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The Functions of Family Law

Serena Mayeri
University of Pennsylvania Law School, smayeri@law.upenn.edu

RESPONSE

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SERENA MAYERI†

In response to Melissa Murray, *Family Law's Doctrines*, 163 U. Pa. L. Rev. 1985 (2015).

Melissa Murray's *Family Law's Doctrines* provides a fascinating case study of legal parentage cases involving assisted reproductive technology, where judges applied relatively new laws to even newer circumstances never contemplated by the laws' drafters.[1] The Uniform Parentage Act (UPA) was a modernizing statute intended to resolve legal questions generated by new societal developments: namely, the rise of nonmarital heterosexual relationships producing children, and the use of artificial insemination within heterosexual marital relationships.[2]

In the decades after its adoption in California, the UPA confronted a brave new world. Two developments further transformed the reality of family life: assisted reproductive technologies such as in vitro fertilization (IVF) and gestational surrogacy, and same-sex relationships producing children. By the law's thirtieth anniversary, California—the perennial leader in family law reform—had once again taken the lead, this time by recognizing the parental rights and obligations of lesbian partners.[3]

† Professor of Law and History, University of Pennsylvania Law School.

1 Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1989 (2015).

2 *Id.*

3 *See* Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (barring the birth mother, who had previously stipulated to her partner's parental status, from attacking the validity of the resulting judgment two years later); K.M. v. E.G., 117 P.3d 673, 680-81 (Cal. 2005) (holding that when a woman donates an egg and her female partner bears a child to be raised in their joint home, both women are legal parents); Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (holding that

Compared with states that were more reluctant to move beyond traditional legal definitions of parentage, California appeared enlightened, modern, and progressive. In many ways, it was. Other states relied on rigid, formalistic definitions of parentage primarily dependent upon marriage—and failing that, biology.[4] California courts instead used functional and biological definitions of family to extend parental rights and obligations to individuals who were unmarried or not genetically related to their children.

But as Professor Murray argues, California's retreat from the formalistic application of categorical distinctions based on marital status did not uproot the bedrock values underlying family law doctrine.[5] In fact, the turn toward biology, intent, and functionality offered courts new tools to maintain the primacy of conjugal relationships as the site of reproduction and childrearing, and, most crucially, to reinforce the privatization of dependency within the two-parent family. The functional turn, Murray writes, did not undermine traditional doctrine; rather it furthered many of the same ends.[6] And, notably, formal categories such as marriage—and biology—did not disappear; they simply ceased to be the *exclusive* determinants of legal parentage. In this way, the California courts' liberal interpretation of the UPA's provisions in the face of unanticipated factual circumstances arguably served the statute's purpose quite faithfully. After all, the UPA was drafted and promoted by Harry Krause, whose primary motivation was to ensure that all children, regardless of their parents' marital status, had the opportunity to know—and, most importantly, be supported by—their fathers.[7]

This continuity in the midst of change raises a question: should we understand the reform of legal parentage as an instance of "preservation

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"a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children's parent under the Uniform Parentage Act and has an obligation to support them").

4 California, of course, was not the only exception to the formalist rule. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (granting visitation rights to a same-sex partner and non-biological mother based on a theory of "de facto parenthood").

5 Murray, *supra* note 1, at 2016.

6 *Id.* at 1990.

7 *See* Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 829-30 (1966); Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974). *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971). On Krause's involvement in constitutional challenges to illegitimacy-based classifications, see Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 92-100 (2003); Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. (forthcoming 2015) (manuscript at 107-12) (on file with author).

through transformation,"[8] to borrow Reva Siegel's term? Preservation through transformation occurs when progressive reform efforts indirectly reinforce, rather than disrupt, status hierarchies by motivating modernizing alterations to the rhetorical and substantive rationales for unjust legal regimes.[9] For instance, equal protection doctrines attack overtly invidious racial classifications but embrace the principle of colorblindness, thereby maintaining racial inequality on more palatable terms.[10] Another classic example is the rise of facially gender-neutral sexual and domestic violence laws that obscure the hugely disproportionate impact of state enforcement failures on women.[11] Arguably, the biological, intentional, and functional definitions of parentage dress up traditional notions of what makes a family legitimate in a progressive guise. Nonmarital partners and non-biological parents are no longer excluded from the legal definition of family, but the traditional marital family remains the gold standard against which all else is measured. Or does this characterization go too far? Do the doctrinal developments Professor Murray describes augur a more profound change, or at least one with a more ambiguous political valence? I am inclined to think so, but perhaps only time will tell.[12]

Legal parentage doctrine illustrates a larger point about the role of functionality in family law today. Pitted against rigid, formalistic definitions of family that require a married father and mother at the helm, self-sufficiently rearing their biological children, functional definitions of family certainly look more progressive. But in practice, functional definitions of family come with their own price. If I marry and raise children with my spouse, we may order our affairs as we please, free from government intervention or examination, so long as we do not divorce or otherwise attract scrutiny from the state.[13] State recognition of my legal relationship to my partner, and both his and my relationship to our children, will be automatic, whether or not our partnership looks like a traditional marriage.

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8 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

9 *Id.*

10 *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142-43 (1997).

11 *Id.*

12 *Cf.* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 828-29 (2014) (arguing that the campaign for marriage equality has helped to produce progressive cultural and legal change).

13 This point is elaborated in much greater depth by Professor Mary Anne Case. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

We can live apart, maintain separate finances, and send our kids to California to be raised by their grandparents without legal consequence.[14]

If I do not fit into those formal legal categories of marriage and biological or marital parenthood, it is a different story. Without the formal tie of marriage (or, in some but not all cases, biology), I might have to prove that my partner and I cohabit, intermingle our finances, list one another as beneficiaries for insurance purposes, hold ourselves out as family, are recognized by friends and relatives as family, and so on. Similarly, if I am the biological or adoptive parent of my child, or if I can invoke a marital presumption to establish parentage, many questions—how much time I spend with my child, what tasks I perform for him, whether I provide financial support or daily care or both, whether I rely on paid caregivers to perform these tasks—are all beside the point unless I have a dispute with my child's other parent. Often, functional definitions of family require an invasive inquiry into the particularities of relationships and the details of everyday life. They reward a particular kind of family life—one that looks as much like the dominant nuclear family ideal as possible.[15]

The functional turn in family law more generally, beyond the determination of legal parentage, is partial, and potentially reversible. First, marital status still matters a great deal in almost every other area of family law, as Professor Murray's own work has brilliantly highlighted and challenged.[16] Whereas courts in California have been open to employing functional definitions in parentage determinations, courts, even in California, have been more reluctant to ascribe rights and obligations to *adult partners* at the dissolution of a nonmarital relationship. Notwithstanding the famous California case *Marvin v. Marvin*, in which the state Supreme Court recognized the possibility of enforcing implicit agreements between cohabiters in the absence of an express agreement,[17] most courts have been unwilling to impose obligations of financial support on nonmarital partners.[18] In other

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14 As Professor Case writes, "a married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state." *Id.* at 1765.

15 Murray, *supra* note 1, at 1990.

16 *See, e.g.*, Melissa Murray, *What's So New About the New Illegitimacy?* 20 AM. U.J. GENDER SOC. POL'Y & L. 387, 399 (2012).

17 557 P.2d 106, 110 (Cal. 1976).

18 On the legal treatment of unmarried couples, see generally CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010); ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION (2012). On the

words, the UPA's attempt to mitigate some of the traditional legal disabilities suffered by nonmarital children does not extend to nonmarital adult relationships.

Formal marital status still matters in horizontal relationships; in some jurisdictions it is the whole ballgame. The 1979 Illinois case *Hewitt v. Hewitt* (in)famously left Victoria Hewitt, a full-time homemaker and mother of two whose lifestyle epitomized traditional marital norms, with nothing after a fifteen-year relationship because she and Robert Hewitt were not legally wed.[19] But even where judges take more liberal attitudes toward nonmarital cohabitation, the impulse to privatize dependency—so central to the (mostly) bygone institution of common law marriage[20]—does not overcome an insistence on formal consent, at a single transformative moment, to marriage or marriage-like financial obligations. Professor Murray's essay leads me to wonder, then, why the imperative to privatize dependency did not push the law of nonmarital *adult* relationships closer to the functional definition of family that prevailed in legal parentage. Indeed, the American Law Institute's (ALI) *Principles of the Law of Family Dissolution* recommended ascribing "domestic partner" status to couples whose living arrangements meet certain functional criteria, but this approach has not taken hold.[21]

Finally, as the marriage equality movement has so starkly highlighted, marriage has many advantages—material as well as symbolic. Marriage primacy is alive and well, notwithstanding family law's functional turn. One way of thinking about the doctrinal developments that Professor Murray describes is this: the law in some forward-looking jurisdictions—such as California—has evolved in response to the changing realities of family life. At the center of this change is the rise of same-sex relationships which, until very recently, have been inescapably nonmarital. The desire to recognize parental rights and obligations for gay and lesbian parents despite their inability to marry has necessitated and, to some degree, driven, the emergence of more functional definitions of family.[22]

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unfulfilled promise of *Marvin*, see, for example, Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001) ("With all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed.").

19 394 N.E.2d 1204 (Ill. 1979).

20 *See* Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1918 (1998) (discussing courts' use of common law marriage to keep women and children from burdening the public fisc). *See generally* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

21 ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at ch. 6 (2002).

22 *See, e.g.*, Douglas NeJaime, *Marriage Equality and the New Parenthood*, HARV. L. REV. (forthcoming 2016).

Now that marriage equality has triumphed,[23] will the ability of same-sex couples to marry stop the functional trend in its tracks? When same-sex couples could not marry, sympathetic courts often recognized their relationships as partners and as parents by jettisoning formalism and applying functional definitions of family.[24] Now that same-sex couples can marry, will a couple's failure to do so signal to courts that their family relationships do not merit legal recognition, after all?[25] Will courts' treatment of same-sex couples follow their treatment of heterosexual couples, in that nonmarital parentage is recognized in the name of privatizing dependency but nonmarital cohabitation is not? And what about more conservative jurisdictions, where courts and legislatures never accepted functional definitions in the first place? Will the nationwide advent of marriage equality reinforce formal definitions of family at the very moment when liberalizing attitudes toward nontraditional families might have impelled a turn toward functional assessments?[26] We may be about to find out.

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23 Obergefell v. Hodges, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015).

24 Other courts continued to insist upon formal indicators of parental relationships, such as second-parent adoption. *See, e.g.*, Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (rejecting parental status claim of non-biological lesbian partner who had not legally adopted child).

25 *Cf.* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 107 (2008) (describing how "[i]n Massachusetts, some employers ended domestic partner employee benefits after same-sex couples won the right to marry").

26 The very question I pose here suggests a negative answer to the question of whether the functional turn is merely preservation through transformation. *See supra* notes 8-10 and accompanying text.