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Childcare Laws*

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# CHICAGO-KENT LAW REVIEW

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### CHANGING AMERICAN STATE AND FEDERAL CHILDCARE LAWS

SYMPOSIUM EDITOR  
JEFFREY A. PARNESS

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This Article makes two basic points. First, the three-parent family is here. Once states accept that parenthood does not depend on either biology or marriage, then three parents are inevitable unless the states go out of their way to rule that adults who otherwise meet their definitions of parenthood will not be recognized. Second, as three-parent family recognition increases, there are difficult questions on how to manage the status of each parent. This difficulty arises because the two major trends in the family law—the recognition of a multiplicity of family forms and the insistence on parental equality—are on a collision course.

Accordingly, in the Article, we first address how the various frameworks for legal parenthood are consistent with recognition of more than two parents, how existing law is moving toward such recognition, and how marriage equality is likely to increase the pressure to acknowledge a variety of alternative family arrangements. Second, we review the existing cases and statutes that have fostered recognition of more than two parents, and document the failure to develop understandings about what such recognition entails when it comes to raising a child. Third, we discuss the problems that would arise if the courts were to try to recognize multiple adults as parents and accord them equal standing in accordance with existing law. Finally, we argue that the solutions lie in a more flexible approach that permits recognition of a primary caretaker principle in those cases with more than two adults who function as parents.

*OBERGEFELL'S AMBIGUOUS IMPACT  
ON LEGAL PARENTAGE* *Leslie Joan Harris* 55

For more than thirty years, the central questions of the law of parentage have been when and to what extent determinations of legal parenthood should be based on biological relationship, marriage to a child's biological parent, or functioning as or intending to be a parent. In *Obergefell v. Hodges*, the Supreme Court endorsed the claim that children whose parents are married are better off socially and legally than nonmarital children; its language could easily be taken to support legal rules that encourage or prefer childrearing within marriage. On the other hand, the Court's argument assumes that the same-sex couple—both members—are in fact parents of the children, even though it is highly likely that only one adult is biologically related to child. The unspoken premise of the argument is that both

are parents because both function as parents (and often, but not always, both participated in the decision-making process that led to the children's conception and birth).

Today it is generally agreed that the law should protect relationships between children and adults who are committed to the children's welfare, and who have taken on the responsibilities of parenthood; the debate is over the best way to protect children and to advance other social goals. This Article examines how the law in the various states balances claims to base legal parentage on biology, function, and marriage and how the Supreme Court's same-sex marriage decisions are affecting that balance. It concludes that the decisions are having some impact in the lower courts, particularly by supporting recognition of the parental claims of adults who are not biologically related to children whom they have raised with their same-sex partners. However, these decisions are limited and cannot protect children and their functional parents adequately in all situations. Therefore, legislative solutions are still needed.

## ASSISTED REPRODUCTION INEQUALITY AND MARRIAGE EQUALITY

*Seema Mohapatra* 87

In *Obergefell v. Hodges*, Justice Kennedy declared that "marriage is fundamental under the Constitution and [should] apply with equal force to same-sex couples." This Article examines how the advent of marriage equality may impact the rights of same-sex couples to have biological children via assisted reproduction and surrogacy. Specifically, this Article points out the ways that the Obergefell decision affects the law of infertility. By the law of infertility, I mean the laws that require insurance coverage of infertility treatments and other assisted reproductive technologies ("ART"). Because same-sex couples are not able to have biological children with each other without ART, they are functionally infertile. However, insurance companies and state statutes use a medical definition of infertility.

I suggest that this conception must change in order for same-sex couples to enjoy the same ART benefits that heterosexual couples enjoy. I examine the Obergefell decision as a backdrop for the impetus for legal change in the realm of increased access to ART. I note how infertility treatment is provided in the United States, and the potential roadblocks for same-sex couples. Then, I discuss the opportunities and challenges for biological parenthood via surrogacy for same-sex couples and advocate for reform efforts to accommodate for same-sex access to these services. I finally suggest community engagement and activism in this realm to open up ART beyond its typically white, upper-middle-class patrons to all of those who wish to have a biological child, regardless of their wealth or race.

## ROMANTIC DISCRIMINATION AND CHILDREN

*Solangel Maldonado* 105

In recent years, social scientists have used online dating sites to study the role of race in the dating and marriage market. This research has revealed a racialized and gendered hierarchy that disproportionately excludes African-Americans and Asian-American men. For decades, other researchers have studied the risks and outcomes for children who are raised in single-parent homes as compared to children raised by married parents.

Drawing on these studies, this Essay explores how racial preferences in the dating and marriage market potentially disadvantage the children of middle-class African-American women who lack or reject opportunities to intermarry relative to children of married parents. Specifically, it examines the relationship between racial preferences in the dating and marriage market and children's access to economic resources and educational opportunities. It sketches the law's role in shaping individuals' romantic preferences, and argues that the state has an interest in providing children affected by racial preferences with similar access to opportunities as children not so affected. It proposes that the state support all families regardless of family form—married, divorced, blended, cohabitating, or single-parent—and that it abolish policies and initiatives that signal state preference for marital families.

QUACKING LIKE A DUCK?  
FUNCTIONAL PARENTHOOD DOCTRINE  
AND SAME-SEX PARENTS

*Katharine K. Baker* 135

This Article unpacks the relationship between the functional parenthood doctrine, constitutionally protected parental autonomy rights and intent-to-parent tests as they are applied in same-sex parenting relationships. It argues that, with the advent of same-sex marriage and second parent adoption, the functional parent doctrine is unnecessary and ultimately counterproductive to anyone interested in expanding legal recognition of non-traditional family forms. The functional parent doctrine asks courts to employ traditional understandings of parenthood (“Who acted like a parent?”) in assigning parental status.

These traditional understandings are usually, if not inevitably, dyadic, heteronormative, genetic, and gendered. In practice, the functional parent doctrine undermines the legitimacy of single-parent families and any family that does not conform to conventional parenting patterns; it indirectly reinforces the notion that the only parents entitled to robust constitutionally protected parental autonomy are married, genetic, heterosexual parents. Advocates and all those concerned with protecting the integrity of same-sex parenting families would be better served by an intent-based system that asks the parties themselves, not judges, to legally declare their family relationship. At virtually no additional administrative cost, states can offer a parental registration system for same-sex parents that puts the responsibility for defining legal families in the hands of the families, thereby allowing those families considerably more freedom than does the functional parent doctrine, to structure their relationships as they choose.

REFORMING THE PROCESSES FOR  
CHALLENGING VOLUNTARY  
ACKNOWLEDGMENTS OF PATERNITY

*Jeffrey A. Parness* 177  
& *David A. Saxe*

Voluntary acknowledgements of paternity (VAPs) significantly determine male legal parentage at birth for many children born of sex to unwed mothers in the United States. VAP processes are chiefly dictated by the federal Social Security Act, which places certain mandates on states participating in federally-subsidized welfare programs. These processes include norms on effective VAP establishments and on VAP disestablishments, either via early rescissions (within sixty days) by signatories or via later contests (after sixty days) by challengers, including signatories. The norms are driven by the Act’s desire to increase reimbursements of state child welfare payments from unwed fathers regardless of whether the fathers are childrearing.

These VAP processes are significantly employed by states for all children of unwed parents, regardless of any welfare assistance, and for childcare as well as child support purposes. Such uses create tensions since legal parentage often has nothing to do with welfare. Further, as to VAP contests, notwithstanding the Act’s promotion of uniform norms, there are significant variations in American state laws. Differences on VAP contests arise regarding who may challenge; what proof is required for an effective challenge; and what time limits exist for any challenge. These variations can prompt troubling results which should be mitigated through reforms of VAP challenge processes undertaken at the federal level.

Because parentage establishments and contests are usually undertaken with no focus on welfare reimbursement and much focus on the childcare interests of parents and the wellbeing of children, American states should create separate parental acknowledgment processes operating outside of the Social Security Act. Such processes, at a minimum, should allow acknowledgments by alleged parents who claim to have met state *de facto* (and comparable) parent standards, including both men and women. Deemphasizing welfare reimbursements, and emphasizing child wellbeing, will better ensure that beneficial (if not constitutionally protected) parent-child relations continue.

# THE PIPER LECTURE

## MIGRANT WORKERS IN THE UNITED STATES: CONNECTING DOMESTIC LAW WITH INTERNATIONAL LABOR STANDARDS

*Lance Compa* 211

Industry and trade associations say that the United States needs more immigrant workers to meet labor shortages and keep the economy growing. Labor advocates counter that the alleged labor shortage is a myth, and that employers' real goal is to replace American workers and put downward pressure on wages of U.S. workers. The United States needs a new immigration policy that balances the needs of companies and the overall economy with needs for high labor standards and protection of workers' rights. International labor and human rights instruments address several migrant labor issues, but U.S. law and practice fall short of meeting international standards in several key respects. A human rights argument creates space for advocacy on behalf of migrant workers. International human rights and labor standards should inform policy makers and advocacy groups' work in crafting immigration law and policy changes.

## STUDENT NOTES

### JUDICIAL DISCRETION V. PREDICTABLE OUTCOMES: A REVIEW OF THE 2016 AMENDMENTS TO THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

*David E. Braden* 249

In 2015, the Illinois General Assembly comprehensively amended the Illinois Marriage and Dissolution of Marriage Act (IMDMA). Illinois legislators cited a desire to increase predictable outcomes and to minimize adversarial litigation as primary goals for passing this overall to Illinois's marriage and divorce law. This Comment evaluates how the amendments advance the stated legislative goals of increasing predictable outcomes and minimizing litigation while maintaining flexibility for fact-specific decision-making through judicial discretion. While the results are mixed, this Comment identifies changes in key provisions to which practicing attorneys should take note.

### UBER DRIVERS: A DISPUTED EMPLOYMENT RELATIONSHIP IN LIGHT OF THE SHARING ECONOMY

*Nicholas L. DeBruyne* 289

Ride-sharing companies such as Uber Technologies Inc. ("Uber") have revolutionized the ride-sharing industry. In the realm of employment classification, Uber has a substantial financial motivation to classify its drivers as independent contractors because it frees Uber from financing workers' compensation programs, payroll taxes, and employee benefit programs. Others argue that Uber should not be able to escape such direct liabilities. In light of this ongoing debate, the U.S. District Court for the Northern District of California has recently denied Uber's class-action settlement agreement, thereby preserving the issue of whether Uber drivers should be classified as employees or independent contractors. Federal courts have traditionally decided employment relationships by applying one of three factor-based tests: the right-to-control test, the economic realities test, and the entrepreneurial opportunities test. My Note first applies each employment classification test to Uber drivers, and subsequently evaluates the competing arguments for employee and independent contractor statuses. The Note's final section explains why Uber drivers should be classified as independent contractors under a slightly modified economic realities test.

**PEDOPHILES DON'T RETIRE:  
WHY THE STATUTE OF LIMITATIONS ON  
SEX CRIMES AGAINST CHILDREN  
MUST BE ABOLISHED**

*Symone Shinton* 317

Sex crimes against children are uniquely heinous. Victims suffer extensive trauma that extends long into adulthood. But despite significant psychological data that indicates survivors of childhood sexual abuse cannot and do not report their victimization on a neat and predictable timeline, sixteen states still require them to do so. Criminal statutes of limitations on sex crimes against children protect predators, permitting them to run out the clock and move on to their next victim. This Note will argue that placing the burden on survivors of sexual abuse to report in time is not only psychologically unreasonable, but also harmful to society. State legislators must abolish their criminal statutes of limitations on sex crimes against children and permit adult survivors of childhood sexual assault to come forward.

**BLOOD ANTIQUITIES:  
PRESERVING SYRIA'S HERITAGE**

*Claire Stephens* 353

The recent large-scale looting of archaeological sites across Syria at the hands of ISIS has brought the devastating effects of the illegal international antiquities market into stark relief. Not only are these illicit excavations irreparably destroying human history, they also enable ISIS to sell Syria's cultural property to fund their jihad. This note examines the international and domestic laws that regulate this illicit antiquities trade. This note further identifies that, while these laws provide a meaningful legal framework, their ineffective implementation prevents them from effectively regulating the illicit antiquities market. Without effective market regulation, buyers in art market countries will continue to purchase the illicit Syrian antiquities that fund terrorist organizations, which will further incentivize the clandestine market. As the world's leading antiquities markets, the United States is responsible to effectively implement the governing law. This Note proposes two ways to accomplish this. First, U.S. customs officers must use innovative technology such as soil analysis to identify illicit cultural property at the U.S. border, preventing its import. Second, amending the Racketeering Influenced and Corrupt Organizations Act to include cultural property crimes will facilitate the successful prosecution of entire trafficking networks and deter participation in the market. These steps are necessary to preserve the world's heritage for generations to come.



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