

Connecticut's "Adults-Only" Same-Sex Marriage Decision

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The Supreme Court of Connecticut has rendered that state the latest in the growing number of states asserting a state constitutional mandate to recognize marriage rights for same-sex couples. (*Kerrigan v. Commissioner of Public Health*). In *Kerrigan*, Connecticut’s highest court held that it was a violation of the state’s constitutional equal protection guarantee to allow same-sex couples all of the benefits associated with marriage, by means of the “civil union” classification, but to deny them the status of marriage.

Among the many “stunning” aspects of the court’s decision was the complete absence of any substantive discussion about the relationship between marriage and the well-being of children. Other states’ judicial decisions creating state constitutional rights to same-sex marriage regularly devoted some portion of their opinions to the argument about whether or not it is rational to reserve marriage for opposite-sex couples on the grounds that children benefit from being reared in a heterosexual, married-parent setting. As the Connecticut Supreme Court recorded in its opinion, however, the state of Connecticut’s lawyers “expressly have disavowed any claim that the legislative framework for committed same-sex couples [e.g. “civil-unions” but not “marriage”] was motivated by the belief that the preservation of marriage as a heterosexual institution is the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation....” Furthermore, the opinion called it “highly significant” that “it is the public policy of this state that sexual orientation bears no relation to an individual’s ability to raise children.” For this proposition, the court simply cited Connecticut’s laws permitting same-sex-couple adoption and making parents’ sexual preference irrelevant to child custody determinations.

To date, every state supreme court decision creating a state constitutional basis for same-sex marriage has performed miserably the work of looking after the long-run interests of children and by extension, society, which is nothing more than the sum total of human beings who are or were once children. Sometimes the lawyers for the state failed to press the issue; sometimes the court looked at poor or incomplete selections of empirical literature. Massachusetts’ Goodridge opinion dealt with this issue the most irrationally, insisting that the state’s assertion that married, biological parenting was optimal for children required evidence (which the state did not and logically could not submit) that “forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”

Still, Connecticut’s decision marks a new low for a state’s exercise of its traditional “*parens patriae*” responsibilities toward children. First, it is almost unimaginable that the state’s attorneys “expressly...disavowed” any claim regarding a link



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between marriage, biological parenthood and child well-being.” The professional, empirical literature supporting this link is vast. On the other hand, the empirical literature claiming to definitively and affirmatively answer the question about the outcomes of homosexual-couple-parenting – according to one of the leading researchers in the field -- contains “fatal flaw[s] of design or execution,” has not been “conducted according to generally accepted standards of scientific research” and does “not rely on samples of sufficient size to provide the statistical power needed to reach the conclusions they did.” (See Affidavit of Steven Lowell Nock, para. 11, Halpern, 60 O.R.3d 321 (No.684/00)).

Second, the Court imposed its own construction upon the meaning of the state’s adoption and custody laws’ treatment of homosexual parenting. The court claimed that these constituted dispositive evidence that “the state” (meaning the people via their elected representatives) saw no relationship between homosexual couple parenting and children’s well-being. What if, rather, the state’s allowing of adoptions to same-sex couples was a statement that such situations are marginally better for children than the possible alternative of indefinite foster care? What if the state’s law allowing children to be placed in the custody of a homosexual parent is based upon the conclusion that it is marginally better for a child to remain with a biological parent than to lose contact with such a parent? The latter possibility is actually an argument against same-sex marriage – given that every child parented in such a household is automatically deprived of at least one biological parent. In any case, the Connecticut Supreme Court’s “construction” of extant state laws revealed only its own biases, not necessarily the will of the legislature or the people.

It is easy, very easy, to continue to pillory the Connecticut Supreme Court for its decision on same-sex marriage, from the perspective of the welfare of the child. Yet it would be unfair to that court, and to all the prior courts which suddenly discovered such a right in their own constitutions, to fail to point out that many events occurring prior to our own decade, made it easy, very easy, for courts to take children out of their normative, legal analyses of marriage.

Technology, of course especially the “pill” effectively, physically, severed the relationship between marriage and children. So did the new reproductive technologies, with their procedures for the use of “donors” (a term of art for paid suppliers’) gametes, embryos, and wombs. As a result, homosexual or heterosexual single persons or unmarried couples are able to bear children. Children can also be born outside of marriage the old fashioned way. Out of wedlock birth-rates have soared to approximately 38% of all births over the past 5 decades.

Technology also played a role in lowering the birthrate within marriage. As fewer jobs relied upon physical strength, and more relied upon technological or other “know-how,” job markets became more open to women. Combined with the fact that technology made housework less time-consuming, women were able to spend more time outside the home in paid-employment. Training and education for such employment takes time. Thus women became likely to marry later and have fewer children. The “cost” of children tended now to be measured not only in monies laid



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out for their care and education, but now also in opportunities foregone by the mother, i.e. paid employment.

At the same time, the law was doing its part to accommodate or perhaps even facilitate – expert opinions vary – the new dissociation between marriage and childbearing. For sometime before, and then following, the passage of no-fault divorce laws across the United States, divorce rates rose. Of course, a higher probability of divorce makes it very risky -- especially for women who perform the lion's share of the caretaking of children – to "invest" in too many children. It makes it risky for men too, if they believe that ex-wives are likely to achieve a more favorable child-custody arrangement. Indeed, today, with women filing about 66% of all divorce complaints, it seems particularly risky for married men to invest in children.

Then of course there were the Supreme Court decisions which posited childbearing as a woman's "burden," to the point where she had to be given a right to abortion. And not a limited right either. *Roe v. Wade* and its companion case *Doe v. Bolton* made sure that even through the third trimester, no state could ban "health"-related abortions, which specifically included abortions for reasons of age, family size, timing, etc. Surely, there are far fewer abortions among the married than the unmarried. But by law, the "abortion right" is for all women. Married women, in fact, cannot even be required to notify their husbands before they seek an abortion of their common child, according to Sandra Day O'Connor's plurality opinion for the Supreme Court in *Casey v. Planned Parenthood*.

It took more than a few state supreme courts' deliberately misreading – or refusing to read -- history, science, and their own constitutions, to get us to the point where the State of Connecticut won't even venture to argue that marriage, procreation, and child well-being are integrally related. It will take a cultural, and even spiritual, transformation in favor of children, before lawmakers are willing to venture such an argument again.

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