

CITIZENSHIP AND FAMILY SECURITY

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WHILE A VOLUME would be necessary for any comprehensive discussion of citizenship, family status, and social security, it is the bringing together of these concepts, the correlating them in our minds, that gives significance to my subject. Assuming our knowledge of them singly, I would like, in this brief compass, to present a thesis regarding the apparent conflict between citizenship and the family that has arisen in the field of social legislation, especially welfare legislation.

The incidents of state allegiance have always exerted strong influences upon family organization and family functioning. Conversely, as a matter of history it is true that the family furnished the basic foundations of the state as an institution. I firmly believe that social security cannot be substantially attained unless social legislation is conceived and drafted in such a way as to preserve the integrity of the individual's status as a member of each of these institutions.

There are certain obvious principles to be kept in mind in relation first to citizenship and then to the family. To begin with, there is the emphasis upon power which springs from the state's achievement in constituting itself as an organization of individuals, each of whom, in his individual capacity, acknowledges toward it a direct, personal, and intimate allegiance. There has arisen in consequence an urgent need to strengthen the family as an agency of social stabilization and adjustment. I wish to indicate in this connection why I think the benefits of legislation relating to the welfare of the family—and more and more of our legislation is allegedly so motivated—should never be conditioned on the individual citizenship of any of its members.

Citizenship expresses the relations of the individual to the state. No aspect of this concept seems to me more significant than the fact that the interests of the state appear to have brought about a process of individualization in this relationship. When I use the term "individualization" I am thinking not only of its origin and conceptual development, of the significant changes that have come about in the factors that determine

citizenship, but also of the resulting emphasis upon the personal character of the state's guardianship function and of the individual's obligations as a citizen, its growing significance in the life of the individual, and its increasing influence, not always stimulating, upon other personal ties and associations.

That the modern state had its origin in the family and clan is a general conception. Jewish history indicates some such development plainly. It is obviously true that in defining and determining citizenship, the *jus sanguinis*—the law of the blood—came first; the *jus soli*—the law of the soil—was a later development. Roman conquests, on the other hand, emphasized territorialism. As a result of Rome's collective extensions of citizenship, naturalization became a concomitant of residence within the particular territory as distinguished from a blood relationship. In our law derivative citizenship is now generally conditioned by residence. Latter-day legislation in relation to marriage is striking evidence of the general trend.

Sir Arthur Keith¹ says that "Under modern civilization Nature's cradles have been smashed to atoms, but the tribal instincts which Nature intended for the propagation of new breeds of humanity have come down to modern man in undiminished force." He says, further, that "The forces, however, which forged the tribal links into a national chain were commerce, communication, and the building of massed populations." Accepting this statement with some reservations, I should nevertheless think it consistent to point out that the tangible evidence of the achievement of national identity and power, and perhaps the technique that has been employed in bringing about national dominance, has been the development of a strong personal bond between the individual and the state. A relationship has been created, as Keith points out, intimate enough to prevail even over strong and instinctive tribal bonds.

The real force and effect of this relationship have been felt since the French Revolution, when

*Federal Security Agency, Office of the General Counsel. Based on an address before the National Council on Naturalization and Citizenship, New York, Mar. 15, 1940.

¹ Keith, Arthur, *Nationality and Race From an Anthropologist's Point of View*, 1919, pp. 33, 35.

it became significant for the great masses of the population. Shortly afterward came universal military service, an individual service which was based upon individual allegiance to the state and replaced the use of mercenaries. Since that time nationalism has grown strong, as territorialism and the individual and personal character of one's relations with the state have become generally accepted.

The United States, for example, has strongly insisted upon the principle that the individual should be free in his choice of citizenship. The Declaration of Independence recites the King's interference with the free right of migration to, and naturalization in, the new country, as well as the free settlement of our domain. The War of 1812 grew largely out of the right of self-determination in relation to state allegiance. While it is both true and interesting that the so-called "natural and inherent" right of individual expatriation was keenly and successfully resisted in our courts and the question was resolved only by legislation,² nevertheless its prevalence appears as a necessary consequence of the general trend, lest duality of citizenship occur on such a scale as to interfere with the general trend toward exclusive and undivided allegiance. A child's right of election to American citizenship founded upon his birthright, it may be noted, is not affected by the expatriation of his parents.³ The principle is therefore fundamental among those on which our Government is founded.

An interesting example of the same principle has arisen in our assistance to needy children. The primary beneficiary here is the child. While the irrationality and perhaps the futility of citizenship distinctions at this level have been quite generally recognized, laws have nevertheless been passed which would condition such aid on the nationality of the mother or other guardian. It will be seen that such legislation runs counter to the concept of individuality and appears therefore to be subject to attack on constitutional grounds.⁴

This illustration, however, may serve to introduce the really formidable issue that confronts us today with respect to citizenship and social legislation.

With the great expansion of the state's paternal functions, especially those of a proprietary nature, a basic conflict appears to arise in relation to this individual-state relationship. If, for example, we conceive of the benefits and protective functions of modern social legislation as dependent upon citizenship—which expresses fundamentally the incidents of one's political and civil or juridical allegiance—we are necessarily thinking in reciprocal terms of the individual's relations with the state, and hence of the rights and powers of the state equally with the privileges and immunities of the citizen. We are thus amplifying enormously the areas in which the relationship becomes a matter of major concern in the life of the individual. We are multiplying the rights, privileges, and obligations contingent upon its existence, what lawyers call the legal incidents of the status. By the same token we are founding so much the more firmly the "hold" that the state has upon the individual.

We must remember, too, the axiomatic truth that the more complex the incidents of any status become, the more difficult it is to attain. In passing upon questions of naturalization, the courts have in crucial cases tended to emphasize the elements of reciprocity in the relationship, the willingness and ability of the individual to fulfill his part of the bargain to the state as a state. This emphasis, while reflecting to some extent the thinking of the individual court or judge, may nevertheless constitute a true interpretation of the spirit of the law. It seems significant, nevertheless, that the individual case often seems to emphasize and bring into relief the material considerations involved, extending even to considerations affecting the physical and economic condition of the individual petitioner for citizenship.⁵

In contrast to this individualized approach, our social legislation has had, I would say for its primary objective, the strengthening of the family; that is to say, of the family as a unit—of family ties and family bonds.

The family, as I am aware from consultation with biologists, anthropologists, sociologists, and others whom we may call "familiologists," should perhaps be defined only by scientists, and then preferably perhaps in a very select company.

² 15 Stat. 223, C. 249, sec. 1; cf. 34 Stat. 1228, C. 2534, sec. 2.

³ *Perkins v. Elg*, 307 U. S. 325.

⁴ *Sacramento Orphanage and Children's Home v. Chambers*, 25 Cal. App. 530, 144 Pac. 317. Opinion of the Attorney General of Minnesota, dated Aug. 5, 1930, to the State Director of Social Welfare.

⁵ Cf., for example, *In re Hoffman*, 13 Fed. Supp. 907; *United States v. McIntosh*, 283 U. S. 605, at p. 621.

So many approaches have been made, however, that I may as well say that, in my thinking, the family is essentially a natural phenomenon. It is thus the medium—and I choose the word “medium” because it includes environment—by or through which life on the earth is given human form and personality, and through which in due course it takes its place in the social order. While this concept may emphasize the conjugal grouping, I suggest it as a sort of tolerant concept which has fairly universal applicability and takes into account the fact that even the primates exhibit excellent studies of the phenomenon. Westermarek, however, declares that the orang-utang is an exception since from babyhood he is able, as an individual, to put up an excellent defense against any likely antagonist.⁶

This observation leads me to the fact that what we are talking about is not just the family, but family security. At every step of the way nature, who gave us the family, warns us that what she had in mind most significantly was security, security and equipment perhaps, although equipment in itself is an element of security. While this statement is a truism, it is an interesting thought to me that the basic bond in the family is, as I conceive it, the elemental adhesion of complementary forces such as physicists are now so busily investigating in material structure. I believe that social stability derives from the basic adhesive forces that unify the family just as I believe that the stability of all matter derives from the adhesive forces at the heart of material structure. We are dealing here with the elementary forces by which nature has provided us with a stable base on which the whole superstructure depends.

The family, in the second place, is a conservative agency or an agency of stabilization. Nimkoff⁷ says:

“There are certain institutions which have, as part of their function, the development of new comforts, new satisfactions, new ways. They initiate experiments and engage in new programs. Educational institutions are constantly devising new schemes of instruction, with the intent of perfecting the learning process. Industry, likewise, experiments with new processes of the production and distribution of goods. Most of all, institutions of scientific research live upon change; it is

their reason for being. But the family differs fundamentally from all these institutions. Its chief purpose is to conserve the old needs of human nature and the human race. . . . Affection, tranquility, stability— . . . And the thing which the family dispenses most of all, affection, is a native emotional state unneeded of change.”

Stanley P. Davies⁸ expresses the same idea when he says:

“Democracy builds upon the rock of a social institution best able to develop the socially motivated, emotionally mature citizen who will not be swept away by slogans and symbols. That rock is the family.”

The extraordinary protective capacities of the family also furnish an absorbing study. I am interested, for example, in what I understand to be the fact that the family offers resistance to the progress of disease for the very reason that it is a cross-section of humanity. Its members, for example, are not ordinarily equally susceptible to diseases which differently affect men, women, and children; and so it establishes barriers which military camps and other concentrations of individuals of the same sex and age do not present.

In the fourth place, while I cannot enter upon the subject of family functioning, it is important to keep before us the fact that the family is and must be perhaps the most reliable agency in the process of social and cultural adjustment. The family possesses the supreme power of actual amalgamation. The family moreover actually so symbolizes unity and cooperation that individual marriages may exert a far-reaching influence. Whole tribes and nations may be affected by them. The family is also the real instrumentality at work within the local group, the band or neighborhood described by Linton and other anthropologists in the process of cultural assimilation.⁹ The significant point here, I believe, relates to the slow processes of adaptation, tempered by its powers of resistance, which equips the family to deal not so much with superficial methods and techniques, adjustment to which is a relatively simple matter, as with the more significant underlying ideals and ideologies.

It is impossible to think of these interrelated functions of the family quite apart from history. The Greeks were past masters of the art of man-

⁶ Westermarek, Edward, *The History of Human Marriage*, Vol. 1, 1921, p. 32.

⁷ Nimkoff, M. F., *The Family*, Boston, 1934, p. 233-234.

⁸ Davies, Stanley P., *Our Unchanging Goal: The Family*, 1938, p. 24.

⁹ Cf. especially Linton, Ralph, *The Study of Man*, 1936.

made form and structure, and they idealized the state. Plato utterly sacrificed the principle of the family in the rules which he drafted for training his suggested social guardians, and quite naturally so, since he evidently had no conception of the importance of its restraints and disciplines, its conditioning of social behaviour, or the basic necessity for its humanitarianism. It were better, he said, for his purposes that neither mother nor father should know their own child.

The classical culture, howsoever tolerant it was or came to be, failed either to assimilate or to make appropriate adjustments to foreign elements. It was therefore reduced to the inevitably futile attempt to maintain an enforced isolation. There has been a tendency to overemphasize either the extent of the intrusion of foreign ideologies, on the one hand, or the disappearance within the Greco-Roman State of normal family life, on the other. The two things appear to be intimately related. The necessary adjustments had to be made, and the family was the essential instrumentality for the job. There was absent the very awareness of its significance.

When the forms and structures that were the ideal of the Grecian culture yielded to the pressures of primitive and untutored life, society went into a coma just as does many a human being whose aims and ideals lie shattered at his feet. Social organization had to begin again by the slow process of local adhesion in communes and, outside of communes, in feudalism. The search for security was intensive because society had learned a great lesson. Walls were erected thicker and higher than ever before, and men sought refuge within them. To be sure, they fled from perils they could see to those they could not see, to filth, skeletons, and the slavish bonds of a feudal allegiance. But what they sought was security.

On one point there appears a very real unanimity of expert opinion. The church espoused the cause of the family; both were preeminently conservative and enduring agencies, and by that means a stable society was gradually resurrected. The individual was lost sight of for a time, and it is significant to me that so also for the most part was the state. Luther resurrected the individual, and Cromwell organized individuals. The state was also resurrected and waxed strong in body and in spirit and assumed the name of nation.

Gradually its functions have increased and so have the incidents of citizenship. National power lies in its command of the individual, of all individuals, in the very fact that it is an organization of individuals.

Modern emphasis on the family then is a natural reaction to the instability of a world of powers thus founded. As respects social legislation, the role of the state as the protector or guardian of the family in the interest of stabilizing society, and not as an instrumentality of force with aims of its own devising, must prevail.

The Oregon school case, which dealt with the prerogatives of the family in relation to education, is, I believe, very much in point.¹⁰ Said the Supreme Court, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Then are not the dynamics of the interaction between citizenship and family security apparent? Each of these relationships places a compelling call upon the allegiance and loyalty of the individual. It is profoundly true, as Galsworthy suggests, that the struggles and conflicts of life—physical, mental, and moral—spring from the conflicting and overlapping bids that are made for the loyalty and allegiance of the individual. A dominant power is assured for any enterprise to the extent that it can make a successful bid for exclusive loyalty; and it is this principle of exclusiveness, necessary as it may be to the achievement of dominance, which, whenever it appears, wars upon the family and threatens the stability of the social order. Whensoever areas of conflict appear between state and family allegiance, they appear as an evidence of national attitudes, objectives, and enterprises in conflict with the freedom and absence of restraint which is necessary to family functioning and with the essential conditions of a stable society. It is this principle of conflicting loyalties that symbolizes for me the really prejudicial effect of what we call regimentation. Conflicts of loyalty spell insecurity.

This conflict indicates the significance of the introduction to one another of government and social science. In our social security, and in our housing laws, in the very regulation of wages and

¹⁰ *Pierce v. Society of Sisters*, 268 U. S. 510. Opinion by McReynolds, J.

hours, in our health services, in all family services under governmental auspices, in our approach to the great problem of the family before the court, in the legislative and judicial recognition that I assume will some day be accorded to a gradually emerging basic science of psychiatry, we are moving toward a reorientation of the state in the interest of more stable conditions. Much has been said—too much it seems to me—about the extension of governmental function. It is not extension of function that is significant. It is rather its orientation or reorientation.

In the ultimate analysis, the integrity of the family and citizenship status must be preserved, each in its own sphere. This is an essential condition of freedom. The family pays little heed to citizenship lines. The family would not be true to its role as an instrumentality of racial and cultural amalgamation or adjustment if it did. Hence welfare legislation, designed to aid the family, cannot achieve its ultimate purpose if its benefits are contingent on citizenship. The two things are incongruous in the same law.

This fact has been recognized. Consider, for example, the principles embodied in the program of old-age and survivors insurance as established by the amendments of 1939 to the Social Security Act. This legislation, which provides not only monthly benefits to retired workers but also benefits for dependents and for survivors of deceased workers, definitely recognizes the economic interdependence of the family. A wife or widow is held by the express terms of the statute to be living with, or to have been living with, her husband if they were both members of the same household or if she receives or received regular contributions from him toward her support. The benefits are based on wages from employment, and employment includes services performed by an employee for the person employing him *irrespective of the citizenship or residence of either*, such employment being within the United States or on an American vessel, as specified in the act. There is no alienage or residence limitation on the benefits which are payable. The insurance, in other words, is not conditioned upon the individual-state relationship and therefore constitutes an incident of the employment rather than of that relationship.

It was proposed in the course of this legislation to forbid payment to aliens or to persons residing

more than fifty miles from the territorial borders of the United States. It was also proposed to continue the tax upon the employer as a privilege tax and to make the appropriate refund to disqualified aliens. These proposals, however, were not incorporated in the law.

Under the present system, therefore, the social security program is an incident of employment, insofar as is administratively feasible, within the country and is appropriately carried forward in the interest of family security notwithstanding the fact that the theoretical divorcement of tax contribution and benefit payment remains unaffected. The funds employed in paying benefits are, in law, proprietary funds of the Government; and you will remember that this circumstance is the real basis upon which State legislation which makes citizenship the condition of public employment and relief is constitutionally justified.

In the same way the unemployment compensation program, which like the public-assistance program is a Federal-State enterprise, conceives the benefit structure as an incident of the employment and has resulted in substantially no distinction based upon citizenship or nationality. In this respect it has had the benefit of the analytical attack made upon such discrimination as has occurred in State workmen's compensation laws. Security is thus conceived in terms not only of the individual's own motivation from the standpoint of his family responsibility but even more pertinently from the standpoint of the basic purpose of the state in the whole program.

It may be said therefore that the presence or absence of citizenship requirements furnishes an acid test of true orientation in social legislation, especially social insurance and welfare legislation.

It must be remembered, however, that citizenship in this country has a dual phase. Since the enactment of the Fourteenth Amendment, national citizenship controls, and State citizenship follows. There has been built up, however, subject to constitutional limitations and the treaty-making power, a system of precedents in all the States with respect to various incidents of citizenship. Up to the present time these State precedents have prevailed in significance over the national incidents, because State legislation has affected much more intimately the conditions of family life and employment; it is true that at times these precedents may appear

to conflict with constitutional principles, especially the principle that the determination of the conditions under which aliens shall be admitted to and continue to live within this country is exclusively reserved to the National Government.

Welfare has been traditionally a matter of State and local concern although, I take it, it is tending to become a matter of national and international concern. To this local tradition, however, we must ascribe the fact that, notwithstanding these national precedents in the field of social insurance, nearly half our States still condition their old-age assistance payments upon the fact of citizenship and as an alternative in some instances, upon a relatively long period of national residence. The period of State residence is, of course, limited by the express conditions of Federal participation in the program.

This situation, it seems to me, makes it all the more pertinent to observe that the function of the State is fundamentally the same in relation to both insurance and assistance programs and for that matter in all welfare provisions; and that the provision of assistance, when made by legislation, does constitute in every instance an actual right, although one ultimately founded in social need.

Intimately related to welfare and social legislation as it affects the family, and furnishing another crucial test of our attitudes, is the subject of land tenure, of homestead and housing legislation. At common law, aliens could not acquire land by operation of law, including inheritance, but could acquire by deed a title good against all but the State. The fear of absentee ownership was natural. It is significant that the only major relaxation of the rules with respect to alien tenure in Federal statutes has been in relation to homesteads where originally the beneficiary was described as the head of a family. The condition of the filing of a declaration of intention, moreover, might be satisfied after entry on the land.¹¹

With only minor restrictions some 30 of our States grant aliens practically the same rights as citizens with respect to real property. Presumably the homestead-exemption laws may have exerted some influence in this respect as they have oriented popular thinking in terms of the protec-

tion of the family. Justin Miller's recent authoritative article on this problem emphasizes the importance of the question in terms of international relations.¹² He cites the recent tendency to utilize the instrumentality of reciprocal treaties. It would seem, however, that our deep concern with this whole question from the standpoint of the function of the family must be fully recognized. The present reorientation of our thinking in terms of family stability and the emphasis upon residence in relation to citizenship would under normal conditions lead one to look forward to a further liberalization of our real-property laws as they affect aliens. Obviously any proposal such as the recent one to condition Federal housing aid on the exclusion of aliens from tenure seems fundamentally opposed to the general trend of social legislation.¹³

The many articles in recent legal publications are indicative of an aroused public interest in all these issues, particularly in view of their recognition of the purely social consequences of such legislation.

From a more dramatic standpoint, what seems to be lost sight of by many who are not administratively in contact with the problem is the fact that a cumulative and hence devastating effect upon single families of mixed nationality may result from the many existing forms of alien discrimination. In New Jersey, for example—and the State could no doubt be New York or some other—there is a certain family. Its older living members are barred as aliens from old-age assistance. The employable head of the family is barred as an alien from employment opportunities to which he is adapted, including even WPA employment. His wife is a citizen in excellent standing as such. She has given birth to a number of children, among whom is a boy of 17; two younger children are citizens; and she is pregnant. For herself, therefore, she has job enough. Her older son's application for CCC training depends upon the establishment of his citizenship. This fact may have influenced her thinking, for she says, in effect, "You expect me to raise my children subject to, and in good condition for, the military service as well as for the civil service of the State, but because of his present alienage you deprive my hus-

¹¹ *Cf. Bogun v. Edinburgh American Land Mortg. Co.*, 63 Fed. 192.

¹² Miller, Justin, "Alien Land Laws," *George Washington Law Review*, Vol. 8, No. 1 (November 1939), pp. 1-20.

¹³ H. R. 7922, 76th Cong., 3d sess., Feb. 9, 1919, p. 52.

band of the very job that would make this at all feasible.”

We are living in a world of incongruities. A psychology of isolation has appeared amid an epoch-making development of the techniques of communication. We are realizing that the airplane and more especially the radio, while effective within their own field, are not substitutes for the agencies of cultural adjustment. In fact, because they directly confront us with the evidence of ideologies so difficult to reconcile with our own, their first effect may well be to arouse our native antipathies. It is conceivable that this sudden and somewhat explosive development has at first made us more race and nation conscious, or has appeared to rush us toward what we instinctively resist.

The agencies of adjustment remain what they always have been, not the agencies of power but the slower processes of social accommodation and adaptation. So far as possible these processes must be encouraged to work. So far as possible they must be freed from the statutory differentiations which impede their operation and they must not be frustrated by any basic policy of enforced isolation. Their power is slow but irresistible if, with the support of the state and fostered and strengthened by the state, they are left free to exert their influence to the utmost.

Nothing that I have said, however, implies by any means that we do not need effective controls, internal as well as external, against disease, crime, and all their train; although I believe that some day the inclusion in this list of poverty, in the case of a sound and industrious individual, will be regarded with the amused incredulity that it deserves. I say only that indiscriminating barriers have not been ultimately maintained by any exercise of force.

It has been wisely remarked that the only reason we have not already had a world government is because we have not had a world enterprise. The history of our attempts to establish certain types of administration on an international basis, however, suggests that social legislation is perhaps the most promising field for this endeavor and may require world cooperation to make it administratively feasible and effective as the right of mankind, not merely of citizens. Administrations to the welfare of the race in terms of humanity, as distinguished from any more limited allegiance, can only operate, like commerce itself, on a jurisdictional basis, unlimited by territorial considerations. Administrative cooperation on an international basis may therefore be appropriately founded on the requirements of the social enterprise with which we are quite generally now engaged.