ANNOTATED LEGAL BIBLIOGRAPHY ON GENDER

ABORTION AND REPRODUCTIVE RIGHTS

Kyle Lee Holt, Note, *Hoosier Mother?: Indiana's Inconsistent Surrogacy Law*, 48 VAL. U. L. REV. 1133 (2014).

Surrogacy contracts in Indiana are unenforceable under statutory regulation because the legislature and courts are concerned that the compensation resulting from surrogacy contracts may be against public policy. As a result, people in Indiana who intend to execute a surrogacy agreement bear the risk of the surrogate repudiating the contract, without a remedy, even if the child is biologically related to both of the intended parents. Conversely, the common law in Indiana enables both intended parents to declare parenthood by establishing proof of a blood relationship with the child, which is often feasible only after lengthy litigation. The conflict between the statutory and common law regarding surrogacy inspired the author of this Note to propose an amendment to the Indiana surrogacy law by incorporating the existing equitable remedy clause under both the Indiana Code and common law to the surrogacy law. This amendment would validate the surrogacy contracts and enable those seeking surrogacy to avoid going through a lengthy judicial process to establish paternity and maternity. The amendment also makes gestational surrogacy—in which the child that the surrogate carries is genetically related to the couple who sought the surrogacy—available and enforceable, so that when the surrogate relinquishes the right to the child, the intended parents would not have to worry about consequences or repudiation. To limit potential problems, the proposed amendment also imposes responsibilities upon both parties, among which the most important is that the intended parents provide substantial medical basis for the need of a gestational surrogacy.

Mischael Sachmorov, Note, *The Morality of Prenatal Genetic Diagnosis and Its Relation to Public Policy*, 25 U. FLA. J.L. & PUB. POL'Y 205 (2014).

This Note author discusses the moral questions raised by genetic testing and answers the questions using the theory of utilitarianism and Kant's categorical imperative concept. The author addresses the difficulties of choosing one moral theory over another when creating public policy and presents examples of how it can lead to extreme results. For example, as prenatal testing becomes more popular it will become a new "hot-button" issue. The future debate over prenatal testing will be similar to abortion today, as some believe it should be banned while others remain impartial. The choice of which philosophy to implement depends on the value policy makers think is most important. If individual freedom is judged to be more important than Kant's categorical imperative, then prenatal testing would be allowed. However, we should find a middle ground between allowing parents to design their children genetically and society's interest in having healthy citizens

and the competing philosophical ideals creating a spectrum with mandatory genetic testing on one end and banning genetic testing on the other.

CHILDREN AND TEENAGERS

Daria Fisher Page, *Closing the Age-Out Gap? Assessing Maryland's Recent Expansion of Equity Court Jurisdiction for Potential Special Immigrant Juveniles*, 22 GEO. J. POVERTY L. & POL'Y 33 (2014).

Due to a discrepancy between state and federal immigration law, immigrant youth between the ages of eighteen and twenty-one years old are, in many cases, unable to apply for Special Immigrant Juvenile Status ("SIJS"), despite being eligible to do so under a federal statute. SJIS is a crucial classification that many undocumented immigrants under the age of twenty-one seek to obtain legal permanent residence in the United States. Every year, thousands of unauthorized children flee to the United States from around the world, hoping to obtain SJIS to create a better life for themselves and, on many occasions, to avoid the dire circumstances that exist in their native countries. Immigrant youth who suffer under the care of abusive and derelict parents depend on the vital relief and key services that the SIJS awards them, including waiver of unlawful entry and working without authorization. In this article, the author argues that those states that receive large numbers of immigrant youth and unaccompanied alien children should follow in the footsteps of Maryland and address the discrepancy between state and federal law, by permitting immigrant youth between eighteen and twenty-one years old to be deemed "juveniles," giving them the opportunity to apply for the SIJS status. While Maryland's attempt to narrow the gap between state and federal immigration law was undoubtedly a step in the right direction, the legislators ultimately fell short of this goal, as Maryland's amendment to state law creates unnecessary judicial limitations, including confining the court's jurisdiction to children under the age of eighteen who are victims of abuse or neglect. Looking towards the future, state legislators should take notice of the current discrepancy and enact legislation that reflects a greater consistency between state and federal immigration law.

Dana Brudvig, Comment, *Today's Tool for Interpreting Yesterday's Conviction: Understanding the Mandatory Statutory Sentence Enhancement in Federal Child Pornography Cases*, 2015 WIS. L. REV. 153 (2015).

It is imperative that there is judicial and legislative reform to remedy the unpredictable sentencing of offenders in federal child pornography cases. While federal guidelines exist, statutory ambiguities and vague judicial decisions cause sentencing disparity among federal judges. The comment author focuses on the

current issues with our system's minimum sentencing structure and the tools that should be given to judges to eliminate random sentences in these cases. The author seeks to distinguish sentences between first time offenders and recidivist offender enhancements due to prior "qualifying" convictions. By creating a system that more efficiently considers one's criminal history, judges would have the opportunity to make more suitable contrasts among offenders.

FAMILY

Geoffrey Leonard, Note, *In Our Back Yards: Dismantling Segregation by Incentivizing Regional Collaboration Under the Fair Housing Act's Affirmatively Furthering Fair Housing Provision*, 22 GEO. J. POVERTY L. & POL'Y 165 (2014).

The issue of housing segregation can be alleviated by the Federal Department of Housing and Urban Development ("HUD") incentivizing regional level assessment and planning for the purpose of integrating racially segregated communities. White flight from segregated suburbs trap black families in cycles of poverty by reducing the tax resources to communities that white families leave, while keeping communities segregated through land-use zoning autonomy granted by the state. HUD has historically neglected its obligations under the Affirmatively Furthering Fair Housing Rule, which is part of the Fair Housing Act, by proactively addressing segregation and granting limited guidance to jurisdictions on how to assess communities for integration progress. HUD recently proposed a rule change that includes regional analysis of disparities between communities, greater public access to data and participatory ability, and the requirement that the assessments should be submitted to HUD along with a proposal on how HUD funding would be used. The author believes this to be an improvement on the prior policy but sees room for further improvement. The author suggests that positive reinforcement, such as extra HUD funding and flexibility to meet deadlines for more ambitious proposals that integrate enclaves resistant to integration would work better than negative reinforcement, such as automatic denial of funding for failure to reach certain integration metrics. These changes would allow HUD and regional jurisdictions to coordinate more closely to break down racially isolated suburbs and concentrations of poverty in minority communities.

David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 234 (2015).

The author of this article argues that over the last decade the media has capitalized on parents' fear of child abductions and caused them to believe their environments are more dangerous than in actuality. As a result, some parents have become over-vigilant in protecting their children from the world's harms. Other

parents, who subscribe to the "Free Range" approach have denied the existence of the "bogeyman," Child Protective Services ("CPS"), and asserted that their children should be given the opportunity to learn responsibility and gain independence. Recently, the "bogeyman" has become a real entity. Parents are at risk of having their children removed from their homes by CPS if their decisions on child rearing do not conform to society's standards of child safety. However, legislation like the Child Abuse Prevention and Treatment Act and the Adoption Assistance and Child Welfare Act fail to provide clear guidelines on what constitutes child abuse and neglect. Moreover, this legislation gives CPS caseworkers too much discretion to remove children and place them in foster care or put them up for adoption, rather than return them to their parents. The perceived threat to a child's safety, ill-equipped legislation, and misguided parenting norms need to be addressed. Viable solutions include setting higher thresholds for findings of abuse and neglect, weighing the costs associated with parents' child rearing choices against the alternatives the parents had available, acknowledging parental discretion, and eliminating the economic incentives for removal.

HEALTH

Leslie Roussev, Note, *The WHO's Crash Diet: The Role of Governments in the International Obesity Crisis and why the Global Strategy Falls Short*, 48 INT'L L. 51 (2014).

International organizations, as well as local and national governments, are failing to address adequately the global obesity epidemic. The rapid increase of obesity rates threatens economic security and poses a serious public health crisis for populations in both developed and developing countries. The author of this Note argues that combating global obesity requires realistic action plans that involve all societal sectors, such as city councils, non-governmental organizations, the media, the food industry, and others. Moreover, governmental initiatives to address the global obesity problem must understand the underlying socioeconomic and political explanations for the increasing rates of obesity and adopt relevant legal framework to combat this socioeconomic and political backdrop. Currently, the "Global Strategy" of the World Health Organization's ("WHO") lacks this framework. Local and national governments should look to the WHO for guidance but should also address their own legal authority and specific cultural, economic, and political realities to combat the epidemic of obesity.

Paul Lewis, *A Gateway to Future Problems: Concerns About the State-by-State Legalization of Medical Marijuana*, 13 U.N.H. L. REV. 49 (2015).

Though marijuana is still illegal under federal law, many states are beginning to legalize the drug for both medical and recreational purposes. In response to state legalization, President Obama released a memo through the Deputy Attorney General, David Ogden, articulating a policy of non-enforcement. This executive action created confusion about the criminal and civil liability of those legally participating in the industry under state law. It is unclear if this policy of non-enforcement will continue going forward. The Odgen memo does not bind future presidents or current prosecutors and government agents. Moreover, the current policy could be construed as a violation of the constitutionally prescribed duties of the executive branch. Due to the instability of the current policy, the author advises state legislatures and individuals to keep in mind the impermanency of this policy of non-enforcement when deciding to participate in activities that would, if not for the non-enforcement policy, subject them to civil or criminal prosecution.

HUMAN RIGHTS

James C. Simeon, *The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of Those Refugee Claimants who Have Committed War Crimes and/or Crimes Against Humanity in Canada*, 27 INT'L J. REFUGEE L. 75 (2015).

This article addresses how Canadian jurisprudence interprets and applies International Humanitarian Law ("IHL") and International Criminal Law ("ICL") in assessing whether refugee applicants should lose protection due to their participation in war crimes, under article 1F(a) of the 1951 Refugee Convention. Article 1F(a) bars protection in Canada for those refugee applicants who participated in crimes against humanity. The author suggests, based on how five of the leading precedential judgments on article 1F(a) apply and interpret IHL and ICL, that Canadian courts generally will deny a refugee application if applicants knowingly participated in an international crime. The Supreme Court of Canada ("SCC") recently modified this standard to require exclusion only if a refugee applicant voluntarily, knowingly, and significantly contributed to an international crime. The SCC aimed to protect these refugee applicants by emphasizing that even though individuals may be complicit in international crimes, a link must be established between the individual and the criminal purpose of the group. The growing population of displaced people worldwide may cause the number of refugee applicants excluded under article 1F(a) to increase. Therefore, the application and interpretation of article 1F(a) will become ever more crucial to

ensure that those who have committed war crimes not only are excluded from international protection, but are prosecuted for these crimes.

Symposium, Hassane Cisseé, Keynote, *Crossing Borders in International Development: Some Perspectives on Human Rights, Governance, and Anti-Corruption*, 55 VA. J. INT'L L. 1 (2014).

The twin plagues of corruption and ineffective government are the largest barriers standing in the way of workable development on a global scale. This Keynote author posits that the international community can, and must, solve these problems with stable and ethical governments that promote social, political, and economic development by prioritizing basic human rights, such as healthcare and education. One illustration of the connection between human rights and development is the example of corrupt nurses in Sierra Leone who demanded rice in exchange for infant immunizations that were meant to be free. When a citizen's right to life-preserving healthcare and sustenance is held hostage because of acts of corruption such as this, a country's overall chance at meaningful development is compromised. Alternatively, focusing on human rights will benefit poor and otherwise vulnerable citizens and strengthen both communities and governments, paving the way for development. When a government is effective and free of corruption, it can respect, inform, and engage its citizens. To achieve this objective on a global scale, the international community should consider together the rights of citizens and development to create a mutually accepted plan for the future.

Olga Velez, *Liberty and Justice for All: The Violations of Basic Human Rights in Detention Centers Across the United States*, 25 U. FLA. J.L. & PUB. POL'Y 187 (2014).

The immigration system is increasingly fraught with difficulties as detained immigrants are residing in detention centers under conditions that do not conform with the requirements of the Universal Declaration of Human Rights. Although immigration reform under the Obama administration strives to support national security, programs and policies direct government resources to detaining non-criminal immigrants for the purposes of satisfying Congress's immigration detention goals. The author suggests providing immigrants with rights to an attorney and abolishing the Secure Communities Program and bed mandate to ensure immigrants are justly, and not arbitrarily, detained. Furthermore, extending an alternative for parole would not only be cost effective for the government, but also enable individuals with special medical needs to access healthcare that is otherwise not adequately provided in detention facilities. Other healthcare focused solutions include allowing detainees to access outdoor surroundings of detention centers for health and recreational purposes and ban the use of solitary confinement

as a method of punishment. These efforts will not necessarily resolve the difficulties the immigrant community faces in the United States but the efforts will help to ensure that immigrants' basic human rights of safety and security are not violated.

MARRIAGE AND DIVORCE

Ashley Kempczynski, Note, *The Marriage Myth*, 22 GEO. J. POVERTY L. & POL'Y 135 (2014).

Marriage proponents argue that children raised in homes with married, heterosexual, parents are more likely to experience the cognitive, social, and emotional milestones associated with normal childhood development than children raised by a single parent or by married parents of the same sex. In the United States, marriage-promotion campaigns stem from moral and religious motivations and often thrive due to racial tensions and animosity. The author argues that the myopic focus on marriage has created the "marriage myth"—a mistaken belief that heterosexual marriage constitutes a remedy for societal ills such as poverty and crime—which diverts attention from factors more significant to a child's development than a lack of heterosexual parents. For example, impoverished children experience a diminished degree of parent-child attachment and a greater risk of exposure to intra-family violence when compared with children raised without heterosexual parents in the home. The author advocates implementing programs to ensure affordable childcare opportunities, increased job and other economic opportunities for fathers, comprehensive sex education, and paid family leave. Additionally, we must improve the rhetoric surrounding single-parenthood by working to humanize these parents, instead of devaluing them. Implementing these long-term programs has a greater likelihood of creating lasting socioeconomic change than any efforts employed by proponents of heterosexual marriage.

Calvin Massey, *Why New Hampshire Should Permit Married Couples to Choose Community Property*, 13 U.N.H. L. Rev. 35 (2014).

The author of this article discusses the benefits of community property in New Hampshire as opposed to separate property, most importantly for tax reasons. Under separate property laws, the surviving spouse receives only one-third of the decedent's estate in a separate property jurisdiction, whereas in a community property jurisdiction, the surviving spouse will receive one-half of the decedent's estate. Furthermore, in a community property state, the surviving spouse will not be taxed in as large of a proportion of capital gains as would be the case in a separate property scenario, a huge benefit for the surviving spouse. Under federal

law, the tax basis of the community property is increased to market value on the date of death. The result is the appreciation in value of the property from when it is purchased to the date of death is never taxed as a capital gain. Only appreciation following the first spousal death is subject to capital gains taxation. It is important to note that the parties always have the option of amending, nullifying, or modifying any agreement during the course of the marriage. Community property in a long-term marriage gives the surviving spouse the best tax benefits in the case of death or divorce. These property laws are geared primarily towards long-term married couples, which have commingled their assets. It is for these reasons the state of New Hampshire would greatly benefit from a community property law, as opposed to the current separate property law.

Katelin Eastman, Note, *"Alimony for Your Eggs": Fertility Compensation in Divorce Proceedings*, 42 PEPP. L. REV. 293 (2015).

The Note author addresses fertility compensation in divorce proceedings and discusses how changes in society have shaped issues as to whether fertility compensation should be included in alimony. New technologies that allow women to freeze their ovum may cause the issue of compensation for this process to become prevalent in divorce proceedings. The author uses a case from New Jersey, between Mr. and Mrs. X, to discuss the history of divorce and alimony and explain the present state of fertility compensation, including how it may be applied to alimony proceedings in the future. While allowing fertilization costs to be included in alimony has the potential of creating a gender divide and may have significant impact on contemporary marriage as a whole, the positive aspects outweigh the negatives. This leads to the suggestion that women should be compensated for the process they may have to go through in order to have children after a divorce.

SEX INDUSTRY

Rachel N. Busick, *Blurred Lines or Bright Lines? Addressing the Demand for Sex Trafficking Under California Law*, 42 PEPP. L. REV. 333 (2014).

The Trafficking Victims Protection Act ("TVPA") and California's human trafficking and pandering laws should criminalize the purchase of sexual acts and the production of pornography in order to curtail the increasing demand for commercial sex and as a means to deter sex trafficking. Sex trafficking, as any other business, operates under the economic forces of supply and demand. If the demand for sex trafficking is decreased by criminalizing its consumption, supply for the business—the number of trafficked women and children—will decrease as well. The author proposes that the TVPA and California's human trafficking statute should be amended to include direct language unambiguously covering

buyers by adding words such as "solicits" and "patronizes" to the sex trafficking statutes. In addition, the general solicitation law and the acquiring of a prostitute law, the two California statutes most pertaining to sex trafficking, should be included in the list of crimes that constitute the human trafficking statute. Lastly, the California legislature should amend the pandering statute to ensure that pornography is outlawed and thus invalidate the Supreme Court of California's decision in *California v. Freeman* that legalized the making of pornography under the auspices of the First Amendment.

WOMEN'S RIGHTS

Carolina S. Schmidt, Note, *What Killed the Violence Against Women Act's Civil Rights Remedy Before the Supreme Court Did?*, 101 VA. L. REV. 501 (2015).

On May 15, 2000, the Supreme Court of the United States struck down the Violence Against Women Act ("VAWA") in *United States v. Morrison*. The Act was signed by President Clinton in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994. The VAWA was a civil rights remedy that enabled victims of violence motivated by gender to recover monetary damages from their attackers in federal court. In addition, the VAWA provided $1.62 billion in federal funding to state and federal agencies for combating violence against women. Finding for the defendants, the Supreme Court held in *Morrison* that the VAWA was unconstitutional because Congress lacked the authority, under both the Commerce Clause and the Fourteenth Amendment's Equal Protection and Enforcement Clauses, to create such a civil rights remedy. Although much has been written about this seminal case, the origins of the civil rights remedy and its legislative history have largely been ignored. The author explores those sources and maintains that even before *Morrison*, the VAWA was an unsuccessful civil rights statute since the statute was not being utilized to effect change in the country. Nevertheless, the reason for the statute's lack of success is that the VAWA, from the beginning, had a variety of structural challenges that prevented its realization.

CARDOZO JOURNAL OF LAW & GENDER

VOLUME 22 2015-2016 NUMBER 2

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