have more incentive to remain employed and to make few demands on their employers because the costs of leaving work are greater than continuing in an unfavorable employment situation.

Karen Syma Czapiskiy ............................................. 1093
19TH CENTURY LOCAL UNEMPLOYMENT COMPENSATION
INSURANCE LAW IN THE 21ST CENTURY GLOBAL ECONOMY

This article focuses on a critique of the New York Court of Appeals' 2003 decision in *Allen v. Commissioner of Labor*, a case of first impression. In *Allen*, the court held that a telecommuting worker physically based in Florida, but electronically linked by computer technology to her work in New York, was ineligible for benefits under New York Unemployment Insurance Law. The *Allen* decision will likely have profound and pernicious consequences in dramatically accelerating the involuntary race to the bottom by the growing sector of unemployed cyberspace workers whose employment is only peripherally defined, if at all, by physical work sites. This article proposes that Congress should enact a national statutory framework for benefit claims. This federal model would focus on the realities of the work product rather than the local physical site of the worker and would best provide a national standard while vesting administration with the individual states.

David L. Gregory ........................................... 1113

UNEMPLOYMENT INSURANCE MEETS GLOBALIZATION AND THE MODERN WORKFORCE

This article considers the impact of globalization and changes in the workforce on the unemployment insurance system, as illustrated by events leading up to recent amendments to Washington State's Unemployment Insurance system. Changes in international trade rules impacted the economic situation in which the Boeing Company operates and gave Boeing both the incentive and the ability to threaten to assemble its next generation jet outside Washington State, if its demands for changes to Washington's unemployment insurance system were not met. The author argues first that globalization transforms "federalism" arguments, making it difficult to assign taxing and administration of social welfare programs to either nations, or sub-national units, like American states. Second, she argues that the entry of women into the modern workforce makes it important to accommodate carework in the unemployment insurance system. Reconceptualizing care work as a form of "economic development" may assist us in developing needed arguments for accommodating carework. In light of the effects of globalization, social movements and advocates concerned with unemployment insurance will require an increasingly sophisticated understanding of the links among disparate areas of the law.

Deborah Maranville ........................................... 1129

PRISON WORK, WAGES, AND CATHOLIC SOCIAL THOUGHT:
JUSTICE DEMANDS DECENT WORK FOR DECENT WAGES,
EVEN FOR PRISONERS

In this article Bill Quigley uses Catholic social thought to argue that prisoners should be treated as full members of the human community and given the opportunity for decent work at decent pay. Our society has chosen to put over 2 million of our sisters and brothers in prison. Work is a social good, as is support of families, and restitution to victims. Those in prison are still entitled to be treated with human dignity. Decent work at decent pay is important, even for those whose freedom is limited by law. Families of prisoners
need support and almost all prisoners are going to get out. Giving prisoners the opportunity to work at decent pay provides a chance to learn skills, to support their families on the outside, and to help build a more just society. It is past time society develops a new way of looking at prison work and prison wages.

William F. Quigley .............................................. 1159

COMMENTS

TRADEMARK PARODY: HOW TO BALANCE THE LANHAM ACT WITH THE FIRST AMENDMENT

Although the Supreme Court has given full First Amendment protection to expressions about philosophical, social, artistic, economic, literary, and ethical issues, the level of protection afforded to parodies of trademarks remains at issue. Historically, the Lanham Act has prohibited any use of a trademark that would harm the trademark's good will. However, public policy considerations deem important both the protection of the right to parody another's trademark and the protection of one's trademark investment and good will. Due in part to these competing goals, courts have ruled inconsistently on trademark cases involving parody. By examining case history, this comment suggests an approach that balances a trademark owner's rights with a parodist's right to freedom of speech. In particular, Congress could amend the Lanham Act to define a parody defense and provide guidelines for courts to follow in order to interpret the parody defense in trademark infringement and dilution causes of action.

Kelly L. Baxter .............................................. 1179

BREAKING OUT OF THE PRISON HIERARCHY: TRANSGENDER PRISONERS, RAPE, AND THE EIGHTH AMENDMENT

The common practice of classifying transgender prisoners based on their genitalia alone creates a substantial risk of rape and prolonged sexual abuse at the hands of more aggressive prisoners. In order to understand the phenomenon of rape between inmates, one must place it in the context of the prison hierarchy. Because the bottom of the hierarchy is defined in terms of the feminine, male-to-female transgender prisoners face a disproportionately high risk of rape when placed in men's prisons. Prisoners who have been raped may seek relief under 42 U.S.C. § 1983, which provides the opportunity to pursue civil remedies for violations of federal constitutional rights. However, in Farmer v. Brennan, the United States Supreme Court held that prisoner plaintiffs claiming violations of the Eighth Amendment must show that prison officials were subjectively aware of a risk to inmate health or safety and disregarded that risk, a difficult standard for most prisoner plaintiffs to meet. In addition, 42 U.S.C. § 1997e requires exhaustion of state administrative remedies before prisoners may file § 1983 claims. Despite apt criticism, the deliberate indifference standard and exhaustion requirements are unlikely to be overturned in the near future. To reduce the risk to transgender prisoners' safety, this comment proposes that national standards eliminating the practice of genitalia-based placement be adopted pursuant to the Prison Rape Elimination Act of 2003.

Christine Peek .............................................. 1211
THERE’S NO PLACE LIKE HOME . . . UNTIL YOU DISCOVER DEFECTS: DO PRELITIGATION STATUTES RELATING TO CONSTRUCTION DEFECT CASES REALLY PROTECT THE NEEDS OF HOMEOWNERS AND DEVELOPERS?

In the last two decades, residential construction defect litigation throughout the United States has increased dramatically. While the flood of litigation in the construction defect arena has kept lawyers busy, these cases have burdened developers, builders, and insurers, as well as homeowners. The impact of such cases has been particularly pronounced in California. The California legislature, at the forefront addressing problems associated with construction defect litigation, has created two statutes addressing residential construction defects in condominium and single-family housing. Both of these statutes include mandatory “prelitigation measures” that require dispute resolution of defect claims prior to filing formal claims. Although these prelitigation provisions exist to encourage settlement, it is unclear whether the rigid dispute resolution measures in the statutes will in fact achieve this goal or simply delay formal litigation. In practice, there has been little time to test the effectiveness of prelitigation statutes for construction defects, but if the dispute resolution provisions prove workable, both owners and builders will benefit because defects will be repaired and full litigation will be avoided. However, the settlement incentives in both of the California statutes may not provide a dispute resolution system that is effective enough to overcome homeowners’ desires to test claims in court. Amending both statutes to provide for additional flexibility in the prelitigation dispute resolution process could help increase the chances for early resolution of residential construction defect claims and better fulfill the goals of the statutes.

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