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Parents' Rights

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Parents' Rights

The principle recognizing the prerogative of parents to educate their children is no longer just a haven from the tyranny of the State. The "right" itself has become an arbitrary claim, with "gender-affirming" parents appealing to it as proxies of their children's "right to choose." And the "parents" bearing the right are, increasingly, those who *choose* children—producing and buying them—not the ones who *have* them. Unless parents' rights are grounded in the authority mothers and fathers possess as participants in a prevenient natural order, to which they themselves are beholden and for which they are responsible, it will become the arena of a lesser known, yet no less terrible, tyranny: the Huxleyan tyranny of our own desires.

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FEATURE ARTICLES

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FEATURE ARTICLE

The Case for (Just) Sex Discrimination

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Until *Dobbs*, most people in the pro-life movement were at home with the thing that makes life possible: non-interchangeable men and women. They were thus wary of the anti-sex discrimination regime ushered in by the 1964 Civil Rights Act, then amplified by the Pregnancy Discrimination Act (1978) and the Pregnant Worker's Fairness Act (2022). They sensed that this regime was homogenizing, undermining the conditions of a rich common life, if not life itself.

After *Dobbs,* however, some pro-life voices began to advocate for that regime on the basis that it *was* pro-life.[1] Republican lawmakers and Catholic feminists called for paid family leave. Pro-family advocates released "Post Roe, pro-family" statements calling for affordable childcare. Most striking of all was the sudden replacement of "motherhood" and "fatherhood," with a unisex lexicon of "caregivers" and "parents."

For some, the endorsement is more than a strategy for keeping babies alive; it is a matter of principle. Anti-sex discrimination law, it is argued, *appreciates* the sexually distinct body, especially the one that bears the disproportionate burden in childbearing. But somewhat counter-intuitively, it does this by appreciating the *bad ideas* people have about it, especially the "stereotype" that women in their childbearing years are not as committed to professional work as men, then by prohibiting all deeds (and words) still captive to it. This is good, it is argued, because it prevents women from being "reduced to" their reproductive potential,[2] thus allowing them free reign, as unique individuals, to develop their gifts and capacities in any field of interest. In that sense, while it remedies the current historical situation, where work and home are regrettably divided, it is also the latest stage in human progress, all former stages being "discriminatory."

Current pro-life feminists are making their bed with the "equity feminists" in the National Women's Party (founded in 1917) who came out of hibernation in 1964 when segregationists offered them an occasion to overturn decades of pro-family policy. In a last-minute attempt to kill (or dilute) the Civil Rights Act of 1964, Southern "Dixiecrat," Congressman Howard Smith of Virginia, suggested—apparently in jest—that "sex" be added to the wording of Title VII which hitherto would prohibit employers from discriminating only on the basis of race, color, religion, or national origin. The proposal was met with whimsical support by Smith's

segregationist colleagues.[3] Up until then, advocates of the Civil Rights Act, chiefly northern democrats, understood Title VII to be primarily about the removal of obstacles that kept black men from gainful employment, and, thus, from providing for their families. When the addition of "sex" was proposed, they opposed it, citing opposition from the Women's Bureau of the U.S. Department of Labor and the American Association of University Women. Its inclusion would jeopardize the primary purpose of the legislation. And it would jeopardize the sex difference itself, which was a different kind of difference, one that could not be homogenized like that between the races. For a moment, it looked like the segregationists had successfully troubled the Civil Rights Act until equity feminists in Congress—Martha Griffiths from Michigan, Katharine St. George from New York, Catherine May from Washington, among others—took the suggestion in earnest and urged support for Smith's amendment, to his apparent surprise. From this unlikely coalition, the Civil Rights Act was passed in the form with which we are now all familiar: an employer may not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual because of such individual's race, color, religion, sex, or national origin."[4] Notwithstanding this history, we are now to read into anti-sex discrimination law an *appreciation* of the sex difference, especially the female one with its disproportionate burden.[5]

> *We have lived for too long under the subordinationist (sexist) account of the female body as a "defective male."*

In reality, the appreciation of the sex difference is only a *temporary* one, since anti-sex discrimination law aims to *reproportion* the disproportion. Much like "handicapping" in sports, it "appreciates" the "disadvantage" only then to compensate for it so that women can stay in the race. The Ginsburg opinion of *United States v. Virginia* exemplifies this logic. Laws against sex discrimination would "celebrate the inherent physical difference" between the sexes by dismissing its relevance to military preparedness and morale, then by lowering the physical fitness standards of prestigious military institutions such as Virginia Military Institute so that women could still be "qualified" to train alongside men.[6]

In fact, the Pregnant Workers Fairness Act treats pregnancy as a *disability* that can be overcome in the "near future." Employers are to be neutral on whether new mothers even *take* leave. The short three months given by the Family and Medical Leave Act (1993)—hardly a sufficient amount of time for mothers and their newborns—says it all. As Catherine Pakaluk says in *Hannah's Children*, the weight of this and all such legislation is towards preventing women from gaining the habits of the heart that would have them prioritize motherhood.[7] It means to instill an attachment to the workforce.

Current anti-sex discrimination law is ultimately sexually homogenizing. Even when it "celebrates the inherent biological differences"—relative to physical fitness or pregnancy—the point is to overcome the "disability." And now, after *Bostock v. Clayton County*, where Justice Gorsuch downgraded the "textual" meaning of the word "sex" in the Civil Rights Act to below-the-belt anatomy, detached from the man or woman who has it,[8] we can expect the "celebrated biological differences" to collapse legally, under the weight of the "gender" above the belt. For if we can disable the male biology of the "female" swimmer so that "she" can swim more slowly—like a girl—why not "cure" the biological "disability" of the female employee, so that she can be more able to work, like men, by outsourcing pregnancy itself. . . or just eliminating

it. Indeed, the Equal Employment Opportunity Commission recently proposed a rule for the implementation of the Pregnant Workers Fairness Act that would require employers to give leave to pregnant employees to do just that, abortion being "related" to pregnancy. Regardless of the original intent of the law, it is the logical development of its spirit (if not its letter), for a disability that must be compensated for may also be cured. Indeed, given the options, we can expect employers to prefer paying for the cure.

The anti-sex discrimination regime discriminates unjustly

For all the talk of "anti-discrimination," current policies discriminate unjustly against *actual* human beings in favor of a disembodied, counterfactual "ideal." They discriminate against *actual* women. On the sexist assumption that their tendencies to "lean out" of the workforce (in the most progressive countries no less) are still nothing but the effects of "arbitrary stereotypes" (never the inclination of women themselves) women must be pushed along relentlessly by the cognoscenti toward the only correct goal: 50–50 participation in the workforce. Paradoxically, they also discriminate against women who snag high-ranking jobs, for it is always suspected that they were second-best, chosen simply because they were women. The law discriminates against the *actual* (bothersome) child, who needs quantity time with his mother. It favors the "easy" institutionalized child. Paid family leave goes hand in hand with the "access to quality child-care." The law discriminates against the *actual* home, that locus of human formation and hospitality. It favors the "bedroom community" made up of shift working parents and their managed children. The law discriminates against the *actual* workplace—even whole fields—which must now be organized around disembodied "ideal" employees. Employers, heads of professional schools and organizations, must pretend not to notice that actual women "lean out." They must, accordingly, organize their offices, schools, and fields pretending not to know what they know, with ever more certitude: that it will be constantly disorganized and understaffed, because of what actual women do.[9] Or, they must live in a workplace that is not so disorganized, but ought to be, since the leaning-in colleagues have left their four-month-old babies at their "Child Development Centers." They must not so much as suggest that this arrangement is not good for the wellbeing of their children, lest they be sued for "sexual discrimination."[10] In short, anti-sex discrimination law requires society at large to discriminate against the actual, and favor the abstract legal fiction, or live as outlaws.

The Case for Just *Discrimination*

Who, though, could be *for* discrimination? The very distinction (*discrimen*) we are talking about—the one that makes our existence possible—could. Conception, pregnancy, and birth all discriminate. Men have an indispensable role in the generation of life; but only women get pregnant. For them, generation is internal and time consuming. And the "discrimination" doesn't end with birth. As Erica Komisar shows in *Being There,*[11] mothers are primed to remain attached to their newborns in a direct, bodily, way[12] for at least three years. The mother naturally "discriminates" in favor of her child, her attention and energy riveted to it in a way not remotely comparable to the father's.[13] The child, in turn, "discriminates" in favor of the mother. The other side of this mutual privilege is, of course, the disproportionate burden. It is the mother who "'pays' directly for this shared generation, which literally absorbs the energies of her body and soul," said John Paul II.[14] The father has his disproportionate burdens too; but they are also his privileges.

The discrimination of pregnancy and motherhood is *highest* in human animals, since their young take about a year to attain what higher mammals have on the first day: their species-specific stance and form of communication. As the Swiss biologist Adolf Portmann argues, human babies are born "immature" because they are *rational* animals who must strive freely to acquire, in the light of day, what other mammals are born with, ready-made, in the darkness of the womb. That they must mature from within the "social uterus" of the family is because they are *dependent* rational animals.[15] Indeed, so much does the child need these primary social bonds, it would learn neither to stand nor to speak were it left in the wild. This means that the human child must be carried for a year. This rational dependency explains the sudden appearance of human fathers in the life of human mothers and their young. Human babies need a lot. Above all they need to be introduced to the truth of things. That is exactly what their "primary educators" do when they provide for the child's material needs *together*, and through their give-and-take *coordination* of distinct tasks, one doing what the other cannot. They show their children the unity-in-difference that stands at the origin of all things. Indeed, it was the universal practice of pre-industrial society to extend the division of labor between men and women, well beyond natural necessities, to enhance the mutual dependence of non-interchangeable spouses, and thus their unity-in-difference.[16] As Ivan Illich said: "outside industrial societies, unisex work is the rare exception, if it exists at all. Few things can be done by women and also by men."[17] In other words, sexual difference extended all the way up—"discriminatingly"—to include a way of being and acting in the home and in society that distinguished in order to unite. Motherhood and fatherhood were not merely below-the-belt aspects of life on top of which others are added but *modes* in which the whole of human nature—physical, moral, and spiritual—as well as individual talents and capacities were lived as a communion in difference.[18]

The new pro-life feminism agrees with *most* of this. It rejects the "one body fits all" feminism that would suppress the female body and abort its contents. It appreciates the female body, and wants to support it, so that it might bear its disproportionate burden. Most importantly, it hails the centuries-long trajectory of thought about the "dignity of women" (represented by Christine de Pizan, Stein, Von Le Fort, Undset, John Paul II, Christopher Lasch), which gave us an *embodied* idea of equality, one that looks at both kinds of bodies as equally positive.

This is good. We have lived for too long under the subordinationist (sexist) account of the female body as a "defective male." The idea that the sexes are equally human in their distinction, not despite it, is a real acquisition. For that we can thank modern biology and the Catholic intellectual tradition, thinking out the implications of divine Revelation concerning God Himself. Indeed, it is on the strength of Christian revelation that the medieval Christine de Pizan "discriminated" well beyond pregnancy and birth, seeing no contradiction between the equal dignity of the woman and the millennia-old tradition of dividing work between men and women:

> [J]ust as a wise and prudent lord organizes his household into different domains and operates a strict division of labour amongst his workforce, so God created man and woman to serve Him in different ways and to help and comfort one another, according to a similar division of labour. To this end, He endowed each sex with the qualities and attributes which they need to perform the tasks for which they are cut out.[19]

It is *because* the two distinct manners of being bodily were two (equally) positive manners of possessing the same humanity (equally), that there was no reason to diminish the distinction, making the sexes socially interchangeable. On the contrary. But that is exactly what the

current advocates of the anti-sex discrimination regime do. They put the brakes on a novel Christian insight when they forget the female body only months after it delivers a baby, turning mothers and fathers into functionally equivalent "parents" and "caregivers." Indeed, it plays right into the hand of disembodied equality, and its sexist assumptions.

Celebrating the inherent differences all the way

Once it is recognized that male and female bodies are equal in their distinction, and the part that the woman plays in the life of the child is cleansed from every hint of disadvantage, disability, and inferiority, there is no need to reproportion things in order to equalize the woman. The incentive, rather, will be to dig into the distinction and carry it up into the whole of life, beginning with the family, then the society of which the family is the first vital cell. The different manners of generating, expecting, and bringing a child into the world will be taken not merely as the first (short) chapter of life, but the genesis of all subsequent chapters, the *arche* that abides throughout the whole (long) story. Thinking in these terms, we would want society to promote the difference—not cure it. We would want it to discriminate, justly, by giving young mothers incentives to help them stay with their young children longer and helping fathers to step up, to do what the mothers cannot do.

Catholic Social Doctrine

As it happens, that sort of discrimination has been proposed and tried. It was proposed by the Catholic Church in its social doctrine. That doctrine appeared as part of a response to the dramatic changes in the organization of labor wrought by the industrial revolution.[20] No serious treatment of our question about men, women, children, and work can fail to deal with the migration of productive labor out of the home and local community. Ivan Illich,[21] Christopher Lasch,[22] Allan Carlson,[23] Wendell Berry,[24] and now Mary Harrington,[25] all speak to this lamentable divorce. It impoverished the home, generally, and women, in particular. For, now they had to migrate out of their homes in their husbands' wake to be absorbed by the world of wage-labor, or be left in dull, lonely homes to consume commodities,[26] invent make-work,[27] and hover excessively over children.[28] One does not overlook the greatness of a mother who "builds a dwelling for the immortal soul" (Cardinal Mindszenty),[29] or the wideness of her work because she "tells her child about the universe" (Chesterton),[30] by saying that women lost something significant when industry migrated out of the home and neighborhood. As Dorothy Sayers noted, the work of spinning, dyeing, weaving, catering, brewing, distilling, preserving, pickling and bottling, bacon-curing, plus the management of landed estates—all women's industries—done communally and integrated with child rearing for over 10,000 years,[31] were outsourced.[32] The traditional family of the twentieth century, therefore, had become a shadow of its former self, losing above all its economic and political agency in the new liberal economy. Yet, it was *precisely in that context* of regrettable choices that the Church opted for policies in favor of protecting young mothers *from* paid labor, on the assumption that they should be kept in close proximity to their young children, to, at the very least, breastfeed them, the last remaining form of home production.

At the center of this protection was the "family wage" which discriminated in favor of wage-earning fathers. The doctrine dates to 1931,[33] and was invoked in 1981 by John Paul II in *Laborem exercens* and then again, in 2003, in the *Compendium of the Social Doctrine of the Church*. Just recently (March 8, 2024) it was affirmed overwhelmingly by the Irish who, rejecting the proposed "anti-discriminatory" language of "care," voted to *confirm* the section of their 1937 Constitution that speaks about "*mothers* in the home" as so "essential for common

good" that they should "not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

Catholic social doctrine uses no sexless talk about "caregivers," nor about the child's need for *two* (unspecified) parents—as in a recent book entitled *Two Parent Privilege*.[34] It is *mothers* of young children who must be protected from the need to enter the workforce, thanks to *fathers* receiving the family wage, or in their absence, *mothers* receiving other social benefits.

The assumption that mothers specifically have their center of gravity in the household is a constant in Catholic social doctrine.[35] On that assumption, it enjoins society to "re-evaluate the mother's role, the toil connected with it, and the need that children have for care, love and affection."[36] Notably, when Catholic social doctrine warns against (unjust) discrimination, it is discrimination against *these* women, the very opposite of current law.

It will redound to the credit of society to make it possible for a mother—without inhibiting her freedom, *without psychological or practical discrimination*, and without penalizing her as compared with other women—to devote herself to taking care of her children and educating them in accordance with their needs, which vary with age. Having to abandon these tasks in order to take up paid work outside the home is wrong from the point of view of the good of society and of the family *when it contradicts these primary goals of the mission of a mother*.[37]

Catholic social doctrine also speaks against "excluding [women] from jobs for which they are capable"[38] and for the "access of women to public functions,"[39] "equal pay for equal work," and "fairness in career advancements."[40] But these statements are all qualified by "the requirements of the person and his or her forms of life, above all life in the home," "*taking into account the individual's age and sex*," so that "women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role."[41] Then, of course, any meaningful notion of "equal work" should be able to recognize the career-length inequality between men and women in dedication to professional work.[42]

The whole weight of Catholic social doctrine assumes that work be conformed to "the primary goals of the mission of a mother." We can presume, then, that women of young children don't have the right to *every* kind of work, the kind that requires them to abandon "what is specific to them," for example: military service, deep-sea fishing, and much of what anti-sex discrimination law encourages them to do today.

The Maternalists

Similar proposals were also made and enacted by a group of influential—mostly Lutheran—women involved in the "Settlement House Movement," which began in the 1880s.[43] Jane Addams, Julia Lathrop, Grace Abbott, Katherine Lenroot, Florence Kelley, Frances Perkins and Eleanor Roosevelt, among others, all promoted maternalist legislation to protect wage-earning women and children from overwork and exploitation and put into place programs and policies that had as their underlying goal to keep young mothers at home with their children (under the age of 16).[44] When the United States entered the First World War, they crafted a bill for soldiers, ensuring that half of their pay would go directly to their wives. During the presidency of Franklin Delano Roosevelt (1933–1945) they helped ensure that the New Deal was mother-friendly. At the center of their agenda was the family wage, more understood than codified: men would be channeled into specific, usually higher-paying jobs or preferred for promotion, while mothers who lacked support from husbands would be granted

a “mother’s pension.” The point was to prevent mothers (and children) from being pushed into paid labor to be absorbed by it and separated from each other (not to promote the “cult of domesticity”).[45] As Frances Perkins (Secretary of Labor from 1933 to 1945) said:

> You take the mother of a large family, she may be able-bodied and all that, but we classify her as unemployable because if she works the children have got to go to an orphan asylum.[46]

Even when women were pulled into the workforce during the Second World War—to become like “Rosie the Riveter”—maternalists were able to obtain a directive that exempted mothers of young children from this sort of national service. When child-care programs were created, they sought to ensure that these would be discontinued when the emergency need was over.[47]

Maternalists thought in *embodied* terms and were, accordingly, averse to the vague and abstract talk of “equality” prevalent among the first wave feminists of their day, gathered in the National Women’s Party. Maternalists opposed their Equal Rights Amendment (in 1923) and were opposed by them when they worked, hand in hand, with the National Association of Manufacturers to prevent passage of special labor legislation protecting mothers and potential mothers working in factories.[48] Maternalists triumphed for decades, right up until the last day of debate over the Civil Rights Act (1964) when “sex” was added to Title VII. Indeed, these were the same women who filled the U.S. Department of Labor’s Women’s Bureau which opposed the segregationist’s proposed amendment. After they lost this debate, the Equal Employment Opportunities Commission struck all their labor reforms, which were aimed at protecting women, from the books.[49] From that point on, what had been *just* discrimination between the sexes became *unjust* discrimination, and vice versa. Sixty years on from this momentous reversal, we are unable to understand the work of the maternalists as anything other than internalized cultural misogyny.

Conclusion

The case for (just) sex discrimination has nothing to do with separating mothers from work (in a sealed off domestic sphere). Pregnancy, motherhood, and homemaking are, of course, already work. But it is perfectly natural for women to engage in other economically productive and culturally generative work, paid or not, as they always have. It is rather an argument for work that is compatible with proximity to young children.

Nor is the case for (just) sex discrimination against the involvement of fathers in the keeping of the home and the care of their children. It is, rather, an argument for their *distinctive* involvement in both. As it happens, fathers always have been involved, just differently: building, fixing, repairing, mending, roughhousing, going off to war, or to Jerusalem. And were the regrettable distance between economic life and the home to be shortened, there is no reason that mothers and fathers would be functional equivalents as “caregivers.” Assuming we really believe in the equal positivity of *both* bodies, there should be nothing disagreeable about that.

Naturally, given the current legal landscape, anyone who is thinking outside the current anti-sex-discrimination box is engaging in a thought experiment, not to mention an illegal one. But it is not nothing to liberate one’s mind. We don’t have to *believe* that it is a “stereotype” to say that the mother has an “irreplaceable role” in the home. Meanwhile we can begin to think long-term.

But what to *do* now? Shouldn't we be realistic? Don't our circumstances justify three-month paid family leaves and the outsourcing of "care"? Wendell Berry's response is a good one: "are we to assume that one may fittingly cease to be Blondie by becoming Dagwood?"[50] That is what an "anti-sex discrimination" regime effectively means. And it is worse today for "Blondie," now that she can outsource, or eliminate, pregnancy—the very *last* form of home production—altogether.

Why not *push more into reality*, instead of away from it? In our current (regrettable) circumstances that would mean erring on the side of the most vulnerable, sacrificing what must be sacrificed for them, while waiting to see what new economic realities might be generated, more in keeping with the economy of the home (the *oiko-nomia*). It could be an adventure much like the adventure parents undertook decades ago when impoverished educational options drove them to go out on a limb to educate their children at home. That initially meant more isolation, for mothers in particular, but it ended up generating a whole new educational landscape, a more human culture, and lots of company.

The adventure for mothers, in the case of work, will, of course, differ depending on how many children a woman has, when they started and stopped arriving, what level of education she has, the kind of work she wants to do, and is capable of doing, and extended family resources. There will be many outliers (and employers who want to have them, regardless of the cost). But the emphasis, culturally and legally, should be on raising the next generation, in a robust home (not warehousing it, in pursuit of disembodied goals). For many women, their children, and their husbands, this would come as a relief. For others, it would mean sacrifice. But individual desires, talents, and capacities need to be subordinated to vocations. Indeed, everyone who has children sacrifices what he or she "wants to do." But one thing they don't sacrifice is work that's worth doing: the building up of a whole *culture* of life, one that is at home with the very thing that makes life possible in the first place: sexually distinct, non-interchangeable men and women, in short, the discriminating body.

[1] See Erika Bachiochi, "Sex-Realist Feminism," *First Things* (April 2023). "Pursuing the Reunification of Home and Work," *The Compass Point* (July 15, 2022).

[2] Cf. Rachel Lu, "Woman Defined," *Law and Liberty* (January 19, 2023); Ivan Illich, *Gender* (Marion Boyars, 1983), 3, 14, 20.

[3] Cf. Alan Carlson, *The 'American Way': Family and Community in the Shaping of the American Identity* (Wilmington, Delaware: ISI Books, 2003), 149–53. Carlson offers an account of the last-minute attempt by Southern "Dixiecrats" to downgrade the Act, with the "killer amendment" (of "sex") to Title VII. The suggestion was met with laughter, and whimsical "support" and "praise" by other Dixiecrats for such things as "making it possible for the white Christian woman to receive the same consideration for employment as the colored woman" (151).

[4] Civil Rights Act of 1964, Title VII, Section 703(a)(2).

[5] Anti-sex discrimination law does have a "carve out" feature that permits states to treat men and women differently, in ways that it would never tolerate for racial categories. The basis would be strictly physical, or "biological." Thus, there can be sex-based fitness standards and sex-separated sports teams, and sex-separated housing (for privacy). Pregnancy would now be added to that, but, only on the most minimal *reductively biologistic* reading of what pregnancy—and motherhood—and children—are and require.

[6] Later, the Fourth Circuit Court of Appeals, citing Justice Ginsburg's opinion, ruled in *Bauer v. Lynch*, 812 F.3d 340 (2016) that the FBI's sex-normed physical fitness standards did not violate Title VII's sex discrimination prohibition.

[7] *Hannah's Children: The Women Quietly Defying the Birth Dearth* (Washington, D.C.: Regnery Gateway, 2024), 341–42.

[8] In his majority opinion in *Bostock v. Clayton County*, 590 U.S. (2020), Justice Gorsuch claims to take a "textualist" approach—considering only the written word—when he presupposes the very ideology at play in the case he is meant to adjudicate, taking the word "sex" (in Title IX) to be a mere anatomical substrate indifferent to one who has it as opposed to the phenomenon which distinguishes *a man* from *a woman* (whole and entire). On the basis of this "textual" reading of "sex," therefore, Justice Gorsuch argued that it would be "discrimination" to treat a man who "identifies as" (and "is") a woman, differently than a woman who "identifies" as a woman. As he wrote: "take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." It is important to see here the slippage between "identifying as" a woman and "traits and actions," thus attaching the case to earlier cases about sex discrimination which concerned dress and behavior. In *Bostock*, on the contrary, the case concerned a man claiming to "be a woman," demanding to wear the female uniform *as a woman*, not as a man defying "stereotypical dress."

[9] This trend is found in medicine, in law, and in STEM fields. Cf. the following articles in thebmj.com, The Journal of Women's Dermatology, the CEPLER Working Paper Series, the Economics Letters, Frontiers in Psychology, Humanities and Social Sciences Communications, and The Science Daily.

[10] This happened to the president of Boston University, John Silver, when he was sued by a female professor who didn't get tenure. She won and the university was ordered to give her tenure. Cf. Helen Andrews, "Lean Out," *The American Mind* (August 25, 2022).

[11] Erica Komisar, *Being There: Why Prioritizing Motherhood in the First Three Years Matters* (Tarcher, 2017).

[12] Abigail Tucker, *Mom Genes: Inside the New Science of Our Ancient Maternal Instinct* (Gallery Books, 2021), 72-73, 80. Oxytocin, which is made in the brain, does not only ready a woman for birth, but apparently also readies the brain for the maternal bond itself (73).

[13] *Mom Genes*, 49–52.

[14] *Mulieris Dignitatem*, 18.

[15] Adolf Portmann, *A Zoologist Looks at Humankind* (Columbia UP, 1990), 82–97.

[16] C. Lévi-Strauss, "The Family," in *Man, Culture, and Society*, ed. Harry L. Shapiro (New York: Oxford University Press, 1956), 275–76.

[17] Ivan Illich, *Gender*, 67.

[18] *The Catholic Catechism*, 2333; CDF, "On the Collaboration of Men and Women," 8.

[19] Christine de Pizan, *The Book of the City of Ladies* (New York: Penguin, 1999), I. 11, p. 29.

[20] *Rerum Novarum*, 42: "Women … are not suited for certain occupations; a woman is by nature fitted for home-work, and it is that which is best adapted at once to preserve her modesty and to promote the good bringing up of children and the well-being of the family."

[21] Illich, *Gender*.

[22] Christopher Lasch, *Women and the Common Life: Love, Marriage, and Feminism*, ed. Elisabeth Lasch-Quinn (New York: W. W. Norton & Company, 1997), 93–120.

[23] Carlson, *The 'American Way.'*

[24] Wendell Berry, "Sex, Economy, Freedom, and Community," in *The Art of the Commonplace* (Emeryville, CA: Shoemaker & Hoard, 2002), 159–81; and "The Body and the Earth," in *The Art of the Commonplace,* 108–11.

[25] Mary Harrington, *Feminism Against Progress* (Washington, D.C.: Regnery Publishing, 2023).

[26] Cf. Ivan Illich discusses at length the transformation of the productive work of women to "shadow work" in the post-industrial wage economy. Cf. *Gender*, 45–60. "The modern housewife goes to the market, picks up the eggs, drives them home in her car, takes the elevator to the seventh floor, turns on the stove, takes butter from the refrigerator, and fries the eggs, she adds value to the commodity with each one of these steps. This is not what her grandmother did. The latter looked for eggs in the chicken coop, cut a piece from the lard she had rendered, lit some wood her kids had gathered on the commons, and added the salt she had bought. . . . Both women prepared fried eggs, but only one uses a marketed commodity and highly capitalized production goods: car, elevator, electric appliances. The grandmother carries out women's gender-specific tasks in creating subsistence; the new housewife must put up with the household burden of shadow work" (49). Germain Greer described it pointedly: "Children live their lives most fully at school, fathers at work. Mother is the dead heart of the family, spending father's earnings on consumer goods to enhance the environment in which he eats, sleeps and watches television" (quoted in Mary Harrington, *Feminism against Progress*, 47–48).

[27] In the introduction to her modern how-to book on housekeeping, New York lawyer Cheryl Mendelson notes that housekeeping books in the 50s began commonly to recommend "a dusting regimen of astonishing rigor for middle-class homes," dusting all the woodwork and furniture, including window frames, screens, and blinds, *every day*, something previously unheard of. Cf., *Home Comforts* (New York: Scribner, 1999), 13.

[28] Christopher Lasch, *Women and the Common Life: Love, Marriage and Feminism*, 93–120.

[29] Joseph Mindszenty, *The Mother*, trans. Benedict P. Lenz (St. Paul, Minnesota: Radio Replies Press, 1949).

[30] G. K. Chesterton, *What's Wrong With the World* (San Francisco: Ignatius Press, 1910), 94.

[31] See Elizabeth Barber, *Women's Work: The First 20,000 Years* (New York: W. W. Norton & Company, 1996).

[32] Dorothy Sayers, *Are Women Human?* (Grand Rapids, MI: Eerdmans Publishing Co, 1971), 23–24.

[33] *Quadragesimo anno*.

[34] Melissa Kearney, *The Two-Parent Privilege* (Chicago: University of Chicago Press, 2023).

[35] Pius XI, *Casti connubi* (1930), 74–76; John Paul II, *Laborem Exercens*, 19; John Paul II, *Familiaris consortio*, 24; John Paul II, *Mulieris Dignitatem*, (1988), 18; John Paul II, *Women Teachers of Peace* (1995), 6; John Paul II, *Evangelium Vitae* (1995), 99; CDF, "On the Collaboration of Men and Women" (2004), 13; *The Compendium of the Social Doctrine of the Church*, 251.

[36] *Laborem exercens*, 19. See also, *Familiaris consortio*, 23; CDF, "On the Collaboration of Men and Women, 13: "A just valuing of the work of women within the family is required."

[37] *Laborem exercens*, 19.

[38] *Laborem exercens*, 19.

[39] *Familiaris consortio*, 24.

[40] *Letter to Women*, 4.

[41] *Laborem exercens*, 19

[42] Cf. John Tierney, "The Misogyny Myth—Women Aren't Discriminated Against in Twenty-first-century America—But Men Increasingly Are," *City Journal* (Summer 2023).

[43] See Allan Carlson's history of them in *The American Way*.

[44] Between 1912 and 1927, maternalists were influential in the creation of the Children's Bureau (1912) and the Sheppard-Towner Act (1921) both of which aimed to "save mothers and babies" from the death rates at the time, through prenatal and infant care education (promoting, especially, breastfeeding); they established Mother's Day as a national holiday (1914); promoted the Smith-Lever Extension Act (1914) to train men in farming techniques and women in home economics; the Smith-Hughes Vocational Training Act (1917) to provide training in the household arts for girls.

[45] As Grace Abbot, chief of the Children's Bureau (1921–1934) wrote: "The whole idea of mothers' pension is that it should be enough to care for the children adequately, to keep the mother at home and thus to give some security in the home."

[46] Cited by Carlson, *The American Way*.

[47] Carlson, *The American Way*, 76.

[48] See Carlson, *The American Way*, 58–59.

[49] Carlson, *The American Way*, 153. The Equal Employment Opportunities Commission (EEOC), in the period from 1967 and 1971, "converted Title VII into a magna carta for female workers, grafting to it a set of rules and regulations that certainly could not have passed Congress in 1964, and perhaps not a decade later, either" (J. E. Buckley, "Equal Pay in America," in Barrie O. Pettman, ed., *Equal Pay for Women: Progress and Problems in Seven Countries* [Bradford, U.K.: MCB Books, 1975], 47).

[50] Berry, "Feminism, The Body, and the Machine," 69.

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FEATURE ARTICLE

The Pre-Political Origins of Parental Rights

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There is growing skepticism about parental rights among many prominent legal scholars who are arguing for changes in the law that would significantly restrict those rights or even call the very notion of parental rights into question. For example, Anne Dailey and Laura Rosenbury have proposed a total restructuring of law related to children, giving less deference to parents and broadly empowering the state to enforce decisions about what it takes to be in the child's best interests even when fit parents disagree.[1] Their view implies significant limitations on parental rights in all areas, including education, administration of discipline, medical decision-making (particularly in areas related to reproduction, sexuality and gender), and non-parental visitation. In the educational arena, Elizabeth Bartholet's 2020 article calling for a presumptive ban on homeschooling received significant public attention.[2] Earlier work by Martha Fineman and George Shepherd goes even further, seeking to ban almost all private schooling.[3] Jeffrey Shulman has similarly argued for severe restrictions on parental rights in education.[4]

These parental rights' critics base their arguments on two sets of concerns: (1) concerns about promoting the well-being of children as they understand it; and (2) concerns about educating children for citizenship in a pluralistic democratic society. Some of their concerns about children's well-being are legitimate, such as concerns about cases in which serious abuse or neglect go undetected because parents claim to be homeschooling them. However, there is no good evidence showing that homeschooled children are abused at higher rates than others—or that children are at greater risk of abuse at home than in school—and, as the Supreme Court noted in *Parham v. J.R.* "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." Other concerns are based on highly contestable views about children's interests, such as Shulman's worry that children's autonomy is harmed when parents educate them in a particular religion without exposing them to other options.

More fundamentally, all of these arguments are flawed because they fail to recognize that parents' rights are grounded in their natural, pre-political authority, authority which the state has the obligation to recognize, but which is not derived from the state. Instead, these authors explicitly see parental rights and authority as conferred by the state. According to Dailey and Rosenbury, "the law's allocation of control to parents is a choice, not a natural state of affairs."[5] Similarly, Shulman states: "All parental power is a function delegated by the state" and "revocable by the state without a showing of parental misconduct."[6] James Dwyer briefly sums up this statist view with his claim that "the law creates the family."[7]

Yet what these and other parental rights critics fail to understand is that family law merely recognizes and regulates the pre-existing institution of the family; it doesn't *create* that institution. As Garnett pithily explains in response to Dwyer: "The law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt."[8] And I would add that the law no more creates parental authority than birth certificates create children. My primary aim in this essay is to further develop this point, showing why, despite what these authors claim, parental rights are natural and pre-political, not derived from the state.

1. Parental Rights as Grounded in Pre-Political Parental Authority

Parental rights are essentially a recognition of parents' authority to make decisions on behalf of or affecting their children, even when others (including state authorities) may disagree with those decisions. This authority is pre-political because it flows from the very nature of the parent-child relationship, which exists as a biological and moral reality that is normatively prior to and independent of political authority and positive law. Note that I do not use the term "pre-political" to suggest that the parent-child relationship is temporally prior to the existence of the political community or that there ever was a "state of nature" in which human beings lived together without being part of a larger authoritative community beyond the nuclear family. My claim, rather, is that the authority of parents is normatively prior to and independent of political authority and positive law, by which I mean that parental authority over children is both original—not derived in any way from political authority or positive law—and primary. By contrast, state authority over children is secondary and subsidiary to that of parents. The basis of parental authority is that, as I will explain shortly in greater detail, the parent-child relationship generates weighty special obligations—obligations which are in some respects non-transferable—for parents to provide for the overall well-being of their children. Because children lack the maturity necessary to make reasonable decisions about what is in their own best interests, fulfilling the obligation to promote children's well-being requires making decisions on their behalf. In other words, parental authority flows from parents' pre-political moral obligation to care for their children by, among other things, making decisions about how best to promote the flourishing of their children and of the family community as a whole, the flourishing of which both includes and redounds to the flourishing of the children.

A. The Foundations of Parental Authority

Understanding the importance of the biological parent-child relationship is crucial for understanding the pre-political origins of parental rights and responsibilities. The biological parent-child relationship is, in itself, a genuine personal relationship that is uniquely intimate and enduring especially from the child's perspective. For it is the only human relationship that literally defines one's identity at a biological level. And while one's identity as a human person

is not reducible to one's biological identity, one's biological identity as a specific human organism is arguably the basis of one's overall personal identity both at any one time and over time. Thus, no other relationship affects one's identity in a way that is as profound and permanent as a child's relationship to his or her biological parents.

At least initially, therefore, a child's closest human relationship is her relationship to her biological parents. This point is important for understanding why the authority of parents over their children is natural, because it is the basis for the claim that biological parents are, by nature, the ones with the strongest and most direct obligation to care for their children (at least initially). Having started the task of bringing a new human person into the world, the biological parents are also the ones naturally charged with the responsibility for bringing that task to completion by raising that child to maturity (a maturity which is not just biological, but also psychological, social, spiritual, moral and intellectual).

Here I am presuming the commonsense view that the nature, weight and content of our obligations to others depend in large part on the nature of our relationship with them. On this view the weight of our obligations is proportionate to the closeness of the relationship and the degree of need. This commonsense view explains, for instance, why we assume that it is right to use a much greater proportion of our time, energy and resources to benefit those who are near and dear to us than to benefit strangers, yet why we nonetheless understand that the dire need of a stranger may at times have a greater claim on us than the minor need of a family member. This commonsense view also explains why we think that some of our obligations to others must be fulfilled personally—such as the obligation to listen sympathetically to a friend in distress—while others—like a teacher's obligation to grade a set of multiple-choice exams—may be delegated to any competent third party or even to a machine. In general, an obligation is non-transferable—i.e., it must be fulfilled personally—when one party in the relationship is *personally* dependent on the other for the fulfillment of the need in question.

> *Respecting the fundamental rights of parents in law requires a deferential approach to parental decision-making in which fit parents are presumed to know better than the state what is in their children's best interests.*

How does this apply to the relationship between parents and children? While many of a child's needs could certainly be fulfilled by people other than the child's biological parents, there is one need that only the biological parents can fulfill, and that is the need for *their* parental love, understood not primarily as an emotion but as a high-priority commitment to the well-being of the child. Even when adoptive parents or others love a child, that love can never truly replace the love of the child's biological parents. Similarly, when a widow remarries, her new husband, however loving he may be, can never truly replace the love of her previous husband. (Note that this is true even if her new husband is more loving, and even if she loves him more than her old husband; my point here is not about the quality or intensity of a particular person's love, but about its irreplaceability.) There is a sense, of course, in which the love of any person is irreplaceable to every other person. Yet we are not harmed by the absence of a stranger's love because the stranger has no significant relationship to us and therefore no

obligation to love us (beyond a basic obligation of respect and concern for us as fellow human beings). By contrast, as already argued, a child does have a relationship to her biological parents—even to biological parents she has never seen—a relationship that makes the absence of adequate love on the part of her biological parents harmful, even if she is well-loved by others, and even if (as may often be the case with adoption, which I will discuss further in a moment) others love and care for her better than her biological parents would have.

Given the weight of biological parents' natural obligation to provide for their children's needs, and the extreme dependence of children upon their parents at all levels, usually the only way for biological parents to fulfill their strictly non-transferable obligation to love their children is for them to raise those children themselves. The only exception is when strong child-centered reasons tell in favor of allowing others to raise the child—reasons of the sort that would later enable the child to understand that his biological parents' decision not to raise him themselves did not reflect a lack of love, but was actually an expression of their love. Indeed, one of the benefits of open adoption is that it sometimes enables children to learn that their biological parents' decision to place them for adoption was not an act of abandonment but rather a loving act to give them the opportunity for a better life.

The argument thus far can be summarized as follows. Given that (1) special obligations for others' well-being flow from the nature and closeness of our relationships with others and on the extent to which others are personally dependent upon us for the fulfillment of their needs; (2) parents are by nature the ones with whom children initially have the closest relationship; and (3) children are personally dependent on their parents to meet important needs, it follows that parents are the ones with the strongest and most direct obligation to promote the well-being of their children in all respects, an obligation which in some respects is non-transferable. Concretely, this means that parents have an absolute and non-transferable obligation to love their children (i.e., to have a high-priority commitment to the well-being of their children), which translates into a strong *prima facie* obligation to raise their children, because this is the only way for parents to appropriately love their children absent strong child-centered countervailing reasons. Thus, given that (1) parents (unless they are incompetent) can only fulfill their obligation to their children by raising those children themselves, and (2) caring for children requires making decisions on their behalf, it follows that parents by nature have the authority to direct the education and upbringing of their children, which includes the authority to make controversial child-rearing decisions. While parents may of course enlist the help of third parties—family, friends, teachers, doctors, pastors, etc.—to carry out their responsibilities, the task of directing their child's upbringing is their personal responsibility which cannot rightly be entirely delegated to others (except in cases of incompetence, as already discussed).

What about adoptive parenthood? As noted, when biological parents are unable to care for their child, placing the child for adoption may be the best way to fulfill their obligations. Once parents have adopted a child, they have the same responsibilities and authority as biological parents, and of course adoptive parents usually form enduring psychological bonds with their children, and profoundly shape their children's identity. Nothing that I say here should be taken to denigrate adoptive parenthood or imply that it is not "true" parenthood. (Indeed, my husband and I are prospective adoptive parents, and we have many friends with adopted children.) My reason for emphasizing biological parenthood is that, as the focal case of parenthood (without which there would be no children to parent), it enables us to understand the essential moral features of the parent-child relationship and to establish that the origin of parental authority is natural and pre-political. For, as already explained, I understand parental authority as grounded on parents' special obligations to care for their children, and I understand special obligations as flowing from the nature of our relationships. Thus, in order

to show why parental authority is natural, it is necessary to explain why, at least initially (i.e., when the child begins to exist) the biological parents are the ones with whom the child has the most intimate and comprehensive relationship—a relationship that is the biological cause of the child's very existence and identity.

By contrast with biological parenthood, adoptive parenthood originates by convention, through the commitment of the adoptive parents to take on the responsibilities that biological parents have by nature—a commitment that, like the natural responsibilities of biological parents, is in principle permanent and unconditional. This commitment is, at least initially, the source of the adoptive parents' obligations. Thus, in the case of adoption, the commitment and resulting obligations generally precede the development of a relationship with the child, whereas in the case of biological parenthood, it is the existence of the biological relationship that generates the obligation and calls for the further development of the already-existing relationship.

Also, by contrast with biological parenthood, the process of adoption is generally (and reasonably) regulated by the political community, which vets prospective adoptive parents to ensure their competence and grants them the legal rights of parents. Thus, the exception in a sense proves the rule. Precisely because the authority of biological parents is not in any way derived from the authority of the state, the vast majority of people would reasonably recoil at the prospect of parent-licensing schemes which would effectively treat all parents like adoptive parents. Although the state (via state-licensed adoption agencies) reasonably steps in to ensure that children have someone suitable to care for them when biological parents cannot or will not fulfill their responsibility, in the normal case, the state simply recognizes and respects the natural childrearing responsibilities and corresponding authority of biological parents that flow from the already-existing relationship between parent and child.

B. The Family as a Natural Authoritative Community

Thus far, I have conceptualized the rights of parents as grounded in the natural authority of parents to make decisions about what is in the best interests of their children and of the family community as a whole. On this view, the family community is a natural authoritative community—i.e., a natural community with authority to direct its own internal affairs, including, centrally, the education and upbringing of children—relatively free from the coercive interference of the larger political community. Thomas Aquinas presents a helpful metaphor for understanding the family as a natural community with its own sphere of authority. Aquinas argues that it is just as natural for a child to be raised to maturity within the "spiritual womb" of her biological family as it is for a child to be gestated in the physical womb of her biological mother. And my argument above, showing how being raised within the "spiritual womb" of one's biological family corresponds to children's deep need to know that they are loved by those who brought them into existence, explains in part why this is the case.

While children are members not only of their families but also of the larger political community, their membership in the larger political community is indirect, mediated through their membership in the family. We can think of this as a nesting-doll model of authority, which can be understood by analogy with international relations. While as a citizen of the United States I am a member not only of the nation but also of the larger global community (of which the United Nations serves as a quasi-government), my membership in the global community is mediated through my United States citizenship, and the dictates or recommendations of the United Nations generally affect me only indirectly, through their influence on United States law and policy (influence which usually is and ought to be non-coercive). The relationship between the family and the state is in some respects analogous to

the relationship between the state and the international community. Because the state has the authority to direct its own internal affairs, it is a widely agreed-upon principle of international relations that the international community ought not to coercively interfere with the internal affairs of a sovereign state, even if the international community reasonably judges that the state could better serve the interests of its citizens by enacting different policies. The exceptions to this are cases in which a government is engaging in egregious human rights abuses or acting in ways that seriously and directly threaten the peace and safety of other nations. Similarly, the state ought to respect parents' authority to direct the internal affairs of the family—including parents' childrearing decisions—unless parents are guilty of genuine abuse or neglect, non-ideologically defined, or are raising their children in a way that directly and seriously threatens the public order (e.g., training children to be criminals).

C. Limited Government and Respect for the Family as a Mediating Institution

Recognizing and respecting that the family (as well as other communities such as churches, civic associations, etc.) is an authoritative community with the right to direct its own internal affairs is an essential and crucial feature of limited government. Indeed, as Hannah Arendt famously pointed out in her seminal work, *The Origins of Totalitarianism*, a hallmark of totalitarianism is the effective elimination of all mediating institutions between the individual and the state. The family is arguably the original and most crucial of these mediating institutions. In *Meyer v. Nebraska*, the Supreme Court clearly recognizes the essential connection between the protection of parental rights and core principles of limited government. Referencing Plato's famous proposal in *The Republic* for the abolition of the family and direct state control over children, as well as Sparta's removal of males from their families at age seven to be raised and trained by official guardians, the Court notes: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." Clearly, the Nebraska law at issue, which prohibited the teaching of foreign languages up through the eighth grade, hardly even approaches the level of restriction on parental educational control envisioned in Plato's *Republic* or practiced in ancient Sparta. Yet the Court makes these seemingly extreme comparisons because the fundamental principle at stake is the same: the law at issue in the case, just like Plato's proposal or Sparta's educational practices, was inimical to the principles of limited government because it usurped the pre-political authority of parents to direct the internal affairs of the family—particularly the education and upbringing of children—without sufficient justification (i.e., abuse, neglect or serious threat to the public order).

It is true (as *Meyer* also clearly notes) that the state does have a direct and serious interest in the education of future citizens as required for the survival of the social and political order—a key part of what John Rawls refers to as the "ordered reproduction of society over time"—and therefore that it has the authority to establish reasonable educational regulations for that purpose. However, such regulations are not (or at least ought not to be) a denial of the primacy of parental educational authority. On the contrary, as the court in *Meyer* explicitly states, compulsory education laws are simply enforcing and supporting "the natural duty of the parent to give children education suitable to their station in life." Thus such laws do not call into question but actually presuppose the natural authority of parents to direct their children's education. This is why the means chosen by the state to promote the legitimate goal of ensuring that children receive an education that will enable them to be law-abiding,

productive and responsible citizens must be respectful of parents' rights to direct their children's education.

D. A Brief Note on Parental Rights as Fundamental Constitutional Rights

While my argument here has presented parental rights primarily as fundamental moral rights that the state has the obligation to respect as a matter of basic justice rather than as a matter of positive law, I also believe that the Constitution, interpreted in light of the common-law tradition, recognizes parental rights as fundamental rights. While not explicitly enumerated in the text of the Constitution, the right of parents to direct the education and upbringing of their children is clearly among those rights that the framers of the Constitution would have understood to be "of the very essence of a scheme of ordered liberty," rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" because they "lie at the base of all our civil and political institutions." The right is clearly also "deeply rooted in [the] Nation's history and tradition," having been affirmed countless times in our history on the basis of common law prior to being articulated explicitly as a constitutional right in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[9]

II. Requirements of Respect for Parental Authority: Educational Policy Implications

Now I want to briefly discuss some of the concrete policy implications of my view of parental educational authority as primary and pre-political, and of parental rights as protecting that authority. Note that I present these policy implications primarily as requirements of justice, rather than as requirements of any existing positive law, constitutional or statutory. These requirements should therefore be taken into account first and foremost by legislators, school officials and other policy-makers in order to ensure that they craft policies that are respectful of parental rights. Nonetheless, as noted above, I also believe that a strong case can be made for the recognition of parental rights as fundamental constitutional rights, and if that is correct, then my arguments are also directly relevant to judicial decisions.

A. Strict Scrutiny, Exemptions, and Accommodations

Most generally, what respect for parental rights requires as a matter of justice is effectively captured by what is referred to in constitutional law as the strict scrutiny standard, according to which laws infringing on a fundamental right are only justifiable if they serve a compelling state interest by the least restrictive means possible. Thus, laws regulating education, even when aimed at the legitimate state interest of preparing children for responsible citizenship, should avoid interfering with parents' authority to direct their children's education to the extent possible. Where reasonable regulations in pursuit of a compelling state interest (such as reasonable compulsory education laws seeking to facilitate the ordered reproduction of society over time) do conflict with parents' educational authority, parental rights may only be overridden when there is no less restrictive means by which the state can achieve its goal. For example, in *Wisconsin v. Yoder*—a case in which Amish parents sought an exemption from the state's compulsory education law so that they could educate their children at home in the Amish way of life after the eighth grade—a less restrictive means to the state's interest of preparing children to be law-abiding, self-sufficient adults was available. The state did not need to force Amish children to receive a standard education until age 16 in order to achieve

its interest, given the Amish community's long history of law-abidingness and self-sufficiency. Accordingly, the Supreme Court ruled that the state had an obligation to grant the exemption in order to avoid violating the Amish parents' rights (and religious freedom).

My account of parental rights also implies that public schools in general ought to avoid promoting controversial viewpoints particularly on sensitive moral and religious issues (such as, for instance, issues related to sexuality and gender) in order to respect the primacy of parental educational authority and make it less likely that the school will be undermining the values parents are trying to teach at home. Given that value-neutral education is impossible, however, the school should be transparent about its curriculum (notifying parents in advance when sensitive issues are going to be raised and showing them the proposed content of the lessons), and exemptions and accommodations should be granted to the extent possible when educational regulations or content prevent parents from raising and educating their children as they think best.

One frequently discussed case in this regard is *Mozert v. Hawkins*. In *Mozert*, the Sixth Circuit court denied the parents' request that their children be exempted from a public school reading curriculum that they believed undermined the religious faith that they wanted to pass on to their children. The parents complained, among other things, that the readers were biased and unbalanced, completely lacking positive portrayals of Protestant Christianity, while sympathetically presenting relativistic and non-Christian viewpoints and lifestyles. The school district did not dispute that the readers were offensive to the families' beliefs but argued that the children should be forced to read them anyway. The Sixth Circuit ultimately held that "mere exposure" to diverse viewpoints did not violate the students' or parents' religious free exercise rights, or the parents' right to direct their children's upbringing. My view would imply that the parents' request for an exemption should have been granted, in line with the decision of the Tennessee District Court (whose ruling was reversed by the Sixth Circuit). The District Court rightly judged that failing to provide the accommodation would violate the parents' rights, because the parents believed that the content of the textbooks could harm their children by undermining their religious faith, and therefore that without an accommodation they would not be able to fulfill their responsibility to protect the spiritual well-being of their children without foregoing the benefit of free public education. Further, as the District Court noted, although the state has a compelling interest in educating children to be responsible citizens, that interest could be served without requiring every student to use the same textbook, and allowing the children in the case to use an alternative textbook would be practically feasible.

B. School Choice

At times—and this is particularly true today as school curricula become increasingly ideological—parents' objections to the public school curriculum may not be limited to a discrete text, program or event, but may involve concerns with the overall atmosphere or pedagogical approach of the school, or with viewpoints conveyed to students across the curriculum (as was the case in *Yoder*). In cases like these, the only way that parents can fulfill their obligation to direct their children's education (and exercise their corresponding right) is to send their children to a different school or homeschool them. Yet, for parents with limited means, these are often not real options. And even for those who can afford these options, the cost is a significant burden.

This problem points to the fundamental injustice of a system in which government-run schools have a monopoly on public educational funding. Given that there is no such thing as a neutral education, the public schools' monopoly on public educational funding means that the default

is for children to be taught the viewpoints favored by the government, using the pedagogical methods favored by the government. Yet there is no reason why the views and methods favored by the government should be privileged in this way. On the contrary, if we take the primacy of parental educational authority seriously, the default should be for children to be educated in line with the views and methods favored by their parents, particularly on controversial matters.[10] Because the education of future citizens is crucial for the common good, providing public funding to facilitate this goal is reasonable, especially given that without it some parents would lack the resources to provide their children with a solid education. Yet, respect for the primacy of parental educational authority would indicate that public educational funding should be channeled through parental choice to schools of parents' choosing (or to subsidize the cost of homeschooling), as long as the education being provided meets certain minimal standards—that is, as long as the basic public purpose of education is being served. Recent laws in many states establishing education savings accounts or tax credit programs are a great example of this.[11] Private schools, homeschools and charter schools sometimes significantly outperform public schools particularly in the most underprivileged neighborhoods, not only with regard to academic learning, but also with regard to civic educational goals, thus fulfilling the public purpose of education more effectively than many public schools.[12] Therefore, limiting public educational funding to government-run school makes no sense, and sends the false message that the formal education of children is primarily the responsibility of the state rather than parents. However, even if private schools, homeschools or charter schools do not outperform public schools academically, that does not mean that school choice programs are a failure. For ensuring that all parents have genuine choices about how and where to educate their children is independently valuable, as it respects the primacy of parental educational authority—making school accountable to parents, rather than the government—and enabling parents to choose schools in which the social and moral environment are more in line with the values that they want to pass on to their children.

Genuine school choice is not only a matter of protecting parental rights, but also of promoting children's well-being by avoiding the confusion and stress that result from conflicts between the values taught at school and at home, and of offering a truly liberal solution to the public goal of ensuring that all children have access to an education while respecting diversity and preventing the state from imposing a single ideology on all children. Indeed, John Stuart Mill was strongly opposed to state provision of education or even state direction of education, arguing that "a general State education is a mere contrivance for moulding people to be exactly like one another."[13] Mill believes that, at most, state-controlled education should be "one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence."[14]

C. Minimal Regulations on Private Schools and Homeschooling

Finally, it is already clear from the foregoing discussion that my account of parental rights also implies a right to send one's children to private school or to homeschool them. It is important to add, however, that state regulations on private schooling and homeschooling ought to be minimal—narrowly tailored to the compelling state interest of facilitating the ordered reproduction of society over time by ensuring that children receive an education that will enable them to be law-abiding, productive, and responsible citizens. It could be acceptable, for instance, for the state to require that children demonstrate age-appropriate progress toward competence in core academic subjects such as math, reading, and writing, as well as basic

knowledge about how our government works and about the rights responsibilities of citizens. This could be done in relatively non-intrusive ways, such as through periodic examinations. Note that my point here is not to suggest that states *should* adopt such regulations, only that they *could* be justified if necessary. For there are many reasons to think that such regulations may not be necessary and may actually do more harm than good. James Tooley argues that state examinations and state-imposed curricula often distort the educational process by, among other things, testing skills and knowledge that are not actually useful for future work, and by making education boring (leading many students to lose motivation and even drop out).[15] Evidence also indicates that private schools and homeschools generally perform at least as well on all measures (including civic educational measures) as public schools, and often significantly outperform public schools especially in disadvantaged communities. Further, even seemingly minimal government regulations may be overly burdensome in practice, wasting resources or interfering with schools' ability to fulfill their educational mission.[16] Nonetheless, some regulations—such as basic academic requirements, or a basic civics requirement—could be justifiable if they were a necessary and effective means to ensure that children receive an education that at least minimally prepares them for responsible citizenship. As long as the state only requires a demonstration of basic academic progress in core subjects, or basic knowledge of our nation's history and government, such regulations are, at least in principle, unlikely to violate parents' right to educate their children as they think best, except in relatively rare cases like that of the Amish. And in such cases, as already argued, exemptions should be granted as long it would not seriously undermine the compelling state interest at stake.

Conclusion

In this essay I have articulated an account of parental rights as based on the pre-political authority of parents, authority which flows from the very nature of the parent-child relationship and the weighty special obligations that parents have to protect and promote their children's well-being. This philosophical account is in line with the common-law tradition and the Supreme Court's recognition of parental rights as fundamental in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In general, respecting the fundamental rights of parents in law requires a deferential approach to parental decision-making in which fit parents are presumed to know better than the state what is in their children's best interests, and to be acting with their child's welfare in mind, unless there is clear evidence to the contrary and the parents' actions constitute genuine abuse or neglect, non-ideologically defined. Specifically with regard to education, parental rights include the right to exemptions and accommodations in public schools when parents find activities or curricular elements objectionable, as well as the right to send one's children to private school or homeschool them, and the right to genuine school choice—which requires putting an end to government-run schools' monopoly on public educational funding through policies like voucher programs.

Although critics worry that robust protections for parental rights the rights and well-being of children or the state's interest in ensuring that children are prepared for responsible citizenship, these critics' arguments are fundamentally flawed, because they fail to recognize the pre-political origins of parental rights, falsely presume that parental rights are inherently in conflict with children's rights, and presume—contrary to evidence and common sense—that the state is more likely than parents to know what is in the best interests of a child and to be motivated to promote the child's welfare.[17] While no parent is perfect, and some parents are incompetent or even malicious, the vast majority of parents love their children and do their best—often at the cost of great personal sacrifice—to promote their children's well-being and prepare them for the future. Although more zealous state oversight of parenting and intrusion

into family life may stop a few cases of abuse or neglect that would otherwise go undetected, it will only do so by inflicting irreparable harm on countless loving families and eroding the family intimacy and trust that is so important for children's welfare. Further, evidence indicates that private and homeschools prepare children for citizenship at least as well as—and often better than—state-run schools. Protecting parents' authority to raise their children in line with the dictates of their consciences is not only a matter of fundamental justice and constitutional rights but is also the best way to promote the well-being of children and the education of future citizens.

[1] Anne C. Dailey and Laura A. Rosenbury, "The New Law of the Child," 127 *YALE L.J.* 1448 (2018); Anne C. Dailey and Laura A. Rosenbury, "The New Parental Rights," 71 *DUKE L.J.* 75 (2021).

[2] Elizabeth Bartholet, "Homeschooling: Parent Rights Absolutism vs. Child Rights to Education and Protection," 62 *ARIZ. L. REV.* 1 (2020).

[3] Martha Albertson Fineman and George Shepherd, "Homeschooling: Choosing Parental Rights Over Children's Interests," 46 *U. BALT. L. REV.* 57, 103, 106 (2016).

[4] Jeffrey Shulman, *The Constitutional Parent* (2014); Jeffrey Shulman, "Who Owns the Soul of the Child? An Essay on Religious Parenting Rights and the Enfranchisement of the Child," 6 *CHARLESTON L. REV.* 385 (2012); Jeffrey Shulman, "The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?" 89 *NEB. L. REV.* 290 (2010).

[5] Dailey and Rosenbury, "The New Parental Rights," 106.

[6] Shulman, *The Constitutional Parent*, 58.

[7] James G. Dwyer, "Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think," 76 *NOTRE DAME L. REV.* 147, 167 (2000).

[8] Richard W. Garnett, "Taking Pierce Seriously: The Family, Religious Education, and Harm to Children," 76 *NOTRE DAME L. REV.* 109, 114 n.29 (2000).

[9] For more detailed constitutional arguments and an in-depth account of the common-law understanding of parental rights that underlies the *Meyer* and *Pierce* decisions, see Melissa Moschella, "Strict Scrutiny as the Appropriate Standard of Review in Parental Rights Cases: A Historical Argument," *Texas Review of Law and Politics* 28 (2024): 771–85; and Melissa Moschella, "Do Parental Rights Extend Beyond the Schoolhouse Door? Correcting Misinterpretations of *Pierce* in Light of History and Tradition," *Notre Dame Law Review* (forthcoming, Spring 2025).

[10] For more on these points, in the context of an argument that some form of genuine school choice is constitutionally required (primarily on religious free exercise grounds), see Melissa Moschella, "*Carson v. Makin*, Free Exercise, and the Selective Funding of State-Run Schools," *Journal of Religion, Culture, and Democracy* (forthcoming, 2025).

[11] See, e.g., the Oklahoma Parental Choice Tax Credit Act.

[12] See, e.g., Patrick J. Wolf, "Civics Exam: Schools of Choice Boost Civic Values," *Education Next* 7 (May 11, 2007); David E. Campbell, "The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools," *BYU L. REV.* 487, 510 (2008); Thomas

Stewart and Patrick J. Wolf, “The School Choice Journey: Parents Experiencing More Than Improved Test Scores,” *American Enterprise Institute* (2015).

[13] J.S. Mill, *On Liberty* (Cambridge: Cambridge University Press, 1997), 106.

[14] Ibid.

[15] James Tooley, *Really Good Schools: Global Lessons for High-Caliber, Low-Cost Education* (Independent Institute, 2021), 166–67.

[16] See, e.g., E. Vance Randall, “Private Schools and State Regulation,” 24 *URB. LAW.* 341, 351 (1992).

[17] For more detailed responses to critics’ concerns, see the longer article from which this essay is adapted (Melissa Moschella, “Defending the Fundamental Rights of Parents: A Response to Recent Attacks,” *Notre Dame Journal of Law, Ethics, and Public Policy* 37 (2023): 397–443). See also, Melissa Moschella, *To Whom Do Children Belong? Parental Rights, Civic Education, and Children’s Autonomy* (New York: Cambridge University Press, 2016), ch.3–4; and Melissa Moschella, “Ordering Parental Rights, Children's Autonomy and Civic Education: A Philosophical Foundation for Public Policy,” Program for Research on Religion and Urban Civil Society (PRRUCS), University of Pennsylvania, vol. 1 (Spring 2020): 9–15.

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Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

American Law and the Cosmological Deracination of the Family

DAVID S. CRAWFORD

Many will recall the New York City "drag march" during "Pride Month" celebrations a couple of years ago, which made news when participants began chanting "We're here, we're queer, we're coming for your children." Many will also recall that march organizers offered somewhat limp assurances that the chant was not to be taken seriously, that it was "taken out of context," or that it was only intended to mock the "moral panic" ignited by the gender wars.[1] In fact, of course, the marchers were very frankly expressing the normally unspoken *logic* and *goal* underlying the LGBTQ+ movement ("the movement"). They were also conveying the idea that there is nothing parents and other objectors can do about it. Given this goal, the movement represents the most potent and immediate threat imaginable to healthy functioning families.

The reason is not only the obvious and practical ways the movement has threatened the parent-child relationship and the integrity of the family, for example in the practice of schools keeping parents in ignorance about their children's gender choices. It is also that we cannot really know what familial relations *are* if we do not have an intelligible idea of what a person is. And the gender movement represents a kind of apocalypse of the intelligibility of the person.

I want to propose that some of the basic assumptions of modern American law, including its pervasive positivism and its consequent cultivation of metaphysically *ungrounded* and individualistically conceived rights, *tacitly shares the movement's* understanding of the person. If so, then basic patterns of legal thought have not only allowed, but have partly produced, the conditions under which the movement has emerged and thrived. And if so, then perhaps even the legal categories and tools available to defenders of the family carry the taint of a deeper logic that ultimately undermines the family and the primary goal of parental rights. And if that is true, then the small victories achieved by legal means may, in the long run, turn out to be either ephemeral or, worse and at a deeper level, subtle confirmations of the deeper logic giving life to the movement.

We might begin by asking whether the category “queer” (the term used by the marchers), along with the other members of the alphabetical pantheon, really does constitute a single “movement.” If it does, it will be because it shares an underlying *principle* giving rise to the whole set of elements composing the movement. And in fact, in all its variants, whether crude or subtle, whether socially conventional or transgressive, the movement *does* presuppose a *central principle*, viz. that the conscious or mental subject in his or her interior life or sense of self is asserted or assumed to be only *arbitrarily* related to the body’s given sexual nature. When I say, “arbitrarily related,” I simply mean that the variants of the movement each propose a lack of order or organic relationship between the individual subject and an externalized and materialized, but sexually dimorphic, body. Hence, the movement supposes that there is no single way one’s attractions *should* run—toward another sex, one’s own sex, or both—or pattern by which one’s identity *should* track the dimorphic body. Rather, the body has no bearing on whether it should be considered normal or natural that any given individual would be attracted or identify in one way or the other. Hence, how one’s mental state and one’s body relate in a given individual is without order or, in other words, is arbitrary. It is the presence of this largely tacit principle that is the common thread of the “orientations” and “identities” of the movement and that entitles us to speak of a definite and single “movement” and not only of a loose amalgam of heterogeneous cultural developments or fads or even pathologies. And it is this principle that shows the movement’s basic alignment with the now centuries-old assault on the idea of the world as part of and dependent upon a greater, *given order*.

> *The basic problem here is that the Court could not talk about the real thing itself. It could not ask the what-is-it question: “What is sex?” “What are man and woman? “*

Now, to say that the movement presupposes and projects an arbitrary relationship between the human interior disposition of spirit, soul, or consciousness and the body also means several further things. First, if the relationship between these fragments of the human whole is arbitrary, then they are in relation to each other quite literally “without order.” They are, in other words, characterized by *dis*-order, in the proper sense of that word. Moreover, this fragmenting lack of internal order is necessarily universal in scope in the sense that it characterizes all “orientations” and “identities,” since these are now conceived as only the manifestations of a particular variant or species within the more general categories or genera of “orientation” and “identity.” Hence, “gay” and “straight,” “cis” and “trans,” are conceived as mere variants within the alternatives of “orientation” or “identity.” Hence, “straight” and “cis” are also mere variants within this *dis*-ordered and arbitrary conceptualization of the individual person.[2] The understanding of the person—*all human persons*—presupposed by the movement is therefore, *just so far*, anti-natural. Moreover, the sexually dimorphic body is, *just so far*, treated as something less than fully personal or humanly meaningful.

What is surprising is that even those who reject the movement and the sorts of cultural changes it promises, nevertheless typically, but unconsciously, have adopted its conceptual framework and vocabulary. So, the movement has succeeded in implanting in us its way of conceiving the nature of sexuality and therefore also, subtly, its ways of viewing reality. Yet, and this is the most important point, arbitrary relations or objects lacking internal order are,

just so far as they are characterized by arbitrariness and disorder, unintelligible.

Now, I claimed a moment ago that the family is unintelligible insofar as the person is unintelligible. The focal meaning of the family is that it is a human community defined by the embodied relations connected with and stemming from the basic human fact of procreation. Given the fragmentation represented in the movement, the most fundamental human relationships, those of the family, the relationships established by being born, by conceiving, by giving birth, the relationships that are written and visible in the body, are by extension *also* treated as *arbitrary*, as *dis*-ordered, in the sense given a moment ago. These most fundamental human relationships depend on the patterns and principles of bodily *order* among persons, mediated by sexual dimorphism, an order that has been dramatically deracinated from its native soil by the *dis*-order within the movement's conception of the individual subject. This form of society implies a loss of the child specifically *as* a child, as being *from* a given mother and father in the fully personal sense.

This pattern of thought can be seen in the bitter irony of the recent California Assembly bill, which declared that "the best interests of the child" require parental "affirmation of the child's gender identity or gender expression." Had the bill been signed into law by the governor, it would have forced parents, who literally *embody* the *non*-arbitrary and *ordered* character of the child's origins, to confess, despite what they experience in themselves and see before them, to a more fundamental *arbitrariness* or *dis*-order at the origin of the child's being and their relationship to it.

Let me briefly indicate more globally why I think this loss of human and social order is so devastating, beyond the obvious direct harm to families, children, and parents. It should be axiomatic that the family and law travel together. Both imply for their intelligibility some notion of the *personal, and on this basis,* some sort of *social order*, and in doing so they inevitably represent and project a sometimes tacit, but always metaphysically saturated, *idea* of man's relationship with the world of real things.

Consider in this regard anthropologist Clifford Geertz's trenchant claim that law is "part of a distinct manner of imagining the real."[3] Law causes us, of course, to act or forebear acting, provides ways of doing things, such as creating wills and entering into contracts and business arrangements, and it provides the civil form and institutional recognition for human relationships, such as marriage and the family. As such, law is necessarily and above all pedagogical, even when it claims not to be. Legal thought, Tocqueville said, shapes "the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire."[4] For one thing, as legal anthropologist Fernanda Pirie points out, important social matters come before the law for its final word. When issues arise that need to be settled by law, they are altered to fit legal categories and language, and in fact this amounts to a judgment about what *is* real or what matters in those conflicts and social tensions, how they *should* be interpreted, what they ultimately *mean*. And what is *legally* real inevitably becomes what is also real for us, for we are, in fact at the root of our beings, law-ordered and law-directed creatures.[5] As Geertz puts it, law is not simply a "technical add-on" for resolving social conflict but plays an active part in *generating* society and its meaning. Law offers "visions of community," he says, "not echoes of it."[6] While we need not follow Geertz, Pirie, and other "anthropologists" into cultural relativism, we do, I think, need to recognize a basic truth in these claims, viz. that law always mediates, even when it claims to do no such thing, an *idea* of the real, for better or for worse. Or as Steve Smith put it at this symposium a few years back, law serves a symbolic function in the projection of an *ideal* about society and its members.

Of course, this mediation of an understanding of what is, and what ought to be, occurs through its explicit prohibitions, rights, and institutions. But it is important to recognize that mediation also occurs at the subtler level of law's assumptions and form of discourse, for example in its assumptions concerning the foundations of rights, its assumptions about the role of morality in law, its assumptions about the nature of the family. In our case, it is important to note that reigning forms of legal rationality imply certain assumptions about the constitution of the human person and of his origins and social context.

Crucial then, if a legal regime is not to become tyrannical and inhuman, is the question of whether the *idea* of the real it presents is *true* and compatible with the fully *human*, which means, of course, having a sense of the fully human. Now, this question of the human clearly is more centrally at stake in some issues, rather than others. Presumably, legal referents are relatively unproblematic in most cases. Physical or intellectual property; legal entities, such as contracts, constitutions, corporations, or branches of government; legal procedures, such as rules of evidence; criminal acts, and so forth, present their own ambiguities and difficulties for legal definition, no doubt. But they do not confront us with the *givenness* of personal nature as directly as the issues surrounding the sexes and family do. These latter necessarily rely *for their intelligibility* on some conception of the person as embodied and sexually differentiated. The law *must* deal with *real* men and women, parents and children, mothers and infants, women and pregnancy, sex and the sexes, and so forth.

Yet this is precisely where American law seems to stumble. To see what I mean, consider the following examples: The *Bostock* decision turned precisely on the question of what "sex" means in Title VII. The Court tried to avoid having to answer this question by saying that under any interpretation, even the dictionary definition of "sex" in 1964, the defendants had treated the sexes differently in relation to shared characteristics, namely "identity" and "orientation." Yet, the Court failed to recognize that attraction to the same sex and attraction to the opposite are shared characteristics and, likewise, that identity in accordance with one's own sex and identity with the opposite sex are shared characteristics *only* on the assumptions concerning the person that are at the heart of the gender movement. In other words, the only way they can be shared characteristics is if we assume the arbitrary and *dis*-ordered relation of the mental and bodily aspects of personal life. And, of course, once we have done this, we must also accept the *sequalae* of having made that assumption, such as its implications for the family and the relationship between parents and child and what "parental rights" might mean. The basic problem here is that the Court could not talk about the real thing itself. It could not ask the what-is-it question: "What is sex?" "What are man and woman? "

Now, if we are to ask about what something is, the best place to begin is by asking, what is the principle that makes the thing in question intelligible? Moreover, asking about the intelligibility of the thing will require understanding that thing as a whole and not as a series of fragments. But these are precisely questions that *cannot* be asked. I could multiply this example many times: We see the same pattern in relation to the run of cases leading up to *Obergefell*, which relied on *rational basis* to overturn states' marriage laws, as though arguments relying on the difference of the sexes and their connection to society's continuation over time through children did not rise even to the basic level of legal rationality. But if they did not, what sort of rationality are we dealing with here? The most obvious answer is that it is a form of rationality that presupposes the *fragmentary* or *queer* anthropology I have outlined above. Or, another example would be the Court's inability to think through what an unborn life is. Or another can be seen in senators' and congressmen's assumptions in the Fairness for All Act that a compromise might be forged that would carve out exemptions for religious institutions from otherwise valid non-discrimination requirements in the remainder of civil society, as though the only basis for knowing *what* a man and woman and their relation to the

child *are* is by a blind and positivistic leap of fundamentalist faith inaccessible to political and legal rationality.

Now, the problem exhibited by these examples is not simply that they have accepted the movement's logic, it is that they represent law's failure to be able to say what vital human things are. So, the question is, *why* couldn't *Bostock* ask about what the object of debate is? Consider, in relation to this last question, the typical claim that, because metaphysical foundations are contentious, we cannot agree on what supports human rights.[7] Hence, we can only agree that we want such rights based on what they do for us, while each of us can nevertheless support them privately based on his own metaphysical commitments. The most obvious question to pose is, how do we know that when we support a right—say, a right to equal treatment under the law or to free speech—we mean the same thing by these rights as those around us who do not share our metaphysical commitments? And of course, experience shows that we do *not*, in fact, mean the same things when we speak of rights. Indeed, the current struggle for a dominant cultural narrative is fueled by this basic disagreement. For this very reason, the arguments over the meanings of the rights are in fact proxy arguments for the sources of disagreement in the underlying and clashing but private metaphysical principles.

But more fundamentally, we find a political and legal form of rationality that hopes to preserve our liberties and commitments, but at the cost of not being able to think, at least as public rationality, about what a human being is, or, in the case of *Bostock*, what sex is. Hence, we are left with an understanding that defines the individual citizen in terms of a freedom without reference to his natural constitution, especially as embodied. In effect, then, if we do not ground rights in an order, then do they not tacitly, subtly convey the anthropology of arbitrary dis-order?

This absence or suppression of the body is of the utmost importance, since the body most visibly both identifies us personally and presents us with the givenness and predetermination of our nature. However, of course, we do have bodies, and the law must deal with that fact in some way. But it cannot do so in a way that integrates it as an organic part of its depiction of the citizen. So, we begin to talk about the body as a "biological" reality (in the modern sense of "biology"), that is to say, as a mechanism external to the person. In this sense, the arbitrariness and *dis*-order of the movement are already, however implicitly, contained in and projected by basic assumptions of legal rationality, concerning rights. Notice also that it was precisely this characteristic that appeared to be the underlying principle indicating the meaning of queer and tying those terms to the rest of the movement.

And notice as well that the impetus for this way of thinking and speaking does not simply come from the larger scientific or cosmological assumptions of modernity. Rather, a certain form of political and legal thought *demands* this way of conceiving the person in its administration of justice, in order even to constitute justice. Hence, it is not at all clear that the cosmological and metaphysical assumptions of modernity have been the cause of a politics as much as the political aspirations demanding liberation from political and natural constraints needed to first revise metaphysics and cosmology.[8] And these aspirations become most apparent when law tries to deal with rights concerning the sexes, the relation of the sexes to children, and so forth, as we see in the examples I have given. So, *Bostock* and the other examples only represent the way an underlying logic emerges visibly in the context of the gender battle.

We find ourselves in a situation in which the things with which law *must* deal are also the very things with which it is *incapable* of dealing. This is the meaning of my admittedly exotic title:

law as currently conceived *looks*, but it does not have the epistemological tools to *see*; it has effectively deracinated natural things, such as the family. And for this very reason, it seems almost impossible to think of any rights, including parental rights, except as reservations of autonomous powers of self-determination, set over and against other autonomous powers of self-determination, rooted in we know not what. Yet, this form of legal rationality, as it concerns what should be understood as the touchstones of and originating principles of that rationality, mediates the arbitrary and *dis*-ordered notion of the legal subject that we can see underlying the movement. And to that extent, the current cultural trend that produces a social phenomenon such as the movement is not only aided and abetted but in fact at least partly itself—as Geertz would have it—*produced* by this form of legal rationality. Can I go so far as to say—postmodern-like—that "the movement" is a social construction, implicit in patterns of thought that are endemic to our law and politics?

The chant at last summer's march was shocking to people, not because it was really a revelation, but because it was an unusually brazen expression of an only formally hidden truth. Its frankness was possible for two reasons. First, the truth is already fairly apparent to everyone.

Second, the marchers obviously think that this truth no longer really *needs* to be denied or even really *needs* "plausible deniability." If we want to understand why the marchers should have arrived at these assumptions, we could do worse than to examine the tacit understanding of the meaning of the person that has been provided to them for the whole of their lives, in part by our conventional patterns of legal thought.

[1] Tyler Kingkade, "'We're Coming For Your Children' Chant at NYC Drag March Elicits Outrage, But Activists Say It's Taken Out of Context" (June 27, 2023), *Newsweek*. The chant was widely covered by other news outlets, as well.

[2] See my "Metaphysics of Bostock," *First Things* (7/2/20); "Against the 'Fairness for All' Act," *First Things* (12/14/19); and "Gender Identity and Nihilism: Some Anthropological Implications of Recent Caselaw" (10/07/19).

[3] Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983), 173, quoted in Fernanda Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013), 57.

[4] *Democracy in America*, I, 270.

[5] Pirie, 54–55, citing John Conley and William O'Barr, *Rules Versus Relationships: The Ethnology of Legal Discourse* (Chicago: University Press, 1990), 168.

[6] Geertz, 218 (quoted in Pirie, 57).

[7] See Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, N.J.: Princeton University Press, 2001), 55, cited in Martin Rhonheimer, *The Common Good of Constitutional Democracy* (Washington, DC: The Catholic University of America Press, 2013), 310.

[8] Cf. Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 174–75.

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FEATURE ARTICLE

The Domestic: The Power That Moves the World

JULIA HARRELL

When a newborn is laid in the arms of his mother, the sense of power and purpose she feels outstrips any other achievement. No academic honor, no professional accolade, no work of art—even those attaining the heights of greatness—can approach this new and unrepeatable child. A child unable to lift his own head can, in an instant, become an entirely new center of gravity for his mother, possessing in his helplessness the power to move her as nothing else can.

"Virtue" comes from the Latin *virtus*, meaning strength or power, particularly the power of causation. American coastal population centers are, putatively, the nation's power centers. Popular culture is manufactured by the entertainment industry in Los Angeles, the New York financial industry drives business, and legislative and military policies are made and executed in Washington, DC. These are the places where the powerful congregate to flex the muscle of causation. But this kind of power is only one kind, and it is subordinate to a different kind.

David Brooks famously delineated résumé virtues from eulogy virtues. "[R]ésumé virtues are the skills you bring to the marketplace…[E]ulogy virtues are the ones that are talked about at your funeral." I will go further and say that eulogy virtues are the source of meaning for résumé virtues; without them, résumé virtues are powerless.

Eulogy virtues spring from the domestic and move the things that matter. The generosity of a father who spends Saturday mornings teaching his son to throw a ball, the gentleness of a mother's kiss on a toddler's scraped knee, the doting big sister carrying the baby around, the adoring little brother attempting to comfort a distressed older sibling by climbing in his lap; these are eulogy virtues in the flesh. They cause the human person to recognize his most fundamental identity: a beloved child of God.

Résumé virtues move the external, they make laws and stock portfolios, they deploy armies. Because their action is in the external world, résumé virtues appear larger and more significant; they are the powers praised in public life and popular culture, the things that command news segments and editorial commentary. Yet, what is meaningful about their action is its impact on people and the domestic. Laws and bank accounts and territorial

disputes matter because of their downstream effects on actual people.

Consider virtue, the power of causation, in light of the narrative categories of *plot* and *stakes*. Plot is what happens in a story; stakes are why it matters. If there are no stakes, the reader has no reason to keep turning the pages.

If I lose a shoe, the other shoe is rendered useless in the absence of its mate. Frustrating, but not particularly compelling as a narrative plot point. Unless…I lost the shoe—a glass slipper to be precise—running back to my carriage, fearing the carriage's imminent reversion to a pumpkin. Said lost shoe was retrieved by a prince, whose search for me is facilitated by the possession of a shoe which fits no one else. If he is successful in using the shoe to identify me in the home where I live, a servant unappreciated and abused by my stepmother and stepsisters, he will rescue me from a lifetime of misery and install me on the royal throne. But if he cannot find the foot that matches the shoe—*my* foot—the cost is quite a bit higher than a missing shoe. Those are the stakes, the source of meaning and context for the lost shoe.

Everything matters to the extent and because it concerns the domestic.

Résumé virtues are all plot. They tell us what happened and who made it happen, but on their own, they are meaningless. The eulogy virtues—the domestic—are the stakes. Every one of the great stories of the canon is a domestic story, even those whose plot revolves around war, crime, or politics.

In that multitude of ships launched when Paris offended Menelaus' hospitality by abducting the lovely Helen and fleeing with her, Odysseus departs to fight the war in far flung Troy. *The Odyssey*'s plot moves through danger, tragedy, and divine retribution. Yet, every obstacle of Odysseus' journey, no matter how terrifying or how richly imagined by the poet, derives its power from its ability to prevent Odysseus from returning from Troy to his home in Ithaca where Penelope waits. The great threat of the land of the Lotus-eaters is not violence, but the power of the lotus plant to erase the men's memory of home and sap their desire to return. They may, if they choose, drift in a haze of empty contentment, having forgotten the only thing that really matters.

When Odysseus and his men escape the Cyclops and land on the hospitable island of the wind-god Aeolus, Odysseus insists they move on, because it is the only way to reach Ithaca, their home and destination. Aeolus contains the winds that would blow Odysseus in the wrong direction within a knapsack, leaving only the West Wind free to carry him home. Buoyed along by the West Wind, the men come so near the shores of Ithaca, they can see the home fires burning. Contentedly awaiting his imminent arrival on the shores of Ithaca, perhaps dreaming of warming himself at one of those fires, Odysseus dozes off. It is the loss of those fires and everything they represent that gives tooth to his men's foolish decision to open Aeolus' sack and allow the other winds to escape, blowing them away from the homecoming that had been, just a moment prior, within reach, and sending them back out to sea.

In the land of the dead, Odysseus encounters his mother who died of grief awaiting his return. The urgency of that return is underscored by the new knowledge that his father, still alive, is wasting away with the same grief that destroyed his mother. Three times Odysseus reaches for his mother, and three times she slips from his grasp, no longer having a body.

Odysseus survives the sirens, Scylla, and Charybdis, he escapes the island of the sun god, resists the temptation of Helios' cattle. He is held captive by Calypso, desperate to marry Odysseus, for seven years. But Odysseus loves Penelope and Telemachus. He yearns for his family and homeland and is consumed with regrets about angering the gods. He wonders what is happening to his family now, if Penelope has been faithful and what kind of man young Telemachus has become. It is always home that captures Odysseus' imagination and moves him onward. Each of the brilliant plot elements derives its power from the stakes—the threat of the loss of home. The great epic is archetypal of all our stories in its centering of domestic power and its ability to move the external world—the power to take us out to war and the power to bring us home, no matter the obstacles.

It is because of Georgian England's entailment laws that Mr. and Mrs. Bennet are desperate to marry off a daughter to the tedious Mr. Collins. The modern instinct is to protest the law, search for a way to change it or circumvent it, because this is the modern concept of power: making laws and policies, or modifying existing ones. The modern wants to resist, to be loud, to demand, to refuse. But the real story of *Pride and Prejudice* isn't about unjust inheritance laws. It's about, well, pride and prejudice. The story of men and women whose flaws and sins threaten their own happiness is endlessly more interesting than legislative maneuvers. Lydia's impulsive and foolish decision to run away with Wickham, Charlotte Lucas' calculations on the value of a marriage to Collins, Elizabeth's (many) near misses with Darcy; these are the events that give the novel its power and meaning, because of the stakes that ride upon them. Social ruin, the practical difficulties of life as an unmarried woman, and the loss of a true love match move the reader to hold his breath waiting to discover what will happen next, and what it will mean for Austen's women.

Prince Hamlet's uncle and newly-minted stepfather, Claudius, dispatches him to England to remove the troublesome young prince who suspects Claudius' own role in the death of the king. Claudius murdered the king to win Queen Gertrude and usurp the throne rightfully belonging to Hamlet's father and then to Hamlet. It is noteworthy that Claudius' decision to seize the throne is undertaken by striking the heart of the household—murdering the king and marrying his widowed queen—and not by military maneuvers. This breach of the household is what sets the entire tragedy into motion. The king's murder is a blow against the family itself; Claudius has betrayed the loyalty of brothers, shared the bed of his brother's wife, and stolen what rightfully belongs to his nephew. This assault on the domestic heart of the play, and Hamlet's resolve to right what is wrong in his home by avenging his father, combined with his flaws of indecision and incoherence, are what conclude in a stage of dead bodies.

When Erlend Nikulausson of Husaby enters into a treasonous political plot, he is caught because his paramour, with whom he has betrayed his wife, then betrays him in turn. The true weight of the matter is felt in the peril to which Erlend exposes his young son by involving him in the destruction of damning letters, the humiliation suffered by his wife, Kristin Lavransdatter, when the entire community learns how he was exposed, the family rift he causes with his brother-in-law, and the financial and social penalties his large brood of sons will have to pay for the rest of their own lives. The subplot around the political jockeying of minor Norwegian and Swedish royalty is only a vehicle for showcasing Erlend's rash decision-making, propensity for womanizing, and lack of sacrificial care and planning for his family; the domestic failures reveal the kind of man he is.

Why does it matter when a thousand ships set sail—when armies deploy, when unjust laws prevail, when traitors are caught and imprisoned? None of these things derive their power from their own reality. Rather, they matter because soldiers will die and the people who love them will grieve, because people will have to make defining calculations to balance legal

realities with personal decisions, and because our sins cause the people we love to suffer. In other words, everything matters to the extent and because it concerns the domestic.

Twenty years after departing to fight the Trojan War, Odysseus arrives on the shores of Ithaca and returns home in disguise. Argos, the faithful hound, lifts his muzzle and pricks his ears at the sound of his long-departed master's voice, before dying in peace. During Odysseus' bath, his childhood nurse recognizes the scar below his knee, acquired in an old hunting accident. Odysseus' knowledge of the marriage bed he carved from his own olive tree reveals his identity to Penelope. His musings on the family fruit trees identify him to his father, Laertes. It is his place in the family home that gives Odysseus his full identity.

Man exists first in a family. John Paul II said that, "The first and fundamental structure for human ecology is the family, in which man receives his first formative ideas about truth and goodness and learns what it means to love and be loved, and thus what it actually means to be a person" (*Centesimus Annus*, 39).

In Odysseus' absence, Penelope wove a shroud for her elderly father-in-law by day, telling her suitors that when the shroud was complete, she would choose a husband. In her fidelity, she unraveled her work each night, pushing off remarriage for another day, waiting for the king. Modernity despises Penelope, the faithful wife, because our misconception of power relegates what is domestic to powerlessness. In fact, the family, the domestic, is both the source and object of power—the ability to cause something else. It was a domestic dispute which began the war taking Odysseus from his home for twenty years, and it was the domestic that drew him home, across oceans and past monsters and (super)natural storms. The comfortable drift of life with the Lotus-eaters and immortality in the bed of a goddess could not silence the call of something more compelling than even the Sirens—home.

The familiar scar on the beloved knee, the garden out back of the family estate, the heirloom piece—these are the things we are willing to go to war for, to make and change laws for, to work and spend for. These are the things that have the power to move us in ways visible to the external world, but meaningful because they concern what is internal, the domestic. When the child who, once laid in his mother's arms, reoriented her entire life comes to the end of his own, he will call out for her, as the dying do. Because the foundational relationships of family and home are the things that really matter, the ones we come to first and last, and that command the movements of the life in between.

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FEATURE ARTICLE

Two Cheers for Parental Rights

SCOTT YENOR

As a response to the ideological state capture of schools and hospitals, conservatives have responded with calls for parental rights. School districts peddle racialist, white-shaming theories in their curriculum. In response, parents want to know what is being taught, so they ask for transparency through what many states call a "parental bill of rights." Schools offer comprehensive sex education, and parents want to be informed of the content and then given the right to "opt out" or "opt in" to such classes. Schools encourage students to identify as other than their so-called "assigned gender" at birth and to do so against the parents' wishes. In this case, conservatives view the state as usurping the role of a parent, and the sanctity of parental rights demands that the state back off. The same kind of pushback can be seen in the campaign for school choice (versus the state monopoly on public monies for education), for independence in homeschooling, for the freedom to hand down religious traditions, and for prudential latitude regarding children's vaccinations.

Conservatives have become wedded to the idea of a formal and kind-of neutral concept of parental rights as a bulwark against the consolidation of state power. There is something reasonable, even deeply revealing about the claim of "parental rights." Parents do have duties and responsibilities over their children that a legitimate state must not interfere with. There are biblical mandates. There are legal protections, as in the landmark Supreme Court cases *Pierce v. Society of Sisters* and *Meyer vs. Nebraska*. In *Meyer*, Nebraska had outlawed teaching foreign languages to children before the eighth grade, while the Oregon statute at issue in *Pierce* required Oregon parents to send their children from age 8–16 to public schools. The *Meyer* court declared the Nebraska law to be an unconstitutional infringement on individual liberty and parental power. Protected liberty, the court held, was more than

> merely liberty of bodily restraint, but also the right of the individual to contract, or engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized in common law as essential to the orderly pursuit of happiness by free men.[1]

Pierce follows *Meyer* in protecting parental rights. During an era where John Dewey and others promoted state-directed, Progressive education and where there was movement toward compromising religious, especially Catholic, private education (as the Oregon law itself attests to),[2] the Court again defended parental rights.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not a mere creature of the State; those who nurture him and direct his destiny *have the right, coupled with the high duty*, to recognize and prepare him for additional obligations.

The court in *Pierce* links a right "of parents and guardians to direct the upbringing and education of children under their control" with a duty to use that freedom well. The fact that the Society of Sisters, an order of Catholic nuns who ran a private school, provided education that was "not inherently harmful" and even "useful and meritorious" made it easier for the unanimous Court to defer to parental rights in this case.[3]

Laws also recognize, for the most part, that those who give birth to children take them home, no questions asked. We do not even think about the automatic character of the fact that those who give birth to the child have authority over the child: we do not randomly distribute children to interested parents. We just assume, for the most part, that those who give birth to children are going to be legally and morally responsible for their upbringing. We do not demand parental licensing. The state does not create this bond and this responsibility. It recognizes it. Call it what you want, the language of parental rights is a good-enough way of conceptualizing parental authority, duty, and responsibility in our time and place.

Parental rights are strongest when they are connected to deep truths about human nature.

The action in our liberal framework of parental rights centers, first, on how to protect parental rights, and second, on how to conceptualize the harms that always limit claims of rights. Parents have rights, everyone will admit, but rights are always limited by claims of abuse or neglect; increasingly, abuse and neglect are defined not by judges or sensible people but by those claiming to be professionals—like teachers, guidance counselors, health instructors, administrators, doctors in the thrall of liberationist ideologies or minority stress syndrome; complicating the matter further, surrogacy has eroded the assumption that those who have children are legally and morally responsible for them.

In some crowds, I reckon, being a liberal is likely to earn scorn, and being a non-liberal or post-liberal will be the default position. And there is good reason for being non-liberal and to criticize the centrality of "parental rights." What intellectual will defend the value-neutral idea of parental rights, when everyone knows that there is no neutral ground; that harm is a value-laden term; that neglect is a value-laden term; that our totalitarian ideological situation is hijacking precisely these terms. I, too, think parental rights are not enough in our time *or in any time*. I, too, want to break free from the rights-harm framing imposed on us by John Stuart

Mill and the American legal tradition of the past seventy years.

However, I don't intend to bury the idea of parental rights. Rather, I want to deepen our appreciation of parental rights with a full recognition that parental rights, as we currently understand them, are not enough. Two cheers for Parental Rights.

The problem with parental rights currently understood is easily summarized. All laws appeal to some understanding of what society expects or what society considers to be good, advantageous, or just. Society is never a closed system. Laws and frameworks point to a social vision and social visions themselves are subject to a higher law. Healthy societies, with more or less common and decent ideas of the good, advantageous, and just, can protect parental rights in a formal way, and parents will be guided by predominant opinions about their duties and the aim of their authority and point their children in the right direction. Our laws protect against harm and neglect, but these terms are understood in light of our regime. There are no Golden Tablets of harm and neglect. Thus, the protection of rights is never simply neutral or abstract. It is always with respect to a particular regime.

Conservatives seeking to avoid the substance of parental rights or who believe their own press have a tough time when the shoe is on the other foot. Parents who want to give their kids puberty blockers at age six, so that their children can choose their gender later in life, could be seen to be exercising parental rights as the concept is used by most conservative advocates. A father who wants to hand his pornography business on to his son and, to start him early, rears him with a firehose of pornographic content so that he learns the "family business," is, in a manner of speaking, handing down his ways to his son, exercising parental rights as many conservatives understand them. Obviously, what parents do with their rights matters and the substance of what society approves matters too. We cannot blindly endorse parental rights any more than we can blindly endorse the argument that parental rights are exercised consistently with the interests of *our* society.

Parental rights are strongest when they are connected to deep truths about human nature. If human nature is up for grabs, if the definition of marriage is loosened, if technology circumvents natural pregnancy, if gender is fluid, if sexual norms are subverted, then the idea of "parental rights" is not going to preserve the traditional privileges and immunities of the family or protect children from predation. The regime informing parental rights makes all the difference.

What is good about parental rights? What truths do the language and idea suggest? Is there a better way of conveying them?

First, the political community's authority in family matters is not exercised directly. A political community may "control" the family in a sense, but its "control" is indirect. There is a core of family life—marriage, sex, and fathering/mothering—that escapes the political community's grasp. No legitimate political community orders a man to marry a particular woman or to marry at all. No legitimate political community orders a husband and wife to have children now or not to have children or to have only a certain number of children. No political community can order men and women to have sex at a particular time. No political community can, upon the birth of a child, simply seize him and give the child to another, without some involvement or permission from the parent. Or give the child its name, except in exceedingly unusual circumstances. Children are never thought to be simply products of the state—either in reproduction or in education. They are products of families working within the political community. In this sense, parental rights and marital rights generally enjoy a traditional immunity from state intrusion because neither are created by the political

community. The political community only acknowledges them.

This understanding of indirection depends for its subsistence on a particular understanding of family duties and of the limited nature of political community. It didn't obtain in Soviet Russia, and it is on the wane in the formerly liberal democracies of the West.

This points to a second way in which the ideas within the conceptual framework of parental rights should guide our thinking. There is an ancient battle between the family on one hand and the political community and the church on the other. They battle for the allegiance of citizens, believers, and family members, though, perhaps, in a perfectly ordered commonwealth such a battle would hardly be waged. People love their families, their political communities, and often their church. Each demands loyalty. Each demands one's time. It is manifestly hard to imagine in our circumstances, but families can be too strong and undermine a commitment to genuine public justice through their favoritism and tribalism. One word makes it clear that families themselves are not self-sufficient: incest. Or to take another: cousin marriage. Sometimes families can be too strong and therefore parental rights, in those cases, can upset the necessary functions of churches and governments.

That, of course, is hardly our problem. The political community can obviously be a threat to the integrity of the family, as when the Soviet Union celebrated the despicable child, Pavlik Morozov, who, according to Soviet legend, squealed on his parents for being hoarders. It is not too difficult to imagine our political community celebrating children who informed on their parents for their carbon dioxide emissions or for harboring racist views or for violating other sacred cows of our regime.

Parental rights, in a manner of speaking, are a recognition that a political community has intruded upon the trust and loyalty that family life requires—on the integrity of the family. Our courts acknowledge this in things like spousal privilege. A loud celebration of parental rights comes from families defending their turf, telling the state, "That's none of your business," defending the loyalty and trust of their members. This is itself a good. When a school counselor is "transing" your kid, a parent is likely to say, "Who do you think you are!" more than, "The substance of your proposal is offensive." There are passions involved in sustaining the battle between family and political community. A vigorous, jealous exercise of parental rights expresses the desire to protect and support one's own, even at great personal risk. This can be excessive and irrational (as people involved in youth sports can tell you), but parental blinders are indispensable. None love their children only as much as they deserve it. Liberalism qualifies or erodes primal loyalties, but they persist within liberalism under the generic rubric of parental rights.

An attack on familial integrity is underway. Parents are encouraged to defer to regime-aligned experts. The State promotes a shrinking vision of what parental duties and obligations are. Parents who get on board with this new vision need not worry because their "parent rights" will be respected, but only because "experts" say so. Between seeing children as primarily the products of the state and accepting publicly funded and administered schooling in the 1850s and 1920s, to usurping parental and churchly functions around sex education in the 1970s, to today's transgendered phase, experts in schools and the medical profession are telling parents that they know better. Once the line between political community and family is moved, it provides a justification for the next move, and the next. The experts define "harm" or "neglect" and family integrity wanes. And parents start to believe in "the experts." The more parents believe in the experts, the more their "parental rights" will be respected, but I would submit that this is purely nominal. Those asserting "parental rights" against our increasingly totalitarian state should always do so knowing that their defense of their own and their

defense of family integrity is also most importantly a defense of a particular way of organizing family life.

Generally, in our revolution today, parents are taught to have an ever-shrinking sense of what their duties and rights are, and they are more willing to have the state take over the family's functions, to see the family itself as something created by the state instead of having integrity of its own. Remember that feminists have renamed "families" as state-created "intimate care-giving units."

Parents who disagree with the experts will appeal to "parental rights." To do so is a rational appeal to one's own. In this sense, we should give *two* cheers for real "parental rights" or "family rights." First, for forming without state action, and second, for minding its own integrity against erosion.

What the parental rights framework does not get is the answer to the fundamental question of what is the purpose or end of parenting or the end of the family or the end of education. Parental rights as a concept is focused a lot on means and not a lot on ends. This ends up implicating a lot, indeed, all of the important questions. Political communities limit the power of parents, and that is good. We may agree in principle that parents should not harm or abuse their children, but our understandings of these terms vary within society and by society. Is spanking abuse? Is free-range parenting neglect? Is Mountain Dew "mouth abuse" and neglect? It depends on what we are trying to accomplish. And evaluating social goals is the duty of political philosophy. Political communities should answer these questions in part through what effects they will have on family integrity. Family integrity is *always* compromised as the state and family battle for the allegiance and love of people, but the compromising should not undermine the glue that holds it together and should point beyond itself to genuine virtues.

On a formal level, my political position is that we should bend against the prevailing winds. In times of excessive clannishness, more political community power is necessary. When the political community intrudes, more "parental rights" or family integrity should be the emphasis. This is my rule of thumb. States must respect the atmosphere of trust and mutual responsibility at the heart of family life, and families should be passionate in defense of it. A state that pushes ideologies that dissolve natural ties and familial unity must be met with a position that defends natural ties and sees the family as the basic unit of society.

The substantive level is where the rubber meets the road, however. In the battle against transgenderism, for instance, formal rights are always interpreted according to subterranean assumptions about human autonomy—and that is really what is at stake. The predominant technological ideology pushed by experts today is that we are not familial creatures and that we are free from our people, our bodies, our families, and Our Creator. The only good response is a philosophy and theology of human limits and how those limits—our birth, our need for love, and our deaths—point toward a life well lived. That is where the action really is, and a defense of "parental rights" connected to duties, a robust conception of the good life, and social thriving would elicit three cheers.

[1] *Meyer v. Nebraska* 262 U.S. 390 at 399 and 401.

[2] See "Father Blakely States the Issue: Unsigned Editorial in *The New Republic*," in *American Progressivism*, eds. Ronald J. Pestritto and William Atto (Lanham, MD: Lexington Books, 2008), 136–37: "Twentieth-century democracy believes that the community has certain positive ends

to achieve, and if they are to be achieved the community must control the education of the young. . . It insists that the plasticity of the child shall not be artificially and prematurely hardened into a philosophy of life, but that experimental naturalistic aptitudes shall constitute the true education." Also Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle Over Compulsory Public Education* (Ann Arbor, MI: The University of Michigan Press, 2009), 40–41, 95–96, 167–68, 191 and 227, who shows that nativists such as the Ku Klux Klan and Progressives promoted compulsory public education in the Oregon context and throughout the nation.

[3] *Pierce v. Society of Sisters* 268 U.S. 510 (1925) at 534–35 (emphasis supplied).

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FEATURE ARTICLE

The Totalitarian Family

MICHAEL HANBY

From courtrooms to medical clinics, from legislatures to school boards, we are witnessing an unprecedented assault on parental authority; with more and more parents helplessly looking on as their traditional prerogatives are parceled out, if not exactly to the state, then to the various medical, educational, and social agencies through which the exercise of sovereignty is diffused in a post-political, technocratic system. I will leave it to the lawyers and the more politically astute among us to determine what, if any, legal and political remedies there might be and whether it is possible to carve out a space of parental rights as a protective hedge against this strange new, diffuse totalitarianism. However, as a precondition for any effective remedy, I think it is important to try to understand as far as possible what this assault really amounts to.

The first thing to be said is that parental authority and parental rights are not the same thing; indeed here, as in many other things, the primacy of rights thinking testifies to a more general *crisis* of authority. Conceptions of parental rights can differ somewhat depending upon whether one thinks of rights negatively as an immunity from coercion or interference in the rearing of one's children, or positively as an entitlement to make decisions on behalf of one's children—a shield or a weapon, as Elizabeth Kirk puts it. However necessary it may be to protect such prerogatives against a political order that is constitutively hostile to them, to confuse these with parental authority would be to confuse authority and power. Parental authority signifies something altogether more basic, which we can see by briefly considering the nature of authority in its distinction from power, at least power in the modern sense of force.

First, authority properly understood is inherently symbolic. It points beyond itself and in so doing makes manifest a real order that is true, good and beautiful, an order upon which its own nature as authority depends. Second, as symbolic of the real, authority and the kind of power derived from it are fundamentally different in their operation from power in the modern sense of force, mechanical or coercive. In contrast to a force that operates mechanically from without, the authority conferred by a real order of truth operates from within, intrinsically as well as extrinsically. By "showing forth all good things that are true," as Augustine says, it elicits recognition, acknowledgement, and consent from the inside out. A

paradigmatic instance of this is when a child, recognizing his mother, first says “mama.” In eliciting consent, authority does not *compel* extrinsically by force but *obliges* intrinsically by virtue of the self-evidence of its truth and the solicitation of its beauty.

Third, to say that authority represents the true order of things means that to recognize authority is to recognize, acknowledge, and consent to a binding order of reality to which we all belong and in which we all participate. Authority, then, is the foundation of every properly political community and the precondition for a politics that is anything other than civil war conducted by other means. Where there is no acknowledgment of truth, there can be no authority, where there is no authority, there can be no real political community. Where there is no common truth, there can be no common world. Where there is no common world, there can be no common good. And where there is no common good, it is necessary, as Hobbes said, to “to erect a common *power* to keep [men] in awe.”

> *In the logic of* Obergefell*, the only real relations are legal relations, subject to the jurisdiction of the state, which is subject to nothing.*

Two final observations before moving on. First, from what has been said about the symbolic nature of authority, it is clear that a crisis of parental authority is really a crisis over the meaning and truth of motherhood and fatherhood, whether these have any toehold in a given and binding order of things, indeed whether *there i*s a given and binding order of things, and thus whether, by extension, the family is a natural or an artificial phenomenon. Second, authoritarianism and totalitarianism are not synonyms, but opposites. Authoritarianism expresses the political order’s rightful, necessary and inevitable concern for the meaning of life, for it premises political order on a *given* order which it can only *receive* from a source above and beyond itself. Totalitarianism, the interpretation of the totality of meaning *as power*, represents a loss of authority and the end of political community. And there is no totalitarianism so total as that which subjects the meaning of nature to political control.

Many of us have been able to anticipate the unfolding crisis of parental authority in general outline if not in exact detail years before it became too obvious to deny because we saw that that in codifying the sexual revolution, the Supreme Court had decided fundamental questions of truth—‘what is’ questions of an irreducibly philosophical and theological nature—by exertions of judicial and political power. Concealing this ideological imposition under the guise of settling contesting rights claims, the court in fact codified new human, or rather posthuman and familial, archetypes, whose inner logic *necessitates* growing technocratic dominance over the family in the forms that I’ve already alluded to.

LGBTQ legal theorists understand this. Under the concept of “channeling,” made famous by Carl Schneider’s 1992 article, “The Channelling Function in Family Law,” they have put the lie to the procedural understanding of law in conventional liberalism and rediscovered its necessary and inevitable philosophical function, its power in shaping social and familial norms, and the “panoply of ways in which family law supports its preferred kinship models—including biological, dual-gendered parenthood—and nudges individuals into conforming to them.”[1]

Courtney Megan Cahill seizes upon this to argue that *Obergefell* dramatically “unsettles” the

traditional channels inscribed in family law and "extends" its implications beyond marriage into realms like procreation and the family. The "animating logic," she maintains, holds "radical, and truly transformative power" that we have scarcely begun to appreciate, though other progressive scholars had begun to unfold these implications even prior to this landmark decision.[2]

Obergefell and the marriage equality arguments leading up to it deploy equal protection and substantive due process as a kind of "universal acid" to dissolve in law distinctions and differences that matter in reality in order to manufacture legal sameness. After all, the difference between, say, being a man (and not a woman) or being a mother (and not a father) is not principally a difference of *function*; but a difference of *kind*—a difference in *what* things are.[3] To deny that such differences matter is to put oneself in the odd position of saying that *what things are*—reality, in other words—does not matter—even as one *cannot help* but declare what things are.

The Court's affirmation of "marriage equality" on grounds of equal protection and substantive due process—and we can now add to this the tortured logic of *Bostock*—not only adopts this functionalist form of reasoning, making "being a man or being a woman" irrelevant to the question of "sameness." In so doing it eliminates any relevant difference between a married man and woman conceiving a child naturally, two women conceiving a child with the aid of a gamete donor and IVF, or two men employing a surrogate to have a child together, thus determining that assisted reproductive technologies are not to be understood principally as a remedy for infertility but as a normative form of reproduction.

This means that mothers and fathers are not fundamentally natural phenomena integral to human identity and social welfare, but mere accidents of a materialist biology overlaid with social conventions that can be replaced by functionally equivalent roles without loss. This is significant both as evidence of the court's philosophical function and for the practical consequences that follow from it. Same-sex marriage and transgenderism not only presuppose the biotechnical conquest of human nature, they require the intervention of ARTs in the one case, and so-called gender-affirming medical care on the other to bring these new archetypes to fulfillment. From the proposition that assisted reproductive technologies are a normative form of reproduction for whatever combination of men and women that may want them, it is but a short step to the further conclusion that the state has an obligation to secure same-sex couples' rights and access to these technologies as a condition of their genuine equality, whether by constitutional, legislative, or bureaucratic means. As the *Perry* Court put it in striking down California's Proposition 8, "California law permits and *encourages* gays and lesbians to become parents through adoption…or assisted reproductive technology."[4]

Obergefell and the cases leading up to it elevate a functionalist conception of the family devised for tragic and unusual cases into an archetype, obliterating the natural norm for the sake of the technologically generated exception. And if "channeling" cannot be escaped, as Schneider said, but rather belongs to the very nature of law, then this so-called disestablishment of the natural family does not leave the state in a neutral position with respect to the family but actively "channels" the nation toward this radical new different archetype.[5] The irony, then, is that "dis-establishment" arguments like Cahill's, and indeed all arguments on such fundamental matters, are proxy arguments for a philosophy of human nature, for the simple reason that the pretense *merely* to be adjudicating rights claims, and not deciding truth claims, is false.

The logic of *Obergefell* requires that "parentage," family and childhood be reconceived according to this mechanistic archetype. With sexual orientation securing ontological parity

and therefore "sameness of condition" between same-sex and opposite-sex couples, the *Obergefell* Court begins to enumerate the four principles which it claims "demonstrate that the reasons marriage is fundamental under the Constitution applies with equal force to same-sex couples."[6] The first is "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[7] The second, "that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals,"[8] seems a further specification of the first, as it recalls Windsor's conclusion that the right is necessary to dignify couples who "wish to define themselves by their commitment to each other."[9]

In the crucial third principle, the Court insists that protecting the right of same-sex couples to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education," invoking *Zablocki* and *Meyer* to describe these "varied rights as a unified whole: '[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."[10] "As all parties agree," the Court adds, "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[11] Denying same-sex couples the right to marry would "harm and humiliate" these children.[12]

The "radical, truly transformative power" of this decision, on Cahill's interpretation, follows from the logic of these three principles working in concert. First, *Obergefell* "acknowledges the reality of gay parenthood, including gay 'biological' parenthood…and explicitly extends constitutional shelter to 'choices concerning…family relationships, procreation, and childrearing.'"[13] This seems to rule out a conservative interpretation of *Skinner v. Oklahoma*,[14] which holds that the Court's rejection of Oklahoma's mandatory sterilization law for certain criminal offenders was really a case about equal protection rather than fundamental rights, a case that "says little about the importance or value of reproduction or the right to reproduce, says nothing about whether that right includes alternative reproductive technologies, and at most prohibits the government from regulating alternative reproductive technologies in unequal ways."[15] By adopting what David Crawford has called the anthropology of orientation, by affirming "biological" gay parenthood and adverting both to liberty and to the "rights" of childrearing and procreation, *Obergefell* suggests that "procreation is a fundamental right under the Due Process Clause" and appears to establish constitutional parity "between sexual and alternative reproduction not only with respect to the right to marry, but also with respect to the right to procreate."[16] As Cahill puts it,

> Obergefell conceptualizes procreation in much the same way that it conceptualizes marriage: as both an equality and a liberty right. That it does so is unsurprising, given that it acknowledges more than once the interconnectedness of marriage and procreation, calling them "related rights" that compose a unified whole.[17]

It becomes apparent that these rights function as a proxy for new "natural" archetypes of person and family when we consider what Cahill takes to be their inverse corollary: "the much larger and more radical proposition that the federal Constitution prohibits the state from privileging families that conform to its preferred domestic paradigm—heterosexual, dual-gendered, biological parenthood—and from punishing families that deviate from it."[18] To put the point positively,

> [I]n expanding the definition of family and parenthood beyond their

> traditional centering in biology, marriage equality jurisprudence de-privileges biology as parenthood's normative ideal…The direct result of decades of family law advocacy on behalf of functional, non-biological parents, the marriage equality precedent paves the way for disestablishing not just traditional marriage but also the traditional family, understood to be the family comprised of two opposite-sex parents and their biologically related children, sexually conceived.[19]

Let us take Cahill's advice and consider just how radical this is. To "disestablish" the "biological" family is in fact to sever any remaining bond between natural kinship and the legal definition of family, for natural kinship can add nothing to the definition of family not already contained in function and intent without privileging biology and re-establishing sex stereotyping via the back door. We see in this what is by now a familiar pattern, in which the given realities of nature are reconceived according to the technological possibilities extracted from them. Just as the idea of a sexual identity distinct from one's sexually differentiated body makes everyone transgender, dispensing with men and women as we have heretofore understood them, just as the idea of sexual orientation makes everyone gay by detaching sexual desire from the body and its natural reference to the opposite sex, so now even the natural family is defined by function and intent, which is to say, that the natural family has effectively been abolished as a matter of constitutional principle.

The "larger and more radical proposition" of *Obergefell*, in other words, is to elevate to the status of a constitutional principle Douglas NeJaime's *de facto* historical observation: in the name of functional parenthood, "natural" means "legal" rather than "biological," an assumption that is operational in Cahill as well.[20] In the logic of *Obergefell*, the only real relations are legal relations, subject to the jurisdiction of the state, which is subject to nothing.

Obergefell thus marks the triumph of the state over any order that would precede, limit, or transcend it. Ironically, it is precisely in the claim to have discovered "new dimensions of freedom" that the Court has arrogated to *itself* the power to define the "concept of existence, of meaning, of the universe, and of the mystery of human life," concealing its exercise behind a contest of rights. Included in this also is the power, in principle at least, to define each *particular* family, since the family is simply a legal and not a natural entity.[21] It is not clear just what principle remains after *Obergefell* to limit the exercise of that power by the state or its extra-legal technocratic proxies over the long term. It is true that we can never fully succeed in annihilating the authority of reality, that even our attempts to annihilate it entail a grudging recognition of it. It is also true that there remains a bulwark of family law, particularly at the state level, which continues to presuppose the natural family, and there is a burgeoning legal movement advocating the rights of children to knowledge of their "genetic identity," emphasizing cases which recognize, in the words of Anika Smith, "that the biological bond between parent and child is meaningful."[22] This is presumably why Cahill attacks the idea of "genealogical bewilderment" along with other justifications for regulating ARTs.[23] Yet if Cahill, NeJaime and other marriage equality legal theorists are correct, "in a world where procreation is a fundamental right, reproductive regulation that burdens any alternative procreator—including mandatory donor and non-anonymity regulation—raises serious constitutional concern."[24] Under these conditions, the bulwark of family law is not likely to survive the "new dimensions of freedom" just waiting to be discovered.

It is likely the courts will be called upon to exercise this power more vigorously in the years ahead. "Same-sex marriage," writes Michael DePrince, "yields same-sex divorce, a concept and practice still evolving in the United States."[25] The archetypal decoupling of procreation from

sexual union and the former's disaggregation not only gives rise to a functional and intentional parenthood as a legal and ontological norm, it disperses "social and biological functions" among numerous people, and as we are now discovering, numerous bureaucratic agencies. Courts have faced difficult decisions on this front since the Baby M case in 1988, the first to deal with the validity of surrogacy contracts well before the explosion in the use of ARTs, and it is part of the history of this revolution that the hard cases created by these new technologies have helped to drive the redefinition of family.[26] As these arrangements become more frequent and more complex, both technically and socially, the courts will be required to exercise this power to define and mediate familial relations not as an exception, but more as a matter of course. By the logic of marriage equality jurisprudence, the natural relations of paternity and maternity offer no limit to the exercise of this power, especially when clinical experts conclude that these "functions" are being adequately performed, or when it has been determined that "parents" have limited a child's capacity for "self-definition"—now regarded as a matter of "public health." The recent case in the Supreme Court of British Columbia, *A.B.* v. *C.D.* and *E.F* is not unrealistic as a harbinger of the future, and states like California have shown an eagerness to enshrine this principle legislatively.[27] Moreover, the distance between "constitutional permission" for the unregulated use of reproductive technologies and "constitutional promotion" of these technologies, between right and entitlement, is a very short one, both in logic and in law. The technological re-conception of human nature *requires* biotechnical intervention for its realization in principle and in fact. By what principle of logic or justice, then, could access to these technologies through publicly regulated health plans be denied to anyone, if such technologies are necessary for the exercise of a universal right protected by the Constitution? By what principle could an insurer extend benefits for fertility treatments to the "medically infertile" while denying them to the "structurally infertile"—another wonderful Orwellian neologism designed to manufacture "sameness" by negating reality.[28]

Nevertheless, the most decisive exercise of this power has already occurred, in the very act of redefining nature. Not only does this act negate any order prior to or higher than the political, thereby absolutizing political order as such; it reconceives that order in mechanistic terms common to *both* the sexual revolution and the biotechnical revolution, ensuring that political order and political rule are subservient to the extra-political exigencies of a more comprehensive technological order. Indeed, for Del Noce, this unity of what he calls "scientism" and "eroticism" are but twin facets of one "new totalitarianism" defined not as a positive political quest aimed at world domination, but as a negative dynamic of disintegration aimed at all "vertical" realities, all traces of transcendence that would inhibit liberation or limit technological progress. That this progress and liberation requires the negation of the very world we share in common—a fundamental characteristic of totalitarianism Hannah Arendt notes—means that the "common power" that replaces it must insinuate itself into the middle of every human relationship, every nook and cranny of our lives. That this progress both *assumes* the biotechnical conquest of human nature as its theoretical and practical condition of possibility and requires this conquest for its realization suggests that what has presented itself superficially as the ever-forward march of liberation is in reality the ever-forward march of biotechnology, the triumph of politics over the order of nature and of technology over the human person.

[1] Schneider, "The Channelling Function in Family Law," *Hofstra Law Review* 20 (1992): 495, 501–02. See also Clare Huntington, "Family Norms and Normality," *Emory L.J.* (2010): 1104–1169; Huntington, "Staging the Family," *N.Y.U. L. Rev.* 88 (2013): 589–651; Elizabeth F. Emens, "Intimate Discrimination: The State's Role in the Accidents of Sex and Love," *Har. L.*

Rev. 122 (2009): 1307–1402.

[2] Courtney M. Cahill, "*Obergefell* and the 'New' Reproduction," *Minn. L. Rev. Headnotes* 1 (2016).

[3] Though "difference of kind" suffices for purposes of this article, the question of the place of sex and gender within classical substance metaphysics and how to cognize the similarity and difference between them is more complicated. There are good reasons for thinking that they might better be thought of according to the category of sort or mode. See D.C. Schindler, "Perfect Difference: Gender and the Analogy of Being," *Communio: International Catholic Review* 43 (Summer 2016): 194–231.

[4] *Perry*, 704 F. Supp. 2d at 1000 (emphasis added).

[5] Schneider, "The Channelling Function," 529.

[6] *Obergefell*, 135 S. Ct. at 12.

[7] *Ibid.*

[8] *Ibid*.

[9] *Obergefell*, 135 S. Ct. at 2600 (citing United States v. Windsor, 570 U.S. 744 (2013)).

[10] *Obergefell*, 135 S. Ct. at 14 (citing *Zablocki*, 434 U.S. at 384; quoting *Meyer*, at 399).

[11] *Id.* at 15.

[12] *Ibid*.

[13] Cahill, "*Obergefell* and the 'New' Reproduction," 6 (citing *Obergefell*, 135 S. Ct. at 2600).

[14] 316 U.S. 535 (1942).

[15] *Id*., 5, (citing *Goodwin* at 1089).

[16] *Id*., 6.

[17] *Id.*, 7.

[18] Courtney M. Cahill, "The Oedipus Hex: Regulating Family After Marriage Equality," 189.

[19] *Ibid*., 248–49.

[20] *Ibid*.

[21] *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

[22] Anika Smith, "Meaning, Biology, and Identity: The Rights of Children," *Cath. U. L. Rev.* 69.2 (Spring 2020).

[23] Cahill, "The Oedipus Hex," 236.

[24] Cahill, "*Obergefell* and the 'New' Reproduction," 8.

[25] Michael S. DePrince, "Same-Sex Marriage and Disestablishing Parentage:

Reconceptualizing Legal Parenthood Through Surrogacy," *Minnesota Law Review* (2015), 799.

[26] See Clyde Haberman, "Baby M and the Question of Surrogate Motherhood," *N.Y. Times* (March 23, 2014).

[27] *AB v CD and EF* [2017] VSCA 338 and [2017] VSC 351 (Can.), in which the Court authorized a 14-year-old girl who "gender identified" as male to undergo hormone therapy at a doctor's suggestion and against her father's wishes, and forbade him from referring to the child by feminine pronouns.

[28] See Valerie Blake, "It's an ART Not a Science: State-Mandated Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons," *Minn. J. L. Sci & Tech* 12 (2011): 651.

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FEATURE ARTICLE

The New Motherless Child and Our Old Constitution

DAVID R. UPHAM

> Sometimes I feel like a motherless child
> A long ways from home
> —Old American spiritual

In the 1951 musical *Royal Wedding*, a woman challenges her boyfriend, "Didn't your mother never teach you no manners?" He responds, "I never had no mother. We was too poor."

The joke, of course, is that every living human person has had a mother. Everyone began his or her life nourished from a mother's ovum and then nourished and sheltered within her womb. Anyone too poor to have a mother was too poor to be alive.

But in our time, innovations in both technology and law will produce, or perhaps have already produced, a new person—the truly motherless child.

Let us consider this novelty and discuss one of its many interesting and troubling implications. The motherless person, under our Constitution, will also be stateless, an alien among us—bereft of both mother and country.

Fatherlessness is old. Motherlessness is not.

Let me begin with some serviceable definitions of the relevant terms. Any person who, from conception and throughout his life, is bereft of the care of his male or female parent, is "fatherless" or "motherless," respectively. Consequently, a person whose father or mother had initially provided such care but then ceased to do so, whether by death, abandonment, or otherwise, is not "motherless" or "fatherless." For instance, a person whose mother predeceased him is not thereby motherless.

Fatherlessness is old. Across thousands of generations of human beings, many, many persons have never received from the male parent any care at all, whether direct or indirect. Soon after copulation, often before even conception, some of these fathers died, and many others

left the mother or were separated from her.

Such fatherlessness was not always fatal. Sometimes the child, though bereft of her father's care, survived against the odds—not only through pregnancy, but also through infancy and even all the way until fertile adulthood. Consequently, the ranks of our ancestors included many fatherless persons.

The male, it seems, may be the true "second sex." His role is secondary and seems even disposable. To be sure, before conception, the male has a necessary and primary role; he and his gamete are active while the female and her gamete are receptive. But afterwards, during pregnancy, his role is secondary and only indirect: he cares for the child by caring for the child's mother. Even after birth, for many years, his role in childcare usually remains somewhat peripheral and optional.

In sharp contrast, from the outset, the mother's care is both direct and absolutely necessary. She feeds the child from her own body, first via the ovum, then via the womb. Without such nutrition, the child would die instantly. The child would die before implantation, and thus, of course, never be born, let alone reach fertile adulthood.

Hence, across thousands of generations, each of our ancestors had a mother's care, but many lacked a father's. Fatherlessness is ancient and common. But motherlessness is not.

The evidence of this novelty appears on my screen as I type this essay. According to my word-processing dictionary "fatherlessness" is a word, but "motherlessness" is not. Fatherlessness has always needed a word, but true motherlessness has not.

Further linguistic evidence can be found in the traditional English translation of the Biblical "orphanous" as "fatherless." Thus, in the King James Version, one reads in James 1:27 that pure and undefiled religion is this: "To visit the fatherless and widows in their affliction." The translators omitted any mention of the "motherless." The reason is simple reality, and not, as some have supposed, the translators' sexism.

The Thoroughly Modern Motherless Child

But in our times, a revolution in technology, bolstered by a revolution in custom and other law, will make the truly motherless child a reality, both *de facto* and *de jure*.

The *technological* revolution began, in the twentieth century, with the invention of two artificial modes of mammalian reproduction. First came the successful subfreezing and thawing of mammalian sperm. This invention greatly enhanced the centuries-old method of artificial insemination ("AI"). We could now, on a massive scale, disintegrate mammalian conception from copulation. Today, in some sectors of the cattle industry, AI is now more common than "natural service." Next came in-vitro conception of mammals, and their successful transfer to a uterus (abbreviated as "IVF"). Now maternity itself could be disintegrated—with one female providing the egg, another the womb.

> *Soon the first motherless child, in law and in fact, will be born! Or more precisely, the first motherless child will be* made.

But a *legal* revolution was also necessary. We, the people, needed to accept the application of

this technology—old and new—to the human person. Americans had long been very reluctant to use these methods of animal husbandry in the procreation of human beings. As late as the 1950s, for instance, only a quarter of Americans approved of artificial, copulation-free insemination—even where the husband was the presumptive sperm-provider.[1] But opposition collapsed over the next few decades—with Americans approving the practice, even when the donor was unmarried, unrelated, or even unknown, to the mother. Consequently, various old and new forms of copulation-free reproduction are now customary and thus normative. Moreover, we may, in the coming years, find, as in animal husbandry, that "AI" is more common than "natural service."

To be sure, such artificial reproduction does not produce a motherless child, strictly speaking. Even under IVF, the child has an ovular mother—and sometimes that same woman also carries the pregnancy.

Nonetheless, the American people's adoption of these practices has now predisposed public opinion to accept any other artificial and disintegrative modes of human reproduction, no matter how indifferent to the welfare of the child. By treating the child as an *object* of *acquisition* the practice has obscured, from the minds of our fellow citizens, the true nature of the human child: a *gift* to be *received*.

Complementing this revolution in human reproduction is the ongoing legal redefinition of motherhood. Motherhood was once considered an inalienable trust. But now, the female person, like the male sperm donor, is increasingly free to treat her fertility as a bundle of discrete alienable powers. She may freely and lawfully not only engage in prostitution, but also sell her ova, make contracts to rent her womb, and otherwise dispose of her maternity. She may even, well before birth, contract to relinquish her offspring afterwards—as the enforceable Rumpelstiltskin contract now has increased acceptance.

By thus presupposing that a woman may prospectively contract to alienate even the offspring or her body (whether ovum, womb, or both), to that extent the law treats the mother, even if present *de facto*, as absent *de jure*. And to that extent, a child is deemed motherless even as he receives actual care from his actual mother in the womb: this mother has agreed to be a mere surrogate, and the laws may ratify her choice. Indeed, if our laws fully embrace à la carte motherhood, a new presumption will govern: every pregnant woman will be presumed to have chosen only the pregnancy, so at birth, each woman will have to show that she has chosen not only to carry the child in utero, but also to retain the child postpartum.

Note here that it is not technology alone that brought about these novelties. The Rumpelstiltskin contract required no new technology. What was needed was a legal revolution—and more specifically, a revolution in mores. The revolution concerned not mere "know-how" but "will-how."

Now, the truly motherless child seems imminent. Our *techne* and our norms are ready. Synthetic ova and artificial wombs may already be functional and will be approved and even applauded.

Soon the first motherless child, in law and in fact, will be born! Or more precisely, the first motherless child will be *made*.

Citizenship and Our Old Constitution

This novelty carries with it many troubling implications. One of them is that such persons will not be citizens under the Constitution.

The Fourteenth Amendment's Citizenship Clause reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The clause indicates two modes whereby a person might acquire citizenship: nativity or naturalization. The first—native or "birthright" citizenship—in turn, has two prerequisites: (1) birth in the United States, and (2) subjection to the jurisdiction thereof. Note that this constitutional definition is only partial: it does not cover those persons, long recognized in our laws as citizens, who are born to American parents but outside the United States.

The first element—birth on American soil—seems straightforward, but the latter requires some exegesis. According to the original understanding, the time of birth is the relevant time for identifying such subjection: the clause might read, "All persons born…in the United States and *at that time* subject to the jurisdiction of the United States." More important for our purposes, this subjection of the newborn to the United States is mediated through his or her subjection to parental authority; newborns are subject to the jurisdiction of the United States only insofar as they are born subject to parents who are themselves subject to that jurisdiction. As Senator Jacob Howard, who first introduced the Citizenship Clause said, the measure would encompass children "born of parents who at the time of birth were subject to the authority of the United States…." And within two decades, the Supreme Court would agree that this subjection "relate[s] to the time of birth," and that such subjection to the United States depends entirely on whether the parents are subject to the same jurisdiction at birth. Persons, native to our soil, are not subject to the jurisdiction if, at the time of birth, their parents are immune from such authority, whether by diplomatic immunity, Indian-tribal immunity, or otherwise.

This constitutional, birthplace definition presupposes that any child born in the United States, is at the time of such birth, truly subject to his or her mother. But the Amendment does not require any known paternity, let alone paternal care. Indeed, the perennial difficulty of identifying paternity might be the principal reason for our traditional Anglo-American rule of citizenship: by *ius soli* (right of soil) rather than *ius sanguinis* (hereditary). This challenge is particularly acute in a large and highly-mobile commercial nation like England and America—and even more so when, as in 1868, one-eighth of the people was emerging from chattel slavery. Because place of birth and maternal identity are far easier to adjudicate, the *ius soli* rule makes sense.

The modern motherless child, however, might not satisfy either of these constitutional prerequisites for citizenship. She might not *ever* be born on American soil or subject to American jurisdiction.

First, the *de facto* motherless child, gestated in a machine, will never be born in the United States—because he will never be born anywhere. Without pregnancy, there is no birth. That is to say, if never *borne*, then never born.

Second, the motherless child, whether *de facto* or merely *de jure*, may lack a "parent" through whom the child could be subject to the jurisdiction of the United States. When the *de facto* motherless child is detached from the artificial womb, or the *de jure* motherless child is separated from the surrogate (even if she is the child's natural mother), it will be unclear who is the "parent" or other entity with actual dominion over the child at that time. Moreover, that "parent" or other entity might not be "subject to" the jurisdiction of the United States. The entity with custodial rights, whether by right of manufacture or contract, may very well be a

foreign national or even a transnational corporation or other association. In many cases, such an entity cannot be constitutionally subject to American jurisdiction. Consequently, the child will lack the derivative subjection necessary for automatic American citizenship.

To be sure, one can imagine any number of legal fictions that might be devised to impute birthright citizenship to these motherless children. As to birth, the legislatures or courts might impute "birth" to a child whenever and wherever the child is detached from the artificial womb. As to jurisdictional subjection, authorities may declare that notwithstanding any foreign entity's actual or legal dominion over the child, any child born or "born," in the United States is still "subject to the jurisdiction" at the time of such birth or quasi-birth.

The trouble with these declarations is that they would be false. A child detached from a machine is *not* born. And a child subject to a foreign entity that resides or is incorporated elsewhere, is thereby not subject to American jurisdiction. Such falsehood would make these legislative acts mere unconstitutional decrees.

The motherless child cannot, therefore, be a native citizen. He or she would have to be naturalized like any other foreigner.

But by our current law, to be naturalized, the child would have first to be "admitted" as an immigrant to lawful permanent residence. Yet as a stateless inhabitant, who had always been among us, he or she would not be an immigrant, and would be therefore ineligible for any such admission.

We recall the ancient injunction of Scripture, "take up the cause of the fatherless." But in our time, for the first time, we must supplement that injunction with a new rule: take up the cause of the motherless.

** This essay was based on a paper first presented at the 2023 Conference on Parental Rights and Family Relations in a Postmodern Age, hosted by the Pontifical John Paul II Institute for Studies on Marriage and Family at The Catholic University of America. I am grateful to the participants for their comments.*

[1] Kara W. Swanson, *The Birth of the Sperm Bank*, 71 Annals of Iowa 241, 245 (2012)

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FEATURE ARTICLE

What *Obergefell* Did Not, and Could Not, Do

JEFF SHAFER

After the Supreme Court's ruling in *Obergefell v. Hodges* that the Fourteenth Amendment requires state civil marriage licensure to include same-sex partners, what remains of the states' authority and policy options as to the natural family? For instance, may states continue to employ original birth certificates to record a child's maternal and paternal progenitors—and exclude persons who are neither? May states still apply the historic presumption of paternity only to men reasonably presumed fathers, and not to women who are not and cannot be fathers? May states adjudicate child custody contests with a default rule in favor of fit natural parents, and against genetic strangers? May states continue to enforce their adoption laws, requiring those who are not the mother or father of the child to adopt before being deemed in law as a parent—even if they're in a licensed same-sex relationship? In general, may states maintain in their laws the weighty distinction between children's relation to the male-female unions responsible for their existence and identity, and their non-relation to same-sex couples bereft of mother or father? In what way may state policy continue to acknowledge and honor human meaning as revealed in the originative and perpetual ties of mother and father to child, inscribed in the very physical constitution and visible identity of that child? Does *Obergefell* stand for a constitutional obligation that states' family policy subjugate natural relations to adult choices and judicial fiat? Or is its ruling less ambitious?

The near-universal response to *Obergefell* by courts and regulators has been in keeping with the cultural and conceptual significance of *Obergefell*'s audacity, rather than its legal significance as a court decision within our particular system of constrained judicial operation. As to the cultural accomplishment, certainly *Obergefell* represents an uncontainable viciousness, an invitation to state totalism and inversion of our legal traditions on the autonomy and integrity of the natural family. But this essay instead focuses on the more circumscribed jurisprudential evaluation. That is, not on what the idea and culturally visible enactment of something called "same-sex marriage" portends for the predicates of social organization, but rather as to the authority and reach of a Supreme Court decision in the circumstance of the American system of constitutional law with its numerous jurisdictional, substantive, and interpretive constraints and guidelines.

Though *Obergefell* did not rule on the constitutional merits of any state law treating paternity,

custody, or birth certificates—indeed, the Court majority did not cite to (let alone evaluate the justifications for) even one such law—the Supreme Court itself and lower courts nonetheless, and unaccountably, have proceeded as if *Obergefell* requires the elimination and replacement of historic state laws grounded in procreative realities.

> *On [the current analysis of* Obergefell*], historic family law must be judicially de-sexed, foisting upon it a so-called "gender-neutral interpretation."*

Two years after *Obergefell*, the Supreme Court in *Pavan v. Smith* ruled that *Obergefell* compels Arkansas to place two female "spouses" as a child's parents on that child's original birth certificate.[1] The Court's four-page opinion treated *Obergefell*'s ruling as having already mandated this outcome, thus relieving the Court in *Pavan* of responsibility to demonstrate (in fact for the first time) that its ruling is constitutionally required. From that point forward, courts have taken *Obergefell* to mean that male and female and procreative kinship are mostly unconstitutional categories when found in state statutes whose operation does not authorize presumptive "parentage" to same-sex partners. On this analysis, historic family law must be judicially de-sexed, foisting upon it a so-called "gender-neutral interpretation."

Thus have numerous courts ruled that state statutes using sex-specific words like "father" must be read to apply to female partners of women giving birth, "reject[ing] the suggestion that a child may only have one mother," as same-sex spouses now "have a constitutional right to be recognized as the parents of a child born during a marriage."[2] Courts likewise have ordered that birth certificates be rid of their genealogical purpose and design, made instead to register same-sex partners' custodial powers over children to whom they have neither kinship nor adoptive relation.

The rationales that courts proffer for their rulings invalidating and inverting state law to create parental status for same-sex partners, while severely attenuated from the *Obergefell* ruling itself and the majority's explanation for that ruling, nonetheless rely on strategically deposited dicta in Justice Kennedy's majority opinion. In his opinion he had observed, as a retrospective description of states' traditional treatment of husband-wife unions, that states "throughout our history made marriage [*i.e.*, the union of husband and wife] the basis for government rights, benefits, and responsibilities."[3] Justice Kennedy then in one long sentence presented a litany of illustrative policy categories allegedly included in those "rights, benefits, and responsibilities"—including the likes of "hospital access," "health insurance," and "campaign finance restrictions," as well as "birth … certificates" and "child custody."[4] He did not elaborate what these policies are or entail. But he suggested that "by virtue of their exclusion from [civil marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage."[5] Justice Kennedy apparently supposed (he offered no sign of having considered the matter) that the "constellation of benefits" presented in state laws were not tailored by those states to the husband-wife character of the union to which they were applied.

The Supreme Court in *Pavan* proposed that *Obergefell* had "consider[ed]" and "held" birth certificate laws "unconstitutional to the extent they treated same-sex couples differently from

opposite sex couples."[6] This is mythical. The Court in *Obergefell* never considered a constitutional challenge to a state birth certificate law, and never held unconstitutional any laws other than those that did not authorize same-sex couples to be licensed as civilly married.

My thesis, then, is that *Obergefell* is responsibly interpreted as accomplishing only the innovation presented in its stated ruling: namely, the discovery of a Fourteenth Amendment right to a civil marriage license by same-sex couples if the state has a civil marriage regime to begin with. *Obergefell* grants same-sex partners no right to automatic child-access, no right to redesign state birth certificate templates, no "gender-neutralizing" of the legal system, and so on. In what follows, I offer ten reasons (from a much longer list) for that thesis.

First. Once civil marriage is renounced of its form and redefined as gay, rather than incongruously transferring all the procreation-related policies associated with the old form of marriage into the new and gelded relationship-type, we are instead obliged to reject the connection between those old policies and the new design of civil marriage.

One of the oldest maxims of the common law is *cessante ratione legis, cessat ipsa lex*: where the reason of a rule ceases, the rule also ceases. The Supreme Court elaborated on that venerable rule as follows.

> This means that *no law can survive the reasons on which it is founded*. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons … , the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances .[7]

Suppose geometry scholars were to announce and establish for us that the meaning of *square* had evolved to include circles. The former rules tethered to a square's four equal-length sides and right angles would have no application to a circle, which has neither. By receiving the designation "square," circles do not benefit from geometric laws founded upon right angles and four-sidedness. The effect of circles' inclusion is instead the opposite: that is, to remove those geometric laws from association with "square" as redefined, as the new form of "square" no longer designates the unique shape that gave rise to the former laws based upon them. "No law can survive the reasons on which it is founded."

A *second* reason that *Obergefell* did not nullify and redesign state domestic relations laws into de-sexed inversions: As a simple matter of procedure, the Supreme Court has no authority to overthrow historic state statutory regimes without ever having a case before it on the question, in which it evaluates each specific policy and then rules on it after hearing from the state governments responsible for their enactment and administration. As the Court has explained, "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[8] It therefore should not be contentious to observe that *Obergefell* did not topple the states' historic family law regimes that were not presented, briefed, argued, or even identified. The Court had no such statutes or rules before it, thus naturally gave no attention to the question of abolishing maternity, paternity, and ancestry from state legal cognizance.

When first agreeing to review the *Obergefell* case, and in setting out the particular questions that would define the scope of its appellate review, the Court never alerted the states that it would be adjudicating the merits of their birth certificate forms and regulations. Hence none of the four states defending their marriage laws in the consolidated cases in *Obergefell* (Michigan, Ohio, Kentucky, Tennessee) briefed or argued the validity of their birth certificate statutes. And the *Obergefell* majority opinion did not cite or analyze the text, history, application, or state interests present in these statutes, nor otherwise demonstrate their unconstitutionality. Indeed, in the process of explaining its discovery of a right to a civil marriage license for same-sex couples, the majority in *Obergefell* disqualified procreation—*i.e.*, the way the children who are registered in birth certificates come into existence—from relevance to the Fourteenth Amendment's required form of civil marriage.

The idea that the *Obergefell* majority, merely by dint of Justice Kennedy's retrospective observation about an array of policies that the states through time had associated (in some unexplained way) with the husband-wife union that *Obergefell* ruled to be a forbidden definition of civil marriage, thereby not only rendered unconstitutional in one fell swoop all of the statutes containing those policies but concurrently rewrote them to impose obligations antithetical to their text and hostile to their enacted purpose, defies standards of judicial authority and beggars belief. As a right of access to a civil marriage license does not entail a right to claim automatic parentage over a partner's child or to redesign the template of state vital records that document a child's birth, mother, and father, the *Obergefell* outcome hardly resolves the claim raised in *Pavan*. Yet by proceeding as if *Obergefell* already definitively resolved the matter, the Court in *Pavan* spared itself the obligation to explain how the Constitution could require such a rule.

Third. As the limited question of the exclusion of same-sex couples from state civil marriage licensure was the dispute under review in *Obergefell*, it would have been anachronistic for the Court to have invited or approached the question of whether a myriad of state statutes and common law standards, in a number of different ways associated with marriage on a host of policy concerns, must (or even can) treat identically same-sex and husband-wife couples, when the predicate question of same-sex couples' access to civil marriage recognition was yet unresolved.

Fourth. In evaluating the asserted constitutional right to a same-sex marriage license, the *Obergefell* majority did not factor in, or assess this claim in terms of, a concomitant right to upend ancient family law that honors maternal and paternal kinship to children. If indeed same-sex civil marriage licensure is indelibly connected to (for instance) redefining paternity into a disembodied benefit for female partners of birthing mothers, or redefining birth certificates into tokens of state relationship-approval for adults unrelated to the children listed thereon, such that these sorts of policies *must* apply as attendants to same-sex civil marriage, it would have been necessary for the Court to have included those policy disruptions in its analysis of whether the Constitution commands states to license same-sex couples as married. The Court did not do so.

Fifth. Though disqualifying the generational wellspring of the man-woman union from the Fourteenth Amendment's required version of civil marriage, the *Obergefell* majority never explicitly depreciated kinship bonds in themselves or denied the propriety of their unique treatment in law.[9] If deferring to natural parent-child relationships may yet be deemed a priority of state law (as it ineradicably continues to be in human experience, cultural meaning, Anglo-American common law precept, and the state statutes enshrining it), presumably it remains so in constitutional principle as well, as it always has until now. *Obergefell* did not rescind the Supreme Court's prior acknowledgments of due process protections for the unique

relation of natural parents to their children, nor did it rescind its rulings validating the different legal treatment of men and women in view of their respective reproductive roles, nor disavow the Court's prior common-sense recognition of the non-fungible nature of, and inherent differences between, men and women.

Sixth. At no point did *Obergefell* demonstrate that any state's (let alone Arkansas's) birth certificate template providing entries for a child's one father and one mother is a state-generated "benefit of marriage" to begin with. In what way is a child's birth certificate a "benefit" that states give to adults because they are married? *Obergefell* never explained. Which states historically classified a vital record of birth in such a way? By my count, zero. And *Obergefell* offered no reason to conclude otherwise. (Arkansas certainly has not done so, as is plain from its statute and the Arkansas Supreme Court's decision authoritatively construing it.)[10] On what basis, then, does the Constitution now require, in contravention of historic state practice, that children's birth certificates be transmuted from a record of a child's birth and progenitors into a "benefit of marriage"? *Obergefell* never explained that, either. Nor did *Pavan.*

Seventh. *Obergefell* did not demonstrate that the state laws "throughout history" that were directed to persons in the union of husband and wife were policies that states even *could* apply to persons in a same-sex relationship. For example, how could the historic physiology-based evidentiary presumption of paternity directed to a birthing mother's husband sensibly apply to relationships of two men or two women? It patently cannot. And if such a law were rewritten into (say) a non-filial "custodianship presumption" that is awarded to a genetic stranger to a child because of that unrelated adult's licensed same-sex civil marriage status, it would be not just a different policy, but a contradictory one. As such, a court could not command such a redesign of state policy either in terms of the "constellation of benefits" historically associated with marriage (which contained no such policy) or under the banner of "equal treatment" (as the proposed treatment is antithetical, not equivalent, to the historic state policy applied to husbands of birthing wives).

Eighth. *Obergefell* did not evaluate or refute the many policy reasons for states' differential treatment of same-sex and husband-wife couples as concerns children. For instance, states (like the Supreme Court in its due process jurisprudence) recognize that a kinship connection to a child is an authorization feature of custody and parental prerogative. The difference between a child's progenitors and those who are genetic strangers marks the difference between those who have the authority and obligation to receive, raise, and support the child, and those with no such claim and duty. This distinction likewise marks the difference that states acknowledge between those persons whose authority would have to be overcome (by death, waiver, or adjudicated unfitness) before their children could be adopted by others, and those others who could not achieve parenthood of children without state adoption decree. *Obergefell* never condemned these legal distinctions or the Supreme Court's own repeated recognition of their significance.

Ninth. Certain historic state laws linked to marriage and related to children have treated persons within a marital relationship differently depending on whether the person is male or female. As a result, those laws were not triggered by the mere status of "married," but by the unique circumstances of being a male or female individual to whom the laws are tailored. For example, states treat some married individuals as mothers (for having given birth to children), others as fathers (for having sired children), with different regulations applied to each. Neither of these are generic "spouse benefits," let alone part of a "constellation" of positivistic government bestowals to boost the esteem of those given a civil marriage license. Being analytically unique considerations, rules pertaining to maternity and paternity cannot

reasonably be treated in bulk, let alone impliedly adjudicated in bulk by a throwaway sentence in Justice Kennedy's opinion, and then deemed unconstitutional unless and until they are transmogrified into a contradictory form of policy that renounces the original by de-sexing it.

Tenth. The alleged *Obergefell* rule on birth certificate statutes and child custody accomplished by its fleeting mention of the words "birth … certificates" and "child custody" is not only empty of justification but of a clear directive of any sort at all. Can these four words, whose meaning and requirements are unstated and indiscernible, plausibly present a constitutional mandate that States rewrite their venerable family law statutes that have never been evaluated or even identified by the Supreme Court?

What, precisely, are the constitutionally commanded rules that must replace the historic state laws grounded in procreative realities? For example, are adoption requirements to be abolished for a same-sex partner who instead now must be provided automatic "parentage" of the child of her partner and a third party? Does this alleged constitutional command mean that fathers have no claim or responsibility to their offspring when birthed to a woman in a licensed same-sex relationship? Does the rule require that a woman has no claim or responsibility to the child she birthed when it is sired by a man in a licensed same-sex relationship whose male partner also claims her child?

Or perhaps the alleged Obergefellian overhaul of state custody and birth certificate law, rather than depending on the mere possession of a marriage license, also requires some *additional* feature in order for strangers to a child to have a constitutional right to custody of them. Is it, for example (and as popularly suggested), the partner's *intent* to possess the child that is the decisive consideration for custody acknowledgment? If so, intent as demonstrated *how* and *when*? Or perhaps instead, parenthood must be awarded to claimants upon demonstration of a quantum of evidence of their custodial performance as to the child. (This being another proposal.) If so, as demonstrated *by what evidence*? In *what quantum*? *When*? *For how long*? Or perhaps is it a "best-interest of the child" standard that must first be vindicated before the child is given over to a same-sex partner. (Another suggestion in the literature.) If so, "best interest" based on *what considerations*?

What is the alleged constitutional command that *Obergefell* indubitably established (as court after court has announced) notwithstanding the fact that *Obergefell*'s ruling says nothing about any of this? And if the specific requirements of the "mandatory birth certificate and custody rule" cannot be identified, how can it be a requirement to begin with? In the plethora of cases in which courts blithely palm off kids to same-sex partners, these questions are not raised, let alone answered.

Notably, though, we do find a reticence by courts and commentators to extend the gay logic so as to ascribe to male couples what courts have repeatedly ruled to be a mandatory marriage right for female couples. Yet if two men with a marriage license are not possessed of the constitutional right to memorialize their relationship on the original birth certificate of a child that they (for some reason) together lay claim to, and have the constitutional right to eliminate the name of the child's mother from the birth certificate and from custody, then *Obergefell* clearly did not require states to convert birth certificates into prizes and custody coupons for persons with civil marriage licenses. Any permissible differential treatment between male and female couples would reveal that it is not, after all, licensed civil marriage status that commands the adult "benefits." If differential treatment is constitutionally permitted based on the sex of the persons in the civil marriage, then *Pavan*'s identification of *Obergefell* as the source and authority for its ruling is for this additional reason false.

So beyond failing even to begin to explain how the Constitution could require such a rule, *Obergefell* did not give the slightest hint as to what the rule in fact is or how it would apply. The absence of guidance in *Obergefell* is enough to refute *Pavan*, and the array of lower courts ruling similarly, that give glib treatment to a grave matter of anthropological upheaval, as if the central questions had already been definitively answered. In fact the discussion has never been had.

[1] *Pavan v. Smith*, 582 U.S. 563 (2017).

[2] *In the Interest of D.A.A.-B.*, 657 S.W.3d 549, 565–66 (Ct. App. El Paso, TX 2022).

[3] *Obergefell v. Hodges*, 576 U.S. 644, 659–60 (2015).

[4] *Id.* at 660.

[5] *Id*.

[6] *Pavan*, 582 U.S. at 566.

[7] *Funk v. United States*, 290 U.S. 371, 385 (1933) (quoting *Beardsley v. Hartford*, 50 Conn. 529, 542 (1883) (emphasis added)).

[8] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd,* 521 U.S. 811, 818 [1997]; internal quotation marks omitted).

[9] Justice Gorsuch registered this point in his dissent in *Pavan*. *See Pavan*, 582 U.S. at 568–69 (Gorsuch, J., dissenting).

[10] *Smith v. Pavan*, 216 Ark. 437 (2016). This 2016 ruling from the Arkansas Supreme Court is that which the United States Supreme Court reversed in *Pavan v. Smith*.

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Humanum

Issues in Family, Culture & Science

RE-SOURCE: CLASSIC TEXT

The Task of Parents

POPE SAINT JOHN PAUL II

Given in 1981 by John Paul II, only four years into his pontificate, the Apostolic Exhortation Familiaris Consortio *continues to shape the Church's discussion on the family, parenthood and the role of society in regard to both of these. In the context of our issue on "Parents' Rights,"* Humanum *presents pertinent passages from this seminal document.*

According to the plan of God, marriage is the foundation of the wider community of the family, since the very institution of marriage and conjugal love are ordained to the procreation and education of children, in whom they find their crowning.

In its most profound reality, love is essentially a gift; and conjugal love, while leading the spouses to the reciprocal "knowledge" which makes them "one flesh," does not end with the couple, because it makes them capable of the greatest possible gift, the gift by which they become cooperators with God for giving life to a new human person. Thus the couple, while giving themselves to one another, give not just themselves but also the reality of children, who are a living reflection of their love, a permanent sign of conjugal unity and a living and inseparable synthesis of their being a father and a mother.

When they become parents, spouses receive from God the gift of a new responsibility. Their parental love is called to become for the children the visible sign of the very love of God, "from whom every family in heaven and on earth is named." [...]

The family, which is founded and given life by love, is a community of persons: of husband and wife, of parents and children, of relatives. Its first task is to live with fidelity the reality of communion in a constant effort to develop an authentic community of persons.

Parents have been appointed by God Himself as the first and principal

educators of their children … their right is completely inalienable.

The inner principle of that task, its permanent power and its final goal is love: without love the family is not a community of persons and, in the same way, without love the family cannot live, grow and perfect itself as a community of persons. What I wrote in the encyclical *Redemptor hominis* applies primarily and especially within the family as such: "Man cannot live without love. He remains a being that is incomprehensible for himself, his life is senseless, if love is not revealed to him, if he does not encounter love, if he does not experience it and make it his own, if he does not participate intimately in it." […]

The task of giving education is rooted in the primary vocation of married couples to participate in God's creative activity: by begetting in love and for love a new person who has within himself or herself the vocation to growth and development, parents by that very fact take on the task of helping that person effectively to live a fully human life. As the Second Vatican Council recalled,

> since parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children. Their role as educators is so decisive that scarcely anything can compensate for their failure in it. For it devolves on parents to create a family atmosphere so animated with love and reverence for God and others that a well-rounded personal and social development will be fostered among the children. Hence, the family is the first school of those social virtues which every society needs.

The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.

In addition to these characteristics, it cannot be forgotten that the most basic element, so basic that it qualifies the educational role of parents, is parental love, which finds fulfillment in the task of education as it completes and perfects its service of life: as well as being a source, the parents' love is also the animating principle and therefore the norm inspiring and guiding all concrete educational activity, enriching it with the values of kindness, constancy, goodness, service, disinterestedness and self-sacrifice that are the most precious fruit of love. […]

The family is the primary but not the only and exclusive educating community. Man's community aspect itself—both civil and ecclesial—demands and leads to a broader and more articulated activity resulting from well-ordered collaboration between the various agents of education. All these agents are necessary, even though each can and should play its part in accordance with the special competence and contribution proper to itself.

The educational role of the Christian family therefore has a very important place in organic pastoral work. This involves a new form of cooperation between parents and Christian communities, and between the various educational groups and pastors. In this sense, the renewal of the Catholic school must give special attention both to the parents of the pupils and

to the formation of a perfect educating community.

The right of parents to choose an education in conformity with their religious faith must be absolutely guaranteed.

The State and the Church have the obligation to give families all possible aid to enable them to perform their educational role properly. Therefore both the Church and the State must create and foster the institutions and activities that families justly demand, and the aid must be in proportion to the families' needs. However, those in society who are in charge of schools must never forget that the parents have been appointed by God Himself as the first and principal educators of their children and that their right is completely inalienable.

But corresponding to their right, parents have a serious duty to commit themselves totally to a cordial and active relationship with the teachers and the school authorities.

If ideologies opposed to the Christian faith are taught in the schools, the family must join with other families, if possible through family associations, and with all its strength and with wisdom help the young not to depart from the faith. In this case the family needs special assistance from pastors of souls, who must never forget that parents have the inviolable right to entrust their children to the ecclesial community. […]

Just as the intimate connection between the family and society demands that the family be open to and participate in society and its development, so also it requires that society should never fail in its fundamental task of respecting and fostering the family.

The family and society have complementary functions in defending and fostering the good of each and every human being. But society—more specifically the State—must recognize that "the family is a society in its own original right" and so society is under a grave obligation in its relations with the family to adhere to the principle of subsidiarity.

By virtue of this principle, the State cannot and must not take away from families the functions that they can just as well perform on their own or in free associations; instead it must positively favor and encourage as far as possible responsible initiative by families. In the conviction that the good of the family is an indispensable and essential value of the civil community, the public authorities must do everything possible to ensure that families have all those aids—economic, social, educational, political and cultural assistance—that they need in order to face all their responsibilities in a human way.

John Paul II served as Pope from 1978 to 2005. He was canonized in 2014.

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