

Respecting family life

Jonathan Herring

*Clear the way when you see me comin through
Back up and bow, nuff respect due.*

Those are, I need hardly tell you, the words of Big Daddy Kane. They are but one example of the widespread use of the term respect in popular culture and particularly rap music. But it is not just rappers who are interested in respect, philosophers and lawyers are too.

Article 8 of the European Convention on Human Rights protects the right to respect for private and family life. Although much attention has been paid to the definitions of “family” and “private”, less has been paid to the notion of “respect”. Commentators have even been known to refer, to the article 8 right as the right to family life. Occasionally, even judges do. However, omitting the notion of respect leaves out an important aspect of the right and a proper understanding of it is essential if the scope of article 8 is to be appreciated.

This article will consider what “respect” in this context might mean. It will look at the concept as discussed in the wider political and philosophical literature. As will be seen the notion is hotly contested by philosophers and others who have written on this issue. It is not intended to resolve these debates, but rather use them as a way of throwing up some important questions about the potential scope and meaning of article 8.

ATTEMPTS TO DEFINE RESPECT

The notion of respect is one that has received much academic attention in recent years. In Britain this is in part due to the “Respect Agenda” which the Blair Government pursued with particular vigour in its final years. On returning to number 10 Downing Street Tony Blair announced:

“I’ve been struck again and again in the course of this campaign by people worrying that in our country today, though they like the fact we have got over the deference of the past, there is a disrespect that people don’t like.

And whether it’s in the classroom, or on the street in town centres on a Friday or Saturday night, I want to focus on this issue. We’ve done a lot so far with anti-social orders and additional numbers of police.

But I want to make this a particular priority for this government, how we bring back a proper sense of respect in our schools, in our communities, in our towns and our villages.”

Since then we have seen a raft of measures and papers seeking to increase levels of respect. Pupils receive lessons on respect in schools, funded by a package the Government said was worth £13.5 million. The Government created “respect zones”. If the urge had taken you could have found them at Derby, Hastings, Oldham, and Exeter, to name but a few. The Brown Government seems less supportive of the “respect agenda”, although www.respect.gov.uk is still up and running.

This is all well and good, but this trendy word has not been given a clear meaning. Tony Blair was content to say, as was his wont in the face of difficult questions of interpretation: we all know what respect means. Well we don’t.

The notion of respect is widely thought to be important and yet there is little agreement on its meaning. As can often be the case with illusive concepts it is easier to state what is respect is not, than to define it in a positive sense. A classic example of a lack of respect is to breach the Kantian imperative and to treat an individual as a means to an end. Respect is seen by some as an essential aspect of treating people equally and recognising their equal moral worth. If I tell you what to do simply because I prefer you to act in a particular way this is not showing you respect. It is not accepting that we have equal moral worth. It indicates I think my views should carry more weight than yours about how you should run your life. Parents’ favourite response in answer to their child’s question “why?” – “because I told you so” – may or may not be appropriate between parents and children. It is certainly not appropriate between equal adults. It is disrespectful. So lack of respect involves not treating another person as an equal human being, of equal moral worth. Thomas Hill (*Respect, Pluralism, and Justice*, 2000, 86) writes:

“respect is . . . something to which we should presume every human being has a claim, namely full recognition as a person, with the same basic moral worth as any other.”

The word respect derives from the Latin *respicere* which means to look again or look back at. As this indicates to respect something or someone involves a particular way of appreciating the thing or person. It means ensuring one is not indifferent or dismissive of the value or person. But saying more than this is problematic because of the variety of contexts in which respect has been used. Robin Dillon (*‘Respect’ in Stanford Encyclopaedia of Philosophy*, 2003, at 1)

explains that respect may be used “as a mode of behaviour, a form of treatment, a kind of valuing, a type of attention, a motive, an attitude, a feeling, a tribute, a principle, a duty, an entitlement, a moral virtue, an epistemic virtue”. It is therefore not surprising that that a single definition has proved illusive.

In this article I shall focus primarily on two issues surrounding the nature of respect, which are of particular relevance when it comes to interpreting article 8. First I shall consider whether respect involves valuing the object respected. Second, whether respect for family life requires a manifestation in action or is essentially a requirement of inaction.

IS ALL FAMILY LIFE ENTITLED TO RESPECT?

I will seek to argue next that to respect family life means to acknowledge that there is something of value within the family life in question. A useful starting point for this argument is to consider the distinction between tolerance and respect. You might tolerate your neighbour’s raucous parties that keep you up all night, without respecting your neighbour for holding them. Both respect and toleration involve a recognition that someone should be permitted to engage in an activity or at least that one should not intervene to prevent them. However, respect (unlike toleration) requires a recognition that the thing or person respected has some moral worth. This is not, of course, to say you necessarily agree or even approve of it. An academic may be respectful of her colleague’s output, even while fundamentally disagreeing with her viewpoint. But it would seem that respect would only be appropriate if some merit was recognised. If the academic believed all her colleague’s work to be plagiarised it would not be correct to talk of it being respected. Respect then indicates that one, at least regards the other’s views as having legitimacy and some moral worth, even if one believes them to be misguided.

But precisely what kind of worth is recognised when you respect something? Stephen Darwall (“Two Kinds of Respect”, (1977) 88 *Ethics* 36) has suggested that there are two main kinds of respect: recognition respect and appraisal respect. Recognition respect does not necessarily involve approval, but it involves an appreciation that there are appropriate responses to the subject due to its status or position in society. This creates a disposition to give the interests of the subject due weight when making a decision. For example, to respect the law is to give due weight to one’s legal obligations when deciding how to act. This you might do even if you believe the law to be a bad one. Appraisal respect, by contrast, involves a positive assessment of a person or reason. You may have appraisal respect for a world class athlete or a parent who cares well for their child because you admire what they do. Appraisal respect can be fairly nuanced. We may admire some aspects of a person’s character but not others (they are a

great lawyer, but a lousy parent) and we may have degrees of appraisal respect (he is a great poet, but she is even greater). By contrast recognition respect is respect for a person’s standing or status and there should be an equal level of respect for all those of the same status.

Article 8 and the meaning of respect

This discussion is important in the context of article 8, for three main reasons. First, as we have just seen respect does not require approval, but it requires the recognition of at least some moral value. This is significant for the definition of family within article 8. If respect, while not requiring admiration, at least requires a recognition of some value or moral worth, this indicates that the state is required to respect any family form which has value, even if it falls short of the government’s ideal. A conservative government might regard married family life as the ideal family form to be promoted, but should respect all family forms that have value. So the notion of respect indicates that “family” in article 8 should not be given a narrow definition, restricted to what might be regarded as an ideal.

Second, the notion of respect requires valuing of all forms of family which exhibit the desired characteristic. As Dillon (“Respect” in *Stanford Encyclopaedia of Philosophy*, 2003, at 1) argues: “respect is universalizing, in the sense that if F is a respect-warranting feature of object O, then respecting O on account of F commits us, other things equal, to respecting other things that also have feature F. In respect, then, subjectivity defers to objectivity.” This indicates that we should not exclude from our understanding of “family” in article 8 those intimate relationships which have the desirable characteristics that families have. Again this would point to a broad definition of “family” for the purposes of article 8.

A third, but more controversial argument, is that some living arrangements have no value worthy of respect. This might arise where a family relationship involved the abuse and/or oppression of its members. If child abuse is uncovered then the abuser parent-child relationship may cease to be a family form deserving of respect and therefore protected by Article 8. Of course, there may be some families where even though there are occasions of abuse, there is still sufficient value left in the relationship that it is entitled to respect. However, in other cases the relationship itself has become a tool of abuse. In such a case the family would be so devoid of moral worth and hence could not be entitled to respect under article 8.

One response to my argument would be to refer to Darwall’s distinction and claim that while a family relationship characterised by abuse may lose any entitlement to appraisal respect, it should still be entitled to recognition respect. In other words although the relationship no longer is respected for the benefits it produces for its members it must be respected by virtue of having the status of a family relationship. An analogy may

be drawn with, say, a religious leader living an immoral life. While he would be entitled to no appraisal respect, members of his religion might still owe recognition respect due to his status as a cleric.

I don't agree with this argument. I am not convinced that the family status per se is entitled to respect. But to substantiate that claim we need to examine further what the worth of family life is. What is it, then, in family life that is entitled to respect? This is a huge question which it is not possible to do justice to, but I will sketch two responses to this which have been advocated by commentators.

The care model

One model sees the care and nurture provided within family as providing its central value. This includes the care between adults, but in particular the production and raising of children. This sees the worth of a family not on its status or formal structure, but rather on the work done in the relationship. For many adopting this approach it is the care and particularly the care of dependents performed within families that give them their worth.

Under such a model whether the family relationship is marked by serious abuse this benchmark of the family is lost. The value of the family is gone. Without care there is nothing to value. What makes us normally respect families is absent.

“The intimacy model”

A rather different understanding of what it is in families that leads one to value them can be located in the writing of John Eekelaar (*Family Law and Personal Life*, 2007). He sees central to the respect for personal law is recognition of the value of the intimate. Without such recognition love is unlikely to flourish. He explains:

“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 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 in their conduct in these contexts, they should do so free from institutional constraint and censure.” (p 84)

He then explains that the value which is being respected is “the value of having space to develop one's personality and personal interaction free from the external gaze.” Importantly he argues that this is irrespective of the “inherent capacity of the activity to advance the well-being either of the actors or of others.” (p 85)

Crucially for our argument, Eekelaar is clear that this privileged sphere is not a licence for harming. He explains “the value that is respected by conferring freedom in the

privilege sphere is defeated if the behaviour harms anyone within or outside that sphere.” Indeed he reminds his readers that respect for the privileged sphere is about allowing love to flourish. Whether, therefore there is violence “respect for the privileged sphere would demand intervention.” (p 86). Eekelaar does not put his argument in terms of the fact that the relationship has lost its entitlement to respect. However, it is hard to see how a relationship can be entitled to respect, when at the same time respect requires the law to intervene to disrupt the relationship.

We have seen then, two different accounts of what it is in family life which is entitled to respect. Be it an account based on the significance of the value of caring or an account based on the values of intimacy and love; neither requires respect for relationships characterised by violence or abuse. Indeed Eekelaar argues quite the opposite that respect would require intervention.

Respecting family and private life

I have a second argument for why an abusive or oppressive relationship lacks respect under article 8. It is that article 8 protects both the right to respect for family life as well as the right to respect for private life. Within the right to respect for private life is the right to bodily integrity. Not only that but also “psychological integrity... a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.” (*Pretty v UK* (2002) 12 BHRC 149, para 61). Article 8 has been interpreted to mean that not only must the state not infringe someone's bodily or psychological integrity, but also the state must ensure that one person's integrity is not interfered with at the hands of another. Where, therefore, there is an abusive family situation there is an incompatibility between a state's respect for family life and respect for the private life of the individual members.

It might be thought there is a ready solution to this dilemma and that is to say that although there is a right to respect for family life, an interference in it is justified in order to protect the right to respect for private life of the members. This approach, it is submitted, should not be taken. It is undoubtedly possible to justify an infringement of one right by reference to another right. This is certainly so where the rights are protecting different values. Hence, for example, a person's right to respect for their home, may be interfered with if it is necessary to protect another person's right to bodily integrity. However, in a case where it is the family life which is itself abusive and interfering with an individual's right to respect for private life, one cannot both respect the individual's rights and the family life. In other words one cannot respect conduct (abusive family life) which is itself interfering with something else you are required to respect (individual bodily integrity). It is, therefore, impossible to respect both the abusive family life and respect the private life of the victim at the same time.

I cannot claim that the courts have adopted the view proposed here. Even in cases of horrific child abuse the courts have accepted the existence of article 8 family life rights between parents and children, only readily to find that the interference with those rights is justified. One can understand the attraction of such an approach. It means that public authorities must ensure that their interventions are justifiable even in the most apparently awful cases. This highlights, I accept, the fact that my argument may be of limited practical significance. For whenever the family form loses an entitlement to respect on my argument, it is inevitable that in any event there would have been a justification for an interference in the right. Nevertheless there is theoretical importance in the fact that the state should not be required to respect abusive forms of family life.

The notion of rights being suspended or forfeited through abusive conduct at first sight sound dangerous to many human rights lawyers. The concept is, however, not alien to human rights. Article 17 of the ECHR states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The European Court of Human Rights in *Zdanoka v Latvia* (Application no 58278/00, June 17, 2004) explained that the purpose of article 17 was to ensure that the rights under the Convention were not exploited. This could be used as the basis for a claim that the misuse of family life to oppress others can lead to a forfeiture of the right.

WHAT DOES RESPECT INVOLVE?

Philosophers have much debated what kind of “thing” respect is: is it an attitude, an action, a principle or a virtue? It is widely accepted that respect is more than a mere feeling. Respect requires more than just having positive emotions about a subject. Part of respect is ensuring that proper attention is given to the thing which is respected when one is deciding how to act. In other words the respect we have for the thing or persons causes us to respond to it in a particular way.

Robin Dillon (“Respect” in *Stanford Encyclopaedia of Philosophy*, 2003) argues that there can be four dimensions of respect. First there are cognitive dimensions. Respect involves a belief or acknowledgement that an item deserves respect. Second she argues there is an affective dimension: respect involves an emotion or feeling. Respect involves more than simply an intellectual acknowledgement of value, but includes a feeling or emotion towards the thing. Third, a conative dimension: respect motivates a person so that they are disposed to act, or not to act, in a way as a result of respect. Finally, she suggests a behavioural element. Appropriate behaviour includes refraining from certain treatment of the object or acting in particular ways as is fitting, deserved by, or owed to the object.

So it is accepted that respect affects the way that the object is treated. But what does this mean in the context of the right to respect for family life?

The ECHR and positive obligations

The European Court of Human Rights has made it clear that article 8 is primarily negative in effect: an obligation not to interfere with family and private life. However, there are in addition some positive obligations that are inherent in the notion of respect. These may require a state to adopt measures and act in a way to ensure proper respect is demonstrated. In *Folgero v Norway* ((App no 15472/02) para 84) it was explained:

“The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account.’ In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.”

In *Evans v UK* ([2007] 2 FCR 5, para 75) it was held:

“Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation” (Odièvre, cited above, § 40).

The following are examples of positive obligations that have been found to be required under article 8:

- To ensure there was an effective investigation and prosecution of a sexual assault (*X and Y v Netherlands* (1985) 8 EHRR 235).
- To take reasonable steps to enforce a court order granting a parent contact with their child (*Hokkanen v Finland* (1994), 19 EHRR 139).
- To consult with a birth father before an application for adoption is made (*Keegan v Ireland* (1994) 18 EHRR 342).
- To ensure there is a legal mechanism so that a child of an unmarried couple has the same rights as any other child (*Marckx v Belgium* (1979) 2 EHRR 330).

By contrast the following have not been held to be required by the ECHR:

- That one parent provide another with sufficient financial support that they did not need to have paid work and could instead spend their time caring for children (*Andersson and Kullman v Sweden* (1986) 46 DR 251).

- To provide financial and other assistance to prisoners so that they could remain in contact with their family (*Andersson and Kullman v Sweden* (1986) 46 DR 251).
- To allow the use of embryos after one of those whose gametes were used to create them had withdrawn consent (*Evans v UK* [2007] 2 FCR 5).

The European Court of Human Rights has avoided making generalisations about when a positive obligation may arise and so it is not easy to find a consistent rationale for when a positive obligation is or is not found under the ECHR. Surprisingly there has been little academic attention given to the question too. In part this may be due to the fact that the circumstances in which a positive obligation may arise are so wide-ranging that generalised statements are hard to make. However, I suggest that the courts academics have too readily lumped together “positive obligations” while they can be usefully broken down as follows:

(1) The European Court of Human Rights has recognised the principle that an individual has rights which the state is required to protect. By doing nothing the state can ensure that it itself does not interfere with a right. But, to ensure that the citizen’s right is not interfered with by another, the state must act positively by creating and enforcing laws or other means. For example, in *A v UK* ((1999) 27 EHRR 611, para 22) looking at the issue of corporal punishment, it was held:

“Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.”

In that case the failure of the state to criminalise severe corporal punishment infringed the child’s article 3 rights.

The state therefore in so far as is reasonable must enact laws to protect individuals from rights-infringing conduct and ensure those laws are enforced by the state authorities. As Stephanie Palmer (“A wrong turning: Article 3 ECHR and Proportionality,” (2006) CLJ 438) has argued, without such an interpretation the protection of the rights under articles 3 and 8 would be “seriously diluted or even ineffective.”

(2) Positive obligations can be imposed upon the state to ensure that state intervention is proportionate. Proportionality requires that any state intervention in family life is the minimum necessary to achieve the legitimate article 8(2) aim. Hence when a child is taken into care this is an interference in the right to respect for family life. It may, however, be justified as necessary in order to protect the interests of the child. However, such an interference may be the minimum necessary and hence there are obligations on the state to act positively in order to promote on-going contact between the child and parent.

(3) Positive obligations are imposed to ensure there is an effective way of complaining about breaches of human

rights. Without the state ensuring there is an effective enforcement mechanism where rights have been infringed or are in danger of being infringed the rights are of little practical use. In the family context this includes a right to seek court orders where a person believes the state or another has interfered with family life.

(4) There is the recognition that rights require not just the protection from interference from others but the creation of positive environments. Traditionally rights were seen in negative terms about limiting the interference in the state – negative restraints on the power of the state or crown. However, times have changed. As Padriac Kenna (“Housing rights: Positive duties and enforceable rights at the European Court of Human Rights” [2008] EHRLR 193) puts it:

“social democracy had moved the notion of human rights from a negative obligation on the state preventing interference with property or capital ownership or accumulation, to one where it was recognised that rights involved state positive obligations to ensure individual welfare for all citizens.”

Hence we currently see increasing interest in socio-economic rights protecting economic welfare and fair shares in the wealth of society. As Sandra Fredman (“Human rights transformed: positive duties and positive rights” [2006] *Public Law* 498) explains this creates a complex picture of citizen-state relations:

“The state’s responsibility is no longer conceived of as a unidirectional provider of a package of benefits, but instead in terms of facilitation and empowerment of individuals. Correspondingly, the rights bearer is characterised as an active agent instead of a passive recipient. Nor does responsibility flow only between the state and the individual. Also brought into focus is the role of community, within which the responsibilities of individuals to each other are valued together with the individual’s self interest.”

What is the relevance of these points to positive obligations in the sphere of family life? It is that the state has an obligation to give citizens the ability to enjoy the goods of family life. Quite what this means will depend on what one regards as the virtues of family life. As mentioned earlier, the care model and the intimacy model might indicate rather different responses here.

Intimacy and positive intervention

As already mentioned, one point of view is that respect for family life, at least as far as the state is concerned, is primarily or even exclusively shown but “keeping out” of family life. John Eekelaar sees the value of family life as part of the recognition of the intimate. Respect of the intimate is necessary for love to flourish. He therefore calls for a sphere of personal interaction which should be free from “institutional constraint and censure”. However, he argues that intervention can be required where harm occurs.

Notice that the argument here is not that where there is violence interference in the right to respect for family and private life is justified; nor even that where there is violence the Article ceases to be relevant. Rather it is that respect actually requires intervention. However, for Eekelaar respect of personal life primarily means non-intervention, it is only in the case of violence that positive intervention is required. Generally it is the absence of state regulation and observation that that intimacy and the benefits of it are able to flow and is the proper mark of respect for family life.

Martha Fineman

Martha Fineman sees the primary family form as a caregiver-dependent relationship. She explains that such relationships do deserve to be protected by autonomy of the individuals, but understood in a special way.

“Autonomy ... would protect entity decision making, giving the unit the respect and authority to self-govern, and including the right of self-definition. Autonomy does not presuppose that the family would be separate from society. The family would be anchored firmly within society, and subsidized and supported by market and state, but would retain authority within its parameters.”

This would involve a far greater degree of positive intervention from the state by way of supporting and subsidising the caring. The intervention should not, however, deprive the functioning of the relationship, unless it “grossly fails”. Further the means of state support and subsidy should not be at the cost of interfering in how the family organises itself.

I find much to support in Robin Dillon’s concept of care respect (“Respect and Care: Towards Moral Integration”, (1992) 22 *Canadian Journal of Moral Philosophy* 105). She contrasts it with the traditional Kantian view of respect which involves staying out of other people’s business. She argues

“So, while Kantian respect might be thought to distance us from one another (recall: ‘The principle of respect admonishes men to keep themselves at a distance from one another’), both in hiding our particular selves from one another and in erecting protective barriers of rights against each other, care respect can be seen to involve a determination to discover, forge, repair, and strengthen connections among persons in ways that benefit all of us. Care respect joins individuals together in a community of mutual concern and mutual aid, through an appreciation of individuality and interdependence”

While seeing that primarily in the context of respect between individuals, the concept can be used to state services. In particular when arguing as follows:

“[R]espect requires not so much refraining from interference as recognizing our power to make and unmake each other as


persons and exercising this power wisely and carefully.

Respecting others also involves, more positively, caring for others by responding to their needs, promoting their well-being, and participating in the realization of their selves and their ends.”

Such an understanding of respect can indicate a model where the state is required to offer services to families as they struggle with family life. Central to the notion of care respect in this context would be a recognition that each family is different and what they are seeking to achieve and what they need from the state will vary enormously. To some what will be required from the state is simply inaction; but for others it will involve the offering and assistance in burdens of family life. Proper respect then would require the state to recognise the benefits of the care offered in family life and offer support where wanted by the family. This model sees state as an enabler and assister of family life. That, it is suggested, is what respecting family life should be seen as involving.

CONCLUSION

I have sought in this article to highlight the significance of the word respect in article 8. In particular I have explored two questions. The first is the meaning of the word respect as including recognising that something has value or worth. This is significant for the purposes of article 8. It means that a narrow definition of family is not appropriate for article 8. Family forms do not have to perfect to be respected; but all family forms that have the value we treasure in families should be respected. However, it has also been argued that some family forms which are oppressive or abusive of their members that they lose entitlement to respect.

Second, I have considered the extent to which respect for family life requires positive intervention by the state. I have argued that this question turns on the nature of the value which is promoted within family life. This is a controversial issue on which there is no consensus. However, I have sought to promote an understanding of respect that sees the role of the state being to empower and enable families to flourish and promote the interests of their members. This requires more than that the state sitting back and avoiding intervention but requires positive assistance from the state to respond to the needs of the particular family. 

- This article is taken from a lecture given by the author at the Institute of Advanced Legal Studies on June 3.

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