

Privatizing Marriage Is Unjust to Children

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The primary business of the state is justice. Because children cannot be autonomous, adult society has an obligation in justice to provide institutional structures that protect their most basic interests.

I was once a libertarian activist. I was on the platform committee of the national libertarian party twice in the late seventies. I used to give introductory talks about libertarianism in people's homes when I was a graduate student.

I would begin these talks by describing the problems that contracts between consenting adults could solve. Often someone would ask, "What about children?" I would always admit that children posed a tough problem for libertarianism, but that we would deal with it in a more advanced lesson. Somehow the time for that more advanced lesson never came.

It was only when I had children of my own that I came to see that something was deeply wrong with the way I had been avoiding the "tough questions" about children. In my personal experience of parenthood, I have had responsibility for profoundly neglected children. These children were permanently damaged by lack of relationship. I came to see that we libertarians have been starting our theorizing from the perspective of adults who are equipped to take care of themselves, make contracts, keep promises, defend their own property, and respect other people's property.

But no one enters the world that way: we enter the world as helpless infants. In fact, if you think about it, infancy is the only truly universal human experience. We all have to pass through infancy to get anywhere else. Yet, we libertarians essentially explain the transition from infancy to adulthood by saying, "Then a miracle happens."

Personally, I think we need to be more explicit about this step.

I decided to rethink the whole business of a free society, starting from the child's point of view, with my 2001 book, *Love and Economics: It Takes a Family to Raise a Village*. The fact of childhood dependence raises a whole series of questions. How do we get from a position of helpless dependence and complete self-centeredness, to a position of independence and respect for others? Are our views of the child somehow related to the foundations of a free society? And, to ask a question that may sound like heresy to libertarian ears: Do the needs of children place legitimate demands and limitations on the behavior of adults?

I came to the conclusion that a free society needs adults who can control themselves, and who have consciences. A free society needs people who can use their freedom, without bothering other people too much. We need to respect the rights of others, keep our promises, and restrain ourselves from taking advantage of others.

We learn to do these things inside the family, by being in a relationship with our parents. We can see this by looking at attachment-disordered children and failure-to-thrive children from orphanages and foster care. These children have their material needs met, for food, clothing, and medical care. But they are not held, or loved, or looked at. They simply do not develop properly, without mothers and fathers taking personal care of them. Some of them never develop consciences. But a child without a conscience becomes a real problem: this is exactly the type of child who does whatever he can get away with. A free society can't handle very many people like that, and still function.

In other words I asked, "Do the needs of society place constraints on how we treat children?" But even this analysis still views the child from society's perspective. It is about time we look at it from the child's point of view, and ask a different kind of question. *What is owed to the child?*

Children are entitled to a relationship with both of their parents. They are entitled to know who they are and where they came from. Therefore children have a legitimate interest in the stability of their parents' union, since that is ordinarily how kids have relationships with both parents. If Mom and Dad are quarreling, or

if they live on opposite sides of the country, the child's connection with one or both of them is seriously impaired.

But children cannot defend their rights themselves. Nor is it adequate to intervene after the fact, after harm already has been done. Children's relational and identity rights must be protected proactively.

Marriage is society's institutional structure for protecting these legitimate rights and interests of children.

This is not only a humane answer, it is also the *proper* libertarian answer, indeed the only *possible* truly libertarian answer. For only this answer allows the possibility of a society in which every individual person is recognized as valuable, as bearing intrinsic human dignity, of holding rights against other people and against the state.

We can't begin our lives as objects to which other people have rights, and somehow, magically, become persons with rights of our own. Yet, the redefinition of parenthood is doing precisely this: treating children as objects. The idea of "contract parenting" is becoming the new institutional structure proposed by people who want to "get the government out of the marriage business." Under this concept, two or more adults negotiate among themselves for parental rights. Perhaps the sperm donor will be a friend of the lesbian couple. They all agree he will be called "uncle" and get to see the child once a week. Or perhaps one woman will "donate" the egg, which is implanted in another woman's womb. The women agree that they will both be mothers, and exclude the anonymous sperm donor father.

These cases suggest that there is something fundamentally flawed about the contractual approach to children. Rather than just recoil from the weirdness of it all, let me spell out these conceptual flaws. First, contracts are limited, but parenthood is a status. Contracts are of limited duration, but parenthood is forever. Second, and more importantly, the child has been objectified. Instead of being a gift, the child is treated as a product or an object. And this has implications for how we view ourselves, and the foundations of our liberty.

This first point about the permanence of parenthood came home to me when I read a peculiar Ohio case last summer. The Mullen case was a pretty standard lesbian custody dispute, with one wrinkle. The birth mother had written up a few documents before the child's birth, giving her lover things such as medical power of attorney for the baby. The former lover claimed that these documents established her as the child's second parent.

The judge in the case was not impressed. He said, in effect, look, a medical power of attorney is a revocable document. Anyone can revoke it any time. As a matter of fact, this nice lady before me in court has just revoked the power of attorney she gave you. But parenthood is forever. A collection of contracts or revocable documents stops well short of an adoption. The nice lady did not let you adopt her child. She could have, but she chose not to. I'm not about to second-guess what this mother intended. You are not the child's parent. Case closed.

He was right. Contracts are not meant to establish permanent or unlimited obligations. Contracts are of limited scope and duration. Parenthood is, and needs to be, forever. This is the fatal conceptual flaw of the contract parenting model. That is why adoption is not a contract. No one signs an adoption "contract," where one party agrees to deliver the child to another, who then has rights to the child. No. Adoption confers *parental status permanently* onto someone.

The second and even more fundamental flaw of the contract parenting model: it treats the child as an object, something to be negotiated over. Even a cursory look at these cases shows that this is true. The adults don't mean for it to be true. I have no doubt that these adults brought children into being in all good faith, and out of love. But they simply can't help themselves. Good intentions do not suffice to overcome the structural tendency for "contract parenthood" to objectify children far more often and deeply than natural parenthood.

When a child is conceived naturally, inside marriage, the child is biologically, legally, and practically the child of both parents. The child can be a focal point for unity between the two people. Of course, things don't always work perfectly or smoothly. But the biological parents, married to each other, have a great advantage: they both have a connection with the child. They've both got skin in the game, literally. When they are married to each other, they have made a

commitment to work together to build a common life. The children are their common project.

This is not so for the child of an anonymous gamete donor. The people raising the child may have a commitment to each other, it is true. But they start off on unequal footing with respect to the child. One is the natural parent, the other is not. The “contract parent” model says that this natural connection should be legally irrelevant.

The frequency and bitterness of these custody disputes says that biology continues to be relevant in fact. A mother may discover that sharing the care of her child with another woman is more difficult than she expected. A sperm donor father may find the attraction of fatherhood more powerful than he expected and want more contact with his children than he expected. Is it really the business of the law to hold people to a “contract” in which they agree, in advance of the child’s birth, that they are going to ignore biology forever? This is absurd, unworkable, and inhuman. No other part of our law makes this kind of demand on people.

A libertarian’s instinct might be to endorse Artificial Reproductive Technology, since it enhances people’s choices. But Artificial Reproductive Technology enhances the adult’s choices, without giving a moment’s thought to the interests of the child. The plain fact of the matter is that our law right now says that anyone with money gets to do whatever they want. There is no legal protection of unborn children and their identity rights. The courts are scrambling around after the fact, trying to protect their legitimate entitlements on the back end.

When the courts have to make these judgments, they end up implicitly or explicitly imposing something on someone. They can’t be neutral among the competing claimants and their arguments. There is no getting around it: when these custody disputes come to court, the agents of the state will impose something on someone. At least one party will not be happy. Sometimes, nobody is happy.

Finally, the deepest reason why society has obligations to children is that this is the only position that is truly consistent with the idea that people deserve freedom, rights, and dignity in the first place. Nature and Nature’s God endowed us with certain inalienable rights: among these are life, liberty, and the pursuit of

happiness. This is a core principle of the American founding, and the American experiment.

In other words, our liberties are gifts from Nature and Nature's God. Our liberties are most specifically not the result of human will, our own, or other peoples. Just so, children are gifts from Nature and Nature's God, not the result of human will. Accepting children lovingly from God, or from Nature, if you prefer, is consistent with a world in which our liberties are gifts.

“Intentional parenthood” is the alternative to accepting children as gifts. We are already seeing people claim that artificially conceived children are better off than other children, because “they are so wanted.” This is supposed to make the children feel better about not knowing their biological origins.

In actuality it is a statement of willfulness: a statement that parenthood is and ought to be an act of the will *and nothing else*. How secure are the rights of these little creations of adult willfulness? What independent standing do they have in society? What claims do they have on adults? What are we doing to ourselves if we act as if we believe that unborn children have no rights that any adult is bound to respect?

This is why I do not believe it is possible or desirable to “get the state out of the marriage business.” The primary business of the state should be providing justice. Children are the most vulnerable parties in any society. But children are particularly vulnerable in a society like ours that values autonomy and independence so highly. Children cannot be autonomous and independent. Adult society owes children an obligation in justice to provide institutional structures that protect their most basic interests. This is why it would be unjust to children for the government to attempt to “get out of the marriage business.” Providing justice to the vulnerable is precisely the business of the government. If it doesn't perform that function, it has failed.

It is not possible to create a free society in which everyone begins life as someone's “choice.” It is not possible to create a lasting society that systematically undermines the biological basis for human identity. Privatizing marriage would perpetrate injustices on children, expand the power of the state,

and in the end, prove to be completely impossible. In short, the state has a duty to be in the marriage business.

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