WOMEN'S ANNOTATED LEGAL BIBLIOGRAPHY

BATTERED WOMEN & DOMESTIC VIOLENCE

Ronald J. Bavero, *Representing Clients in Family Offense Proceedings*, 16 PACE L. REV. 49-72 (1995).

A family law practitioner in New York must have a thorough understanding of legislation enacted to protect victims of domestic violence. The author provides an update of domestic violence laws and presents a step-by-step practical guide to representing clients under Article 8 of the Family Court Act by offering instruction as to various aspects of family offense litigation, such as initiating proceedings, preparing for hearings, understanding the various types of orders resulting from such litigation, and describing the complications of parallel criminal proceedings. The author feels that a thorough understanding of these procedures is essential to any attempt at resolving the complex and competing issues involved in representing clients in family offense proceedings.

Austin B. Byrd, *Family Law* — Alexander v. Inman: *The Tennessee Court of Appeals Establishes Guidelines for Contingent Attorneys' Fees in Domestic Relations Cases*, 26 U. MEM. L. REV. 1575-99 (1996).

The Tennessee Court of Appeals in *Alexander v. Inman* addresses whether it is proper for an attorney to handle a domestic relations

matter on a contingency fee basis. The court illustrates the potential conflicts of interest inherent when a contingency fee contract is arranged, such as discouraging reconciliation and forcing unfavorable settlements. Although the court did not prohibit such fees outright, it set forth guidelines to help determine if and when attorneys may enforce contingency fee contracts in divorce cases, and sought to strictly regulate their enforceability.

A. Renee Callahan, Student Article, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome,* 3 AM. U. J. GENDER & L. 117-52 (1994).

The author compares the established and judicially accepted "learned helplessness" view of battered women with the new alternative survivor theory. On the surface, the theories appear quite different but, in reality, they are very much the same, differing only in how the women are characterized. The author proposes a new theory encompassing all women called the Survival Theory 2, but suggests that the courts may not accept expert testimony on this new amalgamated theory due to limited scientific research.

Christopher R. Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats With Snakes,* 50 U. MIAMI L. REV. 919-43 (1996).

The author contends that the concern for the rights of defendants in domestic violence cases must involve a careful scrutiny of the legislative, executive, and judicial responses, and that certain issues must be addressed in measuring the efficacy and fairness of those responses. Furthermore, the author believes that only a critical examination of the pretrial process of the domestic violence defendant will lead to a judicial response that considers and meets the needs of all the actors in a particular case, and which will fashion a remedy best suited to aid in eradicating such violence from society.

Abraham G. Gerges, *Psychiatric Evaluations May be a Partial Solution to Domestic Violence,* 68 N.Y. ST. B. J. 50 (Sept.-Oct. 1996).

The author discusses the potentially positive impact of pre-sentence investigations in the judicial system. The article stresses the beneficial importance of pre-sentence investigations of convicted domestic violence defendants by presenting to the sentencing judge valuable, and often unavailable, information to better determine an appropriate sentence. The author makes the point that, although an individual's actions could not be accurately predicted,

pre-sentence investigations would assist judges and serve as a possible solution to prevent repetitive domestic violence offences.

Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849-1910 (1996).

The author examines the tensions that arise when the state mandates victim participation in domestic violence cases, and contends that these tensions are caused by the unclear role of the criminal justice system in advocating both sides of the public/private dichotomy. This dichotomy is created by society's simultaneous efforts to preserve the victim's individual right to choose to prosecute and the community's right to be safeguarded from abusers. Using a pragmatist approach to explore these issues, the author argues that prosecutors can decrease the costs associated with mandatory participation by reducing their reliance on the victim's voluntary testimony. In conclusion, the author asserts that prosecutors ought to decide the propriety of victim participation on a case by case basis, considering the seriousness of the crime, sufficiency of evidence, and violent history of the batterer. In certain cases, prosecutors must take the prosecution away from the victim if they desire to send a clear message that domestic violence is criminally unacceptable.

James T. R. Jones, *Battered Spouses' Damage Actions Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191-262 (1996).

This article argues that treating physicians should have a duty to report spousal abuse, and that this duty should be enforced by holding non-reporting physicians civilly liable to victims under a negligence scheme. The author argues that a special relationship exists between doctors and patients which would require action where the common law otherwise might not. Civil actions by victims will not only allow for some compensation, but will also compel physicians to report past abuse, thus allowing protective service and law enforcement officials to prevent future abuse.

Minna J. Kotkin, *The Violence Against Women Act Project: Teaching A New Generation of Public Interest Lawyers*, 4 J.L. & POL'Y 435-61 (1996).

This article examines the Violence Against Women Act and its potential for teaching law students about social action lawyers within the context of a law school clinical program. This program has

sought to empower students in their pursuit of public interest careers as a legitimate goal of clinical education, and may serve a more lasting function than an exclusive emphasis on traditional skills training. According to the perceptions of the author, the Violence Against Women Act project has served that end, and has provided the much needed education about this new civil rights remedy to victims of domestic violence and sexual assault, and their advocates.

Kym C. Miller, *Abused Women Abused by the Law: The Plight of Battered Women in California and a Proposal for Revising the California Self-Defense Law*, 3 S. CAL. REV. L. & WOMEN'S STUD. 303-29 (1994).

In California, there rarely exists a legal basis for battered women's claims if they acted in self-defense when they killed their abusers. This is because one of the key elements of self defense is the fear of "imminent harm," which often does not exist in the case of an abused woman who retaliates against a batterer. Therefore, the author argues that the law in California must be amended, or else the future of abused women will remain dependent upon sympathetic jurors or other inadequate solutions.

Lanae L. Monera, Note, *Michigan's Domestic Violence Laws: A Critique and Proposals for Reform*, 42 WAYNE L. REV. 227-58 (1994).

In 1994 and 1995, Michigan revised its domestic violence laws in an attempt to curb the growing crime by expanding the protection afforded by injunction orders, imposing higher penalties on batterers, and implementing new procedures for police officers and judges. The author explains Michigan's domestic violence law and argues that the law should be further revised in order to have any practical effect. She believes that the law should make injunctions available twenty-four hours a day, make the arrest of batterers mandatory, include stronger prosecution policies, require judges to hand down lengthy sentences, and allocate monetary relief to victims to enable them to leave their batterers.

Steven I. Platt, *Women Accused of Homicide: The Use of Expert Testimony on the Effect of Battering on Women — A Trial Judge's Perspective*, 25 U. BALT. L. REV. 33-46 (1995).

The author, a former circuit court judge who has presided over many cases involving women accused of killing their abuser, offers recommendations to litigators on how to effectively incorporate the "Battered Wife Syndrome" expert testimony into their defense.

Comparing two factually similar cases in which one defendant was acquitted and the other defendant was convicted, the author analyzes each defense strategy by specifically focusing on how the jury responds to "Battered Wife Syndrome" testimony. The author concludes by suggesting various tactics defense attorneys may employ to successfully persuade the jury to look at the "Battered Wife Syndrome" testimony in a light most favorable to their client's best interest.

Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-*Furman *Era*, 49 SMU L. REV. 1507-48 (1996).

Our law of homicide generally exhibits a bias against treating domestic homicide as seriously as some other categories of homicide that are arguably no more reprehensable or predatory in nature. Focusing on capital domestic murder, the author argues against automatic mitigation — the imputation of provocation or diminished capacity — simply because the relationship between victim and defendant is domestic or sexually intimate. She concludes that if homicide laws were purged of patriarchal values, the remaining principles that underlie our grading of homicide offenses would be consistent with the rejection of a domestic discount; the worst domestic murders like the worst predatory murders would rank among the most reprehensible crimes.

Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032-83 (1996).

This article discusses the reluctance of prosecutors to pursue criminal sanctions against married domestic violence abusers because of the difficulty of procuring the battered spouse's testimony. The author contends the hinderance involved in compelling a spouse's testimony is due to the evidentiary rule of spousal privilege, which forbids a spouse from testifying against the defendant spouse if either party objects. This rule forbids the prosecution from compelling testimony in domestic violence cases, thereby denying justice to victims of abuse. The author proposes that in order to preserve justice, spousal immunity should be abolished in domestic violence cases.

Dale T. Smith, *We Can Settle This Here or Downtown: Mediation or Arrest for Domestic Violence Calls?*, 2 J. DIS. RESOL. 369-82 (1995).

This article compares the different policies of mediation and arrest used by police in dealing with domestic violence. The author analyzes the case *Eagleston v. Guido,* in which the plaintiff, a victim of domestic violence, alleged that the police department denied her Fourteenth Amendment right of equal protection by failing to protect her against her abusive husband by using mediation techniques rather than arresting him. The author argues that mediation is not as effective as arrest, and that counties should dispatch specialized units to domestic violence calls. The author concludes that, in order to promote successful programs to combat domestic violence, counties should be held liable if their inadequate policies fail to protect victims.

Rachel A. Van Cleave, *A Matter of Evidence or of Law? Battered Women Claiming Self-Defense in California,* 5 UCLA WOMEN'S L.J. 217-45 (1994).

When a battered woman kills her batterer in a "non-traditional confrontational" setting, courts have difficulty finding the existence of imminent danger of death or bodily injury. As such, a battered woman faces evidentiary obstacles in raising a self-defense claim. This article analyzes the California Appellate Court opinion in *People v. Aris,* and evaluates legislative proposals that seek to address these problems. The author concludes by offering her own solution for ensuring that battered women who kill in these circumstances are permitted to fully present their claims of self-defense.

Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage,* 54 MD. L. REV. 183-241 (1995).

Courts have increasingly recognized the tort of intentional infliction of emotional distress as a basis for recovery in domestic violence suits. However, in order to recover damages, a battered woman must prove that her husband's conduct was outrageous. The author of this article argues that this standard is highly subjective, and that courts should instead adopt a *per se* standard of outrage. This standard would be particularly useful for women who may be unable to prove battery and for indirect victims of domestic violence, such as the child who witnesses the violence.

CHILD ABUSE

Gail Ezra Cary, Casenote, *Evidence — Expert Testimony — The Admissibility of Child Sexual Abuse Accommodation Syndrome in Child Sexual Abuse Prosecutions.* State v. J.Q., 130 N.J. 554, 617 A.2d 1196 (1993), 26 RUTGERS L.J. 251-71 (1994).

In *State v. J.Q.*, the New Jersey Supreme Court determined that Child Sexual Abuse Accommodation Syndrome ("CSAAS") testimony is insufficiently reliable to prove abuse, but that it may be used to rehabilitate the credibility of a victim's testimony by helping jurors understand the victim's responses to the abuse. While the court did not depart from the established standard for judging the reliability of scientific testimony ("general acceptance in the scientific community"), the burden of admissibility nevertheless remains high, and the court shows a continued sensitivity to the rights of the accused.

Thomas Conklin, Note, People v. Fitzpatrick: *The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases,* 26 LOY. U. CHI. L.J. 321-50 (1995).

In *People v. Fitzpatrick,* the Illinois Supreme Court held that the Child Shield Act violated the Confrontation Clause of the Illinois Constitution. The Child Shield Act allowed a child to testify by means of a closed-circuit television if testifying "face-to-face" would cause the child to "suffer serious emotional . . . effects, or be unable to reasonably communicate . . . ," such as in cases of sexual assault. The author believes that the *Fitzpatrick* court erred by ignoring legislative history and case precedent, and by using such a strict textual approach to interpreting the Illinois Confrontation Clause. The Illinois General Assembly reversed the effects of *Fitzpatrick* one month later, and essentially reinstated the Child Shield Act by amending the Illinois Constitution to eliminate the "face-to-face" language relied upon by the *Fitzpatrick* court. This change will "further the primary purpose of the confrontation clause by [allowing] cross-examination of child abuse victims in an environment more conducive to obtaining the truth from children," and will ensure the protection of child victims.

Scott A. Davidson, Note, *When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403-19 (1995-96).

Due to the increase of child abuse incidents, legislatures have purposely utilized broad language to protect children from the infinite variety of conduct that could give rise to state intervention. However, these vague child abuse statutes expose parents to the risk that they will be unjustly accused of child abuse and will have to expend time and money to defend themselves. The author argues that the most effective child abuse statues should simultaneously provide some flexibility and protect children from abuse, while providing guidelines that help juries determine what constitutes excessive or unreasonable physical discipline.

Robert F. Drinan, S.J., *Saving Our Children: Focusing the World's Attention on the Abuse of Children*, 26 LOY. U. CHI. L.J. 137-46 (1995).

This speech was presented by the author at the dedication of the Loyola University of Chicago School of Law's CIVITAS Child Law Center. The author offers motivation to those working in the field of child law by lauding the United Nations Convention on the Rights of Children as a definitive step toward protecting the world's children. The author also reflects on the tragic loss of young lives both in the United States and abroad. He concludes by encouraging those who might otherwise feel overwhelmed by the immensity of the problem to follow the example set by the CIVITAS Child Law Center and continue in the struggle for children's rights.

Gary Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought By Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. ILL. L. REV. 417-42.

Traditionally, victims of child sexual abuse ("CSA") have had no legal recourse against their abusers because the statutes of limitation barred them from bringing civil action. The most common response by the courts is to apply the "discovery rule," essentially tolling statutes of limitation until the victim knows or reasonably should know of the injury. The author criticizes this response as being an inadequate solution that discriminates against victims who cope by repressing the abuse. The note suggests that the nature of the offense should entitle CSA victims to an exemption from the statutes of limitation altogether.

Karen S. Kassebaum, *The Siblings of Abused Children: Must They Suffer Harm Before Removal from the Home?*, 29 CREIGHTON L. REV. 1547-691 (1995-1996).

The article addresses the dilemma of whether an abused or neglected child's sibling, who has not necessarily been abused or neglected, should be removed immediately from the parental home. The article speculates that siblings have remained in abusive homes because state actors have the mistaken belief that a sibling must suffer actual harm before removal. The author concludes that siblings should be removed immediately when they are placed at risk of being harmed, and supports this claim by examining legal precedent that allows children to be removed upon a showing of risk and by discussing various sociological studies that affirm these risks.

Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 LAW & PSYCHOL. REV. 59-91 (1995).

This article discusses research conducted on sexually abused children which shows that it is necessary to evaluate the current prosecutorial system. Criminalization efforts, although genuine, remain futile. In fact, investigating allegations of sexual abuse and prosecuting offenders often impedes a child's mental and psychological healing. There are signs of change to make the system "more victim-friendly," but more needs to be done. The author suggests that the focus should not be solely on criminalization, and that the interference of the legal process in a child's life should be minimal at most.

Daniel B. Lord, Note, *Determining Reliability Factors in Child Hearsay Statements:* Wright *and Its Progeny Confront the Psychological Research*, 79 IOWA L. REV. 1149-79 (1994).

The criteria for deciding admissibility of children's hearsay statements against defendants in child abuse cases was established by the Supreme Court in *Idaho v. Wright*, and further developed in subsequent cases. The author compares the factors identified by the court with those that psychological research has empirically found to be predictive of truthfulness and reliability in children's accusations. The comparison shows that courts, instead of relying solely on judicial precedent, should refer to psychological research as a guide to determining hearsay exceptions to children's testimony.

Michael A. Pignatella, Note, *The Recurring Nightmare of Child Labor Abuse — Causes and Solutions for the 90s*, 15 B.C. THIRD WORLD L.J. 171-210 (1995).

This article examines how child labor abuse in the United States has increased despite such anti-child labor legislation as reflected in the Fair Labor Standards Act. The author contends that insufficient funding, deregulation resulting from staff cuts in the labor department, and society's limited awareness of child labor abuse perpetuate the exploitation of children. In order to improve child labor practices, the author posits that the legislature must address the coverage disparities as applied to agricultural and non-agricultural child labor, and suggests monitoring child labor violations in industries that are hazardous to a child's health.

Linda J. Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209-69 (1994).

This article reviews the Hague Convention on the Civil Aspects of International Child Abduction, which was adopted by the United States in July of 1988. The Treaty was enacted to protect children from wrongful removal or retentions from the lawful guardian by providing a set of rules requiring the return of the child. The author describes the structure and implementation of the Convention, along with the United States' experience with it. The author further highlights major concerns, such as the processes used to discern which parent has custody rights, to determine when custodial rights are breached, and to define the child's "habitual residence." Finally, the author notes that the multitude of countries and courts that have collaborated on such issues adds to the disparity of decisions.

CHILD CUSTODY

Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1-58 (1996).

Through surrogacy and the use of known or anonymous sperm donors, gay men and lesbians are creating new family forms that include biological children. The author examines the situation involved in *Thomas S. v. Robin Y.* (the *Steel* case), in which the courts were called upon to determine the legal status of a biological father who had a limited involvement in his child's life, in the context of gay and lesbian parenting. Through a Model Presumption,

the author sets forth a system under which men in Steel's position would be afforded certain rights as an involved sperm donor, in that the Model Presumption would effectively estop the custodial parent from ending the relationship between the child and involved sperm donor, and simultaneously prevent the non-custodial parent from elevating his legal relationship with his child to a level commensurate with the custodial parent. In conclusion, the author argues that this mutual estoppel will enable dispute resolutions without requiring that every relationship be classified as parental or non-parental, and that such a Model will advance the best interests of children in non-traditional families.

Nelson A. Mendez, Comment, *Child Custody Entangled with Religion:* Osteraas v. Osteraas, 31 IDAHO L. REV. 339-52 (1994).

Throughout the United States, there have been different rulings on whether the "religion factor" may be considered by the court in awarding child custody. The author discusses the Idaho Supreme Court's opinion in *Osteraas v. Osteraas* which held that courts should not enter into the "treacherous waters of religion" unless there is clear and convincing evidence that particular beliefs will adversely affect the welfare of the child. The author argues that this holding is imprecise, and must specify when interference with a parent's religious practices may be appropriate.

Kristin Morgan-Tracy, Comment, *The Right of the Thwarted Father to Veto the Adoption of His Child,* 62 U. CIN. L. REV. 1695-724 (1994).

This comment examines the legal rights of "thwarted fathers" — a group of fathers who, in lieu of being unaware of the pregnancy, have no constitutionally protected interest in their children, and thereby have been unable to veto adoption procedures. The author argues that the court's framework of only recognizing the parental rights of putative fathers who have established a "substantial relationship" fails to adequately address the concerns of the "thwarted father." The author also views such a framework as promoting detrimental and diverse state interpretations. In conclusion, the author asserts that the constitutional interests of "thwarted fathers" can be protected by the state without threatening the best interests of the children and the interests of the adoptive parents.

Barry M. Parsons, Casenote, Bottoms v. Bottoms: *Erasing the Presumption Favoring a Natural Parent Over Third Parties — What Makes This Mother Unfit?*, 2 GEO. MASON INDEP. L. REV. 457-93 (1994).

With the "traditional family" disappearing in the United States, courts have been faced with difficult decisions regarding child custody. In recent years, courts have deferred to the natural parent over third parties when no sufficient proof exists that it is in the best interests of the child to be placed with the third party. Yet in *Bottoms v. Bottoms*, a Virginia court granted custody to the maternal grandparent, rather than to the natural mother. The author asserts that this atypical decision was based solely on the mother's sexual orientation — the mother is a lesbian living with her "spouse" — and concludes that the decision does an injustice to gay and lesbian natural parents by refusing to prioritize the best interest of the child over the sexual orientation of the parent.

Scott B. Rae, Ph.D., *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219-77 (1994).

Acknowledging parental rights as one of the most controversial components of any proposed legislation regulating surrogacy arrangements, where as many as five people may raise custody claims, Rae stresses that parental rights must be clearly articulated in order to properly legitimize a child born of such an arrangement. The author examines the definition of motherhood in a lengthy discussion of genetics, gestation, and intent, concluding that gestation determines motherhood. The author contends that the right of parents to associate with their children should be established as a fundamental right, and thus pre-birth waivers of parental rights should be viewed as unenforceable and those contracts voidable. Rae advocates a dual standard that evaluates the best interests of the child and the strength of competing parental claims for adjudicating custody disputes, and proposes that adoption law, not contract law, be applied in surrogacy settings.

Suellyn Scarnecchia, *Who is Jessica's Mother? Defining Motherhood Through Reality*, 3 AM. U. J. GENDER & L. 1-13 (1994).

Suellyn Scarnecchia represented the adoptive parents in the custody trial of Baby Jessica, the two-year old child who was taken from her adoptive parents and given to her biological parents under court order. In this transcript of a speech given by Ms.

Scarnecchia, she reflects upon the trial, discusses the shortcomings of the court system's current method of biological-based custody determinations, and argues for a three-pronged test wherein the child's best interests are paramount over parental rights or biological links.

Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,* 71 IND. L.J. 623-71 (1996).

This article examines the approaches courts currently use in assessing the relevance of sexual identity and conduct in determining parental entitlement to child custody and visitation. It focuses primarily on the analysis of legally recognized lesbian and gay parents, arguing that ignorance and prejudice too frequently combine to distort the analysis of custody cases. The author concludes that the correct approach to questions of parental sexual identity or conduct is a carefully designed and applied nexus test focusing on the conduct in question and its relationship to the welfare of the child.

CHILD HARASSMENT

Alexandra A. Bodnar, Student Article, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School,* 5 S. CAL. REV. L. & WOMEN'S STUD. 549-89 (1996).

This article examines the prevalence of sexual harassment in primary and secondary schools. Specifically, it focuses on the lack of remedies available to victims of peer sexual harassment who suffer psychologically, physically, and academically because most schools are unwilling to take action against the perpetrator. The author advocates that schools nationwide be required to implement sexual harassment policies as a prerequisite to receiving federal funding. The author believes that early action against sexual harassment in schools will decrease the incidence of sexual harassment cases in the workplace.

Sylvia Hermann Bukoffsky, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX,* 42 WAYNE L. REV. 171-93 (1994).

Students sexually harassed at school can seek redress from the school district and personnel by suing for money damages pursuant to Title IX of the Education Amendments of 1972. At least one circuit court has indicated that Title IX may provide money dam-

ages paid by schools to students who are sexually harassed at school by their peers. The author advocates the propriety of awarding money damages, but only when the Title IX violation is intentional. When a school does not take adequate measures to stop the sexual harassment, the author states that the threat to the school's budget may be the ultimate weapon a student can use to ensure compliance by the school with federal standards.

CHILD RIGHTS

Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927-51 (1995).

The juvenile criminal justice system was created to reflect the essentialist view that a child was intrinsically different from an adult, and therefore required a separate and distinct social institution to address the child's socially deviant behavior. The Progressive Era changed the structure of society, such that the distinctions between adults and children are far less defined today. In addition, the juvenile justice system has become far more retributive than rehabilitative and is inherently procedurally deficient. Consequently, the author advocates the creation of a unified criminal justice system which would reflect contemporary social constructions of childhood and provide more individualized attention to the offender regardless of age.

Judy Cashmore & Kay Bussey, *Judicial Perceptions of Child Witness Competence*, 20 LAW & HUM. BEHAV. 313-34 (1996).

In an effort to better understand the difficulties faced by child witnesses, the authors interviewed fifty magistrates and judges in New South Wales, Australia, about their personal experience with child witnesses. This article discusses the results of their study which, although highly variable, uniformly illustrated judicial concern over the competence of child witnesses. The study showed that while the children were generally honest, many described the children as highly suggestible, susceptible to the influence of others, and prone to fantasy while on the witness stand. The authors hope their study will provide insight when child witnesses are called to the stand.

Charles Chejfec, Comment, *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. COMPUTER & INFO. L. 343-69 (1995).

The laws affecting adoption fail to adequately address the issue of HIV/AIDS testing and disclosure in adoptees. Whereas disclosure of HIV infection may render a child "unadoptable," failure to disclose may cause a child to be placed with a family who is unable to bear the financial or emotional aspects of caring for a child with AIDS. Adoption agencies, though able to authorize HIV tests, are reluctant to do so because the inaccuracy of tests during the first eighteen months of a child's life may jeopardize placement of the child, less than 30% of all infants born to HIV positive mothers will ultimately contract AIDS, and adoption agencies fear the threat of litigation. The author concludes that looking solely at the best interests of the child and placing the child in a home at any cost may no longer be appropriate when dealing with the possibility of HIV infection. Therefore, he proposes a statute which mandates HIV testing of all adoptees throughout the first eighteen months, as well as counseling for prospective parents, in order to bring uniformity and fairness to the adoption process.

Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254-82 (1996).

This article explores the problems associated with the mandatory transferring of serious juvenile offenders to adult criminal courts merely as a result of state law. This practice was implemented in response to both the public frustration over the juvenile court system's ineptness and a concern about the increase in serious juvenile crimes. The author maintains that this mandatory law-based transfer system does not meet the needs of either juveniles or society. Instead, she asserts that the judiciary is better suited to make transfer decisions on a case-by-case basis, and supports this proposition by looking to New Mexico's discretionary transfer statute.

Stephen J. Cosentino, Note, Boley v. Knowles: *Child's Pay — Child May Recover Medical Expenses Independently of the Parent*, 64 U.M.K.C. L. REV. 431-47 (1995).

Parents are not always the best guardians of their child's legal rights. Missouri's most recent case on the issue, *Boley v. Knowles*, supports for the first time the independent legal right of a child to maintain an action to recover medical expenses. *Boley* came in the

context of a mother seeking compensation for the expenses incurred by her in providing for the medical treatment of her child. The new ruling allows recovery where the statute of limitations has run for the parents of a child but where a claim in the child's own name is still viable. By contrasting *Boley* to the traditional common law as it has developed and been rationalized, the author discusses the implications of the new rule on statutes of limitations, future medical expenses, contributory negligence, and more generally, the legal rights of children themselves.

James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321-478 (1996).

The author argues that religious exemptions to child welfare and education laws violate the Equal Protection Clause of the Fourteenth Amendment and constitute an injustice to children of religious objectors. The author contends that the children cannot speak for themselves and have no one to speak for them, except those parents who want to deny them the benefits and protections that the law guarantees to other children. This article addresses the theoretical, doctrinal, and practical issues that an equal protection claim on behalf of religious objectors' children would raise, describes the types of discrimination that religious exemptions to child welfare laws inflict upon children, and concludes that very few exemptions should survive an equal protection challenge.

Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407-54 (1996).

Historically, adjudicatory decisions limiting due process rights for children were based on the characterization of the child as either "good" or "bad." The "good child" was a member of the "vulnerable class" and the "bad child" was considered to be one who "possessed maturity and well developed skills," and thus the "bad child" would be held accountable for the crime. Analysis of a number of cases regarding children's due process rights reveal such characterizations to be the norm and not challenged due to the rational-basis scrutiny accorded such cases. The author claims that children are people under the Constitution, and as such cannot have their due process rights manipulated based on anything less than a heightened-scrutiny analysis. Thus, it is necessary to evaluate the

maturity level of each child as well as the particular circumstances of the battered children who kill their parents.

Ellen R. Fulmer, Note, Novak v. Commonwealth: *Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?*, 30 U. RICH. L. REV. 935-60 (1996).

The author argues that Virginia law, including *Novak v. Commonwealth,* upholding convictions based on confessions made by juveniles without a guardian or attorney present and without the reading of Miranda rights, contradicts decisions by the United States Supreme Court. The author proposes that juveniles should receive greater protection than adults during interrogation, since they are incapable of understanding their constitutional rights. Therefore, the author contends that there should be a bright line standard, so the rights of juveniles are protected and the standard is clear for law enforcement officials. These standards should include provisions that a juvenile can not waive his rights against self-incrimination without the advice of counsel, statements should be made in the presence of a parent or an attorney, and police should avoid coercive practices.

Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective,* 20 LAW & HUM. BEHAV. 229-47 (1996).

Juveniles who commit serious violent crimes are increasingly being tried under the punitive and retributive sentencing policies of the adult criminal system. The author argues that the juvenile justice system, which was established to recognize the developmental immaturity of adolescents, and which considers rehabilitation to be an important facet of sentencing, remains the most appropriate means of addressing the problem of juvenile violent crime. The author advocates the undertaking of a detailed study of the socio-economic upbringing, decision-making, and cognitive processes of violent adolescents, and purports that such mitigating factors justify reversing the retributive sentencing policies that have begun to replace the current sentencing policies of the juvenile court system.

Julien Gross and Harlene Hayne, *Eyewitness Identification by 5- to 6-Year-Old Children,* 20 LAW & HUM. BEHAV. 359-73 (1996).

Though court room testimony by young children has long been excluded because of its unreliability, the ever increasing need for such testimony has mandated reopening discussion on this issue.

To this end, this article takes a position contrary to the prevailing view, by asserting that young children can in fact be reliable and competent witnesses. This conclusion is supported by the findings of a controlled experiment in which thirty-four five- and six-year-old children were shown a photograph of an individual whom they were later asked to recall. Surprisingly, the children were able to provide, after both short and long intervals of time, reliable testimony and a reliable narrative account of past events surrounding that particular individual.

Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317-73 (1994).

This article explores the application of the government's structural practice of maintaining modern democracy through the separation of powers principle to the problematic distribution of "granting" a child's legal power to private fiduciaries. Due to the present growth of physical and psychological health risks exposed to children as a result of custodial fiduciaries who have power over them, the author argues that there should be government incentives which promote multiple custodians in child custody decisions, as well as an involvement of non-legal parties to counteract the decisions of primary custodians whose self interests may harm the child. The author concludes that in order to safeguard a child against child abuse, the multiplying and separating of legal powers of children is of significant psychological and social importance for the nation's youth.

Jennifer Seibring Marcotte, Comment, *Death Penalty for Minors: Who Should Decide?*, 20 S. ILL. U. L.J. 621-36 (1996).

This author discusses the application of the death penalty to juvenile offenders, and maintains that decisions regarding this serious criminal penalty are better decided by the state and federal legislatures. The author argues that, by arbitrarily setting a minimum eligibility age of sixteen for death penalty sentencing to juvenile offenders, the United States Supreme Court has assumed the role of a super-legislature. The author contends that the age of an offender should act as just one of many mitigating factors and not as an absolute ban on the imposition of a death sentence. The author concludes that, until the Supreme Court revisits this issue, legislators are prevented from effectively legislating in the best interests of their constituents.

Joseph T. McCann, *Obsessive Attachment and the Victimization of Children: Can Antistalking Legislation Provide Protection?*, 19 LAW & PSYCHOL. REV. 93-112 (1995).

Virtually every state has enacted anti-stalking laws in some form to prevent violence, serial homicides, and sexual assaults. While these statutes are promising, they are geared towards the adult victim. However, there is an alarming increase in the stalking and harassment of younger victims. Children and adults do not perceive threats and danger the same way and the laws should be revised to take this into account. The anti-stalking laws must be more sensitive to the special needs of children, including harsher penalties for those convicted of stalking children and better monitoring methods to track child stalkers after parole or release.

Daniel O'Donnell, *Resettlement or Repatriation: Screened-Out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child*, 52 INT'L COMM'N OF JURISTS 16-33 (1994).

Vietnamese asylum seekers who are unable to establish their claim to refugee status are "screened-out" and returned to Vietnam under international law. "Screened-out" children, who have been separated from their parents and are alone in host countries and in refugee camps, are generally repatriated and returned to their parents based on a preference for family unity and an analysis of the best interests of the child. However, the Convention on the Rights of the Child acknowledges the basic human rights afforded to children, and thus recognizes situations in which separation may actually be in the best interests of the child, such as where the child has no parents or where the parents are abusive. The decision not to repatriate these children would involve permitting them to stay in their host countries on humanitarian grounds rather than as a matter of right under international refugee law. The author concludes that while family reunification should be the goal, the best interests of some children may require exceptions to the rule of repatriation and family reunification.

Catherine S. Ryan, Student Article, *Battered Children Who Kill: Developing an Appropriate Legal Response*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301-39 (1996).

The author examines the legal treatment of abused children who kill their parents, and argues that Battered Child Syndrome must be admissible as evidence where appropriate. Due to the inadequacy of traditional self-defense theories in patricide cases, evi-

dence of chronic abuse and expert testimony enable a jury to accurately assess an abused child's culpability. In light of what she finds to be inadequate legislation in this area, the author puts forth a proposed statute with evidentiary standards and jury instructions tailored to the unique situation of homicidal abused children.

Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75-123 (1995).

The Parental Rights Restoration Act, enacted by the Michigan Legislature, allows probate judges to determine whether a minor should be permitted to have an abortion without the consent of her parents. The authors argue that this judicial bypass, which does not define and take into account the "maturity" and "best interests" of the minor, fails to provide a framework for judicial decision-making. They maintain that the consequence of this shortcoming will be arbitrary decisions by probate judges based on their personal beliefs about abortion and young girls. The authors instead propose guidelines to assist judges in deciding whether a minor has reached a certain level of maturity, and suggest that the courts look at the nature of the teenager's decision, as well as the psychology and sociology of the decision process.

Joseph F. Smith Jr. & M. Kay Runyan, *How Private Secondary Schools Can Meet Their Obligations to Accommodate Students With Specific Learning Disabilities*, 17 W. NEW ENG. L. REV. 77-107 (1995).

With the incorporation of Title III into the Americans With Disabilities Act, private schools, like federally funded public schools, are now required to admit and accommodate students with specific learning disabilities. These low-cost accommodations include providing reasonable facilities for students during placement examinations, modifying foreign language requirements, and ensuring that students with disabilities understand examination directions. The authors state that, by complying with the Act, private schools will enable students with learning disabilities to excel.

Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200-62 (1994).

Children in foster care are placed in "a legal limbo" because, although they have been taken from their parents, they have no say as to their own fate. Foster care was established as a temporary

solution for children in adverse situations, and was not intended as a lifestyle providing no family stability and possible emotional damage. According to the author, the most important issue to these children is initiating their own termination proceedings so they can be eligible for adoption.

Matt Steinberg, *Free Exercise of Religion: The Conflict Between a Parent's Rights and a Minor Child's Right in Determining the Religion of the Child*, 34 U. LOUISVILLE J. FAM. L. 219-35 (1995-96).

Historically, courts have recognized parental rights to make important decisions, such as choice of religion and affiliated beliefs, on behalf of their minor children, because society believed that minors lacked the maturity to make well-reasoned decisions. The author argues that this reasoning is flawed, since what parents believe is best for their child, such as refusing medical treatment and public schooling for religious reasons, could negate the child's constitutional right to act in his own best interest. The author contends that "children of sufficient maturity and intelligence" should have the same constitutional rights as adults, thereby allowing them to assert their own independent religious beliefs instead of forcing parental religious beliefs upon them.

Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 26 LOY. U. CHI. L.J. 147-82 (1995).

Focusing on the debate in Florida over the juvenile death penalty, this article weighs the arguments for and against a juvenile death penalty from both a historical and constitutional standpoint. The author argues that a juvenile death penalty cannot legally and logically coexist with a State's *parens patriae* duty to protect children by considering their best interests. The author urges legislators to view juvenile justice from a "best interests of the child" standard rather than trying to equate juvenile punishment with its adult counterpart.

DISCRIMINATION

Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479-540 (1994).

This article argues that, despite Title VII's effectiveness in acknowledging and protecting women from discrimination in the workplace, Title VII has not adequately defined the women who are protected. The author asserts that complex female claimants, wo-

men who represent a discriminated race or national origin, are not provided for in the protected categories of Title VII. The author concludes that the judiciary must interpret Title VII more broadly in order to encompass the complex female claimant into Title VII's protected categories.

Julie M. Amstein, Student Article, United States v. Virginia: *The Case of Coeducation at Virginia Military Institute*, 3 AM. U. J. GENDER & L. 69-115 (1994).

In an effort to retain state funding without having to admit female cadets, the Virginia Military Institute developed a plan to establish a separate facility for female applicants. The author contends that just as "separate but equal" is unacceptable in a race context, it is also unacceptable in a gender context. Therefore, ensuring equal opportunity for women requires the Virginia Military Institute to accept women into its already existing facility.

Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541-82 (1994).

Noting that the judiciary relies on community norms as an objective measure of rationalizing employer dress and appearance requirements, this article explores how such reliance can perpetuate the gender inequality that Title VII was meant to eliminate. By illustrating that commentators have argued that dress requirements are discriminatory towards women, the author concludes that all forms of dress are dependent on cultural codes, and that any critical analysis should focus on improving the meanings behind dress codes rather than promoting their elimination.

Walter B. Connolly, Jr. and Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845-931 (1994).

The authors assert that the courts' interpretations of Title IX of the Education Amendments of 1972, which prohibit sex discrimination by educational institutions which receive federal funding, are inconsistent with the intent of Congress and the United States Department of Education's Office of Civil Rights ("OCR"). In effect, courts have required universities to provide intercollegiate athletic opportunities to men and women in proportion to their enrollments. The authors maintain that the OCR's interpretation of Ti-

tle IX does not require equal financial assistance, but that disparity can exist if it results from legitimate nondiscriminatory factors.

Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism*, 38 How. L.J. 611-28 (1995).

This article provides a critical analysis of the current welfare reform consensus and its focus on ending single motherhood. The author denounces the "new welfarism," asserting that it condemns single mothers and their children for their anti-patriarchal existence, and fails to consider why they are poor and how their poverty developed. Unless social welfare policy makers challenge these underlying assumptions, the debate concerning the nature of poverty in the United States will continue to blame poor, single mothers for the poverty of their families and the communities in which they live. The author concludes that the main federal assistance program, Aid to Families with Dependent Children, is flawed. However, its existence relieves the government of any responsibility for the conditions which create the need for public assistance and permits the government to exploit public ambivalence toward the poor.

Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDPA*, 12 Law & Ineq. J. 429-56 (1994).

This article argues that the 1980 "valid court order" amendment of the Juvenile Justice and Delinquency Prevention Act of 1974 has had discriminatory effects on female status offenders. Such discrimination has resulted in granting the judiciary the discretion to incarcerate children based on "immoral," rather than criminal, behavior. The author contends that the 1980 amendment is the progression of a governmental paternalistic agenda to restrict female sexuality, as evidenced by judges disproportionally incarcerating more females for behavior their parents or judges find "immoral." In order to decrease the discriminatory acts of judges who sentence according to personal values concerning female sexuality, the author posits that juvenile status offenders must be granted their due process rights, and that the 1980 amendment must be repealed.

Laurie Dechery, Note, *Preferential Treatment or Discriminatory Standards: Do Employer-Provided Insurance Plans Violate Title VII When They Exclude Treatment for Breast Cancer?*, 80 MINN. L. REV. 945-78 (1996).

This note considers whether an insurer's denial of coverage of HCT/ABMT, an experimental treatment for breast cancer, discriminates against women. Women with breast cancer have been denied coverage for HCT/ABMT under contract law using exclusionary clauses. However, employer-provided insurance plans that offer less coverage for a woman's health risk than a man's may be discriminatory and violate Title VII of the Civil Rights Act of 1964. The author concludes that women with employer-provided insurance plans that exclude experimental treatment for breast cancer should have a valid cause of action under Title VII.

Simon Devereaux, 9 CAN. J.L. & SOC'Y/RCDS 219-21 (Fall 1994) (reviewing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989)).

In *Toward a Feminist Theory of the State*, Catharine MacKinnon argues that male dominance of women is the fundamental fact of society, and that prevailing liberal conceptions of the State and jurisprudence ignore the reality of male dominance. The author claims that pornography is at the core of a vast complex of social processes by which men learn to view women as a means to male ends. In Simon Devereaux's review of MacKinnon's book, he applauds her broad and deep command of law, theory, and philosophy as well as the way her forceful rhetoric constantly provokes the reader. However, he questions MacKinnon's aggressive assertion that pornography is, as he puts it, "the binding element of the prevailing system of sexual hierarchy."

Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227-57 (1995).

This article posits that women lawyers in early twentieth-century America had unique professional needs and, therefore, approached the legal profession differently than their male counterparts. Even when provided with the opportunity to study the law and pursue a legal career, women lawyers still had to deal with the pressures of family life and motherhood. These additional pressures were not faced by men, and, therefore, men had more time

to devote to their careers. Thus, to compete successfully in a male-dominated market, women had to sacrifice their family lives.

Deidre G. Duncan, Comment, *Gender Equity in Women's Athletics*, 64 U. CIN. L. REV. 1027-55 (1996).

Despite Title IX's ban on discrimination in federally funded college athletic programs, gender discrimination continues in the funding of college athletics. The author asserts that by focusing primarily on a strict proportionality funding criteria, federal courts have established an unworkable, rigid application of Title IX, and the National Collegiate Athletic Association has historically resisted full implementation of Title IX rather than create a workable method of compliance for universities to follow. The author concludes that colleges will achieve compliance with Title IX only by equally evaluating the three criteria under the 1979 Office of Civil Rights Policy Interpretation, a system which the author asserts still governs Title IX analysis today.

Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456-78 (1994).

This article promotes the elimination of government restrictions that are placed upon the association between individuals of different castes. The author specifically condemns prohibitions placed upon same-sex marriages and other voluntary economic, professional, or religious associations as violations of the right to freedom of association. Suggesting that people should be categorized only for formal or legal distinctions, the author argues that a law prohibiting formation of a personal or professional relationship with another based on race, sex, or sexual orientation would directly contradict cornerstone principles, and therefore must be rejected.

Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Anti Discrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & LAW 27-81 (1994).

On the one hand, quasi-private clubs may provide an environment where members feel at ease because certain people are excluded, and the limited group may be better able to understand the member's specific background and needs. On the other hand, these clubs often provide benefits that cannot be obtained in other places (*i.e.*, business connections through the "old boy's network"), thus requiring society to balance carefully the right to free associa-

tion with the right to be treated equally without discrimination. The author advises courts to interpret liberally the definition of "public accommodations" provided in the Civil Rights Act of 1964, so that quasi-private clubs, providing "public" services, cannot avoid anti-discrimination laws by claiming they are "distinctly private" institutions. Likewise, the author cautions courts to be careful not to allow free association claims to succeed if they are being used pretextually to discriminate, rather than for any genuine religious, political, social, or cultural purpose.

Katherine M. Franke, *What Does a White Woman Look Like? Racing and Erasing in Law*, 74 TEX. L. REV. 1231-36 (1996).

This article highlights current events and debates surrounding the issue of race and the struggle for "racial empowerment." The author discusses the 1938 and 1940 trials of *Sunseri v. Cassagne* involving the annulment of an interracial marriage based on a Louisiana law prohibiting marriage between "any white person" and "any person having a trace of negro blood." Based on *Sunseri v. Cassagne* and a historical look at racial discrimination, the author concludes that we must first evaluate who "we" are before we can define "black" and "white."

Jill Gaulding, Note, *Race, Sex, and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646-94 (1995).

The author presents a theory to explain the current state of insurance discrimination law which acknowledges that some forms of insurance discrimination are necessary and fair. The current laws allow sex discrimination, but forbid race and genetic discrimination. In order to explain such selective discrimination, it is necessary to mix positive and negative rights theory. Negative rights reasoning has been used in past theories of insurance discrimination, because positive rights are not politically effective in a culture permeated by negative rights. The author argues that despite the cultural preference for negative rights, the fairness of race, sex, and genetic discrimination in insurance cannot be explained only in those terms, but instead relies on a positive rights perspective.

Melody Harris, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57-110 (1994).

In this article, the author examines the impact that Title IX has had on collegiate athletics. This exploration begins with a back-

ground history of Title IX as it applies to athletics and the recent victories and defeats by women athletes litigating in order to bring gender equity to intercollegiate athletics. Prima facie elements of Title IX discrimination claims brought against educational institutions' athletic departments and legitimate affirmative defenses to those claims are discussed. The author is critical of the courts' lack of definitive tests to set precedent for future litigation under Title IX. Finally, the article outlines the remedies which are or should be available to athletes who successfully prove Title IX violations.

Tamara K. Hervey, Book Review, 16 COMP. LAB. L.J. 273-76 (1995) (reviewing DISCRIMINATION: THE LIMITS OF LAW (Bob Hepple & Erika Szyszcak eds., 1992)).

This book contains a diverse collection of approaches, each from a critical perspective, to viewing United Kingdom laws combating race and ethnic discrimination. A general criticism offered by the reviewer is the book's failure to adequately address issues of comparability between discrimination on grounds of race and on other grounds, between areas of policy, and between the United Kingdom and other nations. Despite the need for more specificity and cross-referencing, the reviewer feels that the editors were successful in compiling articles that reflect the British perspective on race discrimination.

Juliette Kayyem, Recent Development, *The Search for Citizen-Soldiers: Female Cadets and the Campaign Against the Virginia Military Institute* — United States v. Commonwealth of Virginia, 30 HARV. C.R.-C.L. L. REV. 247-66 (1995).

The Virginia District Court in *United States v. Commonwealth of Virginia* held that the all-male admissions policy of the Virginia Military Institute ("VMI") did not violate the equal protection clause so long as women were afforded the opportunity of a parallel military education. In reviewing VMI's proposal to create a similar school for women, the court reasoned that the similar outcome of a "citizen soldier" from both schools would satisfy the equal protection clause, despite the lack of the military teaching style and certain educational programs provided at VMI. The author disagrees with this reasoning and believes that the court used a stereotypical analysis of women, which has deprived women of their right to an equal military educational opportunity.

Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351-402 (1995).

This article, through a comparative analysis of pregnancy discrimination cases in the United States, Britain, and the European Union, traces the evolution of sex discrimination laws. Once able to use sex discrimination laws to prohibit pregnancy discrimination, the courts have now expanded the laws toward greater protection of pregnant women. The author purports that, although there have been legal victories in advancing the protection of women in the workplace, too much significance should not be attached to those victories until we can document whether they have had an actual positive effect on the lives of employed women.

Thomas Koenig & Michael Rustad, *His And Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1-90 (1995).

The modern era of tort liberalization, which began to lift the barriers imposed on women to recover for their injuries, may be ending. This article explores the evolution of women's tort remedies and analyzes the disparity between tort awards to men and women. Professors Koenig and Rustad evaluate proposed tort reforms such as the FDA defense to punitive damages, limitations on medical malpractice remedies, and restrictions on non-economic damages. The authors argue that such tort reform would disproportionately reduce the awards to women as compared to men, thus creating "gender injustice in disguise."

Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535-67 (1993).

In 1991, the Violence Against Women Act ("VAWA") was introduced in both the House and the Senate. VAWA seeks to set up programs and initiatives to decrease violent crimes against women. This article focuses on Title III of the VAWA which creates a civil rights cause of action for female victims of violence motivated by gender. The author examines the problems faced by minority women when race and gender are treated as mutually exclusive categories of experience. Concluding that the gender motivation requirement of Title III is misguided, the author argues for a stereotyping test as an alternative.

JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103-216 (1994).

Expounding on the 100 year fight for women suffrage which symbolized full citizenship, this article shows how the gender system is a social system that divides power. The author demonstrates how the Supreme Court perpetuated this gender system by validating laws to keep women from voting through constitutional decisions pertaining to voting and related issues. The author further contends that even in the post Nineteenth Amendment era, the Court continues to preserve women's subordinated status by failing to strike down other aspects of the gender system, such as employment and education discrimination.

Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137-53 (1994).

The Convention on the Elimination of All Forms of Discrimination Against Women was formed to protect women's rights around the world. This essay emphasizes that the Convention, although successful in increasing international awareness of women's legal issues, has not received the backing necessary to be effective. The author, stressing that the United States has an opportunity to be a leader in women's rights, appeals to the United States to ratify the Convention, thereby giving it needed economic and political strength. The author concludes that without this backing the Convention remains largely unenforceable and is an idealistic model without any real world effects.

Jennifer M. Palmer, Comment, *Education Funding: Equality Versus Quality — Must New York's Children Choose?*, 58 ALB. L. REV. 917-55 (1995).

There is great disparity in educational budgets due to local property taxes and, therefore, great disparity in children's education. In most states, property taxes are used to fund public education. If a locality has high property values, they will have comparatively more money for education than an industrial neighborhood where property values are lower. The author uses this information, in addition to an average dollar per student ratio, to substantiate his point that educational success can and does hinge on funding levels. The author examines how these differences might be challenged by state and federal equal protection clauses.

Andrew Richardson, Note, *Sports Law:* Cohen v. Brown University: *A Title IX Lesson for Colleges and Universities on Gender Equality*, 47 OKLA. L. REV. 161-82 (1994).

Title IX of the Education Amendments of 1972 "prohibits gender-based discrimination by educational institutions receiving federal financial support." *Cohen v. Brown University* illustrates how Title IX may be applied to promote gender-blind equality in the area of intercollegiate athletics. When cuts in the women's athletic program at Brown were held to be discriminatory and to violate Title IX, the school's federal financial assistance was jeopardized. The court determined that in order to comply with Title IX, there must either be participation opportunities for women proportionate to male/female enrollment, a history and continuing practice of women's athletic program expansion, or proof that "the interests and abilities of the members of [the discriminated against] sex have been fully and effectively accommodated. . . ." According to the author, the *Cohen* decision and its threat of Title IX litigation have positively affected the financial planning, decision making and future prospects of many intercollegiate athletic programs for women.

Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335-410 (1994).

Focusing on current legal protections afforded to pregnant workers and arguing that they are inadequate and in need of major reform, the author provides case studies in this comment to illustrate the lack of on-the-job accommodations for pregnancy-related disabilities as provided for in Title VII of the Civil Rights Act of 1964. The author assesses the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act, and notes that while improvements have been made, current protections remain unreliable and unavailable to millions of working women who remain at risk of significant income and job loss.

J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273-385 (1995).

The current law of employment discrimination distinguishes between two types of workplace sexual harassment: *quid pro quo* harassment and hostile environment harassment. The former triggers automatic vicarious liability on the part of the employer, whereas the latter will only trigger vicarious liability if the employer had

actual or constructive notice of the harassing conduct. Courts justify this distinction using agency principles and common-law vicarious liability doctrine, but according to the author, this distinction is doctrinally and functionally incorrect. The author suggests a restructuring of the employer liability doctrine in cases of sexual harassment, and proposes strict liability for an employer for "systematic discrimination subject to conditional notice liability. . . ." This standard would force employers to adopt internal complaint procedures, provide victims an incentive to share information about discrimination, and define standards of care for victims of sexual harassment and discrimination.

William H. Webb, Jr., Comment, *Sports Law* — Cohen v. Brown University: *The Promulgation of Gender Equity in Intercollegiate Athletics*, 25 U. MEM. L. REV. 351-63 (1994).

In an effort to promote gender equity in intercollegiate athletics and to enforce the anti-discrimination policy of Title IX, the Department of Education's Office of Civil Rights established federal guidelines for university athletic departments. The author denounces the decision in *Cohen v. Brown University* in which the court adopted a three-pronged test to determine whether a university's athletic programs comply with Title IX, and suggests that universities be given wider discretion in making financial and athletic decisions.

GAY RIGHTS

Joseph G. Arsenault, Comment, *"Family" but Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813-42 (1995).

This comment examines the current New York Court of Appeals outlook on homosexual couples. The author shows how a lack of understanding by society and, in turn, the court system affects a homosexual couple's legal rights. The main goal according to the comment is for homosexual partnerships to be fully recognized under state marriage or domestic partnership legislation. Although New York law is emphasized, the comment analyzes additional jurisdictions. In Hawaii, for example, the legislature changed its legal definition of marriage in response to a claim that barring same-sex marriage is unconstitutional.

Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397-426 (1995).

When a same-sex couple validly marries in one state and subsequently moves to another state where same-sex marriage is illegal, their new state of permanent domicile may not recognize the marriage. The doctrine of comity is discretionary and does not require states to recognize marriages created by other states. However, judgments are entitled to full-faith and credit regardless of the public policies of the respective states. This note proposes that the Full-Faith and Credit Clause, when properly understood, may require each state to recognize the marital decrees of other states, since marital decrees, unlike marriage laws and marriage certificates, are judgments or judicial decrees of marital status.

Donald L. Beschle, *Defining the Scope of the Constitutional Right to Marry: More Than Tradition, Less Than Unlimited Autonomy*, 70 NOTRE DAME L. REV. 39-93 (1994).

This article examines the debate over whether or not homosexual couples have a constitutional right to marry. The author rejects both the narrow view, which recognizes only traditional heterosexual marriage, and the broad view, which imparts full equality to homosexual couples. The author argues that, while homosexual couples have the right to many of the duties and benefits of marriage, the government should still be allowed to confer additional benefits on individuals who enter into preferred traditional relationships.

Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1032-118.

This article discusses *Baehr v. Lewin*, in which the Hawaii Supreme Court determined that the State committed sex discrimination by refusing to grant marriage licenses to same-sex couples. The author discusses the uncertain validity of a same-sex marriaged couple who marry in Hawaii and then return to the couple's home state. Categorizing the choice-of-law approaches of various states, the author hopes to provide to advocates, when arguing for recognition of same-sex marriages, arguments consistent with the state's choice-of-law approach. Only then, the author concludes, will same-sex marriages finally gain legal acceptance.

Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence,* 3 S. CAL. REV. & WOMEN'S STUD. 183-218 (1994).

In responding to recent criticism of legal feminism as a legitimate jurisprudential enterprise, the author analyzes three theories of lesbian legal inequality. Each theory makes important contributions to understanding lesbian inequality, but because each is deficient, it is impossible to regard one as the "best." The author, noting that her findings may disappoint some, concludes that any attempt to define a full-blown theory of lesbian jurisprudence is premature, and yet suggests a lesbian-centered account to address the problem of lesbian invisibility in feminist jurisprudence.

Elizabeth McDavid Harris, *Intercourse Against Nature: The Role of the Covenant on Civil and Political Rights and the Repeal of Sodomy Laws in the United States,* 18 HOUS. J. INT'L. L. 525-56 (1996).

Sodomy is considered a crime in twenty-four of the fifty states. In *Bowers v. Hardwick,* the United States Supreme Court decided not to extend the constitutionally protected right to privacy to homosexuals' sexual practices. To circumvent the power of this decision, the author proposes using international precedent to fight for the repeal of sodomy laws in the United States. Following the United Nations Human Rights Covenant, which establishes the right to privacy as a human right, two international tribunals struck down laws criminalizing sodomy. The author states that, although the U.N. Covenant does not create private rights enforceable in United States courts, the United States is bound to uphold international law of human rights.

Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom,* 3 AM. U. J. GENDER & L. 183-246 (1995).

Advocating the rights of gay men to create a family, the author analyzes the concept of surro-gay parenting and the way society and the government view these types of arrangements. Through assisted conception statutes that relate to donor insemination and any other arrangements gay men may enter into in order to become parents, the government has instituted policies that restrict the ability of gay men to become parents more so than gay women. Instead of trying to legislate society's view of what a family should be, the author concludes that the government's regulations should provide emotional and legal protection for all loving and caring

families, thereby granting reproductive freedom to anyone who wishes to become a parent.

Scott N. Ihrig, Student Article, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students,* 14 LAW & INEQ. J. 555-91 (1996).

This article examines the law school experience from the perspective of gay, lesbian, and bisexual students based on the author's own experiences, and the experiences of other gay, lesbian, and bisexual students at the University of Minnesota Law School, and provides an unscientific survey of gay, lesbian, and bisexual students. The article argues that the failure to include and address the concerns of gay, lesbian, and bisexual individuals is particularly devastating in the context of legal education, and that the main burden of rectifying this failure is currently being shouldered by gay, lesbian, and bisexual students. The author proposes to remedy this problem by encouraging gay, lesbian, and bisexual law students to engage in dialogue, enter debates, and become active in their communities to bring about positive transformations.

Note, *"In Sickness and in Health, in Hawaii and Where Else?": Conflict of Laws and Recognition of Same-Sex Marriages,* 109 HARV. L. REV. 2038-55 (1996).

The author argues that same-sex marriages should be recognized by a state when the marriage has been legally performed by a sister state, within the sister state's jurisdiction. The author contends that the acceptance of this proposition, referred to as *lex celebrationis,* would promote stability and predictability. The author reviews the stipulations mentioned in the Restatement of Conflict of Laws, and discusses how a state can avoid the recognition of a marriage if it strongly offends the public policy of the state. The author concludes that this use of a bright line rule would reflect and enforce the legal preference for encouraging contractual freedom.

Richard Nunan, *Militant Gays, Gays in the Military, and Privacy as Social Freedom,* 13 LAW & PHIL. 481-92 (1991) (reviewing FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM (1992)).

The author analyzes Schoeman's exploration of privacy as it applies to social relations. The review explores Schoeman's illustration of the failure of moral philosophy to speak to human agents through the concept of privacy, and discusses Schoeman's suggestion that the right to privacy has an expressive function in promot-

ing the individual's self expression. The author discusses the practice of "outing" gays — the practice of making the sexual orientation of homosexual individuals public knowledge without that individual's approval. The article concludes that Schoeman's concept of privacy prevents such an "outing" of gays.

Sharon G. Portwood, *Employment Discrimination in the Public Sector Based on Sexual Orientation: Conflicts Between the Research Evidence and the Law*, 19 LAW & PSYCHOL. REV. 113-52 (1995).

Although the Constitution guarantees certain inalienable rights to the citizens of this country, many Americans with minority sexual orientations continue to experience discrimination that extends to even the most fundamental aspects of their lives — including the right to work for a living. In the public employment sector, the courts have rejected numerous constitutional challenges and perpetuated subtle and not so subtle forms of discrimination. This author examines the current state of law in light of the relevant social science evidence and public policy considerations by discussing the law, policy, and research evidence regarding some of the general assumptions that underlie current legal precedent and analyzes the implications for the future.

HARASSMENT

Francis Achampong, *A Critical Analysis of the Two-Pronged Perspective for Viewing a Hostile Environment in Sexual Harassment Cases*, 24 SW. U. L. REV. 303-18 (1995).

In *Harris v. Forklift Systems, Inc.*, the Supreme Court established a two-pronged test for determining whether a Title VII action exists. This new standard requires that there be an objectively hostile work environment, and that the victim subjectively perceives the work environment to be abusive. This article criticizes the more restrictive test because, although the elimination of the psychological harm requirement, present in previous tests, makes it easier to bring sexual harassment suits, it may have off-set this benefit by making it more difficult for a plaintiff to fulfill the second prong of the test.

Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125-74 (1995).

The author argues that the present treatment of sexual harassment claims can be equated to the past view of criminal rape, in that there is an assumption that the victim asked for the harassment. In this article, each of the five elements required to establish a prima facie case for sexual harassment are examined, and the unwelcomeness element used by the Supreme Court in *Meritor Savings Bank v. Vinson* is particularly criticized by the author because it creates a presumption that the victim welcomed the harassment. The author contends that in sexual harassment cases, the victim should not have to prove that she did not welcome the advances, but rather the accused should be required to defend his actions.

Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699-726 (1996).

This article examines federal law on the issue of whether Title VII of the Civil Rights Act of 1964 provides a cause of action for same-sex sexual harassment. It presents and analyzes the reasoning of the courts that have addressed the issue, with a particular focus on recent developments in the law. The article argues that, although the momentum seems to favor recognition of the cause of action, courts have not applied it to the common case involving abusive treatment of a member of the same sex that does not involve an unwelcome sexual advance.

Deborah Epstein, *Can A "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399-451 (1996).

The current formulation of hostile environment harassment speech law strikes the best possible balance between the fundamental interests of equal opportunity and free speech. The author argues that while some scholars have underestimated the harm that verbal harassment inflicts on women workers, others have effectively abdicated workers' free speech rights. Further, the author credits the Supreme Court for balancing these two interests through five elements that define a sexual harassment claim, but thinks that relying on the secondary effects doctrine to uphold harassment law over a freedom of speech challenge would increase the potential for abuse of the government's censorship power.

Michael S. Greve, *Sexual Harassment: Telling the Other Victims' Story*, 23 N. Ky. L. Rev. 523-41 (1996).

The article asserts that sexual harassment proceedings operate on the presumption that the accused is guilty and that by defining sexual harassment narrowly, excluding the elements of pervasiveness and unwelcomeness, non-legal proceedings lead to the violation of the due process rights of the accused. In this article, the author criticizes two university hearings following this definition where professors were found guilty of sexual harassment based solely on unverified and unquestioned assertions of students. The author concludes with a reminder to feminists that lawsuits are about individuals, not symbols, and that by turning lawsuits into referenda, innocent black men are falsely charged with rape.

Kristi J. Johnson, Comment, Chiapuzio v. BLT Operating Corporation: *What Does it Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual" Harasser Revisited*, 79 Iowa L. Rev. 731-52 (1994).

This article analyses the Wyoming District Court decision of *Chiapuzio v. BLT Operating Corporation*, in which it was held that a male or female victim may bring a case as long as the victim proves he or she was harassed with gender driven remarks. The ruling thereby eliminates the but-for sex requirement, but departs from precedent by now allowing Title VII actions against superiors who harass employees regardless of gender. The author concludes that the court should look to the basis of the harassment when determining whether the case qualifies as a Title VII sexual harassment case.

Aileen V. Kent, Note, *First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 Hofstra L. Rev. 513-37 (1994).

Commenting on hostile environment sexual harassment, this note points out that such harassment is prohibited by Title VII of the Civil Rights Act of 1964, and yet the First Amendment could be used as a defense. The author argues that Title VII is narrowly drafted so as to avoid violating the First Amendment right to freedom of speech. Moreover, the author asserts that allowing the harasser to use such a defense harms both employers and destroys the purpose of Title VII. The author concludes that since the government has a strong interest in preventing sexual harassment, Title VII must take precedence over the First Amendment.

Renee Levay, Comment, *Employment Law — Equal Employment Opportunity Commission v. Walden Book Co.: Does/Should Title VII Apply to Same-Gender Sexual Harassment?*, 26 U. MEM. L. REV. 1601-32 (1996).

Title VII was initially designed to prevent work-place discrimination on the basis of race and religion, but over the years the law has evolved to also protect against discrimination on the basis of gender and sex. The court in *Equal Employment Opportunity Commission v. Walden Book Co.* has expanded this protection and determined that same-gender discrimination also falls under the protections afforded by Title VII. The author purports that this decision must now be recognized outside the state of Tennessee because Title VII is a federal law and should therefore apply uniformly across the country.

Yxta Maya Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN'S STUD. 279-302 (1994).

The United States government is hesitant to involve itself in the military's internal matters. Consequently, the military is often allowed to handle disciplinary problems within its own chain of command. This practice has led to inadequate protection for victims of sex crimes. The author argues that military status should not shield an individual from criminal prosecution, and therefore the government must be more active in punishing sex offenders who are in the military.

Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461-562 (1995).

The author examines the Title VII prohibitions against hostile environment sexual harassment, and comments on Eugene Volokh's and Kingsley Browne's First Amendment concerns regarding these prohibitions. The author argues that the Constitution permits hostile environment law's regulation of free speech because it regulates speech which impedes gender equality and which does not significantly further free speech interests. Contrary to Volokh and Browne, the author contends that hostile environment law furthers First Amendment interests by eliminating the disadvantage to women caused by discrimination, which in turn promotes a functioning participatory democracy.

Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability,* 71 U. DET. MERCY L. REV. 817-44 (1994).

The United States Supreme Court, in *Meritor Savings Bank v. Vinson,* held that a claim of hostile environment sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. In the aftermath of this decision, confusion exists regarding employer liability in these cases. The author explains that the courts frequently use the doctrines of respondeat superior liability and general agency principles in order to determine damages. In conclusion, the author contends that a more appropriate doctrine to apply is the negligence/notice standard.

Eugene Volokh, *How Harassment Law Restricts Free Speech,* 47 RUTGERS L. REV. 563-78 (1995).

This article, which discusses harassment law's limit on free speech in the workplace, is the latest position paper of Eugene Volokh in his ongoing debate with Suzanne Sangree. Volokh argues that the "context" and "content" considerations of harassment law do not succeed in limiting the restrictions of what seems like core protected speech. The author discusses how a formalist approach to free speech questions in harassment suits, is superior to Sangree's sensitive balancing approach because the formalist approach requires consideration of the future impact of the rules presently being crafted.

HEALTH, HIV, AND AIDS

Joseph S. Alper et al., *Genetic Discrimination and Screening for Hemochromatosis,* 15 J. PUB. HEALTH POL'Y 345-58 (1994).

Screening programs designed to detect genetic diseases before symptoms appear are gaining widespread use by insurance companies and employers. These screening programs discriminate against individuals incorrectly diagnosed, and individuals with the genotypes for the disease, but who will never experience a phenotypic manifestation of those genotypes. The effects of genetic discrimination are evident in the wrongful denial of insurance and employment, and also in the subsequent stigmatization by relatives, friends and community members. The authors advocate for genetic screening programs that employ stringent safeguards to minimize the discrimination rate. Further, participation in screening programs should be voluntary and with informed consent.

Anne N. Arbuckle, Note, *The Condom Crisis: An Application of Feminist Legal Theory to AIDS Prevention in African Women*, 3 IND. J. GLOBAL LEGAL STUD. 413-55 (1996).

This note suggests an alternative to the notion of empowering women as an AIDS prevention technique, and proposes applying feminist legal theory to more realistically effectuate HIV/AIDS prevention through condom promotion. The acceptance method seeks to diminish, and ideally eliminate, the effect that sexual differences, whether biological or cultural, have on African women's opportunities for maximum protection from HIV and AIDS. The author concludes that, by implementing these changes, an immediate solution to the problem of AIDS will take place in Africa.

Rebekah R. Arch, RN, Comment, *The Maternal-Fetal Rights Dilemma: Honoring a Woman's Choice of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637-73 (1996).

This comment examines whether a pregnant woman has the right to refuse medical care deemed necessary to the health of the fetus. The author analyzes *Roe v. Wade*, in addition to other constitutional cases, and then describes Jehovah's Witnesses' religious conflicts with medicine and the law, in order to discuss the dilemma of whether the constitutional rights of the mother or the fetus should prevail. The author argues that courts should look more carefully into the facts and into doctors' and patients' wishes, and concludes that the judiciary should encourage physicians to explore alternative methods of treatment for patients expressing moral or religious objections to fetal surgery.

Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and its Legal Regulation*, 3 TEX. J. WOMEN & L. 7-56 (1994).

By posing the "woman question," Bobinski identifies the unique legal and social problems confronting HIV positive women. The author uses a gender-based analysis to review constitutional, state, criminal, and tort laws affecting women with HIV. The author suggests that medical policies that discriminate against women with HIV lead to inadequate HIV clinical tests, which exacerbates problems uniquely felt by HIV positive women. This article exemplifies both the advantages and shortcomings of an entirely gender-based study.

Martin Gunderson et al., *Routine HIV Testing of Hospital Patients and Pregnant Women: Informed Consent in the Real World*, 6 KENNEDY INST. ETHICS J. 161-82 (1996).

With increasing abilities to reduce maternal-fetal HIV transmission, the Centers for Disease Control and Prevention have proposed that all pregnant women should be encouraged to undergo HIV testing. This article supports the proposal, but recognizes the personal infringement of the patient's rights, and the expense of time, increased training, and extra personnel it will cost medical facilities. In light of this, the authors recommend guidelines and procedures, including consent forms and referral services, to help implement programs for HIV testing of pregnant women which balance the interests of informed consent, personal rights, health of the unborn fetus, hospital costs, time constraints, and benefit to society.

Donna Lenhoff and Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39-67 (1994).

The Family Medical Leave Act, enacted by the Clinton administration, affords women increased job security and other benefits if they need to take a leave of absence from work for medical reasons, such as maternity leave. This Act mandates that employers allow employees who take a leave of absence to return to their previous positions. The author argues, however, that one issue the Act fails to address is the lack of income during absences from work. The author asserts that Congress must rectify this and other inadequacies in the Act.

Estelle H. Rogers, *Change of Venue: Abortion Regulation in the States*, 3 TEX. J. WOMEN & L. 123-33 (1994).

The author examines the current political climate concerning abortion in this country by reviewing the country's 1993 legislative actions. She argues that the "triumph in *Roe v. Wade*" has meant little to nothing in terms of protecting a woman's right to abortion since 82 out of 99 state legislative bodies have some form of anti-choice regulation. The author categorizes the majority of these regulations into two groups: outright bans and regulation schemes for clinics/public funds. The second of these groups denies any public funding to any facility that performs abortions, and also requires detailed statistical reporting and insurance minimums. Furthermore, the author contends that there is a national anti-

abortion campaign funded and orchestrated by the religious right. Consequently, the author states that no matter how trivial and benign a regulation may sound, it must be carefully scrutinized.

Allyn L. Taylor, *Women's Health at a Crossroad: Global Responses to HIV/AIDS*, 4 HEALTH MATRIX 297-324 (1994).

The article addresses how the World Health Organization ("WHO"), an international organization which directs and coordinates activities against AIDS, has assisted the international effort to heighten and expand awareness regarding HIV/AIDS, and the health and social status of women. Pointing to the increase of HIV/AIDS among the female population of the world, the author envisions that changes are indeed being made in the world's outlook on women's health issues. The author concludes that an international effort, in conjunction with the increase of HIV/AIDS among women throughout the world, will spur nations to focus their policies and laws on the necessity of improving and protecting the health and well-being of women.

MATRIMONIAL

Paul J. Buser & Thomas R. White, *Stock Redemptions in Marital Separation Agreements: Unsteady Steps for the Unprepared*, 30 FAM. L.Q. 41-89 (1996).

Under current law, the money paid in a stock redemption transaction to a non-business spouse for his or her share in a family-owned corporation is treated as a constructive dividend to the redeeming spouse, who must then bear the tax cost of the redemption. The author advocates a uniform application of corporate tax rules to all situations involving stock redemption agreements so that the tax burden would be more fairly borne by both parties. The author also examines current case law addressing this problem, compares the intent behind section 1041 of the Internal Revenue Code with its actual effects, and suggests guidelines that matrimonial attorneys should follow to address the tax ambiguities involved in stock redemption transactions when fashioning divorce settlements.

Regina Graycar, *Gendered Assumptions in Family Law Decision-Making*, 22 FED. L. REV. 278-99 (1994).

The Australian Family Law Act of 1975, although written in gender-neutral fashion, has been applied by the courts in a gendered manner. Areas of the law in which gender problems arise for women

include property and economic issues, as well as divorce, custody battles and violence. The author concludes that, despite the use of gender neutral language, inequality continues to underpin laws and social relations in Australia.

John A. Miller and Jeffrey A. Maine, *Tax Consequences of Community Income: Problems and Planning Opportunities During Divorce,* 30 FAM. L.Q. 173-97 (1996).

In *Poe v. Seaborn,* the court held that community income, in those states that continue to have community property laws, must be taxed equally on behalf of each spouse, without regard to which spouse generated the income. *Seaborn's* severe implications arise because each spouse remains liable with respect to half of the post-separation or pre-divorce community income. By discussing the current law in this area, the authors propose practical ways in which the inequitable consequences of *Seaborn* can be minimized, if not fully avoided.

Garry C. Randall, *What to Do With the Family Home — Before and After the Divorce,* 30 FAM. L.Q. 23-39 (1995).

Disposing of the family home is an inevitable part of the divorce process. This article contemplates the tax problems that occur when one party gets the home and the other receives a cash settlement. The divorcee that walks away with a cash settlement is not taxed according to section 1041 of the Internal Revenue Code, whereas the party who gets the home will have to pay income tax equal to the difference between the original cost of the house and the sales price of the property should she sell the home at a later date. This article proposes several ways in which a family home can be disposed of in a divorce settlement so that the party who receives title to the home can avoid getting a disparate settlement.

Stephen C. Robinson, CPA, *Tax Consequences of Divorce Can Be Avoided,* 23 TAX'N FOR LAW. 170-75 (1994).

This article discusses the three types of transfers incident to a divorce that are of particular tax consequence: alimony, child support, and transfers under a property settlement. When there is a cash payment between former spouses, it must be ascertained what type of transfer is being executed. The author, providing a number of examples concerning each of the three types of transfers, concludes that practitioners should be alert to issues pertain-

ing to transfers incident to a divorce in order to provide careful tax planning.

MISCELLANEOUS

Penka Angelova, *Women and Nationalism: On the Position of Women in the Nationalist Movements of the Balkan Peninsula,* 5 UCLA WOMEN'S L.J. 49-61 (1994).

Penka Angelova describes the historical and social forces driving the fierce nationalist movements among the Balkan peoples. The author comments on where women stand in the midst of the current attempt to gain national consolidation, explaining how the existing patriarchy leaves only the subordinated and supporting roles for women. For the past 150 years, women have served primarily as mothers, guardians of the patriarchal value system, and conveyors of language and oral history; any possibility of change to this status quo remain in a "language which does not yet exist" in the Balkans.

Christina Bannon, Comment, *Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?,* 26 ARIZ. ST. L.J. 835-56 (1994).

This comment, noting that many individuals who suffered sexual abuse as children are now suing their abusers when their memories return, speculates that many of these cases may be caused by "False Memory Syndrome." The American Medical Association suggests that many of the techniques used to recover such memories are too suggestible. The author asserts that in order to avoid legal controversy, the therapeutic techniques used to retrieve repressed memories must be within the professional standard of conduct of the mental health profession.

Joyce Ann Baugh, et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment,* 26 U. TOL. L. REV. 1-34 (1994).

This article assesses the nomination of Justice Ruth Bader Ginsburg to the Supreme Court of the United States, and attempts to predict how Justice Ginsburg will perform. Neither Justice Ginsburg's confirmation hearings, nor her first time on the bench, have provided any definitive conclusions about how she will behave as a Supreme Court Justice. Discussing opinions in which Justice Ginsburg had written on behalf of the majority, concurring and dissenting opinions in various areas of the law, and with the aid of

graphs, the authors suggest that Justice Ginsburg has established herself to be a judicial moderate.

Petra Bläss, *Feminist Politics — Experience in Parliament*, 5 UCLA WOMEN'S L.J. 77-82 (1994).

This essay focuses on the changes made by the Independent Women's League ("IWL") and the feminist movement in response to the new political structure of the German Democratic Republic. The author believes that the limited equal rights legislation, which exists in some areas of the law, has become inadequate to change the male biased society of the new German Democratic Republic. The political agenda of the newly transformed IWL focuses on ways to translate feminist ideals into effective policies. These feminist policies seek to eliminate the gender division in every aspect of society, by replacing the outworn policies which fail to address the roots of women's problems.

Petra Bläss, *Women in East and West Germany: Victims of Discrimination, Humiliation, Domination?*, 5 UCLA WOMEN'S L.J. 71-5 (1994).

This essay discusses the deterioration of women's rights since the unification of Germany. Deindustrialization and job reductions in service careers have led to the unemployment of twice as many women as men, leaving these women to be dependent on their husbands and partners. Accordingly, the author believes that the restructuring of the German Democratic Republic is being carried out at the expense of women. In addition, the current restrictive abortion regulations have created an added burden on women. The author posits that the few progressive laws enacted by the government do not reflect feminist ideals, and have failed to accomplish any substantial change in society.

Judith Olans Brown, Lucy A. Williams, and Phyllis Tropper Baumann, *The Mythogenisis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457-539 (1996).

The authors argue that the laws concerning women have been unconsciously influenced by the larger culture which is permeated by mythic thinking. These myths stereotype women by their class and race, generalizations of women's sexuality, their roles at home, and their jobs in the workplace. The resulting stereotypes have served as the basis for the repressed status of women in the legal system, which effects the legal issues arising out of paid labor, family, wel-

fare, and sexuality. The author contends that it is necessary to reformulate these oppressive myths by directly addressing them in the media, and also by formulating new generalizations rather than having lawyers continue to use distortive mythologies in the representation of women.

Naomi R. Cahn, *Family Law, Federalism, and the Federal Court*, 79 IOWA L. REV. 1073-126 (1994).

The domestic relations exception to diversity jurisdiction permits federal courts to abstain from hearing cases involving divorce, custody, or alimony. Although federalism and competency to hear family cases are the primary reasons offered for the existence of the exception, the author suggests that this is mere pretext for the true explanation: a bias against matters that concern women. The greater mobility of families, and hence the greater need to protect against bias towards out-of-state litigants, as well as the increased federal mandate over family law, requires federal courts to overcome their bias against family cases.

Elizabeth Seale Cateforis, *Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas*, 4 KAN. J.L. & PUB. POL'Y 101-14 (Winter 1995).

This article discusses the moral, legal, and ethical issues that accompany surrogate motherhood — an arrangement involving the intended parents, a couple including an infertile woman, and the "surrogate mother," who is artificially inseminated with sperm from the male of the intended parents. The author contends that, since surrogacy is a viable alternative to adoption and other reproductive options, Kansas should adopt legislation regulating surrogacy. First, the author argues that it is the state's obligation to provide guidance and protection, both before and after the arrangement is finalized. A thorough examination of issues arising from surrogate motherhood follows. Finally, the author analyzes other states' surrogacy legislation and outlines a proposal for surrogate motherhood legislation in Kansas.

Fred Cohen, *From the Editor: Sex Offender Registration Laws; Constitutional and Policy Issues*, 31 CRIM. L. BULL. 151-60 (1995).

This article reviews a New Jersey sex offender criminal registration law commonly referred to as "Megan's Law," by commenting on the successful New Jersey District Court challenge in *Diaz v. Whitman*. The author, after pointing out various legal arguments, af-

firms the court's view that such laws are *ex post facto* laws which inflict additional punishment upon the sex offender long after the commission of the offense. Moreover, the author asserts that such laws foster fear, and promote vigilantism in society, rather than serving to protect the public from a potential danger.

Simon Devereaux, 9 CAN. J.L. & SOC'Y/RCDS 221-23 (Fall 1994) (reviewing LUCIA ZEDNAR, WOMEN CRIME, AND CUSTODY IN VICTORIAN ENGLAND (1991)).

In *Women, Crime, and Custody in Victorian England,* Lucia Zednar discusses the proposition that prevailing social constructions of gender in Victorian England generated different perceptions and treatment of men and women in the penal system. While male criminality was believed to be related to economic motives, female criminality was viewed to be the consequence of moral failing, and thus, the aim of prison was to restore female offenders to their "normal" condition of moral purity and rectitude. Devereaux praises Zednar's expert treatment of gender and penal ideologies, while suggesting that a more thorough contrast of male and female penal philosophies and regimes would have been helpful.

Sandra Farrington-Domingue, Comment, *The Intersection of Race and Gender and Its Effects in the Workplace,* 5 S. CAL. REV. L. & WOMEN'S STUD. 187-88 (1995).

The author argues that race and gender intersect to exclude women from the areas where major decisions are made on a daily basis, such as the middle and upper management positions in government. The author contends that women of all classes and ethnicities must begin a "conversation" by putting all differences aside in order to prevent men from continuing to perpetuate the "good ol' boy" network. The author concludes that the sooner women unite behind a common goal and engage in conversation to eliminate the "intersection" that results from being excluded from the boardrooms of the world, the sooner many changes will occur.

Martha Albertson Fineman, *A Legal (and Otherwise) Realist Response to "Sex As Contract,"* 4 COLUM. J. GENDER & L. 128-42 (1994).

Reproductive choice has been one area not dominated by male bias. In the Supreme Court decisions *Roe v. Wade* and *Planned Parenthood v. Danforth,* the court placed the option of abortion in the hands of women. This author criticizes "Sex As Contract," claiming that it seeks to reassert male biases in an area which wo-

men have fought hard to achieve decision-making power. The author argues that the contract theory suggested for sex would do nothing more than return women to the times when they had little or no rights within marriage, and abandon the control they have gained over their own bodies and reproductive capacities.

Deborah Weimer, 17 J. LEGAL MED. 177-82 (1996) (reviewing JONI N. GRAY, PHILLIP M. LYONS, JR., & GARY B. MELTON, ETHICAL AND LEGAL ISSUES IN AIDS RESEARCH (1996)).

The book provides a summary of relevant federal regulations and case law that is a resource to attorneys wishing to provide advice in AIDS related law. It is described by the reviewer as responsive to the political landscape that is both shaping and being shaped by our response to the AIDS epidemic. The reviewer writes that although the book provides a thorough treatment of many of the issues facing researchers who are conducting or planning to conduct psychosocial research on AIDS, the book has many shortcomings, including a lack of emphasis on the need for research to protect the privacy of the those infected with the virus. Furthermore, the reviewer argues that the authors failed to suggest ways to overcome the cultural barriers that arise in AIDS research, ignored the issue of research of infected adolescents, and did not delve into the overriding ethical issue of who decides what research will be conducted and how this is decided.

Susan S. Grover, *"Ain't"?*, 3 S. CAL. REV. L. & WOMEN'S STUD. 335-38 (1994).

In this response to Marc Linder's critique of her earlier essay, the author suggests that Linder misunderstood her point. The author says that her essay was not about what kind of work people do for a living. Instead, it was about the experience of women who are mothers of young children and the difficulties these women encounter in striving to present a professional face to their male clients and colleagues. In this context, the author argues, Zoe Baird serves as an apt example of the fragmentation and duality these women face.

Thomas R. Ireland & Anne E. Winkler, *Projecting the Lost Future Economic Contribution of a Female Child: Refining Income Data to Reflect True Losses*, 4 J. LEGAL ECON. 19-37 (Summer 1994).

When a child is disabled, litigants call upon experts to determine the child's lost future economic contribution. This article's objec-

tive is to demonstrate that economists who rely on the unadjusted earnings data for all women from the Current Population Survey significantly underestimate the lost economic future earnings of a female child. The authors point out that such underestimation of future earnings occurs because household production and child rearing is ignored. Moreover, the authors suggest that expert economists should use the earning stream of never-married, childless women as a proxy for both labor market earnings and the lost household production of a totally disabled female child.

Laurie A. Keco, Note, *The Citadel: Last Male Bastion or New Training Ground,* 46 CASE W. L. REV. 479-530 (1996).

Some proponents of single-gender schools acknowledge a measure of pedagogical value to such institutions. The author asserts, however, that the admission policies of all-male schools, such as The Citadel and the Virginia Military Institute, subordinate women. In response to a constitutional challenge based on an equal protection violation, the South Carolina Institute of Leadership for Women ("SCILW") was proposed as a parallel program to The Citadel. The author asserts that this sister institution fails to address the nature of the constitutional violation of The Citadel's all-male admission policy, and that SCILW will be perceived as an inferior program because it cannot provide various intangible factors associated with The Citadel. The author concludes that the implementation of full integration at The Citadel is the only way to satisfy the demands of the Fourteenth Amendment.

Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity,* 3 AM. U. J. GENDER & L. 247-63 (1995).

This article is a narrative of a single mother in need of Aid For Dependent Children. In order to receive the needed federal aid, this single mother is forced to go to court to prove the father's paternity, learns that her court appointed lawyer represents the government's interests rather than hers, and is asked to answer personal questions as well as reveal sexual intimacies. Using the narrative, the author demonstrates that the system for obtaining federal aid is adversarial, pitting parent against parent. At the conclusion of the narrative, the father feels that the mother is purposefully hurting him, and the mother believes that the father's feelings should be subordinate to the needs of the child.

Christine M. Kong, Comment, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257-96 (1995).

This comment examines various forms of sexual offender legislation and focuses on the current interest in the enactment of community notification laws. The author discusses the various state approaches to sex offender legislation, examines the Federal Crime Bill and its provisions that mandate the establishment of community notification programs in each state, addresses the potential problems inherent in the use of community notification programs and proposes limited application of community notification programs as a means of protecting citizens. While Congress and many state legislatures acknowledge that community notification may provide one method of helping to protect children from released sex offenders, the author maintains that state notification laws must remain constitutionally sound.

Stanford M. Lin, Recent Development, *China's One-Couple, One-Child Family Planning Policy As Grounds For Granting Asylum* — Xin Chang Zhang v. Slattery, No. 94 Cov. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231-43 (1995).

In *Xin-Chang Zhang v. Slattery*, the Southern District of New York held that a man who fled China because of its family planning policy may satisfy the requirements for political asylum as detailed in the Refugee Act of 1980. When viewed in light of previous decisions, the Xin-Chang decision has further confused the complex area of law regarding when refugees may qualify for asylum in the United States. Although many view this decision as favorable for those seeking asylum on these grounds, it remains unclear whether this decision will be adopted as a broad standard in immigration law.

Marc Linder, *I Ain't Gonna Work on Zoe's Farm No More: Reply to Susan Grover*, 3 S. CAL. REV. L. & WOMEN'S STUD. 331-34 (1994).

In this reply to an article by Susan S. Grover, the author takes issue with Grover's use of defeated Attorney General nominee Zoe Baird as illustrative of the duality and fragmentation faced by all working women today. The author suggests that Grover's emphasis on the problems of a woman whose earnings place her in the richest one-tenth of one percent of the population is misplaced and that the

servant problem of Baird, an "elite working mother," is irrelevant to the child care needs of the average working parent.

Deborah L. Mills, Note, United States v. Johnson: *Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903-41 (1996).

In 1984, Congress ordered the United States Sentencing Commission to establish guidelines which would take into account the juvenile record of adult criminals in their sentencing. The author argues that if courts are not given the force of these guidelines, adults who have committed crimes as juveniles may avoid the consequences of their repetitive criminal behavior. The court in *United States v. Johnson* upheld these guidelines, and sent out the message that courts will no longer "forget" the crimes that adult criminals committed as juveniles. The author concludes the *Johnson* decision will benefit society because adult criminals should no longer derive the benefits of the juvenile courts.

Krisztina Morvai, *Continuity and Discontinuity in the Legal System: What it Means for Women: A Female Lawyer's Perspective on Women and the Law in Hungary*, 5 UCLA WOMEN'S L.J. 63-70 (1994).

The author explains that the transition to democracy in Eastern Europe has a weak foundation upon which to formulate laws reflecting women's rights. The Communist rhetoric of female equality merely meant that women were encumbered with full-time work outside the home, as well as full responsibility for domestic work and political participation. Women were viewed as less competent than men in the work force despite these greater responsibilities. With the advent of democracy, opportunity exists to draft laws that better reflect women's welfare. The author expresses particular need for laws protecting women from domestic violence, rape, and sexual harassment.

Miranda Perry, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727-60 (1996).

This article argues that parental involvement in school condom-distribution programs is constitutionally mandated and maintains that distributing condoms at public schools necessarily burdens parental liberty interests in directing their children's upbringing and education. The author suggests that, since parental liberty interests in the upbringing of their children are rooted in the fundamental liberties protected by the Due Process Clause of the

Fourteenth Amendment, they should be reviewed under the strict scrutiny standard. In conclusion, the author asserts that only school condom-distribution programs that require prior parental consent can survive this scrutiny.

Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoption*, 20 SETON HALL LEGIS. J. 363-431 (1996).

This article analyzes the development of unwed biological fathers' rights to his child after the child has been placed with an adoptive family. The fact that the Supreme Court has never addressed the issue of newborn adoptions and whether an unwed father, whose identity or whereabouts are unknown, must be given notice of his child's adoption, and the lack of uniformity in adoption laws amongst the fifty states, have contributed to the confusion in balancing the interests of the parties involved. The author proposes that concerned fathers enter into a single national putative father registry, and that a father who fails to appear on the registry by thirty days after the birth or adoption of the child would be held to have abandoned his child and concomitantly forfeited his parental rights.

Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239-319 (1994).

Property has traditionally been conceived of as a bundle of sticks, or legally protected interests, held together by competing and conflicting policy goals. However, the author argues that property should instead be conceived of in modern psychoanalytic terms, "as the sensuous grasping of a tangible thing." The proper metaphor is that of the phallus controlling, protecting, and entering the female body. The author then analyzes the psychoanalytic concept of the female in relation to this male-based phallic imagery.

Lynne Soine & Mary Ann Burg, *Combining Class Action Litigation and Social Science Research: A Case Study in Helping Homeless Women With Children*, 3 AM. U. J. GENDER & L. 159-82 (1995).

The authors, by analyzing *Sharp v. Perales*, argue that class actions relating to socio-political and economic issues benefit homeless women with children. Due to a variety of factors, the number of homeless women with children who rely on government aid to survive is growing at an alarming rate. The authors conclude that legal advocacy and the courts' decisions help homeless women with

children by improving their quality of life, but they also propose combating homeless mothers' multiple problems by combining the resources of legal advocates and social science researchers.

Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169-81 (1996).

The author argues that the Federal Sentencing Guidelines, which do not equate sex and family ties into the sentencing process, are impracticable. These fixed guidelines fail to consider individual culpability and circumstances which are necessary to formulate the ideal criminal sanctions and end the harmful effects of incarceration on the family structure. Instead, the author contends that sentences should be determined by including other factors, such as sex, "family ties and responsibilities," race, economic status, and past abusive relationships. Therefore, the author suggests that judges should be able to depart downward from the Guidelines to minimize the prison terms for parents, or be able to use non-incarcerative alternative punishments to allow parents to continue to raise their children.

PORNOGRAPHY

Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143-68 (1995) (reviewing RICHARD A. POSNER, SEX AND REASON (1992) and EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992)).

The reviewer illustrates that political leftists and rightists are positionally unified against laws that censor pornography, and argues that pornography perpetuates male dominance and sexual violence against women. Although the political left and right approach the issue of banning pornography differently, the reviewer asserts that both camps advocate for the protection of the individual's right to produce pornography.

RAPE

Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913-43 (1996).

Politically motivated rape, currently classified under international law as "ill-treatment," should be reclassified as torture because the characteristics of the crime meet, if not exceed, the three essential

elements which define torture: (1) the intentional infliction of severe pain or suffering (2) for one of several illicit political purposes (3) by or at the instigation of government officials. The author compares different forms of abuse and after finding the essential distinction between "ill-treatment" crimes and "torture" to be "the intensity of suffering inflicted," equates the acute suffering of these rape victims to those of torture victims. The author contends that the classification of politically motivated rape as torture would afford the rape victims special rights and protections not available to victims of ill-treatment crimes and it would support the dignity of women in the international community.

Deborah Stavile Bartel, *A Comparison of the Federal and New York State Rape Shield Statutes*, 11 TOURO L. REV. 73-105 (1994).

Federal Rule of Evidence 412, the Federal Rape Shield Law, bans opinion and reputation evidence in a rape trial and only permits evidence of the complainant's prior sexual conduct in limited instances. New York's Rape Shield statute differs from the Federal Rule in that New York permits opinion evidence and allows admission of a woman's prior prostitution convictions as well as all evidence of the complainant's prior sexual relations with the defendant. The author suggests making the Federal Rule similar to the New York Rule in order to avoid having courts analyze whether the omission of a woman's prior sexual conduct is in violation of the Constitution.

Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815-60 (1996).

This article examines the development of mistake of fact as a defense to rape from its adoption in 1964 to its virtual demise in the last year. The author argues that the emergence of a rule of equivocality culminates from a growing judicial discomfort with the implications of an expansive defense of mistake to a charge of rape. The article analyzes in detail the rule of equivocality announced in California and suggests that this rule is more than likely to have a nationwide influence.

Garth E. Hire, Student Article, *Holding Husbands and Lovers Accountable for Rape: Eliminating the "Defendant" Exception of Rape Shield Laws,* 5 S. CAL. REV. L. & WOMEN'S STUDIES 591-610 (1996).

Rape shield laws were created to protect victims of rape by prohibiting an accused rapist from introducing evidence about the victim's prior sexual history with third persons in order to prove consensual sex in the disputed action. There is an exception to the rape shield laws, however, where the victim's prior sexual history involves the defendant. Therefore, where the accused rapist is an ex-lover or husband, the accused may introduce evidence about the victims sexual relations with the defendant. This article addresses how this exception to rape shield laws often times prevents the successful prosecution and conviction of rapists who are the husbands or lovers of their victims and proposes the elimination of this exception.

Eric A. Kauffman, Recent Development, *Criminal Law — Rape — Forcible Compulsion; Evidence — Admissibility — Rape Shield Law:* Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994), 33 DUQ. L. REV. 697-719 (1995).

In Pennsylvania, in order to satisfy the "forcible compulsion" element of the rape statute, there must be a showing of physical force, or psychological coercion. Under the Rape Shield Law, evidence as to the defendant's behavior is admissible but evidence of a victim's prior sexual conduct is inadmissible. The author suggests that a more accurate account of events would result if the victim's conduct in granting or denying consent was included.

Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court,* 22 DENV. J. INT'L L. & POL'Y 317-74 (1994).

The current legal fora available to Muslim women and girls in Bosnia and Herzegovina are ineffective to provide monetary relief to the victims, and ineffective to deter the perpetrators of mass sexual violence. The author argues for the establishment of a permanent international criminal court with jurisdiction over acts which shock the conscience, are regarded by world opinion as destructive of international peace, and are likely to escape punishment by national authority. Additionally, the proposed permanent international criminal court should impute liability upon all military and political superiors who knew or should have known of the offensive acts

but took no measures to prevent the acts or punish the perpetrators.

Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape,* 5 COLUM. J. GENDER & L. 182-215 (1996).

This article compares the differences between American and Jewish rape laws. The author argues that Jewish law is far more sympathetic to the victims of rape, and imposes stricter penalties upon those men who commit this violent crime. For instance, Jewish law offers victims a fairer and more protective system of recourse. Also, under Jewish law, a lack of consent is sufficient for a finding of rape, while American law requires greater proof. Although the author claims that Jewish law is a better response to rape, she concludes that Jewish law is not a feasible model upon which to base changes in American law.

Susannah Miller, Recent Development, *The Overturning of* Michael M.: *Statutory Rape Law Becomes Gender-Neutral in California,* 5 UCLA WOMEN'S L.J. 289-99 (1994).

Tracing the development of California's statutory rape law, Miller notes that under the state's first version, only females could be victims and only males could be punished. When the law was attacked on equal protection grounds in 1981, the Supreme Court upheld its constitutionality by accepting the state's argument that gender-neutral language would frustrate valid state interests. However, California reversed its policy in 1993. Miller concludes that California's gender-neutral language amendment was not a response to the feminist critique of inequality in the law, but rather a response to the need to legally protect male minors.

Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women,* 2 MICH. J. GENDER & L. 83-128 (1994).

Trafficking in women, including sexual slavery, prostitution, sex vacations, and rape brothels in times of war, is a problem that has not been successfully curtailed by international treaties and agreements. This article looks at the reasons why international instruments have been so ineffective in ending the world sex trade. Though international treaties exist, governments have been unwilling to devote resources for enforcement and individuals have no remedies under these treaties. Regional conventions have tried to

address this enforcement problem by creating an individual right to bring a petition, but many complaints have been rejected because they were not brought specifically against a state party. The commission which hears these cases can only give a non-binding opinion, try to facilitate a settlement, or publish a report in an attempt to put public pressure on a state, none of which provides a direct remedy. The authors suggest that in order to stop trafficking in women, attention needs to be focused on the deficiencies of the treaties which purport to outlaw these human rights abuses.

K. Lianne Wallace, Note, *Privileged Communications in Sexual Assault Cases: Rhode Island's Treatment of Clergyman-Parishioner and Psychotherapist-Patient Communications*, 28 SUFFOLK U. L. REV. 433-64 (1994).

After providing an overview of privileged communications, Wallace notes that the delicate nature of testimonial privileges often causes controversy regarding the scope of a criminal defendant's Sixth and Fourteenth Amendment rights. Wallace examines court treatments of psychotherapist's and clergyman's privilege in civil and criminal sexual assault cases. Acknowledging that absolute privileges are the exception to the rule, the author concludes that Rhode Island will follow the majority of jurisdictions and continue to employ the *in camera* process, barring discovery of privileges only when it is not an obstacle to the administration of justice.

REPRODUCTIVE RIGHTS

Taunya Lovell Banks, *The Americans With Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57-98 (1994).

In this article, the author argues that under the Americans With Disabilities Act ("ADA"), directive reproductive counseling of HIV-positive women constitutes unfair treatment based on their physical disability. The author questions the extent to which the ADA prohibits health care providers from controlling, through counseling or refusal of reproductive services, the procreational choices of women with disabilities, specifically women with HIV. After outlining the ADA's three-prong test that assesses whether an individual poses a direct threat to the health or safety of others, namely their potential offspring, the author concludes that the test's vagueness allows heathcare providers to avoid treatment of HIV-positive women.

Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415-54 (1996).

Although female genital mutilation occurs in the United States, the international community has recognized that women must be protected from this persecution. The author asserts that United States law must protect young girls presently living in America and those seeking asylum in America from being forced to undergo the excision of their genitalia and suffer consequent medical and psychological harm inflicted by this practice. The author argues that, while laws banning female genitalia mutilation and the courts' recognition of it as a form of persecution will not alone end the practice, such moves would reflect the United States' disapproval for female genital mutilation and support the universal struggle against it.

Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825-76 (1996).

This note discusses the implications of the Supreme Court holding in *Planned Parenthood v. Casey*, which introduced the undue burden standard to test the constitutionality of state abortion regulations and analyzes the implementation of this standard by the lower courts. The author surveys recent cases which have implemented the undue burden standard, and concludes that the lack of Supreme Court guidance creates confusion. For example, a serious problem that has arisen is whether *Casey* implicitly overruled the traditional *Salerno* test for facial challenges to abortion restrictions. The author claims that lower courts have been more inclined to dispense with the *Salerno* test resulting in greater success for challenges to newly enacted state abortion restrictions.

Howard W. Jones, Jr., *Children of Choice: A Doctor's Perspective*, 52 WASH. & LEE L. REV. 225-32 (1995).

The author, a physician and fertility specialist, responds favorably to John A. Robertson's work, *Children of Choice: Freedom and the New Reproductive Technologies*. The author finds that a legal doctrine of procreative liberty provides insurance to the physician who must guide infertile couples through the maze of available technologies. He believes, however, that physicians must ethically consider the welfare of offspring, and therefore he excludes single and same-sex parents from the realm of procreative liberty. The author also dis-

cusses miscellaneous matters, most notably the potential legal problems concerning the cryopreservation of embryos.

Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, 68 S. CAL. L. REV. 427-92 (1995).

This note addresses the conflict between two important constitutional rights: the right to an abortion and freedom of speech. In an attempt to strike a peaceful balance, courts and legislatures have fashioned "buffer zones" which keep protestors at a distance from clinics and their employees and patients, yet allow protestors to exercise their right to free expression. In *Madsen v. Women's Health Center*, the United States Supreme Court addressed a challenge to an injunctive buffer zone and put forth a new content-neutral injunction test. The author concludes that the standard promulgated by the Court does little to eliminate the confusion surrounding free speech restrictions, and that further clarification is necessary to ensure protection of both constitutional rights.

Timothy O. Lenz, *The Restriction of Abortion Protesters in Florida*, 59 ALB. L. REV. 1685-91 (1996).

This article examines judicial restrictions on abortion protesters to describe how social utilitarianism is used to decide civil liberties conflicts and to explain its substantive impact on individual rights in state and federal law. This article focuses on two recent abortion protestor cases, *Madsen v. Women's Health Center, Inc.* and *Operation Rescue v. Women's Health Center: The Florida Approach*, and claims that the use of social utilitarianism guided their outcomes. The author states that political consequences of this method include: 1) the blurring of the distinction between courts and legislative and other decision-making institutions; and 2) the attempt to balance individual rights claims with social interests — an attempt that the author believes favors the latter. The author concludes that judicial attempts to use empirical measures of social utility to decide civil liberties cases are inherently political, despite the argument by critics of judicial activism that the method is apolitical.

Christina L. Misner, *What if Mary Sue Wanted an Abortion Instead? The Effect of* Davis v. Davis *on Abortion Rights*, 3 AM. U. J. GENDER & L. 265-99 (1995).

This article assesses the holding in *Davis v. Davis*, which permits the husband to avoid procreation by destroying frozen embryos con-

ceived through artificial insemination that have yet to be implanted in the woman's uterine wall. The author states that the decision enables a party wishing to avoid procreation to prevail over the party's right to procreate, and compares such results with the woman's right to avoid procreation through abortion. It is the author's conclusion that when a woman desires to abort her pregnancy, she should be afforded the same right *Davis* provides to husbands who wish to destroy frozen embryos. Moreover, the author asserts that procreation should be a personal right, and that both men and women should be able to avoid procreation without any hindrance or delay.

Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15-37 (1994).

This article examines the use of Norplant, a contraceptive designed to provide up to five years of continuous, but reversible, birth control, as a segment of welfare reform. Use of the unconstitutional conditions doctrine may force the Court to implement a higher standard of review and recognize the controversy surrounding the welfare recipient's surrender of his or her constitutional right in exchange for a government benefit. The author posits that the unconstitutional conditions doctrine should be applied to legislation involving welfare benefits and Norplant.

Terry Pfeifer, Note, City of Wichita v. Tilson: *The Necessity of Defense as Applied to Abortion Clinic Trespass*, 42 KAN. L. REV. 79-89 (Crim. Pro. Ed. 1994).

The Supreme Court of Kansas rejected the defendant's necessity defense because she did not criminally trespass to prevent a legal harm, but rather to perpetrate a personal moral or ethical belief. The court, however, failed to determine whether Kansas recognizes the necessity defense. Therefore, the author argues that *Tilson* is constitutionally inconsequential because it still allows abortion clinic protestors to continue raising the necessity defense.

Amy D. Porter, Note, *International Reproductive Rights: The RU 486 Question*, 18 B.C. INT'L & COMP. L. REV. 179-219 (1995).

RU 486, a medical alternative to surgical abortion approved for use only in France, Britain, Sweden, and China, is a pill which acts to interrupt pregnancy. Many other nations have signed international documents purportedly supporting fundamental rights and

freedoms, yet these nations have fallen short on their international pledges by refusing RU 486 to their citizens. The author states that in countries offering access to abortion as a legal right, international instruments safeguard a woman's right to pick the method of abortion best suited to her, and RU 486 ought to be among the choices.

Philip J. Prygoski, *The Implications of* Davis v. Davis *for Reproductive Rights Analysis*, 61 TENN. L. REV. 609-46 (1994).

The Tennessee Supreme Court in *Davis v. Davis* determined that for legal purposes, a pre-embryo created through in vitro fertilization is to be considered neither a person nor property, but rather occupies an interim category that entitles it to special respect because of its potential for human life. The Court divided the concept of parenthood into four distinct parts: genetic, gestational, bearing, and rearing, and stated that this distinction will help future courts better balance the claims of parents in a variety of contexts. The author reviewed the Court's decision in *Davis v. Davis*, and then analyzed its potential impact on future cases dealing with unenumerated parental rights.

Laura M. Purdy, *Children of Choice: Whose Children? At What Cost?*, 52 WASH. & LEE L. REV. 197-224 (1995).

This article is included in a symposium on John A. Robertson's work, *Children of Choice: Freedom and the New Reproductive Technologies* (1994). The author poses ethical concerns with Robertson's zealous support for virtually unlimited rights to reproductive technologies intended to produce healthy and wanted offspring. The author argues that resources directed toward such technology will divert much needed efforts away from social and health programs designed to prevent fertility problems in the first place. The author also contends that these technologies, developed and implemented primarily by men, could, ironically, detract from choice if a male dominated medical culture should insist upon these options for women.

John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233-67 (1995).

The author has written this article in response to criticism he received on a prior work, *Children of Choice*. His original book fosters the idea that procreative liberty is a fundamental right and an important aspect of self-determination and well being. Here, he ex-

plores each of his critics' fears and criticisms of procreative liberty, and defends his position. He believes that the typical concerns surrounding reproductive technologies do not justify infringing the right to realize their respective plans. Accordingly, some type of balance between theses conflicting sides is necessary to ensure that these new reproductive technologies are used wisely.

Olga Rodriguez, Note, *Advocating the Use of California's Stalking Statutes to Prosecute Radical Anti-Abortion Protestors,* 7 HASTINGS WOMEN'S L.J. 151-76 (1996).

The violence and pressure put on abortion clinics and clinic personnel has become so great that fewer doctors and places are willing to offer abortions each year. The right to choose must be protected by protecting the medical personnel who perform abortions. Evidence shows that there is a nationwide conspiracy to eliminate this service by attacking the people who provide it. Legislation is needed that will punish anti-abortion advocates when their actions go beyond the protection of the First Amendment and become harassment or stalking. The author commends the California stalking statutes as they provide a powerful protection and remedy against anti-abortion extremists for their violent acts. Efforts in all states need to continue so this kind of criminal behavior can no longer continue to the detriment of a necessary and legal service.

Ruth Roemer, 15 J. PUB. HEALTH POL'Y 364-67 (1994) (reviewing CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS (1993)).

Daniels' *At Women's Expense: State Power and the Politics of Fetal Rights* wrestles with two dilemmas: whether fetal rights as patients are distinct from pregnant women's rights as citizens, and whether a woman's relation to the state and standing as a citizen changes if she can carry a fetus to term. Using three case studies, Daniels' analysis focuses on forced medical treatment, employment policies excluding fertile women from jobs or promotions that may jeopardize fetal protection, and efforts to prosecute drug-addicted pregnant women for fetal abuse. The author praises Daniels' informed, enlightened, and penetrating analysis. The author is most fascinated by the second case study since it provides arguments by the employer and union, scientific facts, policy arguments, and thoughtful comments.

Nadine Taub, *At the Intersection of Reproductive Freedom and Gender Equality: Problems in Addressing Reproductive Hazards in the Workplace,* 6 UCLA WOMEN'S L.J. 443-56 (1996).

Reproductive hazards, which may include exposure to toxins or ergonomic stress, can interfere with healthy procreation by preventing conception, by reducing or deforming sperm or eggs, or by causing congenital malformations. This article uses case law to look at past employment policies that excluded women from certain lucrative jobs with the pretense of protecting fetuses, while ignoring the reproductive dangers incurred by men. The author examines how reproductive hazards are presently dealt with, and discusses future policies, both long-term and short-term solutions, and the need for gender equality to ensure that both men and women are afforded the same benefits of safe and healthy work conditions to maximize reproductive freedoms.

Debora Threedy, *Slavery Rhetoric and the Abortion Debate,* 2 MICH. J. GENDER & L. 3-25 (1994).

This article explores how both sides of the abortion debate use the image of the slave as a rhetorical tool or metaphor in making legal arguments. The law shares attributes of both rhetoric and metaphor as powerful conceptual and cultural tools which are capable of limiting focus and therefore understanding of larger issues. The author argues that slavery rhetoric in legal discourse focuses on abortion to the exclusion of other reproductive issues and fails to keep abortion in context, as one piece of a larger concern for reproductive autonomy and meaningful choices for all women.

Satsie Veith, Note, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard,* 23 HOFSTRA L. REV. 453-81 (1994).

This note explores the plurality opinion of *Belloti v. Baird,* which outlined a procedure that enables state legislatures to constitutionally formulate statutes requiring parental involvement in a minor's decision to seek an abortion. The opinion also provides that minors who want an abortion but who do not want to obtain parental consent can seek permission from the courts. The author's position is that not only is this judicial bypass harmful, but the maturity standard is pro forma. The author notes that the court rarely denies permission, and comments that the procedure creates inconvenience and humiliation.

SPOUSAL SUPPORT

Anthony Dickey, *Is there a Third, Unstated Condition for Spousal Maintenance?*, 69 AUSTL. L.J. 172-73 (1995).

Section 72 of the Family Law Act of 1975 mandates two conditions in order to establish the right to spousal maintenance. This article observes that such conditions are that the spouse must be unable to adequately self-support, and that the spouse from whom maintenance is requested must be capable of providing financial support. The author questions whether a third unstated condition — that the marital relationship may be directly or indirectly responsible for the inability to self-support — is implicit in the Act. The author supports the adoption of this third condition through an analogy with property interests in accordance with §75(2) of the Family Law Act of 1975.