"We, Black Believers": Momma's Doubts About the E.R.A.

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Dear Momma,

I am taking this moment from my coursework to write to you about an issue that has come up in my study, which you and I spent so much time talking about during my last visit with you. Lately, I have been thinking about the Equal Rights Amendment (ERA) and the reasons that women have been divided over the issue. I find myself thinking not just about women in general, but about you, my mother, Ernestine Bagley of Chester, Pennsylvania. I want to share my thoughts with you about the ERA, about divisions among women, and about divisions *within* women whose social identity involves not only woman-ness, but also Blackness.

I want to think with you because I miss you, because I love you, and because whatever I believe about woman-ness, about Blackness, and about the law begins with what you have given me to believe about myself. If other women and men want to listen in, I am confident that we, you and I, will not mind. Indeed, I have even added footnotes to make our discussion clearer to those who may not be familiar with some of the Biblical, historical, literary, or legal references that are commonplace to you or me.

As you know, I am an advocate of the ERA. That advocacy may seem moot since the ERA has just been effectively defeated. But I am convinced that the political struggle for the ERA should and will continue as it has for at least the past three score years.

I know that you are ambivalent about the ERA; you know that your judgment of social-ethical issues has always deeply affected my own. You may also know that, in my estimation,

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the significance of law is its role as the practical ideological codification of dominant social and ethical norms. Thus, this discussion is simultaneously concerned with personal, social, and doctrinal legal issues that the ERA debate raises, all within a framework of explicit ethical values.

Although the quest for a Constitutional amendment guaranteeing equality of the sexes in the law dates back to at least 1923, the starting point of this discussion is 1954. That year the Supreme Court's decision, *Brown v. Board of Education*,[1] outlawed a racially segregated public school system. In *Brown*, the Supreme Court actually reached a very narrow decision on the issues raised by Linda Brown and her NAACP lawyers. The Court did not, for instance, outlaw racially restrictive voting laws that denied our people the franchise in those jurisdictions where most of us then lived. The *Brown* decision did not strike down Jim Crow[2] (apartheid) in public accommodations. It did not declare illegal those galling classified ads for housing and jobs, divided into "White" and "Colored" sections, that were standard fare in our Chester, Pennsylvania *Times*. Indeed, the Court did not even address *de facto* racial segregation in putatively unitary school systems like the public school system which your children attended.

Still, *Brown* was a tremendous legal and symbolic victory for us. Regardless of the legal-ese, we knew that the Court had given in to the relentless extra-legal lobbying and agitation of civil rights advocates. That is, without detracting from the personal brilliance of Charles Houston, Thurgood Marshall, and the other NAACP lawyers, we knew (you knew better than I did) that *Brown* was something our people had won. *Brown* proved that we could win and win big. It signaled us to intensify our struggle, to claim our rights in every sphere of life. Without *Brown*, there might not have been the Montgomery bus boycott and the emergence of the powerful direct action

1. 347 U.S. 483 (1954) (held that the separate but equal doctrine had no place in education systems and declared illegal the segregation of students by race). The Supreme Court in *Brown* did not expressly overrule Plessy v. Ferguson, 163 U.S. 537 (1896).

2. "Jim Crow" is the colloquial term for the American system of apartheid or racial segregation through which this country codified White Supremacy. It involved restriction of Afro-Americans from white public facilities, white schools, white seats on public conveyances, white housing, etc. Jim Crow often required posting "White" and "Colored" signs to designate segregated facilities. Functionally, Jim Crow involved either dual systems or the exclusion of Afro-Americans from a panoply of white citizenship rights and benefits. For a thorough discussion of American apartheid, see C. Vann Woodward, The Strange Career of Jim Crow (1955).

movement, two short years later in 1956.[3]

Retrospectively, some may argue that we read too much into *Brown*. The masses of us, ignorant of the fine and narrow points of law, took *Brown* to mean that the highest Court of the land had given us the green light to claim equality in all aspects of our social existence. Arguably, Dwight Eisenhower's mandate that integration take place with "all deliberate speed" was closer to the legal mark than the Negro's cry for "Freedom Now!" But the symbolic meaning of *Brown* transcended legal niceties and confirmed a new social and ethical norm that had no authentic space for Jim Crow, White Supremacy, and the "separate but equal" standard articulated in *Plessy v. Ferguson*[4] just before the turn of the century.

The ERA is likewise a legal symbol. The ERA has been a rallying point for the broad political and cultural movement seeking the equality of the sexes, demanding the liberation of women. Resistance to the ERA is often obfuscated by appeals to the traditional hierarchy of the patriarchal family. Anti-ERA forces look to Biblical sanctions of female subordination to support their position: remember Paul's admonition to women to keep silent in church.[5] Legal scholars and judges have argued, especially in family law areas, that relations between women and men are more properly the preserve of local governments. This anti-ERA indoctrination glaringly parallels pro-racist appeals to tradition, to allegedly divine sanctions ("Slaves, obey your masters."),[6] and to racism masking as states' rights. Our experience as Afro-Americans furnishes us with a unique ability both to recognize the powerful, practical value of legal symbols and to see through the fogs of anti-egalitarian apologies for Male Supremacy. Our experience is an historical precedent.

Thus, not surprisingly, race-related law has emerged as the most useful paradigm for the formulation and adjudication

3. The Montgomery boycott story is stirringly and analytically chronicled in Martin Luther King, Jr., Stride Toward Freedom (1958) (*see* 151-53, 157-60 for the interplay between mass protest strategies and litigation). Derrick Bell argues that, without the direct action protest movement, *Brown* would probably have been a dead letter. Derrick Bell, Race, Racism and American Law, 279-361 (2d ed. 1980). Perhaps the most thorough discussion of the interplay between legal rights and mass protest is Frances Piven & Richard Cloward, Poor People's Movements: Why They Succeed, How They Fail, 181-263 (1977). *See also*, Martin Luther King, Jr., Why We Can't Wait (1964).

4. 163 U.S. 537 (1896) (holding that race-based segregated accommodations for railway passengers were not violative of the fourteenth amendment if such accommodations were equal in nature: the "separate but equal" doctrine).

5. 1 Corinthians 14:34.

6. Ephesians 6:5, Colossians 3:22, Titus 2:9.

of laws and legal controversies related to sex. To a great extent, the evolution of sex discrimination law, especially in the past score of years, has involved two recurrent themes: whether legislatures should append "sex" to areas covered by race-related anti-discrimination law, and whether courts should interpret the category of "sex" like the category of "race" in anti-discrimination law. The emergence of these themes reveals the tendency toward confluence of race law and sex law doctrines.

There is, however, still a great divide between race law and sex law in this strange land. Race is a suspect classification that triggers the presumption of wrongfulness. Allocation of jobs on a racial basis, for example, invites strict scrutiny and is, in the context of contemporary law,[7] invidious discrimination, unless the allocation serves as a compensatory remedy for effects of racial discrimination, *e.g.*, affirmative action or some other "compelling government interest."[8] Gender-based distinctions must merely "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to satisfy judicial scrutiny under the equal protection clause to the Constitution.[9] Furthermore, the courts treat gender-based "benign discrimination" much more ambiguously and leniently than race-based discrimination. In effect, this means that women *per se* have less legal protection against materially and psychically damaging discrimination than Blacks have. Whether the legal protections are mirrored in real world experience depends, of course, on various factors. Formal legal protections notwithstanding, the quality of justice afforded to women often turns upon whether the women are

7. We would be recklessly shortsighted to forget that the presumption of invidiousness, with respect to racial classifications, is a fairly new Constitutional standard. Indeed, the Supreme Court in *Plessy* upheld racial separation as constitutionally permissible and affirmed segregation laws that were commonplace in both the North and South from before the birth of the Republic. *See* A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period (1978). Not until its decision in *Brown*, a scant 29 years ago, did the Supreme Court finally assert that "separate but equal" is inherently "unequal."

8. Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (the Court prohibited the allocation of a specific number of admissions to minority students). United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that Title VII did not prohibit employers or unions from seeking to remedy racial imbalances in traditionally segregated job categories).

9. Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that age-sex differentials were an improper basis for an Oklahoma law permitting the sale of beer to women at age eighteen but not to men until age twenty-one). Oklahoma's stated objective, traffic safety, failed under the Court's test.

Black or white, rich or poor, welfare mothers or suburban housewives, highly educated or functionally illiterate, well-paid professionals or "cleaning ladies."

The passage of the ERA will elevate sex discrimination issues to the same Constitutional level held by race discrimination issues. Under the ERA, gender-based classifications will be as suspect as race-based classifications are, and the legal arsenal to defend the rights of women will be significantly expanded. At the same time, the ERA will not magically obliterate those biological differences between women and men that might be juridically significant. In other words, using cliche' examples, the laws governing wet-nurses or sperm-bank donors would not cease to have differential applications to women and men since only women are potential wet-nurses and only men are potential sperm donors as biological matters of fact. I imagine these examples seem silly, but they serve to highlight that there are relevant biological differences between the sexes which the ERA will not affect any more than the *Brown* decision has affected the pigment of our skin or our right to select hair grooming products we feel most appropriate for our nappy hair!

Indeed, the group which may benefit most materially from the passage of the ERA is that of Afro-American women who are often "triply jeopardized" by racism, sexism and economic deprivation (the latter reflecting the feminization of poverty and the fact that Black women are much more likely to be poor than "our white sisters").[10] The elevation of sex discrimination to the same level of legal scrutiny as race discrimination, encompassing the "disparate impact" and affirmative action precedents (not yet overturned by the Rehnquist Court),

10. In 1981, the median income for white women was $5,519. Bureau of the Census, U.S. Dept. of Commerce, Money Income of Households, Families, and Persons in the United States: 1981, Current Population Reports, Consumer Income, Series P-60, No. 137, Table 46, 153. The median income for Black women was $4,903. *Id.* at 155. Correlatively, the median income for white households in 1981 was $20,153 and for Black households was $11,309. *Id.* at Table 1, 5. Because one out of every three Black households in 1980 was maintained by a woman, the conclusion that Black women are, as a whole, poorer than white women is clear. Further, 66.9% of Black women in America earned less than $8,000 for the year 1981. *Id.* at Table 39, 122. At the same time, 62.8% of white women in America earned less than $8,000. *Id.* Contrastingly, 31.6% of American males earned less than $8,000 in 1981. *Id.* at 120. The median income in 1981 for white males was $14,296, *id.* at Table 46, 153, and the median income for Black males for that same year was $8,501, *id.* at 154.

For a discussion of the impact of racism on the Black family and on women in the Black family, see Muhammad Kenyatta, *In Defense of the Black Family: The Impact of Racism*, Monthly Review, March 1983, at 12.

should be especially attractive to poor and working-class Black women. The *Brown*-like symbol of the ERA should trigger enthusiastic support from Black women who, like you, have directly experienced *Brown*'s liberating impact against Jim Crow.

Why then are so many of our mothers, our aunts, our grandmothers, our older sisters, our role models and our counselors ambivalent about the ERA? Please forgive my audacity in hazarding an answer. I am cautious because of my relative youth and the often clumsy blindness of my own sex. And let me, in speaking about this ambivalence, revert to the "we" voice that is most natural in our intimate conversation, for your ambivalence gives me pause no matter what bold poses I might strike.

We are ambivalent because we are afraid, lest anything detract from our struggle against racism which has been the central fact of our social, political, and economic lives. We have grown accustomed to submerging the claims of woman-ness lest we give the white masters a wedge to divide us from our beleaguered men. We know these bourgeois feminists because we have heard them divulge their intimacies, while oblivious to us scrubbing their floors and serving their tables. We know how much alike they are to their husbands, fathers, and brothers whose chauvinism they berate. We simply do not, indeed, cannot, trust them to see the scars where our own men have wounded us.

We have been, many if not most of us, sustained by a faith in the same Bible that the Phyllis Schlaflys and Jerry Falwells have used as a weapon against us. We do incline an ear to the religious rhetoric of the anti-feminist Rightists, even though we ultimately reject their politics. Abortion is a troubling ethical question for us. We are turned off by the apparent glibness of the visible feminist leadership toward this question, even though—or better to say, especially because—we have cradled our crying daughters in our arms after counseling them to terminate unplanned pregnancies. We have suffered too many break-ups of our own marriages and yearned too often for husbands who would indeed protect us from the vicious white-made world to applaud cheerfully the deterioration of the family—even though we ourselves have never played the vapid Harriet to a banal Ozzie. We have fought for our daughters and sons to gain entry into the American Dream; we find little joy in the realization that that Dream is just another nightmare.

We have been, as the poet Margaret Walker[11] intones, "believers," even when we knew more than we believed.

And, now, we are sometimes just simply tired. We have hoped so high for the flowering of one revolution, the revolution for racial justice in our children's lifetimes. And we watch daily as our hopes wither, as too many of our peers—women and men—shrivel toward pointless deaths after lives that seem too often of no great moment. We watch as the glorious children of our neighborhoods grow into embittered, fearsome, dangerous brutes and our neighborhoods decay into impoverished anarchy. We are sometimes just too tired to re-invest our broken hopes, again. I know.

But, Momma, you have prevailed. You have given me strength even when you didn't know you had any left. Your mended hopes have held better than good enough. As you have moved on and on, through your tirednesses and ambivalences, you have shown me how to move through my own doubts. I am not writing to try to persuade you to become an advocate of the ERA or of anything else; you know what you know. And your example has taught me to trust my own knowledge.

I am an advocate of the ERA, dearest woman, because you have persuaded me of myself.

With love and gratitude,
Your son,
Muhammad

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11. Margaret Walker Alexander, *We Have Been Believers* in The Poetry of Black America 145-46 (Arnold Adoff ed. 1973). The poem begins,

> We have been believers believing in the black gods of an old land,
> believing in the secrets of the seeress and the magic of the
> charmers and the power of the devil's evil ones.

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