Women, Law, and Social Change
A GLOBAL VIEW

American Bar Association Division for Public Education
Women, Law, and Social Change: A Global View

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What is the status of women in the world today?

There is, of course, no easy answer to this question. Different societal norms and cultural traditions, differences in economic status or educational opportunities, whether one lives in an urban or rural area—all are factors that can affect the lives of women and the freedoms they enjoy. But today, perhaps more than at any other time in human history, women around the world are united in an effort to protect themselves and their families and to improve their lives through recourse to the law.

As you will read in this issue, law has become an instrument of social change in every corner of the globe. In the European Union, legislative initiatives are pushing forward a strategy of “gender mainstreaming,” while raising fundamental questions of what “gender equality” should look like for both women and men. In Tanzania, women are using their country’s ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)—a major international treaty mandating equal treatment for women—to challenge customary laws that put women at a severe economic disadvantage. In China, government policies are confronting, and attempting to change, age-old preferences for boys over girls. Tribunals established under United Nations auspices in the wake of conflicts in the former Yugoslavia and Rwanda have established historic precedents by classifying acts of sexual violence against women as war crimes.

You will also read about areas of the world where change cannot come soon enough. Women victimized under the Taliban in Afghanistan still fear a return to the brutalities of the warlord state that preceded the Taliban’s repressive regime, especially if efforts to solidify a new government fail. Elsewhere, women face economic discrimination, restrictions on their liberty, and acts of violence and lack the resources or sufficient faith in local systems of justice to defend their rights. Hope for these women lies in the commitment of advocates who refuse to let these injustices go unnoticed by the world community.

There are many lessons your students will be able to draw from the articles and activities in this issue. I would like to highlight two. First is an increased awareness of the incredible diversity of conditions faced by women around the world and the challenges faced by governments and advocates who seek to change long-established beliefs and patterns of behavior. Second is an understanding of how seeking equal rights for women can benefit all members of a society, improving the health of its citizens, the strength of its families, the growth of its economy, and the commitment of its political and legal institutions to equal justice for all.

Mabel C. McKinney-Browning

Director, ABA Division for Public Education
Women’s Economic Rights in the European Union

The formation of the European Union has brought changes to women’s working lives.

by Colette Fagan and Jill Rubery

The European Union (EU) has embarked on an ambitious plan of “gender mainstreaming.” But what does the EU mean when it addresses “gender equality” in employment legislation? Is the goal to make the current male norm the standard for women? Are new workplace norms needed for both women and men? Find out how laws are shaping these and other employment issues for European women.

Over the last few decades, there have been a number of changes in women’s economic roles in the European Union (EU), which is a political and economic union that now encompasses 15 European countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the UK). Women’s labor force participation rates have risen rapidly in those member states where the rates were low, and generally in every country women maintain a more continuous pattern of employment across their working lives than did previous generations. This includes women with young children. Gender differences in labor market participation have declined, but gender inequalities remain in the type of employment undertaken: women and men remain segregated into different job areas, women are more likely to work part-time, and women are paid less than men (even when the average hourly rates of full-time permanent workers are compared).

There are some important differences to bear in mind when considering the situation of women in the EU from a U.S. perspective. First, in EU member states there is more public provision or funding of childcare. Second, employment conditions are generally more regulated. For example, there are limits on full-time working hours, guaranteed holiday entitlements, more job security and compensation for redundancy and layoffs, and more extensive maternity leave entitlements. Third, while women’s employment rates have been rising, in most countries they are still lower than in the United States. Finally, due to a combination of the var-

Colette Fagan is a senior lecturer in the Department of Sociology and senior research fellow at the European Work and Employment Research Centre at the University of Manchester.

Jill Rubery is professor of Comparative Employment Systems and director of the European Work and Employment Research Centre at the Manchester School of Management, University of Manchester Institute of Science and Technology.

“Gender differences in labor market participation have declined, but gender inequalities remain …”
ious welfare state and employment policies in the EU, earnings and income inequalities are generally smaller in the EU than in the United States; in other words, European societies tend to be more equal.

**European Equality Legislation**

Equal treatment for women and men is a fundamental principle of the European Union (EU). Equal treatment is mandated in the original 1957 Treaty of Rome, which is the founding agreement upon which the EU has developed and from which all EU legal principles flow. The principle of equal treatment has been given legislative form and force through a series of EU directives and accompanying case law. National legislation in every member state must comply with the requirements of these directives as well as the principles established in case law. (Individual complainants go to their national courts in the first instance, but cases can proceed to the European Court of Justice.)

The European Union has introduced, over a period of 27 years, a series of directives concerned with gender equality. The first two directives, passed in 1975 and 1976, established the key principles of equal pay and equal treatment between women and men with respect to access to employment, promotion, and training. Subsequent directives have

- Addressed issues of equality in social security (both statutory and occupational).
- Altered the burden of proof in equality cases in favor of the complainant, so the onus is now on the employer to demonstrate that discrimination has not taken place.
- Provided protection for pregnant workers.
- Introduced entitlements to parental leave for mothers and fathers.

In 2002, there was a significant amendment of the 1976 equal treatment directive. This amendment

- Provided a definition of sexual harassment.
- Revised the definition of indirect discrimination.
- Specified the need for governments to establish national equality bodies and effective remedies and sanctions (including the removal of upper limits to compensation).
- Specified the need for equality reviews to be undertaken at company level and with the social partners (employers and trade unions).

In 2003, the European Commission is proposing a major consolidation, streamlining, and further recasting of the equality legislation to further enhance its efficacy.

**Gender Mainstreaming and the European Employment Strategy**

Women’s economic rights in the EU have also been advanced through the development of the European Employment Strategy, initiated in 1997. This strategy sets a number of quantitative targets and objectives for national governments’ employment policy. Governments are required to submit annual National Action Plans (NAPs) detailing their policies and progress to the European Commission for evaluation. The European Commission then makes recommendations to each national government concerning specific issues that should be addressed in that country. (There is no legal requirement for national governments to take account of these recommendations, but there is persuasive political pressure to cooperate to at least some degree.)

A key target of the employment strategy is to raise the employment rate for women across the EU, since this rate is lower than that for men in most countries, with the exception of the Nordic countries, where there is little gender difference in the employment rates. The employment strategy has set a target of a 60 percent female employment rate by 2010. National targets have also been set to increase the number of childcare provisions in order to facilitate women’s entry into employment. Thus, there is now a European-wide policy of encouraging women to participate in employment throughout their working lives and to arrange childcare through a combination of extended maternity and parental leave provisions and increased provision of childcare services (child minders, nurseries, out-of-school and...
holiday clubs). Governments are expected to increase the provision of childcare services in a number of ways—directly through public provision, through state subsidies (either directly to private companies or by tax allowances for parents), and through other mechanisms to facilitate the supply of childcare (e.g., providing training to increase the supply of childcare workers).

The adoption of the “gender mainstreaming” policy has provided a major new opportunity to promote equal opportunities within the European employment system. However, this is not without problems. The first type of problem is a conceptual one, as the term “gender equality” has not been explicitly considered in the European Employment Strategy. Gender equality can be conceptualized in three different ways, each with different policy implications:

**Gender equality based on “sameness,” with the male norm remaining unchanged.** In terms of employment, this means that women should be encouraged to work full-time like men, taking short periods of maternity leave only, supported by comprehensive, affordable, and full-time childcare services.

**Gender equality based on “sameness,” but with a new norm for both men and women.** For example, there is the expectation that becoming a parent should impact on the employment behavior of mothers and fathers in similar ways—that both should be able to take extended parental leave periods or to reduce their hours to part-time while their children are young. (The Swedish parental leave system is a good example of this principle.)

**Gender equality based on “difference,” in which the male and female norms are different but equally valued.** On average, women behave differently than men. They are more likely to reduce their working hours after they have children, and they are more likely to work in jobs that involve looking after or supporting people, such as health care, education, secretarial, and cleaning work. However, this position argues that women should not be penalized financially for these differences in the type of paid and unpaid work that they perform in society. Rather, the rates of pay should be raised in jobs in which women predominate (e.g., through “equal value” mechanisms of job evaluation) and the time that women devote to raising children or caring for elders should be acknowledged financially by society (through provisions made in pension systems, payments for raising children, and so on).

Implicitly, the European Employment Strategy is preoccupied with the first definition of gender equality, with the focus on raising women’s employment rates supported by an expansion of childcare services. Yet this objective is unlikely to be achieved without progress toward a broader objective of gender equality in the distribution of the time-consuming unpaid work of looking after children and elders, for services can provide only a partial substitute for all the work that is done within the home. Furthermore, an emphasis on increasing the rate of employment may neglect gender inequalities in the quality of employment—namely, that women tend to be segregated into the lower-paid jobs and sectors. Thus, equality in the distribution of work is only one dimension to equality; there must also be equality in access to income and resources and in responsibilities for the unpaid work involved in raising children and caring for elders.

The second problem with implementing a mainstreaming approach is a practical one, for it requires political...
Ready for Combat? Equal Treatment in the European Union

The nations that have become member-states of the European Union have agreed to protect and actively promote gender equality in the workplace: equal pay for equal work, equal opportunities for vocational training and promotion, and equal treatment of men and women at work. But does gender equality have limits? In recent years, a series of cases involving the role of women—and men—in the armed services have raised interesting questions about whether equality extends to the front line.

In 1976, the Council of the European Union (EC) issued a directive to implement the principle of equal treatment for men and women in employment-related issues. The directive provides that “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly.” It preserves, however, the right of member-states to exclude from this principle occupational activities for which “the sex of the worker constitutes a determining factor.”

This directive was tested in a case involving Angela Sirdar, who served in the British Army and, from 1990 to 1995, was chef for a commando regiment of the Royal Artillery. She lost her Royal Artillery position in a wave of military budget cuts but received an offer of transfer to the Royal Marines. When the Royal Marines became aware that Sirdar was a woman, they informed her that, because of a policy excluding women from service in the Royal Marines, the offer had been made in error. Sirdar sued.

The Royal Marines based its policy of excluding women on its requirement of “interoperability”—the need for every Royal Marine to be capable of fighting in a commando unit, regardless of the position to which he was regularly assigned. The Royal Marines are specially trained, “go anywhere” commandos, organized into four-men “fire teams” trained to be deployed into hostile environments. The

“What these cases demonstrate is that achieving the goal of equality for women involves adapting both laws and cultures.”

James H. Landman is an associate director of the ABA Division for Public Education in Chicago.
The presence of women in these units, it was argued, might compromise their combat effectiveness.

The European Court of Justice agreed. Central to the court’s decision was the fundamental difference between the Royal Marines’ organization, based on “interoperability,” and that of other British military units. The court accepted the British government’s argument that an exclusively male Royal Marines corps was necessary. One year after its Sirdar decision, Kreil was successful. The German ban on service by women was far broader than the British exclusion of women from the Royal Marines: virtually all military positions in the Bundeswehr were closed to women. Accordingly, the European Court of Justice found that Germany could not sustain a blanket prohibition on women in positions that might require the use of arms.

A new twist in the “equal treatment in the military” controversy came earlier this year when the European Court of Justice released its judgment in Alexander Dory v. Federal Republic of Germany. Military service in Germany is compulsory for men only; women serve on a voluntary basis. Citing the Court’s ruling in the Kreil case, Alexander Dory, a man, claimed that compelling men only to serve in the military constitutes unlawful discrimination against men and violates their right to equal treatment. The Court avoided Dory’s equal treatment claim by ruling that a member state’s choice of military organization is a matter to which the law of the European Community does not apply.

Land Tenure and Economic Opportunity in Tanzania
As in many societies, land is the predominant source of wealth in Tanzania. It is important both for the production of income and as collateral for business development loans. Until recently, however, a widowed or divorced Tanzanian woman had few legal rights to claim land she had occupied during her marriage, even if it was property that she had personally brought to the relationship.

Despite a national constitution that proclaims a right to equality, many land disputes in Tanzania are still determined by customary laws that are highly discriminatory against women. Customary laws are those that have been shaped by the customs and traditions of various tribal communities within Tanzania, and they continue to have great force in local communities. The vast majority of Tanzanian tribal communities are structured according to a patrilineal system: land descends from father to son, with women traditionally excluded from the rights to possess, acquire, or inherit property in their own name.

Land tenure reform has become a pivotal issue for women seeking greater independence and self-sufficiency. The Tanzanian government has recognized the need to effect legal change for women. In 1985, it ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which became the basis for a 1990 landmark ruling by the Tanzanian High Court in Ephrahim v. Pastory. Holaria Pastory’s father had bequeathed land to her in his will, but when she tried to sell the land, her nephew asked to have the sale voided as a violation of customary law against a woman’s sale of clan land. Pastory argued that this was a violation of the Tanzanian constitution’s protection of women’s rights. In upholding her position, the high court explicitly cited ratification of CEDAW as evidence of the constitutional protections Pastory claimed and ruled that the customary law relied upon by her nephew improperly violated those protections.
Despite Holaria Pastory’s success and the high court’s ruling, the provisions of customary law are still enforced in many areas of Tanzania. The national government has continued to pursue land reform and in 1999 passed land reform acts asserting women’s equality to men in matters of land acquisition and possession. However, because the land reform acts still acknowledge customary law, critics fear that this legislation might not have a meaningful impact in communities where customary law remains strong. For others, the legislation represents an important step toward changing centuries-old traditions—traditions that cannot be expected to change overnight.

Later, Longer, Fewer: Women and Population Growth in China

Approximately one in five persons in the world lives in China. Since the 1970s, the Chinese government has aggressively promoted policies attempting to control population growth. Originally introduced under the motto “Later, Longer, Fewer” (later marriages and pregnancies, longer gaps between children, fewer children), these policies have successfully slowed the rate of China’s population growth. The Chinese government estimates that, as a result of the policy, there have been 300 million fewer births in China. However, these successes have come at a cost, borne largely by Chinese women and girls.

Although limits on family size affect both men and women, women are far more likely to experience the physical as well as the emotional and economic consequences of family planning policies. This has certainly been the case in China, especially after more stringent efforts to control population growth were instituted in the late 1970s. Under the so-called one-child policy, married couples faced severe economic consequences if they had two or more children, and there were reports of local authorities forcing women to undergo abortions or sterilization procedures.

Ancient traditions have also clashed with modern China’s family-planning policies. As in many traditional cultures, sons in China were responsible for aged parents, and they were also seen as more valued additions to the family workforce, especially in the rural areas, where a majority of China’s population still resides. Women have thus faced increased pressure to produce a son, resulting in cases of abandonment of female infants and even reports of female infanticide. Sex-selective abortions, made possible by modern medical technology that can determine the sex of fetuses, are also thought to have become more common.

The 2002 Population and Family Planning Law1 was intended to formalize population control policies and criminalize certain practices that have become associated with these policies. The law reasserts the government’s policy of later marriages and “one couple, one child” and provides for specific incentives to reward couples that follow the policy. Couples who volunteer to limit their family size to one child can be awarded a “Certificate of Honor for Single-Child Parents” and qualify for preferential treatment by employers and preferential access to various government programs, including training, technology, and poverty-alleviation loans. The law also provides that individuals who “undergo surgical procedures for family planning” (i.e., voluntary sterilization) will be granted leave from their jobs and may be rewarded with incentives at the local level. Those who bear children

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FOR DISCUSSION

What do you think equal treatment should mean in a military context? Is it fair to exclude women from service in units trained for combat? If men face compulsory military service, should women also?

Beyond a desire for social justice, why would it be important for a society to support equal economic opportunity for women?

Family-planning laws in China illustrate the problems that can emerge when new legislative initiatives confront long-established traditions or beliefs. How do you think people in the United States would respond if the government imposed a fine on families with more than one child?
Throughout history, soldiers have abducted, raped, tortured, and enslaved women in wartime. Violence does not happen randomly—it is determined and deliberate. Increased levels of violence against women continue into the post-conflict period. Criminal activity often thrives in such situations, where law enforcement is generally weak and there is rarely an effective judicial system. Accountability on the part of states and societies for crimes against women means more than punishing perpetrators. It means establishing the rule of law and a just social and political order.

The failure throughout history to deal with crimes committed against women in war has only recently begun to be addressed. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) are examples of this. However, change is slow and in many cases nonexistent. The sexual enslavement of at least 200,000 girls and women by the Japanese army during World War II as so-called “comfort women” has never been tried by any local or international court.

Reparations for achieving justice and accountability for women may take the form of restitution, compensation, rehabilitation, or guarantees that similar crimes will not be committed. Increasingly there are international norms that recognize reparations due to an individual. The UN Commission on Human Rights has appointed a Special Rapporteur on the right to reparations, and principles relating to the right to a remedy have been drafted. In addition, individuals have the right to reparations under the Rome Statute of the International Criminal Court (ICC) under Article 75.

“Ensuring accountability to women within the justice system will require a range of strategies.”

Adapted and reprinted from Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peacebuilding by Elisabeth Rehn and Ellen Johnson Sirleaf.

For the online text of this article, visit insightsmagazine.org
But many obstacles prevent women from seeking justice. They may not have enough money to travel to a trial or the ability to take time off from work or to leave their families; they may be intimidated or disillusioned by the justice system. Support services and legal aid are rarely provided to women, and gender bias within the judicial process—the very process that regulates how equality is achieved in society—prevents women from receiving fair treatment as witnesses, as complainants, and in investigations. Women are often blamed for the crimes committed against them and risk retribution for pursuing justice. The social and political instability of judicial systems during conflict and in post-conflict situations further impedes women’s access to justice.

Ensuring accountability to women within the justice system will require a range of strategies. These can be carried out at national, regional, or international levels, and through a variety of judicial methods: the ICC, ad hoc (formed for a specific purpose) tribunals, special courts and tribunals, and national justice systems. Nonjudicial methods, such as truth and reconciliation commissions and traditional mechanisms, can also play an important role in establishing accountability for crimes against women in war. A combination of methods may be appropriate in order to ensure that all victims secure redress.

**The International Criminal Court**

The establishment of the International Criminal Court marks a new era of international justice and accountability for women. The Rome Statute of the ICC includes forms of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization, in the definition of crimes against humanity and war crimes. Persecution, with gender as a basis for persecution, and the crime of enslavement, including the trafficking of women and children, are also listed as crimes against humanity. A statement in the commentary of the statute explains further that rape and other sexual violence can constitute acts of genocide.

Formed in 1997, the Women’s Caucus for Gender Justice in the ICC galvanized hundreds of groups and individuals to bring a gender perspective into the substance and procedure of the new court. The statute’s rules of procedure guarantee witness protection for women who testify. This reduces the risk of retaliation against women who give evidence. A Victims and Witnesses Unit (VWU) within the ICC will provide protection, counseling, and other security measures. The court will also establish reparations through compensation, restitution, and rehabilitation, which may take the form of communal reconstruction and healing programs. In a notable innovation, the ICC will create a trust fund for victims. The ICC statute requires that its judges, both male and female, have legal expertise on specific issues, including violence against women. It also calls for “fair representation of women and men” among judges.

Perhaps the most significant effects of the ICC for women will be at the national level, as the statute is intended to set in motion a process of national law reform. States that ratify the statute will need to amend their national law and adopt new legislation, if necessary, to ensure conformity with the statute’s provisions. If this does not happen, the state runs the risk of being deemed unwilling or unable to investigate or prosecute those crimes.

**Ad hoc Tribunals**

The International Criminal Tribunals of the Former Yugoslavia and Rwanda have raised the standards of accountability for crimes of sexual violence against women. Even though the judgments they have handed down constitute a tiny fraction of cases, these set historic precedents in prosecuting war crimes, crimes against humanity, and genocide. In so doing, the judgments of the ad hoc tribunals have clarified definitions of sexual violence.

Despite their achievements, ad hoc tribunals have been hampered by seri-
ous lapses and inconsistencies. The actual process of prosecuting crimes of sexual and gender violence in the proceedings of both tribunals has been slow, as well as painful for victims and witnesses. In some cases, women have withdrawn because the tribunals have failed to provide adequate support and protection.

**Special Courts and Tribunals**

War crimes against women have also been prosecuted in special courts and tribunals. For example, since judicial systems in Sierra Leone had virtually collapsed by the end of the conflict there, the Special Court for Sierra Leone was created by an international treaty between the United Nations and the government of Sierra Leone to provide justice for crimes committed during the war. The innovative court structure will involve both national and international judges and lawyers and will draw upon international and national legal systems. The statute of the Special Court refers explicitly to crimes of sexual violence and stipulates that “due consideration should be given in the appointment of staff, to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.” Unlike the ICTY and ICTR, the Special Court is funded on a voluntary basis by donor countries.

**National Approaches**

Getting indictments for crimes against women has proven to be most difficult at the national level. After a peace agreement is signed and the fighting stops, governments emerging from conflict face enormous challenges in rebuilding the judicial system. Judges, lawyers, and other legal experts may have fled or been killed. In some cases, broad amnesties may be granted to specific individuals or groups of individuals, which invariably result in impunity for crimes against women.

In attempting to set new national standards for their protection, women can look to international conventions and customary laws, the jurisprudence of the ICTY and ICTR, and the ICC statute and demand that these precedents be used during national trials. Despite the difficulty inherent in this, such trials may have several advantages over international tribunals. They generally have better access to evidence and involve witnesses who might be unable to travel outside the country; they engage the local population, enabling them to claim ownership; and they help build a collective historical memory. Some legal experts argue that war crimes trials in national courts can also play an important role in re-establishing the national judiciary by building court infrastructure and training local judges and lawyers.

**Truth and Reconciliation Commissions**

Truth commissions provide a public forum for victims to express their grievances and seek reconciliation. They establish an official public record of crimes committed in war by gathering testimony and other evidence from survivors. Whereas the truth-telling functions of criminal trials are restricted by law and procedure to deal only with facts that are legally relevant to the case at hand, truth commissions are able to develop a more comprehensive record and understanding of the full scale of violations.

The work of truth commissions—in which people describe what happened to them in their own words—can answer the need for a cathartic public recounting of women’s suffering. When truth commissions have gender-sensitive mandates and procedures, they can legitimize women’s experiences, making them part of the official public record. Like prosecutions, truth commissions are most effective when the affected populations feel a degree of ownership in the process. For women, this usually requires special measures to inform them about the commission’s structure, functions, and procedures.

For truth commissions to serve women, their mandates must reflect the nature of the violence and human rights violations against women. Crimes that are not explicitly mentioned in mandates are at risk of being ignored or under-emphasized. This is especially true for crimes of sexual violence.

Like trials, truth commissions require investigation and fact finding. Yet monitoring and reporting violations in con-

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**FOR DISCUSSION**

What difficulties do women face in seeking justice in courts for crimes committed against them in times of war? If victims make it to court, what difficulties might they face in proving a case?

Should female victims of war crime be compensated for violence they have suffered? What sorts of compensation are appropriate?

A court case might secure reparations for one victim of war crimes. But can it also serve other important functions?

Do improvements in international courts help prevent war crimes against women? What are additional ways of decreasing violence against women in times of war?

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On November 17, 2001, Laura Bush delivered the first weekly presidential radio address ever given entirely by a U.S. first lady. “The plight of women and children in Afghanistan,” she said, “is a matter of deliberate human cruelty carried out by those who seek to intimidate and control.” Although it was positive to hear the first lady being so outspoken about women’s issues, I remember thinking how much more powerful her argument would be internationally if the United States demonstrated its universal commitment to women’s human rights by joining the 169 [now 174] nations that had ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Furthermore, although the fall of the Taliban was clearly a positive development, U.S. bombs were not gender-sensitive and were giving rise to civilian casualties—female as well as male—as the first lady addressed the nation. As I listened, I also knew that, with the overthrow of the despicable Taliban, Afghan women had but gone from the fire into the frying pan; for, as my 1996 visit to the country had shown me, the newly victorious Northern Alliance also included misogynistic war criminals.

In July 1996, as an Amnesty International delegate, I traveled to Pakistan and Afghanistan’s capital city of Kabul, prior to its fall to the Taliban. During my visit, I interviewed many women who had been victims of a whole range of Mujahideen groups (groups that had previously fought the former Soviet Union but turned on each other after its withdrawal, devastating what remained of the country). Many of these groups, though not sharing the Taliban’s agenda of complete gender apartheid, were also fundamentalists and had been brutalizing Afghan women long before the Taliban emerged.

This is part of what was missing for me in Mrs. Bush’s radio address and in many discussions in this country of the plight of Afghan women before and since—some acceptance of responsibility. With our support—along with that of Pakistan, Saudi Arabia, and other allies—of any group (no matter how extreme its ideology) that opposed the illegal Soviet invasion and occupation, fundamentalist armed groups mushroomed.

Furthermore, now that the United States has removed the Taliban from power, we have an even greater obligation to do all we can to ensure that Afghan women are effectively able to realize their rights. While the $296 million [in aid] that the United States pledged is but a drop in the bucket, it should be immediately forthcoming as a first step. Additionally, Congress and the Bush administration must fully fund the Afghan Women and Children Relief Act, enacted in December 2001 to provide education and healthcare for Afghan women and children.

On the security front, Human Rights Watch has called on the international community to support the expansion of the mandate and duration of the International Security Assistance Force in Afghanistan (ISAF), and more than 60 aid groups have also called directly on the UN Security Council to do so. It is vital for the U.S. government to support such a plan. In addition, U.S. forces should immediately desist in providing direct support to individual warlords in Afghanistan, as reported by human rights groups.

Time is of the essence. I was horrified to read in an aptly titled Human Rights Watch document “Return of the Warlords: June 2002” that “in many ways, Afghanistan today resembles Afghanistan in the early 1990s, when regional commanders were consolidating their power before the onset of the savage civil war that followed the fall of the Soviet-sponsored Communist government.”

Bearing this in mind, I want to challenge the government of the United States and the new government of Afghanistan, as a first step, to ratify CEDAW together. By ratifying CEDAW together, the United States and Afghanistan can begin to break the link to that terrible past.
What Is Happening with the Treaty for the Rights of Women?

by Margaret Fisher

The United Nations adopted the first comprehensive treaty on the rights of women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. The United States signed the treaty in 1980 but has never ratified it. In this interview Alexandra Arriaga, Director of Government Relations for Amnesty International USA, explains the history of the treaty, and considers some important provisions.

Q: What can you tell us about the Convention on the Elimination of All Forms of Discrimination against Women?

Arriaga: The Convention, which is generally known as the Treaty for the Rights of Women, is the first treaty that comprehensively looks at the human rights conditions affecting women around the world. It sets out the minimal standards that are necessary to address the rights of women. It covers the whole gamut of issues from education to proper health care, to the right to be free of violence, to the prevention of trafficking.

Q: Tell us about the history of this treaty.

Arriaga: The United Nations adopted the treaty in 1979, and since that time 171 [now 174] countries have ratified it. The United States signed the treaty in 1980 but has not ratified it.

Q: What is the recent history of the treaty in the United States Senate?

Arriaga: In 1994, the Senate Foreign Relations Committee under the chairmanship of Senator Claiborne Pell (D-R.I.) held hearings on the treaty and, with bipartisan support, voted in favor of sending the treaty to the Senate floor for ratification. Unfortunately, time ran out, and the Senate concluded for the year before voting on CEDAW. The Senate changed parties that year, and Senator Jesse Helms (R-N.C.) became chairman of the Senate Foreign Relations Committee. He opposed the treaty and refused to bring it to the Senate committee for consideration. In 2002, Senator Joseph Biden (D-Del.) became chairman of the committee and with Senator Barbara Boxer’s (D-Calif.) strong leadership held a hearing on CEDAW. Again the committee voted with bipartisan support in favor of sending the treaty to the Senate floor for ratification, and again time ran out before there was an opportunity for a vote by the entire Senate. Senator Richard Lugar (R-Ind.) is now chairman of that committee and will make the decision as to whether to hold further hearings and whether to support Senate ratification. That’s where the treaty presently stands.

Q: I’d like to focus most of this interview on the area of reproductive rights of women as they are provided for in the treaty. What exactly does the treaty say about reproductive rights?

Arriaga: The first provision on reproductive rights is equal access to health care, including family planning and prenatal and postnatal care. Article 10 requires equal access with men to education, with access to specific education to ensure the health and well-being of families. This includes information and advice on family planning.

Alex Arriaga, Director of Government Relations for Amnesty International USA immediately before the Senate hearings on CEDAW on June 13, 2002.

Margaret Fisher is an adjunct professor at the Seattle University School of Law, and she assists the state courts of Washington with educational programs.
Q: What other provisions are there?

Arriaga: Article 12 talks about eliminating discrimination in the field of health care and ensuring access to health care services, including those related to family planning. It requires free access where necessary and adequate nutrition during pregnancy, confinement, and the postnatal period. Article 14 bans discrimination in rural areas, ensuring that rural women have access to health care facilities, including information, counseling, and services on family planning.

Q: One of the objections made against ratification of the treaty is that it requires access to abortion. How would you respond?

Arriaga: That is an important question. Let me be very clear. Nowhere does the treaty include the word abortion. It speaks only about family planning. To understand what that means in the context of this treaty, we need to explore what the understandings are. The understandings apply to any specified portion of any treaty and are an official way for the United States, or any ratifying country, to make sure that interpretations of that segment of the treaty are clear. In 1994, the United States agreed to include with the treaty an understanding offered by Senator Jesse Helms. The Helms understanding states, “Nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.”

Q: Is this understanding still attached to the treaty?

Arriaga: Yes, it still forms part of the treaty under consideration in the Senate today.

Q: Has any other federal interpretation been given on the treaty’s position on abortion?

Arriaga: In 1994 during the Senate hearings on the treaty, the United States Department of State declared that the treaty is “abortion neutral”; in other words, the treaty does not address the issue of abortion.

Q: Has the advisory committee [that reviews implementation of the treaty] ever addressed the issue of abortion?

Arriaga: When the advisory committee has spoken about abortion, its recommendations have fallen within these categories: (1) Generally, it has expressed opposition to abortion as a method of family planning. (2) It has expressed concern about high maternal mortality rates due to unsafe and illegal abortions. (3) It has expressed concern about high maternal mortality rates due to unsafe and illegal abortions. (4) It has condemned coercive abortions. (5) It has condemned abortions for sex continued on page 21

CEDAW
Convention on the Elimination of All Forms of Discrimination against Women

FOR DISCUSSION

What positive things will happen if the United States ratifies CEDAW?
Do you think there would be any consequences in ratifying this treaty? What kinds of obligations would the United States have?
Why do you think it has taken the United States so long to ratify CEDAW?
Improving Women’s Rights Around the World

According to the United Nations, two-thirds of the women in the world are illiterate. Millions of women lack basic human rights. In some countries, they are not allowed to attend school, work, or vote. Many women and girls are physically brutalized, suffering abuses such as “honor” crimes, domestic violence, and forced marriage. Women and girls also make up a majority of the world’s refugees, and many suffer particular atrocities because of their gender.

Because of pressure from the international community, many of these types of human rights violations are no longer being tolerated. Advocates for women’s rights have helped focus world attention on issues that matter most in the lives of women and their families: access to education, health care, jobs, and credit, and the chance to enjoy basic legal and human rights and to participate fully in political life. Activists have also succeeded in getting repealed many laws that explicitly discriminate against women.

Women’s groups have also been using another tool in their struggle for basic human rights: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Approved by the United Nations in 1979, CEDAW commits ratifying nations to overcoming barriers to women’s equality.

In this edition, Students in Action looks at the status of women’s rights in different countries around the world. It also highlights the progress being made in areas such as workplace rights, reproductive rights, human rights, and political rights. A world map on pages 18–19 identifies the specific countries you can read about.

What is CEDAW?

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international treaty that was adopted by the United Nations General Assembly in 1979. Often described as “an international bill of rights for women,” it commits countries that ratify the treaty to actively pursue measures intended to ensure equality between women and men. As of September 2003, 174 countries are parties to CEDAW. The United States has signed but not ratified the treaty.
encounter in the future, when you become parents and caretakers of the next generation of Americans.

For additional information, and for a Take Action! activity, be sure to visit insightsmagazine.org. (Click on “Students in Action” when you get there.)

**Afghanistan**

**GENDER APARTHEID**

Under the Taliban, Afghan women were barred from employment, forbidden to go outside the home without a male escort, required to wear head-to-toe burqas at all times, and barred from obtaining an education. Women were even denied basic health care. All these policies were brutally enforced by the Taliban’s Ministry for the Promotion of Virtue and the Suppression of Vice, which administered lashings and public beatings to accused women.

Following the Taliban’s defeat, a new transitional government has made restoring women’s rights a priority and has established a Ministry of Women’s Affairs. Women claimed 10 percent of the seats in the recent “loyal jirga,” or grand assembly.

**Bosnia and Herzegovina**

**WAR CRIMES**

On April 30, 1992, Serb forces took over the town of Prijedor in northeast Bosnia. Within a month of the takeover, Serb forces set up detention camps in order to suppress a suspected uprising of local Muslims and Croats. At the Omarska camp, murder, torture, rape, and barbaric conditions were the norm. The outrage generated by these atrocities highlighted the need to ensure that gender crimes committed during the war would be prosecuted.

On February 22, 2001, for the first time in history, the International Criminal Tribunal for the Former Yugoslavia brought charges solely for the crimes of sexual violence against women. It defined rape and enslavement as crimes against humanity. The judgments handed down regarded rape as a form and means of persecution; they represent a considerable step forward in redressing gender crimes.

**Canada**

**WORKPLACE TECHNOLOGY**

The majority of the Canadian population living in poverty are women. The considerable wage gap existing between men and women who work full-time can be explained partly by the growing trend of high-paying positions in the technology and electronic communications industry being filled by men. Without government sponsorship of equal training opportunities for both sexes, women are increasingly falling into the underpaid and, in extreme cases, impoverished sectors of Canadian society.

Organizations such as Women in Trades, Technology, and Blue Collar Work have been helping women improve their computer skills, learn to use the Internet, and take advantage of current technologies in order to obtain better-paying jobs, communicate more easily in the work world, and work from home while continuing to fulfill familial responsibilities.

**China**

**FAMILY PLANNING**

Since the 1970s, the Chinese government has aggressively promoted population control with the motto “Later, Longer, Fewer” (later marriages and pregnancies, longer gaps between children, fewer children). Under a so-called one-child policy, married couples faced severe economic consequences if they had two or more children.

Because sons have traditionally been more valued than daughters in China, some parents abandon their female infants and, in extreme cases, commit female infanticide. Sex-selective abortions have also been reported.

To prevent these abuses, the government passed the 2002 Population and Family Planning Law. The law prohibits discrimination against women who give birth to girls and the abandonment of female infants. It also prohibits using ultrasound technology to determine the sex of a child, as well as sex-selective abortions for nonmedical reasons. In order to end the traditional preferences for boys, the government has also endorsed programs to promote the value of women.
Ecuador

VIOLENCE AGAINST WOMEN

Nearly 60 percent of Ecuadorian women are victims of domestic violence. A national law addressing the issue was passed in 1995 and later became part of Ecuador’s constitution. Education programs, psychological assistance projects, a hotline, and a shelter for abused women have been established. A law that makes it compulsory for the government to organize campaigns against domestic violence and to provide social and health assistance for battered women was also passed.

Germany

EQUAL MILITARY TREATMENT

Before 1999, German women had been banned from any type of military service involving the use of arms. They were essentially limited to positions in the medical and military-music services. In 1999, the European Court of Justice found that the ban was discriminatory. Germany changed its constitution to open all careers and career groups—including military service—to women. However, service by women in the military remains voluntary, while German men must serve.
Ghana
SLAVERY

In southeastern Ghana, the *trokosi* tradition has been practiced for generations: girls are given to village priests for offenses committed by the girls’ family members. These girls become the priest’s slaves and property and must serve the priest sexually and domestically, working on his farm until death.

In 1998, the government of Ghana passed a law prohibiting *trokosi* and criminalizing it as a form of slavery. As a result, nearly 2,800 girls were released from their servitude. A non-governmental organization, International Needs Ghana, has helped the girls return to their families and has provided housing, food, counseling, and schooling. Survivors of *trokosi* have also formed a human rights organization to advocate for enforcing the law against it.

Japan
DOMESTIC VIOLENCE

Domestic violence had been a serious problem in Japan, but it went largely unrecognized and unaddressed by the government until the early 1990s. Then several cases of extreme violence against women became highly publicized. As a result, much greater attention has been paid to women’s issues in general and domestic violence in particular. Currently, more than 40 shelters and 87 counseling centers for battered women are operating throughout the country. Legal services and crisis hotlines are also available. The fight against domestic violence was strengthened in 2000 when Japan’s Council for Gender Equality defined violence against women as a violation of the Japanese constitution guaranteeing equal rights between the sexes.

Jordan
“HONOR” KILLINGS

Traditional culture holds that the reputation of a family rests on the reputation of its women. This custom has led to “honor” killings, in which male relatives kill women to restore the family’s good name in the community after the woman’s virtue has been compromised. Women may be killed for being victims of rape, incest, or sexual abuse; for rumored sexual activity; and for extramarital affairs.

In 2001, the Jordanian government repealed the penal code section that exempted men who killed their wives or female relatives found committing adultery from being punished. The king and queen of Jordan have also vowed to end the practice of honor killings, and courts have issued longer sentences for honor crimes in a few cases. Development of a government-sponsored shelter for women is underway. The goal is to provide women with support services, including psychological counseling, training, and rehabilitation.

Mexico
PREGNANCY DISCRIMINATION

Pregnancy discrimination has been a common practice among *maquiladora* employers who want to avoid the cost of maternity benefits. Female job applicants are routinely asked questions about whether they are planning to become pregnant, and they are required to take pregnancy tests. Workers who become pregnant on the job are often verbally harassed, fired, or given pay cuts.

However, in 1998, in accordance with the provisions of the North American Agreement on Labor Cooperation (NAALC), the United States, Canada, and Mexico agreed to address the problems of pregnancy discrimination in the workplace. While the Mexican government has been slow in promoting women’s labor rights, women’s rights activists have noted that the adoption of NAALC—and the pregnancy-related discrimination cases that have been brought under it—has focused greater attention on the problem.

Nepal
ABORTION

Traditional laws explicitly denied women any type of sexual and reproductive rights. Abortion was punishable as a criminal offense. As a result, nearly 20 percent of the women in prison had been convicted for undergoing abortions. In a typical year, more than 6,000 women died from pregnancy-related causes. Half
these deaths were attributable to unsafe abortions.

In 2002, Nepal passed a law amending discriminatory laws against women under the National Code. In addition, the law making abortion a criminal offense was repealed. Proponents are now working to ensure that the law is implemented quickly and that women who are facing punishment are released.

**Tanzania**

**PROPERTY RIGHTS**

Most communities in Tanzania are patrilineal: land passes from father to son. Women traditionally do not have the right to possess, acquire, or inherit property in their own name.

In a landmark case by the Tanzanian High Court (*Ephraim v. Pastory*), the court upheld the right of a woman to sell land she received from her father's will. A nephew had challenged the sale, claiming that it violated customary law, which prohibited a woman's sale of clan land. The Tanzanian national government has continued to pursue land reform and in 1999 passed land reform acts asserting women are equal to men in matters of land acquisition and possession.

**Tunisia**

**FAMILY LAW**

In Tunisia, national law permitted polygamy and unequal inheritance laws, among other discriminatory practices. However, after Tunisia gained its independence from French colonial rule, it adopted the Code of Personal Status. This new code changed the typical views of marriage and spousal obligations. It made polygamy illegal and abolished repudiation, which allowed a husband to end a marriage at will without legal proceedings. Also, women can now file for divorce on the same terms as men, while mothers' rights to custody and women's inheritance rights have been improved.

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**Take Action!**

1. Select three of the profiled countries and conduct research about the history of women's rights and gender equality in those countries. Write an article highlighting the advances made and the work that needs to be done still to bring about gender equality. What cultural influences have made change difficult? What influences are shaping policy change today?

2. The road toward gender equity and women’s rights has been long and rocky even in liberal democratic cultures. Investigate efforts in the United States to gain equal rights for women. Compare and contrast the political, cultural, and social situation of women during different eras of American history. Prepare a poster presentation outlining your research and present the poster to the class.

3. Though the United States signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1980, the U.S. Senate still has not ratified the treaty, meaning that the United States is not bound by its terms. Research the history and terms of CEDAW, as well as the arguments made for and against its ratification. Then write an editorial expressing a position on whether the treaty should be ratified, supporting your position with facts. Present the arguments for and against ratification in a class forum.
Selection. (6) It has urged governments to review their family planning and abortion laws to address these types of problems.

Q: Why should the U.S. ratify the treaty?

Arriaga: There are three issues to highlight here. First, ratifying is an excellent way for the United States to affirm global leadership on human rights of women and make it absolutely clear to the rest of the world that we stand with them on these international standards. Second, the United States generally has a very strong record in comparison to other parts of the world when it comes to laws and practices that seek to provide women with the recourse they need to prevent abuses. It would be important for the United States to share its experience and expertise. By ratifying the treaty, we then can participate in the advisory committee and share our experiences when reviewing the reports from other countries and making recommendations. Third, women around the world are asking the United States to ratify the treaty so that the United States can forcefully and effectively press the leaders of foreign governments to meet the standards for human rights of women set forth in this treaty.

Q: What steps would you advise voters to take to get the treaty ratified?

Arriaga: It is absolutely imperative that people educate themselves on the Treaty for the Rights of Women. They need to let their senators and the White House know of their support for U.S. ratification of this treaty.

Q: Where can people get more information about the treaty?

Arriaga: People can learn more about the treaty and sign up for action alerts at www.amnestyusa.org. Also, the Web site www.womenstreaty.org represents a coalition of more than 180 organizations, including the American Bar Association, that support ratification of the Treaty for the Rights of Women.

Alexandra Arriaga is director of government relations for Amnesty International USA in Washington, D.C.

Conclusion

Given that the development of gender mainstreaming is a long-term process, nations have come a long way, although much still needs to be done. There is a clear need for more and better gender monitoring and gender impact assessment and for better feedback from assessment to policy modification. Too little attention has so far been paid to both the actions and attitudes of employers and to the behavior of men. However, despite these deficiencies, the attention currently being paid to gender equality issues within European employment policy far exceeds what could have been expected, even in the early years of the 1990s.
Learning Gateways

by Linda Karen Miller

This teaching strategy extends students’ understanding of the legal issues confronting women’s rights around the world. The focus of the lesson is on the struggles of women in the European Union, Tanzania, and China for equal rights. For an extended lesson, as well as additional strategies and activities, go to insightmagazine.org.

Objectives

As a result of this lesson, students will:

- Recognize that women around the world do not possess equal rights.
- Learn about the basic struggles of women in selected parts of the world to achieve equal rights.

Target Group: Secondary students

Time Needed: 1 to 2 class meetings

Materials Needed: For each student, copy of the article “Seeking Equality for Women Around the World”; for student groups, Student Handout

Procedures

1. Prepare for the lesson by reading the article “Seeking Equality for Women Around the World” on pages 7–9 in this edition.

2. Give students copies of “Seeking Equality for Women Around the World.” Explain that the topics discussed in the article will form the basis for this lesson—a mock women’s conference, “World Symposium on Women’s Rights.” Ask students to come to class next time prepared to volunteer for the subcommittee of their choice:

   (1) European Union and Equal Treatment for Women in the Military
   (2) Land Tenure Rights of Women in Tanzania
   (3) Family Planning in Mainland China

   Stress that each subcommittee must have students who represent both sides of the legal issue facing their country.

3. Have students volunteer for the subcommittee on which they wish to serve. Distribute copies of the Student Handout to subcommittee members. Ask each subcommittee to select a chair and a recorder. Members of the subcommittee are to review the material on their particular country in the reading and conduct further research, as needed, into both sides of the legal issue.

4. Explain that subcommittee members should discuss the information gathered and prepare their position paper for the “World Symposium on Women’s Rights,” following the outline on the Student Handout.

5. After the subcommittees have given their presentations, have conference attendees vote on the resolutions.

6. Ask all conference attendees to fill out an issue diary (a diary about each issue in each of the areas). Have students write their thoughts, attitudes, and opinions about the legal issues and the ways the issues were or were not resolved at the conference. If the issues were not resolved, encourage students to reflect on the reasons why not.

Dr. Linda Karen Miller is a retired secondary school American government teacher who teaches school law at the Community College of Southern Nevada.

Teaching Standards for This Issue

Each edition of Insights on Law & Society is designed to support national standards of major educational organizations. To see the national standards supported by this Insights edition, visit insightsmagazine.org (click “Learning Gateways”).

Insights on Law & Society 3.3 • Spring 2003 • © 2003 American Bar Association
Subcommittee Outline

Directions: Fill in this outline while researching the legal issues involved in your country’s problems. Make sure that, as part of your deliberation process, people on both sides of the issue have an opportunity to present their viewpoints.

Your Subcommittee (circle one): European Union
Tanzania
China

1. State the legal problem.

2. Identify possible/probable causes of the problem.

3. Offer a solution.

4. Identify possible problems that your solution might cause.

5. Organize your conclusions, including the position taken on the issue. (Be sure to explain why this particular position has been taken after evaluating the possible solutions.)
The 2002–03 Term in Review

The 73 cases that were decided after argument this term included landmark rulings in the areas of affirmative action and gay rights.

Tough Sentencing

Ewing v. California, No. 01-6978; Lockyer v. Andrade, No. 01-1127; Sattazahn v. Pennsylvania, No. 01-7574

In Ewing v. California, No. 01-6978, the Supreme Court upheld a repeat felon’s life sentence for stealing three golf clubs. And in Lockyer v. Andrade, No. 01-1127, the Court held that a sentence of two consecutive terms of 25 years to life for shoplifting $150 in videotapes was not contrary to any “clearly established” gross disproportionality principle under the Eighth Amendment.

On a similar note, a defendant who had been sentenced to life imprisonment had cause to regret pursuing an appeal that succeeded in having his conviction set aside. On retrial he was reconvicted and this time sentenced to death rather than life—a result that the Supreme Court in Sattazahn v. Pennsylvania, No. 01-7574, held did not violate double jeopardy principles.

Affirmative Action

Grutter v. Bollinger et al., No. 02-241; Gratz et al. v. Bollinger et al., No. 02-516

One of this term’s two affirmative action cases involved a challenge to the admissions program at the University of Michigan’s law school; the other asked the Court to strike the program at the university’s undergraduate school. Because courts must use “strict scrutiny” when reviewing officials’ use of race, it was clear at the outset that the affirmative action policies at both schools would have to be struck down unless they could be shown to consist of “narrowly tailored measures” that furthered “compelling” governmental interests.

Barbara Grutter, the plaintiff in the law school case, Grutter v. Bollinger et al., No. 02-241, is a white Michigan resident who was denied admission to the school despite having earned an outstanding grade point average and a high score on the Law School Admission Test. She contended that the school had no “compelling interest” to justify its use of race in making admissions decisions.

Writing for a 5-4 majority, however, Justice O’Connor endorsed Justice Powell’s view (in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)) that student body diversity is in fact “a compelling state interest that can justify the use of race in university admissions.” Further, the admissions program did not rely on quotas but instead followed Justice Powell’s recommendation that race be used only as a “plus” factor in a program that remained flexible enough to ensure that each applicant was “evaluated as an individual” and not in a way that made an applicant’s race or ethnicity “the defining feature” of his or her application.

The white petitioners in Gratz et al. v. Bollinger et al., No. 02-516, on the other hand, persuaded six justices that the university’s undergraduate program, which automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant, was not narrowly tailored to achieve educational diversity. The undergraduate admissions program was therefore struck down.

Gay Rights

Lawrence et al. v. Texas, No. 02-0102

Perhaps even more surprising to social conservatives, however, was the Court’s 6-3 decision in Lawrence et al. v. Texas, No. 02-0102, striking down a Texas statute that made it a crime for persons of the same sex to engage in certain kinds of sexual conduct together. In declaring the law in violation of the due process clause, the Court overruled its contrary ruling in Bowers v. Hardwick, 478 U.S. 186 (1986).

In striking down the Texas law, Justice Kennedy wrote for the majority that the Court was now endorsing Justice Stevens’s declaration (in his Bowers dissent) that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

“This,” proclaimed Justice Scalia, in what is proving to be the most-quoted dissent of the term, “effectively decrees the end of all morals legislation.”

If the promotion of majoritarian sexual morality is not even a legitimate state
While the dissenters would have upheld the new law and permitted the trial to take place, Justice Breyer, joined by Justices Stevens, O’Connor, Souter, and Ginsburg, struck it down on the grounds that the ex post facto clause, which bars laws that criminalize conduct that was legal when originally performed, also forbids the government from reviving a previously time-barred prosecution.

**Ex Post Facto**

*Stogner v. California*, No. 01-1757

Justice Scalia was likely no less annoyed when he joined Justice Kennedy’s dissent to the Court’s equally surprising 5-4 decision in *Stogner v. California*, No. 01-1757, that a new California statute of limitations governing sex-related child abuse crimes violated the Constitution’s ex post facto clause, Art. I, § 10, cl. 1. As a result of this ruling, state courts now must release dozens of convicted child molesters and drop charges against other alleged child sex abusers.

The petitioner in the case, Marion Stogner, was a former priest facing child molestation charges for acts he allegedly committed between 1955 and 1973. Although a three-year statute of limitations was in place during the years his alleged crimes took place, he was not indicted until 1998, after the state enacted its new statute of limitations authorizing prosecutions for child sexual abuse as long as the cases are begun within a year of a victim’s first complaint to the police.

**First Amendment**

*United States v. American Library Association*, No. 02-361; *Commonwealth of Virginia v. Black et al.*, No. 01-1107

In *United States v. American Library Association*, No. 02-361, the Court upheld the Children’s Internet Protection Act (CIPA), which provides that public libraries that receive federal assistance to provide Internet access must install software to block images that constitute obscenity or child pornography.

A group of libraries, library associations, library patrons, and Web site publishers challenged the constitutionality of the filtering provisions on First Amendment grounds. A chief complaint was that current filtering technology is not sophisticated enough to avoid inadvertently blocking nonpornographic sites. The act seeks to mitigate that defect by permitting adults to ask the librarian to either unblock the specific Web site or turn off the filter, but the plaintiffs contended that this remedy was burdensome.

Writing for a plurality of the justices, Chief Justice Rehnquist stressed that in his view, the law neither penalizes libraries that choose not to install filtering software nor denies them the right to provide unfiltered Internet access. “Rather,” he wrote, “CIPA simply reflects Congress’ decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.”

In *Commonwealth of Virginia v. Black et al.*, No. 01-1107, the Court revisited the controversial subject of cross burning. The Virginia cross-burning statute made it a felony for any person “with the intent of intimidating any person or group” to burn a cross on “the property of another, a highway or other public place.” It also specified that any such burning “shall be prima facie evidence of an intent to intimidate a person or group.”

In announcing the judgment of the Court, Justice O’Connor wrote that the provision treating any cross burning as prima facie evidence of an intent to intimidate rendered the law unconstitutional in its current form. But she went on to declare that, with a carefully drawn statute, a state may nevertheless ban cross burnings that are carried out with the intent to intimidate.

Justice Thomas, the only African American on the Court, filed a lone dissent in which he declared that the Court should have upheld the law as is because in his view it prohibited only conduct, not expression. And in any event, he said, “just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.”
Enacted Legislation

Preventing Child Abuse. On June 26, President Bush signed the Keeping Children and Families Safe Act of 2003, which strengthens state and community programs that prevent child abuse and family violence, provides resources to increase the number of older children placed in adoptive families, and requires background checks for foster and adoptive parents. The act, passed by Congress as S. 342, ensures that states will provide training for child protection caseworkers so that they will be able to recognize situations of substance abuse and domestic violence. Caseworkers also will receive training about parents’ legal rights and how to handle allegations that parents are abusing their children.

Tax Relief. At the end of May, the Jobs and Growth Tax Relief Reconciliation Act of 2003 (P.L. 108-27) was signed into law after Vice President Dick Cheney cast the tie-breaking vote in the Senate (see box p. 27). The act provides lower tax rates for dividends and capital gains and lowers income tax rates for individuals. The act also immediately increases the child tax credit and provides relief from the marriage penalty.

Amber Alert. President Bush signed into law a wide-ranging package of child safety measures, the centerpiece of which will expand nationally a voluntary quick-response network to help find kidnapped children. Named after a nine-year-old girl abducted from Texas and later found murdered, the Amber Alert system, already operating in many states, sends information about suspected child abductions via highway signs and radio and TV notices. The legislation provides funds to states and communities for network equipment and also strengthens federal criminal penalties for childographers, sexual abusers, and kidnappers.

Proposed Legislation

Medicare Prescription Drug Benefits. The Senate and the House passed separate bills that would add a prescription drug benefit to Medicare, setting up the biggest expansion of the program in its 40-year history. Both bills, which would become effective in 2006, increase the role of private health plans by adding a managed-care option to Medicare that would allow senior citizens to join preferred-provider healthcare plans that also provide drug benefits. Alternatively, senior citizens could remain in the traditional Medicare plan but would also be able to participate in private drug plans and get the same prescription benefits. The effort by lawmakers to iron out differences in the proposals is expected to be a contentious and lengthy proposition.

Flag Desecration. The House overwhelmingly passed a resolution proposing a constitutional amendment to authorize Congress to pass legislation banning desecration of the U.S. flag. H.J. Res. 4, passed by a 300-125 vote, would overturn a Supreme Court precedent that protects flag burning as a form of political expression protected by the free speech clause of the First Amendment of the Constitution. Supporters of the proposed constitutional amendment maintain that the flag warrants special pride as a national symbol. Opponents

Ann Simeo Heinz is an attorney, editor, and writer working in Chicago.

For activities and the full text of this article, visit insightsmagazine.org
maintain that, though flag desecration is offensive, the House resolution constitutes an unwarranted restriction on freedom of speech and expression under the First Amendment.

Legal Aid for Unaccompanied Alien Children. Legislation has been proposed to provide legal aid for unaccompanied alien children who are detained in the United States. Proponents emphasize that detained children are rarely aware of their rights under U.S. law and most speak little or no English. Many unaccompanied children are also often strip-searched, shackled, and housed with convicted juvenile offenders. The legislation provides guidelines and standards for the treatment of unaccompanied minors to ensure that they are treated as children rather than criminals. In addition, S. 1129 would provide pro bono legal representation for such children in their immigration matters as well as appointed counsel at government expense as a last resort. The bill also includes a pilot project to provide the appointment of guardians ad litem (guardians appointed by a court for a single lawsuit) to interview children and develop recommendations regarding custody, detention, and release and to ensure that the children understand the proceedings.

Gun Industry Liability. In response to lawsuits filed against the gun industry by more than 30 cities and counties alleging a range of claims based on negligence, nuisance, and product liability, Representative Cliff Steams (R-Fla.) introduced legislation (H.R. 1036) that would allow negligence actions against the gun industry only in extremely limited circumstances. Proponents say the bill will prevent frivolous lawsuits against federally licensed gun manufacturers, wholesale distributors, and retailers. Opponents, on the other hand, argue that gun manufacturers would enjoy special immunity in state courts for product liability claims even though they failed to adopt and implement safety devices that would prevent common, foreseeable injuries. The proposed standard, according to critics, would bar lawsuits involving children and adults regardless of whether the firearm involved were equipped with safety devices designed to prevent such accidents.

Learn More About Proposed Bills

Students and teachers can review an annotated inventory of selected congressional bills proposed during this congressional session by visiting insightsmagazine.org (click “News from Capitol Hill”). Grouped by subject such as “Election Law” and “Health Law,” these bills have been chosen because of their probable interest to students and usefulness in educational settings. To research any congressional bill by bill name or number, visit thomas.loc.gov.

Vice Presidential Tie-Breaking Votes

According to Article I, Section 3 of the U.S. Constitution, “The Vice President of the United States shall be President of the Senate, but shall have no Vote unless they be equally divided.” As president of the Senate, the vice president is responsible for enforcing the Senate’s rules and recognizing speakers. Senators are allowed to speak only after the vice president or the president pro tempore recognizes them. The vice president can therefore wield tremendous influence over whether legislation passes by permitting only certain senators to speak. However, the vice president is not allowed to participate in any debates or to vote, except in case of a tie.

Since 1789, vice presidents have cast 241 tie-breaking votes in the Senate. Many of these votes were against issues that would have failed even if the vice president had not voted, because in case of an evenly divided Senate, the question at issue automatically dies. In these cases, the vice president’s negative vote is essentially irrelevant, as the legislation could not have passed. Instead, the only purpose of the vice president’s negative vote is to publicly show opposition to the proposal.

The country’s first vice president, John Adams, holds the record for most votes, having broken a tie 29 times in the Senate. Adams’s votes protected matters such as the president’s sole authority over the removal of appointees and the location of the nation’s capital. Adams also once cast a tie-breaking vote to prevent war with Great Britain.

More recently, the most active use of the tie-breaking power belongs to George Bush, Sr., who voted seven times during his vice presidency to save controversial weapons systems backed by the Reagan administration, including the MX missile, chemical weapons, and the Strategic Defense Initiative. The current vice president, Dick Cheney, has cast five tie-breaking votes so far, including a vote this spring to pass President George W. Bush’s tax legislation.
Teaching with the News

DNA Evidence: Facts and Fiction

Deoxyribonucleic acid, or DNA, is at the center of a scientific revolution that is transforming our system of justice. Since first introduced in American courtrooms in the late 1980s, DNA evidence has exculpated wrongfully convicted prisoners awaiting execution on death row. It has contributed to the identification, arrest, and conviction of criminals who might otherwise have remained at large. And it has altered our expectations of what criminal investigators can achieve when analyzing a crime scene.

Within an individual’s body, DNA remains the same from cell to cell. A cell from a person’s strand of hair, for example, will have the same DNA as a cell from the same person’s toenail. Fluids and other substances produced by the body—saliva, perspiration, semen, urine, and fecal matter—will also contain the individual’s DNA.

The term “DNA fingerprint” is often used to describe an individual’s unique genetic profile, and indeed the use of DNA evidence is very much like the more traditional use of fingerprint evidence. Crime scene investigators search for substances containing a suspect’s DNA much as they would search for a suspect’s fingerprint. Once found, the DNA evidence is matched with a DNA sample taken from the suspect, just as fingerprint evidence would be matched with a suspect’s fingerprint.

Because DNA is present in virtually every cell in the body, investigators have a much better chance of finding DNA evidence than of locating a good fingerprint. A skin cell, a single strand of hair, or a drop of saliva or perspiration can all yield DNA evidence that a suspect was present at a crime scene. At the same time, the absence of a suspect’s DNA at a crime scene can be exculpatory. In a case of rape, for example, the fact that a suspect’s DNA does not match the DNA found in the rapist’s semen would point strongly to the suspect’s innocence.

How Conclusive Is DNA Evidence?

Does the presence of a person’s DNA at a crime scene establish guilt? Not at all—it typically indicates only that the person was there at some time. DNA cannot establish when the person was there or for how long. Once DNA has been matched to a suspect, a prosecutor or defense attorney will consider the “probative value” of the DNA evidence, the extent to which it tends to prove the suspect’s guilt or innocence.

A variety of factors can influence the probative value of any given piece of DNA evidence. Imagine a case in which a man is found strangled to death in his apartment. The suspect is a longtime friend of the victim. The fact that a hair from the suspect’s head was found in the victim’s apartment might not mean much—the hair could have been shed anytime the suspect visited the victim, not necessarily on the day of the crime. If, however, skin cells from the suspect’s hands were found embedded in the fibers of the rope that strangled the victim, a prosecutor would have much stronger evidence of guilt.

Additional Information

For the online text of this article, plus FAQs, useful links, and teaching ideas, visit insightsmagazine.org.

James H. Landman is an associate director of the ABA Division for Public Education in Chicago.

Inspired by DNA: Facts and Fiction

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Although the validity of DNA evidence is backed with a strong degree of scientific certainty, it remains subject to challenge at trial. As with any piece of physical evidence, crime-scene investigators and technicians in forensic laboratories must take care to document the “chain of custody” of DNA evidence. By doing so, they can establish that no one was able to contaminate or tamper with the evidence. DNA evidence is also degradable—especially in contact with water, air, or temperature extremes—and less than perfect samples of DNA evidence can produce inconclusive results in laboratory testing.

In some instances, defense attorneys can also argue that tests on DNA have produced a “false positive”—that the match of DNA to suspect was the result of laboratory error, kinship (i.e., the DNA was really that of a close relative), or coincidence. Prosecutors can respond with evidence of the statistical probability that the DNA is an accurate match or, when laboratory error is alleged, that the laboratory technicians followed established protocol for handling and testing the DNA. But in most cases, if investigators have obtained a good sample of DNA, followed established protocols for analyzing it, and made a positive match between the DNA evidence and a suspect, the match is difficult to refute.

**What’s in the Future for DNA Evidence?**

As of 1998, all 50 states had authorized databases of DNA samples collected from convicted criminals. The Federal Bureau of Investigation (FBI) maintains CODIS—the Combined DNA Index System—that lets federal, state, and local crime labs search for DNA matches at the national, state, and local levels. These databases allow criminal investigators to run DNA evidence collected from a crime scene against DNA that has been collected from convicted criminals in hopes of finding a match and identifying a suspect.

The successful match of DNA evidence from a crime scene with the DNA profile of a particular individual in a database is known as a “cold hit” when the suspect is identified by virtue of the DNA match alone. Such “cold hits” are becoming routine as police access to DNA databases and the number of individuals whose DNA profiles are available on them grows.

All states collect DNA from convicted sex offenders for their DNA databases. Many states also collect DNA from other classes of felons and, in some instances, persons convicted of misdemeanors. In some states, samples are also collected from certain classes of juvenile offenders, especially those involved in sex offenses. And in a few states, DNA samples are now being taken from those arrested for, but not yet convicted of, violent crimes.

Under current federal law, the national DNA database, which now includes over 1.3 million DNA profiles, is restricted to samples from convicted adults. But both the White House and lawmakers on Capitol Hill are pushing to ease this restriction, allowing DNA profiles from states that are more aggressive in their collection efforts to be included in the national profile.

Some worry that easing restrictions on whose profiles are included in DNA databases infringes upon civil liberties. If you are indicted for a criminal offense, but never convicted, should your DNA remain in a state or national database? If not, who is responsible for taking care that individuals who are wrongly accused of a crime are removed continued on page 31

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### Teaching Resources

- In 2000, PBS’s flagship public affairs series, *Frontline*, aired “The Case for Innocence.” The documentary explores the cases of four individuals who were convicted of crimes despite the presence of DNA evidence exonerating them. The documentary Web site, www.pbs.org/wgbh/pages/frontline/shows/case/, provides profiles of the four cases as well as interviews and articles exploring the current and future state of DNA evidence and flaws in our existing criminal justice system.
- February 28, 2003, was the 50th anniversary of James Watson and Francis Crick’s announcement that they had discovered the double-helix structure of DNA, which launched a revolution in the science of human genetics. Court TV has produced a “DNA 50th Anniversary Special” examining the ways DNA evidence has changed the criminal justice system. Features include an interactive “crime to conviction” activity, reports on the use of DNA in “cold cases,” and the civil liberties issues surrounding the creation of DNA databases. These can be found online at www.courttv.com/archive/news/forensics/index.html.
outside the limits proscribed by the law must pay a “social compensation fee.” Among the acts prohibited or criminalized by the law are:

- Discrimination against, or abuse of, women who give birth to girls or suffer from infertility.
- Discrimination against, or mistreatment or abandonment of, female infants.
- Use of ultrasound or other technologies to determine the sex of a fetus for non-medical purposes, as well as sex-selective abortion for non-medical reasons.
- Illegal performance of a sterilization procedure.
- Counterfeiting medical reports or certificates related to family planning.

Aside from the 2002 law, China is vigorously promoting ideas that up-end traditional preferences for boys and practices that have degraded the status of girls. Women in their childbearing years are now invited to participate in consciousness-raising sessions that emphasize the value of women’s work beyond producing sons. Illustrated books—including one titled *Giving Birth to a Girl or Boy Is the Same*—demonstrate and criticize traditional practices and beliefs that have demeaned women and girls.

Another aspect of the program promotes the idea that a girl can carry on the family name. The government highlights “model” men who, in a reversal of traditional practice, join their wives’ families and villages.

**Conclusion**

The clash between deeply held cultural beliefs and efforts to promote the equality of women underlies all three cases described in this article. What these cases demonstrate is that achieving the goal of equality for women involves adapting both laws and cultures. Increasingly, nations around the world are committing to this process.

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Elisabeth Rehn is an advisory council member of Intellibridge, a Washington, D.C., research firm, and a member of the UN Department of Peacekeeping Operations review board. She is also a member of the Court of Conciliation and Arbitration of the Organization for Security and Co-operation in Europe, a member of the International Steering Committee for Engendering the Peace Process, chair of the Finnish Association for Education and Training of Women in Crisis Prevention, and chair of the World Wildlife Fund, Finland. She has held a number of other government and UN positions, including Special Representative of the UN Secretary-General in Bosnia and Herzegovina.

Ellen Johnson Sirleaf is chairperson of the Open Society Institute West Africa, an external adviser for the UN Economic Commission for Africa, a member of the advisory board of the Modern Africa Growth and Investment Co., and chair and CEO of Kormah Investment and Development Corp. She has held many positions in regional and international financial institutions, including the World Bank. She was one of seven people chosen by the Organization of African Unity to investigate the Rwanda genocide.
from DNA databases? Who has access
to these databases, and what restrictions
are placed on access to potentially sen-
sitive health or other genetic informa-
tion that can be encoded in DNA? These
are serious issues, raising significant
privacy concerns. Thus far, however,
courts have generally ruled that state
database practices have not yet crossed
the line on civil liberties.

It is likely that DNA will continue
to alter our criminal justice system.
Work on the human genome is already
suggesting that there may be genetic bases
for not only our physical appearance but
also our emotional behavior. Might DNA
someday be pressed into service as
character evidence to prove that a sus-
pect’s personality was “pre-wired” for
certain behavior? Such a scenario seems
far-fetched today, given the weight that
our legal system and society place on
concepts of individual responsibility
and free will. But as our knowledge of
human genetics grows, so too might the
challenges we face in reconciling new
scientific understanding with long-held
beliefs.

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(For access information, see inside front cover.)

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