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The Black Family in Modern Slavery

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In his autobiography, Malcolm X describes a childhood ended and a family divided by the racially motivated murder of his father, the emotional breakdown of his mother, and the exercise of state authority. El-Hajj Malik El-Shabazz, as he later came to be known, spoke with bitterness about the role of the state in the disintegration of his family. After his father's death in 1931, his mother was repeatedly fired as white employers learned that she was the widow of a "troublemaker." The family was forced to accept welfare payments. For Malcolm, these payments represented sustenance less than they represented the beginning of a "psychological deterioration [that] hit our family circle and began to eat away at our pride."[1]

> When the state Welfare people began coming to our house . . . [t]hey acted and looked at . . . [my mother] and at us, and around in our house, in a way that had about it the feeling—at least for me—that we were not people. . . .
>
> My mother was, above everything else, a proud woman, and it took its toll on her that she was accepting charity. And her feelings were communicated to us. . . .
>
> She would talk back sharply to the state Welfare people, telling them that she was a grown woman, able to raise her children, that it wasn't necessary for them to keep coming around so much, meddling in our lives. And they didn't like that.
>
> But the monthly Welfare check was their pass. They acted as if they owned us. . . . As much as my mother would have liked to, she couldn't keep them out.[2]

Five years later:

> [T]he state Welfare people kept after my mother. By now, she didn't make it any secret that she hated them, and didn't want them in her house. But they exerted their right to come. . . . I think they felt that getting children into foster homes was a legitimate part of their function, and the result would be less troublesome, however they went about it.
>
> And when my mother fought them, they went after her. . . .

1. A. HALEY & M. X, THE AUTOBIOGRAPHY OF MALCOLM X 14 (1965).
2. *Id.* at 12-13.

I'm not sure just how or when the idea was first dropped by the Welfare workers that our mother was losing her mind.

But I can distinctly remember hearing "crazy" applied to her by them when they learned that the Negro farmer who was in the next house down the road from us had offered to give us some butchered pork—a whole pig, maybe even two of them—and she had refused . . . It meant nothing to them even when she explained that . . . it was against her religion as a Seventh Day Adventist.

They were vicious as vultures. They had no feelings, understanding, compassion, or respect for my mother . . . Right then was when our home, our unity, began to disintegrate. We were having a hard time. . . .But we could have made it, we could have stayed together. As bad as I was, as much trouble and worry as I caused my mother, I loved her.[3]

A year or so later, Malcolm was placed in a foster home. Eventually, his mother was committed to a state mental hospital. Malcolm X described the subsequent order making each of her eight children a ward of the state as "Nothing but legal, modern slavery—however kindly intentioned."[4]

Admittedly, Malcolm X's account is not the report of an objective observer of state child protective systems, but it serves to illustrate the other side of appropriate concern for troubled and impoverished black families. In the guise of our professional roles—as psychiatric consultant, expert witness, attorney and judge—we have had experience with state child protective and social service systems and we appreciate the need for social intervention when poverty or parental pathology leaves children at risk. We in no way mean to minimize the extent to which poverty pathology restricts the potential of those who parent in these times of social neglect.[5] Yet, we have seen that there is as much truth today as there was in the days of Malcolm X's childhood in the charge that social intervention is often destructive to viable family systems.

This paper explores the contemporary manifestations of that truth. It addresses the darker side of social responses to troubled and impoverished families: the risks that governmental interventions will be unnecessarily sweeping, disrespectful, and debilitating rather than supportive. It presents a recent set of case histories that illustrate the adverse effects of state intervention in family life. It then examines the present state of constitutional rights regarding family autonomy and uses the case studies presented to conclude that in order to be supportive and respectful, courts should apply those principles to contain interventions, and should be careful not to let their misunderstandings of black family life justify interventions.

CASE 1

Ms. W is a thirty-two-year-old, Black female, who is the single mother of an extremely bright twelve-year-old son. When her son was offered a scholarship to an all white private school, she refused the scholarship, and stated that she planned to send her son to a board of education certified, Black "alternative" school. When questioned about her decision, she stated that she did not believe that it was in her son's best interests to attend a school where he would be the only Black student.

The school believed that Ms. W was so obsessed with racial issues that she could not make the best decision for her son. They asked her to see the school

3. *Id.* at 17-18.
4. *Id.* at 21.
5. For a recent review of the social and economic condition of Black families, see Billingsley, *Black Families In A Changing Society*, in NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 1987, at 97 (1987).

psychologist, who, primarily because of her thinking about racial issues, her "bizarre" attire and "bizarre" handshake, diagnosed her as a paranoid schizophrenic. The school then contacted the Bureau of Child Welfare and Ms. W's son was placed in foster care.

The Bureau was unable to accept Ms. W's plan for her child's education or her feelings about racial identity. It continued to view expressions of her experience as a Black woman in the United States as evidence of paranoia. Because the Bureau continued to regard Ms. W as mentally ill, it determined that treatment with demonstrated improvement would be required for her to regain custody of her son. Ms. W was enraged by the entire situation and refused any type of treatment. She was therefore deemed unable to plan for the return of her son. After a year of placement, the Bureau moved to terminate her parental rights on the grounds of mental illness.

Like all of the parents described in this paper, Ms. W was unusual among persons faced with termination of parental rights actions in that she was represented by assertive and sensitive counsel.[6] Her attorney arranged for Ms. W to be evaluated by a Black psychiatrist. The psychiatrist found that the "bizarre" attire was the African dress, jewelry and headscarf that Ms. W had worn to her interview with the school psychologist;[7] the "bizarre" handshake was the "Black Power" handshake made popular during the 1960's. The Black psychiatrist came up with no findings that were consistent with the earlier diagnosis of schizophrenia.

The psychiatrist found that the child was a well adjusted, high functioning twelve year old. He was quite confident, and had a positive image of himself as a developing Black male. There was no evidence of any type of psychological distress or difficulty.

The court agreed with Ms. W. and found that there was no evidence that she was mentally ill. The court also ruled that her son should be returned to her immediately. Although the family had suffered a prolonged and unnecessary separation, it was reunited.

CASE II

Ms. X was not as fortunate as Ms. W was. She is a twenty-eight-year-old single, Black, West Indian woman. Six years ago, she was called to school because her then six-year-old son had been involved in a fight with another student. Ms. X met with her son's teacher to discuss the incident. As Ms. X was leaving the school with her son, the teacher saw her spanking the child. The next day, the Bureau of Child Welfare took the boy from school, and placed him with a foster family.

It was two days before Ms. X knew what had happened to her son, and she spent those two days in a panic. When she finally found the boy, she was relieved, but furious. She vented her anger against the agency staff, which led them to believe that she was "paranoid" and "explosive."

Ms. X's son constantly expressed the wish to return to his mother's home, and he was always upset when his visits with her were over. Because the Bureau had decided that Ms. X was ill, the staff viewed the child's wish to return to his mother and his crying at the end of the visits as evidence of his illness. The Bureau frequently terminated visits for months at a time because staff felt that the visits were too upsetting for the child. Although the child continued to be distressed about the

6. The poverty of parental resources in the majority of cases cannot be overstated. As the Supreme Court has noted, in Santosky v. Kramer, 455 U.S. 745, 763 (1982), "[t]he State's ability to assemble its case [in termination proceedings] almost inevitably dwarfs the parents' ability to mount a defense."
7. The interview occurred immediately after a craft class that Ms. W taught at the local community center, and it was her practice to wear African dress for the classes.

loss of his mother, he was otherwise a physically and psychologically healthy child. Furthermore, the child, other family members and neighbors from the same West Indian community understood the mother's approach to discipline, and viewed it as appropriate.

Despite Ms. X's six-year effort to conform to the Bureau's concept of the fit parent, she continued to be viewed as threatening and dangerous. She was told that she was "mentally ill," and that unless she went into treatment, she would never live with her child again. Unlike Ms. W, Ms. X complied with the Bureau's demand that she enter treatment. Her therapist and her instructors from various parent training programs supported her efforts to regain custody but the Bureau continued to view her as unfit. They, therefore, moved for a termination of her parental rights as the first step in a plan to free the boy for adoption by another family.

In support of its application to terminate parental rights, the Bureau submitted evaluations of Ms. X. She was labeled as "explosive," despite the fact that there was no history of explosive outbursts or violence; she was labeled as "paranoid," despite no evidence of paranoid behavior. The Bureau staff was clearly afraid of Ms. X, and they had no idea why she was so outraged by the continued placement of her son. They were unable to understand why she might distrust "the system," so they were forced to label her distrust as paranoia.

Like Ms. W, Ms. X had the unusual benefit of a hard working, publicly funded lawyer and a sensitive psychiatric expert. The testimony of loyal friends and family members and the work of these professionals enabled Ms. X to persuade the court that she was not mentally ill or otherwise unfit as a parent. Nevertheless, Ms. X lost her child. The court found that she had failed adequately to plan for the boy's return. It then reasoned that because the child had lived with the same foster family for the last five of his six years of placement, and this foster family wanted to adopt the child, termination of Ms. X's parental rights was in his best interests.

CASE III

Mr. and Mrs. Y, both thirty years of age, met in a training school for mentally retarded adults, and they were married about ten year ago. When Mrs. Y was six months old, her mother was seriously injured in a car accident, after which she informally placed Mrs. Y with a female friend. Because this friend/foster mother was unable to care for Mrs. Y, the foster mother's mother became the primary caretaker and the person whom Mrs. Y considers to be her mother. Mrs. Y has lived with this woman since she was about a year old, and Mr. Y moved into the home when he and Mrs. Y were married. Mr. Y has worked for the same company for the last ten years, and he has been able to support the entire household with his earnings.

About two years ago, Mrs. Y was alone with their three children—then ages one to four—when she found that she had to run an errand because she was sick from her pregnancy with their fourth child. She left the children with the adolescent daughter of a neighbor, who often looked after various children in her building. When the baby-sitter left the apartment for a brief period of time, the children began to cry. Another neighbor heard the children, went to explore the situation, found the children alone and called the Bureau of Child Welfare. The Bureau immediately placed the children in foster care.

When the Bureau realized that both parents had been previously determined to be "mentally retarded," the children were moved into a preadoptive home, and the Bureau moved to terminate their parental rights. The Bureau found no merit in Mr. and Mrs. Y's claim that their extended family support network was highly functional and able to meet the needs of their children.

Re-testing at the behest of counsel for the parents indicated that Mrs. Y was

retarded, but that the retardation was mild. Mr. Y, however, scored in the low average range. Psychiatric and social work evaluations were also obtained by the parents' attorney. The evaluations indicated that both Mr. and Mrs. Y had considerable parenting skills. Although Mrs. Y had some limitations, she was clear about those limitations, and she readily used her very available support network in the best interests of her children. Comparable uses of kinship and fictive kinship networks were common in the Black community in which Mr. and Mrs. Y resided. The excellent status of the three children in foster placement, as well as the excellent health of the newborn child, confirmed that the parenting of Mr. and Mrs. Y and their extended family network was more than adequate.

The court found that the intellectual capabilities of the parents did not place the children at risk of abuse or neglect, and therefore denied the petition for the termination of their parental rights. The Bureau was instructed to develop a plan for the swift return of the children to the care of Mr. and Mrs. Y. They had, however, endured a four year period of unnecessary family disruption.

CASE IV

Ms. Z is a twenty-three-year-old, Black female. At age ten, she was severely injured in a car accident. The accident left her in a coma for one year, after which she was hospitalized for an additional year. When she first left the hospital, her mother refused to provide for much needed rehabilitation services and special schooling, despite the fact that the family received a large sum of money in settlement of the suit filed against the driver of the car that hit Ms. Z. Finally, Ms. Z's aunt brought Ms. Z into her home and began to provide the required specialized services. The residual injuries from the accident include a limp, a weak left arm and rather substantial speech difficulties.

Ms. Z has been living with and has been supported by her common law husband for four years. They have a two-year-old child. When the child was about a year old, the family was evicted. They were unable to find a shelter in which they could reside together. Ms. Z was forced to leave the father and go to a shelter for women with children. After a few weeks, she decided to temporarily place the child in foster care while she and the father established a new living situation. Within two weeks, the parents had found a new home and the mother returned to the foster care agency to regain custody of her child. The agency refused to return the child on the grounds that Ms. Z was mentally retarded, physically handicapped, immature and unable to provide appropriate care.

Although the father acknowleged paternity, and although it was clear that he was in the home supporting Ms. Z and their child, the agency disregarded his parenting role with the child and the stability that he offered to the home.

Ms. Z's psychiatric expert found that the most impressive aspect of Ms. Z's presentation was her severe speech impediment. It took her a considerable amount of time to explain her situation—time that the agency staff, including psychiatrists and psychologists, never really allowed her. There was no evidence of mental retardation. Although physical handicaps somewhat limited her mobility in the street, Ms. Z was quite able to perform all the day-to-day tasks associated with child and home care. Ms. Z had not yet resolved all of the dependency needs brought about by the long period of disability she experienced during her childhood. However, these needs did not significantly interfere with her ability to care for her child, nor did they constitute a mental illness that might cause potential harm to the child.

Moreover, although Ms. Z and the father were not married, in all respects, he functioned as husband and father. Additionally, he managed the responsibilities of the two roles quite well, and demonstrated a longstanding commitment to both. In response to Mr. and Ms. Z's well prepared defense, the court ordered that the

child be returned, but, like the Y family, the Z family had suffered an unnecessary separation of more than three years.

In each of the cases we have described, cultural and class blinders interfered with official judgments concerning the appropriate response to concerns about the welfare of Black children. Each represents an inappropriate interference with the functioning of a sound family unit. Interferences of this kind should be inhibited by constitutional principles of family autonomy.

The scope of constitutional rights of family autonomy is largely undetermined. The strongest United States Supreme Court statement of rights of biological family autonomy came in a case in which familial rights *and* the rights of free exercise of religion were found inadequate to protect the freedom of a biological family to involve its children in the street distribution of religious literature. The act of distribution, thought by the family to be a religious duty, was held by the United States Supreme Court to be properly prohibited by state child labor laws.[8]

In the area of termination of parental rights, courts have not been protective of the family unit. The Supreme Court has held that biological unwed fathers are entitled to be *heard* with respect to parental fitness before adoption of their children may be authorized.[9] However, the Court's holding in *Quilloin v. Walcott* suggests that the right to be heard may be of very limited value. In *Quilloin*, the Court approved termination of the parental rights of an unwed father who was a fit parent, who could not have been said to have neglected his child and who posed no threat to custodial continuity.[10] Similarly, the Supreme Court has required that grounds for termination of parental rights be established by clear and convincing evidence,[11] but the Court has diluted the effectiveness of this standard by holding that counsel need not invariably be appointed for indigent parents involved in termination proceedings.[12] The Supreme Court has not directly addressed the level of exigency required before custodial rights may be interrupted.[13]

Because of these doctrinal ambiguities concerning the scope of family autonomy rights, courts have a large amount of discretion in deciding when to allow social service agents to intervene in and often disrupt functioning families. Courts balance undetermined family autonomy rights against the obligation and authority of the state to take protective action with respect to children.

As the judiciary works to delineate more precisely the depth of family autonomy rights, it must keep sight of the special risks of destructive and disrespectful family interventions in a pluralist society. In doing so, they will be true to the intentions of the drafters of the fourteenth amendment—true to the original concept of national citizenship and its guarantees of life, liberty, property and due process of law.

The fourteenth amendment was a revolutionary articulation of national citizenship guarantees. It was forged in the process of abolishing slavery. The thirteenth and fourteenth amendments were conceived by men who regarded the deprivation of family rights as a fundamental vice of slavery and the protection of family rights as an essential component of citizenship. As articulated earlier, Malcolm X suggests that there is a line beyond which government cannot go without violating liberty interests that distinguish the slave and the citizen. Statements by the drafters of the

8. Prince v. Massachusetts, 321 U.S. 158 (1944).
9. Stanley v. Illinois, 405 U.S. 645 (1972).
10. Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding the lower courts use of a "best interests of the child" standard to terminate the parental right of an unwed father rather than requiring the use of the "unfit parent" standard required to terminate the parental right of a wed father).
11. Santosky v. Dramer, 455 U.S. 745 (1982).
12. Lassiter v. Department of Social Services of Durham, 452 U.S. 18 (1981).
13. *Cf. Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1231-35 (1980)(noting that the "Supreme Court has consistently refused to address directly the issue of vagueness in juvenile statutes").

Civil War Amendments indicate that they would have agreed with Malcolm X's assertion. In 1864, Congressman Ingersoll said:

> I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. *He has a right to the endearments and enjoyment of family ties*; and no white man has any right to rob him of or infringe upon any of these blessings.[14]

Senator Harlan's description of the "incidents of slavery" contained the following: "Another incident is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family."[15]

Congressman Kasson said:

> [T]here are three great fundamental natural rights of human society which you cannot take away without striking a vital blow at the rights of white men as well as black. They are the rights of a husband to his wife—the marital relation; the right of father to his child—the parental relation; and the right of a man to the personal liberty with which he was endowed by nature and by God, and which the best judicial authorities of England have for a hundred years declared he could not alienate even by his own consent.[16]

We do not deny the obligation of a just society to support troubled children and families. We simply urge that interventions *be* supportive, rather than debilitating and that their sweep be checked by recognition that our constitutional system properly respects the autonomy of the family unit and depends upon its independent functioning.

> In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.[17]

The value of the family unit and the rights of family autonomy are no less important in the case of families whose lifestyle challenges majoritarian assumptions and expectations. The case studies noted above illustrate how majoritarian misunderstandings of black family life can be oppressive. In order to ensure that the promises of the framers of the Civil War amendments are carried out and that interventions are supportive and respectful, courts must clearly delineate the scope of permissible intervention in family units and must be mindful of the inevitable differences in family life found in a pluralist society.

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14. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864)(emphasis added).
15. *Id.* at 1439 (1864)(emphasis added).
16. CONG. GLOBE, 38th Cong., 2nd Sess. 193 (1865).
17. P. Heymann & D. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 773 (1973).