Michigan Law Review

Volume 86 | Issue 6

1988

Law, Science, and History: Reflections Upon *In the Best Interests of the Child*

Peggy C. Davis
New York University Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Family Law Commons](#), [Judges Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Peggy C. Davis, *Law, Science, and History: Reflections Upon In the Best Interests of the Child*, 86 MICH. L. REV. 1096 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/4>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LAW, SCIENCE, AND HISTORY: REFLECTIONS UPON *IN THE BEST INTERESTS OF THE CHILD*

Peggy C. Davis*

IN THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud, Albert J. Solnit, and Sonja Goldstein. New York: The Free Press. 1986. Pp. xix, 236. Cloth, \$15.95; paper, \$8.95.

"GoldsteinFreudandSolnit" is a common term in the parlance of lawyers concerned with child custody and parental rights. It evokes a familiar set of beliefs about child development and child placement decisionmaking. The term is regularly intoned in family proceedings as authority for the view that assuring continuity of care should be the virtually exclusive criterion for child placement determinations. It is invoked to urge a process of identifying the adult with whom a child is primarily bonded — the child's "psychological parent" — and protecting the permanence and autonomy of the psychological parent-child relationship.¹

Goldstein, Freud, and Solnit have promoted these beliefs in concise, accessible volumes addressed to legal, child welfare, and mental health professionals.² In the legal context, the authors' goal has been "to provide a basis for critically evaluating and revising [consistently with their beliefs about psychological parenthood] the procedure and substance of court decisions, as well as statutes."³ In this, they have had notable success. The theories and recommendations of these scholars have stimulated a significant, albeit incomplete, restructuring of statutes and common law governing child placement decisionmaking.⁴ The effect of psychological parent theory upon legislative

* Professor of Law, New York University Law School. B.A. 1964, Western College for Women; J.D. 1968, Harvard Law School. — Ed. Support for the preparation of this review and for research concerning the Civil War Amendments was provided by the Filomen d'Agostine and Max E. Greenberg Research Fund of New York University School of Law.

1. It is also invoked — rightly, but too infrequently — to urge haste in determining child placement issues. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 40-49 (1979) [hereinafter *BEYOND THE BEST INTERESTS*].

2. See *BEYOND THE BEST INTERESTS*, *supra* note 1; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). Sonja Goldstein was not an author of the earlier works.

3. *BEYOND THE BEST INTERESTS*, *supra* note 1, at 5.

4. See Davis, "There Is A Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) [hereinafter Davis]; Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1983-84).

schemes has been complex and interesting.⁵ Its effect upon judicial applications and elaborations of law has been more controversial.⁶ Like other conspicuous demonstrations of the power of a scientific theory to influence the law, the impact of psychological parent theory upon judicial decision making has led — predictably and appropriately — to concern about the processes by which outcomes are determined and changes in law are effected.

Professors Goldstein and Solnit are distinguished legal scholars, and their view that judge-made law must change in response to psychological parent theory is expressed with an uncommon sophistication about legal process. That sophistication has been enriched by their frequent participation in child placement litigation. However, the earlier books of Goldstein, Freud, and Solnit were not critiques of legal process, but works of advocacy. In the course of advocating law reform, these authors were mindful, but not critical, of the processes by which scientific theory affects legal decisionmaking. They displayed the legal technician's proficiency at marshalling and characterizing precedent to facilitate a desired result, and spoke eloquently of the process:

There is in law, as psychoanalysis teaches that there is in man, a rich residue which each generation preserves from the past, modifies for the now, and in turn leaves for the future. Law is, after all, a continuous process for meeting society's need for stability by providing authority and precedent and, at the same time, meeting its need for flexibility and change by providing for each authority a counterauthority and for each precedent a counterprecedent. The living law thus seeks to secure an environment conducive to society's healthy growth and development.⁷

They also argued that, regardless of the availability of controlling "counterprecedent," judges are justified in providing for "the now" by modifying rules of law "[o]n the basis of knowledge extrapolated from [the social sciences]."⁸

In the Best Interests of the Child addresses more carefully the processes by which judges, in collaboration with lawyers and social scientists, apply and alter law. Its prescription for assuring just and accurate results in those collaborations is a scrupulous attention to interdisciplinary boundaries (pp. 120-21). The central message of the book is that professionals involved in child welfare matters must be disciplined to work within the limitations of their respective fields.

The book concludes with two appendices: Stephen Gould's scath-

5. See Davis, *supra* note 4, at 1569-79; Taub, *supra* note 4; Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 449-53 (1983).

6. See Davis, *supra* note 4, at 1593-98.

7. BEYOND THE BEST INTERESTS, *supra* note 1, at 80-81.

8. *Id.* at 94.

ing critique of *Buck v. Bell*,⁹ and a poignant passage from *The Autobiography of Malcolm X*.¹⁰ The Gould critique describes a collaboration between law and social science in which early (and now discredited) teachings of eugenics informed a Supreme Court decision to deny constitutional protection of a fundamental right of family — the right to procreate. The Malcolm X passage describes a collaboration between law and social science in which child welfare and mental health experts informed a lower court decision to sever the legal bonds that preserved a troubled, but arguably viable, family unit, institutionalize the mother, and place the children in various foster and adoptive homes. The appendices receive little attention in the text. These powerful and powerfully told stories are simply offered; their implications for lawyers and scientists working across disciplinary boundaries are not probed. Yet, by their independent force, they enrich our understanding of the dimensions of difficulty involved in integrating law and science without sacrificing justice or oversimplifying notions of accuracy.

This review essay consists of two parts. Part I examines the boundary adherence techniques advocated in *In the Best Interests of the Child* and discusses their potential as controls against inappropriate judicial incorporation or rejection of scientific knowledge. It argues that when science becomes relevant to lawyering or to judging, it is wise, but insufficient, to leave the law to the legal professionals and the science to the scientists. The difficulties of assuring just and accurate results in these interactions require that professionals find objective measures of the reliability and impartiality of scientific judgments and screen out those judgments that fail to meet the measure.

Part II takes the appendices as a focal point for examining a second dimension of difficulty in law-science interactions. The appendices demonstrate that deference to the teachings of social science can lead courts to compromise deeply valued rights of family autonomy. Part II argues that lawyering and judging at the borders of law and science require recognition of this possibility. It is not sufficient that scientific judgments be professionally made and screened for accuracy. The shaping and application of law in response to scientific truths are complex, multidisciplinary processes that require circumspection: for accuracy is elusive, truths are neither timeless nor absolute, and claims of science may be in tension with compelling, historically based claims of political and legal theory. The excerpt from *The Autobiography of Malcolm X* describes the destruction of

9. P. 127, appendix 1 (reprinting Gould, *Carrie Buck's Daughter*, 93 NATURAL HISTORY 14 (July 1984)) (examining the lives affected by *Buck v. Bell*, 274 U.S. 200 (1927)).

10. P. 142, appendix 2 (reprinting MALCOLM X & A. HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 12-21 (1965)).

Malcolm X's family as "modern day slavery."¹¹ The analogy is surprisingly rich. The fourteenth amendment was conceived by people who regarded slavery's denial of family rights as a uniquely deplorable usurpation of fundamental human entitlements. Rights of family were explicitly included among the rights that the fourteenth amendment was designed to safeguard. Part II draws upon the slavery analogy to offer a previously unrecognized constitutional basis for cautious judicial scrutiny of scientifically supported infringements upon rights of family.¹²

I. LAW, SCIENCE, AND THE LESSON OF BOUNDARY ADHERENCE

At one level, the maxim, "Thou shalt not lightly cross professional boundaries," has self-evident merit. Few lawyers and judges are professionally trained in the sciences. With respect to a child welfare issue, humility vis-à-vis the child development specialist is appropriate. Few scientists are professionally trained in the law. With respect to questions of law, humility vis-à-vis the legal specialist is appropriate.

The authors enrich this maxim by adding a valuable corollary. When law and science professionals collaborate to resolve a controversy, it is important that they expose particular sorts of professional premises that might be relied upon in fashioning a resolution (pp. 58-59, 74). This technique of explicating premises is applied differently with respect to legal and scientific disciplines.

Scientific experts are encouraged to communicate scientific conclusions fully, and to report any reliance upon lay understandings of legal rules (p. 74). The belief that experts must expose scientific premises to legal professionals stems from two axioms of legal process. First, scientific judgments may be relevant to the determination of a matter under existing legal standards. When this is so, the risk of an erroneous determination is reduced to the extent that scientific expertise is fully available to legal professionals. Second, law may, and should under some circumstances, change to reflect knowledge gleaned from the sciences.¹³ Expert knowledge that appropriately commands adjustment of legal rules is, therefore, equally necessary to the lawyering and judging functions.

The authors' insistence that scientists expose reliance upon lay interpretations of the law stems from a wish to avoid inappropriate self-censorship. The concern is that scientific opinions will be withheld because of a belief that legal rules or customs require their rejection (pp. 70-74). Self-censorship of this kind would result in withholding

11. *Id.* at 146 (reprinting p. 21).

12. The constitutional theory set forth in Part II provides an alternative to the theory of "penumbral" privacy that served as a basis for the elaboration of family rights in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and subsequent cases.

13. See *Davis*, *supra* note 4, at 1540-41.

from the legal process potentially useful information. An expert in law may see, where a lay person would fail to see, room for incorporation of scientific knowledge to influence an outcome or to advance legal doctrine.

The authors impose upon law professionals a more limited obligation to explicate premises. Legal professionals are urged to be explicit concerning any *scientific* premises upon which they may rely (pp. 58-59). This infrequent but laudable practice is advocated because it exposes lay opinion on scientific questions to critical expert evaluation, minimizing the risk that legal determinations will be made on the basis of misinformation or uninformed judgment (pp. 58-59). The authors do not, however, identify a need to inform scientists of the bases of legal judgments. Their only expressed concern with respect to the scientist's understanding of law is that communication of scientific knowledge not be deterred by inexpert determinations that the legal system cannot, or will not, utilize the information.¹⁴

The value of these prescriptions of boundary adherence and interdisciplinary communication is not to be gainsaid. The fault of *In the Best Interests of the Child* is that its focus and structure result in an overstatement of that value. The reader is left with an inappropriate confidence that justice and children will be served if lawyers lawyer, judges judge, and scientists inform. This occurs because the critique of interdisciplinary exchanges is compromised by an understandable but disabling failure to set aside substantive convictions in the interest of assuring rigor in the analysis of process. As we have seen, the authors have firm convictions concerning the appropriate disposition of a broad category of child placement matters.¹⁵ In broaching the subjects of interdisciplinary boundary adherence and communication, they set a goal of objectivity: "We have been careful not to let the force of our convictions and the temptation to reinforce the proposals we made in the earlier books lead us to find only good practices in decisions that we like and only poor practices in decisions we dislike" (p. 12). The goal proves elusive. *In the Best Interests of the Child* consists almost entirely of critical reviews of case histories. Good practices are repeatedly illustrated by decisions that are consistent with the authors' convictions.¹⁶ Poor practices are repeatedly illustrated by decisions that are inconsistent with the authors' convictions.¹⁷

This skewed result flags two artificialities in the sample of cases

14. Pp. 70-74. Part II of this review argues that legal principles require cautious scrutiny of scientific claims that are offered to justify compromises of fundamental rights. These legal principles should be understood by scientists and taken into account when scientific opinion is marshalled in the service of legal argument. Law professionals relying upon these principles should therefore assume a duty to explicate legal premises for the benefit of the scientific community.

15. See notes 1-3 *supra* and accompanying text.

16. *E.g.*, pp. 44-53, 56-57, 57-62, 62-64, 64-67, 97-98.

17. *E.g.*, pp. 21-28, 31, 34-37, 70-71, 72-74, 74-78.

reviewed in the book. First, the sample is virtually devoid of expert evidence that is inconsistent with the authors' positions.¹⁸ Only one of the cases reviewed involves an expert who holds a professional view contrary to those expressed in the earlier works of Goldstein, Freud, and Solnit.¹⁹

Second, professionals who disagree with the authors' child development theories are presumed to act without scientific basis, while professionals who agree with their theories are presumed to act consistently with scientific wisdom. When legal professionals look beyond expert witness advice to reach results that are consistent with psychological parent theory, they are described as having crossed professional boundaries in appropriate ways (pp. 57-67). These legal professionals are credited with having properly applied principles of child development.²⁰ Legal professionals who rest their decisions upon independently held scientific theories that are inconsistent with the authors' positions are condemned for having usurped the clinical role (pp. 21-37). The possibility of correct reliance upon independently acquired expert views that are inconsistent with the views of the authors is not considered. The legal professionals involved in these cases *have* violated the rule of explication of scientific premises. Whether they have silently deferred to extra-record scientific knowledge, we cannot know.

As a result of these artificialities, the authors have created a universe in which law and science interact in only three scenarios: (1) Law professionals learn from expert witnesses who are almost always right in their scientific judgments; (2) Law professionals learn from reading or associating over time with scientists who are always right in their scientific judgments; and (3) As a result of independent evaluation of scientific matters, law professionals make scientific judgments that are always wrong. In this universe, all is well if professional boundaries are respected and law professionals receive, accept, and follow the teachings of science. The real world is a different place, and the differences are telling.

18. Pp. 34-37. There is a body of expert opinion that contradicts the authors' views. See Davis, *supra* note 4, at 1545-46.

19. This expert is a case worker who is faulted for her failure to seek the advice of a mental health professional. Pp. 34-37. All other experts accused of improper practices are doctors and social workers who adhered to the views of Goldstein, Freud, and Solnit, but failed to advance those views on the ground that the law, the participating lawyers or the assigned judge was hostile to the "right" result. Pp. 70, 72-74, 74-78. These clinicians are criticized for having misused knowledge of law, such as the fact "that the court 'never' denied fathers the right to visit unless . . . there was evidence of physical abuse," (pp. 70-71); that a particular court demanded clinical assessments even when they were useless and detrimental, (pp. 71-72); or that biological parents would eventually achieve custody of their children regardless of clinical counterindications, (p. 73).

20. The authors commended, for example, a judge's ability to learn "from their work with child development experts . . . that the custody of a child who has thrived in long-term care with the same foster family cannot be changed without harming him." P. 55.

A. *Expert Witnesses Are Not Always (or Almost Always) Right*

One of the greatest mistakes we can make is to regard as simple what is complex. If psychiatrists and psychologists *knew* how to achieve a child's best interests, deciding child custody cases would be comparable to diagnosing and treating a known medical condition. But psychiatrists and psychologists *don't* know²¹

The court quoted above rested its assertion of the fallibility of expert judgments upon a record of expert disagreement in the case before it.²² When a legal matter involves a battle of experts, it is obvious that experts can err, and it is inevitable that the legal professionals' approach to expert evidence will be critical, rather than simply deferential. This is desirable. The rights of parties and the development of law are as easily compromised by deference to mistaken or incomplete scientific judgments as by ignorance.

Unfortunately, evenly matched expert battles are not an inevitable feature of the adversary system. This point is particularly telling in the context in which the authors consider law and science interactions. Child placement matters are rarely litigated with luxurious legal and expert resources. Expert evidence is frequently available only to one side or only to the court, exercising its power to solicit independent professional evaluations. As a result, the maxim of deference to expert opinion is not regularly moderated by the reality of conflicting expert evidence.

To recognize the desirability of moderation and amplification of the maxim is not to overlook its importance. Deferential and critical postures can be consistent. Although the mental health professional is less than perfect in her ability to determine the best course of child development, her determination is more richly informed than that of a lay person. Nevertheless, experts are fallible. Legal professionals are obliged, therefore, to be sensitive to factors that affect the reliability of expert opinion.²³

Some of these factors are inherent in adversarial legal process. When law and science interactions occur in litigation, there is a risk that expert opinion is biased or shaded by the expert's association with one of the competing adversaries. There is the additional risk that resource imbalances will preclude or impede challenges of expert evidence offered by the more richly endowed litigator.

Other risk factors are inherent in the scientific process. The want of omniscient experts requires sensitivity to the risks that expert opinion is biased for reasons that precede the assumption of an adversarial

21. *In re Donna W.*, 325 Pa. Super. 39, 58, 472 A.2d 635, 645 (1984) (emphasis in original).

22. 325 Pa. Super. at 58, 472 A.2d at 645.

23. This is important when expert opinion shapes the interpretation of facts relevant to application of established rules of law. It is imperative when expert opinion informs the development or alteration of rules of law. See Davis, *supra* note 4, at 1600-02.

position in litigation; is based upon theoretical premises that are unsound; or is based upon factual premises that are inaccurate. The obligation of the legal professional is not automatic deference, but respectful, critical scrutiny.

B. *Nonwitness Experts Are Not Always (or Almost Always) Right*

The authors accurately observe that in interpreting and shaping legal rules legal professionals rely upon information that is extra-judicially acquired. As we have seen, *In the Best Interests of the Child* applauds this sort of boundary crossing; other legal scholarship has persuasively established its inevitability.²⁴

Of course, scientific information acquired outside the courtroom is no less fallible than that acquired inside the courtroom. There is a consequent risk that independently acquired scientific knowledge will be mistaken or incomplete. There is the further risk that it will be misused or misunderstood by the legal professional working in an unmastered discipline. The authors find the technique of explicating premises adequate to address these risks. They offer the case of *Ross v. Hoffman*²⁵ as a model of appropriate judicial use of independently acquired scientific information. The *Ross* judge is commended for having explicated extra-record scientific premises as he announced his decision. In awarding custody to a long-term caretaker pitted against a biological mother, the judge noted the reliance upon scientific information acquired by judicial notice:

[T]here is a book out, which is widely read, by three very well respected professional doctors, Drs. Goldstein, Freud and Solnick [sic], called 'Beyond the Best Interests of the Child' and in that book they point out that whether any adult becomes a psychological parent over the child is based upon a day-to-day interaction, companionship and shared experiences. And if you look at it from that view, Mrs. Hoffman has had this advantage.²⁶

The judge surmised that this theory was what a trial expert "had in mind" when he testified that there was risk in moving the child from a known to an unknown environment.²⁷ The action of this trial judge

24. It is conventional wisdom today to observe that judges not only are charged to find what the law is, but must regularly make new law when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule. The very nature of the judicial process necessitates that judges be guided, as legislators are, by considerations of expediency and public policy. They must, in the nature of things, act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific.

E. CLEARY, MCCORMICK ON EVIDENCE 928 (3d ed. 1984) (footnotes omitted). See also Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

25. 33 Md. App. 333, 364 A.2d 596 (Md. Ct. Spec. App. 1976), *affd. as modified*, 280 Md. 172, 372 A.2d 582 (1977).

26. 33 Md. App. at 336-36, 364 A.2d at 599 (quoting the Chancellor below).

27. 33 Md. App. at 333, 364 A.2d at 600.

was affirmed by two appellate courts²⁸ and is applauded by the authors as an appropriate crossing of professional boundaries. *In the Best Interests of the Child* reports that this was a case in which scientific knowledge not only affected an outcome, but also changed the law:

The precedent established in *Ross v. Hoffman* incorporates generally accepted and generally applicable knowledge from the field of child development. These precedents, in some cases, enable lawyers to argue against and qualify courts to overturn, without hearing expert testimony, the presumption in favor of natural parents. Lawyers and judges on their own can come to recognize many "parent"-child relationships that should normally not be disturbed. Thus, through judicial precedent the borders between the professions are opened and may legitimately be crossed under certain circumstances. [p. 60]

In supporting the *Ross* outcome and agreeing with its scientific premises, the appellate courts and the authors of *In the Best Interests of the Child* have confronted a bypass of legal process and chosen to applaud, rather than correct it. It is laudable that the *Ross* trial judge "recogniz[ed] and express[ed] that which helped him to decide."²⁹ But the expression came too late. Ms. Ross legitimately complained that she lacked a pre-decision opportunity to challenge the controversial³⁰ theories upon which her custodial rights ultimately turned. She was not alerted to the need to seek or offer expert criticism of psychological parent theory. She was not alerted to the need to seek or offer evidence that it had been misapplied to her situation. If competing theories were offered in the appellate process, the opinions give no hint of their consideration. The timing of the explication of scientific premises precluded or compromised use of the mechanisms upon which the adversarial system relies to promote accuracy and fairness.

After-the-fact admission of professional boundary crossing is preferable to silence, but sound decisionmaking and principled development of the law require more. They require that the parties be alerted to judicial consideration of extra-record scientific information in time to refute it. They require inquiry to determine whether the party against whom the information is to be used has the resources to evaluate and challenge it. They require that extra-record scientific information be tested against a measure of general acceptance within the relevant discipline. They require attention to the risks that the immediate parties lack the ability or motivation to address the ramifications of enshrinement in precedent of a principle that may be insufficiently certain or potent to resolve the range of future cases to which it will be applied.

28. See note 25 *supra*.

29. 33 Md. App. at 338, 364 A.2d at 600.

30. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 n.52 (1977) ("*Beyond the Best Interests of the Child* . . . is indeed controversial.").

C. *The Sources of Legal Judgments Concerning Scientific Matters Are Various and Ambiguous*

In cases, like *Ross*, in which boundary crossings by law professionals are approved, the authors applaud after-the-fact explication and unquestioning acceptance of scientific authority. In cases in which legal boundary crossings are condemned, the authors identify and denounce an unexplicated result, assuming that full explication would reveal no scientific authority to which deference has been paid by law professionals. In fact, unexplained scientific opinions offered by lawyers and judges are often grounded, as the *Ross* opinion was grounded, upon a combination of informally acquired scientific knowledge, common sense, and lay speculation. The authors' segregation of these two categories — appropriately deferential crossing of professional boundaries on the one hand and inappropriate inexpert practice of science on the other — is misleading. Cases in which judges resort to extra-judicially informed scientific conclusions are more usefully viewed as a single category as to which the prescriptions of identification, explication, and respectfully critical evaluation of scientific opinion should be uniformly applied.

The example of inappropriate boundary crossing, identified by the authors as the case of Lisa Stone, illustrates this point. Counsel for a child who was the subject of a visitation dispute took the position that his client's opposition to visitation by a noncustodial parent was pathological (p. 32). Reasoning from their view that psychological parents must be autonomous, Goldstein, Freud, and Solnit have categorically opposed court-ordered visitation.³¹ They find the contrary position of the child's attorney unscientific and wrong (pp. 33-34). The authors may be right. It may also be that the attorney relied upon independently acquired scientific evidence that maximum contact with noncustodial parents reduces the emotional harm that children suffer as a result of divorce.³² It may be that he relied upon a scientist's belief that in the bitter aftermath of marital dissolution children are commonly influenced, to their emotional detriment, to resent and reject the noncustodial parent.³³ These scientific views are differently evaluated and reconciled by different experts. Were the attorney for the child to adhere to the limited terms of the prescriptions of explication and deference, he would have only to identify scientific authority for his views. His obligation is greater. It is to seek out the conflicting expert opinions that bear upon his client's situation and subject those views to critical evaluation. The corresponding judicial obligation is

31. BEYOND THE BEST INTERESTS, *supra* note 1, at 116-33.

32. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY No. 106, DIVORCE, CHILD CUSTODY AND THE FAMILY 882-87 (1980).

33. See, e.g., Goldstein, *Psychoanalytic Perspectives on Divorce and the Psychological Development of Children*, in OBJECT LOSS IN CHILDREN (M. Scharfman ed.) (forthcoming).

to assure that this process occurs; that it includes adversarial challenge; and that the solicitation, evaluation, and advocacy of competing expert views is not impeded by resource limitations.

II. LAW, SCIENCE, AND THE LESSONS OF HISTORY

If lawyers lawyer, judges judge, and scientists inform, then interdisciplinary collaborations may improve case-specific decisionmaking and the development of law. This result is not, however, inevitable. As Part I establishes, the principle of boundary adherence wants elaboration. Interdisciplinary collaboration is more likely to improve legal decisionmaking if information from the sciences is examined critically. The story of Carrie Buck gives urgency to the appeal for critical evaluation of scientific opinion. The story of Malcolm X evokes a historical legacy that provides the nucleus of an argument that critical judicial evaluation of scientific opinion is constitutionally required when claims of science challenge claims of family integrity and autonomy.

A. *The Stories of Carrie Buck and Malcolm X*

Carrie Buck appealed to the Supreme Court of the United States for protection of her right to bear children. She was the first target of compulsory sterilization laws enacted in Virginia in 1924 (p. 132). The Court denied Carrie Buck's appeal. Its opinion was grounded in scientific evidence that she, her mother, and her only child were "imbeciles," (p. 134) and in scientific knowledge that imbecility is heritable (p. 134). Declaring that "[t]hree generations of imbeciles are enough,"³⁴ the Court established society's right to "prevent those who are manifestly unfit from continuing their kind."³⁵ It deterred or defused constitutional challenge of involuntary sterilizations — of which there were 63,678 between 1907 and 1964.³⁶ It has not been overruled.

Scientists working five decades later have concluded that "there were no imbeciles, not a one, among the three generations of Bucks," (p. 141) and there is now a scientific consensus that although "[s]ome forms of mental deficiency are passed by inheritance in family lines, . . . most are not" (p. 133). Yet, the science that underlay the *Buck* opinion was generally accepted in its day,³⁷ and the initial diagnoses of Carrie Buck and of her mother were the product of measurement by the then relatively new, but altogether respectable Stanford-Binet I.Q.

34. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

35. 274 U.S. at 207.

36. Ferster, *Eliminating the Unfit — Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 632 (1966).

37. J. AREEN, *FAMILY LAW: CASES & MATERIALS* 832-33 (2d ed. 1985) [hereinafter J. AREEN] (citing HUMAN BETTERMENT ASSOCIATION OF AMERICA, SUMMARY OF UNITED STATES STERILIZATION LAWS (1952)).

test.³⁸

The story of Carrie Buck may teach nothing more than that scientific insights deepen and improve over time. If this is so, then we may rest content in the hope that law grounded in scientific knowledge will be altered by reasonably paced responses to scientific advances. Professor Gould's telling of the *Buck* story offers a different lesson and calls for a less complacent response:

When we understand why Carrie Buck was committed in January 1924, we can finally comprehend the hidden meaning of her case and its message for us today. The silent key, again and as always, is her daughter Vivian Carrie Buck was one of several illegitimate children borne by her mother, Emma. She grew up with foster parents . . . and continued to live with them, helping out with chores around the house. She was apparently raped by a relative of her foster parents, then blamed for her resultant pregnancy. Almost surely, she was (as they used to say) committed to hide her shame (and her rapist's identity), not because enlightened science had just discovered her true mental status. In short, she was sent away to have her baby. Her case never was about mental deficiency; it was always a matter of sexual morality and social deviance. The annals of her trial and hearing reek with the contempt of the well-off and well-bred for poor people of "loose morals." Who really cared whether Vivian was a baby of normal intelligence; she was the illegitimate child of an illegitimate woman. Two generations of bastards are enough. [An expert witness for the state] began his "family history" of the Bucks by writing: "These people belong to the shiftless, ignorant and worthless class of anti-social whites of the South."³⁹

If, as Gould believes, social bias infects and hides behind scientific judgments,⁴⁰ then law professionals are obliged to evaluate scientific knowledge with this possibility in mind. The conclusion that "[t]hree generations of imbeciles are enough"⁴¹ was not simply wrong. It was both wrong and too lightly made. The Court dealt with a right that is universally cherished.⁴² Yet, compromise of the right was easily justi-

38. See Ferster, *supra* note 36, at 603-04.

39. P. 137. Attorneys for Carrie Buck offered no challenge of her diagnosis or of the heritability of her alleged condition. Brief for Petitioner, *Buck v. Bell*, 274 U.S. 200 (1927) (No. 292). As evidence of the certainty of the scientific underpinnings of the challenged law, Respondent offered the opinion of Professor East of Harvard University that "[i]n a quarter of a century laws of heredity . . . [had] been formulated as definite and precise as those of physics and chemistry." Brief for Respondent at 10, *Buck v. Bell*, *supra*.

40. Gould notes in this regard:

Science, since people must do it, is a socially embedded activity. It progresses by hunch, vision, and intuition. Much of its change through time does not record a closer approach to absolute truth, but the alteration of cultural contexts that influence it so strongly. Facts are not pure and unsullied bits of information; culture also influences what we see and how we see it. Theories, moreover, are not inexorable inductions from facts. The most creative theories are often imaginative visions imposed upon facts; the source of imagination is also strongly cultural.

S. GOULD, *THE MISMEASURE OF MAN* 21-22 (1981).

41. *Buck v. Bell*, 274 U.S. at 207.

42. Indeed, the right of procreation was the first right to which the test of strict scrutiny was

fied because social bias inhibited deference to a basic human entitlement of the affected class and facilitated acceptance of questionable scientific "truths."

The story of Malcolm X is also the story of state intervention to affect the lives of members of a disparaged group. It, too, involves family rights of fundamental character. It, too, may involve scientific judgments too lightly made. It does not, however, involve a scientific judgment now "known" to be wrong. It provides, therefore, a more difficult test of the argument for skeptical scrutiny when science is offered to justify limitation of the fundamental rights of a class that is the subject of social bias.

Malcolm X describes a childhood prematurely ended and a family divided by the racially motivated murder of his father and the exercise of state authority. El-Hajj Malik El-Shabazz, as he later came to be known, spoke with bitterness of the role of the state in the destruction of his family. After his father's death in 1931, Malcolm's 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."⁴³ We know the story of the destruction of the family only through the memory of the man who survived it — to become first a petty criminal and then a human rights activist of international prominence. It is best told in his words:

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 if we were their private property. As much as my mother would have liked to, she couldn't keep them out. She would get particularly incensed when they began insisting upon drawing us older children

applied. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941). The *Skinner* court described procreation as a "basic civil right[] of man. . . . fundamental to the very existence and survival of the race."

43. MALCOLM X & A. HALEY, *supra* note 10, at 14 (not excerpted in appendix).

aside, one at a time, . . . and asking us questions, or telling us things — against our mother and against each other.

. . . We really couldn't understand. What I later understood was that my mother was making a desperate effort to preserve her pride — and ours.

. . . .

. . . [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

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 . . . 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. They told us, "She's crazy for refusing food." Right then was when our home, our unity, began to disintegrate. We were having a hard time, and I wasn't helping. 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.⁴⁴

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 "[n]othing but legal, modern slavery — however kindly intentioned."⁴⁵

We have too little information to know whether the intrusion upon this woman's parental rights was in the best interests of her children. We do not know her condition, whether it was objectively diagnosed or whether it was appropriately treated. We do not know what assessments were made by mental health and child welfare professionals or what theories of child development supported the removal of the children and the termination of her parental rights. We do not know whether conditions in the household would have been more disabling to the children than the trauma of family dismemberment. But we can learn from her extraordinary son to appreciate more deeply the value of rights lost with the scientific and legal judgments to supplant, rather than support, the family.

44. *Id.* at 12-18 (portions excerpted in appendix).

45. *Id.* at 21.

B. *The Lessons of the Slavery Analogy*

El-Hajj Malik El-Shabazz recalls the orders assigning new familial ties for himself and his siblings and equates them to slavery. This is a startling insight. It evokes an American historical legacy, a legacy that is crucial to appreciation of the appropriate scope of constitutional rights of family: It provides guidance, grounded in history and political theory, for legal professionals who must weigh scientific claims against fundamental rights of family. It addresses contemporary arguments that certain rights of family are not "‘deeply rooted in this Nation’s history and tradition’"⁴⁶ and that their enforcement "represent[s] choices that the people have never made."⁴⁷ It therefore warrants detailed presentation.

The relationship between denial of family integrity and slave status is well recognized in the scholarship of slavery. Indeed, denial of rights of family is regarded as a hallmark of slavery:

[T]he slave was always a deracinated outsider — an outsider first in the sense that he originated from outside the society into which he was introduced as a slave, second in the sense that *he was denied the most elementary of social bonds, kinship*. "*Quem patrem, qui servos est?*" (Plautus, *Captiva* 574). "What father, when he is a slave?"⁴⁸

American slavery followed this pattern.

The condition of the American slave family was a mixed issue of law and practice. Descriptions of the relevant law are found in treatises of both uncritical and abolitionist scholars. In the former category, Thomas R.R. Cobb, confessing a bias "by . . . birth and education in [the] slaveholding State [of Georgia],"⁴⁹ reported that the slave had no legally cognizable right of marriage, family inheritance, or parental custody.⁵⁰

46. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1985) (White, J. dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

47. 476 U.S. at 787. Justice White's dissent in this abortion case reflects a continuing debate concerning the validity of the Supreme Court's recognition of unenumerated rights of family privacy, integrity, and autonomy. See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 12 (1971); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

48. M. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 75 (1980) (emphasis added) (citation omitted).

49. 1 T.R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* at x (1858).

50. "The inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves." *Id.* at 242-43.

The contract of marriage not being recognized among slaves, of course none of its consequences follow from the contubernial state existing between them. Their issue, though emancipated, have no inheritable blood.

. . . How far this contubernial relation between slaves may be recognized and protected by law, is a question of exceeding nicety and difficulty. The unnecessary and wanton separation of persons standing in the relation of husband and wife, though it may rarely, if ever, occur in actual practice, is an event which, if possible, should be guarded against by the law. And yet, on the other hand, to fasten upon a master of a female slave, a vicious, corrupting

William Goodell, writing as an abolitionist,⁵¹ saw the matter no differently with respect to the legal rights of slaves:

"A slave cannot even contract matrimony, the association which takes place among slaves, and is *called* marriage, being properly designated by the word *contubernium*, a relation which has no sanctity, and to which no civil rights are attached."⁵²

. . . .

. . . "[T]hese laws do not recognize the *parental* relation, as belonging to slaves. A slave has no more legal authority over his child than a cow has over her calf."⁵³

. . . .

"In the slaveholding States, except in Louisiana, no law exists to prevent the violent separation of parents from their children, or even from each other."⁵⁴

"Slaves may be sold and transferred from one to another without any statutory restriction or limitation, as to the separation of parents and children, [etc.], except in the State of Louisiana."⁵⁵

Goodell supports the view that slave family relations were no more honored in practice than in legal theory.⁵⁶ Literature of the mid-nineteenth century reflects the prevalence of this view and suggests the extent to which it influenced abolitionists' understanding of the evils of slavery and the importance of family rights to the definition of citizenship. Frederick Douglass, for example, had written that upon the death of a master he was:

immediately sent [forth] to be valued and divided with the other property. . . . No one could tell amongst which pile of chattels I might be flung. Thus early, I got a foretaste of that painful uncertainty which in one form or another was ever obtruding itself in the pathway of the slave. It furnished me a new insight into the *unnatural power* to which I was subjected. Sickness, adversity, and death may interfere with the

negro, sowing discord, and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the master.

Id. at 245-46 (citations omitted).

51. W. GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 17 (1853) ("We propose . . . by an exhibition of the American Slave Code, to test the moral character of American slaveholding."). The work was published by the American and Foreign Anti-Slavery Society.

52. *Id.* at 106 (citing G. STROUD, *SKETCH OF THE SLAVE LAWS* 61 (1827)) (emphasis in original).

53. *Id.* at 113 (citing W. JAY, *JAY'S INQUIRY* 132 (2d ed. 1835)).

54. *Id.* at 114 (citing G. STROUD, *supra* note 52, at 50).

55. *Id.* (citing J. WHEELER, *A PRACTICAL TREATISE OF THE LAW OF SLAVERY* 41 (1837)).

56. *Id.* at 115-21. Anecdotal accounts portray families separated by sale or distanced by the demands of servitude. Advertisements from southern newspapers offer rewards for the capture or killing of slaves reported to have run away in order to join family members. For further evidence of the frequency of slave family disruption, see authorities cited in J. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 38 (1988).

plans and purposes of all, but the slave had the added danger of changing homes, in the separations unknown to other men.

... One word of the appraisers, against all preferences and prayers, could sunder all the ties of friendship and affection, even to separating husbands and wives, parents and children.⁵⁷

This aspect of slave life was "the greatest perceived sin of American slavery."⁵⁸ As such, it was a central concern of abolitionists. Harriet Beecher Stowe wrote in 1853 that "[t]he worst abuse of the system of slavery is its outrage upon the family; and, as the writer views the subject, it is one which is more notorious and undeniable than any other."⁵⁹ An anonymous article in the *Antislavery Record* of 1836 said that "American slavery, both in theory and practice is nothing but a system of *tearing asunder the family ties*,"⁶⁰ and described the bonds among family members as manifestations of "sacred law which slavery scornfully sets at naught."⁶¹

Abolitionists believed that the evils of denying slaves the right of family went beyond the deprivation suffered by the slave.

Families of both races felt the evil effects of slavery;^[62] but, more

57. F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 95-96 (1962) (emphasis added).

58. J. MCPHERSON, *supra* note 56, at 37.

59. H. STOWE, *THE KEY TO UNCLE TOM'S CABIN* 237 (1853). Stowe writes in response to charges that family separations depicted in *Uncle Tom's Cabin* were unrealistic or atypical. Her evidence of the prevalence of slave family disruption includes eyewitness accounts of family separations resulting from slave auctions and advertisements for the sale of slaves. *Id.* at 259-67, 268-76.

60. *The Disruption of Family Ties*, *ANTISLAVERY RECORD*, Mar., 1836, at 9 (emphasis in original). The author asserts that in slaveholding states, "the principal business by which wealth is acquired is the *breeding of slaves*." Observing that "this trade takes off not usually whole families, but the young and the strong," the author says, "[n]ot a slave mother does there live in the slave-breeding district, who is not liable to lose her son or her daughter the moment her master shall think it for his interest to sell." *Id.*

61. *Id.* at 11. These and other abolitionist views on the family are collected and discussed in R. WALTERS, *THE ANTISLAVERY APPEAL* (1976).

62. Abolitionists took the view that slavery corrupted both white and black family values. They also argued that slavery inhibited the liberty of whites. Goodell wrote of a slaveholder without liberty to control the education of his children.

Here is a waiting-maid, discreet and pious; or here is a nurse, whom all her owner's children call "Mammy." A little knowledge of letters would qualify one or both of them to teach the little white masters and misses their alphabet. . . . [W]here is the legal protection of [the owner's] right to select a teacher of the alphabet to his own children? In Louisiana, he would be subject to one year's imprisonment for teaching such a slave to read! He enjoys liberty, does he?

W. GOODELL, *supra* note 51, at 374. This liberty interest was subsequently recognized as being embodied in the fourteenth amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In further support of the argument that slavery compromised the family values of whites, Goodell cited an incident apparently much discussed among his contemporaries:

Look then at the dying Thomas Jefferson, the penman of the declaration that "all men are created equal," now penning a clause of his last will and testament, conferring freedom (as common report says) on his own enslaved offspring, so far as the Slave Code permitted him to do it, supplying the lack of power by "*humbly*" imploring the Legislature of Virginia to confirm the bequests, "with permission to remain in the State, where their families and

important, so did society. "The Family is the head, the heart, the fountain of society," proclaimed one abolitionist, "and it has not a privilege that slavery does not nullify, a right that it does not counteract, nor a hope that it does not put out in darkness."

Destruction of the home fit with slavery's symbolic function as the exemplar of what could go wrong with society.⁶³

The attention abolitionists gave to the slave family paralleled an attentiveness throughout antebellum America to the institution of the family. It reflected a belief — held within and without abolitionist circles — that the family was not only sacred, but also the foundation of social order and moral development and the source of individual comfort and satisfaction.⁶⁴

It was in this context of general concern for the family as a social institution and particular concern for the deprivation of slave family rights that Congress addressed the slavery question. Family rights were an explicit concern when Congress acted, through the thirteenth amendment, to abolish slavery. Family rights were an explicit concern when Congress acted, through the Civil Rights Act of 1866 and the Freedmen's Bureau Bill, to define the rights of freedmen and other national citizens. Family rights were therefore encompassed when rights of national citizenship were given constitutional status with ratification of the fourteenth amendment.⁶⁵

connections are" — then dying, under the uncertainty whether his requests would be granted or his children sold into the rice swamps!

W. GOODELL, *supra* note 51, at 375. The literature of the time also included de Tocqueville's account of an

old man, in the South of the Union, who had lived in illicit intercourse with one of his Negresses and had had several children by her, who were born the slaves of their father. He had, indeed, frequently thought of bequeathing to them at least their liberty; but years had elapsed before he could surmount the legal obstacles to their emancipation, and meanwhile his old age had come and he was about to die. He pictured to himself his sons dragged from market to market and passing from the authority of a parent to the rod of the stranger, until these horrid anticipations worked his expiring imagination into frenzy.

1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 380 (P. Bradley ed. 1956).

63. R. WALTERS, *supra* note 61, at 58.

64. It is surprising, but important, that feminists and anti-feminists, abolitionists and anti-abolitionists, reformers and anti-reformers all directed their attention to the same institution. Rather than being a mere sentimental convention, concern for the family was bound up with the most serious social and cultural debates in antebellum America:

Virtually everybody assumed that, when properly structured, the family was crucial to social stability and to social improvement. . . . There was . . . more unity here than mere ritual expression of the importance of family life: the family, and relationships usually comprehended within it, were almost uniformly presented as vehicles of social and individual salvation.

Walters, *The Family and Ante-bellum Reform: An Interpretation*, 3 *SOCIETAS* 221, 225 (1973).

65. The fourteenth amendment was designed to give constitutional status to the rights conferred by the Civil Rights and Freedmen's Bureau legislation of 1866. This is "[t]he one point upon which historians of the Fourteenth Amendment all agree, and indeed, which the evidence places beyond cavil." tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171, 200 (1951).

1. *The Thirteenth Amendment Debates*

Concerns for the protection of family rights were regularly reflected in the debates concerning the thirteenth amendment.⁶⁶ The debates reflected more than concern regarding the condition of the slave family. They reflected also the conviction that the familial rights denied to the slave were fundamental and inalienable. The remarks of Congressman Ingersoll are typical: "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 . . . and no white man has any right to rob him of or infringe upon any of these blessings."⁶⁷ Senator Sumner asked that his colleagues imagine an extraterrestrial visitor beholding the spectacle of slavery:

[A]stonishment . . . would swell to marvel as he learned that in this republic, which has arrested his admiration, where there was neither king nor noble, but the schoolmaster instead, there were four million human beings in abject bondage, degraded to be chattels, . . . despoiled of all rights, even the right of knowledge and the sacred right of family; so that the relation of husband and wife was impossible and no parent could claim his own child.⁶⁸

Senator Wilson declared that upon ratification of the thirteenth amendment

The sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.⁶⁹

66. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865):

The slave could sustain none of those relations which give life all its charms. He could not say my home, my father, my mother, my wife, my child, my body. It is for God to judge whether he could say my soul. The law pronounced him a chattel, and these are not the rights or attributes of chattels.

(statement of Rep. Creswell); CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) ("[Slavery] has destroyed the sanctity of marriage, and sundered and broken the domestic ties.") (statement of Sen. Clark); CONG. GLOBE, 38th Cong., 2d Sess. 221 (1865)

It is strange that an appeal should be made to humanity in favor of an institution which allows the husband to be separated from the wife, that allows the children to be taken from the mother; ah! that allows the very children of the deceased slaveholder himself to be sold to satisfy his merciless creditors.

(statement of Rep. Broomall); CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) ("It has been asserted . . . that this thing, slavery, was of divine origin. . . . What divinity [is there] in tearing from the mother's arms the sucking child, and selling them to different and distant owners?") (statement of Rep. Shannon); CONG. GLOBE, 38th Cong., 1st Sess. 2984 (1864)

[T]he condition of . . . slaves has been attended with circumstances which not only deprive them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children"

(statement of Rep. Kelly) (quoting the Preamble to an Act for the abolition of Slavery in Pennsylvania).

67. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

68. CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864).

69. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

Senator Harlan described and condemned as contrary to natural law the "incidents of slavery." The first two incidents related to rights of family. The Senator spoke first of marriage:

Some of the incidents of slavery may be stated as follows: it necessarily abolishes the conjugal relation. . . . [I]n none of the slave States was this relation tolerated in opposition to the will of the slave-owner

The existence of this institution therefore requires the existence of a law that annuls the law of God establishing the relation of man and wife, which is taught by the churches to be a sacrament as holy in its nature and its designs as the eucharist itself.⁷⁰

Senator Harlan spoke next of the parent-child relationship:

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. And yet, according to the matured judgment of these slave States, this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.⁷¹

For Harlan, and for other abolitionists, the slaveholder's claim of property rights was illegitimate because it stood in conflict with superior and "inalienable" human rights of the slave — rights that were "sacred," denied only by laws "shocking to human nature itself," rights that were "holy," "necessary to the preservation of virtue in civil society," and emblematic of the relationship between God and man. Representative Farnsworth put it in these terms:

What vested rights [are] so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother man?⁷²

The status attributed to family rights by proponents of the thirteenth amendment was asserted even more clearly by Congressman Kasson:

[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.⁷³

70. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

71. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

72. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865).

73. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

2. *The Debates of the Thirty-Ninth Congress*

Congressional debate concerning the reach of the thirteenth amendment did not end with the amendment's passage.

The congressional battle that raged around . . . [the Civil Rights Bill and the Freedmen's Bureau Act] constituted . . . [an] important debate over the Thirteenth Amendment. By the Amendment, the principle of universal liberty had been established. The Freedmen's Bureau and Civil Rights bills represented the efforts of the Amendment's framers, acting contemporaneously with its ratification, to implement the Amendment and define the principle.⁷⁴

Implementation of the amendment involved containment of the effects of the Black Codes, by which Southern states sought to perpetuate incidents of slavery. These codes included measures that compromised the family rights of former slaves.⁷⁵ When Congress acted to invalidate the Black Codes and to interpret and enforce the thirteenth amendment guarantee of liberty, family rights were again addressed. In these debates, as in the thirteenth amendment debates, members of Congress explicitly recognized the fundamental importance of family rights to the concept of freedom:

Slavery cannot know a home. Where the wife is the property of the husband's master, and may be used at will; where children are bred, like stock, for sale; where man and woman, after twenty years of faithful service from the time when the priest with the owner's sanction by mock ceremonies pretended to unite them, are parted and sold at that owner's will, there can be no such thing as home. Sir, no act of ours can fitly enforce their freedom that does not contemplate for them the security of

74. tenBroek, *supra* note 65, at 186.

75. The codes uniformly provided for the legitimization of slave marriages. H.R. EXEC. DOC. NO. 118, 39th Cong., 1st Sess. (1866). However, Senator Windom reported from correspondence describing the Black Codes of Mississippi that "Section third [of the freedmen's bill] compels all freedmen to marry whomsoever they may now be living with, and to support the issue of what was in many cases compulsory cohabitation." CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (quoting from letter from Lt. Stewart Eldridge to Maj. Gen. Howard (Nov. 28, 1865)). In some jurisdictions, slavery was effectively continued through the device of making black children the wards or apprentices of whites. The procedure by which this was done differed from apprenticeship arrangements involving white children in that parental consent was not required. An example of legislation establishing this device was offered by Senator Sumner to illustrate the evils of the Black Codes. CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865). Senator Donnelly reported that "[t]he black code of Tennessee provides that . . . children [of the vagrant Negro] may be bound out against his wish to a master by the county court . . ." CONG. GLOBE, 39th Cong., 1st Sess. 589 (1865). Similar apprenticeship arrangements were held, in an opinion by Chief Justice Chase, sitting in the Circuit of Maryland, to violate the thirteenth amendment. *In re Turner*, 24 F. Cas. 337 (C.C.D.Md. 1867) (No. 14,247). *Turner* has been incorrectly cited as an opinion of the Supreme Court abolishing these apprenticeship practices. See, e.g., H. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM* 410 (1976). The effect of *Turner* is not entirely misperceived as a result of this error. An excerpt from a subsequent district court opinion, transmitted to Congress in 1868, says of the case, "This decision . . . will govern me in all future applications of a similar character, unless a different opinion shall be pronounced by the Supreme Court." S. Misc. Doc. No. 24, 40th Cong., 2d Sess. 6 (1868).

home.⁷⁶

The first version of the Civil Rights Act spoke in terms of discrimination, prohibiting "any inequality of civil rights and immunities among the inhabitants of [former Confederate] States."⁷⁷ Senator Sherman proposed that the Act be amended to "secure to the freedmen of the southern States certain rights, naming them, defining precisely what they should be, [and including] the right . . . to be protected in their homes and family [as a] . . . natural right[] of free men."⁷⁸ Senator Sumner also urged specification of the rights of freedmen, including among them the rights "to contract marriage, and to make any arrangement whatever concerning their family affairs. . . ."⁷⁹

The Act was amended to specify rights to which freedmen were entitled. The specification included the rights

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as it is enjoyed by white citizens, and . . . [to] be subject to like punishment, pains, and penalties, and to none other.⁸⁰

It was understood that the rights of contract,⁸¹ of property⁸² and of equal benefit of law⁸³ encompassed rights of marriage⁸⁴ and family

76. CONG. GLOBE, 39th Cong., 1st Sess. 2779 (1866) (statement of Rep. Eliot, speaking with respect to the homestead provisions of the Freedmen's Bureau Bill).

77. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).

78. CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

79. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (quoting regulations accompanying the 1861 Proclamation emancipating the serfs of Prussia).

80. CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

81. The deprivation of all slave family rights was traced to denial of the right to enter the contract of marriage. See note 50 *supra*.

82. Rights of family were, in the nineteenth century, regarded as aspects of the property rights of men. The language of Representative Wood, speaking in opposition to the thirteenth amendment, illustrates the point. "The social and domestic relations are equally matters of individual ownership with flocks and herds, houses and lands. The affections of a man's wife and children are among the dearest of his possessions, and as such are under the protection of the law." CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).

83. The application of the equal protection concept to family rights is illustrated in the full text of the debates cited at note 84 *infra*.

84. The understanding that the thirteenth amendment and enforcing legislation affected the right to marry sparked heated controversy in the Freedmen's Bureau Bill debates over the prospect of miscegenation. In this context, we find two congressmen denying that the right to marry was conferred by the language of the bill. See CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton, denying that the right of marriage was a civil right within the meaning of the Freedmen's Bureau Bill); CONG. GLOBE, 39th Cong., 1st Sess., Appendix at 75 (1866) (statement of Rep. Phelps, denying that the Bill encompassed a right to marry). But most who spoke on the subject argued or acknowledged that the bill affected marriage rights. Opponents of the bill complained against its scope. See CONG. GLOBE, 39th Cong., 1st Sess. 318 (1866) (statement of Sen. Hendricks, arguing that "[m]arriage is a civil contract, and to marry according to one's choice is a civil right"); CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson, arguing that the right to make and enforce contracts encompasses the right of interracial marriage); CONG. GLOBE, 39th Cong., 1st Sess. 418 (1866) (statement of

integrity.⁸⁵

The thirty-ninth Congress went beyond assuring former slaves the enumerated rights set forth in the Civil Rights Act (and, in slightly modified form, in the fourteenth amendment). It made them citizens. Rights of family were understood not only as components of rights of property, contract, and equal protection, but also as components of the liberty interests inherent in citizenship status. Senator Trumbull offered the amendment to the Civil Rights Act that conferred citizenship rights upon freedmen.⁸⁶ His subsequent remarks describe the intended scope of the rights to be conferred:

It is difficult, perhaps, to define accurately what slavery is and what liberty is. Liberty and slavery are opposite terms; one is opposed to the other.

. . . Civil liberty . . . is thus defined by Blackstone:

"Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public." That is the liberty to which *every citizen* is entitled⁸⁷

When consideration of the Trumbull amendment resumed on the following day, Senator Howard responded to those who argued that Congress lacked the authority to enforce general citizenship rights in behalf of freedmen; he spoke specifically of rights of family:

[The slave] had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.

. . . .

. . . Is a free man to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word "freeman" that does not include these ideas? The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?⁸⁸

Sen. Davis, arguing that the right of interracial marriage is a consequence of the law). Supporters of the bill acknowledged that the right to marry was implicated, and addressed the miscegenation fear by positing a "separate-but-equal" approach to marriage rights. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Fessenden, arguing that "[the black man] has the same right to make a contract of marriage with a white woman that a white man has with a black woman"); CONG. GLOBE, 39th Cong., 1st Sess. 322, 420 (1866) (statement of Sen. Trumbull, arguing that the right of marriage, encompassed by the bill, did not include the right of interracial marriage).

85. Rights of family integrity were understood to flow from the right to create a family by marriage. See note 50 *supra*.

86. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

87. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

88. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

3. *The Fourteenth Amendment — A Third Force in Law-Science Interactions Touching Family Life*

In this country, the meaning of citizenship developed with reference to the experience of slavery. It was in the process of abolition that rights of national citizenship were articulated and given protection against encroachment by the states. The fourteenth amendment assured the constitutional status of fundamental rights that were identified in the thirteenth amendment debates as having been trampled by slavery, and decreed by the civil rights legislation of 1866 to be the entitlement of free people.⁸⁹

The debates of the thirty-eighth Congress have prompted the observation that "[t]he opposite of slavery is liberty."⁹⁰ Denial of rights of family is of the essence of slavery. It was a prominent and uniquely detestable feature of American slavery.⁹¹ Appreciation of the need to protect rights of family is a legacy of the progression from a slaveholding nation to a nation in which citizenship is a human birthright.

The fourteenth amendment, understood as an embodiment of that legacy, serves to insulate rights of family. When claims of science seem to justify curtailment of those rights, special scrutiny is required to test the objectivity and accuracy of the scientific judgment and the balance between liberty lost and public policy advanced. Scrutiny of this sort would have heightened judicial appreciation of the value to Carrie Buck of the liberty to bear children and the value to Malcolm X's family of the right to survive as a family. Scrutiny of this sort would have encouraged critical judicial examination of scientific prognoses with respect to the unborn children of Carrie Buck and the uprooted children of Malcolm X's mother.

Goldstein, Freud, Solnit, and Goldstein have enriched the store of scientific knowledge upon which lawmakers may draw in advancing the public good and promoting the interests of children. Their unexplained offering of the stories of Carrie Buck and Malcolm X suggests that they sense the dangers of uncritical reliance upon that knowledge. Both the science and the dangers must be appreciated. Law-science collaborations that affect fundamental rights require more than that

89. See notes 73-88 *supra* and accompanying text.

90. tenBroek, *supra* note 65, at 179.

91. The legacy of this feature of slavery is described from the perspective of a principal character in Toni Morrison's novel of motherhood and slavery:

Anybody Baby Suggs knew, let alone loved, who hadn't run off or been hanged, got rented out, loaned out, bought up, brought back, stored up, mortgaged, won, stolen or seized. . . . What she called the nastiness of life was the shock she received upon learning that nobody stopped playing checkers just because the pieces included her children. Halle she was able to keep the longest. Twenty years. A lifetime. Given to her, no doubt, to make up for *hearing* that her two girls, neither of whom had their adult teeth, were sold and gone and she had not been able to wave goodbye. . . . "God take what He would," she said. And He did, and He did, and He did. . . ."

T. MORRISON, *BELOVED* 23 (1987).

lawyers and scientists know their respective places. They require critical analysis of the competing claims of science and law; humble evaluation of the power of scientists to know; and cautious delineation of the rights and responsibilities of individuals, functioning within the "private realm of family life"⁹² and of the collective, acting upon scientific knowledge to assure or enhance the well-being of its members.

92. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).