ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ADOPTION

Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003)

Interstate recognition of adoption judgments falls squarely within the Full Faith and Credit Clause and therefore every state must give judgments from other states the same effect that would be given to the judgment in the state that rendered it. States, for reasons of public policy, may deny recognition of a statute of another state but cannot deny recognition of a judgment of that state under the Full Faith and Credit Clause. However, when a state statute refuses to recognize any "right or claim arising" from a same-sex relationship, it becomes questionable whether the court in that state must recognize an adoption based on a same-sex relationship recognized in the first state. The author attempts to shed light on the issue by evaluating a hypothetical whereby a same-sex couple adopts a child in one state where both members of the couple are legally considered parents of the child and then the same couple wishes to relocate to a state, which prohibits

adoptions by lesbians. Ultimately, the author concludes that under the Full Faith and Credit Clause, the second state must recognize both members of the couple as legal parents.

William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2003).

This article focuses on the current debate surrounding the issue of adoption by same-sex couples and the tendencies of some states to discriminate against same-sex couples as adoptive parents. The author addresses the historical assumptions of adoption law and the role of the "best interest of the child standard" in adoption determinations. The author surveys the law on adoption regarding same-sex couples and explores the possible effects of current same-sex adoption statutes. The author concludes that shifting from a child-centered adoption regime to one that is adult-centered would be a major departure from adoption law over the last century. Such a departure, the author posits, would fail to serve the best interests of the child since it further complicates the understanding that society has the family as the fundamental unit of our society.

Liana Nazaryan, Note, *Interracial Adoption: Is a Colorblind Adoption a Good Idea in a Color Conscious Society?*, 23 J. JUV. L. 100 (2003)

This note focuses on the development of American interracial adoption law by examining its history from the first interracial adoption in 1948 to its current status. The author examines different viewpoints on interracial adoption and their theoretical underpinnings, including the "best interest of the child" standard's application to interracial adoptions. While the author argues that every child and situation is unique in an interracial adoption, the sole factor considered by courts and adoption agencies in the screening process for potential parents should be the best interest of the child. However, it is not the best interest of the child, but rather considerations of race and ethnicity that courts and agencies tend to consider most in interracial adoptions. The author concludes that if adoption agencies and courts would refrain from this overemphasis on race and ethnicity, "the best interest" of thousands of children would properly be considered.

Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803 (2003)

Because adoption court proceedings are protected by the Full Faith and Credit Clause, they typically raise fewer interstate enforcement problems than other kinds of domestic relations issues, such as same-sex marriage. A state cannot challenge a valid same-sex adoption on public policy grounds when the state that conducted the adoption proceedings permits same-sex adoption. However, problems of choice-of-law, subject matter and personal jurisdiction, and collateral attacks often arise in multi-state adoption controversies and are often ignored or misunderstood by the court. The author addresses Congress' power to implement legislation pertaining to adoption by same-sex partners and ultimately concludes that it is a better idea to leave the matter to the states, which have traditionally exercised regulatory power over domestic relations.

CHILD ABUSE

Sheri L. Bienstock, *Mothers Who Kill Their Children and Postpartum Psychosis*, 32 SW. U. L. REV. 451 (2003)

This article focuses on postpartum psychosis disease and its legal underpinnings in different jurisdictions. For instance, under Texas law, a woman who murders her own children as a result of postpartum depression may be found either guilty of capital murder or not guilty by reason of insanity. The author argues that these two options are insufficient for a defendant with severe postpartum depression. Instead, our judicial system needs to recognize elements of both guilt and sickness in a woman with postpartum depression who commits murder. In other words, while such a woman may have a mental disorder, she should also be held responsible for her actions. Ultimately, the author concludes that courts should properly acknowledge severe postpartum psychosis by recognizing a statutory heat of passion or guilty except for insanity scheme as suggested by the American Law Institute.

Stephanie Dreyer, Note, *Texas' Safe Haven Legislation: Is Anonymous, Legalized Abandonment a Viable Solution to Newborn Discardment and Death?* 12 TEX. J. WOMEN & L. 167 (2002)

The note addresses the horrible crime of infanticide. The author recognizes the efforts of the state of Texas to protect both the mothers and

the children in these situations by providing them with "Safe Haven" laws. These laws provide a new mother with an alternative to killing and discarding her child by creating a way to legally and anonymously abandon a newborn with an emergency medical service provider. In Texas, the laws have already saved the lives of three infants and more are expected to be saved as word of the law spreads. The note further argues that, although the first round of Texas' "Safe Haven" laws are not perfect, they are still an effective means to prevent newborn deaths and unnecessary jail time for their young, frightened mothers by eliminating any stress that may drive a young mother to infanticide. In fact, the article shows examples of other "Safe Haven" laws being enacted with similar results in states such as New York, California and Alabama.

Justine A. Dunlap, *The "Pitiless Double Abuse" of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL'Y & L. 523 (2003)

To prevent child abuse, the New York Administration for Children's Services ("ACS") removed children from the homes of battered mothers, claiming that these mothers had "engaged in" domestic violence by themselves being battered spouses. In 2001, battered women and their children responded by bringing a class action suit against ACS to stop the practice. ACS argued that they were simply preventing a pattern of "learned helplessness" in the children of battered women. The author hopes the pending appeal in *Nicholson v. Williams* will curb future administrative practices such as those of the ACS.

Michael Futterman, Comment, *Seeking a Standard: Reconciling Child Abuse and Condoned Child Rearing Practices Among Different Cultures*, 34 U. MIAMI INTER-AM. L. REV. 491 (2002)

The author explores how cultural definitions of child abuse vary. Different definitions of child abuse become particularly apparent when immigrants settle in the United States. Often, these immigrants will find themselves in Family Court on child abuse or neglect charges for behaviors that are consistent with their native claim. The author proposes a test that may be used to evaluate the cultural contribution of the suspect child raising practice. If the practice causes emotional or physical harm, then it must be prohibited, and, likewise, if the practice causes no harm, then it may be acceptable. The author suggests this simple test will force the court to focus on the children who the important part of the debate.

Jayne Huckerby, *Women Who Kill Their Children: Case Study and Conclusions Concerning the Differences in the Fall from Maternal Grace by Khoua Herand and Andrea Yates,* 10 DUKE J. GENDER L. & POL'Y 149 (2003)

In this article, the author argues that a woman's race is a major issue contributing to the often-shocking crime of matricide. The author demonstrates this by comparing Andrea Yates, who drowned her five children in the bathtub, to Khoua Her, an immigrant who strangled her six children. The author argues that white women who murder their children are often labeled "mad" (as in Yates' case) in order to preserve the middle-class notion of motherhood. In contrast, minority mothers who kill their children are more likely to be saddled with the label of "bad" or "evil." There are a number of reasons for this disparity between women of different races, including the following: 1) in the United States, white women already have a racial head start and thus more people can identify with a white mother; 2) white women want to preserve the "suburban myth of motherhood;" and 3) expressing empathy for a "mad" mother is less controversial than expressing empathy for mothers from different cultures.

Susan Vivian Mangold, *Reforming Child Protection in Response to the Catholic Church Child Sexual Abuse* Scandal, 14 U. FLA. J.L. & PUB. POL'Y 155 (2003)

The author offers examples of how changing conditions in various states' child protection systems will lead to the creation of safer environments for children and more support for law enforcement agencies. These new reforms follow in the wake of the Catholic Church abuse scandals, where, in many parishes, the bishops were aware of the reports of child abuse and yet failed to alert authorities to the actions. The author also offers four points to guide these suggested reforms: 1) the mandatory reporting system must be expanded to include clergy and others in professional positions over children such as teachers, day care providers; 2) reports of abuse by perpetrators outside of the home should be first referred to law enforcement authorities and not child services agencies for investigation; 3) criminal records of child abuse must be maintained in statewide central registries; and 4) penalties for failing to report abuse must be enforced and should include both civil and criminal penalties. The author argues that implementation of these measures will protect children from the threat of abuse.

Christopher Marlborough, Note, *Evolution, Child Abuse and the Constitution,* 11 J.L. & POL'Y 687 (2003)

This note analyzes the high rate of step-parents who abuse their children as compared to the much lower rate of child abuse by biological parents. The author proposes that in the case of an unexplained death of an infant younger than one year old that lived in a household with a non-biological adult, a child fatality review team should investigate the possibility of child abuse. Biological and adoptive parents have a fundamental liberty interest that encompasses the companionship, care, custody and management of their children. The author uses the relatively recent field of evolutionary psychology to explain why legislatures should not accord stepparents a fundamental liberty interest. Instead, the author proposes that in cases where a child fatality review team investigates the infant's death in a home where there is a step-parent, should use rational basis review to pass a child fatality review law.

Martine B. Powell & Donald M. Thomson, *Improving Children's Recall of an Occurrence of a Repeated Event: Is it a Matter of Helping Them to Generate Options?* 27 LAW & HUM. BEHAV. 365 (2003)

Children subjected to repeated abuse suffer from a high rate of confusion when trying to recall a specific event. The author conducted three experiments examining two different interview techniques to determine the best technique for having a child accurately recall a prior abuse experience. The experiments tested whether encouraging children to consider various details that occurred throughout a repeated event enhances their ability to recall the timing of an event based on giving the child access to the details of an incident prior to the interview or having a child generate the details themselves. The author found that increasing the accessibility of content details might be a way of increasing a child's recollection of an event. The article warns that providing a child with too many details would be considered leading, unless the child had recalled the details prior to the interview.

David M. Smolin, *Nontherapeutic Research with Children: The Virtues and Vices of Legal Uncertainty,* 33 CUMB. L. REV. 621 (2002)

This article examines the difficulties in obtaining a child's consent to nontherapeutic medical research. A legal system that values autonomy and independence is by nature designed for an informed consenting adult, and this system is often at odds with children who by law cannot give consent

themselves. The author points out that the regulatory system provided by the Food and Drug Administration is complex for nontherapeutic research. The system rightfully presupposes that researchers and drug companies are self-interested and the system's complexity can make adaptations on a case-by-case basis, placing the child's welfare first.

Thomas J. Sullivan & Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty to Protect: How the* Deshaney *Decision Cast Children into a Constitutional Void,* 13 GEO. MASON U. CIV. RTS. L.J. 243 (2003)

The article explores the decision of *DeShaney v. Winnebago County Department of Social Services,* which explored the state's responsibility toward a child when the state is aware of the abuse. The *Deshaney* court held that the state was not responsible for placing a boy with his father who abused him so severely that he wound up retarded and crippled. The article contends that children, as the most powerless members of society, should be protected by the Constitution. The authors interpreted *Deshaney* to only require the state to protect children when the state itself has created the dangerous situation. The authors cite *Brown v. Board of Education* to argue that the Supreme Court should have recognized that an affirmative duty to protect children exists under both the Due Process and Equal Protection Clauses. Since there are societal values under both clauses, *Brown* would apply a Due Process violation of a child's right to life and liberty while in school.

CIVIL RIGHTS

Anita L. Allen, *Privacy Isn't Everything: Accountability as a Personal and Social Good,* 54 ALA. L. REV. 1375 (2003)

This article discusses the value of privacy in the wake of the September 11, 2001 terrorist attacks and how privacy can conflict with the value of being held accountable to the public for one's private actions. The author discusses accountability for a person's sexual conduct and other conduct inside the home. Examples from African-American private life are used to illustrate the risks and benefits of accountability for sexual conduct. The author proposes that a liberal society was never meant to suspend accountability for one's actions, but at the same time she cautions against simple intolerance and oppression.

Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, a Decade's Review*, 11 AM. U.J. GENDER SOC. POL'Y & L. 533 (2003)

Under the American system of checks and balances, the President of the United States and state governors are given the power to grant clemency, which is the constitutional right to reduce a prison sentence, to stop an execution and to forgive convictions and other infractions. The author introduces the concept of clemency by briefly discussing the pardons made by former President Clinton on his last day in office. She then delves into instances where governors used clemency specifically for the purposes of pardoning battered women who have killed their abusers. Clemency is only given sparingly, and the president or governors are often criticized for granting it. The author notes that although the clemency power is used to fix the wrongs of the judicial branch, it may not enough to protect battered women who have been convicted of killing their abusers.

Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM, 273 (2003)

This article describes how, in response to the "War on Drugs," Congress passed legislation requiring every federal housing authority to provide in its leases that any tenant, member of a tenant's household, or person under the tenant's control engaging in drug-related criminal activity would be evicted. This had a devastating effect on poor, minority neighborhoods. Mothers were evicted from public housing because of the drug-related activities of their children, even if the mothers themselves had no knowledge of those activities. Mothers are now kicking their children out to avoid eviction. This article argues that this so-called "zero-tolerance" law does nothing to curb drug dealing because it puts the burden on the mothers and not the children. The author believes that this legislation underestimates the importance of community-generated and social sources of control like a mothers' authority. The author concludes that getting rid of drugs in neighborhoods should be subject to local control, and mothers should be able to have the authority to demonstrate to their children the ill consequences of drugs, not have these consequences thrust upon them.

Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40 (2003)

Prisons are breeding grounds for violence against the people the author calls "the most vulnerable members of our society" – inmates. The author writes about the experience of women in two of California's prisons, Valley State Prisons for Women ("VSPW") and the Central California Women's Facility ("CCWF"), which are the world's two largest prisons for women. The author contends that the main problems plaguing prisons today involve the private businesses that operate prisons for profit and the political shift away from a welfare state to a punitive state. The author argues that these prison industrial complexes endanger inmates by providing inadequate healthcare. The article concludes with a call for reform of women's prisons so that inmates' human rights are protected.

Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073 (2003)

Traditionally, hate crimes are thought of as violent acts against people of different races, religions, sexual orientations and ethnicities. However, the author argues for a broader concept of hate crimes, one which includes the growing problem of "affinity fraud" – financial schemes targeted at specific victims because of their race, religion or ethnicity and perpetrated by members of the targeted groups. Affinity fraud is estimated to have cost 90,000 investors over $2.2 billion from 1998 to 2001. The article explores types of affinity fraud, analyzes the Congressional intent behind the enactment of the Hate Crimes Sentencing Enhancement Act in 1994, and examines the reasons why hate crimes statutes should be interpreted to include affinity fraud. The author concludes that the perpetrators of affinity fraud should be held to greater culpability than the perpetrators of non-bias based crimes because affinity fraud breeds mistrust among communities and social groups of its own members.

Thomas Grisso. et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003)

The author conducted a study to examine the ability of adolescents to competently stand trial by administering the MacArthur Competence Assessment Tool-Criminal Adjudication. The study was intended to address whether adolescents are capable of participating in their own trials,

differences among the age groups, and how knowledge of the shortcomings in adolescents' ability to testify might inform law and policy. The goal of the study was to provide information that might be useful for the development of more tailored laws and to provide practitioners with information to inform the capacity of youths to serve as trial defendants. Results of the study indicated that youths under age fifteen perform more poorly than young adults and that these adolescents also made decisions that reflected a proclivity to making choices complied with the wishes of authority figures.

Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide and Adequate Remedy for Postpartum Psychotic Women,* 93 J. CRIM. L. & CRIMINOLOGY 713 (2003)

The author argues that American courts should return to a broader insanity test to correctly prosecute mothers who commit infanticide. The comment provides a history of infanticide and postpartum depression research. The author suggests a return to the American Law Institute ("ALI") test for insanity, which measures criminal intent, the essential element for conviction under most homicide statutes. Currently many courts employ the arguably outdated and male-biased M'Naghten test, which does not account for one who cannot control her actions. The author argues that the ALI test would give the courts more leeway in assessing postpartum psychotic homicidal women.

Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers,* 12 CORNELL J.L. & PUB. POL'Y 373 (2003)

Responding to Professor Michelle Oberman's proposals to protect teenage girls from men and teenage boys, this article examines sexual activity between teenagers. The article begins by outlining the concepts introduced in Oberman's articles, including the nature of statutory rape, barriers to consensual sexual activity, sex as a game or conquest, social immaturity and silence. The author examines the legal solutions Oberman has suggested and attacks the soundness of the assumptions upon which her conclusions are based. In conclusion, the author warns that uneven application of laws governing sexual activity between teenagers threatens to send a mixed message to teenagers of how to obey the law and to the courts of how to enforce the law.

Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803 (2003)

The author argues that the Supreme Court's holding that § 1409(a), which proscribes citizenship requirements for those born out of wedlock to a citizen and non-citizen, was not a violation of the Equal Protection Clause wrongfully perpetuated the stereotype of motherhood as being automatically biological and sociological. The author strongly disagrees with the preferential treatment the statute conveys to mothers who are American citizens because of the perceived biological and sociological bonds created between mother and offspring during birth and care giving.

Sara F. Russell, *Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327 (2003)

This article analyzes the press coverage of the civil rights remedy enacted by Congress in 1994 as part of the Violence Against Women Act (VAWA). The author illustrates how Congress characterized the remedy as a civil rights remedy and, newspapers reported it as such, until the Supreme Court struck down the law. The article describes how newspapers covered the passing and subsequent striking down of the law and analyzes how their coverage changed over a course of ten years. What had been a civil rights remedy became a civil remedy or the "Rape" Law. The author believes that the shift in the tone of the reporting had to do with the language that the Supreme Court used in overturning the law, successful lobbying by defense lawyers and conservative groups, and the press' inability or unwillingness to distinguish between rape and gender-motivated violence. The article also discusses the editorial debate over the VAWA law, which included issues such as whether rape is truly a "hate crime," whether the law protects women, and whether the law is discriminatory toward men. The author concludes although the press largely mis-categorized the law, it did bring the issue to the public's attention.

Sandra J. Schmieder, Comment, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian County: An Argument for Amendment*, 74 U. COLO. L. REV. 765 (2003)

The author highlights a problem with the Violence Against Women Act of 1994 ("VAWA"), which permits Indian tribes to ignore foreign restraining orders. VAWA was enacted with a provision that requires states and Indian tribes to give full faith and credit to protection orders issued in other

jurisdictions. Many states and Indian tribes have not done so. However, because tribes are protected from lawsuits through tribal sovereign immunity, VAWA is unenforceable in tribal communities. The author urges Congress to amend VAWA to allow for lawsuits against tribal officials by individuals seeking injunctive relief.

CUSTODY, VISITATION, ADOPTION & DIVORCE

Anthony P. Bolson, Note, *Non-Parents: Overcoming the Law's Presumption of Parental Custody;* Meldrum v. Novotny II, *Extraordinary Circumstances and the Advent of "Timmy's Law"*, 48 S.D. L. REV. 484 (2003)

When child custody cases involve the potential rights of non-parents and natural parents, South Dakota courts have usually recognized a preference for the natural parent where there has not been a showing of extraordinary circumstances that would dictate deciding otherwise. Recently, however, the South Dakota Supreme Court and legislature, in response to the Court's decision, have departed from this long established precedent and allowed for the interests of the child to govern even in cases where previously known extraordinary circumstances do not exist. This new legislative policy does little to aid trial courts in making custody determinations. This policy overturns firmly established precedent that protected parents' constitutional right to raise their child as they deemed fit.

Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children; ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105 (2003)

Lawyers who seek to represent children have often been faced with complicated ethical questions as to their overall role in protecting the child in court proceedings. After almost ten years of drafting, discussions and compromises, the American Bar Association has finally adopted the Standards of Practice for Lawyers Representing Children in Custody Cases. This represents a significant step in developing criteria and guidelines for lawyers in determining the most suitable methods for representing child clients. If followed, these standards will help to eliminate areas of representation notoriously plagued with confusion, such as whether an attorney can act in more then one capacity toward a child.

Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567 (2003)

Traditionally, a custodial parent seeking to change locations would face a heavy burden in proving to the court that the move would be in the best interest of the child, if that move meant that the non-custodial parent would no longer be in close proximity to the child. Increasingly, courts are beginning to recognize that certain technological advances, such as instant messaging and affordable long-distance phone systems (as examples of "virtual visitation"), can allow children and non-custodial parents to maintain a healthy relationship even without close physical proximity. The future of visitation cases should and will include technology-assisted virtual visitation, which will allow for more flexibility to custodial parents as well as providing the needed quantity of time spent with non-custodial parents.

Laura A. Harper, Note, *The State's Duty to Protect Children in Foster Care – Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793 (2003)

The United States Supreme Court has yet to decide the standard for determining the duty owed by states to children in the custody of state foster care systems. In cases involving adults either incarcerated or in state-run mental institutions, the court has used the "deliberate indifference" standard and the "professional judgment" standard. Lower courts have applied both standards to children in foster care. However, an entirely new standard should be adopted given the high incidence of abuse in foster care situations and the special vulnerabilities of children. The standard should be stricter and allow for an adequate remedy for children abused while under the supposed protection of the state.

Karen Paige Hunt, Note, Hathaway v. Bergheim*: Determining The Best Interests of Siblings Under South Dakota's Rules For Deciding Custody*, 48 S.D. L. REV. 543 (2003)

In *Hathaway v. Bergheim*, the South Dakota Supreme Court protected the best interests of only one sibling where it had to determine custody of two half-brothers who had different fathers. Although it was in the best interest of that sibling to live with his father, the court granted custody of both siblings to the mother. The Supreme Court considered the trial court's application of the best interests of the child standard in light of the modified view that it is better to find a placement solution that is least detrimental to the interests of the entire family. The author notes that the trial court

included the rule against separating siblings without compelling reason as part of its analysis of the best interests of the child. She agrees with the Supreme Court's affirmation of the trial court's decision because this analysis highlights the least detrimental solution.

Michelle Markowitz, *Is a Lawyer Who Represents the 'Best Interests' Really the Best for Pennsylvania's Children?*, 64 U. PITT. L. REV. 615 (2003)

This article addresses the longstanding debate about what a lawyer's role should be when the client is a child, particularly under the laws of Pennsylvania. After providing a history of children's right to counsel, the author addresses Pennsylvania's Guardian Ad Litem statute that compels a child's lawyer to act in the "best interest" of the child, rather than undertaking the "expressed interest" role. Under the "best interest" standard, attorneys untrained in social work or child welfare may usurp judicial power. Other arguments against the best interest role include the provision of Court Appointed Special Advocates to assist attorneys in an expressed interest role and cognizance of the fact that many children are actually capable of making their own decisions. After discussing the newly-blurred role of the code of ethics, the role of the judge, and the role of the lawyer, the author concludes that Pennsylvania made the appropriate decision in choosing the "best interest" model because of the unfortunate circumstances of the under-funded and overcrowded child welfare system.

Kurt Mundorff, Note, *Children As Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare,* 1 CARDOZO PUB. L. POL. & ETHICS J. 131 (2003)

This note suggests that decisions involving the lives of children placed in foster care revolve around monetary concerns and that the child is simply a product of trade between agencies and foster parents. The author argues that the affected groups do not object because they have been convinced that foster care is necessary. The result is a breakdown of their families. The article states that African American children constitute a disproportionate percentage of the population of children in foster care and suffer conditions "akin to African slavery." The author suggests the Thirteenth Amendment, which prohibits slavery, may be used to prohibit the current conditions of foster care.

Dana E. Prescott, *Biological Altruism, Splitting Siblings and the Judicial Process: A Child's Right to Constitutional Protection in Family Dislocation,* 71 UMKC L. REV. 623 (2003)

This article supports the idea that siblings have the right to maintain a relationship that would have existed if their biological parents had remained together. Isolation from family inflicts dangers such as increased chances of abuse. Therefore, the author posits, courts should take sibling relationships more seriously. After examining the factors courts consider in custody decisions, the author asserts that the splitting of siblings should be a constitutional matter because of the right to appointed counsel. An examination of the Supreme Court decision *Troxel v. Granville* yields criticism for not using procedural due process to truly act in the child's best interest. Finally, the article concludes that a compelling interest before severing a sibling relationship is not enough; the Supreme Court should find that right to a sibling relationship in the Constitution itself.

Jeffry C. Sorenson, Note, *Changing the Changed Circumstances Requirement: A New Standard for Modifying Permanent Custody Orders,* 23 J. JUV. L. 90 (2003)

After outlining the historical context of the modification of permanent custody orders in California, the author defines three relevant terms: "best interests of the child," "permanent custody," and "changed circumstances rule." Using these terms in the context of the present law in California, the article analyzes the *Montenegro v. Diaz* decision, which enacts the changed circumstances test as the standard for modifying a permanent custody order. Stressing the importance of protecting the child's interests, the author criticizes the court for giving more weight to *res judicata* and judicial economy than to the rights of the child. The article concludes that the changed circumstances test should be abolished.

Robert G. Spector, *Family Law: Third Party Custody After* Baby Girl L. *and* A.G.S*: Now Where Are We?* 56 OKLA. L. REV. 415 (2003)

This article addresses the recent increase in third party child custody proceedings, specifically in Oklahoma. After describing the many different methods of intervention by third parties such as grandparents and through habeas corpus, guardianship and juvenile proceedings, the author examines *In re Baby Girl L* using the judicial standard of clear and convincing evidence of parental unfitness. In this case involving a failed adoption, the court

focused on the best interests of the child rather than the fitness of the parent. The article then examines the statutory provisions relating to third party custody with examples from case law. After shifting focus to modification cases, where the Oklahoma Supreme Court determined that the standard is clear and convincing evidence that former impediments to custody have been removed, the author criticizes the court for failing to resolve confusion over the standard in subsequent cases and leaving the law on third-party custody in disarray.

Linda Lea M. Viken, *Child Support in South Dakota From Obligor Only to Shared Responsibility, an Overview*, 48 S.D. L. REV. 443 (2003)

Prior to Congress's Child Support Enforcement Amendments of 1984, South Dakota issued a Governor's Commission's Report recommending an "obligor only" child support guideline, where amounts of child support are based solely on the income of the paying parent. In 1988, a new Commission modified the policy to use an income shares model and included abatement for periods of visitation. In 2000, the Commission attempted to remedy the fact that they had the highest child support obligations in the nation for low-income obligors. After discussing a number of issues such as what constitutes sharing of physical custody, the Commission added a permissive abatement for shared custody situations where a parent has custody of a child for more than 120 days a year and provides other financial responsibilities. Finally, the statutes instruct the Court to consider each case on an individual basis.

Virginia G. Weisz & Suzanne McCormick, *Abandon Probate Court for Abandoned Children: Combining Probate Guardianship of the Person and Dependency into One Stronger, Fairer Children's Court*, 12 S. CAL. REV. L. & WOMEN'S STUD. 191 (2003)

The California court system should be reformed in such a way that judicial proceedings for children who are not living with their parents would be conducted in a single court. This type of reform would eliminate the inequities between the current dual system consisting of both probate and juvenile dependency courts. The current system treats children, parents and potential guardians in the juvenile dependency courts with a far greater degree of due process, requiring thorough investigation and proper representation of all parties, as well as more diverse and far reaching solutions, including assistance for children with special needs, additional social services and monitoring. In contrast, those children, parents and guardians who are in probate court proceedings receive fewer benefits and a much less stringent observance of due process requirements.

DOMESTIC VIOLENCE

Laura S. Adams, *Fleeing Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287 (2003)

The author argues that it is questionable whether the Refugee Convention and the Refugee Act of 1980 were meant to include domestic violence victims as candidates for refugee status. In order to include victims of domestic violence as candidates for refugee status, the evaluation must shift away from internal characteristics of the victim, such as "woman" or "child", and instead focus on the state's relationship to those individuals. The state has chosen not to interfere in what it considers the private business of the family. Therefore the proper characterization of domestic violence victims must be "women living in families" or "children living in families."

Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 AM. U. J. GENDER SOC. POL'Y & L. 847 (2003)

There are multiple approaches to explaining the prevalence of domestic violence in Africa, each of which implicates a different set of solutions to the problem. The "rights theories" explain domestic violence in Africa by the lack of recognition of individual human rights, requiring legal, educational and political reform to alleviate the problem. The "feminist explanation" attributes the problem to the repression of women, theorizing that education and the removal of women from their disadvantaged social and economic position would reduce domestic violence. The "cultural explanation" attributes the problem to traditional African norms and re-socialization is necessary to alleviate the problem. The "transitional society" treats the problem as temporary and assumes that it will dissolve on its own once the societal changes are complete. The "culture of violence" approach attributes domestic violence to the acceptability of violence in post-colonial Africa, suggesting that better crime control and increased penalties are necessary. Ultimately, reducing domestic violence in Africa requires combining all theories and approaches.

John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207 (2003)

Attorneys cannot faithfully and ethically discharge their duties to their clients without considering, evaluating and appropriately responding to the effect that domestic violence might have on pending legal matters. Domestic

violence can pervade divorce or custody proceedings, battery and self-defense crimes, estate and tax planning, and a myriad of other areas. Attorneys need to become aware of the possible victimization of their clients and take appropriate action. Where the batterer and the victim are seeking joint representation, it might be wholly unethical to accept such an appointment. Where the victim is seeking representation, even in a matter not directly related to the abuse, it is the ethical duty of the representing attorney to counsel his or her client on the issues of domestic abuse or send the client to someone who can assist the client with those specific issues.

Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031 (2003)

The author argues that California must reform its mandatory mediation legislation to adequately address the problems of domestic violence. Currently, mediation is mandated between the victim and batterer in all cases. By forcing victims into the mediation procedure, California is effectively dis-empowering the victim because she is unable to adequately protect herself due to psychological and procedural handicaps. Additionally, by mandating private mediation, California is removing the issue of domestic violence from the public eye. In order to avoid these harms, California must make the mediation process voluntary by offering the victim a traditional court forum. Further, if the victim opts for mediation, California must provide adequate procedural safeguards to facilitate the process.

Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567 (2003)

Inadequate resources in jurisdictions with large volumes of domestic violence proceedings result in fact-finding gaps in many family court proceedings. The author argues this is, in large part, due to the emphasis on criminal law remedies for domestic violence. Additionally, the cost of legal services, failure to appeal family court decisions and the relative lack of power within the family law bar contribute to the fact-finding gap in civil courts. The author argues that substantial progress could be made by use of a psychoanalytic tool, "compassionate witnessing," for the people who surround victims of domestic violence, including caregivers, advocates, lawyers and judges. The article explains the technique and shows how it might be employed to improve the system, fill the fact-finding gap, and, ultimately, benefit everyone involved in domestic violence cases.

Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Guns Laws*, 91 KY. L.J. 935 (2002)

This note argues that Kentucky gun laws should be strengthened to prevent gun-related domestic violence homicides. Domestic violence victims are most likely to be killed by their abusers with a handgun. The federal laws that prohibit firearm possession by anyone convicted of a domestic violence misdemeanor are rarely enforced by the responsible agency, the Bureau of Alcohol, Tobacco and Firearms, so abusers have little incentive to relinquish their guns. Although many states have adopted similar laws that provide better enforcement mechanisms through state and local police, Kentucky has not. The author argues that the passage of Kentucky Senate Bill 172 would prevent further domestic violence homicides by giving local law enforcement, prosecutors and judges the tools they need to arrest, prosecute and sentence violators.

Sonja K. Hardenbrook, Comment, *The Good, Bad and Unintended: American Lessons for Cambodia's Effort Against Domestic Violence*, 12 PAC. RIM L. & POL'Y J. 721 (2003)

This note explores the problem of domestic violence in Cambodia. While Cambodia's Constitution, laws and international agreements to which they are a party guarantee protection for women, the Cambodian legal system inadequately enforces these progressive measures. The Royal Government of Cambodia recently made a proposal to combat domestic violence, which includes criminalizing violent acts and providing protection orders for victims. The author argues that the law will ultimately be a failure. Cambodia can look to the American successes and failures in prevention of domestic violence, in hopes that synthesizing these lessons will help Cambodia in its effort to eradicate domestic violence.

Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 14 HASTINGS WOMEN'S L.J. 1 (2003)

This article examines the unintended consequences of mandatory prosecution policies for crimes of domestic violence. Specifically, mandatory prosecution can have a severe impact on immigrant women who are prosecuted as a result of confrontation with their U.S. citizen or naturalized abuser. The Violence Against Women Act allows immigrant victims of domestic violence to petition on their own for naturalization, foregoing the

normal process of application via the citizen spouse. The author argues that instead of mandatory prosecution, implementation of discretionary prosecution will protect these women from the possibility of deportation and potentially losing custody of their American born children.

Roxanne Hoegger, *What If She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181 (2003)

This article analyzes the implications of the *Hague Convention on the Civil Aspects of International Child Abduction* as it relates to abused spouses a nationality other than that of their batterer and the custodial rights of their children. When the *Hague Convention* was drafted, the primary focus was men who kidnapped their children and fled to another country. The author argues battered women fleeing their abusers and taking their children to their home country is common and not adequately addressed by the *Hague Convention.* Courts in many countries have responded by fashioning new remedies called "undertakings" to ensure the mother and child's safe return to the country from which they fled. The author argues that the proper remedy would be for the *Hague Convention* to legislate a domestic violence defense to claims of child abduction that would offer women more protection than the current "grave risk" defense affords.

Jennifer R. Johnson, Comment, *Privileges Justice Under Law: Reinforcement of Male Privilege by the Federal Judiciary Through the Lens of the Violence Against Women Act and* U.S. v. Morrison, 43 SANTA CLARA L. REV. 1399 (2003)

Two thousand to four thousand women die each year from domestic abuse, but few of the abusers are brought to justice. The author argues that the federal courts have historically discriminated against women by offering them little in the way of monetary redress for their injuries and characterizing the violence against them as being within the realm of "family law." These issues are exemplified by the Supreme Court's decision in *U.S. v. Morrison*, where the Court found Title III of the Violence Against Women Act to be unconstitutional. Title III provided a civil remedy to victims of gender-based violence and was enacted by Congress under its Commerce Clause power. The Supreme Court held that Title III did not affect interstate commerce and was non-economic in nature therefore it did not fall within the scope of the Commerce Clause. The author rejects the Supreme Court's ruling as perpetuating gender discrimination and not providing women with "equal justice under law" – the phrase engraved above the doors of the Supreme Court.

Linda Kelly, *Disabusing the Definition of Domestic Violence: How Women Batter Men and the Role of the Feminist State,* 30 FLA. ST. U. L. REV. 791 (2003)

The author argues that men and women commit domestic violence at similar rates. Remedies and services for victims of domestic violence have been shaped by the feminist definition of domestic violence, resulting in unequal resources for male victims. In fact, the truth about male victims of domestic violence poses a threat to feminist theory. The author recommends broader research into the conditions that give rise to domestic violence.

Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses,* 11 AM. U. J. GENDER SOC. POL'Y & L. 733 (2003)

According to the author, the stereotypical victim witness is "sweet, kind, demure, blameless, frightened, and helpless." Victims and witnesses who do not match that description create unique problems. Examined are the jurisdictional variations concerning requirements for obtaining a civil protection order and the disadvantages created by expressing fear. The author criticizes the use of expert witnesses who reinforce stereotypes.

Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present and Future,* 2003 U. ILL. L. REV. 1115 (2003)

Currently, only California and Alaska have evidence rules allowing prosecutors in domestic violence cases to admit previous acts as evidence to show the defendant has a propensity to commit acts of domestic violence. This article discusses the implementation and effect of new evidentiary rules for domestic violence. It outlines the Federal Rules of Evidence dealing with criminal defendant's previous records of sexual assault or child molestation and explains how these rules should be expanded to include acts of domestic violence. The author calls for other states to follow California and Alaska's example by enacting similar evidence rules that allow a showing of propensity towards domestic violence.

Cheryl J. Lee, Note, *Escaping the Lion's Den and Going Back For Your Hat – Why Domestic Violence Should be Considered in the Distribution of Marital Property upon Dissolution of Marriage*, 23 PACE L. REV. 273 (2002)

New York has an equitable distribution law to compensate spouses whose contributions to the marriage were not paid, such as in the capacity of homemakers. Despite the equitable distribution laws, the author concludes that the current standards in New York do not provide a victim of domestic violence with an appropriate share of marital property. The article suggests a solution of enacting a domestic violence provision in the New York equitable distribution law.

Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687 (2003)

This article examines whether new evidentiary rules that states have created for domestic violence cases should be used in the federal courts. These new rules involve impeachment of a testifying defendant, admission of evidence concerning similar previous crimes, and a new hearsay exception for victims. After examining these state rules of evidence, the author concludes that they should not have a role in the Federal Rules of Evidence because they are unnecessary due to the high rate of conviction for cases of violence against women in federal courts.

Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003)

The author identifies a judicial bias against abused women in child custody or visitation litigation, based on a conventional belief that a woman in an abusive situation is a bad mother. Although attitudes toward domestic violence have become less critical, courts are still recalcitrant to award custody to domestic violence victims. The author asserts that this is caused by a desire for gender equality in custody hearings and a misconception of the role of domestic abuse in custody litigation. The attempt at gender neutrality is bias against the mother, assigning her blame in a violent situation in an attempt to value the role of the parents equally. Meier argues for a solution where relevant state actors intervene to ally themselves with the private advocates on behalf of the domestic violence victims to help counter the bias of the courts.

Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921 (2003)

In domestic violence terms, forgiveness can be considered negative because people interpret the term to mean that the victim must forget what happened and because it prevents the batterer from taking responsibility for his conduct. The author argues these assumptions do not have to be true, and that forgiveness of both the abuser and victim for being battered can be healing. The author discusses different models for dealing with domestic violence including the traditional justice system, mediation, restorative justice, which utilizes a victim's support networks, and truth commission, which tries to create a new moral culture. The author also explores various indigenous models based on native Hawaiian healing, Navajo peacemaking and Rwandan justice and reconciliation. While none of these techniques demands that a victim forgive an abuser, they are optimistic and take into account the idea that people can change.

Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victim's Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47 (2003)

Poor or low-income women with a violent spouse are often afraid to seek child support payments out of fear of a violent response. The 1996 Welfare Act has made it more difficult for a woman to obtain state assistance without making an attempt to obtain child support. This choice between poverty and increased violence is problematic, prompting domestic violence advocates to add exemptions to the Act. A few jurisdictions have linked domestic violence prevention with the child support process and this has helped abused women safely seek child support. This type of program has the advantage of providing comprehensive services to women and ensuring that they can escape both violence and poverty.

Kathleen Waits, *Feminist Lawmaking On-Line: The FIVERS Domestic Violence Listserv*, 11 AM. U. J. GENDER SOC. POL'Y & L. 877 (2003)

A listserv discussing domestic violence issues, called the Intimate Violence Listserv (INTIO-L), was shut down due to a war of words between feminist members and an anti-feminist contingent that had joined. This experience has led some of the feminist members to create a new listserv, FIVERS, which required subscribers to agree with a feminist analysis of intimate violence. The author discusses how narratives of victims and advocates posting on FIVERS can help attorneys better understand the

problems facing their clients. The members can discuss problems with the legal system in domestic violence cases, as well as issues with medical care and social services. Overall, the author views this listserv as both as a tool and an important outlet for frustration.

Merle H. Weiner, *The Potential and Challenges of Transnational Litigation For Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 749 (2003)

This article analyzes the Hague Convention on the Civil Aspects of International Child Abduction through the prism of women attempting to escape abusive households. The treaty was written expecting that angered non-custodial fathers would abduct children, but more often, it is the custodial mother who does so, many times in an attempt to flee domestic abuse. In this circumstance, the victim of abuse may once more be attacked by legal maneuvers by her batterer trying to separate her from her children. The article illustrates various tactics one may use to help an internationally fleeing domestic violence victim retain custody. Such tactics include the ability to construct a convincing narrative and the ability to navigate the unique procedures of an action under the Convention. Both may require experts, either lawyers or expert witnesses. The article suggests that the Hague Convention should be reformed in light of the gender inequalities present in modern society.

Veronica L. Zoltowski, *Zero Tolerance Policies: Fighting Drugs or Punishing Domestic Violence Victims?*, 37 NEW ENG. L. REV. 1231 (2003)

This article argues that "zero tolerance" policies established by public housing authorities harm victims of domestic violence. As many zero tolerance policies mandate eviction for any violent or criminal act that takes place in the public housing, many victims face eviction for the actions of their abusers. Victims of domestic violence in public housing often have few housing options, and an eviction for an incident beyond their control can be a black mark on their records, preventing them from finding an affordable place to live. The article suggests that Congress or the Department of Housing and Urban Development should force public housing managers to change their rules so that zero tolerance no longer applies to housing developments.

EDUCATION

Michael J. Brown, *The Children's Internet Protection Act: A Denial of a Student's Opportunity to Learn in a Technology-Rich Environment*, 19 GA. ST. U. L. REV. 789 (2003)

This article evaluates Congress's attempts to prevent children from accessing inappropriate materials on the Internet. The current law, known as the Children's Internet Protection Act, is Congress's third attempt at controlling the Internet, the first two having been held unconstitutional by the Supreme Court. Lower courts held the Act unconstitutional as well for forcing librarians to block websites too broadly, preventing users of publicly funded libraries from gaining access to material there is no reason to prohibit. The article approves of this decision, since the use of blocking software impairs the ability of students to research controversial topics, and suggests that, instead of passing a law, teachers and librarians should be more involved in their charges' Internet use.

Meghan E. Cherner-Ranft, Comment: *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891 (2003)

In 1972 Congress passed Title IX of the Education Amendments, which is the only federal statute that allows a plaintiff to collect damages for gender discrimination by an educational institution. The author argues that recent judicial interpretations prevent victims of sexual harassment from effectively collecting damages under Title IX. Recent case law holds that when a plaintiff brings a Title IX claim against an institution, she is preempted from also bringing a 42 U.S.C. 1983 civil rights lawsuit against an individual in the institution for sexual harassment. Allowing Title IX to preempt 1983 claims creates a lack of accountability of the school itself and imposes liability on the individual directly responsible. The author concludes that the scope of Title IX should be widened to the point where an individual at an institution could be held accountable for sexual harassment.

Susanna Frederick Fischer, *The Global Digital Divide: Focusing on Children*, 24 HASTINGS COMM. & ENT. L.J. 477 (2002)

This article reprints a speech surveying the quality of access by children to information and communication technologies. The six countries surveyed are the United States, the United Kingdom, France, Australia, Mongolia and

Tanzania. The article finds that in nations with greater development, there is disparity in access to information and communication technology along racial and income lines, but a strong chance for children to have some access to those technologies. However, in less developed countries, children have very limited access to the Internet due to both poor infrastructure and poor education. Many leaders in the technology industry agree that the first step in closing the gap between technologically capable children in developed countries and technologically illiterate children in developing countries is to ameliorate the poverty in those countries. The article concludes that improving access to technology should not be a priority higher than improving quality of life.

Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003)

This article looks at the successes and failures of Title IX of the Education Amendments of 1972 (Title IX) in the first thirty years since its enactment. Despite the fact that the purpose of Title IX is to give equal opportunity to both men and women's scholastic athletics, women are still discriminated against in athletic participation, employment and benefits. The author argues several reasons for the continuing discrimination. First, there have been no changes to any of the regulations of Title IX since its enactment in 1975. Also, there has been little case law addressing Title IX issues because the Supreme Court has decided only four substantive Title IX decisions. Title IX has also faced opposition from those who believe that the law is discriminatory against male athletes. Additionally, the author explores issues of equal benefits and conditions afforded to women's sports teams as well as employment of females in coaching and other athletic department positions.

Jamie Polito Johnston, *Depriving Washington State's Incarcerated Youth of an Education: The Debilitating Effects of* Tunstall v. Bergeson, 26 SEATTLE UNIV. L. REV. 1017 (2003)

This article discusses the case of *Tunstall v. Bergeson.* The Washington State Supreme Court in *Tunstall* ruled that prisoners in Washington jails who were over the age of eighteen do not have a right to basic education or special education programs. The article argues that the refusal of Washington to provide education for its older prisoners not only makes recidivism more likely, but the refusal also violates the state constitution, the Federal Individuals with Disabilities Education Act, and the Fourteenth

Amendment. The article concludes by recommending that the Washington State Legislature amend its Prison Education Act to include older students.

Jesse Mendelson, Note, *Sexual Harassment Intercollegiate Athletics by Male Coaches of Female Athletes: What It Is, What It Means, and What the NCAA Should Do*, 9 CARDOZO WOMEN'S L.J. 587 (2003)

Sexual harassment of female college athletes by male coaches is an emerging issue in the media, but as of yet only a few instances have been publicized. The author discusses the three cases: *Klemencic v. Ohio State University, Ericson v. Syracuse University, and Jennings and Keller v. University of North Carolina.* According to the author, the problem is widespread, yet under-reported because female athletes do not want to jeopardize their success in their sport. However, as the issue is becoming more public, and coaches and students must be educated on the issue. The author advocates for coaches to adopt a Coaches Code of Ethics since as long as the sexual harassment remains undefined, it is unenforceable. Most importantly, once there is a code of ethics, it must be enforced with a zero tolerance policy.

David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239 (2002)

This article examines President George W. Bush's efforts to improve the American school system through the No Child Left Behind Act. The author concludes that although Bush's plan is not completely without merit, it is in need of serious reform to better accomplish its stated goals. With particular focus on the flaws inherent in current standardized testing, the author calls for innovations in state performance assessments to address the needs of today's students as well as the institution of programs that counteract the segregation of minority and disadvantaged students. These and other proposed reforms will enable the plan to succeed in a meaningful way by elevating state standards and practices to support all children.

Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003)

Public schools have not adequately addressed the presence of law enforcement officials. The author argues that it is necessary to evaluate the presence of law enforcement in light of the Fourth Amendment. The current standard to conduct searches, reasonable suspicion, should not apply

to school officials and law enforcement equally. The proliferation of zero tolerance policies in schools has lead to the increased use of the criminal justice system to deal with student conduct. The author proposes that school officials should be permitted to search students where there is reasonable suspicion, but law enforcement officials should be subject to the stricter standard of probable cause.

Corey Rayburn, *Why are YOU Taking Gender and the Law?: Deconstructing the Norms that Keep Men Out of the Law School's "Pink Ghetto,"* 14 HASTINGS WOMEN'S L.J. 71 (2003)

Inspired by the reactions he received while taking a gender-focused seminar in law school, the author of this article analyzes the role of men in feminist studies, which he terms "the pink ghetto," and offers suggestions for the integration of men into the gender dialogue. He argues that although men are unable to identify with the female experience, their involvement and awareness of gender issues is integral in that it demonstrates a commitment to support the furtherance of women in a male-dominated society. The author proposes specific remedies in the law school setting, including a revision of feminist rhetoric to make it more relevant to men, as well as the utilization of utopian fiction to focus on gender relationships.

Gigi Rollini, Note, Davis v. Monroe County Board of Education*: A Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 FLA. ST. U.L. REV. 987 (2003)

In *Davis v. Monroe Country Board of Education*, the Supreme Court held that schools may be liable for damages under Title IX of the Education Amendments of 1972 if administrators fail to take appropriate action upon notice of students sexually harassing other students. Although this case would appear to be a victory for students who have been victimized by sexual harassment, the author of this note cites that O'Connor's majority opinion in *Davis* sets a very strict standard to justify recovery in such cases and may ultimately discourage victims from bringing these lawsuits in the future. The author examines the development of case law since the Supreme Court decision, detailing various ways in which lower courts have interpreted O'Connor's words and the ultimately ambiguous standard that has emerged from the case. The author concludes that until Congress steps in to clarify Title IX, courts will continue to flounder and produce inconsistent results, rendering the statute utterly ineffective as a tool for combating sexual harassment in schools.

Sr. Mary Angela Shaughnessy, *Violence in Schools*, 42 CATH. LAW. 1 (2002)

This transcription of a lecture by Sister Mary Angela Shaughnessy examines the prevalence of violence in both Catholic and public schools and pinpoints areas in need of immediate reform. In particular, she emphasizes the need for all schools to enforce their state's safety laws to protect children from potential dangers, a notion that has historically been resisted by Catholic schools who seem to hold themselves above governmental intervention. To counteract potential acts of violence, Shaughnessy calls upon schools to institute annual safety audits and have a crisis plan in place. Above all, she says, the resolution of this issue requires the combined efforts of school administrators, teachers and counselors to combat the elements of violence that creep into the classroom and take responsibility for the children with whom they are entrusted.

Jeffrey H. Smith, Note, *Wrestling With the Effects of Title IX: Is It Time to Adopt New Measures of Compliance for University Athletic Programs?* 68 MO. L. REV. 719 (2003)

Compliance with Title IX, which prohibits the exclusion of anyone on the basis of sex from any educational program or activity that receives federal funding, has created unique challenges for many university athletic programs. In order to comply with Title IX, schools have reacted by eliminating athletic programs that cater to an overrepresented gender in an attempt balance the apportionment of federal funds. The Eighth Circuit Court of Appeals, in *Chalenor v. University of North Dakota*, held that elimination of the university men's wrestling team did not violate the Title IX rights of current and potential members of the team. The author suggests that revision of the Department of Education policy interpretation of Title IX, which has arguably led to an increase in athletic programs available to women but not necessarily desirable changes, could be more effective while at the same time compliant with the requirements of Title IX.

James M. Sullivan, Note, *The Single-Sex Education Choice Facing School Districts After the No Child Left Behind Act of 2001 is Not the One That Congress Intended*, 10 GEO. J. POVERTY L. & POL'Y 381 (2003)

As an addendum to the No Child Left Behind Act of 2001, Congress provided a list of educational programs that would be eligible for federal funding. One such program provides for public schools to have the option to institute single-sex education consistent with local laws, in order to remove

gender biases from the classroom and to promote the advancement of women in the fields of mathematics and science. The author examines the constitutionality of this provision under the Equal Protection Clause and the merits of single-sex educational programs in general. The high costs associated with the creation of a single-sex system and the developmental harms of gender segregation seem to outweigh the potential benefits to children. Finally, the author proposes that there are other equally viable alternatives schools could adopt to achieve the same ends which are not constitutionally questionable and should be offered federal funding.

Sandra Vergari, *Charter Schools: A Significant Precedent in Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 495 (2003)

The author reviews the charter school concept in theory and practice. These debates over charter schools have polarized traditional schools from those that are chartered, creating tension over school funding, competition for students and issues of accountability. While researchers at the Brookings Institution found that the charter school test scores were below those of comparable traditional public schools, the author argues that quality research has yet to be done on the relative performance levels of students. She concludes that charter schools constitute a significant precedent in the history of public education policy and should be nurtured.

Zipporah Batshaw Wiseman, *What Feminist Pedagogy Has Wrought*, 11 AM. U. J. GENDER SOC. POL'Y & L. 963 (2003)

This is a transcription of closing remarks given at the symposium "Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Lawmaking." The speaker notes that feminist pedagogy has revolutionized law school as a place where one could learn law as a process of fostering social change. She notes that this notion was totally foreign to law schools at the time the first course on battered women was initiated at Harvard Law School in 1991. She concludes that the work must continue and that one day male colleagues will stop calling feminists' courses "soft" law and their own courses "hard" law.

HISTORY & CULTURE

Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Continental Settlement*, 52 EMORY L.J. 645 (2003)

This article explores the importance of family as a driving force and political legacy of westward settlement. He explains that nineteenth-century American culture had two distinct conceptions of political economy, agrarian-republican (espoused by Jefferson) and other liberal-capitalist (articulated by Hamilton). While frontier families embraced Jeffersonian politics, they were largely ineffective in limiting the Hamiltonian elements of American political economy. Rather, they served as social and political instruments for extending the nation's political authority over conquered territories. While western settlers did not influence politics, their Jeffersonian outlook and rugged environment had the effect of substantially improving the status of women.

Christine Alice Corcos, *The Women Lawyer Hero and Her Quest for Power in Popular Culture*, 53 SYRACUSE L. REV. 1225 (2003)

This article proposes that women lawyers are never viewed as heroes in popular television shows and movies. After viewing a number of these shows and movies, the author found that women lawyers are more likely to be perceived as failures than their male colleagues. Women lawyers are either emotionally conflicted or cold and uncaring people. It is impossible to find a female lawyer on television portrayed as a successful attorney and female. The author argues that the portrayal of women lawyers on television only undermines the power and authority real life female lawyers.

Stephen Cretney, *The Law and the Family – Time for Divorce?*, 32 C. L. WORLD REV. 101 (2003)

This article describes the relationship between the legal system and family disputes in Great Britain. The author begins with a history of how the British courts have treated family law cases (specifically, divorce cases), and the changes that have occurred over the last two centuries. The British legal system is not the correct forum for resolving divorce disputes. The author believes that the law does not help those seeking divorces, but rather impedes the process by trying to fit divorcing parties' dissolution into legal terms and processes that are inappropriate and in fact create more harm, humiliation, and work for the family. If the separation is amicable, there is

no reason to involve the legal system. Most of the issues that are at concern in a divorce, such as making sure each party knows the consequences of their actions and protecting children's interest, are not properly addressed in a court of law, but rather are matters for social services.

Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & Fam. Stud. 1 (2003)

The article concerns the failure of American family law to satisfactorily resolve issues of ownership of frozen embryos, prenuptial property agreements and surrogate mother agreements. The authors propose using three procedural devices, declaratory judgments mediation and judicial or administrative approval, to assist the parties in determining a legally binding determination at the outset. The article considers the debate over the role of contract in family law, the to strength of premarital agreements, and developing procedures necessary to permit pre-birth declarations of parentage, especially in the case of frozen embryos. The authors conclude that their proposed paradigm will provide for more certainty, avoid the danger of exploitation of those with less bargaining power, and strengthen family life, rather than simply resolving adversarial disputes.

Rebecca M. Ginzburg, Note, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in* Belle Terre, 83 B.U. L. REV. 875 (2003)

The dominance of the nuclear family is in decline. In its place, many Americans are choosing to live in communal housing arrangements. Many local state zoning laws, citing the desire to minimize population, prohibit these communities from existing in traditional single-family areas. The Supreme Court, in its 1974 decision *Village of Belle Terre v. Borass*, held that these zoning ordinances are constitutional. The people seeking to live communally today are different from those who sought to dissociate themselves from society in the 1960s and 1970s. Today, many people in non-nuclear families are seeking the same stability and economic advantages found in nuclear families. The Constitution protects citizens from state encroachments into privacy. Further, while population control is a legitimate state goal, discriminating against certain people who cohabitate is unconstitutional.

Hillary Golder & Diane Kirby, *Mrs. Mayne and her Boxing Kangaroo: A Married Woman Tests her Property Rights in Colonial New South Wales*, 21 L. & HIST. REV. 585 (2003)

This article illustrates women's property rights in late nineteenth century Australia through a breach of contract case. At that time, women's personal property passed absolutely to her husband, and he was entitled to the income she derived from any freehold property upon marriage. This custom was challenged by Mrs. Mayne, a married woman who invested some of her earnings in a young kangaroo, which she taught to box and exhibited as "Fighting Jack." Mrs. Mayne entered into a contract with two brothers to take the kangaroo on tour. After a dispute regarding money owed her, Mrs. Mayne sued the brothers for breach of contract. Surprisingly, the jury found for Mrs. Wayne, despite traditional notions that a woman could not enter into a contract and own property.

Cheryl D. Hicks, *"In Danger of Becoming Morally Depraved": Single Black Women, Working-Class Black Families, And New York State's Wayward Minor Laws, 1917-1928*, 151 U. PA. L. REV. 2077 (2003)

This article discusses New York State's Wayward Minor Laws, which criminalized the incorrigible behavior of young girls. The statute allowed parents and police to commit young girls to private reformatory institutions for rehabilitation. The author notes that the statute was rooted in the idea that working class families, especially black families, were unable to control and monitor the behavior of their children. The statute seemed helpful to the family initially, however, the stays were extremely lengthy and separated the young girls from their families.

Sue R. Lee, Comment, *Comforting The Comfort Women: Who Can Make Japan Pay?*, 24 U. PA. J. INT'L ECON. L. 509 (2003)

The Japanese government built brothels, or "Comfort Stations" in Japanese military stations all over Asia. The "Comfort Women" were in some instances forced to serve as sexual slaves to the Japanese military. Some of the comfort women have come forward demanding that Japan take moral responsibility, make full disclosure of the facts and accurately revise Japanese history textbooks, and make reparations. Some of these women brought suit in the United States, but the case was dismissed. The author concludes that while the United States does not have to protect the human rights of foreign nationals at the expense of economic interests, the Bush administration went too far by failing to adjudicate this issue.

Bythe Leszkay, *Feminism on the Front Lines*, 14 HASTINGS WOMEN'S L.J. 133 (2003)

This article focuses on the inequality concerns raised by the fact that currently, American women lack the right and obligation to fully participate in the United States military. Women are prohibited from serving in combat positions. The author examines the effects that restricting women's rights to participate in the military has on the women who are currently serving, including the concerns of the glass ceiling, conceptions of a woman's inability to serve, lack of respect and sexual harassment. After analyzing the concept of citizenship, the author addresses whether this concept is in accordance with current feminist theory. In dispelling the notion that arguments claiming equality are outweighed by the competing interest of the military's mission, the author notes that women's inclusion would actually create a more effective military. Ultimately, the author concludes that women will never have true equality and equal status as United States citizens until they are afforded the right and obligation to fight for their country.

Marian J. Okada, *A Labor of Love: Stories of the American First Lady, A Corporate Wife, and a Military Wife*, 9 CARDOZO WOMEN'S L.J. 527 (2003)

This article looks at three women as examples of the sacrifice many women make in forgoing career opportunities to facilitate their husband's careers. All three of these women were expected to serve as advisor, social hostess and do whatever it took to boost the career of their husbands. There are ways to place economic value on women's domestic labor, such as by taxing men who enjoy the services of their wives by or removing marital status as a category for tax filing, since the husband benefits by a more advantageous tax rate of sharing his income with his wife. The author urges that the consideration of these proposals will value women's contributions to their husbands.

Larry Peterman & Tiffany Jones, *Defending Family Privacy*, 5 J.L. FAM. STUD. 71 (2003)

In recent years, the structure of the traditional family has been reexamined and is being redefined. This article discusses two questions regarding the definition of the family; first, how the family is construed and the relationships among its members, and second, the perception of a family by the rest of the world. The question, "what constitutes family privacy?" is examined from the perspectives of American jurisprudence and from theorists Locke and Montesquieu. The author summarizes that Locke and

Montesquieu have informed our concept of what constitutes the family and warns that modern courts should be mindful of balancing individual autonomy rights at the expense of the family unit.

Lisa R. Pruitt, *"On the Chastity of Women All Property In the World Depends": Injury From Sexual Slander In the Nineteenth Century*, 78 IND. L.J. 965 (2003)

A woman's sexual propriety has long been a significant measure of her worth in society. But before statements to a woman's chastity were considered slander per se, courts required that women prove special damages in order to state a cause of action. Slanderous injuries to women go to emotional and physical wellbeing and dignity, however, courts required that women show pecuniary loss. The author argues that defamation law reflects the gender bias since it was very difficult for women to show pecuniary injury when they were far less likely to control property. Emotional distress and attendant physical illness, even where it was shown that these injuries caused financial consequences, were not recognized. This placed women at a severe disadvantage when trying to establish injury to their reputation, which was fragile in the first place.

Elizabeth M. Schneider, *The Perils and Pleasures of Activist Scholarship*, 11 AM. U. J. GENDER SOC. POL'Y & L. 965 (2003)

The author highlights two main issues raised by pursuing activist scholarship: making the decision to withdraw from friends and family in order to pursue a major scholarly project and the idea of scholarship as a conversation. The former, as the author states, requires being one step away from the very things that influence and stimulate one's scholarly work. The latter, however, involves the task of introducing one's work into scholarly conversation; which the author opines is not an easy task in an environment where those conversing are burdened with professional responsibilities that infringe on the amount of physical, psychological and intellectual support activists are able to lend one another. While the these issues are present for all legal writers and scholars, they are particularly important for feminist activist academics.

INTERNATIONAL LAW & HUMAN RIGHTS

Sunila Abeysekera, *Maximizing the Achievement of Women's Rights in Conflict-Transformation: The Case of Sri Lanka*, 41 COLUM. J. TRANSNAT'L L. 523 (2003)

Women's human rights are impinged upon during times of conflict by conservative tendencies to co-opt and emphasize the reproductive role of women for the benefit of the community or nation. Many of these communities and nations restrict women from raising divisive issues, such as domestic violence, incest and unequal treatment, in order to maintain a positive image of the community or nation as a whole. Specifically, the author cites examples of rape, sexual abuse, torture and other atrocities committed against the Tamil women during conflict in Sri Lanka. The author states that the post-conflict processes in Sri Lanka be used to create a new human rights framework, rather than reassembling and restructuring the gender inequality inherent in the status quo. Finally, the author states that the efficacy of the nascent gender equality efforts in post-conflict communities and nations depends upon women taking an active role in post-conflict governance.

Jennifer Brown, *Rural Women's Land Rights in Java, Indonesia: Strengthened by Family Law but Weakened by Land Registration*, 12 PAC. RIM L. & POL'Y J. 631 (2003)

This article explores rural women's land rights in Java, Indonesia, where women's legal land ownership rights are belied by the nation's land registration processes. Indonesia's land registration process is not well known among women landowners and, as a result, women may be susceptible to property loss in the case of divorce or a spouse's death. The author argues that women's property rights in Java are nonetheless protected by formal procedures for the transfer or division of land and recognition of marital community property. Effective land registration systems, along with legal and social recognition of women's property rights, are paramount in preserving women's ownership interests.

Rhonda Copelon, *Another Strand In The Dialect Of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL'Y & L. 865 (2003)

In the 1990s, violence against women was not discussed in government or officially as a human rights violation. Rather, it was treated solely as a

personal matter, one that had to be dealt with on an individual basis because human rights focused only on the actions on the state and not on those of private citizens. Although the 1993 Vienna Declaration and Programme of Action was a great achievement and integrating women's rights issues into the international human rights system, the author calls for the full implementation of the initiative to eliminate all forms of violence against women.

Beverly Encarguez Perez, *Woman Warrior Meets Mail-Order Bride: Finding an Asian American Voice in the Women's Movement*, 18 BERKELEY WOMEN'S L.J. 211 (2003)

The author examines how the history of exploitation of Asian women who came to America beginning in the nineteenth century contributed to the creation of the lasting stereotype of Asian women as docile sexual goddesses, a myth, which fanned the fires of the Asian mail-order bride industry. The industry continues to this day and coupled with America's mercurial immigration laws, creates a trap for these women. Seeking any way out of poverty, Asian women leave their home countries only to become virtual slaves to American husbands, at the mercy of deportation, language barriers, and social stigma. The author concludes that legislative efforts cannot be enforced without a grassroots effort of Asian American women and feminists as a group who can help to end the mail-order bride industry.

Rachel Farkas, *The Bush Administration's Decision To Defund The United Nations Population Fund And Its Implications For Women In Developing Nations*, 18 BERKELEY WOMEN'S L.J. 237 (2003)

This article criticizes the Bush administration's 2002 decision to discontinue funding to the United Nations Population Fund. This fund, founded in 1967, ensures universal access to a variety of reproductive health services and had a specific agreement with the People's Republic of China to promote this goal without any forms of coercive family planning. Spurred by allegations of the fund's support for Chinese forced abortions and involuntary sterilization practices, the Bush administration conducted an investigation to evaluate the Fund's family planning programs in China. Although there was no evidence that the fund knew about coercive methods of family planning, the investigation concluded that the Chinese programs still had coercive elements in law and practice. Despite the coercive family planning in China revealed by the investigation, the author concludes that the only reason the Bush administration decided to terminate financial support for the fund was because of the President's personal beliefs about

abortion.

Brooke B. Grandle, *Choosing To Help Or To Advocate Their Agenda: A Comparative Look At How The Supreme Courts Of India And The United States Approach Violence Against Women*, 24 WOMEN'S RTS. L. REP. 83 (2003)

This article compares how the Supreme Courts of India and the United States deal with sexual violence against women. To examine the United States' approach, the author analyzes the *United States v. Morrison* case where the Court emphasized federalism instead of providing women with a guaranteed federal remedy against their attackers. The case was contrasted with two Indian Supreme Court cases where the court assumed an activist approach in handling sexual assault against women. The Indian court acted to ensure safety and remedies for rape victims. Though the two courts acted in a similar manner, they both engaged in forms of judicial advocacy, each reaching different results. The U.S. Supreme Court surrendered its position on violence against women in the name of legislative advocacy while the Indian court engaged in the same to advance legislative activity.

Swanee Hunt, *The Critical Role of Women Waging Peace,* 41 COLUM. J. TRANSNAT'L L. 557 (2003)

This article considers women's roles in global peacekeeping activities, including preventing terrorism and promoting peace. Although women are often not represented during the most crucial decision making processes, the author believes that including women in conflict prevention and resolution would be advantageous for several reasons. Women are highly invested in preventing and stopping conflict; they are adept at bridging ethnic, political and cultural divides; they have their fingers on the pulse of the community; and they are innovative community leaders. The author urges for gender equality in public policy.

Stephen M. Knight, *Reflections on Khawar: Recognizing the Refugee from Family Violence,* 14 HASTINGS WOMEN'S L.J. 27 (2003)

In April of 2002, the High Court of Australia decided the Khawar case, establishing asylum for women fleeing gender abuses including domestic violence, honor killing and prostitution. Naima Khawar, the subject of the case, fled her abusive husband in Pakistan. The Khawar decision made Australia one of the few countries willing to expand the traditional refugee categories of political opinion, religion or particular social group grounds.

Currently, the United States does not recognize domestic violence refugees or any of the five existing grounds for asylum established by the United Nations Convention Relating to the Status of Refugees.

Anupama K. Menon, *Gendered Epidemic: Addressing the Specific Needs of Women Fighting HIV/AIDS in Cambodia*, 18 BERKELEY WOMEN'S L.J. 245 (2003)

This article addresses how women can help prevent the spread of HIV/AIDS in Cambodia. Cambodia suffers from the highest rate of HIV/AIDS in East Asia due to a range of factors that particularly impact women, including poverty, decades of social upheaval, and an internationally reaching sex trade. In addition to emphasizing prevention among Cambodia's population, the author identifies elements of gender inequality, which contribute to the spread of the disease. Women are expected to care for large extended families, putting their own health last; women also have inadequate access to health care, and have fewer options than men in determining the course of their own lives. The author concludes that even earnest efforts by the Cambodian government to curb the spread of HIV/AIDS will not succeed without a change in Cambodia's social balance between men and women, which means recognizing the important role women can play in the fight against the disease.

Julie Mertus, *Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles*, 41 COLUM. J. TRANSNAT'L L. 541 (2003)

Using Kosovo as her frame of reference, the author analyzes the approach the United Nations has taken in its attempt to offer women a better social standing after conflict than they had prior. The author argues that this "rights-based approach," which tries to create gender equality through a system of legally enforceable individual rights, suffers from shortfalls in the face of the day-to-day realities of life, as economic limitations mesh with strongly inculcated gender structures. While acknowledging that the U.N. has attempted to recognize gender issues particular to such war-torn areas, the author concludes that no real progress can be made unless women themselves are allowed equal access to the rebuilding process on every level, creating a workable solution with lasting benefits.

E. Odhiambo-Abuya, *The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?*, 12 PAC. RIM L. & POL'Y J. 673 (2003)

In Australia, spouses and dependant partners of citizens and permanent residents may apply for a two-year temporary visa, after which they may apply for a permanent visa if the relationship is found by immigration officials to be "genuine and continuing." There are three exceptions to this rule. One exception is for spouses or partners abused by their Australian counterpart, if they can satisfy specific legal tests. To qualify, an applicant must prove that he or she is a victim of domestic violence and was in a "genuine and continuing" relationship. The author studies this part of the immigration regime and points out flaws dealing with cultural differences influencing the reporting of domestic violence, fear of immigration officials, lack of immigration, and failure to address domestic violence toward a fiancée.

Meg Russell & Colm O'Cinneide, *Positive Action to Promote Women in Politics: Some European Comparisons*, INT'L & COMP. L.Q. 587 (2003)

This article examines the various examples of experimentation with "positive action" taken in European countries in an attempt to increase the number of women in national legislatures. Women's representation in national legislatures does not match men's participation anywhere in the world. However, Western nations compare pitifully with such nations as South Africa and Argentina. These countries use quotas in either electoral law or the selection procedures of political parties to ensure that certain numbers of women are elected. The authors examine similar, relatively well-received procedures developing in Sweden, Norway, Germany and France and compare them to the attempts and legal setbacks encountered in the United Kingdom. They conclude that none of the European countries have been completely successful in their efforts to balance the number of men and women legislators, but that through such experimentation, improvement can be achieved.

Amy S. Tsanga, *A Critical Analysis of Women's Constitutional and Legal Rights in Zimbabwe in Relation to the Convention of the Elimination of all Forms of Discrimination Against Women*, 54 ME. L. REV. 217 (2002)

This article examines the Convention of the Elimination of all Forms of Discrimination Against Women, developed by the United Nations and ratified by Zimbabwe in 1991. The Convention recognizes that discrimination against women violates human rights and prevents women

from advancing in many areas. By analyzing how the Convention has been applied to life in Zimbabwe, the article offers a detailed account of the Convention's objectives and realities in the face of a nation governed by an often conflicting Constitution and strict societal norms. The author notes problems in critical areas such as politics, legal defense and access to healthcare, all especially important to women. She concludes that Zimbabwe's constitution needs a broader focus in order to accommodate the goals of the convention, in light of the daily realities faced by women in that country.

Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473 (2003)

This note concerns the denial of student visas, with a focus on applicants from China and India. Because tens of thousands of students apply for H-1B (specialty worker) status and eventually become permanent residents, the author argues that the statutory burden of convincing visa officers that they intend to leave the U.S. is obsolete and unworkable. The author argues that the requirement that visa applicants have no intent to stay serves no useful function in an era with shortages of domestic talent in key fields and abundant opportunities for highly educated foreigners to work without becoming public charges. He concludes that the intent requirement for student visas should be jettisoned and refusals should be based on transparent substantive criteria.

Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99 (2003)

The author examines recent legal reform in China from the perspective of male and female divorce litigants and discusses the kinds of citizenship rights that Chinese the court system currently promotes. In particular, the divorce process is linked to housing shortages for women. The Chinese legal system leaves many women economically disenfranchised and some near destitute after the divorce process is concluded. The effectiveness of true legal reform in China depends on the government improving the condition of women divorcees and others suffering from impositions upon their basic human rights.

MARRIAGE

Bill Atkin, *The Challenge of Unmarried Cohabitation – The New Zealand Response*, 37 FAM. L.Q. 303 (2003)

This article examines New Zealand's judicial and legislative responses to the increasing frequency of "de facto marriages," or cohabitation without formal legal trappings, over the last thirty-five years. To resolve property disputes in de facto marriages, the courts developed the "reasonable expectations" test, which provided a mechanism for a person who had played a significant role in a relationship to obtain some recognition through a share in the other party's property. Over time, the judicial approach was superceded by the Property (Relationships) Act, which came into force in 2002 and placed married and unmarried couples on the same plain for the vast majority of important financial matters including money, property and inheritance. In conclusion, the article recognizes that while gaps remain in the law affecting de facto marriages, such relationships are now widely accepted as a fact of life.

Mary E. Chesser, *Joint Representation in a Friendly Divorce: Inherently Unethical?*, 27 J. LEGAL PROF. 155 (2003)

Divorcing couples often seek joint representation out of financial considerations, raising the ethical question of whether one attorney can truly represent both parties in an inherently confrontational action. There is substantial debate in the legal community as to whether lawyers should undertake joint representation in matrimonial disputes, even where both parties consent and there is no actual conflict. The author examines established guidelines regarding joint representation, which found in the Model Rules, ethics opinions and court decisions regarding joint representation. Given the complex and conflicting interests involved in matrimonial disputes, the author concludes that an attorney considering representing both parties through joint representation or mediation should pay close attention to his or her state's ethics rules.

Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455 (2003)

This article examines the impact of the Uniform Marital Property Act on three different aspects of property law related to marriage: ownership of property during marriage; ownership and division of property at divorce; and

division of property at the death of one of the spouses. In common law property systems, there is no presumption that property acquired during marriage is marital property since property is owned by the titleholders, whether it be both spouses or one. In contrast, the Act's marital property system presumes that property acquired during marriage is marital property. To date, Wisconsin is the only common law state to adopt the Act, and incorporating the new law into existing divorce law jurisprudence has proved problematic. The author considers whether, as a policy matter, it makes sense for common law marital property systems to embrace this new property ownership system. She concludes that a state considering adoption of the Act must determine how important it is to recognize the joint contributions of both spouses during marriage, regardless of which spouse holds title to the property.

Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 L. & SOC. INQUIRY 629 (2003)

The author conducted an interview-based study of 71 members of committed same-sex couples in order to examine the relationship between same-sex marriage as a cultural practice and a legal ambition. She found that members of committed same-sex couples generally support legal recognition for same-sex relationships through marriage or some similar legal mechanism. In addition to practical considerations, such as the range of legal and financial benefits that legal marriage would bring, many people in committed same-sex relationships also yearn for the symbolic benefits that legal marriage confers. The author concludes that widespread belief in the law's ability to produce cultural equality through pronouncements of legal equality may be naïve, but the prevalence of such a belief in the face of contradictory evidence attests to the central place of law in the cultural imagination.

Twila L. Perry, *The "Essentials Of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003)

This article examines one of the most important legal obligations of marriage, the duty of support and services. Often described as "the essentials of marriage," the duty of support requires each spouse to provide the other with a minimum level of material support and the duty of services generally requires spouses to provide for each other's care and companionship, including sexual companionship. Historically, the husband had the duty of support, while the wife had the duty of services; today the duty of support and services is mutual. The author examines the contemporary relevance of

the duty in a world in which equality and personal and sexual privacy have become increasingly important and concludes that it should be redefined to retain a duty of economic support between spouses, but eliminate the badly outdated doctrine of the duty of services.

Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243 (2003)

This article recognizes that over the last hundred years, the law in Louisiana and the rest of the U.S. has moved away from a moral view of marriage. The entrance into, the content of, and the grounds for termination of marriage have all been affected by this retreat. The largest change is apparent in the no-fault divorce, where the decision to terminate is made by only one of the spouses. The new purpose of marriage is the public recognition of a private relationship between two people. The author concludes legal abandonment of the regulation of marriage is the major reason the current view of marriage and its public image has changed.

Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003)

The terms "polyamory" and "polyfidelity" describe several types of sexual partner groupings, which have a variety of the number, sexes, sexualities and the level of commitment involved. Polyamorous relationships can also include same-sex or bisexual relationships, neither of which is within the confines of traditional polygamy. A polyamorous relationship raises issues within the marriage relationship; whether group marriage should be put into the same category as same-sex marriage. The author concludes that the large group dynamics of the polyamorous family could undermine individual identification with the state by blurring the lines of public and private spheres and individual autonomy.

Maura I. Strassberg, *Lawyering for the Mentally Ill: The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003)

The article explores how modern Mormon polygamy consistently harms freedoms of teenage wives and should continue to be criminalized. Polygamous communities constrain the adults involved, evade government regulation, and do not contribute to mainstream society. In contrast, polyamorous relationships do not infringe on individual rights and are not a threat to larger social interests. There are significant factual differences

between the polygamy and polyamorous families. The author concludes that modern polygamy statutes should not included polyamorous relationships.

Mark A. Tumeo, *Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go?* 50 CLEV. ST. L. REV. 165 (2002)

The author contends that there are three options available to same sex couples in Ohio municipalities who seek marriage benefits: prohibitions on discrimination in public accommodations, commensurate benefits for domestic partners with those offered to spouses of municipal employees, and requiring firms contracting with a municipality to offer benefits to domestic partners of employees equal to benefits given to spouses of married employees. The article discusses each option and the challenges such ordinances would face in light of state and federal law and constitutions. The author concludes that municipalities have the power to protect gays and lesbians from discrimination in public accommodation and that domestic partnership benefits to municipality employees would be possible. He believes that requiring contractors with municipalities to supply equal domestic partnership benefits would be ineffective.

Shannon Renton Wolf, Note, *Making Waves: Circumventing Domestic Law on the High Seas*, 14 HASTINGS WOMEN'S L.J. 109 (2003)

Ireland has come under increasing criticism for not legalizing abortions. Increasingly the citizens of Ireland have sought legal abortions through other means. The organization Women on Waves proposed the creation of a floating abortion clinic, which sailed under the Dutch flag. This proposal brings about numerous questions regarding international law, state sovereignty, the law of the sea and human rights. If the ship is successful, Ireland may not have any legal recourse and may eventually have to rethink their laws regarding abortion. This proposal is an example of how to successfully circumvent domestic law; and raise awareness of abortion rights.

Saranna Thornton, *Maternity and Childrearing Leave Policies for Faculty: The Legal and Practical Challenges of Complying With Title VII*, 12 S. CAL. REV. L. & WOMEN'S STUD. 161 (2003)

In colleges and universities, there is on going discrimination against pregnant faculty, in direct violation of the Pregnancy Discrimination Act of

1978. The discrimination manifests itself in the policies regarding maternity and childrearing leave. These conditions place additional hurdles to women who work in higher education, thereby pushing highly qualified women out of academia. The policies of these institutions also can put a woman's health at risk by not permitting the needed recovery time after childbirth. Administrators and faculty of these institutions need to reexamine their policies in order to adhere to the mandates of the PDA.

PARENTING

Carolyn Ballard, Note, *Mother May I? Minors as Parents*, 23 J. JUV. L. 29 (2002-2003)

This note addresses a general legal problem, which arises when minor children become parents themselves. Parents have legal dominion over their minor children, but do not owe a duty to care for the minor child's offspring. The author questions the legal ambiguity inherent in a system that fails to define how much control an adult parent possesses with regard to the minor parent and the adult parent's grandchild. The minor parent's right to bring up the child is limited because minors do not have the same rights as adults. The author suggests that minor parents should be emancipated and that a change in state law to make such emancipation more simple would clearly identify the legal boundaries related to this problem.

Stacy L. Brustin, *The Intersection between Welfare Reform and Child Support Enforcement: D.C.'S Weak Link*, 52 CATH. U. L. REV. 621 (2003)

Since the passage of "welfare reform" in the nineties, poor families with children can only get state support for several years. After that time, an impoverished family must rely on work and child support. Although the welfare reform laws encourage the payment of child support by absentee parents, the reality is that enforcement is soft and too few families get the support they need. The article suggests that those enforcing child support under the new laws – social workers, investigators, and judges – should focus on processing cases more quickly and getting support to children.

Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023 (2003)

This comment argues that poor families are often denied Fourteenth Amendment due process in proceedings involving child services. Not only

are the proceedings difficult for low- income parents who have no right to legal counsel, but the concept of "child abuse" is so loosely defined that often mere poverty qualifies. Further, many federal child protection statutes provide money to states for each child entered into the child protection system, encouraging state agencies to separate more children from their families. The author suggests providing higher pay for social workers, creating a poverty exception to charges of neglect, and providing counsel to indigent parents as ways to help poor families deal with child protection services.

June Carbone, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011 (2003)

In the time of primitive man, it was likely that biological parentage was the most critical factor to the well-being of an infant, as newborns required the support of at least their two parents. Currently, immediate post-natal support is not as important as long-term parenting. Further, there are many current instances where, due to infidelity or uncertainty, a person who can prove biological parenthood may challenge the person who took parental responsibility over a child. The states and the Supreme Court are deeply divided over which possible parent to favor. To solve the problem, this article suggests a scheme of mandatory paternity testing at birth so that all paternity and support issues can be resolved immediately.

Merry Jean Chan, Note, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186 (2003)

The author of this article seeks to reclassify parental rights under the First Amendment, and in doing so, avoid the confusion and judicial uncertainty currently surrounding the doctrine of fundamental rights under the substantive component of the Due Process Clause of the Fourteenth Amendment. Using an intellectual property model she calls the "authorial parent paradigm," the author grounds parental rights in a different part of the constitution without altering any of the substantive legal rights. The article promotes a view of parenting, including both child rearing and procreation, as a mode of creative expression, like authorship, wherein adults contribute to the continuation of the democratic state. Chan draws a comparison between the state's interest in mediating copyright law and parenting, as they both call for a balance between expressive and societal interests. The First Amendment, the author argues, provides a more flexible and meaningful framework in which to consider these rights than does the Due Process Clause.

Susan Isard, Note, *Stock Options and Child Support: The Price of Accuracy,* 14 HASTINGS WOMEN'S L.J. 215 (2003)

Many employers offer their employees stock options. The author examines case history and determines that many courts have found stock options to be a resource for child support but face the challenge of devising a reliable method of valuation. Any assessment method will inevitably compromise the valuation for some families because option values rise and fall. Yet, the author argues, such appraisals are necessary to consider all the best interests of children.

Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference after* Troxel v. Granville, 88 IOWA L. REV. 865 (2003)

This article examines the state of third-party visitation rights in the aftermath of the Supreme Court's recent decision in *Troxel v. Granville,* which affirmed a judgment denying a couple's visitation rights with their grandchildren. The author explores the case's ambiguous standard requiring courts to give "special weight" to the parents' decisions to restrict or deny third parties access to their children, arguing that this standard should not apply where the third parties seeking visitation share a significant emotional bond with the children. Relying on cultural family models outside of white, middle-class America, the author points out that this category of persons, dubbed "quasi-parents," may be equally capable of determining what is in the children's best interests as the biological parents. The article sets out the criteria for qualifying as a quasi-parent under this framework, which include the assumption of parental duties and an emotional bond with the children, and proposes that when these criteria are met, the third parties should be able to overcome the court's general deference to a parental denial of visitation.

Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage,* 34 MCGEORGE L. REV. 637 (2003)

The author argues that California's method to determine the legal identity of a child's parents is outdated. California's statutory scheme governing parentage lacks sufficient references to new factors like surrogacy. The author proposes a new three-part model. The first part, the "baseline," assumes that the genetic parent is the parent unless another person has been legally declared to be the parent. Except in cases of artificial insemination,

the 'bright-line' necessitates that parties enter into contracts in all cases of assisted conception where someone other than the genetic parent is the intended parent. The final part, the "best interests," requires that if there is no pre-validated contract, the courts determine parentage by utilizing the best interests of the child standard.

Ricki Rein, Note, *Assessing Criminal Liability for the Passive Parent: Why New York Should Hold the Passive Parent Criminally Liable*, 9 CARDOZO WOMEN'S L.J. 627 (2003)

This note questions whether a non-abusive, or "passive" parent, should have a statutory duty to prevent child abuse. Some states, but not all, subject the passive parent to criminal liability, even though that parent does not directly commit the abuse. States like New York are reluctant to impose liability because the passive parent lacks the requisite criminal intent (mens rea) to commit the crime. The author surveys ways in which states have tried to get around the mens rea requirement – from creating an affirmative duty to protect the child, to using accomplice theory or the felony murder rule. The author discusses the pros and cons of asserting Battered Woman's Syndrome ("BWS") as an affirmative defense. Turning to New York's child abuse statutes, she concludes that the New York legislature should take affirmative action to provide adequate protection for children by creating criminal liability for the passive parent.

Janet Leach Richards & Sheryl Wolf, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409 (2003)

Doctors may experience a clash between law and medical ethics when they disclose paternity to protect the best interests of a child. Many states now allow disclosure of at least some information about biological parents, despite the doctor/patient confidentiality rule, in a trend toward acknowledging the importance of knowing one's biological history. When determining whether to disclose paternity, a doctor should use a balancing test to weigh potential harmful effects of disclosure against the potential health and psychological benefits of the child.

Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35 (2003)

This article discusses how both voluntary acknowledgement and court ordered paternity may be reversed, or "disestablished." More paternity

disestablishment actions are being brought as a result of genetic tests that conclusively establish paternity. The author argues that many states lack a coherent framework for disestablishment, especially when it comes to paternity established through voluntary acknowledgement. After weighing both administrative and court-ordered disestablishment, the author concludes with several recommendations including: requiring genetic tests before allowing a person to sign a voluntary acknowledgment, or alternatively to clearly draft the voluntary acknowledgement form; adopting a time limit on challenging paternity acknowledgments; requiring establishment of fraud, duress or material mistake of fact before ordering genetic tests; and specifically authorizing consideration of the "best interests of the child" in making the determination of whether to order the introduction of genetic tests.

Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 (2003)

This article examines the presumption that children born in the context of marriage are the children of the husband and wife. While this presumption protects the sanctity of marriage by assuming the husband and wife have both remained true to their vows, paternity questions may still be raised. Whether the paternity of marital children should be established by genetic testing is questioned by the author. After surveying judicial approaches to the thorny issue of disestablishing the paternity of marital children, the author explores the Uniform Parentage Act of 2002 (UPA). She concludes that the UPA offers an excellent model for achieving the best interests of the child, although difficult issues concerning child support obligations remain.

Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963 (2003)

Recent cases involving the inheritance rights of children conceived after the death of a parent highlight the legislative vacuum surrounding posthumous conception. Such births pose social, political, ethical, practical and legal questions that have yet to be adequately addressed. This comment examines the current state of the relevant law, including the Uniform Parentage Act, state law and intestacy law, as well as the law in several other countries. The different circumstances under which posthumous conception can occur are also considered. The author suggests that careful postmortem planning will be necessary until comprehensive legislative

reform provides a proper framework for understanding the rights of posthumously conceived children.

Melissa E. Scott, Comment, *No Pregnancy and No Parenthood: The Likely Legitimacy of* VMI*'s Parenting Policy*, 76 TEMP. L. REV. 411 (2003)

In January 2002, the Virginia Military Institute adopted a policy, which requires any cadet who marries or becomes a parent to voluntarily resign from the Corps or face expulsion. The policy was immediately criticized as illegal sex discrimination in violation of Title IX of the Education Amendments of 1972 because it contains no mechanism for detecting or confirming when a male cadet becomes a parent, while a female cadet's visible pregnancy would automatically trigger application of the rule. Further, critics argued that the policy violates the Equal Protection Clause of the Fourteenth Amendment because it is neither neutral nor justified. This comment examines both arguments to predict the likely outcomes of any future litigation and concludes that neither claim is likely to succeed.

Brooke N. Silverthorn, Note, *When Parental Rights and Children's Best Interests Collide: An Examination of* Troxel v. Granville *as it Relates to Gay and Lesbian Families*, 19 GA. ST. U. L. REV. 893 (2003)

This note discusses the implications of *Troxel v. Granville* to gay and lesbian families, since both partners are not the biological parents of the child. The author concludes that the relationship between child and non-biological parent must be protected. States should supplement *Troxel* with special standing requirements recognizing the valuable relationship between the child and non-biological parent.

Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99 (2003)

Parental responsibility statutes hold parents either criminally or civilly liable for the delinquent behaviors of their child. One rationale behind these statutes is that juvenile crime is the result of bad parenting and that the laws are implemented to encourage parents to take an active role in their child's behavior. But this rationale might be misguided since as the child grows, parental influence competes with various influences from peers, popular culture, and surrounding communities. Most criminology and sociology theories indicate that it is not only the family, but economic status, academic achievement, racism, peer groups and other factors that lead to

juvenile delinquency and parental responsibility laws only address one of the factors.

PORNOGROPHY

Jason Baruch, *Permitting Virtual Child Pornography—A First Amendment Requirement, Bad Policy or Both?* 55 FLA. L. REV. 1073 (2003)

In this article, the author discusses the wisdom of the logic and policy underlying the Supreme Court's holding in the case of *Ashcroft v. Free Speech Coalition.* The holding of *Ashcroft* held that the Child Pornography Prevention Act of 1996 (CPPA) was substantially overbroad and, therefore, unconstitutional. The CPPA prohibited distribution and possession of any image that "is or appears to be, of a minor engaging in sexually explicit conduct." The author argues that the Court's application of the over breadth doctrine was inappropriate; and, instead, the Court should have upheld the CPPA because of its limited effect upon protected speech and the government's compelling interest in safeguarding the welfare of children.

Ashutosh Bhagwat, *What if I Want My Kids To Watch Pornography? Protecting Children From Indecent Speech.* 11 WM. & MARY BILL OF RTS. J. 671 (2003)

This article explores two aspects of the government's interest in protecting children from exposure to sexually explicit speech: facilitating parental supervision and independently restricting access to minors. The author states that the former is a relatively uncontroversial proposition and the latter somewhat controversial. Since restriction of indecent speech is regarded as content based, restrictions upon sexually explicit material are subject to a strict scrutiny analysis. Therefore, whether the government has a compelling interest in restricting such speech to minors is critical to determining the constitutionality of such a restriction. The author argues that reliably determining whether a compelling governmental interest exists is not possible because the Supreme Court has failed to develop a coherent theory or approach for evaluating governmental interests.

Sara C. Marcy, *Banning Virtual Child Pornography: Is There Any Way Around* Ashcroft v. Free Speech Coalition? 81 N.C. L. REV. 2136 (2003)

This article discusses the Child Pornography Act of 1996 (CPPA) and the Supreme Court's rationale for finding it unconstitutionally overbroad.

The CPPA banned the distribution and possession of any image depicting minors engaging in sexually explicit conduct. However, the Court found the CPPA impermissibly overbroad because its language proscribed speech that according to precedent was not classifiable as obscenity or child pornography. Subsequently, Congress has proposed new legislation to ban much of the sexually explicit material covered by the CPPA. The author concludes that Congressional action incorporating court-approved prohibition of speech and tougher enforcement of obscenity laws are most likely to withstand review by the Supreme Court.

Gary D. Marts, Jr., Note, *Constitutional Law—First Amendment And Freedom Of Speech—"It's OK—She's A Pixel, Not A Pixie: The First Amendment Protects Virtual Child Pornography*, 25 U. ARK. LITTLE ROCK L. REV. 717 (2003)

This note considers the Supreme Court decision, *Ashcroft v. Free Speech Coalition*, and its significance in holding that unless material is either actual child pornography or obscene, it is not governmentally prohibited despite the documented harm caused to its youngest victims. The author discusses the historical value of failed attempts to both restrict and define obscenity. He then explores Congress's effort to do the same, by passing the Child Pornography Prevention Act and the reasons the Supreme Court gave for labeling its provisions as unconstitutional. The author speculates that although the CPPA was discarded, there will be new legislation in its stead, substantively the same, but worded differently.

Lyndall Schuster, *Comment: Regulating Virtual Child Pornography in the Wake of* Ashcroft v. Free Speech Coalition, 80 DENV. U. L. REV. 429 (2002)

This article begins by examining the Supreme Court decision *Ashcroft v. Free Speech Coalition.* That holding categorizes provisions in the Child Pornography Prevention Act as unconstitutional. In so holding, the Court permits virtual child pornography as speech protected by the First Amendment. The author opines that the nation's children have been harmed and will continue to be harmed from the free reign of virtual and real pornography. The author focuses on potential legislation arising from this decision and reasons that Congress should, at the very least, prohibit hard core virtual child pornography in the interest of child protection.

Emanuel Shirazi, Note, *How To Constitutionally Protect Against Virtual Child Pornography*, 25 HASTINGS COMM. & ENT. L.J. 343 (2003)

This note is an in-depth analysis of the Child Pornography Prevention Act. First examined are the technological advancements used to eliminate the need for actual children in virtual child pornography. The author then outlines the history of Congress's attempts to pass laws that would protect children from avid viewers of child pornography. The CPPA was created for several reasons, the most important being the need to eliminate problems with enforcing existing laws. Because the Supreme Court overturned the CPPA as unconstitutionally overbroad, the author proposes a new law that addresses Congress's original concerns, complies with existing obscenity standards and has no affirmative defense problems.

RELIGION

Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031 (2003)

This article focuses on the proper role for both the Catholic Church and the state in addressing the national crisis of Catholic priests' sexual misconduct. The author suggests that the Church abused its constitutional freedom in its unsatisfactory handling of this issue. The author develops the idea of "responsible freedom," an ideological construct that means the Church must make proper use of its religious freedom for the common good. It also means that the Church must recognize state's responsibility while the Church maintains its independence. With proper cooperation between the Catholic Church and the state, meaningful solutions can be reached for victims of sexual abuse and such crimes can be prevented in the future.

Janna Satz Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957 (2003)

The recent exposure of the clergy abuse scandal in the Catholic Church has resulted in numerous third party tort actions against the Church. This note discusses the five major theories of civil liability used by plaintiffs in lawsuits against the Church, including: breach of fiduciary duty, intentional inflection of emotional distress, clergy malpractice, respondeat superior, and negligent hiring, supervision and retention. The theory of negligent hiring,

supervision and retention is analyzed in detail because that doctrine has been the most effective in suits against Church hierarchy for sexual abuse by members of the clergy. However, there is a split of authority among the states as to whether an action against the Church can be maintained under this doctrine because some courts have held that the First Amendment bars these suits. The author argues that courts should adopt the position of the Florida Supreme Court, which has held that the First Amendment does not bar an action against the Church for negligent, hiring supervision or retention. The Free Exercise Clause does not bar an action against the Church because the absolute freedom to believe is not impaired. Finally, courts that have held these actions are barred as an excessive entanglement under the Establishment Clause are incorrect, the author argues, because the duty to prevent harm does not implicate an ecclesiastical matter that the secular courts are barred from deciding.

REPRODUCTIVE RIGHTS & TECHNOLOGIES

Amy R. Applebaum, Note, *When Parental Autonomy Clashes with a Child's Interest in the Advances of Science: The Case for the Future of Court-Ordered Gene Therapy*, 48 WAYNE L. REV. 1543 (2003)

This note examines the rights of a fetus vis-à-vis the rights of its mother with regard to the developing science of gene therapy, currently an experimental arena, but which may potentially develop into a widespread practice to save fetuses from serious postnatal deficiencies and disease. The author suggests that legal conflict will arise when a mother wants to refuse such treatment in order to maintain her bodily integrity, despite the potential benefits to the fetus and minimal physical injuries to the mother. In an effort to examine the debate, the author considers past cases in which courts have ordered medical treatment for minors in spite of parental objections and cases where fetuses are deemed to have certain rights under the law. Upon balancing the risks and benefits, the author concludes that courts should extend the rights of a fetus to gene therapy treatment, even absent the mother's consent, in the interests of the future child's quality of life and society's interest in protecting this life.

Sara K. Alexander, *Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature*, 38 GA. L. REV. 395 (2003)

This article identifies a dearth of laws protecting parents whose child is born following gestational surrogacy. Gestational surrogacy is when a couple's sperm and egg are fertilized in a laboratory and implanted in a

third party woman; the woman carrying the baby is therefore not biologically related to it. Focusing on Georgia, the author points out how this creates uncertainties for parents seeking to have a baby by gestational surrogacy, since pre-birth contractual release of parental rights is often not recognized. The author concludes that laws addressing this increasingly used infertility method are crucial to protecting the rights of such couples. In order to balance the rights of all involved, the author suggests various ideas states could adopt, such as a pre-conception court order validating the release of parental rights; a clear legal definition the word "mother" which would not simply mean a woman who gives birth, but also the woman responsible for the genetic makeup of the baby; and as a related measure, laws which recognize that the act of carrying a baby to term does not create parental rights.

Joseph J. Bozzuti, Comment, *Judicial Birth Control?: The Ninth Circuit's Examination of the Fundamental Right to Procreate in* Gerber v. Hickman, 77 ST. JOHN'S L. REV. 625 (2003)

In *Gerber v. Hickman,* the Ninth Circuit concluded that the right to procreate through marriage is a basic human right only outside of prison. By finding that procreation is fundamentally inconsistent with incarceration, the court thereby terminated Gerber's prospects of conceiving a child. The author concluded that when prisoner reproductive rights are reexamined, the court should try to be more consistent with the other rights of privacy.

Melanie M. Brookes, Comment, *Reproductive Rights in Afghanistan: Considerations of Abortion Regulation in Light of the Afghan Reconstruction Process,* 18 CONN. J. INT'L L. 595 (2003)

This comment examines existing Afghan law and tradition to predict the reproductive rights issues that are likely to arise during the current process of lawmaking and institution building. The author considers the Bonn Agreement, Afghanistan's 1964 Constitution and 1976 Penal Code and the Hanafi school of the sharia (Islamic law). In light of Afghanistan's particular gender relations and the religious and cultural views of abortion, its regulation is likely to pose a unique challenge for both the new healthcare system and the new government. The author concludes that reproductive rights should be treated as part of an overall concern for human rights. Until reliable and enforceable statutory protections are in place, international and other human rights monitoring organizations should use their influence to insure that women are provided with health care, civil and political rights, and other social freedoms.

anet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101 (2003)

The issue of abortion concerns the needs and demands of the nineteenth and twentieth centuries. The issue of embryonic stem cell research and cloning bring about questions of personhood. Both issues are debates about social transition. The debates surrounding abortion and embryonic research show how culture has changed; individual autonomy now has higher value and the lines between home and work have become blurred. The debate about abortion and embryonic research concern social transition, it is unclear what the future holds as society is forced to reexamine its deeply held convictions.

J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003)

The author conducted an empirical study to examine the impact of parental involvement law upon young women in Massachusetts. Massachusetts is a state with a parental involvement law regarding unplanned pregnancy. The study focused on why young women did not involve their parents, who they did actually involved, and, lastly, their experience with seeking court authorization. The study has raised doubts about the validity of courts limiting young women's abortion rights; the study has given the young women a voice in the debate over parental involvement laws, and allows them to be heard regarding their own circumstances. The author concludes that there are alternatives for young women facing unplanned pregnancies in states with parental involvement laws.

Consuelo G. Erwin, Note, *Embryonic Stem Cell Research: One Small Step for Science or One Giant Leap Back for Mankind*, 2003 U. ILL. L. REV. 211 (2003)

After the Second World War, an American tribunal tried several Nazi doctors for their involvement with medical experiments performed on humans against their will. The tribunal created the Nuremberg Code, which placed the value of human life before that of science. Courts and legislatures in the United States have consistently followed this principle and should continue to do so in the case of experiments on embryonic stem cell research. Case law has established that the embryo's interest is secondary to the woman's rights. However, embryonic research is complicated because the embryo is separate from the mother and therefore may enjoy broader rights. Many courts have recognized the legislature's protection of an

embryo. Legislatures should enact legislation that would ban embryonic experimentation to honor the U.S' longstanding tradition of valuing human life over medical science.

Tobey E. Goldfarb, Comment, *Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning is a Cause for Concern*, 33 CAL. W. INT'L L.J. 345 (2003)

Since the 1960s, the United States has been supportive of international population control measures especially when those measures are designed to assist developing countries effectively compete and grow economically and socially. This long-standing United States policy has lead to the creation of several international organizations that supply funds for population control. The current Bush Administration has sought to deny funds to any organization that spends money on abortion-related issues. The author argues that Bush's position is undermining international respect for the United States. Further, the United States may even be in violation of international law due to its refusal to support certain organizations for political, rather then monetary, reasons.

Amanda Mechell Holliday, Comment, *Who's Your Daddy (And Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH. L. REV. 1101 (2003)

Texas lacks a statutory scheme to address the issue of surrogacy. Consequently, signatories to a surrogacy contract are uncertain as to whether the contract will be enforced. The author argues that because of the increasing importance of surrogacy, Texas should pass legislation defining the requirements of a valid surrogacy contract and the responsibilities and rights of the parties. Benefits of such legislation will include certainty and confidence in the result of the contract.

Christine Intromasso, Note, *Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional Violation of* Planned Parenthood v. Casey's *Undue Burden Standard*, 24 WOMEN'S RTS. L. REP. 101 (2003)

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court revisited the abortion issue and expanded the ability for states to regulate abortions by applying an undue burden standard instead of the strict scrutiny standard previously established. The torts of

"wrongful life" and "wrongful birth" allow recovery from medical practitioners who fail to notify parents of defects in their unborn child that would have led the parents to abort. Certain states have enacted legislation that bars these causes of action even though this could allow anti-abortion doctors to force their views on their patients by failing to notify parents of defects where the doctor thinks that parents may abort. Because the *Casey* standard is confusing and ill-defined, these statutes have sustained Constitutional attacks although it is not clear without further investigation whether these statutes do in fact unduly burden a woman's right to choose. It is time for this matter to be revisited by the Supreme Court so that courts and legislatures will have unambiguous guidance in determining whether statutes barring these causes of action are in fact unconstitutional.

Steven J. Johansen, *Clearly Ambiguous: A Visitor's View of the Irish Abortion Referendum of 2002*, 25 LOY. L.A. INT'L & COMP. L. REV. 205 (2002)

In 2002, the Irish government sought to amend the country's constitution to establish certain conventions pertaining to abortion. The referendum was written to appeal to both pro-life and pro-choice abortion advocates. It would have overturned a judicial ruling that allowed for abortions in situations where the mother was suicidal and allowed the use of the "morning after pill." The alleged ambiguities in the written language, combined with the public's suspicion of the high courts' willingness to manipulate constitutional phraseology led to the eventual defeat of the referendum. Although the assertion that the referendum was ambiguous was not entirely accurate, the measure was likely to fail anyway because of the compromise offered in the legislation.

Erik W. Johnson, Note, *Frozen Embryos: Determining Disposition Through Contract*, 55 RUTGERS L. REV. 793 (2003)

The author observed that in vitro fertilization has led to increased litigation on the issues of family, parentage and childbirth. However, there is a lack of legislation governing the in vitro fertilization process and custody of the frozen embryos to guide the courts. The author suggests that pre-embryos should be granted more rights than normal cells and that parties should be required to sign consent forms before undergoing the in vitro fertilization procedure. The author also suggests that legislation be enacted to guide the courts in adjudicating cases where the consent form is invalid or nonexistent.

Sylvia Kim, Note, *Embryonic Stem Cell Research Controversy: Focus On The Private Sector And International Sphere,* 14 HASTINGS WOMEN'S L.J. 89 (2003)

The author argues for increased stem cell research. She suggests that stem cell research shows respect for embryos because they are used to improve the lives of suffering people. She points out a lack of appropriate substitutes that provide equal benefits. Federal law does not permit the funding of research involving a risk to embryos but the private sector funds its own research, which goes unregulated. Unregulated research leads to abuse of embryos. The author concludes that federal funding will reduce the abuse, allowing for stem cell research to develop more quickly and bring the United States up to par with the rest of the world.

Justyn Lezin, *(Mis)Conceptions: Unjust Limitations On Legally Unmarried Women's Access To Reproductive Technology And Their Use Of Known Donors,* 14 HASTINGS WOMEN'S L.J. 185 (2003)

Compared to married couples, single women and lesbians have access to a narrower range reproductive technologies. For example, unmarried couples are often required to use frozen sperm, thereby lowering their chances of successful fertilization, whereas married couples are allowed to use fresh sperm. The author is also concerned with courts that treat the sperm donor as the legal parent ignoring preconception contracts. California has legislation, which gives unmarried couples access to all reproductive technologies, and the author suggests that other states follow this example. The author also suggests that all states guarantee that preconception contracts assigning legal parentage will be upheld.

C. Keanin Loomis, Note, *A Battle Over Birth "Control": Legal And Legislative Employer Prescription Contraception Benefit Mandates,* 11 WM. & MARY BILL RTS. J. 463 (2002)

This note argues that medical plans offered by employers should cover the cost of prescription contraception. The author suggests that the reason for the lack of coverage has less to do with economics and more to do with the fact that corporate America is predominantly male. Insurance coverage makes economic sense because it leads to savings in other areas already covered by insurance and reduces the frequency unwanted pregnancies. The author recommends that federal legislation be enacted mandating insurance coverage of prescription contraception.

Michelle Oberman & Joel Frader, *Dying Children and Medical Research: Access to Clinical Trials as Benefit and Burden*, 29 AM. J.L. & MED. 301 (2003)

This article discusses the problematic area of subjecting terminally ill children to experimental treatment. Currently, experimental treatment is administered to dying children more often than at any other time in history. The authors illuminate the ethical and legal polices governing the use of children in experimental research. They note that a family's consent to use a child in experimental research is not always completely informed and argue that truly informed consent means that a child's guardian must completely understand the risks and benefits of the research. The guardian must also understand the fact that the experiments are not actual medical treatment and that participation in the experimental treatment is unlikely to extend survival.

Melanie Pearce, *Children as Subjects in Nontherapeutic Research*, 23 J. LEGAL MED. 421 (2002)

This comment discusses the use and the rights of children in nontherapeutic research studies and the legal responsibilities of the institutions that use children in their experiments. The comment also details the history of the use of children in medical research, the safeguards put in place for children, whether there is a special relationship that creates a duty of care between a research institution and its subject child, and the ethical concerns of using children in medical experiments. The author acknowledges the need for children in certain nontherapeutic research studies, but argues that before children are used in such experiments, more studies are needed on a child's ability to consent to such studies.

Susan C. Stevenson-Popp, Comment, *"I Have Loved You In My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U.L. REV. 727 (2003)

This comment explores the need for legal change to the Uniform Parentage Act with regard to its posthumous reproduction. The author describes the history of statutory and case law regarding the intersection of paternity and intestacy. In *Woodward v. Commissioner of Social Security*, a Massachusetts case, the court allowed a posthumously conceived child to be considered issue of a deceased parent. The author advocates for statutory change to follow *Woodward*'s reasoning and considers the issues surrounding posthumously conceived children, including decedent's intent and providing these children with the recognition and rights as a child of the decedent.

Cheryl M. Plambeck, *Legal and Bioethical Considerations of Physician-Pregnant Patient Confidentiality and Prenatal Drug Abuse*, 23 J. LEGAL MED. 1 (2002)

A pregnant woman's use of illegal drugs impacts the confidential relationship of physician and patient. Recently, some state and local governments have prosecuted pregnant women who engage in illegal substance abuse. The author examines the United States Supreme Court decision of *Ferguson v. Charleston* and its impact on physician-pregnant patient confidentiality. She concluded that the Court's decision was correct, finding unconstitutional administration of warrantless and nonconsensual urine drug tests for all women suspected of drug use who obtained care at the Medical University of South Carolina.

Pollybeth Proctor, Note, *Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case*, 31 GA. J. INT'L & COMP. L. 459 (2003)

This note explores British prisoners' right to procreate. The author begins by examining the Human Rights Act, which does not allow for interference by a public authority with the right to family life except when necessary to national security or public safety. The Prison Rules defer decisions about procreation to the Secretary of State. The author describes the Mellor case, where the court imposed social values, such as the dangers of single parenting, to deny a request for artificial insemination from prison while confirming the policy of prohibiting conjugal visits in prison. She also addresses Britain's incorporation of the European Convention on Human Rights as it applies to procreation from prison and the competing public policy arguments. After comparing Britain's approach to a prisoner's right to procreate with the United States' approach, the author concludes that the United Kingdom is complying satisfactorily with the standards that the Human Rights Convention set by denying artificial insemination to prisoners.

Megan Colleen Roth, Note, *Rocking the Cradle with* Erickson v. Bartell Drug Co.*: Contraceptive Insurance Coverage Takes a Step Forward*, 70 UMKC L. REV. 781 (2002)

The author discusses the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC) in light of *Erickson v. Bartell. Erickson* was a successful class action complaint that asserted sex-based discrimination

because prescription contraceptives were not covered under insurance. After describing the effects of prescriptive contraceptives and the frequency of use, the author lists the limited effects of the decision under the individual state laws that actually have coverage for contraceptives. She asserts that EPICC, currently on the floor of Congress and supported by both pro-choice and pro-life movements, would enable coverage for all insured women.

David M. Smolin, *Nontherapeutic Research with Children: The Virtues and Vices of Legal Uncertainty*, 33 CUMB. L. REV. 621 (2002)

This article examines the difficulties in obtaining a child's consent to nontherapeutic medical research. A legal system that values autonomy and independence is by nature designed for an informed consenting adult, and this system is often at odds with children who by law cannot give consent themselves. The author points out that the regulatory system provided by the Food and Drug Administration is complex for nontherapeutic research. The system rightfully presupposes that researchers and drug companies are self-interested and the system's complexity can make adaptations on a case-by-case basis, placing the child's welfare first.

Lisa Walgenbach, Comment, *Artificial Insemination Behind Bars: The Boundaries of Due Process*, 36 LOY. L.A. L. REV. 1357 (2003)

A male prisoner's right to have a child through artificial insemination is inconsistent with the state's legitimate penal interests. The state's interest in carrying out the prisoner's penalty is stronger than the prisoner's right to procreate. Although the Ninth Circuit held that a prisoner does not have the right to artificially inseminate his wife, the Court's weak reasoning will likely result in the Supreme Court reversing the Ninth Circuit decision. The circuit court should have applied a four-factor analysis developed by the Supreme Court looking to the rationality, reasonability, impact and alternatives of the prison regulation. Taking these factors into consideration, the circuit court should have found that the prison has a legitimate interest in prohibiting male prisoners from providing semen for artificial insemination of their wives.

Samantha Weyrauch, *The Fetus and the Drug Addicted Mother: Whose Rights Should Prevail?*, 5 J. OF MED. & L. 95 (2001)

The increased awareness of fetal harm caused by maternal drug use has prompted some states to pass legislation restricting an expectant mother's

behavior. While it is understandable how the concern for the health of the fetus prompted such developments, there are many legitimate reasons why such laws must not be pursued. Foremost are concerns for the equal protection, privacy, bodily autonomy and due process rights of the mother. Recently, South Carolina courts have begun upholding laws policing drug use by mothers. However, these decisions should be halted and reversed in order to protect the rights of the mother.

June Mary Zekan Makdisi, *The Slide From Human Embryonic Stem Cell Research to Reproductive Cloning: Ethical Decision-Making and the Ban on Federal Funding*, 34 RUTGERS L.J. 463 (2003)

This article addresses the Bush Administration's decision to use federal funds for research on existing stem cell lines. Specifically, she discusses the propriety of using federal funds for research that has controversial ethics. Although the National Institute of Health has approved federal funding for research on existing stem lines, Congress has imposed very specific requirements. The National Bioethics Advisory Commission recommended funding for existing stem cells, but also on subsequent research in an attempt to rectify the legal difficulties. The fact that existing stem cells will slowly become useless lends credence to the erosion of Bush's decision. After examining the moral and scientific pros and cons of cloning and its effect on funding, the author concludes that the federal government should remain neutral on such difficult ethical questions.

SEX CRIMES

Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003)

About half of states still retain the marital immunity exception to rape. The author argues that these states should abolish the exemption. States that have made their rape laws marriage-neutral must amend their laws to add an express instruction stating that the victim's consent on prior occasions may not be used to infer consent at the time of the alleged rape. The underlying justification of ongoing consent for the marital rape exemption also contributes to the pervasiveness of bias against those who are raped by their intimate partners. Criminal law will be paralyzed to redress all rapes unless and until such biases are eradicated.

Jennifer G. Daugherty, Note, *Sex Offender Registration Laws and Procedural Due Process: Why* Doe v. Department of Public Safety Ex Rel. Lee *Should be Overturned,* 26 HAMLINE L. REV. 713 (2003)

The author argues that the Second Circuit incorrectly held that requirements of the Connecticut version of Meagan's Law violate due process. The Supreme Court should reverse the Second Circuit because of their erroneous conclusion that the relevant "stigma-plus" test is met. Under the stigma part of the test, the offender's reputation must be harmed because of the registration. This criteria is not met where the offender's reputation is harmed as a direct result of his conviction, rather than the registration procedures. Additionally, the offender must show that the information being disseminated about him is false. Finally, under the "plus" prong of the test, the offender must show a change in legal status, but none of the registration procedures actually trigger such a change. None of the relevant factors can be shown to hold the Connecticut statute unconstitutional.

Kim S. Ménard & R. Barry Ruback, *Prevalence and Processing of Child Sexual Abuse: A Multi-Data-Set Analysis of Urban and Rural Counties,* 27 LAW & HUM. BEHAV. 385 (2003)

This article analyzes a study that investigated the factors that affect the processing of child abuse cases from the reporting stage through sentencing. The authors analyze data compiled from monthly reports by all rape crisis centers in Pennsylvania, the Pennsylvania Office of Children, Youth, and Families, and the Pennsylvania Commission on Sentencing. The results of the study indicate that the levels of county expenditures affect the rates of reporting, verification and sentencing. Additionally, other factors, such as whether a county is rural or has a higher percentage of people living in poverty, negatively affect the reporting and verification of child abuse. Finally, counties with a higher percentage of stranger assaults also had higher rates of sexual abuse reporting.

Abigail E. Robinson, Comment, *Treating the Sex Offender at Any Cost: Fifth Amendment Privilege Against Compelled Self-Incrimination in the Prison Context,* 42 WASHBURN L.J. 725 (2002)

In *McCune v. Lile,* the Supreme Court held that Kansas' prison regulations regarding its sexual abuse treatment program for convicted sex offenders was constitutional. Studies show that treating sex offenders is generally a successful tool for decreasing recidivism. However, the Kansas

program, like some other states, requires participants to sign an "Admission of Responsibility" form, admit guilt and take a polygraph test. Furthermore, Kansas denies use immunity to inmate participants and sanctions convicted sex offenders who refuse to participate. The author argues that the Supreme Court holding was not the right outcome for three reasons. First, the Court failed to follow a clearly established precedent that states must grant use immunity for statements that are compelled after an individual has asserted the privilege against self-incrimination. Second, the Court misapplied a due process standard because a separate liberty interest had never before been required in the Fifth Amendment context. Finally, the Court did not address penalties like the revocation of parole or good-time credits for failure to participate because they did not arise in this case. This relevant fact leaves open the question of whether other similar state programs that impose these sanctions are still constitutional, and the author argues this factor may sway the Court in future cases.

Ashley E. Seuell, Comment, *Walking the Fine Line: How Alabama Courts Have Interpreted and Applied the Child Physical and Sexual Abuse Victim Protection Act,* 54 ALA. L. REV. 1427 (2003)

This comment examines the Child Physical and Sexual Abuse Protection Act, an Alabama statute, which allows a child's testimony in a child abuse case to be admitted via closed circuit television, videotaped depositions or through the testimony of other witnesses to whom the child has made out-of-court admissions. The Act purports to protect the rights of criminal defendants through a special jury charge where the trial judge informs the jurors that the child's out of court statements were not subject to cross-examination and requires the prosecution to give notice whenever a child's out-of-court statements are going to be introduced, which would normally be hearsay and inadmissible at trial. This Act allows a child to be declared unavailable to testify, an exception to the hearsay rule as long as several requirements are met, including a determination that the child's statements are trustworthy. The author argues the Alabama Act is constitutional as the safeguards do not offend the defendant's right to confront witnesses and conforms to the Supreme Court's Sixth Amendment jurisprudence.

Jonathan M.H. Short, Note, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court,* 8 MICH. J. RACE & L. 503 (2003)

The international community has recently recognized violent sexual acts, not necessarily resulting in death, when directed at a specific ethnicity, as a form of genocide. The author defines genocide within the scope of sexual violence and delineates it from the more common charge of crimes against humanity. He also outlines the various forms of sexual violence as genocide. The author analyzes a recent case dealing with this issue in the International Criminal Tribunal for Rwanda. He concludes that the recently enacted Rome Statute of the International Criminal Court, which contains general definitions of sexual violence, should set a new standard in prosecuting genocide by sexual violence.

SEXUAL IDENTITY

Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference,* 31 CAP. U. L. REV. 691 (2003)

The author focuses on two studies concerning the effects on children of gay parents. The first study, issued by a committee of the American Academy of Pediatrics, found no significant differences between children raised by homosexual parents and children raised by heterosexual parents. The second report, issued by two sociologists, found that the children of homosexual parents have different gender and sexual preferences and behavior. He predicts that the American Academy of Pediatrics study will be viewed as more credible, but that it is irrelevant and the results of the sociologists' study should not be used to deny rights to homosexual parents.

Randall P. Bezanson & Michele Chloe, *Speaking Out of Thin Air: A Comment on* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 25 HASTINGS COMM. & ENT. L.J. 149 (2002)

The Supreme Court ruled that the organization that runs the Boston St. Patrick's Day Parade was exercising its free speech right when it denied the application of the Irish-American Gay, Lesbian, and Bisexual Group. The authors refer to this incident as speech selection and examine what type of speech the Supreme Court was protecting. The Court did not recognize the parade participants as speakers for First Amendment protection, finding instead that the group running the parade was expressing their views

through the parade, which was speech in itself. The authors then discuss various theories of speech and examine the case in terms of each of these methods, asserting that the decision does not fit in with any of the theories. They argue that the Court should be more careful in laying out its reasoning in First Amendment cases relating to speech selection, as the current precedent is murky.

Margot Canaday, *"Who is a Homosexual?": The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law*, 28 LAW & SOC. INQUIRY 351 (2003)

Federal laws reflect an idea that homosexual identity indicates that someone engages in homosexual acts. The author explores the tension in the law between identity and conduct, finding that the identity based provisions prevailed because they were supported by the belief that homosexuals were psychopathic, whereas conduct based criminal laws were affected by process requirements. Regulators tried to make homosexuality visible and link the actions with a status in an attempt to keep out immigrants that might be homosexual. This article examines the cases relating to these attempts at keeping out those who committed homosexual acts or showed a propensity toward being a homosexual. The author concludes that by attempting to designate homosexuality as a status, the Congress, courts, and INS inadvertently gave legitimacy to the gay rights movement.

Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495 (2002)

This article examines the influence of science on concepts of homosexuality. In the late nineteenth century, science and medicine began to question why people committed acts of sodomy and tried to find a scientific explanation to replace the religious views of immorality. Scientists asserted that the people committing homosexual acts had a medical problem. They concluded that homosexuals were mentally perverted. This conclusion led to laws aimed at these "perversions," such as prohibitions against cross-dressing, rather than just prohibitions against acts of homosexuality. Later, psychologists, such as Freud, identified homosexuality as an illness, leading the law to begin treating homosexuality as a pathology or a mental disorder, with incarceration in a mental institution required to try to "fix" homosexuals and keep them from harming the people around them, particularly children. The scientific community's dismissal of homosexuality as a mental disorder had a significant impact on the law, and

many of the laws against homosexuals have been changed, either by choice or by court decisions. The author asserts that ongoing discussions of homosexuality in the scientific community will continue to have an effect on the law.

Anne C. Hydorn, Note, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 HASTINGS CONST. L.Q. 237 (2003)

Although the right to privacy is never explicitly mentioned in the United States Constitution, the Supreme Court has rooted it in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. However, in *Bowers v. Hardwick*, the Supreme Court held that nothing in the Constitution granted a fundamental right to gays and lesbians to engage in sodomy. This is because sexual conduct between consenting adults was not immune from governmental regulation and the right to engage in such conduct did not fit into any of the rights asserted in previous right to privacy cases. The Fourth Circuit subsequently expanded *Bowers* by stating that it was controlling on the issue of whether the right to privacy extends to forced disclosure of private homosexual conduct. By contrast, the Third Circuit held that unwarranted sexual orientation disclosure is indeed covered under the right to privacy. The author addresses this circuit split on the issue of disclosure of sexual orientation, and concludes, as the Third Circuit did, that the right to privacy must extend to forced disclosure of sexual orientation.

Bonnie Johnson, Note, *Constitutional Law—Privacy and Equal Protection—Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians*, 25 U. ARK. LITTLE ROCK L. REV. 681 (2003)

Recently in *Jegley v. Picado*, the Arkansas Supreme Court examined the constitutionality of an Arkansas statute criminalizing sexual relations between members of the same sex. In holding that the statute violated the Arkansas Constitution, the Court found that the Arkansas Constitution accords individual rights greater than those secured by the United States Constitution. In studying this case and its potential ramifications, the author analyzes the judiciary's role as guardians of civil liberties. The note also scrutinizes the current legal status of gays and lesbians at both the national and state level. Ultimately, the author concludes that the holding by the Arkansas Supreme Court in *Jegley v. Picado* implies the court's recognition of a fundamental right to privacy for all citizens and equal protection for gays and lesbians.

Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy,* 38 HARV. C.R.-C.L. L. REV. 511 (2003)

This note presents a model of gay-based advocacy centered on the concepts of pluralism and representation for gays, lesbians, bisexual and transgender individuals. After establishing his vision of social justice lawyering, which values debate and diversity among the gay, lesbian, bisexual and transgender constituencies, the author examines four different examples of gay-based organizations and the political actions and decisions they make. In examining these gay-based organizations, the author evaluates national, regional and local organizations based on his model of gay-based advocacy. Ultimately, the note concludes that multiple organizations with a wide range of ideological positions are necessary. Furthermore, the author notes the possible benefits of combining separate gay-based organizations with different resources in order to increase the quality of life for all gays, lesbians, bisexuals and transgender individuals.

Bradley A. Sultan, Note, *Transsexual Prisoners: How Much Treatment is Enough?* 37 NEW ENG. L. REV. 1195 (2003)

This note studies transsexual prisoners seeking expensive medical care to change genders while in prison. A transsexual is defined as someone who suffers from a deep and persistent dissatisfaction with his or her anatomical sex and who may also suffer from Gender Identity Disorder, a psychological illness where a person deeply believes that their physical gender is the opposite of their true gender. Gender change surgeries run between $37,000 and $77,000, and even pro-inmate commentators are unsure under what theory of law these inmates should be protected. The author offers several theories on why these inmates should not receive the surgery courtesy of the taxpayer, the strongest of which cites Judge Posner – "Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment."

WORKPLACE DISCRIMINATION & HARASSMENT

Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation,* 53 SYRACUSE L. REV. 1117 (2003)

This note analyzes the evolution of disparate treatment sex discrimination cases. The 1964 landmark case of *Price Waterhouse v. Hopkins,*

which established gender stereotyping as actionable discrimination, serves as the foundation for the note. According to the author, court decisions illustrate that effeminate males have no clear plan concerning gender stereotyping. However, they can increase their chances of success by establishing a prima face case of sex discrimination.

Gregory A. Bullman, *Abuse of Female Sweatshop Laborers: Another Form of Sexual Harassment That Does Not Fit Neatly Into the Judiciary's Current Understanding of Discrimination Because of Sex*, 78 IND. L.J. 1019 (2003)

The author explores how workers in America's garment sweatshops often work more than forty hours a week without receiving overtime pay, a problem greatly overshadowed by the fact that they often make less than minimum wage and are forced to work in dangerous, unsanitary conditions. He posits that these workers are treated poorly because they are female. The article also shows how many courts, following the Supreme Court's current Title VII doctrine, fail to classify these workplace conditions as gender discrimination even though the employees are all female workers. Because the majority of the workers are female, these sweatshop workers cannot prove unequal treatment of the sexes, but they can prove that they have faced tougher workplace conditions because of their sex. The author calls for the courts to broaden their interpretation of Title VII to protect more people, including female sweatshop workers, who have been victimized by discrimination because of their sex.

Matthew Clark, Comment, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After* Rene v. MGM Grand Hotel, 51 UCLA L. REV. 313 (2003)

This comment explores the recent case of *Rene v. MGM Grand Hotel,* which held that no federal statute authorizes victims of workplace sexual orientation discrimination to sue their employers for damages. In *Rene,* the plaintiff, a gay male butler on the luxurious twenty-ninth floor of the MGM Grand Hotel in Las Vegas, claimed that his coworkers and supervisors subjected him to many different forms of physical and psychological harassment. The author explores the lack of protection from harassment that many homosexual men and women face because there is no language in Title VII that protects them. The comment suggests cases like *Rene* should be viewed similarly to sexual discrimination, because, had Rene been a woman, his coworkers would have likely not mocked any of Rene's relationships with men. The author argues that the courts should not deny protection to homosexual employees because of either precedent or

congressional intent, but should instead consider that there is no real justification for sexual orientation harassment.

James W. Colliton, *Race and Sex Discrimination in Charitable Trusts*, 12 CORNELL J.L. & PUB. POL'Y 275 (2003)

Charitable trusts that discriminate on the basis of gender and race, whether the trust is public or private, may violate the Fourteenth Amendment's Equal Protection Clause. In the event that the charitable trust is intertwined with a public purpose (for example providing a scholarship at a public school), the author argues that a trust's discriminatory provisions based on gender and race should not be enforced, even when the trustee is a private trustee rather than public trustee. Discriminatory provisions should not be enforced for two reasons; one is that enforcing these provisions violates the Equal Protection Clause, and the second reason is that enforcement of these provisions is against public policy. The author uses case law to define the types of charitable trusts that have a public purpose.

Lee Franck, Note, *The Cost to Older Workers: How the ADEA has been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns*, 76 S. CAL. L. REV. 1409 (2003)

The Age Discrimination in Employment Act ("ADEA") was enacted in 1967 after a disturbing shift in the business world, which began to view older workers as liabilities rather than valuable employees. This note focuses on how recent court interpretations have begun to undermine the purpose of ADEA by allowing employers to terminate older employees because they earn higher salaries. The history, intent and statutory language of ADEA and similarities between ADEA and Title VII are explored, as well as a circuit split in interpreting the ADEA. The author recommends that courts adopt a disparate impact analysis in deciding ADEA cases.

Stacy A. Hickox, *The Elusive Right to Reinstatement Under the Family Medical Leave Act*, 91 KY. L. J. 477 (2002)

The Family Medical Leave Act ("FMLA") allows employees up to twelve weeks of unpaid leave for medical-related reasons and provides for employee reinstatement after taking the leave so he or she can return to work. In the ten years since the passage of FMLA, courts have made reinstatement much more difficult for employees. Employees now bear the burden of proof to show that the employer did not have a legitimate reason to refuse

reinstatement. This article explores how the circuits have treated FMLA related lawsuits with regard to the refusal of an employer to reinstate an employee, focusing the discussion of the problems of burden of proof and intent. The author argues that in order to fulfill the intent of FMLA, courts should interpret the Act as giving a right of reinstatement to the employee and place the burden of proof on the employer to show why an employee should not be reinstated.

Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437 (2003)

This note discusses the role that racial jokes play in our culture and how that role impacts racial harassment in the workplace. Racial jokes have long pervaded our society but only recently been a grounds for workplace harassment. Although the Supreme Court awarded the largest jury verdict ever for a hostile work environment claim based solely on racial jokes in the workplace in 2001's *Swinton v. Potomac Corp.*, there has been little conformity among the circuits about what constitutes an abusive working environment. This is due to vague standards of what factors should be included when conducting hostile work environment analysis and questions of broad social context. The problem is contextualized with historical anecdotes about the development of racial jokes in the United States, why racial and ethic humor exists, and how racial humor impacts targeted minority groups. Courts must consider the broader social context when deciding cases of racial harassment in the workplace.

Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67 (2002)

The author analyzes the collision between sexual harassment jurisprudence and the First Amendment by providing an introduction to the enactment of Title VII and Title IX, exploring the Supreme Court's First Amendment content-based restriction doctrine and juxtaposing hostile work environment sexual harassment law, and finally offering five ways that courts can distinguish sexual harassment law from protected speech proscribed by the First Amendment. The author suspects that the Supreme Court would not rule against twenty years of sexual harassment law by carrying out its content-based restriction doctrine to sexual harassment, but would instead incorporate one of the methods outlined by the author to distinguish its content-based restriction doctrine from sexual harassment case law.

Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism,"* 55 ME. L. REV. 63 (2003)

In recent cases beginning with *United States v. Lopez*, the Supreme Court has limited Congress's Commerce Clause powers to regulate behavior by finding numerous pieces of legislation outside of the scope of the Commerce Clause and therefore unconstitutional. The author proffers that this phenomenon of "New Federalism" may affect sexual discrimination law that has been established under Congress's Commerce Clause powers. By analyzing the two major components of New Federalism, state sovereign immunity and the enforcement powers, the author offers his thoughts about New Federalism's impact upon public employers with respect to sexual discrimination in the workplace. He also analyzes the Ninth Circuit's ruling in *Nevada Department of Human Resources v. Hibbs* in order to understand the issues on appeal to the Supreme Court concerning the Family and Medical Leave Act. The author believes this case is one of the most important cases to test the Supreme Court's New Federalism because it questions Congress's enforcement power and ability to prohibit sex discrimination by public employers.

Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong*, 19 CONST. COMMENT. 391 (2002)

The author advocates that First Amendment speech in the workplace be determined contextually and not by bright-line rules that do not reflect differences in workplace missions. For instance, she suggests that nude photos of women could constitute sexual harassment in a manufacturing plant while they are protected by freedom of speech in an art museum. These two workplaces have varying missions, one to promote a product and one to promote art; therefore nude pictures in one environment would be inappropriate while acceptable in another. The author refutes arguments that have suggested that having a contextual based rule would discourage speech in the workplace by not providing bright-line standards for appropriate and inappropriate speech. She suggests that general sexual harassment guidelines will be sufficient to allow employers to make the distinction and affirms contextual-based sexual harassment laws will be the best way to protect employees from hostile work environments while protecting speech.

Marisa J. Mead, Note, *Taxing the Victims: Compensatory Damage Awards and Attorney's Fees in Sexual Harassment Lawsuits*, 11 J.L. & POL'Y 801 (2003)

The Small Business Job Protection Act provides no income tax consequences for damages resulting from physical injury, but assesses income taxes on damages awarded for non-physical injury. According to the author, this discrepancy has prevented sexual harassment, a non-physical injury, from being recognized as a serious problem. This tax treatment also prevents victims from reporting sexual harassment because tax issues can both cost the victim money and discourage settlement. This disparate tax law also supports the contention that such psychological harm is not a "real" injury. The author suggests eliminating the different treatment through the pending Civil Rights Tax Relief Act, which would not include awards resulting from discrimination as taxable income, or to tax the offenders rather than the victims.

Stephanie Schmid, Comment: *A Perfunctory Change? Harvard University's New Sexual Misconduct Complaint Procedure: Lessons From Campus Adjudication Systems*, 18 BERKELEY WOMEN'S L.J. 265 (2003)

Harvard's sexual misconduct policy for peer disputes places the burden for the production of evidence of sexual misconduct solely with the complainant. According to the author, the new system does a disservice to the students affected by it and promotes frustration, outrage and protest. The author argues that Harvard should abandon this policy and replace it with a new policy that is created in collaboration with university administration, students and alumni, emphasizing increasing awareness, raising reporting rates, decreasing the incidence of sexual assault, and taking into consideration students' experiences. In addition, Harvard should investigate every complaint fully and create a supportive community by involving both students and alumni.

Saranna Thornton, *Maternity and Childrearing Leave Policies for Faculty: The Legal and Practical Challenges of Complying With Title VII*, 12 S. CAL. REV. L. & WOMEN'S STUD. 161 (2003)

In colleges and universities, there is on going discrimination against pregnant faculty, in direct violation of the Pregnancy Discrimination Act of 1978. The discrimination manifests itself through the policies regarding maternity and childrearing leave. These conditions put up additional hurdles to women who work in higher education, thereby pushing highly qualified women out of academia. The policies of these institutions also can

put a woman's health at risk by not permitting the needed recovery time after childbirth. Administrators and faculty of these institutions need to reexamine their policies in order to adhere to the mandates of the PDA.

Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution From Maine*, 55 ME. L. REV. 23 (2003)

More than forty years ago, Congress enacted the Equal Pay Act to combat the disparity in pay between men and women working at equal or comparable jobs. Seventeen states have similar statutes. Yet, the disparity still exists. The author looks at the federal law, Maine's law and the laws in the other states that have such statutes. She also evaluates the controversial and complicated comparable worth doctrine, which bases salary on a list of specific criteria rather than supply and demand. She contrasts this to the more popular requirement of equal pay for equal work. According to the author, poor enforcement of these statutes is not the only problem—issues concerning women, home and the workplace make its implementation difficult. Nevertheless, the author argues that better enforcement and more support from the courts would help close the gap.

James A. Ryan, Note, *Contraceptives and Employer Health Prescription Plans: An Examination of* Erickson v. Bartell Drug Co., 11 GEO. MASON L. REV. 215 (2002)

Erickson v. Bartell Drug Co., using Title VII and Pregnancy Discrimination Act analysis, determined that prescription drug coverage of contraceptives is mandated. *Bartell* reasoned that in order to preserve the equal treatment of women, the employer must permit the inclusion of contraceptives, something that is perceived as a 'female only' benefit, in their prescription drug plans. On the contrary, the author argues that true equal treatment under Title VII would prohibit unequal treatment of the sexes and should prohibit states from mandating the inclusion of contraceptives in prescription drug plans. Further, Title VII fails to adequately define "sex" and "discrimination" leaving both terms to judicial interpretation. Overall the article suggests that providing prescription contraceptives to women alone is antithetical to the intention of Title VII, and hence state statutes following *Bartell* should likewise be struck down.

Jennifer R. Taylor, *Mixing the Gene Pool and the Labor Pool: Protecting Workers From Genetic Discrimination in Employment*, 20 TEMP. ENVTL. L. & TECH. J. 51 (2001)

Recent strides in genetic testing spearheaded by the Human Genome Project (HGP), have made it possible for scientists to determine an individual's predisposition to developing certain diseases and conditions or passing along those traits to their offspring. While the HGP presents great potential for identification and treatment of diseases, it raises the new challenge of keeping such information private. The genetic information of screened employees may be used by employers to determine genetic tendencies and allow employers to selectively discriminate against those people who pose a risk of not being the genetic ideal. Additionally, genetic information is private to an individual and such knowledge should be the property of that person alone, and even then only if he or she wishes to discover it. The author suggests that where federal legislation is insufficient, state laws must compensate to protect employees from misuse of genetic information by their employers.