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Introduction

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LAW REVIEW SYMPOSIUM 2010: REPRODUCTIVE RIGHTS, HUMAN RIGHTS, AND THE HUMAN RIGHT TO HEALTH

INTRODUCTION

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The human right to health, it seems, has finally come of age. First articulated in the human rights context in 1946,² the right to health is now sufficiently developed that it can form the basis for recognizing or strengthening other rights, and commentators can debate its complexities and limitations, as in this diverse and timely Symposium. At the same time, advocates, academics, and policymakers have begun to consider reproductive rights in a broader and more global context—one that reaches beyond the narrow confines of the right to privacy in U.S. constitutional jurisprudence to encompass concepts of human rights, reproductive justice, and access to holistic reproductive health care, from the earliest beginnings of the reproductive cycle to its end.³ And perhaps most importantly, they have begun to connect reproductive rights to the right to health in various productive ways. Yet, the array of contributions to this Symposium demonstrates that as the right to health has matured

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² See, e.g., United Nations High Comm'r for Human Rights & World Health Org., Fact Sheet No. 31, *The Right to Health*, at 1 (June 2008), available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>; Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 977 & n.95 (2010).

³ The contributions by Andrew Coan and Browne Lewis pertaining to assisted reproductive technologies, for example, speak to the beginning of the reproductive cycle; Benjamin Mason Meier and Miriam Labbok's article in this Symposium on the right to breastfeeding arguably pertains to its end.

and our understanding of reproductive rights has become more complex and more global, a dizzying proliferation of new and urgent questions, problems, opportunities, and challenges have presented themselves.

Attempts to achieve judicial enforcement of human rights domestically have long been plagued by resistance resulting from a variety of factors, including the intransigence of the distinction between positive and negative rights in U.S. jurisprudence, with only the latter being considered the proper objects of constitutional protection.⁴ Although commentators have long questioned the usefulness and meaningfulness of the distinction itself, it remains alive and well in the U.S.⁵ Even setting aside the negative/positive rights distinction, moreover, there are reasons to doubt whether full judicial enforcement of rights such as reproductive rights and the right to health is possible or desirable. One might question, for example, whether judges are competent to engage the complex scientific and policy issues involved in certain right-to-health claims, or whether the task of realizing such socio-economic rights is better left to legislative bodies, or even non-governmental entities. Notably, several of the authors in this issue have drawn upon comparative analysis both to critique and to substantiate reproductive rights and right-to-health norms.

A number of the contributors to this Symposium explore the question of how best to enforce reproductive rights in greater depth. Some bring to bear fresh perspectives on judicial competence and role, while others move beyond judicial enforcement to conceive of a more broad-based assumption of human rights duties and enforcement among both state and non-state actors. Andrew Coan, Assistant Professor at the University of Wisconsin Law School, examines the issue of judicial competence in the reproductive rights realm from a fresh perspective in *Assisted Reproductive Equality: An Institutional Analysis*. In particular, Professor Coan considers the problem of the right to access assisted reproductive technologies through the lens of institutional competence. Professor Coan's article,

⁴ The term "positive rights" usually refers to rights that require the government to provide something to individuals, such as health care or education, whereas "negative rights" are usually rights against government interference with the individual's liberty to do something, like speaking freely or practicing one's religion. For further discussion of this distinction, see generally B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 502-03 (2009).

⁵ *Id.* But see, e.g., William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in THE CONSTITUTION IN 2020, at 55, 62-63 (Jack M. Balkin & Reva B. Siegel eds., 2009) (arguing that "social and economic rights . . . are not strangers in the province of U.S. constitutional experience").

which critiques Professor Radikha Rao's scholarship on this issue, argues for a nuanced comparative approach to institutional analysis. Professor Coan observes that even the most attentive institutional scholarship on reproductive liberty, including Professor Rao's, fails to take fully into account the comparative limitations of the judiciary in distinguishing between the motivations and targets of ART legislation, as well as the comparative limitations of the legislature in terms of its incentives to find facts and to truly reflect the views of an informed public. "The basic point is simply expressed," Professor Coan explains. "Intelligent institutional choice requires a comparison of the plausible institutional alternatives. It is never enough to show that one institution functions well or poorly in the abstract."⁶

Professor Browne Lewis's article, too, gives us reason to doubt the competency of courts to deal with the legal and factual complexities surrounding reproductive health and technologies. Professor Lewis, who is Associate Professor and Director of the Center for Health Law and Policy at Cleveland-Marshall College of Law, describes the patchwork of laws, and substantial areas of remaining uncertainty, concerning the regulation of new reproductive technologies in *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*. Despite the fact that assisted reproductive technologies have been in use for several decades,⁷ Professor Lewis shows, through a thoughtful analysis of the difficulties of determining both maternity and paternity of certain children born through assisted reproductive technologies and a broad sketch of the legal issues surrounding posthumous conception with the sperm of deceased men, that the law has yet to catch up with the complexities of modern reproductive science. She also shows that it needs, urgently, to do so.

By contrast, Cynthia Soohoo and Jordan Goldberg, both attorneys with the Center for Reproductive Rights, take a distinctly optimistic tack in *The Full Realization of Our Rights: Social and Economic Rights in State Constitutions*. While recognizing the inherent difficulties involved in judicial enforcement of social and economic rights, Soohoo and Goldberg argue that state courts nonetheless can and should develop a distinct set of standards for reviewing

⁶ Andrew B. Coan, *Assisted Reproductive Equality: An Institutional Analysis*, 60 CASE W. RES. L. REV. 1143, 1155 (2010).

⁷ The first instance of in vitro fertilization dates to 1978, however, commentators have pointed out that the practice of artificial insemination may have begun as early as the 18th century. See, e.g., Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 169 (2009). Nonetheless, the use of reproductive technologies has greatly increased in recent years. See generally Jacques de Mouzon et al., *World Collaborative Report on Assisted Reproductive Technology*, 2002, 24 HUM. REPROD. 2310 (2009).

and realizing those rights. Indeed, Soohoo and Goldberg question the importance of the traditional positive/negative rights distinction, as well as the traditional arguments against judicial enforcement of socio-economic rights, drawing on the widely discussed jurisprudence of the South African Constitutional Court for support.⁸ Moreover, they note that important differences between state courts and federal courts make state courts a particularly appealing choice for the enforcement of socio-economic rights like the right to health. At a minimum, Soohoo and Goldberg suggest, state courts can enforce a negative right to health. The authors then chart a path for possible enforcement of a positive right to health.

If Soohoo and Goldberg's article gives reason to hope that socio-economic rights can be enforced in domestic courts, Professor Martha Davis's article highlights one reproductive policy domain in which a human rights lens is desperately needed in the United States. Professor Davis's article shows the importance of "bringing human rights home"⁹ by applying international human rights norms in population planning policies to domestic child exclusion laws. In *The Child Exclusion in a Global Context*, Professor Davis, who is Associate Dean and Professor of Law at Northeastern University School of Law, persuasively demonstrates that the child exclusion policies in effect in various states in the U.S. are among the harshest and most morally questionable in the world, potentially violating a number of international legal standards. Professor Davis's article brings a keen comparative perspective to bear on the issue of family planning incentives. She notes that the U.S. policies largely comprise coercive or punitive disincentives to childbearing that target distinct and vulnerable populations, including the children themselves. Moreover, those punitive policies are often supported by very little sustained or careful debate or analysis and do not relate to any coherent national policy on population planning. The population measures of the countries examined by Professor Davis—India, China, Ghana, Kenya, and Tunisia—do not exhibit all of these characteristics in combination, as the American policies do.

⁸ For a sample of the extensive U.S. scholarly literature on the socio-economic rights jurisprudence of the South African Constitutional Court, see, for example, Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369 (2008); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151 (2009); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

⁹ BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

Moving beyond the problem of enforcement, the goal of identifying new and enforceable human rights also entails the challenge of defining the right's contours and substance. Several of the contributors to this Symposium have taken on the difficult intellectual task of conceptualizing and giving content to new human rights based on the existing right to health and reproductive rights. Wayne State University Law School Professor Lance Gable's article, *Reproductive Health as a Human Right*, persuasively argues for a distinct human right to reproductive health that would transcend the traditional categories of negative and positive rights. Professor Gable trenchantly notes that the right to reproductive health is situated at the intersection of reproductive rights—which are traditionally viewed as negative, decisional rights—and the right to health, which grows out of a tradition of positive, foundational rights and includes recognition of the importance of underlying social determinants of human health. His article thus aspires to sketch a broad but enforceable right to reproductive health by combining the two rights models. Professor Gable recognizes many of the difficulties inherent in the inclusive, positive nature of the right but suggests that the chances of the right's enforcement can be improved through a flexible understanding of government obligations and through exploitation of legal and normative redundancies that support those rights.

In *From the Bottle to the Grave: Realizing a Human Right to Breastfeeding Through Global Health Policy*, Benjamin Mason Meier, Assistant Professor of Global Health Policy at the University of North Carolina at Chapel Hill, and Miriam Labbok, Professor of the Practice of Public Health and Director of the Carolina Global Breastfeeding Institute at the UNC Gillings School of Global Public Health, argue for a human right to breastfeeding, which requires them to identify both a new rights-holder—the mother-child dyad—and new duty-bearers—including state and non-state actors—to take account of the complexities of the globalized public health landscape. Of course, the project of articulating and protecting human rights cannot be a mere academic exercise; rather, Professors Meier and Labbok's article demonstrates that real people's lives are at stake. It thus presents a provocative and eye-opening account of the way in which global health law and policy, by largely succumbing to the will of the powerful transnational formula industry, has failed to protect the health of women and children at the end of the reproductive cycle. Despite the obvious and overwhelming benefits of breastfeeding, particularly in the developing world, Professors Meier and Labbok demonstrate the concrete importance of human rights discourse,

showing that the shift away from the human rights framework for encouraging breastfeeding has prevented the issue from gaining both the salience and the enforcement mechanisms that could save the lives of millions of infants every year.

Finally, Professor Reva Siegel's symposium keynote address, *Dignity and Reproductive Rights*, provided a meditation on both the power and the drawbacks of broad, inclusive human rights concepts in vindicating rights on the ground. Professor Siegel, the Nicholas deB. Katzenbach Professor at Yale University, incisively illuminated the various meanings and uses of the concept of dignity in contemporary political and judicial discourse surrounding abortion. Though not itself recognized as a right, the multifaceted concept of dignity—which may take on the meanings of autonomy, equality, or even respect for bare life itself—grounds various human and constitutional rights. Yet in the reproductive rights context, dignity has repeatedly been used as a basis for restricting as well as expanding abortion rights. Driven in part by this startling recognition, Professor Siegel's address considered the possibilities and limitations of engaging dignity in the service of advancing women's rights, rather than undermining them. Professor Siegel thus explained that dignity can be dangerous, due to its plural and malleable nature; at the same time, dignity has possibilities for bringing together in dialogue members of diverse normative communities about the most fundamental questions concerning not only human rights but also human nature itself. Indeed, it provides a fitting motif for the diversity of scholarly contributions on human rights, reproductive rights, and the right to health that comprise this excellent Symposium. While much work remains to be done in order to realize fully this aspect of human dignity, in the form of robust rights to health and reproductive justice both at home and abroad, these Symposium contributions demonstrate the power of creative, comparative thinking, as well as the vital importance of further thoughtful and nuanced debate.