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STATE-INTEREST ANALYSIS AND THE CHANNELLING FUNCTION IN FAMILY LAW†

Carl E. Schneider*

I. INTRODUCTION

I want to develop some themes I advanced in my article entitled *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*.¹ In that article I noted that while courts and commentators have lavished effort on the fundamental-rights side of privacy law, they have scanted the state-interest side, thereby producing crucial weaknesses in that law.² I felt that state-interest discussions in privacy cases often seemed to me unsatisfying. This is an attempt to see why.

A major difficulty is that states tend to advance and courts tend to accept quite narrow specifications of a statute's purpose. I believe, however, that often particular statutes are part of a larger framework of laws serving some relatively broad purposes. More generally, "the Court often looks at the particular situation a case presents in isolation from its legal and social context and often looks at the challenged statute in isolation from other statutes and from other forms of social regulation."³

Here, I consider another interest that is part of that context. I do so by examining further the law's work in building and sustaining social institutions. Briefly, I suggest that that work, which I call the "channelling function," may often be advanced as part of a state's interest in statutes challenged on privacy grounds. I do not argue that such an interest will always be present or that it must always prevail. I do argue that it is an often ignored, but often legitimate, aspect of a statute's goal and of a state's interests.

† © 1992 by Carl E. Schneider. These remarks were based on a paper prepared for the Conference on Compelling Government Interests at Albany Law School, September 26-28, 1991. The full paper, on which these remarks were based, is scheduled to appear in a volume tentatively entitled *Compelling Government Interests: The Mystery of Constitutional Analysis* (Stephen E. Gottlieb ed.) to be published by the University of Michigan Press.

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¹ 51 *LAW & CONTEMP. PROBS.*, Winter 1988, at 79.

² *See id.* at 82-96.

³ *Id.* at 97.

Finally, a word about the scope of my remarks. One might ask two basic questions about the channelling function. The first is whether its use is wise social policy. The second is whether it may properly be adduced as a state interest to justify a law challenged on privacy grounds. I address only the second question. Channelling can be used for multiple ends. I will discuss the most typical and perhaps the hardest case, namely, the version of the channelling function that could have been most plausibly advanced in recent privacy cases. I am not arguing that *any* use of the channelling function constitutes by itself a compelling state interest or even that all its forms and features are desirable. For one thing, it is very hard to know what a compelling state interest is, and the Court has been reasonably closed-mouthed about telling us.

Finally, I end the beginning with a confession. In the years between the time Professor Stephen Gottlieb asked me to participate in this conference and today, I have lost interest to an embarrassing extent in the constitutional questions that I will be addressing—questions that increasingly seem to me stale, flat, and unprofitable—and find myself instead interested in the channelling functions's role in family law.

II. THE THEORY OF THE CHANNELLING FUNCTION

A. *Defining the Channelling Function*

The law performs the channelling function by creating, or more often, supporting social institutions that are thought to promote desirable ends. I intend "social institution" broadly: "In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative."⁴ Generally, the channelling function does not require that people use social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive that combine to make it seem reasonable and even natural for people to use them. Thus, people can be said to be channelled into them. As Berger and Luckmann write, "Institutions . . . , by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be pos-

⁴ ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 10 (1991).

sible.”⁵ Or, as James Fitzjames Stephen wrote, “The life of the great mass of men, to a great extent the life of all men, is like a water-course guided this way or that by a system of dams, sluices, weirs, and embankments. . . . [I]t is by these works—that is to say, by their various customs and institutions—that men’s lives are regulated.”⁶

With what institutions has family law been concerned? Most obviously with “the family.” However, that term has grown so broad and vague that we will treat two more specific institutions: marriage and parenthood. Each of these terms, to be sure, itself needs narrowing. To do so, we will first consult current social understandings. Second, we will narrow our terms by asking what social arrangements the law evidently seeks to promote.

Applying those tests yields a normative mode of “marriage” with several fundamental characteristics. It is monogamous, heterosexual, and permanent. It rests on love. Husbands and wives are expected to treat each other affectionately, considerately, and fairly. They are to be animated by mutual concern and willing to sacrifice for each other.

On the same tests, the institution of parenthood has several key normative characteristics. Parents should be married to each other. They are preferably the biological father and mother of the child. They have authority over their children and can make decisions for them. Like spouses, parents are expected to love their children and to be affectionate, considerate and fair. They must support their children during their minority. They should try to assure them a stable home. In particular, they should stay married to each other, so that the child lives with both parents.

Obviously, these two normative models are not and never were descriptions of any universal empirical reality, and soon I will examine recent changes in social practices and ideals that affect these models. Nor are these models the only ones the channelling function might be recruited to serve. Nevertheless, they do describe ideals that have had long and substantial allegiance in American life and that have animated the law. But how has the law tried to support these two institutions and to channel people into them? A quick and partial sketch should show more concretely how channelling works.

The law long ago (I am using a somewhat archaic version of emphasis) set a framework of rules designed to shape and sustain the

⁵ PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 52 (1966).

⁶ JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 63-64 (R.J. White ed., 1967).

model of marriage I described above: It wrote standards for entry into marriage, standards that prohibited polygamous, incestuous, and homosexual unions. It sought to encourage permanence in marriage by inhibiting divorce. It tried to promote desirable marital behavior both directly and indirectly. It imposed a few direct obligations during marriage, like the duty of support. Less directly, it invented special categories of property (like tenancies by the entirety and rights of dower and curtesy) to reflect the special relationship of marriage. It indirectly set some standards for marital behavior through the law of divorce. Fault-based divorce law did so by describing behavior so seriously wrong that it justified divorce. Marital-property law implicitly set standards for the financial conduct of spouses. Finally, prohibitions against nonmarital sexual activity and against quasi-marital arrangements in principle confined sexual life to marriage. "What is all this," James Fitzjames Stephen once asked, "except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society?"⁷

Similarly, a framework of laws endeavored to shape and sustain the institution of parenthood. Laws criminalizing fornication, cohabitation, adultery, and bigamy in principle limited parenthood to married couples, and laws disadvantaging illegitimate children made it wise to confine parenthood to marriage. Laws restricting divorce made it likelier that a child would continue to live with both parents. The law buttressed parents' authority in a variety of ways. For example, parents could use reasonable force in disciplining their children. They could decide whether their children should have medical treatment. Parents of "children in need of supervision" could recruit the state's coercive power. However, the law also attempted, directly and indirectly, to influence parental behavior. It required parents to support their children. It penalized the "abuse" or "neglect" of children and obliged many people to report evidence of any such behavior. It made parents send their children to school. Less directly, the law of child custody set some standards for parental behavior and emphasized the primacy of children's interests. Finally, some states further elaborated the relationship between parent and child by requiring adult children to support their indigent parents.

This sketch suggests some further comments on the channelling function. First, it has two aspects. In one aspect, it creates (or, more often) recruits an institution and attempts to shape and sustain its

⁷ *Id.* at 156.

nature. In the other, it seeks to channel people into that institution. It can perform these two tasks in several ways. First, it does so simply by recognizing and endorsing them. Thus institutions may be given some aura of legitimacy and permanence. Legal recognition may be extended by setting up formalized, routinized, and regulated entry and exit to an institution, as the state has done with marriage—i.e., “By the authority vested in me by the State of Michigan, I now pronounce you man and wife.” And, as I said earlier, the very currency and presence of these institutions to some extent channels people into them.

But mere governmental recognition may little affect an institution or an individual. A second channelling technique is to reward participation in an institution. Tax law, for instance, may offer benefits—like the marital deduction—to married couples that are unavailable to the unmarried. Similarly, Social Security law provides benefits to spouses it will not provide lovers. In a somewhat different vein, the law of alimony and marital property offers spouses the advantage of protection on divorce.

Third, the law can channel by discouraging the use of competing institutions. Sometimes competitors are flatly outlawed, as by laws prohibiting sodomy, bigamy, or adultery. Sometimes competing institutions are disadvantaged. For instance, the rule making contracts for meretricious consideration unenforceable traditionally denied unmarried couples the law’s help in resolving some disputes. Similarly, nonparents are presumptively disadvantaged in custody disputes with parents. Finally, restrictive divorce laws impede reentry into the alternative institution of single life.

Fourth, in principle people could be channelled into an institution by directly penalizing its nonuse. One might, for instance, say that school taxes penalize not having children, since nonparents get less out of those taxes than parents. However, the weakness of this example suggests the difficulty of finding good instances in American law of direct penalties for not marrying or not having children.

By and large, then, the channelling function does not rely primarily on direct legal coercion. People are not forced to marry. One can contract out, formally or informally, of many of the rules underlying marriage. One need not have children, and one cannot be forced to treat them well. Rather, the function shapes an institution that has broad social support and that comes to seem so natural that people use it almost unreflectively. It relies centrally on social approval of the institution, on social rewards for its use, and on social disfavor of its alternative.

B. What Purposes Does the Channelling Function Serve?

The channelling function's primary purpose I have said, is to foster social institutions and to channel people into them. But why might the state want to do so? Similarly, family law's channelling function is partly a specialized way of performing the protective, facilitative, and arbitral function. For instance, marriage variously serves the protective function. Law does not just (in conjunction with other social forces) create a shell of an institution; it creates (again with much help) institutions with norms. The institution of marriage, which the law recruits and shapes, attempts to induce in spouses a sense of an obligation to treat each other well—to love and honor each other. At the elemental level of physical violence, the law has tried to buttress this socially-imposed obligation by criminalizing, and (increasingly in some jurisdictions) aggressively prosecuting spouse abuse, by making cruelty a ground for divorce, and by taking cruelty into account in settling the spouses' economic affairs. At the level of economic life, the law has (at least nominally) supervised the fairness of antenuptial agreements and the distribution of the spouses' assets on divorce.

More subtly, these institutions also serve what I have called "efficiency" functions (but that might in this warmer context be called "ways of easing social life"). First, the channelling function's institutions save people from having to invent the forms of family life *de novo*. Imagine two nineteen-year olds living in a state of nature who find themselves in love. Without established social institutions, they would have to work out for themselves how to express that love, how to structure their relationship, and what expectations they might reasonably have of each other. The same couple in, say, the United States in the mid-twentieth century would find a set of answers to those questions in the institution of marriage. They would see other answers presented by other institutions. They would hear criticisms of marriage. They would not be compelled to marry. But, if their relationship met the requirements of marriage, marriage would seem natural to them because most of the adults they knew partook of it, because society and the law supported it, and because they had to some extent internalized its values. The institution, in other words, would be part of a readily accessible social vocabulary.

The channelling function does not just relieve people of the burden of working out afresh how to organize their lives. Even if one could satisfactorily invent modes of living for oneself, they probably could not be lived alone, but would be lived with others. This suggests that people need to understand and predict what other people think and

do so that they can readily and safely interact and cooperate with each other. Social institutions help meet that need. As Martin Krygier writes, "There are many social situations where our decisions are strategically interdependent [with the decisions of other people] [I]n such situations, *norms* will be generated which provide 'some *anchorage*; some preeminently conspicuous indication as to what action is likely to be taken by (most of) the others. . . .'"⁸ Social institutions and the norms that they create, then, help people predict and thus count on, cope with, and cooperate with other people.

More concretely, for example, the institution of marriage helps people plan for the future even before becoming engaged and reach easier understandings with their fiancés and spouses about their married lives. People dealing with spouses benefit as well. On the most mundane level, they know that when they say, "Can you come to dinner on the sixteenth?" the invitation will be taken as including both husband and wife. Less banally and more consequentially, a wedding ring warns anyone attracted to its wearer not to contemplate an intimate relationship.

The advantages of institutions in family life are vividly revealed by situations in which institutions are absent. Andrew Cherlin describes the difficulties for remarried adults and their children whose

day-to-day life includes many problems for which there are no institutionalized solutions. These problems can range from deciding what a stepchild should call his or her stepparent, to resolving the sexual tensions that can emerge between step-relatives in the absence of a well-defined incest taboo, to defining the financial obligations of husbands to their spouses and children from current and previous marriages.⁹

Nor are these failures of institutionalization easily overcome. David Chambers writes that "the relationship between many stepparents and stepchildren remains unclear and uncomfortable well beyond the initial stages."¹⁰

We can summarize these workings of the channelling function by imagining two people looking for recreation, who live in a world without tennis, and who are given three balls, two racquets, and one net.

⁸ Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 258-59 (1986) (quoting EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 109 (1977)).

⁹ ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 87-88 (1981).

¹⁰ David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102, 106 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

They could no doubt find some way of amusing themselves with these toys. But tennis is a good game partly because it developed over many centuries, and the two could not easily invent as good a game. Further, where tennis is a social institution, the two will readily find people with whom to enjoy their recreation, to improve their game, to boast of their successes, and to lament their failures. And part of the pleasure of tennis lies in knowing its past glories and following its current progress. Tennis, in other words, succeeds because it is a well-developed, well-established, and widely shared social institution. Marriage and parenthood benefit from that same fact.

My time is now expiring, and, as an advocate of social institutions, I feel obligated to stay within the rules. I do want to say one last thing, however. It will surely have occurred to you that there are some difficulties with the operation of the channelling function. A large part of my paper is given over to those difficulties. Let me just suggest to you very briefly what a few of those difficulties are.

The first difficulty, it seems to me, is that there is a serious question about whether the channelling function works. One of the most interesting bodies of literature in legal scholarship today is one whose real purpose seems to be to show that law makes hardly any difference in the world at all. I am thinking, of course, of Stewart Macaulay's work on contracts,¹¹ and of Robert Ellickson's work on the ranchers in Shasta County.¹² There is, in other words, a real question about the extent to which legal institutions actually affect people in the way they live their daily lives, especially when you consider how many other things more pressing and immediate are likely to impinge on people.

The second difficulty with the channelling technique is that it has obvious costs. When you disadvantage competing institutions, you are imposing costs on people who would like to use those institutions. There is a good deal of variation among different kinds of channelling situations that will in turn cause a good deal of variation in the cost of the channelling function. I think it is clear that there will be situations in which those costs are too high.

A third problem with the channelling technique is the possibility that social change has passed at least some versions of the channelling function by and that any attempt to restore something like the

¹¹ See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

¹² See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

status quo ante is doomed to failure. Let me just say, once again, that the example I have used to illustrate the channelling function is not the only purpose to which the channelling function could be put. My own suspicion is that the channelling function is now being used in a very different sort of way to try to reshape the relationships between men and women within marriages.

Fourth, it seems to me that the attraction of the channelling function depends considerably on what goals that function is set to pursue. This, like any other function, can be put to unpleasant purposes, and then it will be an unpleasant function. And the last question, of course, is whether the state should try to prescribe institutions for people to live in at all.