ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

DOMESTIC VIOLENCE

Leila Abolfazli, *Criminal Law Chapter: Violence Against Woman Act*, 7 GEO. J. GENDER & L. 863 (2006).

The Violence Against Women Act (VAWA) reaches a domestic abuser who travels across state lines with the intention of injuring, killing, harassing, or intimidating the victim, forces a victim to cross state lines, crosses state lines in violation of a civil protection order, possesses a firearm in violation of a protection order, or has a domestic violence conviction. The author emphasizes the lack of understanding in the judicial system of domestic violence and its view of domestic violence as a family problem beyond the reach of legal and police remedies—blaming the victim as much as the abuser for the violence. VAWA II eliminated the question of whether the violence was inflicted before causing the victim to cross state lines by adding the language "to facilitate such conduct or travel," so that the violence could be linked in any way with interstate travel. The third attempt at VAWA expands the preventative efforts to decrease domestic violence, dating violence, sexual assault, and stalking, in addition to responding to the diversity of victims, eliminating the mandatory arrest language, and developing methods for identifying patterns and history of abuse. As a result of these changes to VAWA, domestic violence is becoming more accepted as a national problem that must be dealt with before a victim is killed by a partner or an abuser is arrested.

Elizabeth Rapaport, *Women as Perpetrators of Crime: Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth,* 33 FORDHAM URB. L.J. 527 (2006).

The United States must reexamine how it punishes mothers who commit infanticide and child homicide. Recent cases, particularly those in Texas, demonstrate society's need to classify these women as either "bad mothers" or "mad mothers." The history and development of such statutes in the United Kingdom is presented, along with several notorious American cases. While the "Good Mother Defense" strategy, that is establishing the defendant as a good mother, may help some women, our focus must be on how to protect the children. By shifting our focus in making such statutes, troubled women may be better served.

Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761 (2006).

Battered Woman Syndrome (BWS), first introduced into the legal system through self-defense claims, is a psychological theory that explains how, through repeated cycles of violence that lead to "learned helplessness," battered women believe they lack all control over their situation and kill, rather than leave, their abusive partners. While all jurisdictions now accept expert testimony on BWS to support claims of self-defense and in some domestic violence cases, there has been criticism regarding its use particularly on the ground that it perpetuates negative stereotypes about women. BWS paints a one dimensional picture of a woman—as being completely helpless—so that when the real woman shows up in court she is unable to match the stereotype and fails in her self-defense claim. By allowing expert testimony that depicts the battered woman as one dimensional and does not acknowledge the emotional complexity of domestic relationships, women who are legitimately suffering from BWS will be unable to use it as a defense. Despite the criticism of the use of BWS and admitting expert testimony regarding it, courts have increasingly allowed introduction of it, with no signs of retreat.

EDUCATION

Keri McWilliams, *Education Law Chapter: Single-Sex Education*, 7 GEO. GENDER & L. 919 (2006).

There is currently a debate as to whether or not single sex education is beneficial, questioning whether or not single sex education is beneficial developmentally and whether or not it is even legally permissible. In order to ascertain whether or not single sex education is constitutional, it is necessary to examine case law and statutory law, most notably, the "No Child Left Behind Act." There are valid arguments both for and against single sex education, for instance, many believe single sex education addresses potentially different learning styles among boys and girls. On the other hand, single sex education has the possibility of reinforcing gender-based stereotypes. Thus, as more evidence becomes available and people become more informed, the courts and legislatures will be better suited to answer these questions.

David Rigsby, *Education Law Chapter: Sex Education in Schools*, 7 GEO. J. GENDER & L. 895 (2006).

There is much controversy as to whether public school systems should include issues of sexually transmitted diseases, HIV, AIDS, contraception, abortion, and sexuality in their sex education curriculum. This has led to wide

variations of sex education laws among the states. State statutes provide regulations as to what must, may, and cannot be taught as well as allowing for "opt-in" or "opt-out" provisions. As the author points out, there have been very few legal challenges to such education statutes due to the fact that courts have found that parents' constitutional rights do not include the right to educate their child about sex. However, the author suggests that statutes that limit sex education to advocate abstinence may be challenged under an equal protection analysis because this practice would exclude any discussion of sexuality from public schools.

Victoria L. Thomas, *Education Law Chapter: Sexual Harassment in Education*, 7 GEO. J. GENDER & L. 907 (2006).

In 1972, the passage of Title IX officially extended protection from sexual discrimination to the educational setting and was later interpreted to include protection against sexual harassment. In examining the legal recourse available to students who are victims of sexual harassment by teachers and/or other students, the author discusses the development of the private right of action for sexual harassment in education and the factors required to establish school liability. In addition to a Title IX claim against the school, a student may bring a section 1983 claim against the individual harasser. The author examines the problems of Title IX, including the narrow protections afforded under certain courts' interpretations of the factors and a refusal to recognize certain forms of sexual harassment. While Title IX is purported to protect students from being denied educational opportunities due to sexual harassment in school, the standards created by the Supreme Court suggest that schools have little incentive to create proactive sexual harassment policies, and thus students are likely to continuing facing significant sexual harassment in school.

FAMILY

Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender and Fathers' Rights*, 40 FAM. L.Q. 315 (2006).

Parental Alienation Syndrome (PAS)–first discussed by psychiatrist Richard Gardner in the 1980's–constitutes a programming or brainwashing of the child by one parent to denigrate the other and is essentially a counter-argument against situations in which a child or custodial parent, usually the mother, alleges that the non-custodial parent is abusive. In the 1960's, with the emergence of the women's rights movement, the discovery of the prevalence of child abuse, and the changing divorce regime from fault-based to no-fault divorce, the fathers' rights movement emerged as a reaction to these changes in society. The fathers' rights movement

countered the women's movement, focusing on equality, particularly in the case of child custody issues. While PAS is not officially recognized by the psychiatric community and is not listed in the Diagnostic Statistical Manuel, it still has become a legitimate issue in divorce and custody proceedings. The author concludes by reminding the reader that the best divorces are ones in which neither alienation nor child abuse occurs, and that we should be working as a society to create new and productive ways to end relationships without ending them with our children.

Susan Ayres, *Newfound Religion: Mothers, God, and Infanticide*, 33 FORDHAM URB. L. J. 335 (2006).

Infanticide, criminalized as murder in the United States, has been linked with postpartum psychosis in many cases. This essay examines whether the trial strategies used in four highly publicized cases in Texas of infanticide by mothers with postpartum psychosis have overcome the traditional stereotype that infanticidal mother's are mad or malevolent. The author hypothesizes that psychotic mothers have been disempowered and silenced, and thus their acts cannot be seen as subversive feminist gestures. However, trial strategies such as videotaped documentation used in the two later cases suggest subversion of conventional views, and provide for the presentation of a fuller voice for the mother. These trial strategies effectively make it more difficult for juries to mete out retributive punishment and much easier for the juries to react with compassion.

M. Michael Babikian, *All in the Family: Family Dynamics and Successful Business Succession Planning,* 20 GLENDALE L. REV. 1 (2006).

Traditional estate planning techniques must be revamped when a family business comprises the bulk of a family's estate and the primary goal is to perpetuate this business through the estate plan. In this area, a "successful" estate plan is one that is tax-efficient and more importantly, accounts for family dynamics. Wealth from family enterprises is commonly lost through the sale of the business or business mismanagement. Mistakes resulting from estate plans which fail to pass on family business wealth can be prevented by first identifying family relationships and building these relations into the family business estate plan. Accounting for family dynamics thereby increases the future probability of business success.

D. Marrianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005).

By focusing on the impact of trafficking and the displacement of domestic adoption, the author demonstrates how intercountry adoption has not effectively served the needs of children. Although intercountry adoption has the potential to improve the lives of thousands of children, it must be properly regulated. Many nations have signed the Convention on the Rights of the Child, its Optional Protocol and the Hague Intercountry Adoption Convention. However, countries must establish regulatory systems that will ensure that transnational adoption is carried out in a way that provides for needs of children and prevents the trafficking of children from countries such as Cambodia, India, Guatemala and Vietnam.

Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, (2006).

In today's highly mobile world, having a steady home in one location is becoming rare and this is threatening the health of many children. The importance of stability was established in the attachment theory, which says that a child's ability to have meaningful and healthy relationships later in life often depends on weather they had a close and consistent relationship with their mother as an infant. This doctrine has been reinforced in our legal tradition by three doctrines: a child is best served by maintaining the status-quo; a child is best served by being awarded to the primary care giver; and lastly, that a custody order cannot be changed unless there has been a substantial change in circumstances. These doctrines have been solidified by statistical evidence that shows that children develop better when in one place, having constant contact with their custodial parent. This argument has been met with much criticism and evidence to the contrary—although the author suggests that the merit of this evidence is in doubt.

Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(a)(2)(D)*, 69 ALB. L. REV. 947 (2006).

Posthumous DNA testing should be allowed under New York's Estates, Powers, and Trusts Law (EPTL) to determine paternity. The current disallowance of the practice originates in earlier days of DNA testing, when it was thought to be unreliable. However, denying posthumous DNA testing today is counter to the current trends because it allows non-marital children the same rights as those born in wedlock. The current proposed amendment to the EPTL is struggling due to concerns over excessive exhumation. The author discusses the concerns over exhumation, the reliability of DNA testing, as well as various benefits of

determining paternity, and concludes that there is no basis for prohibiting posthumous DNA paternity testing.

Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for 'Impermanence'*, 34 CAP. U. L. REV. 405 (2005).

The author explores the effect of pro-adoption policies on kinship caregiving families and explains why there should be an expansion of alternatives for these families. The federal and states' governments strong pro-adoption position ignores opportunities for the state to intervene in families and to make narrowly-tailored interventions that allow for the child to be restored to her home later on. Although the child welfare administrator should be concerned about permanency for children, these administrators appear to have a very limited view of permanency that favors adoption over other beneficial alternatives. Alternative solutions, such as subsidized guardianships, are not as heavily financed by the federal government. Moreover, legislation that subsidizes kinship caregivers recognizes cultural norms in the African-American community. The District of Columbia's Grandparents Caregivers Pilot Program Establishment Act of 2005 is a promising piece of legislation that provides grandparents with the opportunity to keep their families together. However, the current pro-adoption measures of the state and federal governments give incentive to kinship and guardian caregivers to adopt rather than participate in other programs.

Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty,* 14 WM. & MARY BILL RTS. J. 943 (2006).

Because many children are born into poverty, the author proposes a new system of identifying a child's birth parents that focuses primarily on the mother. Under this proposal, the birth mother would be the only assigned parent to the newborn, but may elect to add a second caretaker in the future. This system allows the primary caretaker, the mother, to select an appropriate second parent while preserving the child's best interest. The author claims that since many single mothers live at or below the poverty line, having an ability to autonomously decide whether she wants to parent alone or share the parenting with a partner, helps to relieve the worry that an abusive male can challenge her custody. As well as eliminating the category of illegitimate births, this proposal will also have consequences on child support and welfare.

Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L. J. 217 (2005).

On November 19, 1997, President Bill Clinton signed into law the Adoption and Safe Families Act (ASFA), amending the 1980 Child Welfare Act and shifting the emphasis of the nation's child welfare policy from family reunification to adoption as the primary method to achieve permanent homes for the thousands of children in foster care. Recent changes in the law such as this have greatly diminished the chances mothers in the criminal justice system have of retaining their parental rights. The author focuses on Wisconsin law to examine more generally how race, gender, and social class influence which parents are more likely to permanently lose their children. The standard to determine termination of parental rights in Wisconsin poses a significant threat for inmates who must leave their children in foster care during incarceration, even if they have not committed any acts of violence against their children or anyone else. The constitutionality of the procedures used in Wisconsin to determine "unfitness" are suspect and will almost certainly be challenged on equal protection grounds, especially in regard to inmate-parents.

Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood,* 14 WM. & MARY BILL RTS. J. 909 (2006).

In order to maintain the modern parentage principles that focus on children's well-being, the author proposes changes to the Uniform Parentage Act (UPA) to redefine the meaning of "fatherhood" as the "social fatherhood". The author argues that the definition of fatherhood should be based on nurture, rather than nature. Nurture includes elements such as "physical, emotional, intellectual, and spiritual care of children." A social father can be distinct and separate from the genetic father, and as such, the author's proposed changes to the UPA would permit for more than one father. The author recognizes that these proposed changes will have a disproportionate effect on children from communities that exhibit a disproportionately high non-marital birth rate.

Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955 (2006).

Early juvenile courts based their authority on the principle of *parens patriae*, or looking after children's "best interests," and operated under the belief that procedural rules should be different from those for adults. After the Supreme Court held in *Kent v. United States* and other cases that juveniles' due process rights could be and had been violated, it imposed a standard of procedures in juvenile

cases that it called "fundamental fairness," based on the Due Process clause of the Fourteenth Amendment and similar to the procedures in adult cases. The authors argue that identical procedures for adults and juveniles are not constitutionally required, but only presumed to be consistent with fundamental fairness. Drawing on due process variations in administrative and non-delinquent juvenile proceedings and social research, the authors argue that traditionally praised standards of due process may not in fact be the "gold standard" they have been thought to be. Instead, they propose a "performance-based management system," which would be one designed to promote objective and subjective perceptions of fairness, allow for ongoing feedback and reform, and provide for an administrative mechanism to manage the process.

Benyomin Forer, *Juveniles and the Death Penalty: An Examination of* Roper v. Simmons *and the Future of Capital Punishment*, 35 SW. U. L. REV. 161 (2006).

In 2003, the Supreme Court determined in *Roper v. Simmons* that the Constitution prohibits the death penalty for offenders who were younger than eighteen when their crime was committed. The author argues that the *Roper* decision is unconstitutional because various provisions of the Constitution mention the death penalty, thus creating a presumption of its validity. The *Roper* court rebutted the presumption of validity by conducting an Eighth Amendment analysis and concluding that evolving national attitudes and fundamental differences in maturity between youth and adult offenders preclude the imposition of the death penalty on minors. The author faults the concept of an "evolving national consensus" as a proxy for the Majority's own moral views, and finds that several cases demonstrate that juvenile offenders may commit heinous and premeditated crimes with the maturity of an adult. The author recommends that the legislative process, rather than the courts, should resolve the contentious national debate over the validity of the juvenile death penalty.

Laura Friedman, *Chapter 635: Allowing Arrested Parents to Arrange for Childcare*, 37 MCGEORGE L. REV. 267 (2006).

Chapter 635, a new provision of the California Penal Code, will help to mitigate the harm to children whose parents have been incarcerated. Prior to this provision, parents had only three phone calls guaranteed to them by law after arrest. Especially in the case when the arrested person is the sole parent, if they are not able to arrange for childcare there can be great psychological harm to the child. Chapter 635 allows parents two additional phone calls to be used solely for the purpose of arranging childcare. While there may be increased costs to the State due to these phone calls, there has been no serious opposition to Chapter 635, and it will help to ameliorate the harm of the wrong-doings of the parents on the children.

Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31 (2006).

Because family law, as it currently stands, is severely fragmented due to the number of different bodies regulating it, it is questionable whether there is a coherence that can unify these diverse laws. The principles that unify family law are "Biblical Traditionalism," which has helped shape U.S. family law and still retains a powerful grip on family law today, and "Liberal Individualism," which focuses on freedom from state interference. The author asks whether these principles are satisfactory but concludes that they are inadequate. The author explains that Biblical Traditionalism's focus on the traditional family dynamic, of opposite sex married couples and their children, elevates family form over family function and fails to recognize the importance of the family function of non-traditional families, resulting in the unequal treatment of people in society, while many believe that Liberal Individualism's focus on the individual is detrimental to the idea of social cohesion. Thus, the author proposes a search for principles of family law that better reflect the goals of contemporary American society.

Ethan M. Krasnoo, *Family Law Chapter: Foster Care and Adoption,* 7 GEO. J. GENDER & L. 999 (2006).

The foster care system in the United States is an area of law where the government may reach its hand into the family unit and assign legal rights to biological and foster parents. Major criticisms of the foster care system stem from two concerns: the systems inability to adequately prepare children for life after foster care and the system's lack of specialized care for children who are gay, lesbian and transgender. State laws on adoption by stepparents and couples who are homosexual vary throughout the country. Opposition to homosexual adoption focuses on the best interest of the child theory: that a child receives the healthiest upbringing in a traditional one mother, one father household and that the religious stigma of homosexuality can be damaging to the child. The author concludes that the difference in homosexual adoption laws will place a strain on the Full Faith and Credit Clause of the Constitution.

Morgan J. Lynn, *Constitutional Law Chapter: C, Indecency, Pornography, and the Protection of Children*, 7 GEO. J. GENDER & L. 701 (2006).

Sexual speech and expression does not receive full First Amendment protection. For example, forms of expression including obscenity, indecent speech, and child pornography can be regulated and even criminalized. What's more, sexual speech can be regulated by using the "secondary effects doctrine" outlined in *United States v. O'Brien*. The author hypothesizes that more cases about

regulation of sexual speech will emerge as a result of the Bush Administration's focus on combating adult obscenity. The author predicts that this will provide for more opportunities to make distinctions between protected and unprotected speech.

Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191 (2006).

It is important for incarcerated males to become effective parents, as a great deal of those incarcerated in this country are males with young children. A father's removal from a child's environment has an extremely detrimental effect on the child. When most fathers are incarcerated they often lose contact with their children; this is due somewhat to our own laws. As such, we must make sure that incarcerated fathers become effective fathers. This can be done by increasing the father's contact with their children while in prison through means such as increased visitation rights and early parole for good behavior.

David D. Meyer, *Reforming Parentage Laws: The Constitutionality of Best Interests Parentage*, 14 WM. & MARY BILL RTS. J. 857 (Feb. 2006).

Traditionally, parentage law has been guided either by the needs of adults, society's desire to protect marriage, or the transfer of wealth between generations. In recent years, some courts have begun to look at different factors in assigning parental roles, focusing on what would be in the child's "best interest." The author examines the emergence of this phenomenon family and debates whether privacy protection should limit the state's ability to choose upon whom to bestow parental status. He concludes that while the Constitution places limits on the states' ability to redefine parenthood, those limits are broad enough to allow states to reform traditional parentage laws.

Jane C. Murphy, *Protecting Children by Preserving Parenthood,* 14 WM. & MARY BILL RTS. J. 969 (2006).

The author points out that the state and federal governments often challenge the maternal status of poor biological mothers by removing children from such homes following a child protection proceeding. Additionally, the Adoption and Safe Families Act of 1997 (ASFA) has led to speedier proceedings that are aimed at finding permanent adoptive parents for children who were separated from their abusive and neglectful mothers, rather than focus on family reunification. The author argues that the mother-child separation is often unnecessary, and as a result, many more children are separated from their mothers than is necessary to ensure their protection. The author suggests reforms to the current law to ensure that

children are not taken away from their mothers unless it is absolutely necessary and is in the best interest of the child. The author also suggests that stronger efforts should be made to foster family reunification rather than adoption.

Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. (2005).

Instances of state-inflicted or condoned domestic violence of women occur worldwide with staggering frequency. A small fraction of these victims escape to the United States seeking refuge, but because of the Refugee Convention's narrow interpretation by U.S. courts, many of these women are returned to their environments of torture. In 1999, regulations were promulgated pursuant to Article 3 of the United Nations Convention Against Torture, providing women who flee from state-inflicted or condoned violence with an alternative path to relief. However, the author notes that these beneficial regulations suffer from a fatal flaw—the failure to provide for family reunification rights pursuant to Article 3 of the Torture Convention. The author argues that family reunification is consistent with legislation designed to protect women who are victims of gender-based violence, as well as the "value placed on the nuclear family as a core unit of society." More importantly, family reunification should be viewed as a human right and not a "discretionary benefit."

Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 Fam. L.Q. 153 (2006).

Even after the passage of the Uniform Parentage Act of 1973 there are still many problems with the rights of unmarried fathers, particularly surrounding the adoption of newborns.Although there is a framework for distinguishing the rights of "thwarted fathers", those that attempted unsuccessfully to develop relationships with their child, and "pop-up pops", fathers that appear in a child's life too little or too late, this framework becomes distorted in the case of adoptions of newborns because biological fathers, whether "thwarted" or "pop-up", have not had time to develop a relationship with the child. Because it becomes difficult to distinguish between "thwarted" and "pop-up" fathers, sometimes the best interests of the child are placed after the rights of the biological father. The author reviews several statutory attempts to differentiate "thwarted fathers" from "pop-up pops", including the Uniform Parentage Act of 2000 and the Uniform Adoption Act. However, the author remains worried about the conservative approaches used to distinguish "thwarted fathers' from "pop-up pops" and questions whether putative fathers should be given so much leeway in determining whether they want to assume parental responsibilities or not.

Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L.Q. 237 (2006).

The divorce reform of the 1960's and 1970's was predicated on the erroneous presumption that parents could end their relationship and maintain only marginal ties through child support and visitation. Today's courts are beginning to recognize that the responsibilities of parenthood often require that the lives of divorced spouses remain intertwined. The recognition that children benefit from a relationship with both parents has resulted in family courts exploring joint legal custody, alternative parenting plans, and shared parenting as more favorable dispositional options for children. Tension still exists between the "clean break" conceptualization of divorce and the concept of a post-divorce family; these tensions are most evident with respect to the relocation of one parent, the delegation of parental authority, and court procedures and settlements. The family courts must redesign its' services and procedures to accommodate the modern post-divorce family who's needs extend beyond custody and support determinations.

Norman Poythress, et al., *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 LAW & HUM. BEHAV. 75 (2006).

An increasing number of youths are being tried in criminal court. However, the mechanism by which cases are transferred from juvenile to criminal court does not require that a youth be found competent to proceed in criminal court. Therefore, it is possible that youths who are transferred to that venue for prosecution may not have the functional legal capacities required for participation. The authors suggest that a youth's incompetence may be the result of immaturity. Gathering data from the State of Florida, the authors test their hypothesis by comparing the competence related abilities and development psychosocial characteristics of a sample of youths prosecuted in criminal court, to that of youths tried in juvenile court and adults prosecuted in criminal court. The study shows that youths prosecuted in criminal court in fact perform slightly better than the two other groups. Therefore, the results do not lend support to the hypothesis that adolescents transferred to criminal court without an evaluation of their competence have impaired competence-related abilities relative to adults.

Jennifer R. Racine, *A Dangerous Place for Society and its Troubled Young Women: A Call for an End to Newborn Safe Haven Laws in Wisconsin and Beyond,* 20 WIS. WOMEN'S L.J. 243 (2005).

In response to the public outcry against neonaticide, many states have hastily passed newborn safe haven laws that are not well thought out and may endanger a newborn's welfare. Newborn safe haven laws designate a place where parents may

drop off a newborn, such as a hospital, to relinquish their rights to the baby under complete anonymity. This legislation fails to address the girls truly at risk, as the laws encourage those who would have otherwise kept their child to abandon it, while those truly at-risk tend not to utilize these services due to their inability to think rationally under their potential mental stresses. Rather, legislation should actively reach out to at-risk mothers through hotlines and education. Current legislation sets the bar too low, promotes abandonment, and does not reach those truly in need of help.

Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711 (2007).

While divorce proceedings are available to aid in dispersal of assets when a married couple separates, no similar proceedings exist to assist a long term cohabitating couple that may have similar comingling of assets. A new Restatement (Third) of Restitution and Unjust Enrichment is being written by the American Law Institute that may allow a partner to claim her share of any assets she contributed to those held by her former partner. The author compares the current Unjust Enrichment scheme to the proposed changes by the American Law Institute and applies this guidance to the issue of cohabitating partners that end up with most assets in one party's name. She concludes that because restitution cannot be used to negate a consensual transfer, such as a gift, judges have relied on unjust enrichment to essentially "do equity" to undo transfers that seem unjust.

Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L.Q. 213 (2006).

Recent decades have seen changing notions of fatherhood and family, and this is chief among the issues that have important legal and psychological implications for joint custody of children. The article examines the pros and cons of various custody arrangements and emphasizes that the best interest of the child should be the basis for all decisions and that appropriate developmental knowledge should be utilized to make custody determinations. Joint custody has been shown to be potentially beneficial to children, except where there is a high level of parental conflict; in fact, the author emphasizes, whether dealing with a joint custody situation or not, wherever there is marital conflict or hostility there is great potential for maladjustment, anxiety, and depression. It is the behavior of the adults who are most significant in children's lives that is determinative of the child's positive development. The author would like to see lawyers and judges pay attention to these issues as they pertain to custody determinations and consider arrangements that alleviate a child's stress, focusing on the child's positive development.

Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 J. L. & PUB. POL'Y 1 (2006).

Despite the fact that she is responsible for raising a child, an underage parent is unable perform as a full legal entity, including the inability to bring lawsuits or enter into binding contracts. In addition, the matter is further complicated when the parent is in a foster home. Whether the mother, the foster parent or the state is responsible for the baby becomes an issue of paramount importance. The authors examine nationwide demographics of ward parents and compare state and federal laws and policies. They find that the current system creates a vicious cycle in which the child born to a ward of the state becomes a perpetual ward himself.

Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions,* 81 N.Y.U. L. REV. 631 (2006).

The "best interests of the child" standard in custody and visitation disputes leaves family court judges and juries generous room to scrutinize a parent's ideology—for example, her beliefs on matters of homosexuality, religion, politics—and this power is easily abused. Fact-finders may cloak subjective morality standards with the rubric of the "best interest" inquiry, as they usurp the right, normally reserved by parents, to define a child's education. Some decisions that reduce or eliminate a parent's custody or visitation rights may seem viewpoint-neutral, claiming to prevent one parent from alienating the child from the other; however, these decisions evidence implicit criticism of unpopular ideology, and ultimately, will negatively impact public debate. The author argues that such speech restrictions are unconstitutional. The respective First Amendment rights of a parent to express his ideology to his child and of a child to hear his parents' ideas should trump the unreasonably vague "best interest" standard that is currently utilized by many courts to resolve custody disputes.

W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child,* 14 WM. & MARY BILL RTS. J. 883 (2006).

The authors attempt to answer the question of who should care for a child when its biological parents cannot. After summarizing the current status of modern adoption law, the authors propose an order of preference for child placement. To support their recommendation that children should be placed with a married couple, the authors present research findings that show that children in such households exhibit more positive outcomes than children reared by a single parent, or non-married parents. Research further shows that if placement with a married couple is not possible, children should be placed with a single parent, and as a last resort,

with an unmarried cohabitating couple. The authors conclude by proposing model legislation designed to seek a placement of adoptive children in homes with married parents to secure the children's best interests.

Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297 (2005).

Children have the fundamental right to adoption. Adoption just like marriage is grounded in ancient custom. Also, just like marriage, it is based on choice, not blood ties. Since adoption is a fundamental right, any barrier to adoption should be given strict scrutiny by the courts. The Supreme Court in *Loving v. Virginia* not only invalidated a law that prohibited marriages between people of different races, but also provided adults with the fundamental right to form a family and to be free of undue state influence and state discrimination. Children are waiting for a case that provides them with these rights. However, the author recognizes that the courts will probably not recognize the right to adoption for children since courts have been reluctant to identify new rights.

Moin A. Yahya, *Deterring Roper's Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty more than Adults*, 111 PENN ST. L. REV. 53 (2006).

The Supreme Court's decision in *Roper v. Simmons* declaring the death penalty unconstitutional for minors was based on reasoning that should have led the court to reach the opposite conclusion. The Court relied on research from the American Medical Association, among others, to reach the conclusion that juveniles are less culpable and deterrable and thus should not be subject to the death penalty. However, as long as juveniles are capable of being deterred at all, the rational response to dealing with a group that is less deterrable is to increase punishment to deter them more. The author uses a law and economics methodology to show that juveniles can indeed be deterred, but that deterring juveniles requires the possibility of greater adverse consequences so as to compensate for what juveniles are lacking, such as proper risk assessment ability. The Supreme Court's holding that the death penalty for juveniles is unconstitutional therefore deprives states of an important tool to combat juvenile crime.

HEALTH

Nancy D. Campbell, *Women as Perpetrators of Crime: The Construction of Pregnant Drug-Using Women as Criminal Perpetrators,* 33 FORHDAM URB. L.J. 463 (2006).

Drug-using pregnant women have wrongly been labeled criminals by the legal system and society. As a result, mostly minority women of low income households are stigmatized as intentionally harming the fetus through their drug use and tagged as unfit to procreate. The author examines fetal right laws and feticide laws in various states that displace rights from the women to the fetus. The author analyzes proposed reform by advocates for drug-using pregnant women such as health care, drug treatment programs and therapy. She concludes that society should not seek criminal retribution against drug-using pregnant women but should instead reform policies to help them.

Heather S. Goldman, *Emergency Health Care Services: Disparate Access and Barriers Faced by Women*, 7 GEO. J. GENDER & L. 1165 (2006).

While the Emergency Medical Treatment and Active Labor Act (EMTALA) entitled all United States citizens to medical treatment in specific situations, it is not a guarantee of universal medical care, as even though the U.S. is one of the most diverse and wealthiest nations, it lags behind other western countries in providing adequate healthcare, with its citizens falling into one of three categories: those with government provided healthcare, private healthcare, and those with nothing. Prior to EMTALA's enactment, there was disparate emergency treatment throughout the country primarily because states could not agree on a universal definition for a medical emergency. However, even under EMTALA, emergency room physicians must screen for mental illness, yet such diseases still go widely under-diagnosed because of concerns of overcrowding. Similarly, emergency contraception has become an issue under EMTALA and in Congress, as several efforts to pass bills that would require hospital emergency rooms provide emergency contraception have been met with little support.

Nicole Haff, *Health Care Coverage: Contraception and Viagra,* 7 GEO. J. GENDER & L. 1185.

Author Nicole Haff discusses a range of issues relating to woman's access to oral contraception from the constitutional and historical access to female contraception, to the impact of erectile dysfunction medications such as Viagra, allowing men to regain their 'vital human function' of sexual freedom, much like oral contraception does with women, and the impact of religious groups lobbying

efforts on access to female contraception. Following the *General Electric Co. v. Gilbert* decision, which held that excluding disabilities arising from pregnancy from an employer's health insurance coverage was constitutional, Congress passed the Pregnancy Discrimination Act (PDA) of 1978 prohibiting employers from discriminating on the "basis of pregnancy, childbirth or related medical conditions." Specifically, during the past decade, major progress has been made in expanding insurance coverage for employees' concerning women's contraceptive needs. While many commentators claim that the introduction of Viagra into the marketplace has aided in the increase of coverage of female contraception, Haff disagrees; she asserts that if a female version of Viagra is ever produced there would be a noticeable shift in prescription coverage of either Viagra or birth control. In conclusion, given today's political climate and legal controversies surrounding coverage of female contraception, this topic will continue to be heavily debated and very litigious.

Heather L. McCray, *Pregnant Behind Bars: Chapter 608 and California's Reformation of the Medical Care and Treatment of Pregnant Inmates*, 37 MCGEORGE L. REV. 314 (2006).

Though the California Department of Corrections and Rehabilitation spent sixty percent more on medical care for female than male inmates, female inmates still suffered from inadequacy of medical care, particularly in the area of pregnancy. The typical practice in most states regarding pregnant inmates is to shackle them during transport to the hospital, through much of labor, and immediately following delivery. Other times pregnant inmates' cries for help are neglected, resulting in incidents of late-term miscarriages. In order to rectify this problem, California has enacted Chapter 608, which outlines minimum state standards for the medical care of pregnant inmates and limits shackling during transport to the hospital, labor, delivery, or recovery, except when necessary for public safety. With 608, California joins Illinois as the only other state to prohibit shackling of pregnant inmates, and is taking an important first step in rectifying some of the problems that pregnant inmates face.

HISTORY & CULTURE

Edward Behrend-Martinez, *Female Sexual Potency in a Spanish Church Court, 1673-1735,* 24 LAW & HIST. REV. 297 (2006).

Between 1650 and 1750 in Northern Spain, the Catholic Church litigated suits brought by husbands who alleged their wives were impotent. These suits were not brought for religious purposes but often for social and practical reasons surrounding sexuality and marriage. Many times husbands brought their wives to trial because they felt powerless to solve their wife's reproductive woes and sought

answers. During these trials, women's reproductive organs were compared with those of men, due in part to ignorance but also because of the view that women were sexually inferior to men. It was widely believed that men needed to control women's sexual power and that women who were impotent could not adequately serve in the marital role.

Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245 (2006).

In the nineteenth century, the Texas Constitution exempted the homestead of a "family" from "forced sale for debts" and vested continued occupancy rights in surviving "family" members after the death of the family head, but was completely silent as to who qualified as a "family" member. Unrelated cohabitants of deceased landowners, like emancipated former slaves, had every incentive to portray themselves as "family" members after the landowner's death. The burden of defining a "family" fell on U.S. state court judges, who struggled to define the legal entitlements of claimants whose domestic living arrangements often deviated from the basic nuclear prototype. This was a difficult task, considering the deeply contested and opposing visions of *how* the state should protect the family home and *who* should be the principal beneficiaries of state protection. The judiciary's failure to integrate formalist and functionalist approaches into a unitary conceptual model of "family" created considerable doctrinal instability in the treatment of unmarried cohabitants.

Gregory C. Pingree, *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy*, 14 AM. U. J. GENDER SOC. POL'Y & L. 313 (2006).

In the nineteenth century, women's rights activists were skeptical that Mormon advocates of women's progress could simultaneously champion women's rights and condone or even engage in plural marriage, which seemed to be inherently coercive, sexist, and unfair. Mormon polygamy, what many nineteenth-century critics called the "Mormon Problem", provides a truly distinct historical context in which to explore the ongoing tension in American law and culture between the ideals of community and autonomy. Mormon women experienced a deep conflict between community and autonomy, for their loyalty to religious community appeared incompatible with their loyalty to the progressive vision of advancing the rights and individual autonomy of American women, including their own. The 1878 U.S. Supreme Court decision in *Reynolds v. United States*, which upheld the constitutionality of anti-polygamy laws, established a standard for privileging the more communal value of "good social order" over the more

individualistic right of a particular community's unconventional religious practice. A rhetorical approach to the American "telling" of Mormon polygamy - a study of narratives meant to legitimize or de-legitimize a core aspect of cultural identity - might usefully be applied to a contemporary social controversy that underscores the paradox of community and autonomy: homosexuality and the so-called culture war over family values and the meaning of marriage.

Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886-1955*, 24 LAW & HIST. REV. 331 (2006).

In the mid-nineteenth century, New York became one of thirty-five states to enact a "seduction law". This statute applied to acts in which a man obtained a woman's consent to sexual intercourse by promising to marry her, and provided that a subsequent marriage between the parties would bar the man's conviction. For almost one-hundred years prior to the 1940s, seduction formed a large part of the understanding of sexual violence. However, in the 1930's, the number of seduction prosecutions decreased dramatically, and the author seeks to explore the context for that change. The history of sexual violence cannot focus on rape alone, and only by including seduction law in our studies can we fully understand the sexual culture of the twentieth century United States.

John W. Wertheimer, *Gloria's Story: Adulterous Concubinage and the Law in Twentieth-Century Guatemala,* 24 LAW & HIST. REV. 375 (2006).

While laws may not determine behavior, they may affect behavior by establishing incentives and disincentives as a channeling function. As a result of traditional Guatemalan culture along with changes to the legal system of Guatemala, Gloria Peralta became the concubine of Julio Diaz at the age of 14 in 1963. Legal reform allowed Julio to openly support a concubine, and this was an economically beneficial relationship for Gloria as well. Further legal reforms, especially in the family court and criminal court allowed both parties to seek redress to problems, albeit with mixed results. Following Julio and Gloria's legal actions, Guatemalan legal reform continues, and even triumphed in 1996 by striking down Guatemala's sexist legal treatment of marital infidelity.

INTERNATIONAL LAW & HUMAN RIGHTS

Susan M. Akram, *Are they Human Children or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187 (2006).

At the 2006 Association of American Law Schools annual conference, a collection of papers were presented concerning undocumented immigrant children.

Professor Jacqueline Bhabha presented a comprehensive study called "Seeking Asylum Alone: U.S. Report," which outlined the situation concerning unaccompanied and separated children entering the United States. Chris Nugent's paper argues that despite the plight of immigrant children being a very visible issue, lawmakers do not address the needs of these children. Professor Lloyd makes the argument that state law should oftentimes preempt federal law when it comes to child immigration issues, because state laws tend to have stronger moral and legal values. Dr. Linda Piwowarcyk's paper focuses on the medical aspects of unaccompanied and separated alien children. Lastly, Professor Berta Hernandez-Truyol's paper attempts to create a new international legal framework in regard to these immigrant children that puts far more weight on fundamental moral rights.

Barbara Atwood, et al., *Crossing Borders in the Classroom: A Comparative Law Experiment in Family Law*, 55 J. LEGAL EDUC. 542 (2005).

This article offers an explanation of how the nine law schools, all in jurisdictions party to the North American Free Trade Agreement, that make up the North American Consortium of Legal Education (NACLE) have promoted international dialogue and fostered a global perspective on law. For example, they have developed teaching modules and courses that allow students from each jurisdiction to interact with each other. Through the NACLE's various projects, students have acquired a greater understanding of the substantive family law of their home jurisdiction by teaching foreign students about the law. Furthermore, they have exposed students to differences in foreign laws and practical problems of enforcing rights within those foreign jurisdictions in both experiential and practical contexts. The article demonstrates that through this relatively inexpensive method of creating face-to-face contact among law students of various places and backgrounds, the NACLE's efforts have successfully introduced broader perspectives in the classroom and potentially increased the future international competence of the participating students.

Valerie Bennett, et al., *Inheritance Law in Uganda: The Plight of Widows and Children*, 7 GEO. J. GENDER & L. 451 (2006).

This article examines the inequality in inheritance law that exists in Uganda. Specifically, the author analyzes the government's unwillingness to enforce equal succession laws in compliance with international human rights law. Although Uganda took steps towards gender equality when the country ratified one of the most progressive and democratic constitutions in Africa, matters of succession have failed to place women on equal footing with men. This is because inheritance issues are generally decided on an *ad hoc* basis or in accordance with Ugandan customary law, which requires that property be passed down from generation to

generation through the male line. The ramifications are severe, including depriving a widow of rights to her husband's estate, becoming a victim of abuse and "property grabbing" by the deceased husband's relatives, and having the widow's children taken away because they are considered to belong to the deceased husband's clan. This article questions how, despite the adoption of a Constitution that implements international human rights norms, Uganda still enforces the Succession Act, which states that a widow, unlike a widower, has no entitlement regarding the deceased spouse's possessions, home, and children. Accordingly, the author calls for the Ugandan Parliament to enact reformed succession laws to remedy discrimination against women and proposes an amendment to rectify the inequality.

Jacqueline Bhabha, *"Not a Sack of Potatoes": Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 187 (2006).

Children that seek international migration, to the United States in particular, and who are not accompanied by adults, face unexpected hardships that compound the deprivation, anxiety, and vulnerability, which prompted the decision to migrate. The role of authorities plays an essential part, as states usually do not arrive at final or expeditious outcomes in cases involving children because children, unsupported by the protective networks that are established for refugees and asylum seekers and underrepresented due to lack of access or funding, "slip through the cracks." The author criticizes the typical characteristics of these cases such as the lack of a standard defining what is in the best interest of the child, and the absence of an adult guardian charged with ascertaining that issue. In addition, there is "adult centered myopia," which results in the failure to treat the migrant as an equal and therefore as someone with rights, and the failure to recognize that this person has different capacities and needs. The author criticizes the state of affairs with respect to the law regarding unaccompanied minors, especially given that being deprived of family members to care for them emotionally and physically is especially devastating, and calls for a child centered perspective that neither calls for open borders or deregulation of immigration control but acknowledges the fundamental differences between children and adults in this context.

Nancy Cantalupo, et al., *Domestic Violence in Ghana: The Open Secret*, 7 GEO. J. GENDER & L. 531 (2006).

This article explores the widespread domestic violence problem that exists in Ghana and analyzes the obstacles that often prevent Ghanaian women from reporting the abuse, particularly the cultural beliefs that domestic violence is a private, family matter that should be dealt with outside of the criminal justice system. Despite this belief, there is some progress with the newly created Women

and Juvenile Unit of the Ghanaian police force, which is trained to deal with domestic violence. In addition, the Parliament has been considering the proposal of a Domestic Violence Bill, which would institute harsher criminal sanctions for perpetrators and civil remedies for domestic violence victims. The author nonetheless determines that there is much more that Ghana could do to fully address the issue of domestic abuse and makes recommendations pertaining to the passage of a Domestic Violence Bill, systematic police training, screening for mediation of domestic violence cases and educational campaigns.

Jonathan Curci, *The Evolution of the Legal Concepts of "Family" and "Marriage" in the EU Legal System and its Impact on Society*, 18 ST. THOMAS L. REV. 227 (2005).

This article focuses on the evolution of the traditional legal concept of family in Europe, as reflected in the decisions of the European Court of Human Rights and the European Court of Justice. Many European states have defined a new form of reproductive family that equates the rights of a homosexual couple with those of a heterosexual couple. The author argues that as European law moves away from the traditional notion of "family", it is consequently losing the social benefits that traditional families provide, such as a balanced upbringing for children, security for the status of women, and a strong unit of society. While proponents of same-sex marriage believe that if they can acquire the label of "marriage" they will receive the same social benefits, the author argues that this is not the case. It is the nature of heterosexual marriage that is unique and a benefit to society, and thus heterosexual couples should be the only ones to obtain the legal status of marriage.

Deborah K. Dunn and Gary Chartier, *Pursuing the Millennium Goals at the Grassroots: Selecting Development Projects Serving Rural Women in Sub-Saharan Africa*, 15 UCLA WOMEN'S L.J. 71 (2006).

The authors argue that grassroots projects for rural women play a vital part in empowering women and encouraging the development of human rights and highlight specific projects that achieve this goal. The authors compared projects by Heifer Project International (HPI) and projects in Gambia and South Africa, using case study and meta-analytic methods and found that some projects, like the HPI project, led to a greater feeling of self-determination and development in women in Africa. They determined that grassroots projects are valuable in developing independence and self-reliance in women and can transform their lives by setting out building blocks for a more democratic culture or for working together. It is especially important to focus on women in Sub-Saharan Africa because they play an important economic and social role in the community and with their rise in status and levels of education, they will play a key role in the development of the

community as a whole. Grassroots development projects should seek to increase women's positions in society by increasing their levels of income, saving them time spent on work and increasing their levels of education, focusing on realistic opportunities for education; most importantly, they should be sustainable while at the same time empowering women.

Tamar Ezer and Susan Deller Ross, *Fact-Finding as a Lawmaking Tool for Advancing Women's Human Rights*, 7 GEO. J. GENDER & L. 331 (2006).

In 2002, Georgetown's International Women's Human Rights Clinic began incorporating human rights fact-finding trips as part of its initiative to address international violations of women's human rights. During their spring breaks, students travel to countries such as Tanzania, Ghana, Uganda and Swaziland, where they meet with local NGOs to explore human rights issues. Before their departure, students engage in intensive study of International and Comparative Law on the Rights of Women and participate in trainings on interview techniques. Upon their return, students prepare human rights reports and recommendations. The partner NGOs in the countries review the reports and bills prepared by the students, engage in community outreach regarding their proposals, and lobby their government to adopt the new laws. Incorporating fact-finding as a component of legislative reform has many benefits. It not only enhances students' learning and their development of legal skills, but it also allows students to work directly with local citizens in order to develop effective proposals for the reformation of policies and laws. Moreover, the facts uncovered during fact-finding investigations may be useful in preparing cases for litigation; it has been shown that litigation, coupled with advocacy initiatives, brings to bear the pressure of the international community on the governments to effect legislative change in their countries.

Tamar Ezer, Kate Kerr, Kara Major, Aparna Polavarapu & Tina Tolentino, *Child Marriage and Guardianship in Tanzania: Robbing Girls of their Childhood and Infantilizing Women*, 7 GEO. J. GENDER & L. 357 (2006).

The practices of child marriage and guardianship in Tanzania perpetuate gender inequality and violate the fundamental rights of women and girls. Such practices also have detrimental effects on the Tanzanian society at large. In 2000, the Tanzanian government amended its constitution to forbid discrimination on the basis of gender; however, the harmful effects of child marriage and guardianship of adult women still persist. Thus, Tanzania must create laws that prohibit these practices. Child marriage prevents economic and educational development among girls and young women, and as a result, poverty persists. Further, although the Tanzanian government has an obligation to protect the health and welfare of women, by continuing to recognize child marriage and discriminatory laws that

subject women to a guardian's control, the government is in violation of such obligation. Furthermore, child marriage and guardianship laws result in domestic violence against women, who lack autonomy over their lives and the lives of their children. Therefore, Tanzania must adopt legislation that defines the minimum age of marriage as eighteen for all individuals, and eliminates discriminatory guardianship laws so that women may achieve equality in Tanzanian society.

Angela Floyd, *Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1977 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L. J. 237 (2006).

Prior to the passing of the Special Immigrant Juvenile (SIJ) status act of 1990, immigrant juveniles who had been placed in state-run foster homes faced a unique dilemma: although the state could intervene and remove them from abusive parents, when they turned eighteen they would become illegal immigrants and could not live or work legally in the United States. Problems have arisen where foster parents seek to have their children declared dependent, yet in 1993 the Supreme Court held in *Reno v. Flores* that Children's Services could detain unaccompanied juveniles. As a result, such unaccompanied juveniles attain illegal alien status upon turning eighteen. One way to reconcile this issue would be to have the Secretary of Homeland Security give state juvenile courts jurisdiction over any immigrant minors who have shown signs abuse or neglect. However, because no standard for granting consent to the juvenile courts has been set, state courts are left with little interpretive evidence of when the Secretary has abused his powers.

Matthew Garber, *Combating the Underground Slave Industry in California*, 37 MCGEORGE L. REV. 190 (2006).

Human trafficking is becoming a growing problem in the United States. The federal government passed the first U.S. human trafficking law as recently as the year 2000. Since then there have been five states to pass laws specifically criminalizing human trafficking. California was the last state to pass such a law, which included provisions for victim support as well as penalties for those trafficking in humans. The law is comprehensive and as the human trafficking problem continues to grow, more states should adopt laws similar to the California law.

Berta Hernandez-Truyol and Justin Luna, *Children and Immigration: International, Local and Social Responsibilities*, 15 B.U. PUB. INT. L.J. 297 (2006).

This article focuses on the health, education, and welfare of immigrant children in the United States, whether they are in the country legally or illegally. The human rights of children have long been recognized as deserving of special protection and to that end a number of treaties are in existence that seek to protect those rights, such as the Convention on the Rights of the Child (CRC), which employs the "best interests of the child standard," mandating that states must assist parents in gaining access to food, clothing, and housing. In the United States, which is not a signatory to the CRC, immigrants and their children come to the country in large numbers but instead of welcoming them, many lawmakers are trying to curb immigration by limiting the amount of federal health care and education benefits available to them. The authors propose that depriving immigrants and their children access to basic necessities is a violation of the social contract, the idea that people will give up a certain amount of freedom in exchange for access to some of the benefits that society provides. If, indeed, the social contract is a viable way of organizing society, then children must be protected, as the future of the world, and be given access to health care, food, education, and housing so they can thrive.

Joshua M. Kagan, *Workers' Rights in the Mexican Maquiladora Sector: Collective Bargaining, Women's Rights, and General Human Rights: Laws, Norms, and Practice*, 15 J. TRANSNAT'L L. & POL'Y 153 (2005).

The maquiladora sector consists of manufacturing plants owned by foreign companies and investors that are situated along the Mexico-U.S. border. The author outlines the persistent history of worker rights abuses in the maquiladora sector as well as the past and present ineffectiveness of government reform aimed at the maquiladora sector. The author posits that lack of government accountability; a weak culture of unionization; and possible collusion between multinational companies and the government as likely causes for ongoing worker's rights abuses. The author proposes, as an alternative, the strengthening of international regulation of multinational companies to rectify the poor working conditions that are endemic in the maquiladora sector.

Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 GA. J. INT'L & COMP. L. 557 (2006).

In both India and the United States, women have historically been discriminated against in terms of voting, political representation and economic

opportunities. Yet, of the two countries only the Indian Constitution now explicitly mandates equality for women. In the United States, by contrast, gender discrimination claims have consistently been addressed under the rubric of formal equality—the notion of treating like people alike—even as conceptions of men and women's differences have changed over time. Because the theoretical and practical limitations of the formal equality model do not always yield results that actually advance women's equality, the author considers the lessons to be learned from the Indian approach, which includes a protectionist approach to "vulnerable" groups like women. The author concludes that the Indian model, which explicitly allows the government to remedy inequality, is the more viable approach to actually achieving equality so long as gender disparities remain culturally entrenched.

Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2006).

In 2005, over 7000 unaccompanied children ranging in age from toddlers to adolescents arrived in the United States. The Office of Refugee Resettlement, which assumes the care of custody of these children, has made considerable progress instituting reforms governing the housing and confinement options and the educational and mental health programming issues of these children, despite funding limitations. The Executive Office for Immigration Review has published guidelines to be used by immigration judges in removal hearings and the National Center for Refugee Immigrant and Children—created through a collaboration of the United States Committee for Refugees and Immigrants and the American Immigration Lawyers Association—trains and supports pro bono attorneys in an effort to address the crisis of legal representation that these children face. Despite these efforts, many difficult problems such as erroneous or inconsistent placement, the specialized care that children in institutional settings require, and the classification and housing of these children must still be addressed. Unaccompanied alien children should receive the full procedural and legal protections offered by the Office of Refugee Resettlement, and the Department of Homeland Security should recognize its administrative limitations in dealing with children and seek the expertise and guidance of those who work with these children and the children themselves.

Linda Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand,* 15 B.U PUB. INT. L.J. 263 (2006).

Since the events of September 11th 2001, immigration and boarder control has been a hotly contested topic for most Americans. Author Linda Piwowarczyk attempts to shed light on a less discussed topic concerning immigration, namely,

the treatment of unaccompanied and separated children in the United States. Traditionally, children are held in detention centers, which studies indicate adversely affect their development and mental health. For instance, a study in Australia showed that almost half the children admitted to a detention center had a mood disorder. Thus, Piwowarczyk concludes that the use of immigration detention of children should be abandoned and the United States should adopt a program of foster care and group homes as well as the use of guardians *ad litem* for unaccompanied and separated children.

Valerie Plant, *Honor Killings and the Asylum Gender Gap*, 15 J. TRANSNAT'L L. & POL'Y 109 (2005).

Honor killings, which occur in many cultures where the family's honor is seen as a personal reflection on each member of the family. When a female family member is believed to have brought dishonor on the family, often of a sexual nature such as with premarital sex or extramarital affairs, then she may be killed. Many times, honor killings will go unreported, and even whey they are, they often go unpunished. There is so little protection from the police and judiciary for women in these countries that, with the exception of suicide, asylum is the only alternative. The author analyzes the inconsistent response given by the United States regarding the granting of asylum towards women facing the threat of honor killings. In particular, this is because persecution resulting from gender does not fit into one of the existing enumerated grounds under the Refugee Act of 1980. In addition, this article scrutinizes previously proposed rules, which continue to be problematic because they only lays out factors that could be taken into consideration, rather than offering more certainty in the asylum application process. Consequently, other solutions are evaluated including the use of gender sensitivity training for asylum adjudicators.

Carrie Sperling, *Mother of Atrocities: Pauline Nyiramashuko's Role in the Rwandan Genocide,* 33 FORDHAM URB. L.J. 637 (2006).

As Pauline Nyiramasuhuko, Rwandan Minister of Family and Women's Development, stood trial before the International Criminal Tribunal for Rwanda, commentators repeatedly questioned how a woman could have committed the heinous crimes of which she was accused. These remarks reveal gender-biased assumptions that women are weak, subservient, or pure and thus incapable of such acts. But throughout history, women in high positions have repeatedly wielded their power towards good as well as evil aims as well. After providing background on the ethnic cleansing in Rwanda, with a specific focus on the systematic victimization of Tutsi women and girls, the author outlines the role of female perpetrators in the Rwandan genocide. She notes that highlighting female

perpetrators' involvement in brutality may help shatter gender myths that leave women susceptible to the kinds of sexual and other violence that was pervasive in the Rwandan conflict.

Nsongurua J. Udombana, *War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L.J. 57 (2006).

The author explicates the root causes of the use of children in war zones as soldiers, sex slaves and slave labor as well as the consequences of the illegal use of children in such ways. The author examines the sources of international law prohibiting the use of children as soldiers and the international community's response to this phenomenon in the form of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts. In addition, the author traces the sources of the protocol and evaluates its potential impact, concluding that while the principles underlying the protocol are ambitious and laudable, the protocol's greatest challenges lies in its implementation and enforcement.

Remedying the Injustices of Human Trafficking Through Tort Law, 119 HARV. L. REV. 2574 (2006).

In response to the significant and growing problem of human trafficking in the United States, Congress passed the Trafficking Victims Protection Act (TVPA) in 2000. Although the law "represents a major step forward in the global effort to combat trafficking," some practitioners have noted that the law's emphasis on the prosecution of traffickers results in the inadequate protection of victims. To meet the needs of victims more fully, practitioners have developed legal strategies involving claims based on the Thirteenth Amendment, the Alien Tort Claims Act, RICO, and other federal statutes. Also available are claims under tort law, which may provide a broader legal foundation, greater flexibility and adaptability, and larger recoveries than the claims brought under the TVPA or other statutes. In California, for example, the claims of intentional infliction of emotional distress, false imprisonment, and fraud or deceit may be available to many victims otherwise unable to seek recovery. Although some have criticized the use of tort law for its inability to adequately express society's moral condemnation of trafficking and the potential necessity for victims to file multiple claims, the author responds that claims under tort law perform the important functions of deterrence and allowing more victims to obtain substantial recoveries.

MARRIAGE

Vicky Barham, et al., *Public Policies and Private Decisions: The Effect of Child Support Measures on Marriage and Divorce*, 35 J. LEGAL STUD. 441 (2006).

Child support policies may affect individuals' choices regarding marriage and divorce by altering the costs associated with these decisions. This article examines the extent to which household formation and dissolution decisions were affected by major child support reforms introduced in Canada in 1997. The data drawn from the Survey of Labour and Income Dynamics (SLID) confirmed the importance of public policy with respect to these matters. The survey found strong support for the conclusion that the decision to divorce is affected by child support policies—this makes sense since the new guidelines attenuate the financial consequences of divorce, and the guidelines reduce the transaction costs associated with divorce. Thus, the important and powerful role played by government policies in affecting the composition of families must be recognized.

Linda Kelly Hill, *No-Fault Death: Wedding Inheritance Rights to Family Values*, 94 KY. L.J. 319 (2005-06).

Courts often look into the behavior—and fault—of surviving spouses in probate cases, such as inheriting from an intestate spouse or collecting workers' compensation death benefits. Fault in these and other areas of family law is often applied inconsistently and without regard to the proper balance between law and equity and courts and legislatures. The author argues that, just as the trend has been to eliminate fault as a standard for divorce, fault should be abandoned in the context of probate. Extensive inquiry and intrusion into the details of a marital relationship are equally inappropriate in both cases. According to the author, basing probate decisions on spousal fault fails to adequately achieve deterrence or retribution and improperly imposes state morality in the private realm of marriage.

Joseph W. McKnight, *Family Law: Husband and Wife*, 59 SMU L. REV. 1307 (2006).

By conducting an annual survey of marital law in Texas, the author highlights the current state of affairs as it pertains to non-marital relationships, the characterization of marital property, the management and liability of marital property, and the division of marital property on divorce. Information regarding same-sex unions and informal marriage are at the forefront of the current analysis of non-marital relationships. The characterization of marital property is revealed through a review of premarital and marital partitions, characterization by tracing, and reimbursement. Alongside a discussion of the management and liability of

marital property, the author discusses cases involving business and residential homestead, home equity loans, and personal property exemptions, which are all deemed to involve exempt property. Finally, the division of marital property upon divorce involves a discussion about the divorce process—by analyzing cases involving jurisdiction and venue, temporary protective orders, notice, appointment of arbitrator, mandamus, disqualification of counsel, as well as appeal and error—and then an analysis of cases that pertain to making the division, settlement agreements, clarification and enforcement, post divorce disputes, and ex-spousal maintenance.

Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257 (2006).

This article compares 19th century law prohibiting Mormon polygamy to state Blaine amendments prohibiting government support for "sectarian" schools. These Blaine amendments may be found to be unconstitutional as they are hostile to the Catholic Church. The author believes that if the Blaine amendments are found to be unconstitutional by the Supreme Court, under the same theory, the anti-polygamy laws would also have to be overturned. The history of both anti-polygamy laws and Blaine amendments is presented, along with arguments for and against each law. The author concludes that both laws are the "product of the same prejudice, the same bigotry, and the same thinly clad animosity," and that neither would "survive strict scrutiny."

Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

The option of filing joint income taxes if married does not match the needs of the current social trends. The joint return of a marital unit assumes a joint economic unit. Current socio-economic trends are not reflected in the way that the income tax is imposed when a joint return is filed. An income-splitting return would more closely reflect the reality of today's couples. This income-splitting approach would also promote an egalitarian economic relationship between the couple.

Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death,* 2005 UTAH L. REV. 1227 (2005).

While feminist reforms have greatly improved equitable property distribution upon divorce, in the event of spousal death, spouses are still often severely

disadvantaged upon dissolution of marital property. With the move of divorce law in many states to a system of no-fault divorce, states have adopted methods of property dissolution that emphasize equity and the partnership theory of marriage. However, when a spouse naturally or suddenly passes on, the deceased spouse's property becomes subject to the intestacy laws of the state. Intestacy laws have not been altered to promote equitable distribution and the partnership theory of marriage, resulting in a distribution unfavorable to the remaining spouse. However, even adopting a partnership theory of marriage may not be the best solution, as traditional gender-roles are imposed in those definitions, a view many feminists and scholars may wish to re-examine.

Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L. J. 189 (2005).

Marriage is understood as both a social institution, from which cultural and social norms emanate, and as a legal institution. Recent cases involving Tom Green, the plaintiff couples in *Goodridge v. Department of Public Health*, and Terry Schiavo, exemplify the consequences resulting from differing interpretations of the social and legal notions of marriage. Practical effects of these interpretations come to a head when the state specifically defines what constitutes marriage, and thus variations outside this framework become subject to state police power. Norms stemming from marriage in the social and cultural context are most threatened in this scenario. The author speaks negatively of state involvement in legislating marriage, as the state lacks the expertise to regulate marriage in the social context.

Mirenda Watkins, *Divorce*, 7 GEO. J. GENDER & L. 1033 (2006).

The author explores current issues regarding divorce, including dissolution structures, remedies, and dissolution structures in non-traditional relationships, such as same-sex unions and domestic partnerships. In chronicling the legal dissolution of marriage, divorce can be either "fault-based," which has its roots in English common law and which most states follow today, "no-fault," which some states have adopted as policy and is justified by the notion that people have the right to make decisions about their lives, or "covenant based," where a couple enters into a contract to participate in a relationship and dissolution occurs when there has been a breach of the contract. The remedies associated with divorce proceedings may be adversarial, in the form of tort claims or non-adversarial, consisting of settlements and alternate dispute resolution methods. While different states have varying approaches to the dissolution of non-traditional relationships, such as same-sex marriages or civil unions—Vermont, for example, allows same-sex couples to file for annulment and divorce—the author highlights that it is

imperative that there be adequate dissolution procedures for same-sex couples. There are strengths and weaknesses in each of the dissolution procedures, which may be available or unavailable to Americans, whether traditional or non-traditional in their relationships, highlighting the inherent complexity yet importance of divorce in American culture.

REPRODUCTIVE RIGHTS & TECHNOLOGY

Elinor Ament, *Constitutional Law Chapter: A. Anti-Abortion Protesting*, 7 GEO. J. GENDER & L 663 (2006).

Abortion clinics have developed various legal tactics to confront anti-abortion protesting, ranging from general trespass laws to federal legislation specifically designed to protect clinic access. *Roe v. Wade* set the stage for the debate over access to abortions, and while anti-abortion protesting is constitutionally protected under the First Amendment, it has periodically gone beyond the constitutional parameters by becoming threatening and violent. The Freedom of Access to Clinic Entrances Act of 1994 (FACE) provides a right of action against someone who by threat of force or physical obstruction injures, intimidates, interferes, or attempts to injure, intimidate, or interfere with someone providing or obtaining reproductive health services; it has replaced RICO as the most relevant statute addressing anti-abortion protesting. Additionally, federal common law has developed standards balancing freedom of speech of anti-abortion protesters with women's rights to seek pregnancy-related services. Thus far, FACE seems resistant to constitutional challenges, and *Madsen v. Women's Health Care Center* as well as *Schenck v. Pro-Choice Network of Western New York* have provided a reliable framework for injunctions against protesters within buffer zones around clinics.

Carol Cannon, Lisa Ricket, Sue Thomas, *The Meaning, Status and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy,* 15 UCLA WOMEN'S L.J. 1 (2006).

While some aspects of reproductive freedom—such as the right to contraception and the right to an abortion—have always been on the top of the feminist agenda, it is important to raise awareness of the equally important reproductive right to bear children. While historically the issue of female sterilization was hotly contested by feminists, today, the authors look to the regulation of alcohol use by pregnant women to monitor the infringement on the right to women's reproductive autonomy. There are two approaches concerning alcohol use during pregnancy, the first, and the most popular approach, is consistent with preserving a woman's right to bear children, seeking to provide information and early intervention and treatment for woman who use or abuse

alcohol during pregnancy. The second approach, which is less popular and infringes on a woman's right to autonomy, seeks to commit pregnant women who use or abuse alcohol and requires people to report women who use alcohol during pregnancy. The authors suggest that one way to guarantee that the second approach is eliminated is to ensure women are well represented in government, especially in state legislatures.

Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEGAL STUD. 379 (2005).

In certain situations, Catholic lawyers may find themselves in the midst of a conflict between their religious and professional obligations. For example, as Catholics unequivocally oppose abortion, can a Catholic lawyer assist a minor in obtaining a judicial bypass for such a procedure? Under the Code of Canon Law, a lawyer will incur the canonical penalty of excommunication because s/he is a necessary accomplice to the act of abortion. Similarly, a Catholic lawyer cannot morally represent a minor in a judicial bypass proceeding for s/he is, in essence, making the immoral practice available to the minor. Thus, if faced with such a situation, a Catholic lawyer should decline to accept the case of a client who wants a judicial bypass.

Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. LAW & POL. 301 (2006).

Through constitutional and historical analysis, the authors argue that the decisions of the Supreme Court regarding abortion are neither grounded in the Constitution nor the history and traditions of the United States. The authors assert that the right to an abortion is not fundamental and the deprivation of such a right does not equate to a universal wrong akin to slavery. Thus, the issue of abortion does not justify federal intrusion on state autonomy. The authors argue that a federalism amendment to the constitution overturning Supreme Court cases on abortion would rectify this problem and return the decision to the American people.

Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006).

In terms of federal abortion law, if the United States Supreme Court follows the reasoning of *Gonzales v. Raich*, the Commerce Clause will empower Congress to regulate the national economy, and abortion might be found to have an effect on

commerce, even though abortion is not commerce itself. The cases of *United States v. Lopez* and *United States v. Morrison* represent the Court's tendency in the last ten years to find congressional statutes outside of Congress' Commerce Clause authority. However, progressives should not argue that a federal abortion law is a Commerce Clause violation because it could foreclose important social legislation enacted by Congress, such as environmental and civil rights legislation, by constricting Congress' power to address national problems. If *Raich* signifies a reversion to post-New Deal congressional deference, the Court might find abortion outside of Congress' authority because it is an area traditionally regulated by the states. As a result, progressives should pursue a political solution rather than utilize the Commerce Clause in order to protect the right to choose.

Thomas L. Hunker, Note, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 J. TRANSNAT'L L. & POL'Y 131 (2005).

Coercive Population Control is a policy that is aggressively pursued by the Chinese government. This policy involves forced abortions, infanticide, sterilizations and intrauterine devices as birth control. The author examines the policy of coercive population control and the United State's response to the policy, namely Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The author criticizes the past difficulty for individuals seeking asylum to escape oppressive birth control policies and lauds section 601 as a good remedy for the onerous burdens placed on asylum seekers in the past.

Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish: Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 J. LEGAL MED. 167 (2006).

The practices of in vitro fertilization (IVF) in general and the cryopreservation of embryos in particular present legal and ethical problems. A precise definition of the term "embryo" is particularly important in the debates surrounding the practices. Courts have differed on their specific rulings regarding the status of cryogenically preserved embryos, but have generally agreed, first, that parties should not be forced to become genetic parents against their will, and second, that such embryos are not full human beings. Most state legislation has been too vague to effectively guide courts' decisions. To promote uniformity and clarity, therefore, the authors outline a model piece of IVF legislation consistent with court holdings that is also clear enough to guide future decisions. They argue for the use of the precise medical definition of "embryo" as any fertilized egg, that classification of embryos as property is the only tenable position, and that unmarried couples should not be precluded from participating in IVF programs.

The model legislation would also require comprehensible consent forms that represent the intention of the couple as a unit and contracts explicitly stating the couple's and the IVF facility's rights and responsibilities regarding cryopreserved embryos.

Brooke McConnell, *Quality Control: The Implications of Negative Genetic Selection and Prebirth Genetic Enhancement*, 15 UCLA WOMEN'S L.J. 47 (2006).

Procreative liberty is not an absolute right and there is room for the government to impose restrictions. As such, this article discusses negative genetic selection and genetic enhancement within the context of procreative liberty rights jurisprudence. Proponents for negative genetic selection and genetic enhancement argue that the right to genetically alter a fetus is similar to the right to rear one's child, while opponents emphasize the risk of "breeding out" undesirable traits. While courts emphasize the family unit and respect the individual's right to make their own decisions regarding child-rearing and procreation in abortion and in right to procreate cases, these new technologies are beyond the scope of such reproduction rights cases because they deal with procreation and not the *right* to procreate. Substantial ethical and moral legal questions are raised by negative genetic selections and genetic enhancement; courts should err on the side of women's rights while balancing the ethical issues.

John G. New, *"Aren't You Lucky You Have Two Mamas?": Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV 773 (2006).

The increasing use of reproductive technologies, coupled with growing societal acceptance of same-sex relationships, requires a reevaluation of how parenthood is legally defined. States have adopted widely divergent approaches in determining the parentage of children born to same-sex couples through the use of technologies, such as in-vitro fertilization, in which one partner donates genetic material and the other partner carries the fetus to term. New York, Tennessee, and Florida deny the parental rights of non-gestational homosexual partners, even when they are the "genetic parents" and have contributed to the rearing of the child. Other states determine parentage based on factors such as the non-gestational partner's intent at the time of conception, contribution to begetting the child through financing in vitro fertilization, and role played in the child's life before and after birth. The author concludes that a more coherent definition of parentage, based upon the involvement of the non-gestational partner in begetting and caring for the child rather than upon arbitrary biological distinctions, would further the best interest of the child.

Jeanette M. Soares, *Health Care Law Chapter: Abortion,* 7 GEO. J. GENDER & L. 1099 (2006).

Since *Roe v. Wade* held abortion to be a constitutional right, the courts and legislatures have implemented more and more restrictions on this right. Current legislation has restricted a minor's right to an abortion, as well as partial birth abortions. Supreme Court decisions such as *Casey* and *Ayotte*, have also created greater restrictions on abortions. In the near future, the Supreme Court will have the opportunity to decide more cases where a woman's right to an abortion has been restricted, most notably through restrictions on partial birth abortions. These decisions will be made despite a lack of a consensus on the issues in the medical community.

Justin Trent, *Health care Law Chapter: Assisted Reproductive Technologies*, 7 GEO. J. GENDER & L. 1143 (2006).

Assisted Reproductive Technologies (ARTs) have created new opportunities for lesbian, gay, bisexual, and transgender (LGBT) individuals and couples to participate in one of society's most important features – the formation of a family unit. The uncertainty that exists in many jurisdictions with respect to the disposition of extra fertilized embryos effectively serves to limit the number of embryos available for donation, thus decreasing the ability of LGBT couples to reproduce using ART. In addition, jurisdictions vary in how they determine parentage, how they regulate surrogacy, and whether they grant health care professionals the ability to deny patients access to ART procedures on moral or religious grounds—all of which have a considerable impact on an LGBT couple's access to ART. Attempts to address ethical issues—specifically the concern with respect to the potential harm to embryos conceived using ARTs—creates unique issues for LGBT parents who may be considered "harmful" because of their sexual orientation. Given time, the courts, the legislature and the insurance companies should be able to create more uniform solutions to these legal and ethical problems.

Alec Walen, *The Constitutionality of States Extending Personhood to the Unborn*, 22 CONST. COMMENT. 161 (2005).

According to the holding in *Roe v. Wade*, a woman has a right to decide whether or not to bear children, and her individual liberty to make this decision outweighs any compelling interest the government may have to protect the unborn fetus. This decision was grounded in the language of the U.S. Constitution, which has been interpreted to suggest that only when a child is born, is it a person who is guaranteed individual civil liberties. However, new legislation at the state and federal levels are providing greater protection to the unborn, which may render the

latter part of the holding in *Roe v. Wade* obsolete. Dworkin and others argue that states may adopt more stringent limits on abortion, but that they cannot escape the constitutional rights guaranteed to women. However, such an argument assumes that there is not an equal guarantee of rights imputed to the unborn human life. Thus, if *Roe v. Wade* is reconsidered, the Supreme Court will have to address the fact that there are states that have established that a compelling governmental interest exists in protecting the life of an unborn fetus even before the point of viability.

SAME-SEX MARRIAGE

Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and its Aftermath*, 14 WM & MARY BILL RTS. J. 1493 (2006).

Although over the past three years there have been many developments in the gay rights movement, there have also been many setbacks. The gay rights movement can learn some lessons from the successes and failures of the civil rights movement. First, political and legal setbacks are the result of controversial judicial victories. Second, that the civil rights movement had moments of success followed by instances of discouragement. The author compares the impact of the Supreme Court's decision *Brown v. Board of Education* to the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Health*. At the end of the day, the gay rights movement, just like the civil rights movement, has benefited from controversial judicial decisions. The author does caution, however, that for the gay rights movements to continue on the road to success, that the emphasis must shift away from courts to the legislative process.

Scott H. Clark, *Utah Prefers Married Couples*, 18 ST. THOMAS L. REV. 215 (2005).

Utah recently enacted a statute and corresponding regulations that favor legally married couples in adoption and foster care. This does not ban adoptions or foster care by individuals or cohabiting couples of either hetero or homosexual orientation, but rather, expresses a blanket preference for legally married couples. Utah claimed that the statute is merely a codification of existing community practices, an expression of the state's "collective morality," and that evidence tended to show that children placed in foster care or adoption have not experienced any measurable harm due to the restriction. Doubters as to the efficacy of the preference for legally married couples cited the possibility that children in state custody would languish within the system because of the reduction in available prospective adoptive parents, and that the preference could not be administered without investigating and monitoring the private lives of prospective adoptive

parents. All of these fears have not come to pass, however, and subsequent studies on children in foster care and adoption support the statutory preference for legally married couples, showing that placement in a traditional husband and wife setting produces greater permanence, better educational outcomes, and better social and emotional adjustments.

Julie L. Davies, *Family Law Chapter: State Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L 1079 (2006).

Following a 1991 Hawaiian court decision invalidating a statute banning same-sex marriage, states have actively addressed legal recognition of same-sex partnerships, with some states acting to restrict same-sex marriage, and others acting to create rights for same-sex couples. Many states have enacted constitutional amendments banning same-sex marriage, and all but four states have statutes reflecting intent to recognize marriage between a man and woman only. New Jersey, New Mexico, New York, Rhode Island, and Washington D.C. do not have explicit provisions prohibiting same-sex marriage, yet they still do not grant marriage licenses to same-sex couples. A few state legislatures have conveyed spousal rights to same-sex couples by allowing same-sex marriage (Massachusetts), civil unions (Vermont and Connecticut), and domestic partnerships (California). The upward trend of acceptance of same-sex couples is at odds with states' proposed constitutional amendments banning same-sex marriage, and it is unlikely that marriage benefits will be conveyed to same-sex couples within the next few years without a ruling by the Supreme Court mandating such treatment throughout the states.

Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006).

Many advocates of same-sex marriage have appealed in their campaigns to similarities with the historic efforts to legalize slave marriage, drawing both support and resistance from different African-American civil rights advocates and clergy members. Historically, prohibitions on slave marriage were based on slaves' status as chattel lacking human and civil rights. By contrast, gay and lesbian individuals are not classified as chattel, and same-sex couples can enter into contractual relationships, such as joint bank accounts and home ownership, that approximate aspects of marriage. Under the legislative model used in some states to grant former slaves the right to marry, once they were emancipated and granted their full "natural rights," slaves' right to marry was restored as a natural consequence. In other states, granting former slaves the right to marry required explicit legislation expanding the definition of marriage. The latter model is similar to the process sought by advocates of same-sex marriage. The author

argues that the acknowledgment of this similarity will benefit both civil rights activists and same-sex marriage advocates by allowing them to learn from each other's strategies and combine efforts where appropriate.

Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?* 14 AM. U. J. GENDER SOC. POL'Y & L. 253 (2006).

Despite the Supreme Court's groundbreaking decision in *Lawrence v. Texas*, which made it illegal for states to pass laws criminalizing same sex consensual sodomy, many Americans are deeply divided on issues regarding gay marriage and gay rights. Although states such as Massachusetts and New Jersey have recently announced the right of gays to marry, staunch conservative opposition to gay marriage both on the Supreme Court and in the political sphere may jeopardize the future of gay marriage. Examples of opposition are Defense of Marriage Acts (DOMAs), which seek to constitutionally ban gay marriage. The author contends that the Supreme Court, if it were to further support gay rights and gay marriage, will use prior cases which relied on the Fourteenth Amendment. Likewise, the Full Faith and Credit Clause is the most significant constitutional provision supporting gay marriage, as it lends credence to the idea that other states should respect gay marriages that were performed in states which have already legalized this right.

Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269 (2006).

The Supreme Court should re-examine the doctrine of intimate association. The right to intimate association was first identified in *Griswold v. Connecticut*, and the doctrine has since been a source of various constitutional freedoms. There is a circuit split in the interpretation of the intimate association doctrine, and courts on both sides of the issue want a ruling from the Supreme Court that would further explain its reach. The author contends that future use of the doctrine could strengthen the case for same-sex marriage beyond Massachusetts. The Supreme Court should affirm a reading of the doctrine that would continue to provide greater privacy and freedom to historically marginalized moral and sexual minorities.

Walter R. Schumm, *Empirical and Theoretical Perspectives from Social Science on Gay Marriage and Child Custody Issues*, 18 ST. THOMAS L. REV. 425 (2005).

The myriad studies on lesbigay parenting yield wildly contrasting interpretations from parties on both sides of the debate. Reviewer bias could be the root of why some will state that heterosexual couples make better parents and

others will state that there is no evidence that same-sex couples are less competent or less effective as parents than their heterosexual counterparts. Furthermore, many of the same-sex parents used in studies were volunteers and thus a self-selecting group which is not necessarily comparable to the general lesbigay parenting population. In the end, each group of parents—gay or straight—come with its own unique set of risks, and these unique risks should not be imputed to either group of parents to its detriment. Moreover, common sense as to gay parenting rights and visitation in hospitals should prevail over homophobic prejudices.

Ellen Stern, *Family Law Chapter: Federal Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L. 1055 (2006).

Although the institution of marriage has evolved over many years, what has remained true is that marriage has been traditionally regulated by the states. In 1996 the federal Defense of Marriage Act (DOMA) was passed by Congress and was the center of much debate because it was said to encroach on state's regulation of marriage. When same-sex couples were granted marriage licenses in a limited number of jurisdictions in 2004, couples were finally able to challenge DOMA on constitutional grounds such as Substantive Due Process, Equal Protection, the Full Faith and Credit Clause, and the Tenth Amendment. While the three cases challenging the constitutionality have all upheld the DOMA as constitutionally sound, Congress has responded by attempting to reinforce DOMA from further judicial attack by introducing the Federal Marriage Amendment (FMA). After analyzing the rationales for and against the DOMA and FMA, the author concludes that both pieces of legislation will have profound and lasting effects on not only same-sex marriage, but on federalism in general.

Tracy A. Thomas, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137 (2005).

Currently, a proposed amendment to the U.S. Constitution seeks to establish that "marriage in the United States shall consist of only the union of a man and a woman." This proposal is reminiscent of that sought by the conservative movement in the nineteenth century, to preserve the family unit by instituting a uniform marriage and divorce law. Although conservatives were concerned with the rising national divorce rate, Elizabeth Cady Stanton responded differently. She believed it was a reason to celebrate, as it indicated that women were escaping the confinement of failed marriages. She argued then, and would argue now, that a constitutional amendment restricting the terms of marriage would staunch the democratic process. It is experimentation and debate at the state-level, which helps to perpetuate American ideals through the comparison of varying legislative

approaches. Elizabeth Cady Stanton argued that marriage should be construed as a contract electively entered into by parties of equal status. Like government and religion, the construct of marriage is a product of society to which individuals have equal rights. Same-sex marriage only furthers these democratic principles of equality, and it would be against the very foundation of our society to adopt a single view of marriage, which ultimately denies equality of individual rights to a specific class of citizens of our country.

SEX CRIMES

Ruby Andrew, *Child Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851 (2006).

Child sex abuse is most often committed by members of the child's family; however, penal regimes seem to protect intrafamilial child sexual offenders. This flaw is the result of either state law offering a reduced criminal charge to perpetrators related to the victim or state law allowing perpetrators related to the victim to escape ever being imprisoned. This article focuses primarily upon California law and the necessity of legislative change by pointing to the loophole created by prosecutors charging intrafamilial child sexual abuse perpetrators with "incest," which may not require any imprisonment, rather than sexual assault; and the exception to probation for intrafamilial perpetrators convicted of sexual abuse. As a result, the author urges that the incest and probation loopholes be closed by opening intrafamilial perpetrators up to the same enhanced penalties imposed upon non-familial sexual assaulters.

Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies,* 59 SMU L. REV. 55 (2006).

It is becoming increasingly common for sexual assault victims to initiate a tort suit against the offender or other liable third persons, either in addition or in lieu of criminal prosecution. Potential advantages of civil tort action are the lower burden of proof required, the ability to claim general causes of action such as battery, the ability to claim compensatory damages, and the freedom to dictate the direction of the litigation. However, a long litigation process, high costs, privacy issues, and failure to remove the offender from the streets in tort-only actions, are disadvantageous. Increasingly, third party liability is generally analyzed with regards to two areas of the negligence case – duty and proximate cause. This recent trend, coupled with a line of pending cases, provides a starting point for policy discussions surrounding the use of tort suits by rape and sexual assault victims in civil courts.

Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws,* 86 B.U.L. REV. 295 (2006).

The community's justifiable desire to protect its children from predators who live among them has given rise to sex offender registration laws and community notification statutes. Pitted against these regulatory measures is the constitutional protection of individual liberties, which deems such regulatory schemes legal only when regulatory intentions outweigh the punitive impact on the registrant. The current scope of sex offender regulatory schemes is too broad, as they apply to strict liability statutory rapists, whose predatory behavior or criminal intent is never proven. This effectively subjects this class of criminals to a regulatory scheme which was never intended for them and is impermissibly punitive, denies substantive due process, and is unconstitutional. The author urges states to either exclude strict liability statutory rape from the list of registerable offenses, offer such offenders procedural due process guarantees in hearings, or reject the strict liability framework outright by necessitating criminal *mens rea* as an element of the crime.

Brett Jackson Coppage, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309 (Spring, 2006).

While communities have a need to be protected, it is difficult to decide where to draw the line to prevent treading on an offender's rights. Because sexual offenders are required to register and provide notice to the community in which they reside, some neighborhood homeowners' associations have used this to create covenants restricting the ability of sexual offenders to move into the area. The author believes that these covenants may not be valid and may tread too heavily on an offender's rights. The conclusion is that modern approaches to covenant law would invalidate most of these covenants as against public policy, while more traditional jurisdictions would likely find these valid.

Lauren M. Davis, *Criminal Law Chapter: Prostitution*, 7 GEO. J. GENDER & L. 835.

The idea and the possibility of legalizing the age-old profession of prostitution should be explored. While prostitution was legal in most large cities throughout the eighteenth and nineteenth centuries, different groups concerned with social morality fought against prostitution, and today all states but Nevada and Rhode Island totally outlaw prostitution. The author argues that when prostitution is legalized, it can be highly regulated in order to address common social ills associated with prostitution including violence against prostitutes, pimping, and the

spread of sexually transmitted diseases. Additionally, the law, specifically the implications of the *Lawrence v. Texas* decision, may be indicative of future legalization of prostitution. While the majority opinion explicitly narrows the holding in *Lawrence*, Davis posits that in the future the decision may very well be interpreted as constitutionally guaranteeing the right to privacy in all consensual sexual transactions between adults.

Stephen C. Dries, *Sex Predators and Federal Habeas Corpus: Has the Great Writ Gone AWOL?* 39 SUFFOLK U. L. REV. 673 (2006).

This article discusses the effect of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and the 2002 *Kansas v. Crane* decision upon sex predators who are indefinitely civilly committed. With the passage of sexually violent predator (SVP) laws in now seventeen states, a convicted sex predator in these jurisdictions is subject to a civil suit upon completion of his prison term. If found to have a disorder and likely to re-offend, the individual is indefinitely civilly committed. Prior to the two aforementioned events, a civilly committed sex predator could file an application for writ of habeas corpus. This option has been made "nearly insurmountable" in light of the AEDPA and Crane opinion. The AEDPA only allows habeas corpus relief when the state court has acted in contravention of "clearly established federal law," and the *Crane* decision "barely even attempts to establish anything clearly." As a result, such persons are left without attainable relief. The author suggests that the Supreme Court clarify the law so that state courts and federal habeas courts have a clear guide to follow.

Elke Geraerts, Marko Jelicic and Harald Merckelbach, *Symptom Over Reporting and Recovered Memories of Childhood Sexual Abuse*, 30 LAW & HUM. BEHAV. 621 (2006).

Many question the authenticity of recovered memories of childhood sexual abuse compared to those memories that have been continuously accessible. The authenticity of recovered memories is often questioned because the symptom of over reporting in people with recovered memories. This study aimed to compare the instances of over reporting in recovered memories in childhood sexual abuse with the instances of over reporting in continuously accessible memories of childhood sexual abuse. The study was conducted by administering the Structured Inventory of Malingered Symptomatology (SIMS) test and Morel Emotional Numbing Test (MENT) to individuals that experienced childhood sexual abuse. While a cursory review of the findings would suggest that those with recovered memories over report symptoms more so than those with continuous memories, the authors conclude that the evidence did not support a finding that those with recovered memories had a tendency to over report symptoms.

Breann M. Handley, *Interplay Investigating: Chapter 133 and Disclosure of Rape Suspect Exams*, 37 MCGEORGE L. REV. 323 (2006).

Chapter 133 of the California Penal Code is intended to clarify confusion regarding rape suspects' privacy rights caused by the Health Insurance Portability and Accountability Act (HIPAA). HIPAA made hospitals wary of releasing suspect's medical information to law enforcement officials. Chapter 133 will require hospitals to release such information to law enforcement, regardless of HIPAA's vagueness in the area. These requirements are not in violation of the constitution and only intend to ameliorate the HIPAA problem. This act restores the legal requirements to the pre-HIPAA state.

Cheryl Hanna, *Women as Perpetrators of Crime: Sex Before Violence: Girls, Dating Violence, and (Perceived) Sexual Autonomy,* 33 FORDHAM URB. L.J. 437 (2006).

Violence against teenage girls is on the rise because of a failure to address the issues facing young women today. Women are involved in troubled relationships and sex lives at a younger age than previous generations. This article examines the possible relationship between violence against teenage girls, violence within romantic involvements, sexual activity amongst young women and increasing violence committed by women. The author concludes that education and parenting norms must be re-evaluated to inform young women of the issues they may face and how best to manage their sexual independence.

Lynne Marie Kohme, *Women as Perpetrators of Crime: Women as Perpetrators: Does Motherhood Have a Reformative Effect on Prostitution?*, 33 FORDHAM URB. L.J. 407 (2006).

This article ponders whether childbearing may have a positive effect on prostitutes. The majority of prostitutes give birth to at least one child. After a brief presentation of the arguments in favor and against the legalization of prostitution, the author examines data on prostitutes who have given birth. While data is limited, the author hypothesizes that there may be hope of reform for prostitutes who become mothers and experience the fears and love associated with childbearing.

Kay L. Levine, *No Penis, No Problem,* 33 FORDHAM URB. L. J. 357 (2006).

Originally enacted to protect a father's interests in his daughter's marriageability, statutory rape laws have since been subject to societal and

academic misinterpretations which erroneously explain the laws as protective measures against gender-specific crimes. As evidenced by *Michael M. v. Superior Court of Sonoma County*, such widespread misinterpretation has penetrated even the United States Supreme Court, which has at times defined statutory rape as only applicable to female victims. A plethora of literature and enforcement policies have reinforced this traditional gendered classification scheme, despite the surprisingly high percentage of female sex abusers and male victims in the population. Psychiatric and psychological evidence has concluded that male victims of rape, child molestation, and even incest, may be traumatized just as much as female victims of these crimes even though they have distinct gender-specific needs and interests. By properly utilizing available scientific evidence and removing ourselves from years of widespread misinterpretation, we must change our current understanding of statutory rape and suggest ways to reform the criminal justice system's responses to all involved victims and defendants.

Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, andEquality in the Statutory Rape Caseload*, 55 EMORY L. J. 691 (2006).

Statutory rape laws are broad and allow for enforcement to be selectively driven by prosecutors. There is a popular perception that prosecutors have a large scope of discretion at their disposal in selecting cases for prosecution. As such, the author investigates the decision-making process that the prosecutors follow in their work. Although theoretically prosecutors could prosecute cases based on personal subjective choices, they do not in fact do so. Prosecution decisions are driven by a complex, deep-rooted system of norms that is continually being influenced by outside factors.

Catherine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu,* 44 COLUM. J. TRANSNAT'L L. 940 (2006).

Rape laws often fail when they are applied to sex crimes that occur as part of mass atrocities because, typically, they focus on the existence of proof of non-consent, rather than the context in which the rapes occur. Once rape is portrayed as an individual instance of sexual interaction, criminal tribunals are less likely to impose liability on anyone other than the individual perpetrator who commits the rape. However, when rape is characterized as a mass atrocity, the concept of respondeat superior becomes more applicable, especially, when the commanding officers mandate the perpetration of such collective crimes. It is the element of coercion that makes the difference, and which transforms the definition of rape from a non-consent-based sexual act to a crime against humanity. Thus, ad hoc international tribunals designed to adjudicate acts of war, genocide, and crimes against humanity must take a context-based approach in defining rape, like the one

the International Criminal Tribunal for Rwanda adopted in 1998 in the case against Mr. Akayesu, to punish *all* individuals responsible, and not just the subordinates who carry out their superiors' directives.

Heather L. McCray, *Protecting Human Rights in California's Detention Facilities: The Sexual Abuse in Detention Elimination Act of 2005*, 37 MCGEORGE L. REV. 303 (2006).

In 2003, Congress responded to the growing problem of sexual abuse in prisons by passing the Prison Rape Elimination Act (PREA). PREA requires an annual review of sexual abuse statistics in federal, state, and local prisons, grants funding to states for the prevention and prosecution of rape, and requires the United States Attorney General to publish national standards on the reduction of sexual violence in prisons. Pursuant to PREA, California adopted the Sexual Abuse in Detention Elimination Act, which aims to prevent sexual abuse and to increase accountability when it does occur. Supporters laud the California Act for improving inmates' access to information regarding sexual abuse, creating the position of an ombudsperson to whom inmates may confidentially report abuse, adopting policies to decrease the risk of sexual violence, providing appropriate physical and mental health care services for victims, and establishing specific procedures related to rape investigations and data collection. The author finds that while prisoners' rights are not popular with the public, PREA and the related California act have drawn wide bipartisan support and will likely lead to public benefits such as the reduction of sexually transmitted diseases and a decrease in costs associated with post-release public assistance and abuse-related litigation.

Allison Menkes, *Rape and Sexual Assault*, 7 GEO. J. GENDER & L. 847 (2006).

While rape and sexual assault encompass a wide range of legal issues, federal and state rape shield laws deserve special attention. Rape shield laws are in effect in all fifty states, to "limit the use of a victim's prior sexual history as a means undermining the victim's testimony" and are formulated as either legislated exceptions, constitutional catch-alls, judicial discretions, or evidentiary in purpose. At the federal level, the author focuses on rape in prison and the Prison Rape Elimination Act (PREA), which created a "zero tolerance" policy for rape and sexual assault in federal or state prisons where the rate of prison rapes has been a cause for concern. The author also notes that advances in technology and particularly the advent of DNA testing have had an important impact on rape prosecution, as DNA evidence is admissible in most state and federal courts. However, the widespread collection of DNA samples from rape kits has led to a backlog that has obstructed its effectiveness in catching the culprits and is

demonstrative of the fact that some rape laws, at both the federal and state level, are more effective than others.

Cynthia Calkins Mercado, Brian H. Bornstein, & Robert F. Schopp, *Decision-Making About Volitional Impairment in Sexually Violent Predators*, 30 LAW & HUM. BEHAV. 587 (2006).

The 1997 *Kansas v. Hendricks* decision, authorizing post-sentence civil commitment for certain sex offenders, appeared to be deemed constitutional by limiting the class of eligible offenders to those "unable to control" their dangerousness. However, the Court did not clarify what it meant by this vague notion of volitional impairment, and thus the authors examined the factors that legal professionals, psychologists, and mock jurors deem most relevant to determination of a sex offender's volitional impairment. Participants in the study, randomly assigned to either a sexual predator commitment or insanity hearing context, were read sixteen vignettes that described a sex offender and included various factors hypothesized to be relevant to determinations of volitional impairment. While it remains uncertain what the criteria for such determinations should be, results of the study suggest that verbalization of control, history of sexual violence, and the context of the hearing are factors that legal actors utilize in their determinations of volitional impairment. Given the controversial nature of post-sentence civil commitment, there must be a justifiable explanation of the concept that explains why those sex offenders with control problems are suitable for such commitment.

Kerry C. O'Dell, *Criminal Law Chapter: Evidence in Sexual Assault*, 7 GEO. J. GENDER & L. 819 (2006).

Prior to the first enactment of a Rape Shield Law in 1978, rape victims used to have to fulfill three requirements of proof: eyewitness corroboration, a demonstration that there was resistance, and complete chastity on the part of the victim. The enactment of Rape Shield laws did away with these standards and allowed defendants to plead their cases with in-camera interviews, allowed victims to be heard, and allowed the trial judge to determine which evidence would be allowed in; most importantly these laws did away with chastity requirements. While every state has done away with the chastity requirement, almost all Rape Shield laws allow evidence of third party sexual conduct to be admitted as character evidence against the victim. Although these exceptions are narrowly tailored, they serve as a deterrent towards women who would otherwise come forward about being raped. Although the Rape Shield laws are a step forward for feminists, evidence still suggests that many sexual attacks remain unreported and

that few women are willing to withstand the public humiliation and scrutiny that a rape trial contains.

Mae C. Quinn, *Revisiting Anna Moskowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts,* 33 FORDHAM URB. L.J. 665 (2006).

Frustration with traditional criminal justice responses to prostitution has given rise to non-traditional, problem-solving courts targeting sex workers. Despite apparent indicators of success, these courts—and the underlying criminalization of prostitution—may in fact create more social problems than the sex industry itself, including undesirable police and judicial practices and special interest control of criminal court. The author revisits the work of the female jurist Anna Moskowitz Kross who over several decades questioned the agenda, method, and underlying ideology of the earliest of these "women's courts." These early critiques raise questions about the effectiveness of more recent versions, specifically the Midtown Community Court in Manhattan. Instead of blindly advocating for additional specialized criminal courts, reformers should reassess the lessons from prior models and consider if funding might be better allocated to other responses to prostitution.

Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery,* 33 FORDHAM URB. L.J. 571 (2006).

Since women began to be incarcerated, they have been victims of sexual abuse; so too were women who were enslaved prior to abolition. The victimization of women in these two contexts has a notable difference, namely that sexual abuse of slaves was considered legal while sexual abuse in the prison context is ostensibly illegal. Yet, marked similarities exist as well: both situations are impacted by powerful financial and political forces and involve power imbalances in which sexual violence can be a means of further oppression. In addition, feminist responses to prison sexual violence, as to slavery, have been sporadic and have yielded mixed results. To date, litigation, public education and legislation, such as the Prison Rape Reduction Act, have begun to address the abuse faced by women in custody but much more must be done to curb violence against women.

SEX DISCRIMINATION

Bruce Ackerman, *The Brennan Center Jorde Symposium on Constitutional Law: Interpreting the Women's Movement*, 94 CAL. L. REV. 1421 (2006).

The critical question facing the United States Supreme Court in the 1970's was if the Equal Protection Clause grants African-Americans powerful constitutional protections, should not women be granted the same protections? The Court recognized a fundamental similarity between racial stereotyping and gender stereotyping. However, the mobilization of a powerful social movement for constitutional change is neither necessary nor sufficient for significant doctrinal changes by the Supreme Court. Large doctrinal shifts in Supreme Court jurisprudence occur without social movements and when these movements arise, the Court sometimes ignores their demands, reacts against them, or favors them. The Court's understanding of equal protection shaped its response to the women's movement; the women's movement did not shape the Court's response.

Marie A. Falinger, *Women as Perpetrators of Crime: Lessons Unlearned: Women Offenders, the Ethics of Care, and the Promise of Restorative Justice,* 33 FORDHAM URB. L.J. 487 (2006).

This article advocates a more caring, individual approach to female criminals. Various approaches have been applied in dealing with women offenders, but none allow many women to be seen as the "agents" of their environments. The author summarizes four major views of what factors have caused an increase in female criminals and thus should be focused on to reduce criminal behavior. Factors such as relationships and economic conditions are compared with sentencing standards used for female offenders. Finally, a "restorative justice" approach is proposed, by which a female offender may identify and change those factors which led her to criminal acts.

Laura Friedman, *Providing Sex Offenders' Conviction and Release Dates to the Public*, 37 MCGEORGE L. REV. 261 (2006).

Under Megan's Law, convicted sex offenders are required to register and law enforcement is required to publish information on where convicted sex offenders reside. Recently, California proposed an addition to its version of Megan's Law that would make an offender's conviction and release dates standard public information available over the internet. This proposal, Chapter 721, is premised on the idea that an offender's length of incarceration and date of release will demonstrate his current level of rehabilitation and control. While this information would be helpful, it must be accurate. However, currently the Department of

Justice does not keep independent records with which it can verify the accuracy of information provided by the Department of Corrections, the Youth Authority, or local departments.

Stephanie Hindson, et al., Note, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549 (2006).

This article focuses on Colorado's administration of the death penalty. First, it surveys the history of the death penalty before and after the landmark *Furman v. Georgia* decision, and second, it endeavors to ascertain whether death sentences are being pursued and applied equitably. In this determination, homicide cases from January 1, 1980 through December 31, 1999 with varying characteristics are compared to establish if factors such as race, ethnicity, gender of the victim, gender of the defendant and county of homicide correlate with decisions to seek death. Results of the investigation show that Colorado, as an advocate for death penalty, has failed to deliver promises of retribution to victims' families. The dataset reveals only one execution and one inmate on death row, as the result of one hundred and ten death penalty prosecutions. Moreover, statistics demonstrate that the decision to seek death sentences is not made equitably. In fact, it is significantly correlated with race, ethnicity, and gender of the victim. The study suggests that the maintenance of the death penalty in Colorado is not only costing the public millions of dollars, but that it not succeeding in attaining death verdicts, and is being pursued inequitably.

Julie Schwartz, *Criminal Law Chapter: Correctional Facilities*, 7 GEO. J. GENDER & L. 771 (2006).

A statistical discrepancy exists between the number of women found guilty of murder—approximately 10% of those arrested for murder are women—and the number of women sentenced to death—approximately 1.4% of the inmates on death row are women. This discrepancy may be the result of aggravating and mitigating factors in sentencing rather than gender bias. For example, many jurisdictions do not deem the type and manner of murder generally committed by women to be punishable by death while felony-murder, the most common crime committed by inmates on death row, is an offense statistically more likely to be committed by men. Many death penalty statutes include a "catch-all" provision that allows judges and juries to consider the background of the defendant when making a sentencing determination; it is hypothesized that female defendants are more likely to encourage sympathy under this provision than their male counterparts. Courts have also considered the disparity between male and female prison populations with respect to prison accommodations under Title IX and Equal Protection Clause of the Fourteenth Amendment and have found that such

differences are generally the result of administrative and discretionary decisions rather than intentional discrimination.

Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women,* 33 FORDHAM URB. L.J. 609 (2006).

The common conception that death row inmates are male is correct: ninety-nine percent of those executed in this country are men. The circumstances of the women on death row who account for the remaining one percent deserve further exploration. The author considers gender biases in criminal statutes and sentencing policies and practices that could explain the gender composition of death row inmates. For instance, a number of aggravating factors that lead to a death sentence, such as committing a murder with premeditation or as part of a felony, are more likely to work against men than women. However, no pattern clearly explains why only certain women are sentenced to death, and why only some of those so sentenced are executed. The author argues that the rarity and inconsistency of women's death sentences suggest the need for a more rational, gender-neutral death penalty system.

Yvonne Zylan, *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment*, 39 U. MICH. J.L. REFORM 391 (2006).

Despite the Judiciary's recognition, prompted by Catharine MacKinnon, of a cause of action for sexually hostile work environments, the author criticizes the lack of protection for gays and lesbians from the same sexually hostile work environments. The author believes that an incomplete understanding of Catharine MacKinnon's work, reinforced by a deficient understanding of sex, sexuality and gender accounts for the difference in treatment. Through a survey of a variety of theories on sex, sexuality and gender, the author concludes that while courts need a better understanding of sex, sexuality and gender, a more complete solution would address the systematic scheme of domination inherent in the modern workplace that results in such conflicts in the first place.

SEXUAL IDENTITY

Susan F. Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B. U. L. REV. 227 (2006).

The presumption of legitimacy of the children born to a married woman is changing shape under the pressures of the realities of genetic testing balanced against the utility of the presumption in the context of same-sex couples. The

presumption was at common law one of the strongest such presumptions, as in most jurisdictions and under most circumstances it was largely non-rebuttable. Today, genetic testing has made the presumption largely obsolete in regards to its original purpose of determining a "likely parent," but its more subtle purpose of reinforcing the functional family is still relevant. Moreover, the functional interpretation of the presumption reinforces the emerging family structures of same-sex couples. There are a variety of alternatives available to reshape the presumption from a gendered to a non-gendered one, applicable to both gay and lesbian couples, and courts ought to search for a mechanism by which to un-gender the presumption, while retaining the presumption's benefit of ratifying the functional family.

Susan J. Becker, *Many are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 17 (2006).

Despite predictions to the contrary, the civil rights movement for sexual minorities in America is not declining. Rather, there are several indicators that society has become more accepting of sexual minorities, and that eventually the law will reflect this change. The author identifies two areas, Christianity and science, in which negative views about homosexuality are being transformed through critical self-reflection of assumptions (CSRA), resulting in the unlearning of formerly held stereotypes. Because sexual minorities have become more visible in society through an increase in planned gay and lesbian families and assimilation of sexual minorities in popular media, opportunities for transformative learning rooted in acceptance of rather than discrimination against sexual minorities has abounded. The author concludes that the attitudes of lawmakers will inevitably reflect the changing attitudes of the public, resulting in equal rights for sexual minorities.

Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM & MARY BILL RTS. J.1539 (2006).

This article provides a critical analysis of recent judicial decisions that others have argued help advance the gay rights movement by arguing that those decisions really advance the goals of those who live in the suburbs, neo-liberals. The author examines *Brown v. Board of Education*, *Lawrence v. Texas*, and *Goodridge v. Department of Public Health* through the perspective of political economy. As such, *Brown* can be seen as a failure, because African-Americans have not been granted total equality. *Brown* was defeated by those who lived in the suburbs at the time because they did not want African-Americans to integrate into their

communities. The Supreme Court in *Lawrence* may have been promoting a neo-liberal goal rather than promoting gay rights. Furthermore, although *Goodridge* and *Lawrence* may be victories, gay rights activists need to be wary and realize that there are more challenges that they will face.

John F. Hernandez, *A Search for Reason in Fairy Tales*, 18 ST. THOMAS L. REV. 259 (2005).

The Eleventh Circuit was incorrect to hold in *Lofton v. Secretary of the Department of Children and Family Services* that the Florida statute precluding all "practicing homosexuals" from adopting children passed the rational basis test. The Court held that the statute is reasonably aimed at promoting the best-interest of children. However, the premise that homosexuals are per se unfit parents is questionable, and there are cases that stipulate that the only reason for rejecting an otherwise fit parent would be if the person admitted they were a practicing homosexual. Moreover, categorically rejecting all homosexuals as potential adoptive parents does not have the desired effect of increasing placements with heterosexual families, but instead simply results in more un-adopted children. The Eleventh Circuit should have held that the statute was unconstitutional because it does not meet the rational basis test.

Sonia K. Katyal, *Sexuality and Sovereignty: the Global Limits and Possibilities of Lawrence,* 14 WM. & MARY BILL RTS. J. 1429 (2006).

The author presents the history of laws in the United States and India that have historically criminalized the homosexual status. In 2003, the Supreme Court's decision in *Lawrence v. Texas* established the constitutional protection of physical intimacy between homosexual and heterosexual consenting adults. Although this decision suggests a globalization of homosexual rights, the laws of India remain intolerant towards the practice of homosexuality. The author argues that although *Lawrence* is culturally confined to Western ideas of sexuality, its notion of private autonomy may be more easily transposed to cultures that differ in their understanding of public sexuality, heterosexuality, and homosexual identity. The author further suggests that in order to globalize the holding of *Lawrence*, the public and private spheres must function together and enhance each other to achieve the desired justice for homosexual couples.

Cynthia R. Mabry, *Opening Another Exit From Child Welfare for Special Needs Children—Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida*, 18 ST. THOMAS L. REV. 269 (2006).

Over 100,000 children around the country currently await adoption. Many of these children are classified as "special needs children" because their age, ethnicity, disability or other status makes them less likely to be adopted. Florida is among the few states that flatly prohibit homosexuals from adopting children, even when they have proven to be exemplary foster care parents. An array of evidence from the social sciences and from states permitting gay and lesbian adoption demonstrate that many homosexual individuals and couples are capable of providing a healthy, loving, and supportive environment for adopted children. Florida should repeal its ban on homosexual adoption in favor of an individualized analysis to determine whether a particular placement best serves the interest of the child.

George A. Rekers, *An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325 (2005).

There is a rational and empirical basis for legally prohibiting persons who engage in homosexual activity from adopting, becoming foster parents, or having custody over children. The debate as to whether homosexuals should have a right to be parents through adoption, foster-care, or as a result of custody decisions should be decided on an empirical basis regarding the best interest of the child, not through the political rhetoric of special-interest groups. Homosexual relationships are inherently unstable, partly due to the prevalence of debilitating mental illness among homosexuals. As such, homes with homosexuals in them are subject to higher than normal stresses, which results in harm to children, and moreover, children in such homes lack a role-model of one gender. Since the harm resulting to children from life in a household containing a homosexually behaving adult are real and verifiable, legislatures are justified in prohibiting child placements into such households.

Mark Strasser, Lawrence, Lofton, *and Reasoned Judgment: On Who Can Adopt and Why* 18 ST. THOMAS L. REV. 473 (2005).

The Eleventh Circuit's decision in *Lofton v. Security Department of Children & Family Services* upholding Florida's gay adoption ban is unfortunate and in gross error given the Court's recent decision in *Lawrence v. Texas*. The Eleventh Circuit misinterpreted *Lawrence* by saying that it did not involve a fundamental right and thus did not require the application of strict scrutiny review. Case law

from *Loving v. Virginia* to *Griswold v. Connecticut* shows the Court describing behavior that consists of fundamental interests which do trigger strict scrutiny without meeting the three guideposts outlined by the Eleventh Circuit. Furthermore, a rational basis test also fails, as this Florida statute results in an outcome that is not in the best interests of the child. While it is disappointing that the U.S. Supreme Court denied *certiorari*, the court may be waiting to make clear that such interpretations of *Lawrence* like the ones by the Eleventh Circuit are wrong.

Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511 (2005).

Historically, a myriad of derogatory and inaccurate stereotypes have developed about persons who engage in homosexual relations. Even today the remnants of those demonizing general stigmas still linger in society to some degree. The legal treatment of homosexuals reflects many aspects of these negative, exaggerated typecasts, which is manifest in the historic prohibition of gays and lesbians from adopting children. This article proposes disregarding all stereotypes about gays and lesbians, whether currently sympathetic or historically unsympathetic, and instead seriously addressing the question of whether adult gay or lesbian lifestyles pose a significant source of concern for adoption of children. The best alternative to the absolute positions on lesbigay adoptions is a presumption that generally disallows it, but that leaves open the possibility for some carefully screened lesbigay adoption when risks to the welfare of children are clearly absent and the placement is the best alternative available for the raising of a particular child.

Jer Welter, *Constitutional Law Chapter: Sexual Privacy After Lawrence*, 7 GEO. J. GENDER & L. 723 (2006).

When *Lawrence v. Texas* was first decided it seemed as though it might put an end to all "morality" based legislation. However, this landmark Supreme Court decision is not being applied as broadly as many would have liked. The subsequent application of *Lawrence* has made it clear that the case merely created certain zones of dignity and does not do an adequate job of protecting people. For instance, *Lawrence v. Texas* invalidates sodomy statutes only "as-applied," and not "facially." Thus, *Lawrence* is problematic predominantly because it is only protecting the "dignity" of having a gay relationship and not the constitutionality of the relationship itself.

Richard G. Wilkins, et al., *Adult Sexual Desire and the Best Interests of the Child,* 18 ST. THOMAS L. REV. 543 (2005).

Adoption law is designed to promote and protect the best interests of adoptive children as opposed to the interests of potential adopters. These laws have spurred state legislatures to investigate the adoptive rights of homosexual individuals and couples. As numerous studies have produced various conclusions as to the effect of homosexual parents on adoptive children, the authors assert that it is premature to decree that homosexual relationships are equal in all respects to more traditional family forms and therefore do not play a role in the "best interest" inquiry utilized in adoption cases. Especially because they are unelected, non-representative politicians, judges should avoid the premature decision-making evidenced in *Roe v. Wade*, and instead opt to consider the evaluations of state legislators in order to make a more informed decision. The reasoning of *Lawrence v. Texas* suggests that the best interests of the child trump adult sexual desires and that the authority of state legislatures to determine these interests in the face of these desires is appropriate.

WORKPLACE DISCRIMINATION & HARASSMENT

Lisa M. Keels, *Family Law Chapter: Family and Medical Leave Act*, 7 GEO. J. GENDER & L. 1043 (2006).

Congress had three purposes in creating the Family and Medical Leave Act (FMLA): to promote gender equality in the workplace, resolve work-related family conflicts, and to ensure job security. The FMLA includes women and men, enabling employees of both genders to take leave, but women traditionally are the responsible caretakers, and this emphasis on family ingrains gendered patterns on leave-taking and undermines progress. The Family and Medical Leave Act will exacerbate gender inequalities as long as women have the dual responsibilities of family and work; women cannot compete in a market where dedication is needed for success and in this way. An ideal Family and Medical Leave Act should contain gender-neutral language and promote the level of gender equality lacking in the current FMLA. There are two primary solutions to this problem: the FMLA should enforce paid leave for all employees and establish more incentives for men to take leave.

Brook Kelly, *Employment Law Chapter: State Sexual Harassment*, 7 GEO. J. GENDER & L. 967 (2006).

Title VII of the Civil Rights Act of 1964 created a cause action for employees who experience sexual harassment or discrimination in the workplace.

Most states have statutes that provide at least the same protections as Title VII, and many expand these protections to protect members of sexual minorities and those employed in businesses with less than 15 employees. Generally, states recognize quid pro quo sexual harassment (sexual favors in exchange for employment) and harassment that creates a hostile work environment. Other types of sexual harassment recognized by the states include: conduct that is sexual in nature or that is offensive or humiliating, conduct that is motivated by gender stereotyping, conduct that is so extreme or continuous that is negatively effects the workplace, and same-sex sexual harassment. While Title VII and comparable state legislation have done much to alleviate sexual harassment in the workplace, many issues, including the possibility that sexual harassment suits themselves may perpetuate the sexual stereotypes they are intended to prevent, still need to be addressed.

Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law,* 13 GEO. MASON L. REV. 817 (2006).

The individual model of workplace sexual harassment is fundamentally flawed. Currently, the three liability schemes used in cases of workplace sexual harassment vary depending on whether the harasser is a supervisor or a co-worker and, if a supervisor, whether the harassment culminates in a tangible employment action. However, all three standards share a common theme: they assume that the employer does not play a role in creating the hostile work environment, and thereby displace the responsibility for eliminating workplace sexual harassment onto the victims of harassment. The problem with this is that few victims actually report harassment. Thus, the author proposes an alternative model of workplace sexual harassment, which holds employers directly liable for their role in fostering a hostile work environment and provides employers with incentives to address the underlying organizational causes of workplace sexual harassment.

Stacey A. Manning, *Application of the Interference and Discrimination Provisions of the FMLA Pursuant to Employment Termination Claims*, 81 CHI.-KENT. L. REV. 741 (2006).

Congress enacted the Family Medical Leave Act in 1993 in order to provide a way for employees to take reasonable leave for medical purposes without suffering a backlash from their employers for their absence from work. While the FMLA does an admirable job in outlining provisions to ensure occupational security for those who take leave, the current jurisprudence does not apply those provisions consistently. Specifically, different courts may choose to interpret an individual's claim that his employment was terminated despite falling under an FMLA-protected leave under either the "interference" or "discrimination" provisions. The interference provision prevents the employer from denying an

employee's exercise of leave under the FMLA, while the discrimination provision prohibits an employer from discharging or discriminating against an employee who made use of the Act. As application of either of these two provisions will result in inconsistent decisions, the interference provision should govern over the discrimination provision because it is broader and imposes less of an evidentiary burden on the plaintiff.

Damon Martichuski, *Sexuality and Transgender Issues in Employment*, 7 GEO. J. GENDER & L. 953 (2006).

This article explores all of the legal protections available for persons suffering from employment discrimination on the basis of sexual orientation. While Title VII of the Civil Rights Act, does not on its face protect against sexual orientation discrimination, in *Price Waterhouse v. Hopkins*, the Supreme Court expanded the scope of Title VII to include protection against discrimination based on "socially constructed gender norms," which has been used limitedly to provide relief, although most courts have refused to use it as a means of advancing sexual orientation protection. Several states have enacted legislation that expressly protects against discrimination on the basis of sexual orientation in employment, and some states afford degrees of protection based on whether the employment is private, public or quasi-public, but most fail to provide protection in private employment, and some even in public employment. Where federal and state law fail to provide protection, there are alternative common law theories such as intentional infliction of emotional distress and violation of public policy which could provide relief. The author is hopeful that the progress being made in this area will lead to the congressional extension of protection under Title VII, thereby eliminating the conflicting jurisprudence that exists today.