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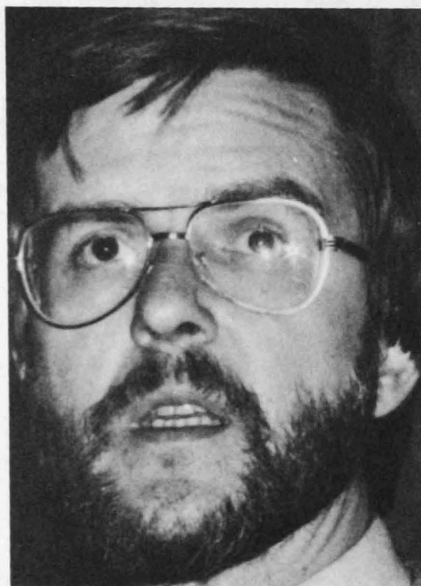
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# The Legalization of the Family: Toward a Policy of Supportive Neutrality

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## Summary:

In recent years government has withdrawn control from some family matters, while initiating intervention into others. Paradoxically, the intention behind such new regulation has often been to increase individual liberty.

Nevertheless, increased government involvement created the "sense that law had seeped into every crevice of American life and that sensible people ought to be asking whether we have gone too far," that underlies this conference. Support for Ronald Reagan's presidential candidacy represents a different kind of response to this feeling, as does such Republican legislation as the proposed *Family Protection Act of 1981*. Intended to "reemphasize the values that made this a great nation," this bill would bar the use of federal funds for educational materials undermining separate roles for men and women and would bar attorneys of any Legal Services Corporation program from helping poor people obtain divorces.

Such legislation expresses the wish not to remove government from the family, but to "replace the liberal's form of governmental intrusion" with another. "Those who most ardently supported the president are...disingenuous in asserting that they want deregulation. They want reregulation."

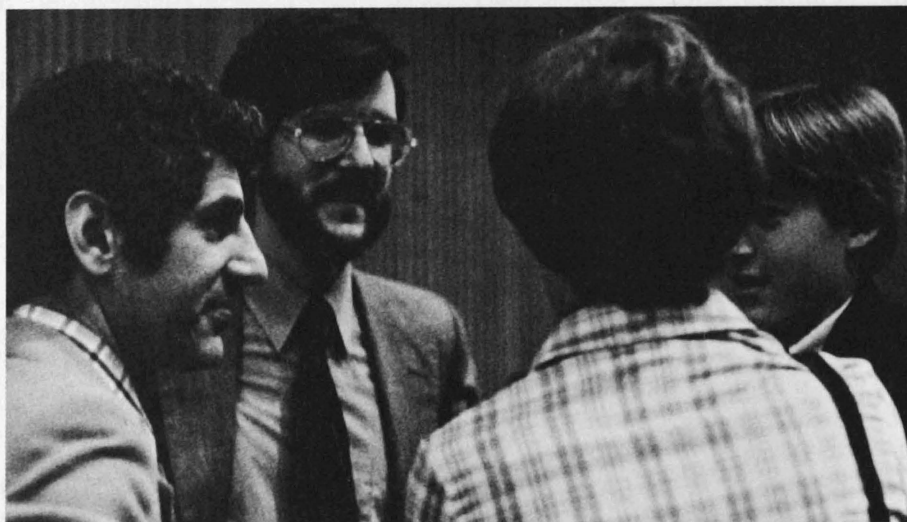
True deregulation, by contrast, could best be approached if government would adopt a policy of "supportive neutrality," entering into family life only to control "harms other than harms to our souls," and only when it has "a basis for believing that intrusion is likely to do more good than harm."

Such an ideal of governmental neutrality toward our choice of family structure accords with our national tradition of commitment to individual liberty, where government's role is to protect the citizens' freedom to live their lives as they please, so long as they do not cause unjustifiable harm to others. It is in families that individuals fulfill many of their needs and desires. In families we find physical protection and sustenance as well as acceptance and understanding, intimacy, and affection. "The family is also the vehicle through which each of us transmits our most fundamental values to the next generation in a culture where it is acceptable for people to hold a variety of values." The family is a sanctuary from the state; "it is with good cause that our Constitution demands that the state must have a warrant and a sound reason before entering our homes."

Although such protection of individual freedom has historically coexisted with laws which greatly limit choices of family structure, we should not continue to condone those laws whose "demands have cut far too deeply into the most basic of human needs and drives." Neither religious nor secular concerns can be effectively advanced to support retaining such restrictive legislation.

A more subtle argument, that "arbitrary rules about family matters are justifiable because they help create a sense of social cohesion," might describe the effect of a shared heritage, but not that of rules arbitrarily imposed on peoples as diverse as we who do not already accept them.

Government should intrude on family life only when its reasons go beyond moral repugnance, and only with "a subtle appreciation for the



Professor David L. Chambers, scholar on the family (center), hears from two members of his own family and from commentator Robert Burt (left).

values of family privacy and autonomy." Yet often, even when attempting to be neutral, government cannot be totally evenhanded. Legislatures must define a taxing unit and, in doing so, create incentives for people to choose one living arrangement over another. The case of *Marvin v. Marvin* illustrates perils threatening lawmakers and judges who aim to be neutral. While the justices' intention in the case seems to have been to support the relationship between unmarried people, and to make the courts available to the unmarried, their decision laid "the foundation for imposing our laws and our rules on the outlaws."

It was an oral and implied contract which the California Supreme Court held was enforceable in the case. The decision directed courts facing 'ambiguous facts' in absence of a written contract to 'presume' that 'the parties intended to deal fairly with each other.' In this, *Marvin* may have "furnished the parchment for a new governmentally imposed charter of 'fairness' for unmarried couples;" it also encourages just the sort of disclosure of the intimate details of domestic life to "bclster claims or denials of an unwritten agreement," that most states have sought to remove from the divorcing process.

It would have been preferable for California to announce that its courts would enforce only written contracts in such cases. Courts and legislatures should be as restrained in regulating families as government has traditionally been in matters of religious preference. Being supportive while being neutral requires that delicate balances be struck. Yet we must appreciate the desirability of finding this difficult balance to become a nation where people are free to choose the family life most likely to satisfy them and enrich their lives.

*The following excerpt, which is drawn from the opening of Professor Chambers's speech, discusses the complex, often paradoxical relationship between governmental regulation and individual liberty in family matters.*

## Excerpt:

"Legalization," the word of the day, has conflicting meanings. One, intended to sound the theme of this conference, conveys the notion of government regulation permeating throughout some area of human activity. The other—as found, for example, in the phrase, "the legalization of marijuana"—is a near opposite: the process of making legal or permissible that which was previously forbidden, taking government out of that which it had previously controlled. The recent history of government's relationship to the family amply displays both sorts of legalization, both intrusion and withdrawal, and reveals a paradoxical relation between the two—that as government frees people to live their family lives as they choose, people feel no more free, in part because much government involvement is required to facilitate the new freedom.

That American governments have in many respects reduced their degree of intrusion on the family is apparent on a moment's reflection. Today, for example, in the United States nearly three million men and women of all social classes regard themselves as "couples" and live together outside of marriage—a number that has more than doubled since 1970 and tripled since 1960. During recent decades, many states have repealed their statutes barring fornication. Few people were ever prosecuted under such laws, but some in the past were threatened and others who lived in sin were fired from public employment. An even more remarkable change in recent years is that a homosexual couple who wants to live together as family is no less free to do so, at least in most large cities—free to hold their heads high, free of any fear of criminal prosecution. Over twenty states have now removed criminal sanctions for voluntary homosexual relations. Homosexual couples are not, it is true, free to marry and they are far less free of discrimination in relation to public employment than are partners in unmarried heterosexual couples, but the law is more tolerant today than it was.

Even the married couple is freer today than in the past—freer to purchase contraceptives, the distribution of which was once severely hampered by state and federal laws, freer to seek an abortion of an unwanted pregnancy. For the married couple perhaps the most important freedom of all has become the freedom to decide not to be a family any more—the freedom, that is, to divorce. A hundred and fifty years ago many American states barred divorce altogether. Of course, many couples simply broke apart without divorcing but neither partner could legally remarry nor, in some states, obtain the law's assistance in dividing property. By the late nineteenth century, divorce was permissible but obtainable only if one partner could prove some sort of serious marital misconduct committed by the other, even in cases in which both partners wanted out of a hopelessly unhappy relationship. It was the state, not the couple, who decided by what moral code the conduct of the couple should be judged. Today, by contrast, all but a handful of states have adopted a system of fault-free divorce. Any person who wants to end a marriage can do so.

In all of this, I do not claim that people are much happier than in the past, but I think it undeniable that they are more free—freer under law and social mores to live with whomever they please, to conduct the relationship in the way they please, and to leave the relationship when they want to. . . .

If so much greater freedom has been permitted by law, why then do many people have a sense that they are less free than in the past and that government today intrudes more, not less, into the lives of families? Why are we

here today? In part, the sense of greater intrusion is the paradoxical effect of the new freedom—for in our society laws are not simply a way of controlling undesired conduct, they are also ways of facilitating people's freedom of choice. . . .

The refusal of states in the past to permit divorce constituted a massive intrusion on people's freedom to live life as they chose. Yet ironically the vastly expanded freedom to divorce produces much more involvement by courts in people's lives. Each year, thousands of Americans who have never been in a court before have their first taste in the depressing process of breaking up. And government's involvement typically continues for years after divorce. Week by week for up to eighteen years in cases in which there are children, one parent, typically the father, will be ordered to make payments of child support under threat of jail. The other parent will be required to permit the noncustodial parent to visit. This court-supervised period of the parents' lives lasts in the typical case in the U.S. nearly twice as long as their marriage itself had lasted. . . .

To be sure, government's greater involvement in families . . . over the last fifty years has also grown out of its increasing role, at least until the last few months, as insurer of all Americans' financial security and out of its involvement in responding to social ills such as racial prejudice, sex discrimination, and inequalities in educational opportunity. This increased involvement has been achieved by both a vast increase in revenue raising through taxes and a vast increase in expenditures through need-based programs, such as AFDC and Medicaid, and social insurance programs, such as Social Security. Many of these enactments require consideration of the various arrangements in which people live (who, for example, should be recognized as the dependents of whom?) and many have forced Congress to confront controversial issues of family policy. Congress would not have been paralyzed repeatedly during the 1970's by the issue of abortion if it had not adopted a broad Medicaid program for low-income citizens and had to decide whether abortions would be a covered service.

Finally, the growth of the mental health and social work professions has also led to greater government involvement in families. Psychologists, social workers, and psychiatrists have become increasingly confident that they can identify people in need of help or dangerous to themselves or others, as well as children who are at risk. They believe they can help people lead better lives. Legislators have responded. In some states, for example, the easing of the divorce laws was accompanied by laws that permitted courts to require couples to participate in counseling and conciliation efforts conducted by professionals.

More substantial in this regard has been the increasing role of the government to protect children against abuse and neglect by their parents. Since the 1950s, more and more has been learned about the widespread incidence of serious physical and sexual abuse of children within families and the more subtle but often equally serious effects of neglect—of children ignored by a self-absorbed, depressed parent, bereft of love or emotional support. This research led to the enactment of reporting laws in all states, laws which have succeeded in increasing dramatically the reporting by doctors and school personnel of suspected abuse or neglect. There has then been a proportionately vast increase in the number of families brought under government supervision. The new activism has been a mixed blessing. Some children have

been rescued from the high probability of death or disfigurement. Many others have been removed unnecessarily from their families, to their grief and the grief of their parents.

In the last few paragraphs, we have been discussing several ways in which government is heavily involved, often on a continuing basis, in the lives of families, intruding more than in the past. An additional source of the sense of intrusion may derive ironically from changes in law not directed at families at all but rather directed at businesses or at government itself. . . .

Consider, for example, the many new laws and court decisions relating to discrimination on the basis of sex. Some such laws affect families fairly directly. Laws that mandate equal opportunities for education and jobs and equal compensation for equal work may themselves directly contribute to the breakdown of traditional family relationships by encouraging women to leave the home and enter the labor force; but a more subtle effect of such laws may be in operation as well. None of these directly orders husbands to treat their wives as equals. Yet these laws, together with the language of liberation that has accompanied them, may well be perceived as imparting a judgment by government about the appropriate relationship of men and women in their private and not merely their public lives. At home the old-fashioned husband who has believed that his dominance was God's will may encounter more resistance in imposing his view and blame the government for having tampered with his natural prerogatives. Law follows and then reinforces social attitudes even toward family matters that it does not directly regulate at all.

Whatever the source of the perception that government is involved more in the lives of family, one measure of the universality of the perception is the degree to which people today accept government as responsible for the solutions to family problems. Newspapers and television newscasters deride bureaucracy and yet when a child is beaten to death by her mother, the focus of the newscast is not on the mother but on the social welfare department worker who had decided not to remove the child from home. The inadequacies of young adults are the fault, not just of parents, but of our public schools. The Civil Rights Commission blames the child-care problems of the working mother on the failure of government to provide adequate day-care services. In fact, in a society of the size and disparateness of ours, many problems perceived as serious do require government's involvement. The challenge is to define the appropriate lines between government involvement and private decision making. . . .



Commentator Robert Burt (left) and David Chambers