

SOCIAL JUSTICE IN POLITICAL THOUGHT

Examining the Rights of Parents

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INTRODUCTION

According to the National Association of Social Workers (NASW) *Code of Ethics* (2009), social workers have a duty to challenge social injustice and to “promote social, economic, political, and cultural values and institutions that are compatible with the realization of social justice” (Preamble section). In addition, the code instructs social workers to “engage in social and political action,” “be aware of the impact of the political arena on practice,” and “advocate for changes in policy and legislation” (6.04 Social and Political Action section). It is clear from this code that social workers have an obligation to understand and be a part of the political discourse on social justice. This literature review identifies the major theoretical underpinnings of social justice in political thought, with a particular focus on issues of family and parental rights. The intent of the analysis is to explore social justice from a political science perspective, as well as identify the limitations of a political analysis of justice within

families. The review concludes with an exploration of the ways that political theory related to parental rights and social justice can be applied to the field of social welfare.

METHODS

To capture as much relevant literature as possible, the author conducted a search of published writings using the following databases: Academic Search Complete, Google Scholar, JSTOR, Hein Online, LexisNexis Academic, Philosophers Index, Social Service Abstracts, Social Science Abstracts, and Social Work Abstracts. The author also consulted the *Oxford Handbook of Political Science* as well as the *Routledge Encyclopedia of Philosophy* and the *Stanford Encyclopedia of Philosophy*. Seeking to join the three concepts which drive this paper—social justice, political theory, and family—the following search terms were used:

- Social justice: social justice, justice, distributive justice, procedural justice, social goals, social inequality, social reform, power;
- Political theory: political theory, theory, political philosophy, political science;
- Family: family, parents' rights, cultural differences, parenting rights, parental rights, multicultural rights, children's rights, right to rear, abuse, property rights.

As needed, search strings were used that linked several of the terms by using "AND" or "OR."

In addition to article database searches, the following political scientists were consulted: (a) Professor Wendy Brown of the University of California (UC), Berkeley Political Science Department and (b) Professor Sarah Song of UC Berkeley's Legal Studies and Political Science Departments. Both professors offered insights into "rights theory," social justice, and the political theory of protecting different classes of individuals. Professor Song also shared her course syllabus on political theory and individual rights.

Limitations of this analysis include the fact that while there are many political traditions (Marxism, feminism, egalitarianism, multiculturalism, to name a few) which discuss social justice and/or family, this analysis has focused exclusively on the concept of parents rights within Western liberal political theory. Furthermore, within the discussion of rights and families are many important attendant issues for which there was no space in this article. Issues such as equality and the rights of women within families, the rights of children within families, and the competing rights of parents within dissolved or broken families are just some of the most evident omissions. While these issues are certainly worthy of their own examination, in the interest of focusing attention on the interaction between the rights of parents and the intervention of the state, these issues have been excluded from this analysis.

FAMILY AND JUSTICE IN POLITICAL THEORY

Since the time of Socrates in 400 BCE, political theorists have considered the role of family in a just society, namely, the extent to which the family

is external to the state and how the rules of state should be imposed upon the family. In *The Republic*, Plato presents the family as an external hindrance to an idealized city, where all citizens must sacrifice themselves, and their family entanglements, to the ordering of society (Colmo, 2005). The family represents both a distraction for the republic's citizens and an expression of self-interest that can be detrimental to societal justice. In his discourse, justice is defined as harmony, efficiency, and moral goodness (Okin, 1977). Approximately 2,400 years later, Rawls presents the family as a central component of the basic structure of society and a key factor in determining whether an individual will experience justice. According to Rawls (2004), a happy family is necessary to a happy life, and the willingness of an individual to make an effort and earn society's benefits is also impacted by the nature of family life. In Rawls conception, then, family is not outside but an important internal element of a just society.

These theories reflect the tensions between the rights of individuals and the greater good of the state. The family represents a place that is both personal and interconnected with society. Decisions which address the tension between justice for individuals and the interest of the state in preserving harmony, efficiency, and moral goodness continue to be a focal point of political discourse. The central issues in this debate include, among other things, parental discretion in decisions affecting their children, rights of individuals to create families, and the protection of children within abusive and neglectful families.

The Autonomous Family

A discussion of the rights of parents logically begins with John Locke and the distinction between the private realm (where a person experiences liberty and freedom that is separate from the control of the state) and the public realm (where individuals consent to limiting their freedom in exchange for the protection of government in society) (Locke, 1988). For Locke, the distinction between the public and the private are essential to his idea of justice (Kelly, 2002). Locke conceived of humans as originally existing in a state of nature characterized by freedom and equality, which was also dangerous and disorganized. In

exchange for the protecting and mediating powers of the state, Locke argues that individuals consented to relinquish some of their freedoms (Locke, 1988). This social contract is fully consensual and limited in its reach. Outside of the reach of the state, the domestic realm provides individuals with a space to realize their potential as rational, free beings even though they have consented to partial rule by government (Kelly, 2002). Locke argues that the state is not necessary in the private realm because a family does not require a neutral party to resolve disputes and enforce laws. Instead, the family is ruled by the father and is naturally peaceful and orderly (Kelly, 2002).

Locke goes on to argue that state interference within the family is not only unnecessary, but also it is antithetical to the state's purpose. Within the family, Locke argues, an individual should be fully at liberty to exercise free will and develop reason (Locke, 1988). These capacities are essential for individuals to distinguish themselves from the ignorant beings that existed within the state of nature. Within the family, the father teaches this ability to his children and cultivates it himself (Kelly, 2002). Locke further argues that the purpose of the state is to protect this space so that a father can fulfill his personal potential and his parental obligation to instill reason in his children. Justice, within this interpretation, is served when the state protects the individual and the family from outside forces but also from itself.

Right to Rear Children

Related to Locke's conception of protected family space are theories concerning the rights of parents to raise their families and make decisions according to their own judgments. Sometimes described as a "right to rear," these theories are based in liberal political thought, where justice depends on enumerated and inferred rights that protect the individual from unnecessary state interference (Waldron, 1998). Liberal theory is also based on the idea that adults are entitled to pursue their own conceptions of what is good and that political power should not be used to force a certain definition of good upon them (Gilles, 1996). In a liberal society, no one is allowed to coerce others with respect to choosing

values or beliefs unless they have a particular privilege to do so (Gilles, 1996).

The United States Supreme Court has applied right to rear theories in cases, thereby, protecting parental authority (*Meyer v. Nebraska*, 1923; *Pierce v. Society of Sisters*, 1925; *Prince v. Massachusetts*, 1944; *Stanley v. Illinois*, 1972; *Troxel v. Granville*, 2000; *Wisconsin v. Yoder*, 1972). In *Meyer*, for example, Justice McReynolds wrote that the 14th Amendment protects

not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (p. 396)

Despite a stated deference to parental rights, the Court has also delineated the circumstances under which those rights can be limited (*Prince v. Massachusetts*, 1944). In the *Prince* decision, Justice Rutledge wrote that while the Court should defer to parents in making decisions for their children, the state has "a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction" (p. 167). He went on to argue that the state has an interest in ensuring "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens" (p. 165). Thus, while the Court has recognized that parents have a right to rear their children according to their beliefs and customs, this right can also be limited if the Court sees a legitimate interest in doing so. According to the *Prince* decision, this obligation is most pertinent when it is designed to protect children from abuse.

Due Process

Following in the liberal tradition that protects individuals from the state are concerns about rights of due process, which are derived from political

theories concerning the “rule of law” and procedural justice. Rule of law theories are based on the idea that justice is dependent on written legal codes and established laws. According to this theory, written law preserves justice because it is created by those whom it governs, but also it is because the law is available for all to see and is applicable to every citizen and the state (Allan, 1998). Under the rule of law, the state cannot create and apply arbitrary laws to its citizens. Furthermore, laws dictate the appropriate conduct of the state when it must interfere in the lives of citizens. In dealing with its citizens, rule of law theories hold that the state must follow guidelines of procedural and substantive fairness known as due process (Allan, 1998).

As applied to the rights of parents, due process and rule of law theories relate to the conduct of the state when it intervenes in the lives of families. In the United States, the Supreme Court has interpreted the due process clause of the 14th Amendment as protecting the rights of parents to the care, custody, and control of their children (*Meyer v. Nebraska*, 1923; *Pierce v. Society of Sisters*, 1925; *Prince v. Massachusetts*, 1944). Although the state may have legitimate reasons to intervene in the lives of families (*Prince v. Massachusetts*, 1944), a state cannot intervene unless it can demonstrate a compelling reason for doing so. The state’s intervention must therefore be narrowly tailored to achieve the state’s demonstrated objective.

In cases involving parental abuse and neglect, the state has a clear interest in intervening in family life. Even in these cases, however, the Supreme Court has held that the state must carefully protect the due process rights of parents (*Santosky v. Kramer*, 1982). In the majority opinion in the *Santosky* case, Justice Blackmun wrote:

[T]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. (p. 753)

Thus, while the Court has acknowledged that state intervention in family life is sometimes necessary, it also held that such intrusion must be limited by parents’ due process rights.

Privacy

Political theories about social justice also include the concept of privacy. According to the utilitarian John Stuart Mill, a just society is one that attains the greatest amount of happiness for its citizens. In order to maximize happiness and promote well-being, Mill argues, individuals should be free to pursue self-development (Skorupski, 2005). Mill also argues that the function of the state is to help individuals achieve this end and the only reason that the state may exercise power over an individual is to prevent that individual from harming others (Skorupski, 2005). Similar to Locke, Mill contends that individuals have a right to private space where they can exercise self-determination and are free from state intervention.

Mill’s conception of individual liberty is directly related to questions of privacy and is pertinent in debates about parental rights. Privacy rights bear on questions regarding birth control and abortion, same-sex relationships and marriages, and the rights of same-sex couples to start families. To some extent, these privacy issues have been debated by the Supreme Court. In 1965, the Supreme Court first articulated a constitutional right to privacy (*Griswold v. Connecticut*, 1965). In *Griswold*, the Court stated that within certain overlapping concepts of the Constitution (the “penumbra”) are protections of privacy rights, where individuals are protected against state intrusion into private affairs. Justice Douglas, speaking for the Court wrote:

We deal with a right of privacy older than the Bill of Rights. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. (p. 486)

Since *Griswold*, the Court has expanded the rights of privacy to include family matters such as contraception and abortion (*Eisenstadt v. Baird*, 1972; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992; *Roe v. Wade*, 1973).

Despite initial judgments that state laws prohibiting homosexuality were legal (*Bowers v. Hardwick*, 1986), the Supreme Court has since ruled that laws prohibiting consensual homosexual intercourse violate the privacy protections of the Constitution (*Lawrence v. Texas*, 2003). In regards to the rights of homosexual individuals to have children, the

Supreme Court has been silent. Some state supreme courts have asserted their authority to intervene by relying on judgments about sexual conduct to deny gay men and lesbians custody and visitation rights to their biological children (*Bottoms v. Bottoms*, 1995). In addition, in Skinner and Kohler's view, because the adoption laws in several states require that parents be married, many state courts have denied same-sex adoption petitions.

Thus, while the courts have recognized the importance of privacy rights, they have also been inconsistent in their application of this theory. In controversial cases, such as the rights of homosexual couples, the Court has only recently recognized a right to privacy (*Lawrence v. Texas*, 2003). The Court has not yet determined its position with regard to homosexual parents.

Equal Protection

An analysis of social justice in political theory would not be complete without a discussion of equality. While there are many theories regarding the types of equality that can be attained, liberal theories are primarily concerned with the equality of individuals in relationship to the state. Political theories on equality hold that the law should apply equally to everyone and that all individuals should be treated the same. Such theories were prolific during the 17th and 18th centuries. Thomas Hobbes and Jean Jacques Rousseau wrote that individuals possessed equal rights in a state of nature. Emmanuel Kant and John Locke both argued that individuals have a natural and moral right to freedom (Gosepath, 2007). In American society, equality theories were codified in the 14th Amendment to the Constitution, asserting that all men are entitled to "equal protection of the laws" (Constitution of the United States, 1868).

In its application to parental rights, research has demonstrated that equality principles have not been adequately applied in child welfare cases (Dettlaff & Rycraft, 2010; U.S. Department of Health and Human Services, Administration for Children and Families, 2008). For instance, literature has established that children of color are overrepresented in child welfare systems, that minority parents have less access to services, and that minority children

remain in foster care longer (Dixon, 2008). While the Supreme Court has not yet heard any cases regarding the disproportionality of minority children in child welfare systems, literature suggests that this is probably because these cases settle early or are dismissed on procedural grounds (Dixon, 2008). Regardless, to ensure that social justice is afforded to parents involved in the child welfare system, it is necessary to be aware of principles of equality and equal protection.

DISCUSSION AND CONCLUSION

Conceptual Framework

Figure 12.1 presents a conceptual map of parental rights. Within liberal political theory, the three most fundamental rights are those of liberty, equality, and the rule of law. As discussed previously, these three rights protect parents against undue state interference. The concept of liberty includes the ideas of the autonomous self and the autonomous family. As discussed by Mill and Locke, this theory protects the rights of parents to rear children according to their own beliefs and customs. The concept of equality further protects the rights of parents to rear children. The overlap between autonomy and equality reinforces the idea that the customs and values of any individual parent are equal and valid in comparison with other customs and values. They are also worthy of protection against the unnecessary intrusion of the state. Also secured in the overlap of liberty and equality are privacy rights within families and freedom for individuals to make their own choices regarding procreation, child rearing, and marriage.

Figure 12.1 also demonstrates the overlapping rights of liberty and rule of law. This combination of freedom and rules ensures that any state intervention in the family must be justified by a legitimate and important state interest, while respecting the due process rights of parents. Finally, the overlap of the rule of law and equality gives rise to the rights of parents to equal protection. The combination of these fundamental rights supports parents in their relationships with their children and protects them from outside interference. In the United States, these rights have been codified by the Constitution and supported by the Supreme Court.

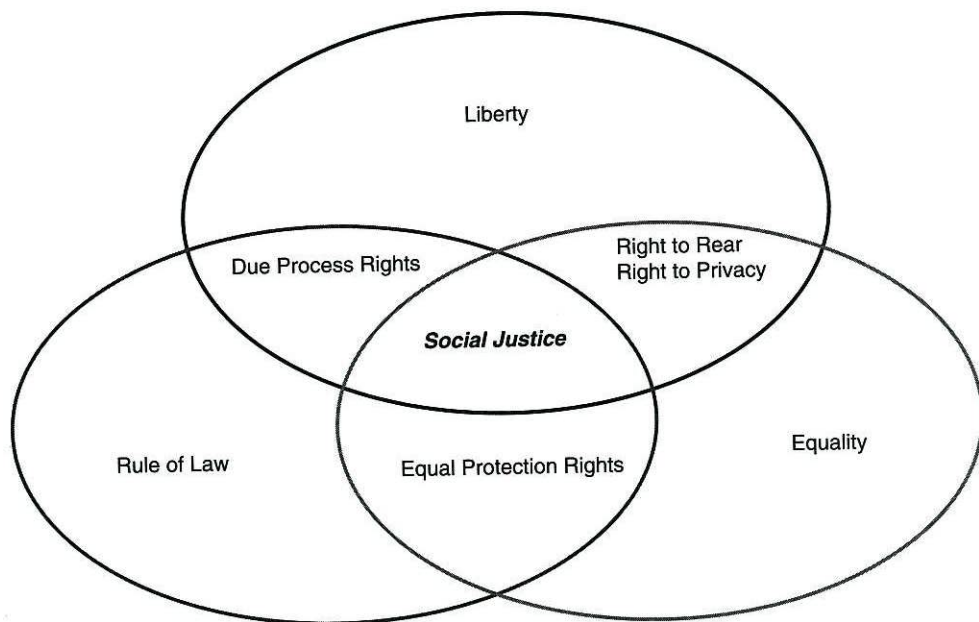


Figure 12.1 Concept Map of Parental Rights

Limitations to a Rights Analysis Within Families

Political theories on social justice have much to offer a discourse on parental rights. By providing a framework for balancing the liberties and protections of individuals against the interests of the state, political theories help clarify which rights are fundamental and deserving of protection. It is clear from the theoretical discussions alone, but also their application in Supreme Court cases, that parents have a right to privacy within their family and that they should be protected as much as possible from state intervention. It is also clear that in order for the state to interfere in the lives of families, it must have a legitimate and narrowly tailored interest in the protection of children. Furthermore, in its intervention in the lives of families, the state must adhere to the rule of law, make its purpose clear, and respect the due process and equal protection rights of individuals.

While political theories are useful in framing the discussion of state intervention and the rights

of parents, conceptual problems arise out of a discussion of the rights of individuals within families because the family is viewed as a single entity when considering protections against state intrusion (Kelly, 2002). As the Supreme Court discovered in *Prince v. Massachusetts* (1944), however, there are times when individuals within a family need protection from other family members. A conception of parental rights based on the family as a single entity does not account for these circumstances.

Another criticism of a rights-based framework is that it creates an adversarial system under which the rights of individuals must be mediated. This is particularly problematic within families, especially in cases of abuse. Such a framework requires that the rights of one individual be limited so that the rights of another individual can be championed. It follows then that the rights of one family member (the abused) are in conflict with the rights of another (the abuser). The competing rights are then litigated in the adversarial environment of the courts, where both parties are provided with attorneys. This antagonistic process is generally harmful to families.

In addition, a preoccupation with the rights of the participants distracts attention from understanding and mitigating the complex circumstances that caused the harmful conditions in the first place. Particularly in child welfare cases, where the purpose of state intervention is to improve conditions for the entire family, a focus on the rights of individuals is not always helpful.

Application to Social Welfare

A discussion of the application of political theories to social welfare brings us back to the NASW *Code of Ethics*. Social workers have a responsibility to act politically and to protect families against injustices. Included in this social justice goal is the duty to protect individuals from undue infringement by the state. Social workers also have a responsibility to protect individuals from harming others. An appreciation for parental rights is useful in understanding how to balance these sometimes competing duties. Importantly, social workers are both helpers in society and agents of social control. Child welfare workers, in particular, have considerable authority in the lives of families, and it is important to remember that in this function, as representatives of the state, child welfare workers are subject to the same legal and political restraints placed on government. As such, social workers should remain ever vigilant about the rights of their clients and protect them from unnecessary interference, even from the workers themselves. As stated in the *Code of Ethics* (2009), social workers should “respect and promote the right of clients to self-determination” (1.02 Self-Determination section).

This analysis also serves as a reminder that principles of social justice are constant, even when circumstances make one wish otherwise. In cases of child abuse, it is tempting to ignore the legitimate rights of parents in order to protect children. As Justice Brandeis warned in *Olmstead v. United States* (1928), however,

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. (p. 479)

Even when trying to protect maltreated children, workers need to take into account the principles of personal autonomy, privacy, due process, and equal protection. While social workers should not stop advocating for children, they need to actively take into account the rights of parents and thereby promote social justice for both parents and children.

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