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All in the Family

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Pregnant Man?: A Conversation

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PROLOGUE

Darren Rosenblum

I'm a law professor who works on gender, sexuality, and culture in the international and comparative context. That's my head working. In "real" life, my partner, Howard, and I have been engaged in having a baby together for several years, a project that came to fruition with the birth of our daughter Melina. Of course, such a project evokes intensely complex feelings and thoughts. Beyond a simple transposition of the personal onto the political, I feel so fortunate to have engaged in myriad conversations with a variety of friends and colleagues who think much more carefully about the family and different aspects of race, class, gender, and sexuality than I do. Fascinating conversations also arose with people who work in the less clearly related fields of administrative law, law and economics, public international law, international commercial law, and law and psychology. These conversations have reshaped my understanding of the boundaries among self, family, and society, and have given me a faith in our profession that, despite the hierarchies and occasional pettiness, we law professors are a warm and supportive bunch.

As Howard and I awaited the birth of our child, I wrote down some of my thoughts on these conversations to memorialize them so that others could share them. Scholarship abounds on parenting and families: surrogacy, in-vitro

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ALL IN THE FAMILY

Angela Onwuachi-Willig and Jacob Willig-Onwuachi

Introduction

Your essay "Pregnant Man?" highlights many significant issues concerning the intersection of law, gender, sexuality, race, class, and family. In an earlier article *A House Divided: The Invisibility of the Multiracial Family*,[115] we explored many of these issues as they relate to multiracial families, including our own. Specifically, we, a black female-white male married couple, analyzed the language in housing discrimination statutes to demonstrate how law and society function together to frame the normative ideal of family as heterosexual and monoracial. Our article examined the daily social privileges of monoracial, heterosexual couples as a means of revealing the invisibility of interracial marriages and families within our society and analyzed how this invisibility is both reflected in and reinforced by the language of housing discrimination statutes. We followed a framework introduced by Peggy McIntosh, outlining unearned and unacknowledged privileges of heterosexual couples and their families; we then used Kimberlé Crenshaw's theory of intersectionality to explain how multiracial couples and families may experience societal benefits and disadvantages differently based on various intersections of identity categories. Our analysis of housing discrimination statutes demonstrated how the assumption that plaintiffs will be monoracial, heterosexual couples fails to fully address the harms to interracial, heterosexual couples that experience discrimination in housing and rental searches because of their interraciality—their race-mixing—as opposed to any person's individual race. In other words, it revealed how societal norms about who constitutes a family have been codified in a manner that ultimately denies legal recognition of all the harms of discrimination for certain couples and families.[116]

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115. Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231 (2009).

116. As we noted in our article, *id*. at 233 n.10, we did not directly focus on LGBT families because sexual orientation is not recognized as a protected class in most housing discrimination statutes, leaving LGBT, monoracial families completely unprotected and LGBT, multiracial families vulnerable at even more intersections. Our focus in our article was to unpack assumptions about groups that were viewed as already fully protected by the law, even as that lack of protection may relate to only expressive harms.

In reading your essay, "Pregnant Man?", we were struck by how your experiences and considerations in adding Melina to your family exposed these mutually reinforcing roles that law and society play in defining the normative family. Your thoughts and experience easily add one more piece of evidence to support contentions we made in our article.

Your essay is replete with examples of how family law serves as the means for identifying the intimate relationships that will be facilitated by government and how society works to reinforce those legal norms. As you show, law and society build on each other and match each other in substance and practice. In particular, you first reveal how the ideal of family as centered around a heterosexual couple is used to enforce and reinforce the expected roles of men and women, not just in terms of their places in intimate relationships but also with respect to parenting. Second, you expose the racial hierarchies among even those families that fit this ideal in terms of racial constitution and sexuality.

A. "Optimal" Mothers (and Fathers)

In examining the intersection of sex, sexuality, and the law, you show how family law—in particular, adoption law—shapes the image of the American family as formed around an intimate, heterosexual couple. First, as your entire essay reveals, the law's construction of particular roles for men and women in families with children worked to define how you named yourself in relation to Melina, with you ultimately deciding to call yourself "papi" even though you really felt like you were "about to become a mother."[117] Your struggles in naming and defining yourself in relation to Melina reminded us of *Lofton v. Secretary of the Department of Children and Family Services*,[118] where the Eleventh Circuit Court of Appeals more or less declared that the roles for men and women as parents in families are inflexible and announced its belief that the optimal way for children of both sexes to learn how to be a woman or man is to observe interactions and life between a man and a woman who are intimately involved with each other. In *Lofton*, the Eleventh Circuit held that a Florida statute banning gays and lesbians from adopting did not violate either the Equal Protection Clause or the Due Process Clause. In so doing, the court accepted as legitimate the state of Florida's interests in preserving the supposedly clear and fixed roles for men and women as parents through a statute designed to prevent families like your "necessarily motherless"[119] family from raising and teaching Melina how to be a woman. The court wrote:

117. *See* Rosenblum, *supra* text following note 15.
118. 358 F.3d 804 (11th Cir. 2004).
119. *Id*. at 819.

> Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling. Florida argues that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida's interest in promoting adoption by marital families.[120]

As the Florida statute[121] and the *Lofton* case demonstrate, the law in many contexts shapes and defines what is established as a "real" or "true" family—a family with a mother and a father. It also shapes who can be considered a mother or father. *Lofton* suggests that a mother can be only a person who was biologically born a woman, who in turn is supposed to model for a little girl what it means to be a woman, and a father can be only a person who was biologically born a man, who in turn is obligated to model for a little boy what it means to be a man.

Such social prejudices provide the foundation for resistance to families that are, by their nature, "motherless" or "fatherless": families that are headed by LGBT persons, especially those headed by men. Wrapped up in this understanding is the notion that you, a man who loves another man and, thus, a man who is not a "real" man, could never be a father. Also wrapped up in this understanding is the idea that no man, including you and Howard, can "mother" (and that no mother can "father"). As one of our white, heterosexual male friends experienced when he sought to adopt a child as a single man, people are skeptical in general about the intentions of men who want to adopt. People often wonder, "Why would a man want children absent a woman?" Our friend had no luck in his efforts to adopt a child as a single man. At best, some viewed him as crazy because men simply do not "mother." At worst, some viewed him as deviant—as a pedophile who wanted to adopt his victims in order to violate them in his own private home. That this avenue of adopting children as a single male, which comes with its own difficulties, is often the only way in which gay male couples can adopt speaks volumes about the strong and powerfully exclusionary roles of law and society in defining legitimate families.

This reality in itself automatically excludes LGBT families from societal conceptions of "real families." In our society, the presumption for LBGT

120. *Id*. at 818-19.

121. FLA. STAT. § 63.042(3) (2002), *invalidated by In re* Adoption of X.X.G., No. 3D08-3044, 2010 Fla. App. LEXIS 14014 (Fla. Ct. App. Sept. 22, 2010).

families is that such families are an alternative for families with two parents of the opposite sex and, in particular, are an alternative for adopted kids.

Against this backdrop, we applauded your decision to challenge this "social presumption's predetermination of [your] family[]"[122] by pursuing a biologically-related baby through surrogacy. After all, such a decision could only work to disrupt the notion of the "normal" or even "ideal" family. But we still wondered why you decided to accept this particular challenge versus others,[123] because as you detail, surrogacy contracts and arrangements, although they can be risky for any couple, are especially worrisome for gay male couples. For example, varying laws from state to state made it even more difficult for you and Howard to trust that your rights under any contract would be recognized, resulting in your "minor meltdown when [your] Skadden-trained mind contemplated an agreement governed by Oklahoma law."[124]

Likewise, your own reluctance as you travelled to Oklahoma to meet the surrogate for Melina, Beth, highlighted the social stigmas that attach to the notion of gay parents. As a general matter, it is hard for us, as your friends, to imagine that you—"gregarious . . . with friends in Paris or Tokyo or shopkeepers in Marrakech or Rio"—would be "super nervous about getting along with people [you] feared would be very different . . . ."[125] In our eyes, you could make anybody in any context fall in love with you. But reading about your worry in meeting Beth in Oklahoma reinforced for us just how much social stigma and prejudice can turn what should be simple meetings into frightening encounters. We very much understood the apprehension.

B. Racial Constitutions

Most of all, given our previous work, we were drawn to your story about how racial norms worked to design the final image of your family. Even as you and Howard were able to avoid legal obstacles in ultimately giving birth to Melina, social norms as well as the lingering effects of past legal definitions of blackness shaped the racial constitution of your family.

Certain of those influences were seemingly (though not actually) small, but powerfully revealing in their racism and identification of a monoracial family as the ideal, such as the question by your friend, another law professor: "Why pay all that money for a black kid when you can adopt?"[126] For example, your friend's question exposed the power of the one-drop rule in our society. As you explain in "Pregnant Man?", biological connections between parents and

122. *See id*. text following note 5.
123. *See* Onwuachi-Willig & Willig-Onwuachi, *infra* Part B, Racial Constitutions.
124. Rosenblum, *supra* text accompanying note 10 (citations omitted).
125. *Id*. text following note 9.
126. *Id*. text following note 7 (paragraph beginning "This drew some . . . .").

children take on an importance of their own in our society. Yet, simply because your first, preferred egg donor could have been black, your friend discounted the biological connection that a child born through surrogacy would have to either you or Howard. In his eyes, one drop of black blood marked your potential child with the black donor as "just another black child," one who could be adopted for a cheaper price, as opposed to your or Howard's biologically related, biracial child, which, because of the costs of surrogacy, would come at a higher price. In other words, the child could only truly be yours and Howard's and worth the cost if she were white; if your child could not be purely white, why expend too many resources on adding her to your family? Such comments by your friend expose the continuing and dangerous effects of racial identity laws and cases that drew sharp lines between white and non-white. These lines not only continue to make it difficult for multiracial individuals to define themselves according to their personal preferences, just as you could not freely define yourself as a mother as you wished to do;[127] they also persist in forcing multiracial families, including LGBT multiracial families, to fight to be families or at least be recognized as families.

Additionally, your friend's question about your possibly spending "all that money" on a black baby highlights the hierarchy of societal value placed on even monoracial, heterosexual couples and on black children in general. Your friend's comments reminded Angela of the 1980s Cabbage Patch Doll craze along with a joke from a white classmate about the costs of the black Cabbage Patch Dolls, which he claimed were five dollars cheaper than the white ones. That classmate remarked that the cheaper cost was why he bought a black Cabbage Patch Doll. In today's version of a different story about costs and dolls, it is the black Barbie that gets marked down half-price while the white Barbie remains at full price at Wal-Mart.[128] Your friend's statement similarly reveals the generally lower value placed on black children and ultimately their families. As Professor Heather Dalmage has highlighted in her book *Tripping on the Color Line: Black-White Multiracial Families in a Racially Divided World*, nowhere are these values more telling than in the adoption arena, where there are "race-related price tags placed on children available for adoption."[129] For example, "in 1990 a U.S. agency published a price list for adoption: white children cost $7,500, biracial children $3,800, and black children $2,200."[130] As Professor Barbara Fedders contends, adoption agencies that use such race-

127. Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2451-54 (2007).

128. Steve Parker, *Walmart Discounts Black Barbie Doll, Leaves White Version Full-Price*, STLTODAY.COM (Mar. 10, 2010), http://www.stltoday.com/news/local/columns/conversation-about-race/article_3a6112a3-02c1-53da-bf1e-19faa50cdc07.html.

129. HEATHER M. DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 156-57 (2000).

130. *Id*. at 157 (citing RITA J. SIMON ET AL., THE CASE FOR TRANSRACIAL ADOPTION (1994)).

based pricing—"set[ting] lower fees for black children than for white ones"—not only "send a message that black children are less valuable than white" but also "reinforce[] the notion of whiteness as a property *right*."[131]

Other influences on your decision of an egg donor exposed broader insights into the microaggressions and macroaggressions faced by white gay parents with children of color. Like you, our initial reaction was one of hope that you and Howard would push the boundaries of race and family by selecting your preferred minority donor—"a tall, attractive provider with a great undergraduate affiliation."[132] Just as your decision to use a surrogate worked to challenge the accepted notion of LGBT parents as an alternative to opposite-sex parents, we wanted your choice of an egg donor to challenge the normative ideal of family as monoracial. However, your reflection on the white gay couple on *Rosie's Family Cruise* that was accused of trafficking as they tried to bring their differently raced child across the border was extremely powerful.[133] While we question your other friend's idea that racial difference would make the child of gay parents even "more" of an outsider, we could not deny the fear that such encounters during travel would surely and repeatedly invoke in your lives.

The *Rosie's Family Cruise* story reminded us of very recent experiences that we, a black-white heterosexual couple, had while traveling with our own biracial children and another family, a black-white lesbian couple, Catherine Smith and Jennifer Holladay, and their monoracial, black child, Zoe, to the Caribbean. Our very presence as a group of travelers destabilized the normative familial images of other people we encountered on the plane or at our resort. People stared (and stared hard, too) at us, not knowing quite how to understand us, but still all the while understanding us as connected to each other somehow.

As a group, we discussed the possibility that other resort guests viewed us all as part of a polygamist family—Jacob with his three wives and mocha children.[134] If our group was, for any reason, separated into smaller groups, it generated greater confusion among our fellow travelers. If we, Jacob and Angela, were ever together alone with Jennifer, who is white, and the kids, people often assumed that Jacob and Jennifer were married and that Angela was a friend with her children, resisting the notion of an interracial family at all. Or they saw Jacob and Jennifer together as a married couple and Angela as a nanny for their black children, resisting the notion that a multiracial family, just as you note earlier about LGBT families, could be created through any means other than adoption. At times, the presence of our kids threw them off,

131. Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. REV. 1687, 1712 (2010).

132. Rosenblum, *supra* text following note 7.

133. *Id*. text accompanying note 8.

134. Our children and the daughter of Catherine and Jennifer all have a similar skin tone.

given how much more they look like Angela, but Jennifer and Angela joked that it was likely easier for others to conclude that Jennifer was like a slaveowner's wife who turned a blind eye to her husband's sexual exploits—often rape—rather than accept the image of our actual multiracial family. If we, Jacob and Angela, were together alone with Catherine, who is black, people just stared. Nothing in their minds could reconcile that combination. There was no conceivable explanation to them because such explanations would have required them either to see and accept a lesbian couple, Angela and Catherine, or accept one of us as Jacob's partner and the children as products of such unions.

More striking, however, were Catherine, Jennifer, and their daughter Zoe's experiences in having their family explicitly and consistently disregarded by both law and society on the island. Before our actual trip, we, Jacob and Angela, worried often about potential prejudice against our friends, especially in light of news articles about violent homophobia in the Caribbean. There was no such violence, though—at least physically. Yet, Catherine and Jennifer encountered constant mental and emotional violence in the failed acknowledgement of their family. Our heterosexuality and thus our legal union allowed us to come through immigration as a family—together with our kids, even though we did not fit the monoracial ideal. However, because Catherine and Jennifer's civil union was not recognized as lawful, they had to separate their family physically to get through immigration—Jennifer and Zoe approaching the official for their review and with legal adoption papers of Zoe by Jennifer, followed by Catherine as an individual. Only in one instance did someone break the social norms of heterosexuality and family. An immigration official told Jennifer as she approached with Zoe, "Your whole family can come up here. Go ahead and bring your whole family up." Our gratefulness as a group for this official's willingness to acknowledge the Smith-Holladay family makes perfect sense, but upon reflection, especially based on your essay, it also is sad. Forced reliance on others' willingness to break with social norms and thus the law provides no comfort. Uneasiness always exists.

Hopes aside, we see why you and Howard would not want to have to engage in such reliance. After all, as experience reveals, it is a privilege to be able to keep it all in the family.