FIRST THINGS

OBERGEFELL AND THE RIGHT TO OTHER PEOPLE'S CHILDREN

by
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We're mournfully familiar with the constitutional right of mothers to be rid of their own prenatal children. Now coming into view is an adult right to possess and have authority over other people's recently born children. What this means, and portends, merits more consideration than it is presently receiving.

Those who dissent from created verities tend to vacillate between disclaiming the reality they contest and depending on it. After entreating the Supreme Court to rule in *Obergefell v. Hodges* that marriage is not about children and the procreative union of husband and wife, but instead about adult companionship, affection, and government dignity-conferral, individuals in marriage-licensed same-sex partnerships now demand access to children—because they are married. As the law traditionally presumed that a child born to a wife was the child of her husband, now the law must deem the female partner of a mother to be the child's other . . . parent. Thus, advocates of marriage-redefinition borrow from the institution they just assassinated the legal standards historically associated with it—as if these could survive the death of their source, and sensibly transfer to same-sex relationships.

Representative of this trend is the case of *Pavan v. Smith*, ruled on by the Supreme Court earlier this summer. In that litigation, two same-sex female couples in marriage-licensed relationships sued the State of Arkansas. The couples demanded the automatic entry of both women's names on the original birth certificate of the child born to one woman. The state of course had designated the child's mother on the birth certificate. The mother's companion, though

unrelated to the child, demanded the same. The plaintiffs argued that *Obergefell* requires that upending of state policy.

The Court in *Obergefell* did indeed recite that "the States . . . have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities," and the Court included "birth . . . certificates" in its illustrative litany. But this is rather beside the point. What marriage has entailed "throughout our history" is exactly what the Court's ruling in *Obergefell* was designed to overthrow. *Obergefell*'s revision of marriage severed the connection of marriage to traditional birth certificate policy.

States "throughout our history" assuredly did *not* grant automatic birth certificate entries to persons categorically unrelated to the child. Nor did states throughout our history fashion birth certificates whose contents indicate that the child has two mothers and no father, or two fathers and no mother. When the Court in *Obergefell* alluded to states' traditional linking of marriage to birth certificates, the statutory tradition it referenced was the rebuttable legal presumption of the husband's paternity of the child born to his wife, which in turn was documented in the record of the child's birth.

Due to the redefinition of marriage as a two-humans partnership rather than a complementary husband-wife union, the character of the marital relationship must be defined down to the points of commonality that exist among those now populating the category. The message of *Obergefell* is that what does not describe couples of the same sex must be erased as a feature of marriage. The procreative generativity of the man-woman union must be only an incidental occurrence (however statistically common) attending certain of those in the redefined relationship of state-licensed marriage; it is no longer a *feature* of marriage. As such, the traditional policies of paternity, legitimacy, and birth certificate documentation—each conceptually dependent on "pre-redefinition marriage"—are anachronisms properly detached from legal marriage in its redesigned form. To retain the policies would be to retain a legal significance to features of marriage that same-sex couples cannot generate.

As a result, there would seem to be two analytical options available in response to same-sex partner demands for automatic parenthood. Either the policies of paternity, legitimacy, and birth certificate design that derived from the husband-wife relation must be ejected from marriage as such, or those historic policies must be reconstructed to serve an alternate purpose. For instance, instead of birth certificates acknowledging the natural descent of the child and documenting the bond to mother and father, their updated purpose may be to ennoble and reward adults in certain relationships by documenting the prize of child custody given them—notwithstanding that their licensed relationship did not, and is of a form that could not, bring the child into the world.

Under either option, plaintiffs' "equality" claim to a constitutional right to child-access should fail. For in the first scenario, if the traditional policies are now dissociated from marriage, they no longer may be claimed as its incidents. In the second, if the policies are retained in name but redefined, then they are not the policies that the states have tied to marriage "throughout our history." They have no pedigree of association with matrimony to serve as precedent for their current demand.

What litigants are left with, then, is a nominal trick: Something called "paternity" or "birth certificate" was historically associated with something called "marriage," so the nouveau policies appropriating those old names must be bundled, too. Remarkably, this bait-and-switch has been credulously received and rewarded by courts and agencies across the country.

But when courts impose on the historic paternity presumption a "gender-neutral" reconstruction, they in effect (to borrow a phrase) castrate it and bid the gelding be fruitful. These courts take hold of a policy founded in a physiological reality and written into the law *as such*—that discerns and assigns paternal status and authority *precisely* in the natural relation of fatherhood bound to motherhood and offspring—and then separate that policy from the ontological weight of the relation that has always justified it. Yet the courts then proceed as if the

hollowed-out remainder yielded a basis on which to assign an adult the presumptive authority to possess and direct the upbringing of an unrelated child.

The equivocation in this maneuver is galling. Also damning is the advocates' ambivalence concerning the analogy of same-sex partners to unions of mother and father. If the natural mother-father relation to the child is inconsequential (the *Pavan* plaintiffs describe the procreation rationale as "specious"), then so is the same-sex partner model whose demand for comparable treatment is staked on an analogy to it.

That nullifying move also attends the reliance on and repudiation of the paternity standard. The historic paternity presumption was directed to the identification of the father. It has no application to women at all, whose maternity of children was demonstrated by giving birth to them. Nor is the paternity presumption relevant to men in same-sex relationships, as their conduct has no relevance to procreation. And as the paternity presumption was grounded in biological fact, it could be rebutted by biological evidence.

What the family-redefinition advocates in fact clamor for is neither the biological paternity standard nor its attending rebuttable presumption. They instead demand that physical "paternity" be transmuted to legal "parentage," and the "rebuttable presumption" be replaced with "irrefutable fact." In sum, they demand de-sexed parentage-upon-demand for an individual adult who lays claim to somebody else's child as a means of bolstering the naturally bereft though artificially legal status of same-sex spouse. Arkansas Supreme Court Chief Justice Brill candidly put forth the revised outlook: "The right to a birth certificate is a corollary to the right to a marriage license." Children are now accessories attending adult legal status.

It's a strange sort of lying when the state issues a birth certificate that declares a child has two mothers and no father. It's a lie everyone knows is a lie. But the fact that no one is fooled doesn't mitigate the damage. When this sort of lying endures as official government policy, it impresses upon the community the public irrelevance of the matter about which it lies, and converts the lie

into a sort of legal truth—which carries systemic authority and gravitational pull. Moreover, the lie is cemented into vital records and the child is deprived of knowledge of family descent. That deference to adult demands at the cost of children's identity-awareness entails what Rabbi Gilles Bernheim called the irreversible scrambling of genealogies. Here again, that is more than a private deprivation; it is a public repudiation of natural family ties.

This brings us to the combination of technological advance and moral retreat manifest in assisted reproductive technologies (ARTs). These technologies have rendered sexual congress unnecessary and (more terrifyingly) conceptually irrelevant to making babies—a crucial shift easing the redefinition of marriage. And the prevalence of contemporary legal concessions to ARTs has muddied the waters analytically in the task of resolving who is the child of whom. Thus in *Pavan*, the opening the plaintiffs exploited is the fact that Arkansas law contains a narrow exception to its biology-based paternity rules: The state assigns paternity to the husband of a wife whose child was conceived via anonymous donor insemination. As the women in the *Pavan* case who gave birth had also been impregnated with donor sperm, their female partners demanded a de-sexed approximation of paternity (i.e., "parentage").

But even in this compromised context, there remains an expressive policy interest in treating same-sex and husband-wife couples differently. Though ill-advised, Arkansas's explicit countenancing of artificial insemination in its paternity assignment to the mother's husband can be interpreted as a concession to, rather than approval of, the off-scene employ of extra-marital insemination. The invasion of the marital relation by the extramarital father might be mitigated by the law's public maintenance (through its paternity designation) of the ideal of marital fidelity and the integrally related fatherhood of the husband, even if the private reality is to the contrary. But in the context of a female couple, the opposite policy lesson is communicated. Such a couple with a child in tow presents an irrepressible message of fatherhood-denigration and third-party intervention into the relationship. That message contradicts the maxim motivating the exceptional standard they demand be revised to encompass their circumstance.

Yet perhaps *Obergefell*'s achievement was, after all, to forbid any such legal distinctions directly or indirectly drawn from the procreative model. The Court having redefined marriage to eliminate its connection to sexual complementarity and the institutional binding together of mother-father-child, there is cause to doubt whether those natural bonds are allowed any longer to matter in law at all, for any reason. For the key point is not what features the Court abolished, but what it abolished them *from*: namely, the archetypal, paradigm-resolving public institution that represents the law's understanding of human nature. The Court having banished the norm of kinship from the marital family (ever its vital locus), it would be incongruous to permit that norm's survival anywhere else.

If state birth certificate regulations prioritize the recording of genealogy rather than functional custodial assignments, they defy the anthropology that *Obergefell* teaches and relies upon. State laws situating the child's identity in hereditary descent assigns legal valence to a feature of reality to which same-sex couples cannot contribute. Notable, then, is the Supreme Court's ruling in *Pavan* that Arkansas must give up its policy devoted principally to that end—at least in the form found in its current statutory scheme.

The distressing challenge presented by modern constitutional jurisprudence in this field is its denial of stable essences or fixed law. Law instead takes its form through a process of evolution guided by elite negotiation, in terms always reinforcing the contingency and provisional character of whatever may be the latest determination. Any apparent impediments to further evolution in family redesign are ultimately insecure, being vulnerable to surmounting by the combination of confessedly inventive legal interpreters and the logical pull of the principles now loosed upon us. As those principles esteem adult choice and role functionality rather than blood ties, they justly invite policymakers' experimentation with family forms, as well as their deference to a wide array of functional innovations adults may select.

Nevertheless, this realm of jurisprudence remains unresolved and thus viably contested. In neither *Obergefell* nor *Pavan* did the Court devote attention to the significance and disruptive

consequences of treating biological motherhood and fatherhood as legal equivalents to functional relationships of adults with other people's children. Nor did the Court acknowledge the doctrinal collision of a standard of biology-irrelevance with wide swaths of historic domestic relations standards and the Court's own due process case law. In view of the Court's analytical silence on the immense controversies implicated in doing so (a subject for another essay), it is yet unwarranted to interpret its rulings as intending to annihilate the legal significance of ancestry and natural parent-child connections, with all their pathos-laden profundities. States may need to pivot legislatively at certain points, but they still have ample cause to hold fast to their historic natural family regulations—and should.

The uniqueness, fecundity, functional elegance, relational logic, and social value of the husband-wife marital relation testify to its created meaning and intentions. Its preservation as an institution in law and society is indispensable to preserve the eminently public truth of human identity as embodied and familial. We may suppress that truth in our epoch of mandatory incomprehension, but seeing the obvious remains available. One should hope it will not require the pitiless crowbar of events to compel our return to collective acknowledgment. But should it be so, the resultant clarity may be a mercy to future generations having in hindsight an instructive exemplar of disaster.

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