

THE PLACE OF THE FAMILY

This essay explains the conservative's conviction that the family is the basic and most important unit of society. In a time when the family is being attacked, the essay calls for conservatives to "look homeward for renewal and inspiration and watch outward to guard against incursions on the family's prerogatives."

THE FAMILY ENHANCES ORDERED
LIBERTY BY ALLOWING PARENTS
TO TRANSMIT THEIR VALUES TO
THEIR CHILDREN EVEN IF THOSE
VALUES DO NOT COINCIDE
WITH THOSE OF A PARTICULAR
GOVERNMENTAL REGIME

Radical ideologues assume that the atomistic individual is the only unit, other than the state, that can make any claim to authority or separate existence. Conservatives, to the contrary, recognize the family as the basic unit of society. They understand that individuals are born and usually raised in the context of family and that among the individual's deepest ties and highest aspirations are those related to family life. The natural ties of family provide goods like socialization and provision that cannot be supplied as effectively by any other instrumentality, and without exacting unacceptable costs in terms of human freedom.

In fact, as Professor Bruce Hafen explains, the family enhances ordered liberty by allowing parents to transmit their values to their children even if those values do not coincide with those of a particular governmental regime:

[I]t remains fundamental to democratic theory that parents, through this institutional role of the family, control the heart of the value-transmission process. As that crucial process is dispersed pluralistically, the

power of government is limited.

It is characteristic of totalitarian societies, by contract, to centralize the transmission of values. Our system thus fully expects parents to interact with their children in ways we would not tolerate from the state—namely, through the explicit inculcation of intensely personal convictions about life and its meaning.¹

In addition, the Utah Supreme Court has noted, "... family autonomy helps to assure the diversity characteristic of a free society.... Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma."²

Conversely, the family is viewed with disdain by radical levelers seeking to advance causes like pure equality or unfettered self-expression. Professor Robert Nisbet notes:

I have always found treatment of the family to be an excellent indicator of the degree of zeal and authoritarianism, overt or latent, in a moral philosopher or political

theorist. Basically, there have been two traditions in Western thought here. In one, reaching from Plato to Rousseau, the family is regarded as an insurmountable barrier to the achievement of absolute virtue or justice in a social order and therefore is to be obliterated. In the other, reaching from Aristotle to Burke and Tocqueville, the family is declared vital to the achievement and preservation of freedom and order alike in society.³

Unlike the relationships between citizens or between citizens and the state, family relationships are primarily based on obligations rather than rights. Typically, family duties are not enforceable in legalistic ways. That does not, however, make them less powerful or binding. Indeed, an important contribution of family life is that it instills in its participants recognition of the good of fulfilling responsibilities they may not be “forced” to discharge. Professor Scott FitzGibbon says, “An excellent person recognizes more things as morally binding than ordinary people might do, but a debased person, it appears, will acknowledge fewer.”⁴ Because family obligations are not “chosen” in the ordinary sense, they can shape character in ways not easily done by activities such as paid employment.

These realities regarding the family allow for additional conclusions about the family, particularly as it relates to other units in society.

First, the family is not the creation of the state. It has a prior existence. Referring to the example of marriage, Professor F.C. DeCoste points out:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the

attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke’s Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives.⁵

In the U.S. context, “... the rights inherent in family relationships – husband-wife, parent-child, and sibling – are the most obvious example of rights retained by the people. They are ‘natural,’ ‘intrinsic,’ or ‘prior’ in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property.”⁶ This means that the authority of the family is independent of, not derived from, the state. Thus, the family is a mediating institution, standing between the individual and the state to provide the individual with identity, purpose, security and protection.

Flowing from this is the reality that the state cannot define and redefine family without doing harm. When it attempts to do so, the state enhances its own jurisdiction over the individual by making the family an instrument of social control rather than an independent unit that can temper the demands of the state on the individual. Then, the individual becomes naked before the state, subject to its whims and projects. Where the family typically relies on persuasion and asserts its demands through conscience and sentiment, the state asserts its demands by coercion and prescription.

This does not mean that the state has no role to play in regards to the family, only that its role must be strictly limited. The state can and ought to provide a legal structure for the family to be recognized and protect the integrity of that structure. Professor Hafen says, “... the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy

[as well as political freedom] depends...upon maintaining the family as a legally defined and structurally significant entity."⁷ This structure can assist third parties in their interactions with the family and create lines of demarcation beyond which the state itself should not pass except in the direst emergency. Nebulous legal definitions of the family (such as legal status for cohabitation) impede these functions. The state may also clear the way for the family in performing its vital functions, such as by treating the family as an economic unit (as with the child tax credit, to use one example).

The limitations on the state's role, however, are crucial partly because there is constantly pressure to erase them in order to allow the state's reach to extend further and also because the family cannot do its work properly without significant independence. "[T]he formal law stops at the family threshold not merely because it *should not* regulate intimate relations but because it *cannot* regulate them without impairing their very existence."⁸

Parents cannot transmit their values to children if they are expected to be transmitters of state messages. Family members will not learn to accept unchosen obligations if they have judicially-enforceable rights to refuse any responsibility that is not freely chosen. A demanding state can make it difficult for parents to provide for children or spouses for one another. An intrusive state can impair all family functions by subjecting them to constant scrutiny.

A chief limitation has historically been that the state will not interfere with the workings of an intact family. (When a family breaks down, as in divorce or abandonment, the law assumes family members are subjecting themselves to its jurisdiction.) In the words of Richard Weaver, "... the policy of a state toward the culture or cultures within it should be *laissez faire*, except at those points where collisions may be so severe that they imperil the minimum preservation of order with which the state is charged."⁹

Thus, in the absence of a compelling reason, such as child or spousal abuse, the state's jurisdiction ends at the threshold of the home. This principle of family autonomy has been recognized in our constitutional tradition.¹⁰

Obviously, the principle involves risk, but its abandonment does as well. Professor Stephen Carter has written:

Parents, of course, may do wicked things. Despite our occasional inability to agree on what constitutes abuse, we do know that some mothers and fathers beat their children within an inch of their lives—or beyond. We do know that some mothers and fathers will raise their children to be vicious racists. We do know that some mothers and fathers will train their children to mock the religions of others. We do know that some mothers and fathers will teach their children (through example) that nothing is more important in life than the pursuit of wealth, power and position.

But are such possibilities reason enough to reject the parental power that the Court discovered in *Pierce*? I would suggest not. After all, the state, too, might do many wicked things, and often has. And the evil that the state does affects far more people than the evil done by any particular parent.¹¹

Conservatism's respect for natural realities and its opposition to an overweening state will lead it to consistently defend the integrity and autonomy of the family. The conservative will recognize in this defense an opportunity to preserve liberty, ensure the well being of many who would not otherwise be cared for, and to perpetuate the best in culture and faith. Conservatives will look homeward for renewal and inspiration and watch outward to guard against incursions on the family's prerogatives. In all this, they will be doing the work of civilization itself.

ENDNOTES

1. Bruce C. Hafen, "Law, Custom and Mediating Structures: The Family as a Community of Memory," *Law and the Ordering of Our Life Together*, pg. 100 (Richard John Neuhaus, ed. 1989).
2. *In re J. P.*, 648 P.2d 1364, 1373 (Utah 1982).
3. Robert Nisbet, "The Pursuit of Equality," *Public Interest*, pg. 103 (Spring 1974).
4. Scott FitzGibbon, "The Formless City of Plato's Republic," *Issues in Legal Scholarship*, (2005) at <http://bepress.com/ils/iss5/art5>.
5. F.C. DeCoste, "Courting Leviathan: Limited Government and Social Freedom," in Reference re Same-Sex Marriage, 42, *Alberta Law Review*, 4, pg. 18 (2005) (citations omitted).
6. *In re J. P.*, 648 P.2d 1364, 1373 (Utah 1982).
7. Bruce C. Hafen, "The Family as an Entity," 22, *University of California Davis Law Review*, pgs. 865, 867, (1989).
8. Bruce C. Hafen, "Law, Custom, and Mediating Structures: The Family as a Community of Memory," *Law and the Ordering of Our Life Together*, pgs. 82, 106-107 (Richard John Neuhaus, ed. 1989).
9. Richard M. Weaver, "The Importance of Cultural Freedom," *Modern Age*, pgs. 21, 23-24 (Winter 1961-1962).
10. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *In re J. P.*, 648 P.2d 1364 (Utah 1982).
11. Stephen L. Carter, "Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later," 27, *Seton Hall Law Review*, pgs. 1194, 1222-1223, (1997).

CITATION

Cite as "The Place of the Family," *Governing Principles Series*, 2007 Sutherland J.L. & P. Pol'y 2, <http://www.sutherlandinstitute.org/uploads/familyplace.pdf>



Crane Building
 307 West 200 South, Suite 5005
 Salt Lake City, UT 84101
 office: 801.355.1272
 fax: 801.355.1705