ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ADOPTION

Andrew T. Binstock, *Not If, But When?: Dismantling the Florida Adoption Act of 2001*, 10 CARDOZO WOMEN'S L.J. 625 (2004).

The Florida Adoption Act of 2001 required a single mother wishing to give her child up for adoption to notify a missing father by placing newspaper advertisements and notices of her decision to give up her parental rights for the child to be adopted. The provisions were intended to protect the rights of fathers. The author argues that the act resulted in mothers abandoning their children and also violated federal and state rights to privacy and frustrated family law in Florida. The author discusses litigation regarding the act, which resulted in the Florida State Court of Appeals holding that the notice provisions violated the right to privacy. In May 2003, the Florida legislature passed a law creating a voluntary, statewide putative father registry to replace the notice provisions.

CIVIL RIGHTS

Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004).

The *Lawrence v. Texas* opinion, with its focus on liberty and equality, will have a profound impact on extending constitutional protection to previously marginalized groups. The author shows how the Court's decision in *Lawrence* departs from earlier cases challenging state sodomy laws and embraces a new approach to substantive due process analysis by asking first whether the state had a compelling or rational basis for the law. The Court does not inquire about whether the law limits a fundamental right, remaining silent on the issue. The author suggests that the Court's silence indicates that it is irrelevant to inquire whether the right being limited is fundamental. The author concludes that although at one time classifying a right as fundamental was a way to ensure greater protection, after *Lawrence* the Court moves forward from fundamental rights towards a broader concept of liberty.

Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004).

The Supreme Court grants Constitutional protection to groups whose liberties are limited by state statutes enacted as a result of the state's moral distaste for the group, but the Court does not have a consistent approach for identifying groups worthy of protection. The author surveys case law, providing examples of the Court legitimizing some groups and placing those groups under the protection of

the Fourteenth Amendment, while other groups are denied recognition and remain outside of the Court's protection. In *Romer v. Evans* and in *Lawrence v. Texas,* the Court found that gays and lesbians were a group when a law denied them the opportunity to seek aid from the government, but the Court excludes others, such as ex-convicts, from group status even when they have been deprived of civil rights. The author suggests that the Court's decision to legitimize certain groups is a normative one. The Court protects groups when a state is unable to articulate a reason for limiting that group's liberties. The author concludes that only after a group has existed long enough to achieve a substantial amount of social acceptance and legal protection is it worthy of receiving the Court's protection.

DOMESTIC VIOLENCE

Mary Grams, *Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn*, 22 LAW & INEQ. J. 105 (2004).

A guardian ad litem serves as an advocate for the best interests of the children in divorce and custody cases. Often guardians ad litem are the most powerful influence in a custody determination. In custody cases, where there has been domestic abuse, inadequate training of guardians ad litem is most apparent. The author argues that in Minnesota the guardian ad litem program violates the Minnesota Constitution by usurping judicial jurisdiction. The author suggests that the necessary reforms to the current guardian ad litem program in Minnesota are: division of the responsibilities and powers with which guardians ad litem are currently entrusted; the creation of an outside review panel; a rewrite of Minnesota statues to acknowledge the complex and problematic nature of domestic violence; and providing guardians ad litem with more training.

Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKLEY WOMEN'S L.J. 138 (2004).

Battered undocumented immigrant women in California find the conventional legal and institutional processes to be unavailable, alienating, and marginalizing. In the last two decades California has been at the forefront of the national crackdown on undocumented immigrants. This crackdown has increased the gender differentials in immigration status thereby intensifying women's dependency on their abusive husbands. Battering husbands of undocumented women now have an additional weapon in their arsenal: deportation. The author uses the life story of nine battered undocumented Mexican immigrants to illustrate the effect of immigration laws and politics on structuring the identities of these women. She argues that there is a need for outreach to battered undocumented

women regarding the Violence Against Women Act (VAWA) legalization process because of VAWA's liberating effect on these women's relationships and possibilities.

Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295 (2004).

The battered women's movement has increased awareness of domestic violence; however, the incidence of domestic violence is also increasing. The author shows how society bears the costs generated by domestic–violence-related medical attention and lower business productivity, and how mandatory state intervention often leads to increased violence. America's initial domestic abuse policies that encouraged or did not interfere with the use of violence in intimate relationships were abandoned for a standard procedure of arresting abusers in domestic abuse cases. The author shows that mandatory state intervention policies have the potential to increase the risk of violence to the victim. Although mandatory arrests and no-contact orders prevent abusers from having contact with their victims, batterers often become more violent during periods of separation. The mandatory reporting of domestic-violence-related injuries to increase arrests or other police intervention may actually increase the risk of subsequent violence to the victim, and may even result in batterers limiting victims' access to healthcare. The author concludes that state intervention policies should consider the victim's interests to more effectively provide for victims' safety and autonomy.

Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work This Time?*, 31 PEPPERDINE L. REV. 709 (2004).

The author suggests that domestic violence will end only by changing the cultural understanding of domestic violence. In spite of the learned helplessness that results from women being taught to be inferior, people need to remember that the battered victim still has competency to decide what is best for her. To have a clear understanding of battered women's syndrome, the misconception that most women resort to lethal violence must be changed. The focus, in understanding psychological aspects of domestic violence, must be on the woman's reaction to her partner, and the profile of the batterer must be changed to include any man we know. The author generally discusses civil protection orders, mandatory arrests, and no-drop prosecution as well as legislation in Louisiana. In order to deter domestic violence, he argues that people need a better understanding of domestic violence and how the victims are viewed in order to provide education and adequate training rather than more legislation.

EDUCATION

Pollybeth Proctor, *Toward Mythos and Mythology: Applying a Feminist Critique to Legal Education to Effectuate a Socialization of Both Sexes in Law School Classrooms*, 10 CARDOZO WOMEN'S L.J. 577 (2004).

Expanding the feminist critique, the author proposes that legal education including values traditionally associated with women could better prepare students to be ethical and morale lawyers. The author suggests two options to reform law schools. First, law school should teach a broader context within which legal problems are solved, which includes consideration of emotions and ethics as well as using interpersonal skills like empathy. As a result, the focus would be shifted away from maximizing individual gain. Second, law school must incorporate narratives that give meaning to the profession rather than just focusing on a mastery of the subjects. The author suggests that these steps will serve to improve the quality of legal service and increase lawyers' satisfaction with their careers.

GENDER DISCRIMINATION

Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501 (2004).

The Supreme Court has produced a narrative on gender and equality. In formulating the legal standard by which to judge gender discrimination in the workplace, the Court applied legal precedents and doctrines, as well as cultural beliefs, values, and ideologies. Through the application of five dominant frames in the area of equality and gender discrimination, the author examines the forty-one cases decided by the Supreme Court between 1971 and 2002 that addressed the issue of gender and equality. The five dominant frames employed by the author are: separate spheres, formal equality, substantive equality, difference theory, and non-subordination theory. The author asserts that in order to provide a clear understanding of judicial decision-making on gender and equality, the same level of scrutiny must be applied to the Court's social and cultural narratives as is applied to its legal narratives.

HISTORY & CULTURE

Rosemary Gartner & Candace Kruttschnitt, *A Brief History of Doing Time: The California Institution for Women in the 1960s and the 1990s,* 38 LAW & SOC'Y REV. 267 (2004).

The authors discuss the forces that would affect change in the "experience of imprisonment" of female inmates including shifts in the political and cultural environments, and the politicization of the inmate themselves, while examining the factors that would contribute to a consistency in the experience, among them the very nature of imprisonment and the tension inherent in the goals and practices of imprisonment. The practices of the prison reflected the shift in ideology from a rehabilitative model in the 1960s to the "get tough" attitude of the 1990s, discussed extensively by the authors, but consisting largely of imposing a managerial model rather than a rehabilitative model upon the prison. Despite this shift, there is a continued sense that women prisoners are not seen as particularly dangerous and do not need to be treated the same was as male prisoners, hence the women are not divided by security level, and the guards remain unarmed. The authors also examine the changes in the population of women inmates, the shift of crimes for which they were imprisoned (largely theft and forgery in the 1960s with an increase in drug and violent crime convictions into the 1990s), the increased time served on offenses in the 1990s, and the overall experiences of the prisoners and the prison staff. The authors conclude that the shifts in penal ideology and practice represent a "refigurement" rather than a transformation, as the practices of imprisonment remain fundamentally the same while the justifications change over time.

Marion Smilely, *Panel II: Equal Citizenship: Gender: Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls*, 72 FORDHAM L. REV. 1599 (2004).

John Rawl's theory of justice as it relates to the original position developed in his work, *A Theory of Justice and Political Liberalism*, has the potential to challenge the need for a patriarchal family. The need for patriarchy in both public and private life would be further diminished by the incorporation of a notion of citizenship that is more democratic than Rawl's notion of citizenship. The article explores how this democratic notion of citizenship is both compatible and incompatible with different portions of Rawl's general theory of justice.

INTERNATIONAL HUMAN RIGHTS

Maria Jose Parejo Guzman, *The Anomalous European Rights to Life and Death: Understanding the Struggle for Recognition of Religious Minority Rights by Examining the Cultural Identity of Spain and Other European Countries*, 35 TEX. TECH L. REV. 297 (2004).

Although the Spanish Constitution purports to grant religious minorities (non-Catholics) rights attendant to life and death, in practice, religious minorities have difficulty asserting such rights when they conflict with Catholicism. For example, serious doubt exists regarding religious minorities' ability to celebrate rights related to funerals, abortion, contraception, techniques of artificial reproduction, and euthanasia that differ from those rights prescribed by Catholicism. This religious inequality arises from the legally privileged status afforded to the Catholic Church. The author argues that in the presence of a dominant Catholic Church it is unlikely that the legal framework in Spain will evolve to further protect religious minority rights.

Renu Mandhane, *The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275 (2004).

International non-governmental organization (INGOs) advocates of women's rights rely on established human rights norms and binding legal covenants to secure women's rights internationally. This article illustrates the specific theoretical limitations of this approach, including the tendency to ignore the underlying cause of the human rights violations and problems regarding the hierarchy between various rights. The author argues that in many circumstances, it would be beneficial for INGOs to supplement their approach with feminist legal theory in order to overcome these limitations. To illustrate her point, the author analyzes a case study of a successful campaign to legalize abortion in Nepal. The author concludes that INGOs would benefit from continually critiquing their approaches internally in order to better achieve their goal of enhancing women's rights internationally.

Jonathon Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN'S L.J. 603 (2004).

Human rights advocates have recently been treating women's rights and children's rights as distinct issues because each group faces unique threats of human rights violations. However, the author argues that it is also important to address how the issues facing women and children are interrelated. Women's

rights laws impact children's rights directly by extending equality between men and women to girls and boys, and indirectly because women tend to be the primary caretaker for children. Furthermore, children's rights benefit women by making girls aware of their rights at an earlier stage in their life, providing educational opportunities and healthcare for children to assist the women who are their primary caretaker. The author discusses a case study of child prostitution in Thailand to illustrate how children's rights benefit women and how focusing on gender issues benefits children.

Symposium Transcription: Robert Wintemute, *The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe and South Africa help the SJC?* 38 NEW ENG. L. REV. 505, (2004).

The speaker recognizes that political minorities who may be unable to convince legislature to pass a law ending a particular discrimination must rely on the courts to bring this issue under a constitutional bill of rights or an international human rights treaty. As an example, the speaker cites *Goodridge v. Dep't of Pub. Health*, where Massachusetts same-sex partners were excluded from civil marriage. As there is no precedent in the United States for a state supreme court ordering the issuance of marriage licenses to same-sex couples, the speaker drafted an amicus brief for the case, citing precedents in other countries. The brief pointed out the international trend towards treating sexual orientation as a suspect classification under national constitutions and international human rights treaties and the international trend towards equal treatment of same-sex couples. The speaker then discusses various domestic and international precedents which take steps to end discrimination. The speaker urged the court to realize that while currently there may not be a precedent, they will not be alone for long.

MARRIAGE

Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137 (2004).

Some states, such as Louisiana, provide for two forms of marriage: standard marriage and covenant marriage. A covenant marriage involves at least three interrelated concepts: permanence extending beyond the lives of the promising parties, unconditional love, and involvement/witness of either God or the larger community. Benefits associated with covenant marriages, as compared to standard marriages, include greater commitment between spouses, greater beliefs and perceptions of permanence, a stronger sense of unconditional love, and a lower divorce rate. This article presents an empirical study of the difference between consent marriage and other couple relationships. The authors conclude that in

consent relationships the couples are more likely to change in ways that serve to enhance their relationships.

Mark Strasser, *Symposium Article: Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667 (2004).

In *Lawrence v. Texas*, the Court struck down a Texas statute prohibiting same-sex sodomy. Scalia, in his dissent, argued that it would be difficult for the Court to rationally argue that the U.S. Constitution does not protect the right to marry a same-sex partner both pre- and post-*Lawrence v. Texas*. The author limits Scalia's argument to post-*Lawrence v. Texas*, but concludes that it is unlikely that the Court will recognize the right to marry a same-sex partner in the foreseeable future even though same-sex marriage ought to be held protected under the Constitution's equal protection and due process guarantees.

Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage,* 117 HARV. L. REV. 2684 (2004).

In 1996, President Clinton signed the Defense of Marriage Act (DOMA), which federally defined "marriage" to exclude same-sex unions. DOMA essentially amended hundreds of federal laws in anticipation of the oncoming legal assault by homosexuals to gain access to benefits, rights and privileges already available to heterosexuals. Its passage, according to the author, was motivated by a bias against homosexuals. The author asserts that DOMA has a narrow conception of marriage that is inconsistent with the Supreme Court's view that an individual is free to choose a marital partner. DOMA's definition of marriage, as being between a male and female, is a violation of the principles of equal protection as it denies legal rights and benefits to homosexuals.

REPRODUCTIVE RIGHTS & TECHNOLOGY

Michael K. Elliot, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child,* 39 REAL PROP. PROB & TR. J. 47 (2004).

U.S. legislation fails to properly account for the inheritance rights of posthumously conceived children after the death of a biological parent. It is necessary to determine whether the child is deemed the legal descendant of a deceased donor and whether the deceased donor may express intent to have the posthumously conceived child recognized as an heir. The prevailing view is that donors may control the use of their reproductive tissue after death which the author concludes should allow donors to provide for posthumously conceived children by explicit reference. Since many legislatures have not accounted for the rights of

posthumously conceived children, it is the responsibility of the person intending to procreate posthumously to explicitly provide for the child in their will to protect the psychological and economic welfare of the child and to ease executors in distributing the deceased's estate. Effective estate administration could be maintained by placing a cut off date in the devise, or the posthumous child's share could be held in trust until the child is born. As well, state legislators could act to limit the time period within which a posthumously conceived child would be recognized as a legal descendant even with explicit reference.

Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies,* 38 GA. L. REV. 575 (2004).

The Rule Against Perpetuities, which has historically presented a number of juridical difficulties, now must contend with a whole new realm of potential problems due to the development of New Reproductive Technologies (NRTs). The article explores the policy considerations behind maintaining the Rule, balanced against various reform proposals that contemplate present and potential loopholes created by the Rule in light of the NRTs. Widespread cryopreservation of semen and fertilized embryos, along with the developing technologies of cryopreserving ova and cloning, has made posthumous conception a reality, raising a multitude of questions regarding when to close the class on a testator's heirs. The article compares scholarly proposals that attempt to minimize the illogical consequences that result from applying current forms of the Rule to NRTs, while aiming to preserve the Rule's limitations on dead hand control and over-fractionation of title. The authors ultimately set forth their own proposal, concluding that there should be a rebuttable presumption against providing for any posthumously-born individuals unless the will contains an implicit provision to the contrary, or unless the testator's intent to include such individuals can be clearly proven.

SEX CRIMES

Kimberly Kelley Blackburn, *Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort*, 55 S.C. L. REV. 619 (2004).

The article adresses the legal protections, or lack thereof, available to sexual assault victims who do not wish to publicly disclose their identities. The Supreme Court has undercut the ability of victims to be protected from or to receive remedy for the media's publication of their identities without their consent. The Court has consistently found that the name of a victim connected with a crime is public information and unless there is a state interest involved, the media can not be punished for publishing the truth. The author posits that the most effective way to

protect a victim's identity is to enact legislation codifying procedures that will prevent the media from getting the information to begin with. There should also be legislation that would provide victims with civil remedies. The combination of such legislation would protect victims of sexual assault from having to deal with another trauma in their lives.

Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?* 117 HARV. L. REV. 2684 (2004).

Rape law has evolved dramatically to the point where a defendant can not reasonably attempt to argue that "no" means "yes." However, rape law continues to deal with the more complicated issues of victims who say "yes" to some sexual activity before the alleged rape. The author asserts that it is of primary importance in dealing with these complex issues to reject the idea that any consent during a sexual encounter is generalized and nonspecific. Each statement of consent is limited to the distinct act to which the alleged victim consented. The woman must be allowed to consent to certain sexual acts and not others and must always retain the right to revoke her consent at any time and for any reason.

SEXUAL IDENTITY

Sandi Farrell, *Reconsidering The Gender-Equality Perspective For Understanding LGBT Rights,* 13 LAW & SEXUALITY 605 (2004).

The author begins with a review of the key arguments in supporting the gender-equality paradigm for understanding issues of sexuality and sexual orientation, particularly in the context of employment discrimination and family law issues. The author focuses on the use of the paradigm arguments in employment discrimination cases, and the movement of some case law towards a broader understanding of sex discrimination under Title VII. With regards to the key family law issues of adoption and same-sex marriage, the author examines the ways in which the paradigm has been applied in those cases. The author goes on to propose that the paradigm actually presents the most appropriate and enduring legal strategy for LGBT advocates. To this end, the author argues that the gender-equality perspective has a universalizing aspect absent from other sex-gender system by proposing that since everyone is gendered, everyone is injured by the effects of the sex-gender system.

WORKPLACE DISCRIMINATION & HARASSMENT

Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004).

The passage of the Civil Rights Act of 1991 changed the substantive rights of class action litigants in employment discrimination lawsuits. The author argues that although these changes have been criticized for making class certification difficult under Federal Rule 23(b), they do not substantively alter the chances of resolution of class action employment discrimination lawsuits. The author assumes that it is unlikely that Congress' intention in expanding the remedies available to class action litigants in civil rights cases, also extended to limiting the availability of those remedies. Some courts have opted to adopt a hybrid method of class certification that incorporates the flexibility to permit class certification while avoiding the reduced effectiveness of the class, which is seen as a failing of the Civil Rights Act by some courts. The author postures that the unwillingness to apply the Civil Rights Act of 1991 to employment discrimination lawsuits is due to the current unfavorable view of class action lawsuits. However, the author argues that concerns regarding absentee plaintiff representation and blackmail settlements are not an issue in employment discrimination lawsuits.

Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101 (2004).

Attraction theory, the theory that sexual advances are based on sexual attraction, has been used to prove causation in sexual harassment cases. Power-based theorists, who assert that workplace sexual conduct reflects and perpetuates sex-based power imbalances at work and in society, have argued that attraction theory should not be used to prove causation in sexual harassment cases because it has doctrinal limits, particularly in cases involving bisexual harassers and in cases where sexual conduct is not motivated by sexual attraction. The author agrees that while attraction theory may not be appropriate in all instances, he argues that attraction theory should not be discarded entirely. He argues that notwithstanding these limitations, attraction theory will continue to provide effective proof of causation for many sexual harassment plaintiffs. The author also believes that attraction theory is preferable to power-based theories because the latter are vulnerable in practice.

Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference With Disturbing Implications For Both Occupational Segregation And Economic Analysis Of Law,* 27 HARV. WOMEN'S L.J. 1(2004).

The article examines occupational gender segregation in light of the strides made by women in the labor market. The author considers possible explanations, including women's preference to work in a nondiscriminatory workplace and the anticipation of discrimination in certain fields that have been traditionally considered as male jobs. Employing an economic rationale for the difference, the author cites claims that employees will seek to move to employers that signal themselves as more fair and equal in their effort to find a nondiscriminatory work place, and notes that this signaling process has been complicated by antidiscrimination law. The author presents a number of qualitative and quantitative models based on the labor market under three different assumptions: all women prefer gender-diverse workplaces; some women prefer gender diversity in the workplace; and an extension of the integrating effects of discrimination in male-dominated areas. Based upon her findings, the author argues for broader legal and policy intervention, including stricter Title VII liability, educational reform, and affirmative action reform, to counteract the imbalance of gender in the labor market.