# ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

## ADOPTION

Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179 (2003).

This article discusses intercountry adoption and highlights weaknesses in the United Nations Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. These conventions fail to resolve the question of whether a country can legitimately decline intercountry adoption when a substantial number of its children are institutionalized. The author provides an overview of the status of intercountry adoption and illustrates barriers and abuses within the system by using Cambodia, Vietnam, Romania and Guatemala as examples. The author calls for global funding to create national adoption departments that work in conjunction with global agencies, providing oversight and gathering empirical information regarding the state of children without families.

Karl E. Hong, *Parens Patriarchy: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1 (2003).

This article focuses on the subject of state authority restricting adoption based on sexual orientation and marital status. The author states that a historical examination of adoption laws indicates that normative values influence perceptions of acceptable parental behavior. He questions contemporary state officials' claims that same-sex families and single heterosexuals tend to raise children that are violent, confused, and immoral. States justify the adoption bans based on moral disapproval toward homosexual couples and unmarried parents, but the Supreme Court has never held that moral criticism alone is sufficient to pass a law discriminating against a specific group. The author states that whether the state can deny a person the right to parent a child based on his or her status as homosexual or unmarried should be protected by substantive due process.

Jennafer Neufeld & Dalia Georgi, *In Re: Adoption of a Minor Child: Circuit Court for the 15th Judicial Circuit, Palm Beach County, Florida*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1199 (2003).

In March of 2001, the Florida Legislature, as part of a sweeping reform of the state's adoption laws, passed an amendment that became known as the Scarlet Letter provision. The provision sought to protect the parental interests of men who father children as a result of anonymous sexual intercourse. For the state to certify the adoptions of children conceived during anonymous sexual intercourse, the law required that the mother search for the child's father. If unsuccessful, the mother was required to publish her name along with the name of the father (if known), the father's physical description, and details of the circumstances under which the child was conceived in a newspaper circulated throughout the county of conception. Several individuals challenged the law on the grounds that it violated their constitutionally protected right to privacy. The court agreed with the plaintiffs. As a result of the court action, Florida's legislature passed a new law creating a confidential paternity registry that requires men to register in order to protect their paternal rights.

Twila L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215 (2003) (reviewing HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION (2002)).

Two contrasting views form the debate over transracial adoption: (1) race should not play a role in placement of a child; and (2) black children should not be placed with white families. Davis attempts to reconcile these two views by arguing that race should be a consideration, and not a determining factor, in a child's placement. In doing so, Davis focuses on ethical issues, including whether parents who adopt transracially should pass on society's racial designations to their children and the moral implications associated with the placement of an adoptive child on the basis of race. Perry concludes that Davis' book presents some interesting issues surrounding transracial adoption, but that the book lacks a full analysis of the political and practical implications associated with these issues.

Laura A Turbe, *Florida's Inconsistent Use of the Best Interests of the Child Standard*, 33 STETSON L. REV. 369 (2003).

Florida permits homosexual parents to be temporary foster parents, but state law excludes homosexual parents from adopting children. The author states that the Florida ban on homosexual adoption is based on misconceptions of homosexual parenting. These misconceptions include notions that homosexuals are poor role models, that homosexuals have a propensity for pedophilia, and that homosexuals harm their children's sexual and moral development. Florida courts have upheld

the ban on the ground that it is in the best interests of the child. However, the author states this reasoning is used to conceal the judiciary's moral bias against homosexuals. The author suggests that the state implement individualized judgments that disregard an adoption applicant's sexuality, since the discriminatory ban hinders Florida's goal of providing as many suitable homes as possible for children.

Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT'L & COMP. L. 689 (2003).

Both economic and non-economic factors have left millions of children throughout the world orphaned or abandoned, while at the same time millions of families and individuals are desperate to adopt them. As the United Nations noted in 1993, international adoption appears to be the ideal response to the needs of these children and prospective parents. Nonetheless, the author warns that this solution may not be enough. The author concludes that while international adoption may serve the immediate needs of individuals, it does not address the underlying causes of orphanhood and abandonment.

## CHILD ABUSE

Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61 (2003).

This panel discussion explores New York City's child welfare system. The panel discusses the removal of many poor, African-American children from their homes via neglect petitions and the subsequent placement of these children in foster care. The panelists speak frankly about race and class while discussing the rights of parents in the system, and they agree that parents are often treated with suspicion and disrespect. They address the difference between removals based on allegations of neglect and those based on allegations of abuse, the frequency of each, and the impact these allegations have on both children and parents. The panel discussion concludes with questions taken from the audience regarding current court cases and suggestions for improving the child welfare system.

Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings,* 37 FAM. L.Q. 485 (2003).

This article attempts to define the extent of procedural protection granted to children under the Due Process clause of the Fourteenth Amendment; specifically, a child's right to counsel in a dependency proceeding. A child's physical liberty interest in such a proceeding is analogized to that of a defendant in a criminal case, drawing attention to the fact that a criminal defendant is unequivocally entitled to an attorney who will mount a vigorous defense on his client's behalf. The Supreme Court has never directly addressed the issue of a child's right to representation. However, the author states that utilizing the three-part balancing test set forth in *Mathews v. Eldridge* is the proper way to analyze the issue. The author concludes that the child's interest in the outcome of the proceeding, the risk of error, and the state's interest in the child compel recognition of a child's constitutional right to representation.

Robert Stone, *The Cloudy Crystal Ball: Genetics, Child Abuse, and the Perils of Predicting Behavior*, 56 VAND. L. REV. 1557 (2003).

The author examines the strengths and weaknesses of using formulas and models to predict human behavior. The author highlights that genetics, environment, and free will are factors that defy rigid categorization. Discussion is centered upon a study that found abused boys with a certain genotype exhibited increased antisocial behavior. The author states that further studies should be conducted into possible links between genetic traits and child abuse. Furthermore, the author advocates the use of genetic testing by the government, so that testing may aid in the administration of child welfare and new treatments for abused children. For example, testing could be used by child welfare departments to determine if authorities should remove a child from a particular home. However, the author warns that there are various dangers associated with relying upon genetic testing because not all children who possess a particular genotype and have a history of abuse are prone to violence.

Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN'S L.J. 145 (2003).

In this article, the author examines the delayed discovery doctrine in regard to a victim's recovered memory of childhood sexual abuse and the unavailability of the doctrine for victims of other forms of child abuse, e.g., physical abuse and neglect. The author states that courts have been influenced by the efforts of feminists and psychotherapists to explain how the nature of sexual abuse leads to repression and outward manifestations of mental illness, thereby leading to an

acceptance of the delayed discovery doctrine in such cases. Traditionally, courts have favored utilizing the doctrine when such memories are recovered. Legislation, however, allows the delayed discovery doctrine to apply to cases where adult survivors have always remembered the abuse. The author argues that victims of other forms of child abuse—e.g., physical abuse and neglect—should also be afforded the protection of the delayed discovery doctrine due to the similarly traumatic effects upon childhood victims.

## CUSTODY, VISITATION & DIVORCE

Erin K. McBride, Note, *Splitting Heirs: Reforming the Custodial Treatment of Identical Twins in Divorce,* 37 FAM. L.Q. 515 (2003).

This note focuses on the need to give identical twins a legally cognizable right to remain together in the event of a custody dispute. The author argues that the special relationship created by twins' biological, psychological, and social bond to one another is a constitutionally-based liberty interest. While courts employ a best interest of the child standard to resolve custody disputes, this does not necessarily mean that twins will be kept together. The author believes that split custody is particularly egregious when involving identical twins. The author concludes that the special relationship between twins will be protected by courts when sibling association is recognized as a fundamental right.

Kristen Santillo, *Disestablishment of Paternity and the Future of Child Support Obligations,* 37 FAM. L.Q. 503 (2003).

Many men are ordered to continue paying child support even though genetic testing has conclusively proven that they are not the biological fathers of the non-custodial children they have been financially supporting. The states' historical presumption of paternity within a marriage now stands in tension with the certitude of establishing paternity through DNA testing. In addressing this issue, the author argues that states must balance the best interests of the child against their own interests and those of the misidentified father. Courts must weigh the lack of a biological relationship with the socio-economic ties that have already been established between the man and the child. This article explores the policy considerations of states that have imposed stringent legal barriers against disestablishing paternity, and compares them with the policies of states that fervently challenge such barriers. The author concludes that states must expand access to genetic testing to protect the interests of putative fathers.

Carolyn R. Wah, *Restrictions on Religious Training and Exposure in Child Custody and Visitation Orders: Do They Protect or Harm the Child?*, 45 J. CHURCH & ST. 765 (2003).

When parents hold different religious beliefs, courts apply two legal standards in child custody cases. The first is the best interests of the child standard. The second is the presumption that children have an independent right to freedom of religion, as codified in the United Nations Convention on the Rights of the Child. Some courts avoid issues regarding a child's religious training by granting exclusive control over a child's religion to the custodial parent. Other courts make decisions based on an avoidance of harm standard. Unfortunately, religious issues in child custody cases are often influenced by ulterior motives, such as one parent's desire for control. The author concludes that judicial interference with a child's religious training, regardless of the method employed by the courts, is likely to cause the children more harm than good.

## DOMESTIC VIOLENCE

Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767 (2003).

The manner in which courts interpret the United Nations Convention Relating to the Status of Refugees (Refugee Convention) renders many women around the world unprotected from domestic violence. This article discusses two major reasons why courts have denied asylum status to victims of domestic violence. Firstly, courts are unclear whether abused women qualify as a persecuted social group under the Refugee Convention. Second, courts pay less attention to individual acts of persecution than to acts of persecution committed by governments. The author reviews several international cases and argues that the Refugee Convention's purpose was to protect victims from domestic violence. The author concludes by stating that courts may better approach these cases by expanding their definition of a social group, which would allow victims of domestic violence to offer complete asylum claims.

Azizah Y. al-Hibri, *An Islamic Perspective on Domestic Violence,* 27 FORDHAM INT'L L.J. 195 (2003).

This article addresses the traditional Islamic view of domestic violence through an analysis of the Qur'an, the holy book of Islam. The author argues that modern instances of domestic violence are indicative of the Satanic logic to which the Qur'an is vehemently opposed. The Qur'an articulates basic general principles about gender relations that the author argues are characterized by affection and mercy. The article further explains how the Chastisement Passage has been

misread as supporting spousal abuse; instead, the author contends it is meant to aid in anger management and conflict resolution between husbands and wives. The article concludes by characterizing the Qur'anic approach to eliminating spousal abuse as a realistic approach that takes into account the complexity of human emotions and the need for a developmental period designed to achieve a better state of being.

Susan F. Hirsch, *Problems of Cross-Cultural Comparison: Analyzing Linguistic Strategies in Tanzanian Domestic Violence Workshops*, 28 LAW & SOC. INQUIRY 1009 (2003).

In recent years, campaigns against domestic violence have been linked to development programs for Third World nations. Tanzania has sought to promote equality in donor-recipient relations while reforming its domestic violence laws. Using linguistic analysis, the author examines two domestic violence law reform workshops held in Tanzania in 1998. The author illustrates how the influence of donor nations in these programs led to the discounting of local officials' suggestions for reform. The author concludes that a concerted effort is needed to expand the influence of local officials in the development process.

Mindie Lazarus-Black, *The (Heterosexual) Regendering of a Modern State: Criminalizing and Implementing Domestic Violence Law in Trinidad*, 28 LAW & SOC. INQUIRY 979 (2003).

The author describes the political, social, and economic factors that led to the passage and implementation of the 1991 Domestic Violence Act in Trinidad and Tobago. After praising the government for formally recognizing domestic violence, the author laments the implementation of the law, offering statistics and anecdotes to highlight the system's failure on behalf of women who applied for orders of protection but never received restraining orders. The author concludes that while enacting equal rights legislation for women in post-colonial states has improved women's lives, there remains much work to be done in implementing such legislation.

Mindie Lazarus-Black & Sally Engle Merry, *Symposium on Violence Between Intimates, Globalization, and the State: The Politics of Gender Violence: Law Reform in Local and Global Places*, 28 LAW & SOC. INQUIRY 931 (2003).

This article introduces a symposium exploring the dynamic interactions between the processes of globalization, nationalism, and gender violence. The authors identify five major themes in the symposium. First, nations do not readily adopt the increasing regulations prohibiting violence against women, but rather debate and reformulate global understandings of gender violence. Second, the terms used to provide a framework for discussing gender violence significantly influence how the public understands and responds to the issues. Third, implementation of gender violence laws continues to fall below expectations. Fourth, the intersections between gender violence and culture can be used either to denigrate or to unify different ethnic and religious groups. Based on these themes, the authors conclude that discourse on gender violence must occur not in isolation but within the context of both local and global concerns.

Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941 (2003).

This article analyzes the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The author compares the elements of CEDAW, which she finds lacking effective sanctions, to the laws of several nations. Additionally, the author notes that a nation's culture may prove to be an additional obstacle to effective implementation of anti-discriminatory laws. One way the author suggests to remedy this situation is to allocate greater resources to women's development in the social sector. The author concludes by stating the lack of effective sanctions in CEDAW will become less important as CEDAW begins to reshape notions of gender, thereby encouraging compliance through cultural awareness.

Shelby A.D. Moore, *Understanding The Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451 (2003).

This article discusses the problems battered women face and argues that welfare reform programs, in particular the Personal Responsibility & Work Opportunity Reconciliation Act of 1996 (Act), encourage women to remain in abusive relationships. The goals of the Act, which include encouraging marriage and two parent families, conflict with society's desire to foster independence for battered women. Furthermore, the author argues that provisions in the Act intended to exempt battered women from the work requirements and limits on lifetime benefits have not been sufficiently implemented. The author concludes

that the Act will remain a significant obstacle for battered women until the work requirement and lifetime benefit exemptions are enforced.

Meghana Shah, Note, *Rights Under Fire: The Inadequacy of International Human Rights Instruments in Combating Dowry Murder in India*, 19 CONN. J. INT'L L. 209 (2003).

This note focuses on a growing human rights problem in India, dowry-related violence. With alarming frequency, young Indian brides are being burned to death by their husbands and their husband's families for what is perceived as an insubstantial or unsatisfactory dowry. The author explores the history of dowry-related violence, India's attempts to end it through legislation, and attempted international remedies. Increased international intervention is argued for because the Indian legal system, in the author's opinion, has largely failed these women. The author concludes by stating that by focusing on the problem in India, the international community could help alleviate the crisis and prevent similar human rights abuses in other developing nations.

David H. Taylor, *Defending the Indefensible to Further a Later Case: Sanctioning Respondents in Illinois Domestic Violence Cases,* 23 N. ILL. U. L. REV. 403.

Under the current statutory scheme in Illinois, domestic violence cases involve both a civil hearing and a criminal trial. The purpose of the civil proceeding is to expedite the issuing of an order of protection. However, the author explains that the civil proceedings are often misused by the alleged abuser to intimidate witnesses during cross-examination and take advantage of the broader rules of civil discovery. It can be difficult to determine if the alleged abuser is acting in good or bad faith, especially because there is no requirement to submit a written answer to the civil claim. The author concludes that while forcing the alleged abuser to admit or deny certain issues during the civil proceeding may adversely affect his right against self-incrimination in a subsequent criminal trial, the victim's safety must be afforded the highest priority.

## EDUCATION

Nancy E. Dowd, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003).

This article poses the question: How can we change the culture of legal education, which Caucasian males have traditionally dominated? The author begins by looking at the recent decision in *Grutter v. Bollinger*, where the Supreme Court upheld the University of Michigan Law School's affirmative action admission policy against a constitutional challenge by a white student who was denied admission. The authors criticize the opinion for adopting too broad a definition of diversity, arguing that the Court's definition of diversity insufficiently protects minorities in the admission process. The authors urge that we should move beyond asking whether there is an inequality in legal education and instead emphasize the benefits of diversity to the legal community.

Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1 (2004).

As members of Congress consider whether to reauthorize the Individuals with Disabilities Education Act (IDEA), special education advocates are exhibiting indifference towards the proposed changes to the IDEA, which dilute the procedural protections regarding parental involvement in educational planning and the assured compliance provisions regarding school instructional and administrative staff. The author suggests that despite the perceived weaknesses of the revised IDEA, special education advocates may find that students benefit from the revised act. In conclusion, the author states that special education advocates should not place all of their attention upon the IDEA reauthorization, as it is equally important to monitor and familiarize oneself with the No Child Left Behind Act of 2001, advocate on behalf of individual students, and advocate for reform at the district, state and federal levels.

Claire G. Schwab, Note, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299 (2003).

This note focuses on the performance of women in law school. The author chronicles the history of women's experience in the law, and traces their uneasy and gradual acceptance into the field, specifically at Columbia Law School. The author then surveys the research that has been conducted on how a student's gender impacts his or her law school experience, finding that female students under-perform, participate less, and are not as confident as their male counterparts. In the

author's own study, conducted at Columbia Law School, where the females currently comprise a slightly higher percentage of the student body than males, the author found that gender differences were present in the first year of law school but dissipated over the following two years. The author therefore concludes that while an increased female student population has not neutralized the effect of gender on a female's law school experience, it certainly has minimized certain negative effects.

## ELDER CARE

*See* Bilkin, *infra* Workplace.

Tracey Kohl, Comment, *Watching out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30 FORDHAM URB. L.J. 2083 (2003).

The growing problem of elder abuse in nursing homes throughout the country has prompted some advocates for the elderly to propose video surveillance as a means of protecting residents. However, privacy concerns present a legal difficulty because many nursing home residents may be incapacitated and thus unable to sign consent forms waiving their privacy rights. The Texas Legislature has attempted to address this problem by allowing the legal guardian or legal representative of a nursing home resident to consent to video surveillance. An additional concern is that the cost of video surveillance will burden residents and their families; however, the author argues that nursing homes should be required to bear the cost. The author concludes by stating that if federal laws addressing video surveillance in nursing homes are carefully drafted, legislators can evade the potential pitfalls of video surveillance and improve the safety and the quality of life of nursing home residents.

## HISTORY & CULTURE

Symposium, *Subversive Legacies,* 12 TEX. J WOMEN & L. 197 (2003).

This symposium addresses important Supreme Court decisions in the areas of employment, institutional equality, and sexual harassment. The speakers discuss the extent to which these decisions have contributed to equal rights for women. A majority of the speakers maintain that although these decisions initially expanded women's rights, many are now dated and largely irrelevant to the goals of contemporary feminists. The speakers highlight a number of problems facing contemporary feminists, including: stereotypical notions of sexuality; limited economic capacity and class status in the workplace; and feminism's obfuscation of related societal inequalities. This symposium concludes with a statement urging feminists to account for all of these factors, so that they may be better equipped to face new challenges.

Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131 (2003).

Historically, nominations to the federal bench were granted to individuals based on political patronage and senatorial prerogative. The author praises President Jimmy Carter's groundbreaking efforts to halt this practice by committing to make the judicial bench better reflect the gender and cultural diversity of America. Carter's efforts resulted in the appointment of five times as many women to the bench as all his predecessors combined. Despite these statistics, the author suggests that Carter's efforts were not as successful as he or his progressive staff would have desired. However, by prioritizing his desire to diversify the bench, Carter's actions made it unfeasible for subsequent presidents to revert to the traditional basis through which presidents filled judicial vacancies.

Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004).

In the 1960's, advocates concerned with the state of women's legal rights were divided in a dispute over whether their goal of equal justice under the law would best be served through the Equal Rights Amendment (ERA) or through judicial interpretation of the Fourteenth Amendment. Pauli Murray, a civil rights attorney, influenced many people with her strategy of amendment advocacy and litigation. Her intersectional perspective propounded the simultaneous pursuit of constitutional change through formal amendment and judicial reinterpretation. The author argues that the strategy ultimately achieved only a partial triumph. Encouraging the Supreme Court to adopt a heightened standard of review for sex-based classifications and the adoption of an intersectional perspective failed to garner the strict scrutiny standard legal feminists sought.

Frances Raday, *Culture, Religion and Gender*, INT'L J. CONST. L. (2003).

The article explores how culture, religion and gender intersect in the arena of international and human rights law. Specifically, the author seeks a solution to the problem of equal rights for women conflicting with cultural practices and religious norms. The author explores various cultures and religions and finds that generally an inherent patriarchy works to stifle women. The author explores various international cases and finds that although judges have attempted to create gender equality, many governments have not supported equal rights for women or have been slow to support such rights. The author concludes that courts and governments must work together to secure rights for women, in spite of deep rooted cultural and religious practices that promote patriarchy.

Sasha Ross, *Daughters of Abraham: Feminist Thought in Judaism, Christianity and Islam*, 45 J. CHURCH & ST. 812 (2003).

This article discusses the overlap between the social and the religious readings of Judaism, Christianity, and Islam, and the view that prejudice towards women is both normative and divinely ordained. Rather than addressing the denominational differences between the three religions, the author focuses on the interplay between doctrinal obstacles and the difficulties women face regarding their families, careers, and faith. The interpretive debate concerning Abraham's actions toward Hagar is used to illustrate how women can speak out against the confines of religion that had previously rendered them silent. The author promotes the development of a feminist theology to counterbalance current theology and to liberate both women and men from sexist ideology and practice.

## INTERNATIONAL & HUMAN RIGHTS LAW

Theresa Barone, Note, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L & COMP. L.J. 579 (2003).

Recent government and media attention has brought to the forefront the problem of human trafficking that victimizes men, women, and children. To combat such trafficking, the United States Congress enacted the Trafficking Victims Protection Act of 2000 that provides remedies for trafficking victims and punishes traffickers. However, the author explains that the effectiveness of the Act is still unproven. The most flawed aspect of the Act is the incomplete definition of trafficking that limits its usefulness to victims, while its most promising aspect is the provision for immigration reform and education, which facilitates victims' escape from the world of trafficking. The author concludes that resolving this complex global problem will take additional time and require the cooperation of both local and international authorities.

Hiram E. Chodosh, *International Crimes Against Women: An Introduction*, 34 CASE W. RES. J. INT'L L. 259 (2002).

This article analyzes the opinions of leading human rights experts regarding crimes against women. The author explores the role that the law can play in eliminating gender-based crimes, such as female infanticide and genital mutilation. The author suggests prosecuting rape as a war crime in international criminal courts and criticizes law enforcement for criminalizing women who are the victims of forced prostitution. Furthermore, the author condemns the Bush administration for failing to ratify the Convention on the Elimination of All forms of Discrimination

Against Women (CEDAW). The author concludes that a deeper understanding of the root causes of crimes against women is needed to reduce gender-based offenses.

*See* Hirsch, *supra* Domestic Violence.

Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263 (2002).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the first international convention to address women's rights in a comprehensive manner, was adopted by the United Nations in December 1979. As of the writing of this article, the United States remains one of only nineteen United Nations members yet to have ratified CEDAW. By not ratifying the treaty, the United States jeopardizes its ability to be a leader in the area of international human rights. Nations that ratify the treaty are merely making a commitment to take the appropriate steps to eradicate discrimination against women. The author concludes that the United States must ratify CEDAW in order to prove it seriously committed to women's rights.

Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT'L L. 305 (2002).

Throughout history rape has always been a part of war, but it was not until 1993, with the creation of the International Criminal Tribunal (ICT), that rape in a time of war became an international priority. The ICT was created for the specific purpose of dealing with war crimes in the Balkans, including rape and other gender crimes. This change was the direct result of the work of non-governmental organizations and the media to record and publicize the stories of victims. While the Tribunal was not able to hold all of the perpetrators accountable, three men were convicted and sentenced for rape. The author hopes that other countries will establish similar tribunals when the ad hoc tribunals are disbanded.

Alastair Nicholson & Margaret Harrison, *Specialist But Not Unified: The Family Court of Australia,* 37 FAM. L.Q. 441 (2003).

Australia's Family Law Act of 1975 established a specialized federal court system in order to deal exclusively with private family law disputes. The system does not have jurisdiction over criminal offenses committed by or against children, child protection issues (aside from those raised by one parent against the other), or adoption matters, all of which are heard in the state and territory courts. Since its inception, Australia's family court has emphasized the crucial role that counseling plays in the dispute resolution process, due to the emotional nature of the familial

conflicts. If a case does ultimately go before a judge, the environment will be less formal than a typical courtroom setting and counselors will be available afterward to assist the family in performing its court-ordered duties. The authors applaud the steps being taken to coordinate the Commonwealth's family law system with the non-uniform state and territory child protection systems, while they disapprove of the current trend of placing greater emphasis on parental, as opposed to children's, rights.

*See* Raday, *supra* History & Culture.

Beate Rudolf, *European Court of Human Rights: Legal Status of Postoperative Transsexuals*, 1 INT'L J. CONST. L. 716 (2003).

In the United Kingdom, two landmark cases demonstrate that the failure to legally recognize a postoperative transsexual as a member of his or her new sex has infringed on their marriage and privacy rights. For the purpose of marriage, a person's gender identity is fixed by their birth certificate. The birth certificate is based on biological criteria at birth, and this document is not updated after such person undergoes gender-reassignment surgery. The author argues that this practice promotes discrimination and harassment from employers, to whom many individuals would not otherwise disclose this information. This practice also precludes postoperative transsexuals from marrying an individual of the opposite sex. The author suggests that the birth register should make an exception for postoperative transsexuals and adjust their birth records.

Barbara Stark, *Crazy Jane Talks With the Bishop: Abortion in China, Germany, South Africa, and International Human Rights Law*, 12 TEXAS J. WOMEN & L. 287 (2003).

The author discusses the difficulty in creating universal standards for women's rights by examining the issue of women's reproductive rights in South Africa, China, and Germany over the past twenty years. Generally speaking, these three countries' abortion laws have undergone significant reform in the last decade. However, at the root of each nation's policies are different and often contradictory social and political values. The author contends that the inability to agree on a universal standard is a reflection of the competing values of national governments and their constituents. Accordingly, the author concludes that less drastic proposals for expanding women's rights would allow for consensus building among such nations.

Martina Vandenberg, *Complicity, Corruption, and Human Rights: Trafficking in Human Beings*, 34 CASE W. RES. J. INT'L L. 323 (2002).

Human Rights Watch has documented the stories of women all over the world who have been bought, sold and forced by their purchasers to work until they have paid off their so-called debt, which is the cost of their own purchase. These debts are never paid off because the victim's captors continuously increase this debt by charging high rates for necessities such as room and board. Often, if the victims of trafficking are discovered by the authorities, they are prosecuted for not having proper papers and performing illegal acts—e.g., prostitution—while the traffickers enjoy impunity. This paradox is often the result of police corruption. The author highlights the progress that has been made to halt such abuses, including the United States' passage of The Victims of Trafficking and Violence Protection Act of 2000 and, in Eastern Europe and Russia, the formation of a network of anti-trafficking organizations named La Strada.

## MARRIAGE

David L. Chambers, *For Ira Ellman: One More Reason "Why Making Family Law Is Hard,"* 35 ARIZ. ST. L.J. 719 (2003).

This article reinforces the thesis of American Law Institute (ALI) reporter Ira Ellman that making family law is difficult. The author agrees with Ellman's statement that the unpredictability of family members' behavior makes rules governing disputes in this area difficult. However, the author submits that the difficulty is also due in part to the strong, subjective views held by lawmakers. According to the author, differences in religion, morals, values, and gender make consensus in this area of law virtually impossible. The author concludes that the simple, coherent set of family law recommendations set forth by Ellman and the ALI are fair to both men and women.

Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403 (2003).

Two critical challenges have faced the family courts over the past twenty years. Firstly, social changes have created a demand for the court to resolve a broadening range of issues, leading to the creation of unified family courts. Second, an increasing number of pro se litigants have come before the courts. The author believes pro se litigants must have access to legal and procedural information if the courts are to effectively manage and protect their constitutional rights. The author uses the California family courts as an example of a judiciary that has instituted reforms and programs specifically designed for pro se litigants. Additionally, the author contends that the services provided by these program

reforms generate cost benefits for the judicial system.

Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication,* 37 FAM. L.Q. 381 (2003).

This article focuses on the treatment of delinquency within the Family Courts, ranging from the first children's court in late 19th century Chicago to the unified family courts of today. Specifically, the author examines the court's changing approach towards delinquents, from the rehabilitative philosophy of the early family courts to the more prosecutorial approach of juvenile proceedings in recent decades. Despite this paradigm shift, the author argues that the unified family court approach, reminiscent of the early conception of the family court, remains the most effective approach to dealing with delinquency. To this end, she explores the ways that various states have implemented unified family courts that are capable of providing a broad array of social and legal services. The author concludes that this structure allows judges the greatest degree of discretion in handling youthful offenders, while still allowing judges to adequately maintain public safety.

Megan A. Drefchinski, Comment, *Out With the Old and In With the New: An Analysis of Illinois Maintenance Law Under the Uniform Marriage & Divorce Act and a Proposal for Its Replacement,* 23 N. ILL. U. L. REV. 581 (2003).

The maintenance law provisions under the Uniform Marriage and Divorce Act have left many in the legal profession dissatisfied. This comment surveys some of the major problems of current maintenance law provisions: low-income women being denied maintenance because they do not meet a minimum income threshold; calculation of maintenance awards that do not take the husband's contributions to the marriage into consideration; and courts having overly wide discretion under the maintenance provisions, leading to fewer settlements and increased frustration among divorced couples. The author argues that the only solution to these problems is to replace the old maintenance law provisions. After reviewing theories about how and why maintenance should be awarded, the author formulates her own maintenance law provisions which address the criticisms of the current laws. These provisions attempt to advance each party's interests while remaining fair and practical.

Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699 (2003).

The author explores difficulties with developing child custody and alimony laws and states that it is difficult to create laws regarding an individual's role in a family that serve both instrumental and fairness rationales. Difficulties in serving an instrumental rationale stem from tension between family privacy and regulations that enhance family values and the minor impact the law has on an individual's choices, in comparison to other non-legal factors. Difficulties in serving a fairness rationale stem from balancing a judge's discretion to make decisions specific to the best interests in a given case while administering a clear and consistent rule. The author concludes by stating that despite these inherent difficulties in creating family law, the importance of ensuring fair outcomes for individuals cannot be overstated.

Jeremy A.M. Evans, *Speech, Spouses and Standing: Is There Standing to Sue When Sanctions Threatened Against One's Spouse Chill Protected Expansion?*, 45 B.C. L. REV. 147 (2003)

The author posits the question: Does a legally cognizable injury occur when a public employee's spouse forgoes speech protected by the First Amendment for fear of employment-related sanctions against his or her spouse? The circuit courts are split as to whether such an injury provides the standing necessary to appear in federal court. The author examines the two tests the courts apply to determine whether the injury is sufficient to provide standing: the independent injury test and the objectively reasonable test. After examining the two tests, the author contends that they are both inadequate. Instead, the author contends that an individual should have standing whenever government action forces one to make the intolerably difficult choice of whether to engage in protected expression when a spouse may suffer harm as a result.

Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

The authors state that it is a common folly of legal scholars to limit discussions of legal rules surrounding marital property to the context of divorce. This article focuses on developing a new approach to marital property under the lens of the ongoing marriage. The authors' primary assertion is that by adopting an ideal of marriage as an egalitarian liberal community, certain conceptions of community, autonomy, and equality become complimentary to one another. The first part of the article focuses on the rules regarding the exit from marriage while the second part addresses rules regarding the property relationship between spouses. It is intended that this altered approach will reshape the way society views marriage in relation to divorce.

Judith H. Fuller, *Remove the Requirement for Premarital Testing for Syphilis Prior to the Issuance of a Marriage License*, 20 GA. ST. U. L. REV. 126 (2003).

Following World War II, a syphilis outbreak motivated the Georgia General Assembly to take action to thwart the transmission of congenital syphilis via premarital blood testing. Subsequently, the General Assembly enacted legislation in 1949 aiming to alert and treat those infected to thwart disease transmission. However, the author discusses how this legislation became antiquated and ineffectual as of 2003 due to changing demographics, limited test results, and the efficacy of national sexually transmitted disease control programs. The author maintains that Georgia and many other states have successfully transitioned away from premarital focused legislation to prenatal focused legislation. In many states, the transition has resulted in net savings and improved syphilis detection rates.

Judith D. Moran, *Judicial Independence in Family Courts: Beyond the Dichotomy*, 37 FAM. L.Q. 361 (2003).

The author examines the issue of judicial independence in the family courts, and the factors that compromise and influence such independence. These factors include the political effects of the judicial appointment process, the breadth of the court's jurisdiction, increased scrutiny of the court's rulings, and concerns regarding the public's confidence in the court. The author opines that any remedial measure taken to ensure continued judicial independence must address each of these issues directly. The author advocates implementation of a rigorous qualification standard for family court judges, diversification of judges and court staff, and on-going training for family court judges.

Nehal A. Patel, Note, *The State's Perpetual Protection of Adultery: Examining* Koestler v. Pollard *and Wisconsin's Faded Adultery Torts,* 2003 WIS. L. REV. 1013 (2003).

This note examines the case of *Koestler v. Pollard*, which involved a husband who found out, after a decade of marriage, that the daughter he had raised as his own was the biological child of a man with whom his wife had an extramarital affair. This information devastated the plaintiff, who sued the man for the tort of intentional infliction of emotional distress (IIED). The Wisconsin Supreme Court rejected his case, effectively barring adultery-based IIED claims. The author explains that historically, the wronged spouse could bring an action in the form of an amatory tort until the mid-twentieth century. The amatory tort was abolished for reasons including the potential for extortion, blackmail, sexism, and the notion that courts should not be involved in such private matters. The author contends that IIED imposes a higher standard than the prior amatory tort, requiring intentional or reckless conduct that is outrageous in nature, causing severe distress to the

victimized spouse. The author argues there is no reason not to allow a legal remedy simply because the suffering occurred in a marital context.

William L. Prosser, *Ellman's "Why Making Family Law is Hard:" Additional Reflections*, 35 ARIZ. ST. L.J. 723 (2003).

The author addresses American Law Institute (ALI) reporter Ira Ellman's presentation on the difficulties of creating family law. This article contrasts the principles system of marital law published by the ALI with the rule based system of the Uniform Marriage and Divorce Act. Using a prenuptial agreement dispute as a starting point, the author examines possible outcomes under each system. The author states that while rules can be useful in allocating finances upon divorce, they do not allow judges to mold their rulings to fit specific circumstances. Although the author holds the ALI's chapter on prenuptial agreements in high regard, he fears it may soon become obsolete as the cultural dynamics of marital relationships and divorce shift.

Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425 (2003).

This article focuses on mediation as an alternative to the traditional methods of marriage dissolution. The author notes that because almost half of American marriages end in divorce, mediation should be a viable alternative to the financial and emotional strain of divorce. There is a general consensus that non-lawyer mediators should be used, and that mediation is not appropriate when there is a history of domestic violence. The author states that mediators must have an acute understanding of the power imbalances between men and women that are inherent in many marriages. Additionally, the author calls for a comprehensive code of ethics and standards to prove that divorce mediation is a strong and viable alternative to the traditional adversarial model of divorce.

Lee F. Satterfield, *The New District of Columbia Family Court—Only the Beginning*, 37 FAM. L.Q. 431 (2003).

The author provides a summary of the changes in the District of Columbia Family Court since the passage of the District of Columbia Family Court Act of 2001 (Act). The Act was prompted by the case of a twenty-three month old foster-child who died shortly after being reunited with her mother. The tragedy was highly publicized and drew harsh criticism of the system. The author describes the practices and problems of the family court division that influenced Congress in drafting the Act, the passage of the Act, and the reforming effects it has had on the District of Columbia Family Court. The author argues that for the court to fulfill its

mission of supporting children and families in an expeditious and fair manner, it is the responsibility of the parents and community to play a role in the resolution of the community's problems.

Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333 (2003).

The authors survey the unified family courts in eighteen jurisdictions. Their goal is to establish a benchmark for further study of the development of unified family courts. The key challenge identified by the authors is the need to determine the range of services the unified family courts will provide and how to provide these services in the midst of budgetary constraints. Despite differences in the services rendered by the unified family courts, they all share the mission of using mediation to resolve family disputes across a broad range of subject-matter cases. Most of the jurisdictions implementing the unified family court system follow the one judge/one family model, which the authors characterize as driven by efficiency and therapeutic justice. The authors conclude by stating that the unified family court is becoming the new standard as the judicial system continues to move towards providing both legal and social services.

## PARENTING

Susan Ayres, *Minor Rights? Youth Navigated Legal Processes*, 15 HASTINGS WOMEN'S. L.J. 39 (2004).

Cases of mothers committing infanticide are shockingly more common than we might expect, with perhaps as many as two killings per day in the United States. Despite this frequency, the author believes that our conception of mothers who commit infanticide is flawed, the result of a simplistic and biased construction of motherhood. The author argues that infanticide laws should account for the individual life experiences of these mothers. Without entirely removing blame from these mothers, the author suggests that courts and media need to expand their perception of the varieties of maternal experience with the aid of literature, proffering Toni Morrison's novel, *Beloved*, as an example.

Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003).

The author rejects the blanket condemnation against the commodification of parental rights. The author's stance is based upon the general acceptance of monetary transactions that routinely occur in adoption, surrogacy, and other markets involving reproductive technologies. The author focuses on alternative insemination to articulate the often-ignored benefits of a relatively unregulated parenthood market. These benefits, in the author's view, outweigh public concerns regarding eugenics, access, anonymity and objectification. According to the author, the free market facilitates the formation of new familial structures by making parenthood available to more people, namely singles and homosexuals, who would otherwise be denied the opportunity of parenthood. The author embraces a new theory of commodification that accounts for both the positive and negative implications of parenthood markets.

Michele R. Forte, Note, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193 (2003).

This article focuses upon the effective assistance of counsel in proceedings regarding involuntary termination of parental rights. Contrary to the author's position, the Supreme Court of Florida ruled that the statutory right to court-appointed counsel in dependency proceedings does not include the right to effective assistance of the appointed attorney. The author takes the position that providing ineffective counsel with no remedy may serve to hinder faith in America's justice system, harm individual state's economic interests, and raise due process implications. The author advocates for individual states and the United States Supreme Court to adopt a position that guarantees the right to effective assistance of counsel when parental rights are in jeopardy.

Risa Garon & Judge Cypert Whitfill, *A Mental-Health Professional and Judge's Journey: Providing Responsible Parenting, Giving Children a Voice,* 37 FAM. L.Q. 459 (2003).

This article addresses the need for a more child-centered, less litigious means of resolving parental custody disputes, from both a psychological and a judicial perspective. The authors claim that professionals working in family law, regardless of their particular discipline, are often lacking in formal education pertaining to children's developmental and emotional needs, and are therefore ill equipped to gauge a child's best interests. The authors explain how this lack of awareness led to the creation of the National Family Resiliency Center (NFRC), which educates parents, attorneys, mediators and judges, enabling them to work together, alongside

members of the religious, educational and medical communities. The authors believe that by removing bureaucratic steps from the process and replacing them with investigatory social work, the adversarial climate within child custody proceedings will diminish, leading to outcomes that are better aligned with the best interests of the child.

Philip M. Gentry, *Damages to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671 (2003).

This article surveys the statistics relating to incarcerated parents and focuses on the negative effects parental incarceration can have on children. The author found that the average age of children with incarcerated parents was eight years old, the affected children were largely minorities, the number of incarcerated parents doubled from 1991 to 1999, and the total number of children with at least one incarcerated parent increased from 936,000 in 1991 to 1.5 million in 1999. As the author highlights, incarceration sharply limits the communications between children and their parents, thereby weakening familial relationships. The author concludes by stating that the legal culture must be changed so that alternatives to incarceration exist and the role of a parent is taken into account during sentencing.

Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 ST. MARY'S L.J. 421 (2004).

Child support programs nationwide are having difficulty recovering even a fraction of the financial support children need from their biological parents. The author explores the history of the paternity process in Texas, illustrating that in response to federal incentives, which give states child support money in proportion to the number of paternity establishments they make, Texas allows almost anyone who works in a state birthing center to obtain a man's signature on an Acknowledgment of Paternity (AOP). The author underscores that due to the aggressive paternity establishment methods in Texas, men are signing and thus being bound to these agreements without undergoing genetic testing to ensure they are in fact the biological fathers. The author concludes that given the long-term legal and financial implications of fatherhood, Texas should implement a reasonable waiting period and advise a potential father to seek legal counsel before he signs an AOP.

Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29 (2003).

Society has a strong interest in establishing paternity, both for the sake of the child and the father. The author examines the various ways in which the legal system and government establish paternity. The author points out that while a man may be the genetic father of a child, there are many aspects to fatherhood beyond biology. The author contends that that the concept of paternity is more complex than the Anglo-American legal system appreciates, encompassing moral and psychological issues that bond a father and child. The author concludes that courts must consider these various issues when defining paternity, instead of relying solely upon DNA testing.

Mae Kuykendall, *Liberty in a Divided and Experimental Culture: Respecting Choice and Enforcing Connection in the American Family*, 12 UCLA WOMEN'S L.J. 251 (2003).

As the definition of family in America has evolved to include same-sex couples and their children, as well as children living with their uncles and aunts, the law has failed to adapt to the ever changing relationships that exist in the modern family. The author argues that the legal system has not adequately adapted to contemporary family structures, to the detriment of the children who are brought up in these situations. The author suggests that the legal system must create a new paradigm to properly align itself with the ways in which adults choose to raise their families. Ultimately, the author believes that this area of the law must be imaginative, experimental, and open for change in order to serve children effectively.

*See* Rosenbaum, *supra* Education.

Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176 (2004).

In an effort to improve the child welfare system, the Adoption and Safe Families Act (ASFA) developed a federal timeline to insure that no child lingers in foster care for an extended period of time. The author believes that the implementation of the fifteen/twenty-two month rule, which states that parental rights terminate automatically once a child has remained in foster care for a proscribed time, is too rigid and does not establish the level of parental fault necessary for terminating a mother's right to her child. Given that parental problems, such as substance abuse, imprisonment, and domestic violence cannot be

resolved in the statutory time period, ASFA does not allow for the courts to consider each particular child's experience. The author concludes that the legal grounds for termination of parental rights under the fifteen/twenty-two month rule often needlessly sever the relationship of a mother and child, and, accordingly, the rule should be made more flexible.

Naomi S. Stern, *The Challenges of Parental Leave Reforms for French and American Women: A Call for a Revised Feminist-Socialist Theory*, 28 VT. L. REV. 321 (2004).

In this article, the author compares the French and American systems of child-centered and family-centered supports; specifically, parental leave from employment. Employers in France are required to provide maternity leave, which is thereby mandatory for female employees. In contrast, maternity leave in the United States is not compulsory. Furthermore, the author points out that while France has separate laws that govern maternity and parental leave, the United States has a single statute—the Family Medical Leave Act (FMLA)—that governs both. According to the author, there are inequities inherent in each country's system: the gender-based protections of the French laws threaten to perpetuate discrimination and subordination of women, while the FMLA perpetuates gender-based capitalism on both men and women. The author's proposed solution is a revival of a social-feminist theory to address the implications of economic class divisions among women in society.

Richard F. Storrow & Sandra Martinez, *"Special Weight" for Best Interests Minors in the New Era of Parental Autonomy*, 2003 WIS. L. REV. 789 (2003).

The authors state that family law must be flexible in order to best serve the interests of modern families. For example, a minor's right to an abortion is conditioned on the minor notifying a parent. These statutes must allow for a bypass of parental permission under the following circumstances, known as Bellotti II bypass criteria: a showing of the minor's maturity and understanding, a showing that abortion would be in the minor's best interest, or a showing that seeking consent would put the minor at risk for abuse. The authors conclude that the judiciary's recognition of parental bypass procedures illustrates that the judiciary is cognizant of the changing nature of modern family life.

## PORNOGRAPHY

Timothy J. Perla, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U. L. REV. 1209 (2004).

Digital child pornography and virtual child pornography are both stored in computers. However, digital child pornography is created by recording minors on film, while virtual child pornography is created by computer generated images—actual minors are not used to make it. The major problem with enforcing anti-child pornography laws is that advanced technology makes digital and virtual child pornography indistinguishable. Congress criminalized possession of virtual child pornography by enacting the Child Pornography Prevention Act in 1996, but the Supreme Court invalidated the statute in 2002 on First Amendment grounds. Congress again criminalized possession of virtual child pornography by enacting the Child Obscenity and Pornography Prevention Act of 2003 (COPPA) and the Supreme Court has not yet tested its constitutionality. The author concludes that COPPA is ineffective and, in the alternative, suggests prosecuting perpetrators for the crime of attempted possession of digital pornography.

## RELIGION

*See* Raday, *supra* History & Culture.

*See* Ross, *supra* History & Culture.

Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion,* 27 FORDHAM INT'L L.J. 225 (2003).

This article explores the historical treatment of women in Islamic Shari'ah courts as a viable system for addressing women's rights. The author argues that the majority view, which regards Western law as a greater champion of women's rights, mischaracterizes the role and structure of the historic Shari'ah courts. The decentralized nature of the courts allowed judges, known as qadis, to decide each case on its own merits rather than rely on a strict adherence to precedent. A study of court records reveals that a large cross section of Islamic society show little hesitation in bringing a variety of problems to the qadi. Only after the introduction of Western influences did women and their families become more reluctant to bring their problems to the public sphere.

*See* Wah, *supra* Custody, Visitation & Divorce.

## REPRODUCTIVE RIGHTS

Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction? The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685 (2003).

This article focuses on collateral sanctions, disabilities that accompany conviction, and how these sanctions should be defined. When sanctions are defined as criminal penalties, the constitutional protections that go along with them—e.g., double jeopardy—are applicable, whereas these protections are unavailable if the penalty is defined as a civil punishment. The author concludes that whether a sanction is criminal or civil should depend on if the sanction is imposed because of conduct or conviction.

Jonathan Dyer Stanley, Note, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn: An Argument for a Special Standard*, 56 VAND. L. REV. 1523 (2003).

The incidence of fetal surgery continues to grow with advances in medical techniques and a rise in the number of doctors willing and able to perform these complicated and dangerous operations. The legal community must evaluate both the duty of care that a surgeon owes to a unborn fetus along with the ability for a family to recover when the surgeon's negligence causes termination of a fetus. The author argues that families should be allowed to recover for the wrongful death of a fetus and believes that a separate standard for recovery is necessary in cases where a doctor chooses to operate on the fetus with no intention of saving the life of the mother.

Gregory J. Roden, *Roe v. Wade and the Common Law: Denying the Blessings of Liberty to our Posterity*, 35 UWLA L. REV. 212 (2003).

In this article, the author voices his objections to the Supreme Court's decision and methodology in *Roe v. Wade*. The author examines and critiques Justice Blackmun's opinion and explores the history of English, state, and federal common law to refute the assertion that abortion was not a criminal act per the common law. Furthermore, the author contends that *Roe*, by hindering states' ability to enforce common law crimes, violates the Fourteenth Amendment. The author then goes on to explore the history and evolution of fetal rights in the United States. Ultimately, the author concludes that *Roe* and its progeny are unconstitutional and should be overturned.

Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57 (2004).

This article addresses the concern that as Assisted Reproductive Technology (ART) becomes the fastest growing area of medicine, the emotional and physical risks to the children created with the assistance of ART are likely to increase. According to the author, federal regulation does not control ART in any meaningful way, leaving such reproduction virtually unregulated. The author illustrates that conflicts between the intended parents' and fertility doctor's interests jeopardize whether ART is conducted in a safe and ethical manner. The author argues for a moratorium on human reproductive cloning and the creation of an agency that would oversee ART to address these issues.

Kate Spota, Note, *In Good Conscience: The Legal Trend to Include Prescription Contraceptives in Employer Insurance Plans and Catholic Charities' "Conscience Clause" Objection*, 52 CATH. U. L. REV. 1081 (2003).

This note analyzes religious exemptions from the Title VII mandate that employers must provide access to birth control pills to all employees. The author describes the history behind the competing claims of religious freedom and reproductive freedom advanced by both sides of the birth control debate. The author then examines a recent California Court of Appeals decision holding that a Catholic charity could not refuse to provide access to birth control because of the Catholic Church's objections to such medicine. Finally, the author discusses the broader social implications of the California Court's decision.

## SEX CRIMES

Nora V. Demleitner, *Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621 (2003).

This article focuses on civil commitment for sexual predators after they have served their criminal sentence. The author first looks at the United States' approach to the control of sexual offenders, focusing on the Supreme Court decision in *Hendricks v. Kansas*, which classified a Kansas law allowing detention of sexual offenders after their criminal sentence as civil, thereby circumventing the prohibition against double jeopardy. The author then details *Sicherungsverwahrung*, confinement based on security concerns, as a better option than civil commitment. The author suggests a scheme based on the concept of *Sicherungsverwahrung*, where sanctions are risk-based and individualized, thereby

assuring proportionality and public safety without sacrificing an individual's liberties.

Amanda C. Graeber, Note, McKune v. Lile *and the Constriction of Constitutional Protections for Sexual Offenders*, 23 REV. LITIG. 137 (2004).

This note describes the lack of constitutional protections afforded to sexual offenders under rehabilitative sex-offender treatment programs. The Kansas Sexual Abuse Treatment Program (SATP) requires the disclosure of offenders' past sexual history to the local authorities in order to provide rehabilitation services and protect public safety. In *McKune v. Lile*, the Supreme Court ruled Kansas' SATP was constitutional, and that it did not infringe on the Fifth Amendment right to immunity. The author asserts that although the Court's holding responds to the high recidivism rates and dangers posed by sex offenders, it ignores potential infringements upon their constitutional rights. The author suggests that more research is required to create laws targeting sexual offenders, in order to ensure that their constitutional rights are respected.

Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277 (2002).

The author states that rape is considered an inevitable companion of war, although it has been historically overlooked by international military tribunals. The United Nations Tribunals of the former Yugoslavia and Rwanda have made great progress in prosecuting gender crimes. Thanks to the work of human rights organizations, progress has been made to collect the stories of victims and raise awareness of gender crimes. The legal community of the United States and other democratic nations can now continue the work that was begun by those tribunals and hold military personnel who commit rape and other gender crimes during war accountable for their actions.

*See* Kuo, *supra* International & Human Rights Law.

*See* Merry, *supra* Domestic Violence.

Janet Philibosian, Comment, *Homework Assignment: The Proper Interpretation of the Standard for Institutional Liability If We Are to Protect Students in Cases of Sexual Harassment by Teachers*, 33 SW. U. L. REV. 95 (2003).

Sexual harassment by school employees is a complex issue because of the psychological impact it has on students who are victimized by the adults they trust. The Supreme Court, in *Gebser v. Lago Vista Independent School District*, found that students have an implied private right of action under Title IX to recover monetary damages from schools for teacher's sexual harassment violations. Until the *Gebser* decision, however, the notice standard for institutional liability was a source of confusion among the lower courts, varying from actual knowledge to constructive notice to strict liability. In *Gebser*, the Supreme Court determined that actual knowledge and deliberate indifference on the part of the schools is required to establish liability under Title IX. The author concludes that lower courts should adopt a broad and reasonable interpretation of *Gebser* to prevent institutions from insulating themselves against liability and to ensure that children have legal recourse.

Nathaniel E. Plucker, Note, *Debating the End of the World and Other Pointless Endeavors:* Thomas v. State *and the Civil Commitment of Sex Offenders in Missouri after* Kansas v. Crane, 47 ST. LOUIS U. L.J. 1151 (2003).

Public fear and the societal perception of sexually violent offenders as a continuing threat to women and children have fueled the impetus for increasing legislation against sex offenders at the expense of procedural safeguards and constitutional rights. Of specific concern to the author is the trend toward civil commitment of convicted sex offenders, primarily justified by unclear empirical evidence concerning the risk of recidivism and the assumption that habitual sex offenders suffer from a treatable mental illness. The author contends that civil commitment is a byproduct of the United States' criminal justice system, which emphasizes punishment over rehabilitation.

Izabelle Barraquiel Reyes, Comment, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN'S L.J. 355 (2003).

The author examines the sentencing schemes employed in jurisdictions across the United States to convict defendants accused of rape. She concludes that despite rape law reform, social attitudes about rape and significant judicial discretion underlie the unjustly short sentences issued to rapists. This comment provides statistics showing that of the three sentencing schemes: indeterminate sentencing, advisory guidelines, and mandatory guidelines, only the latter eliminates the

disparity in sentencing. Ultimately, the author advocates for creating mandatory sentencing guidelines, educating the judiciary, and attempting to change negative social attitudes regarding rape victims.

Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003).

Current rape law recognizes physical force as abrogating a victim's free will, while excluding non-physical, coercive behaviors that can compel sex. Analogous to penalties for non-physical coercion in contract law, the author argues for expansion of the criminal definition of rape to include the use of non-physical forms of coercion. The author argues that the law must include non-physical coercion to fully realize the intricacies of rape cases and to avoid the numerous acquittals that occur under current force-based standards.

Patricia Visseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287 (2002).

Article 53 of the Vienna Convention defines peremptory norms as laws that are universal, such as the prohibition of torture, genocide, and slavery. No state can engage in the conduct prohibited by peremptory norms and all states must punish those that do. Rape is outlawed by many of the international conventions, prohibited domestically in all countries and, in certain instances, considered a form of torture, genocide, and slavery. However, the author states that while the international prosecution of rape has made great progress over the last decade, it is still not considered a peremptory norm as defined by Article 53 of the Vienna Convention.

## SEXUAL IDENTITY

Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power To Vindicate The Moral Sentiments of the People*, 39 TUL. L. REV. 95 (2003).

The author discusses the Supreme Court's decision in *Lawrence v. Texas*, in which the Court declared sodomy laws as applied to consensual adult sex in private places unconstitutional. This effectively overturned the 1986 case of *Bowers v. Hardwick,* in which the Court declared prohibitions against sodomy between consensual adults constitutional. The author traces the history of United States sodomy laws, enacted to curb homosexual acts and homosexuality among the US population. The Court could have used the transformation and liberalization of American culture, but instead relied on a rational basis analysis to overrule *Bowers*. Consequently, the Court did not address whether the rights impinged upon were

fundamental. As a result, the author concludes that *Lawrence* provides weak legal precedent for advocates of gay rights.

Felicia Duncan, Comment, *Sexual Orientation Discrimination—A Cause of Action For Sexual Orientation Against the City of Detroit Is Barred by the Governmental Tort Liability Act,* 81 U. DET. MERCY L. REV. 135 (2003).

This comment examines the case of *Mack v. City of Detroit. Mack* concerned a female police officer who was sexually harassed by a male supervisor, scheduled for undesirableassignments, and ultimately ignored when she complained of this treatment because of her status as a lesbian. The city of Detroit's charter includes a commitment to secure equal protection for all individuals. The author explains the principal issue raised in *Mack* iswhether the city charter creates a private cause of action for sexual discrimination. Additionally, the court discussed whether the Governmental Tort Liability Act (GTLA) precluded such action. The court ultimately barred the police officer's ability to bring a sexual orientation discrimination suit against her employer because GTLA bars bringing such a claim against a governmental agency.

Sunish Gulati, Note, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177 (2003).

This note focuses on the precarious legal position of those who do not conform to a particular gender stereotype via their behavior, appearance, demeanor, or choice of partners. The people most often affected include transsexuals, transvestites, cross-dressers, lesbians, and gay men. The author argues that those who do not fit into society's preconceived notions of gender identity are vulnerable to discrimination based on sex-based stereotypes. The author concludes that these preconceived notions of gender identity are unjustified and even dangerous, as they influence courts' analysis of sex discrimination claims. Although courts typically analyze sex discrimination on the basis of a victim's genitalia, they should instead shift the focus of their analysis to sex-based stereotypes.

Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J. L. & FEMINISM 1 (2004).

In this article the author reviews the major privacy cases decided by the Supreme Court leading up to the decision in *Lawrence v. Texas* and asserts that the Court's trend toward restricting the scope of permissible government intrusion is promising. The author argues that the government should not have the authority to interfere with private adult activities, whether viewed as a right to liberty or privacy, and that *Lawrence* shifts the burden to the government to provide a legitimate reason for impinging liberty and privacy interests. The author concludes by stating that specific application of this heightened standard will depend upon individual court's preferences.

Dana Neacsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601 (2002).

This article focuses on the current state of sexual legal discourse. Hegel's theory of *ius personale* and its accompanying Marxist critique, along with Dworkin's theory of individual legal rights, are used to show how individual sexually-oriented rights can promote liberal social change. An analysis of obscenity laws and Megan's law shows that some sexually-oriented legislation can promote conservative social change. The author then posits the theory that Title VII actually promotes conservatism by eliminating sexuality from the workplace. The author concludes that the non-political nature of sexual legal discourse makes it useful for both conservatives and liberals to promote social change.

Justine D. Parker, Note, Rene v. MGM Grand: *A Step Toward Title VII Protection Against Discrimination Based on Sexual Orientation?* 36 CONN. L. REV. 275 (2003).

This note questions whether an employee should be permitted to make a claim for sexual harassment when alleging that the harassment occurred because of the employee's sexual orientation. Specifically, the author argues that sexual orientation discrimination has been largely ignored in the development of Title VII jurisprudence. Title VII had previously been held to only allow claims of sexual harassment that were based upon sexual attraction. However, the author advocates a view of sexual harassment based upon gender discrimination rather than sexual attraction. The author supports the decision reached by the Ninth Circuit in *Rene v. MGM Grand*, where the court held that same-sex sexual harassment and gender stereotyping are actionable under Title VII.

## WORKPLACE DISCRIMINATION & HARRASSMENT

Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act,* 35 COLUM. HUMAN RIGHTS L. REV. 113 (2003).

The 1974 amendment to the Fair Labor and Standards Act (FLSA) expanded the federal guaranty of a minimum wage and overtime compensation to include a wide range of domestic employees including, but not limited to, full-time nannies, home nurses and gardeners. At the same time, the amendment created an exemption for companionship services that has grown to encompass almost all personal service providers for the elderly and disabled in private homes. This note argues that overbroad interpretation of the exemption has grown well beyond the congressional intent of the 1974 amendment. The author urges the courts to reexamine the limits of the companion exemption in light of the vast expansion of the homecare field.

*See* Duncan, *supra* Sexual Identity.

Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform,* 72 FORDHAM L. REV. 659 (2003).

In this piece, the author explores the burgeoning field of anti-discrimination class-action suits filed by private actors under Title VII of the Civil Rights Act from a procedural and remedial point of view. Discrimination has moved beyond the overt actions that many Americans normally associate with intolerance and has instead become structural in nature. The author recaps the history of Title VII suits initiated by public and private actors and then explores current citizen-initiated Title VII suits as a means of examining institutional discrimination. After recognizing the drawbacks of the class-action model, particularly in addressing individualized claims, the author concludes that this litigation tool is one that can affect serious reform of workplace discrimination.

Daniel J.H. Greenwood, *Gendered Workers/Market Equality*, 12 TEX. J. WOMEN & L. 323 (2003).

The author posits that while feminism has succeeded in opening the marketplace to women, traditional gender roles still result in inequality. Male gender roles have remained rigid as females have entered the workplace; as a result, females have assumed traditionally male roles whereas males have resisted assuming roles traditionally assigned to females. This development has lead to a dearth of individuals who are willing to perform vital societal tasks—e.g., raising children and taking care of the elderly. The author concludes by stating that the

next step in eradicating gender inequality must be to liberate men in such a manner that they may assume roles traditionally assigned to females.

Lynda Hamilton, Book Review, *Horseplay or Harassment: A Continuing Problem in Same-Sex Discrimination*, 9 J. LEGAL STUD. BUS. 81 (2003).

Over the last decade, employers have increasingly struggled with the elimination of sexual harassment in the workplace. The courts have been vital in defining the behaviors that constitute sexual harassment, especially same-sex harassment, under Title VII of the 1964 Civil Rights Act. In 1998, the Supreme Court delivered a blow to employers by extending federal civil rights protection to claims of same-sex harassment, thereby resolving a split that existed among the circuit courts as to whether same-sex claims were viable under Title VII. Yet, this favorable resolution for employees leaves the circuits with the arduous task of distinguishing between actionable discrimination and same-sex behavior that is not discriminatory, the latter referred to as horseplay. The author concludes with the caveat that based on several Supreme Court holdings, employers should be forewarned that they must satisfy a burden of proof in order to escape liability in same-sex harassment suits for horseplay.

Joan McLeod Hemingway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEXAS J. WOMEN & L. 247 (2003).

The opportunity for selective enforcement of insider trading violations exists because of the vagueness of insider trading statutes, the numerous governmental agencies responsible for enforcing them, as well as the personal biases of those individuals responsible for deciding which cases should be litigated. The author uses Martha Stewart's recent trial to illustrate that the Securities and Exchange Commission (SEC) may have chosen to vigorously pursue her prosecution because of her fame, gender, and political beliefs. The author argues that the SEC must impose stricter standards to ensure insider trading data is collected reliably and corroborated, before launching an investigation based on specific data. In conclusion, the author states that the outcome of these reforms would be greater uniformity in enforcing insider trading violations, which would eliminate many of the biases inherent in the current system.

Sujata S. Menjoge, Comment, *Testing the Limits of Anti-Discrimination Law: How Employers' Use of Pre-employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326 (2003).

The use of psychological and personality tests in the hiring process remain largely unregulated, despite overly broad provisions of federal anti-discrimination laws, namely Title VII and the Americans with Disabilities Act (ADA), which create loopholes for employers to discriminate against job applicants who are members of protected groups. When employers administer tests that encompass intrusive questions about the employees' backgrounds, preferences, beliefs and perceptions, employers may easily circumvent provisions of anti-discrimination laws in three ways: (1) employers may probe for information that is otherwise prohibited in pre-employment interviews, (2) employers may eliminate candidates based on stereotypical traits related to protected groups, and (3) employers may administer standardized tests established on culturally-biased norms of a non-representative sample. The author contends that as the popularity of pre-employment tests escalates, the remedy to the situation lies with state governments' active regulation of specific protections to rectify the inadequacies of current federal law.

David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).

The author analyzed jury verdict reports in California employment law cases, and concluded that women and minorities are substantially disadvantaged in employment discrimination claims as a result of judicial and juror bias. In the article, the author argues that jurors are skeptical of discrimination claims by women and minorities because the substantive law, which is largely shaped by appellate judges who are white males, is dismissive of such claims. Furthermore, the author argues that juror bias against women and minorities in discrimination claims is increased by the social bias of the broader community, which blames racial inequality on minorities' lack of motivation. Finally, the author attacks the allegation that runaway juries award disproportionate judgments in employment discrimination cases.

*See* Stern, *supra* Parenting.

Joanna Stromberg, *Sexual Harassment: Discrimination or Tort*, 12 UCLA WOMEN'S L.J. 317 (2003).

Title VII is the principal statute used to redress sexual harassment claims in the workplace. The author argues that utilizing Title VII providesadvantages to filing tort law claims of sexual harassment. However, the author states that Title VII is not ideal for pursuing claims of workplace sexual harassment. Furthermore, the author suggests that that sexual harassment does not necessarily fit into the rubric of employment discrimination. From a plaintiff's perspective, the author explores the advantages and disadvantages of choosing to pursue a claim thru Title VII and illustrates the differences between sexual harassment and employment discrimination. Ultimately, the author concludes that the proper approach to litigating sexual harassment in the workplace is to blend tort liability and remedy principles with Title VII's lowered requirements for intent and injury.