RESPECT


Article 8 of the ECHR states that “everyone has the right to respect for his private and family life”. But why talk about respect at all? Why not simply say that “everyone has the right to private and family life”? Does “respect” add or subtract anything? Would something be lost with its removal?

It is common to trace the concept of respect for individuals to Kant’s injunction that people should be treated as ends and not as means. It is important in political discourse. Ronald Dworkin believes that the justification for democracy is that “it enforces the right of each person to respect and concern as an individual.”\(^1\) Multi-culturalists claim that people’s distinct identities should be respected.\(^2\) Most people think that we should respect the dead; and this has been extended to the idea that we should respect to body-parts of individuals who have perished.

Stephen Darwall\(^3\) distinguished between “recognition respect” and “appraisal respect”. The latter occurs when we hold individuals in high regard for features of special excellence; as such it is not owed to everyone, for it may or may not be merited. The former describes what occurs when we give appropriate recognition to people as people, and are willing to constrain our behaviour accordingly. I am not completely convinced by the distinction. Leaving aside figurative usages (such as when we say a mountaineer “respects” a climb for its hazardous qualities), the two seem to share a common element which is more important than the differences: that respect for something or someone lies in acknowledgement that a feature of that entity has value in and of itself, the value usually not being assessable in monetary terms.\(^4\) This may often involve admiration., but

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4 This looks similar to the proposition advanced by Carl Cranor, and criticised by Darwall, that respect involves judging a person as having a characteristic which is a “good thing”: “Toward a Theory of Respect for Persons” (1975) 12 *American Philosophical Quarterly* 303-19. It is different, though, in that Cranor’s
one can respect something without admiring it: such as the dogged determination of someone to persist in a misguided view. One respects the dead, but we do not admire them for being dead. In those cases respect acknowledges a value: consistency in the first case; in the second, remembering that we are all to some extent beneficiaries of the efforts of our forbears, and acknowledging our own mortality.

Failure to respect a person as a person signals disregard of the value of those attributes which are central to anyone’s status as a human. It might be captured by the concept of “dignity”. Some constitutions enjoin respect for human dignity. But in this context, the expression “dignity” looks redundant. Respect for human dignity simply means respect for humans as humans: recognizing the value of those attributes which are central to being human.

We can now suggest a sense in which the addition of the term “respect” in Article 8 does add a dimension which would be lost without it. If the provision merely read “everyone has the right to private and family life” and that a public authority must not “interfere with the exercise” of that right, except in specified circumstances, it would indeed have imposed a defeasible obligation on the state. The insertion of the word “respect” gives the provision the character of a statement that family life is to be held to have value in and of itself. That value does not disappear even if intervention is justified. It persists in a world of many values. So Article 8 seeks to entrench family life as a value.

I want to argue that, if family law is to be respectful, it must be informed throughout by recognition of the value of the intimate. This is essential because without it love is unlikely to flourish. By “the intimate” I do not refer to a geographical or temporal space which is norm-free. I mean by it that there is, or should be, a sphere of personal interaction, whether between adults with one another, or between adults and children, which is privileged in the way I will describe. I have in mind behaviours ranging from

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idea of a “good thing” implies something which is morally desirable, whereas I use “value” simply in the descriptive sense as referring to something which is (highly) valued in its own right.

5 See D. Kretzmer and E. Klein (eds), The Concept of Human Dignity in Human Rights Discourse (Kluwer, 2002).
everyday communication and modes of dealing with routine events, and the allocation of domestic roles, to emotional interactions, strategies for coping with difficulties and crises, mutual participation in diversionary activities, modes of care, and so on. My claim is that, while individuals of course draw upon moral and social norms, and external advice, in their conduct in these contexts, they should do so free from institutional constraint and censure. I will call this the “privileged” sphere.

How does family law show that it values this?

I can start by showing how it has failed to respect this. The intimate has in fact been legally regulated from time immemorial. Wives, for example, have traditionally been placed under a legal duty to obey their husband, subject their intimate behaviour to legal scrutiny. In some cultures, social norms frown on women showing too much pleasure in sex; prompting genital mutilation. In our recent history, bodily functions came under legal scrutiny in the law of nullity; in divorce law, the definition of adultery,\(^6\) and the whole edifice of fault-based law, including the doctrines of connivance, condonation, provocation and recrimination, all provided opportunities for extensive judicial analysis of what went on in people’s bedrooms, and for pronouncements to be made on the way they dealt with crises in their emotional lives. Take the case in 1962 cited by Cretney where a court held that a wife had to put up with her drunken husband because there was no evidence of “any disgusting behaviour such as vomiting or being unable to control his bladder”.

What is the value which is not being respected here? It could not be the actions themselves, which range across all manner of intimate behaviours, including a variety of sexual practices (and attempts). It is the value having space to develop one’s personality free from the external gaze. Love itself demands such a space if it is to sustain a lifelong partnership. It might be thought that any activity within that valued space must itself have value (at least unless it was harmful, and thereby constituted an abuse of the space). That

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\(^6\) Sexual gratification less than full penetration does not count: *Sapsford v Sapsford* [1954] P. 394.
could be true only in the sense that doing anything one desires is of value to the person doing it. But this concept of value is either tautological, or plain wrong (one can sometimes desire things which are bad for us). A more powerful analysis is that the value of recognizing the privileged sphere lies in the freedom to engage in unregulated activity irrespective of the inherent capacity of the activity to advance the well-being either of the actors or of others. Such activities may have much, little, or no value. Compared to Picasso’s solitary jottings, my idle efforts have no value, either for me or others. Compared to the value of intercourse resulting in pregnancy, some other types of sexual activity may have little or none. At least, whatever value they have are of no relevance to the recognition of the value of allowing unregulated space to perform them. That value is violated when the most intimate aspects of adult relationships are measured against the prescriptions of a legal or social norm.  

This value is similar to, but not the same as, the value of privacy upheld in cases from Griswold v Connecticut to Lawrence v Texas. But the value of privacy covers a wider range of activities. It also seeks to protect against intrusion, external observation or disclosure. The behaviour I am considering is valued by reason of its freedom from external regulation. This may imply freedom from observation or disclosure, but not always. The behaviour I have in mind could take place very publicly, and I will argue that intimate behaviour in parental relationships should in principle always be open to observation. Nor is my argument based on the good of autonomy. This is partly because the value of autonomy extends beyond the intimate; but also because an autonomous life is valuable only if it is worthwhile. Why should we value an autonomous life if it is misspent? In contrast, my argument is that recognition of the privileged sphere is a value whatever the activities (if not harmful) that take place within it. This creates the conditions necessary for flourishing (love) and the living of a worthwhile, autonomous, life, but it is not the same as those.

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7 Of course, the parties to a relationship respond in different ways to each other’s behaviour. The result might be relationship breakdown, and the law may need to deal with that.
8 381 US 479 (1965).
This is not to suggest that norms do not, or should not, play any role in personal relationships. But the legal norm works on the *consequences* of the behaviour, not the behaviour itself. So the nature of a post-divorce settlement may reflect the fact that the wife looked after the children while the husband provided income. But the law does not say that it was wrong for the parties so to arrange their lives, or indeed stipulate any model they should have followed.

Nor does it mean that general legal norms, of criminal law, or of tort law, are silent. In particular, the value that is respected by conferring freedom in the privileged sphere is defeated if the relationship benefits one party at the cost of damage to the other, or if it harms people outside that sphere. In particular, the value that is respected by conferring freedom in the intimate sphere is defeated if the behaviour harms anyone within or outside that sphere. This is a further difference from the good of autonomy, for it can be argued that autonomous persons should be free to undergo consensual, and therefore victimless, harm.\(^\text{10}\) Whatever view may be taken on that, I am not arguing that respecting the privileged sphere in itself demands acknowledging freedom to engage in consensual harmful activity. But it is important to be cautious about how harm is understood. Behaviour does not become harmful merely by assertion.\(^\text{11}\)

So, those cases apart, the violation of the privileged sphere is itself an abuse. Such violation of intimacy can take place directly or indirectly. Writing in 1994, John Finnis\(^\text{12}\) defended what he called the “standard European position” regarding homosexual


\(^{11}\) John Finnis, “Law, Morality and Sexual Orientation” (1994) 69 Notre Dame LR 1049 describes homosexual acts as being “manifestly unworthy of the human being and immoral”, and “morally worthless”. “Whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates … after a gruelling day on the assembly line”. The worthlessness of the activity would not matter under my argument. However, Finnis goes further in claiming that same-sex relationships are actually harmful to the participants because the partners’ bodies do not fit together in the same way as a man and a woman’s do and are “deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage.” Of course, some intimate actions can be harmful, but they do not become so by mere assertion.

conduct, which did not directly forbid it but permitted discrimination and disadvantage to be visited on active homosexuals in order to discourage what was deemed behaviour which lacked worth.

This perfectionist argument maintains that states can and must take sides in matters which take place in the intimate sphere. I am not going to disagree with that. I do not accept Dworkin’s view that that liberals should think that respect for autonomy means that the state should be neutral as to what constitutes a good life for its citizens.\(^{13}\) Indeed, as I have explained, my argument is not put forward in terms of the promotion of autonomy. I have not stipulated that the actions within the privileged sphere should be worthwhile (though they should not be harmful). Nevertheless, they should be beyond official regulation. Since these protected acts may either have value or have no value in themselves, it cannot be argued that they can be respected only if the state adopts a neutral position between them: how can one be neutral between acts with value and those without? This can be shown by an analogy. Suppose two friends indulge their spare time in a harmless, useless, activity (say, planespotting); another two play tennis (equally harmless, marginally less useless). The community may choose to promote tennis over planespotting (to encourage exercise, socialisation, national achievement and pride) without showing any disrespect to the planespotters. Indeed, it must make such choices. For example, pro-natalist policies favour some kinds of intimate activity without disrespects those unlikely to lead to procreation.\(^{14}\)

But there is a difference between encouragement of one activity over another and such discouragement of the other which amounts to its denigration and amounts to external regulation within the intimate sphere, amounting to disrespect for it. The distinction is partly one of intent; but even without intent, may be found in the consequence of conferring so many benefits on one form of intimacy rather than another that the disparity amounts to a form of denigration in the way the “standard European position” described

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by Finnis in regard to same-sex relationships did.\textsuperscript{15} The “standard European position” has since disintegrated, at least in the United Kingdom. The age of consent has been equalised,\textsuperscript{16} joint adoption by gay couples permitted,\textsuperscript{17} gay cohabitants held to have been living together “as (if) man and wife”,\textsuperscript{18} civil partnerships for gay persons of equivalent status to marriage approved by Parliament,\textsuperscript{19} and the prohibition placed on local authorities quietly repealed.\textsuperscript{20} The European Court of Human Rights is gradually accepting that discrimination on the basis of sexual orientation is a breach of human rights.\textsuperscript{21}

\textit{Care and Nurture}

I wish to suggest that the basis for respecting the rights of parents to care for and nurture their children lies in the same value implicit in recognizing the privileged sphere which I have discussed above.

A number of unappealing reasons have been given for affording parents that entitlement. That they in some way “own” their children; that they in some way have the right to treat their children as the instruments of furthering their own interests and beliefs.

The justification can now best be found in a combination of factors. We start with the scheme for identifying which adults are responsible for caring for the children. These are normally the child’s genetic parents, and for good reason: these are normally the people who will feel disposed to care for the child, though societies have been wise enough to allow alternative provision for caring and nurturing children where parents, have felt unable to bear the burden.

\textsuperscript{15} Bamforth’s examples of deleterious consequences for homosexuals.
\textsuperscript{16} Sexual Offences Act 2003, s.
\textsuperscript{17} Adoption and Children Act 2002, s. 144.(4).
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\textsuperscript{19} Civil Partnerships Act 2004.
\textsuperscript{20} Local Government Act 2003, s. 122.
\textsuperscript{21} \textit{Da Silva Mouta v Portugal} [2001] 1 FCR
Like the interaction between adult partners, that between an adult and the child the adult is caring for and nurturing, falls within the privileged sphere, and is to be valued in the same way. Between adults, privacy may sometimes be a necessary part of that respect. I do not think it is ever necessary in the case of the parent-child relationship. Indeed, I do not think it would be desirable. All actions between parents and children must in principle be open to scrutiny. In principle, because there must be trade-offs against other liberty values. But the scrutiny is to detect harm and exploitation, not to impose a favoured ideal within the intimate realm. It is a difficult distinction: not of principle, but of application. The borderline will be continually contested. An English decision provides a perfect example. A separated father complained that the mother and her new partner sometimes walked naked around the home and bathed communally with the children. The Court of Appeal overturned a decision to return the children from them to the father, Butler-Sloss LJ saying: “A balance has to be struck between the behaviour within families which is seen by them as natural and with which that family is comfortable, and the sincerely held views of others who are shocked by it. Nudity is an obvious example. Both on the beach and in the home some grown ups walk around nude – indeed you see it at one end of Budleigh Salterton Beach – and they bring up their children to do the same. Other parents pass on to their children a more inhibited approach to nudity. Communal family bathing is another example … in a happy well run family how the members behave in the privacy of the home is their business and no one else’s.”

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Religion

Freedom of religion is respected because of the value in allowing human beings to assess the wisdom of the past and find their own answers to questions about the place of mankind in the world. The value that is respected is not the same as that respected in recognizing the value of the privileged sphere, but it is akin to it, for one’s religious or related beliefs are among the most intimate aspects of one’s personality, and affect it in the most intimate ways. As in the case of the behaviour in the privileged sphere considered earlier, the value of freedom of belief does not imply that the belief itself is

22 Re W (minors) (residence orders) [1999] 1 FLR 869 (Butler-Sloss LJ)
valuable: for some, it might seem quite absurd. But without that freedom and that space, a creative, psychological need, akin to the need for love, cannot develop. It is widely held that respect for a person’s religious or philosophical beliefs requires allowing that person to pass those beliefs on to his child.\textsuperscript{23} But what value does this respect? Archard states the common view that it is “the liberal ideal of tolerating a diversity in adult ways”.\textsuperscript{24} But while diversity may sometimes be attractive, it has no, or little, value in itself. It can sow discord. Some adult ways may be better than others. Diversity is merely a likely consequence of respecting individual beliefs, which may be attractive or unattractive, not an end in itself. Could the value be the perpetuation of the parent’s belief? But why should its perpetuation be valuable? Society might be much better off with a different belief. Could it be the satisfaction of the parent? This may be politically expedient, but it is an unattractive value, resting on the perception of children as mere instruments of their parents’ wish to control the nature of the world after their death.\textsuperscript{25} There is indeed value in giving children the opportunity to learn from their predecessors. But the issue is not one of making the parents’ beliefs available to the children, but of requiring children to be \textit{educated in or brought up in} their parents’ beliefs. The real value, it is suggested, in allowing parents to pass on their religious beliefs to their children, is respect for the privileged sphere of the parent-child relationship. The US Supreme Court’s recently appeared to acknowledge this when it said that “the state cases create a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to this child his or her religious perspective.”\textsuperscript{26} But despite claims that this right extends beyond the privileged sphere, this has not been

\textsuperscript{23} Article 2 of the First Protocol of the European Convention of Human Rights requires states to “respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” The International Covenant on Civil and Political Rights requires states parties to respect “the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions.”

\textsuperscript{24} Archard, p. 131.

\textsuperscript{25} See Truth

established: in the United States such attempts have come up against the Establishment clause of the First Amendment, prohibiting the advancement of religion in schools,\textsuperscript{27} 

But parents in other jurisdictions have also been unsuccessful.

[English parents are constrained by the national school curriculum.\textsuperscript{28} The European Court of Human Rights has held that compulsory sex education did not interfere with the parental right, provided it was not done in a doctrinaire manner.\textsuperscript{29} And while the European Court of Human Rights has held that the infliction of corporal punishment on a child in Scotland violated the parents’ rights under the Protocol,\textsuperscript{30} this referred to a mode of discipline, not instruction. Other parents in England\textsuperscript{31} and South Africa\textsuperscript{32} have been unsuccessful in attempts to require schools to use of corporal punishment. However, parents are sometimes able to withdraw their children from exposure to ideas with which they disapprove. In England they are expressly permitted to withdraw them from classes in religion and sex education. The US Supreme Court allowed Amish parents to withdraw their children from the secular education system.\textsuperscript{33} The only values which allowing this upholds would be if the exposure undermined the ability of the parent to impart his beliefs in the intimate sphere, or if exposure to new ideas threatens the stability of the child. Instruction in a different belief might have such consequences, but it should not be easily assumed that exposure to other beliefs obstructs the parent’s activities in the privileged sphere (unless they are seriously hostile to them]

\textit{Respecting children}

Respecting the beliefs of adults, therefore, has only limited consequences with regard to the way children should be taught in the public sphere. But the beliefs of children, too,

\textsuperscript{28} Lundy
\textsuperscript{29} Kjelsden, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR711.
\textsuperscript{30} See Campbell and Cosans v United Kingdom (1982) 4 EHRR 293. It would appear that the infliction of such punishment on a child at school in itself undermined the parents’ beliefs practised in the intimate sphere that such punishments were wrong.
\textsuperscript{31} R (on the application of Williamson) v Secretary of State for Education and Employment [2002] 1 All ER 385;
\textsuperscript{32} Christian Education South Africa v Minister of Education (2000) 9 BHRC 53.
\textsuperscript{33} Wisconsin v Yoder 406 US 205 (1972).
nurtured in the privileged sphere, demand respect, even if we must accept that those beliefs might only be provisional while they are developing their ideas. Thus issues of children’s education outside the privileged sphere, and of allowing the child to observe religious practices, should be seen as aspects of the rights of children rather than of parents. Non-provision of instruction in the child’s beliefs, and educational requirements concerning dress, attendance at religious services, or periods of study, which conflict with those beliefs, may fail to give them sufficient value. In Leyla Şahin v Turkey\(^\text{34}\) the European Court of Human Rights has allowed a ban on wearing headscarves in Turkish Universities on the basis it fell within a state’s margin of appreciation to permit such a ban based on its perception that such symbols might place unacceptable pressures on those who did not wish to wear them, might lead to discord, and was therefore necessary in protect democracy. Thus ruling could support the blanket ban on the display of conspicuous religious symbols in state schools imposed in France in June 2004. But the assertion of a policy of secularism in schools is more a statement of policy rather than a justification of necessity, and places insufficient value on the children’s beliefs.

So what is it to respect children? Partly, it is the same as for any person. Respect acknowledges the value of those features of individuals which allows them to flourish. Physical abuse and neglect clearly contradict this. But that cannot be the whole story. Respect for a child demands more than the kind of respect one has for one’s pet hamster. Just as we show respect to our elders by putting value on those things they have achieved and handed down for our benefit, so we show respect to the coming generation by accepting the value of their contribution to the nature, beliefs and ideals of the society in which they will live. All societies reflect their past, whether transmitted from the previous generation through the intimate sphere or by public means. But we must value the privileged spheres and relationships in which the new generation develops new ideas with which to face the new realities which confront them.

\(^{34}\) (Application no. 44774/98) 29 June 2004
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