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Adoption, Race, and Group-Based Harm

Larry May*

The following essay is based on a presentation by Professor Larry May on 10 March 1999 as a part of an interdisciplinary panel discussion of Professor Dorothy Roberts' paper.

I wish to discuss Dorothy Roberts' powerful and original contribution to the debates about race, adoption, and child welfare from three different perspectives. First, as a philosopher I agree with many things Roberts says about the nature of race and social justice. Second, as an adoptive parent I challenge some of Roberts' views about adoption, especially transracial adoption. Third, as a student of the law, I agree with the spirit but disagree with the letter of Roberts' legal proposals. While we agree more than we disagree, I will emphasize the points of disagreement in order to better stimulate our collective rethinking of her controversial views and proposals.

I. DISTRIBUTIVE JUSTICE AND GROUP-BASED HARM

Dorothy Roberts argues that issues of social justice need to play a prominent role in debates about how legal institutions should deal with the growing number of poor Black children in foster care. According to her view it is natural to feel sympathy towards any suffering child and to seek the end of the suffering as soon as possible.¹ In attending to the suffering of one child, however, we may neglect or even harm many others. While it is appropriate to focus on the right of children not to suffer at the hands of their parents or in foster care, it is also important to focus on the harm to Black children as a group because

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1. See Dorothy Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63 (1999).

so many of them are permanently removed from their biological parents. In another context Roberts postulates:

The rights of Black children must be interpreted in the context of racial oppression. . . . The excessive disruption of Black families affects the stability of the group as a whole, weakening its ability to struggle against many forms of institutional discrimination. . . . As part of the group, Black children are severely harmed. . . .²

Roberts believes a philosophically respectable position exists that will allow us to move beyond the sympathetic response to individual cases and enables us to consider the group consequences of various policies. I wish to begin by strongly supporting the philosophical point that Roberts is making. In discussions about rights and justice, there are generally thought to be only two models. The first one is the individualistic model of justice. Under this model if the rights of an individual are violated, then that person will sue to obtain a remedy for the particular harm he or she has suffered. The second model is a collectivist one. Here rights attach to groups (*e.g.*, whites and Blacks) and individuals possess only derivative rights. The battles over affirmative action and busing are largely drawn in collectivist terms and therefore roundly criticized for neglecting the individual.

There is, however, another strategy that employs an intermediate category of rights that I have called “group-based” rights.³ These are rights of an individual, but rights the individual obtains by virtue of being a member of a group. The rights one has as a Black person or as a parent are individual rights, but they are deeply embedded within the social context of one’s group affiliations, which are themselves constitutive of the individual’s identity. When a Black person is discriminated against because she is Black, this is a denial of her

2. Dorothy Roberts, *Is There Justice in Children’s Rights? The Critique of Federal Family Preservation Policy*, (Feb. 1999) (unpublished paper presented at a conference at the University of Pennsylvania).

3. For a discussion of group-based harm see LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* (1987). *See also* LARRY MAY, *SHARING RESPONSIBILITY* (1992) (discussing how to conceptualize racism).

group-based rights. Group-based rights remain a part of the individualistic tradition because they attach to individuals. Moreover, they also remain a part of the collectivist tradition because they are based on group membership.

Consider the case of race-based job discrimination. If a discriminatory hiring policy exists, then any Black person who applies for the job will be discriminated against. In some respects it does not matter that these job applicants have unique features; all that matters is their membership in the group. It is, however, only an illusion to think that a given job applicant is not harmed individually. In fact, she is the one denied the job. Yet, the way that she is harmed is not by virtue of her unique characteristics, but rather by virtue of her membership in a certain group. If we treat her problem as one that is hers personally, we will fail to see how race has played a significant role in her discriminatory treatment. If we treat the problem as solely a group problem, we will fail to see that individuals are indeed harmed.

So, I find myself in deep agreement with Roberts' belief that there is a philosophically respectable way to talk about child welfare policies that puts race in the center of the discussion but does not ignore the specific plight of individual children. Children in abusive or neglectful families are harmed in ways that call out for help. However, Black children who are removed from their biological parents and placed into foster care and then, perhaps too quickly, into adoptive families also experience a different kind of harm—harm as a member of a given Black community. We must realize that laws and government programs can harm individuals in two ways: individually and collectively by hurting the group of which the individual is a member. We should not let our sympathy for the plight of a given child numb us into thinking that this suffering is the only important consideration in these debates about child welfare.

II. THE DOUBLE-BIND FOR WHITE ADOPTIVE FAMILIES

Roberts uses her philosophical analysis to condemn a recent federal program that moves mainly Black children, who are in foster care, into mainly white adoptive families. In her other writings Roberts argues that those white families who are willing to adopt Black children are

engaging in a form of racism since they are trying to take Black children out of their own communities and away from Black caretakers who can instill in them a proper understanding of and adeptness for responding to racism. In addition, she argues that those white families who have strong preferences for adopting white children are also engaging in a form of racism. While such arguments are not without merit, these arguments essentially condemn adoptive white parents for engaging in racism if they want to adopt white children or if they want to adopt Black children.⁴ The upshot is that white adoptive parents are seen as perpetuating racism regardless of their decision. Therefore, there is an internal problem with Roberts' position that is especially glaring and galling for white adoptive parents like myself.

These internal problems are magnified when one realizes that Roberts sees any adoption as a societal failure. As she states, "In an ideal society nearly all children would be raised by their families in a healthy, safe, and flourishing environment."⁵ She claims that societies that have reduced the number of adoptions, such as Sweden, have done a "good thing." Roberts takes this position because she seems to think that biological parents can raise their own children better than strangers. What evidence is there for this? What theory of parenting is it based upon? We get few answers from Roberts.

Roberts merely perpetuates the stereotype of adoptive parents as second-choice and second-rate parents, assuming that biology somehow endows people with much better parenting skills than if they were biologically unrelated to children they raise. According to her view adoptive parents ideally only come into the picture when the biological parents are dead or mentally ill.⁶ Adoptive parents are seemingly better than dead or mentally ill parents, but on Roberts view that is all we can say for sure. Roberts' assumptions about adoption are quite distressing indeed. What she misses is that adoption is often the only hope that poor Black children have of breaking out of the cycle of foster care placements.

4. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 269-276 (1997).

5. Roberts, *supra* note 2, at 8.

6. *Id.*

In her remarks on our panel, Roberts employs a strikingly evocative example of people plucking babies out of a fast moving stream.⁷ She believes it would be better if we could stop the flow, so that so many babies would not have to be saved. However, if one cannot stop the flow alone, Roberts views people plucking the babies out of the stream as a bad idea. The problem is that if these babies are not plucked out of the stream, many of them will drown. I want to suggest that both strategies are legitimate: trying to stem the flow of poor Black children who need to be saved by adoption and using adoption to save those who remain in need.

Roberts misidentifies the problem. Adoptive families, especially white families, have not caused the poverty that Roberts rightly rails against. Transracial adoptive families are not causing the disintegration of Black identity. Indeed, people in transracial adoptive families and transracial marriages suffer racist abuse. So why do white families even think about adopting Black children? In my experience it is because they care about the children who are caught in an often endless cycle of going between their abusive or neglectful homes and unstable foster care arrangements. And they care about race relations in America. There may be villains in this story but they are not the adoptive parents.⁸

III. LEGAL RESPONSES TO CHILDREN'S RIGHTS

I will now consider whether the philosophical position Roberts and I both endorse supports her conclusions about child welfare laws. Roberts thinks that reproduction and adoption laws should be aimed at promoting racial justice. Most importantly, she argues persuasively that federal and state governments should stop penalizing and punishing Black mothers and that these governments should not “abandon the poor, Black, and desperate families whose children are

7. Roberts, *supra* note 1, at 72.

8. To be fair to Roberts I should note that the position I am really criticizing here is that espoused by the National Association of Black Social Workers (NABSW). Roberts has discussed the views of this group in supportive terms, although she has not explicitly endorsed the NABSW's view that when white families adopt Black children the white families engage in a “form of genocide.” Roberts, *supra* note 4, at 262.

typically put in foster care.”⁹ I agree with Roberts’ overall sentiment that we need to focus on the causes of child abuse and neglect and do something about them, rather than spend tax dollars removing Black children from their families.

Roberts urges that we distinguish between children placed in foster care because of abuse (sometimes even torture) and those who were merely neglected. Abused children are only a minority of the children in foster care, whereas the majority are victims of “parental neglect related to poverty.” Roberts believes that removing this second group of children from the home and into adoptive families will cause children to “suffer when unnecessarily separated from their parents.”¹⁰ According to Roberts we should recommit to family preservation to combat the harm done to Black children and their communities. Additionally, she argues we should turn away from the current program of encouraging white couples to adopt Black children and remove them from their families.

Roberts fails to consider another group-based harm. The insecurity of Black children, who go back and forth between abusive or neglectful homes and unstable foster care, is also having a devastating impact on Black community life. For this reason I have decidedly mixed feelings about Roberts’ proposals. I completely agree that our society should place more emphasis than it does on helping poor families out of poverty as a means for diminishing the occurrence of child abuse or neglect. I also believe, however, that justice is possible in a child welfare system that encourages adoptive family placement for those children who need to escape unsafe homes or an endless series of foster homes. I would like to combine these two ideas. Our laws should help and encourage the elimination of poverty and also help well-intentioned people to adopt. Both policies should be based on the best interests of the children.

Government agencies should not be quick to terminate parental rights but they should not be slow to act either. Black children are harmed by the continued disintegration of Black family life, which

9. Roberts, *supra* note 2, at 2.

10. *Id.* at 6.

results from the removal of children from their families. But some Black children are harmed much more by their own biological families and by the systemic deprivation they suffer by never having a stable, loving home life. Black children are also harmed by the deterioration of Black communities that results from so many Black children remaining in unstable homes during their most formative years. For the sake of these children, we should not be slow to remove them from unsafe and unloving families, just as we should not be quick to remove them permanently from families which just happen to be poor.

We should give two competing policy objectives substantial weight. We should endorse the objective of providing the most secure childhood possible for all children, and this means not being quick to send children back for more abuse or neglect. Additionally, we should endorse the objective of strengthening Black families so that they can provide secure homes for their children, and this means not being quick to remove them permanently from their families if it is likely their parents will stop neglecting or abusing them. A good child welfare program will be a reasonable one, not favoring either of these objectives. Like other legal matters where the truth of the matter is highly contested, a middle ground should be preferred. I have learned much from Dorothy Roberts in that I am able to see the pitfalls of going too far in the direction of terminating parental rights. On the other hand, I think she has gone too far by failing to consider the benefits of adoption. My criticisms of Dorothy Roberts, however, do not diminish my respect for her contribution to these debates.