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A Relevant Message about School Vouchers from South Carolina*



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By Paul T. Mero

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On the heels of the Utah State Legislature passing school vouchers, an interesting public dialogue is also occurring in South Carolina but with a twist. In a southern state significantly more populated with African-Americans than Utah, the debate over school vouchers has taken on an added dimension, namely the introduction of the topic of slavery.

A well-respected African-American minister in Charleston, associated with the NAACP, has raised the specter of slavery as an argument *against* the movement for school vouchers. The Rev. Joseph A. Darby of the Morris Brown A.M.E. Church believes that vouchers treat children like commodities and that the last time we treated human beings as commodities we called it slavery.

Another African-American minister from Charleston, Pastor Richard L. Davis with Clergy for Educational Options, disagrees. Lamenting the dismal educational achievement for black children in South Carolina's public schools, Pastor Davis, writing for *The State* newspaper, explains, "Such [low] achievement levels harm our children just as surely as Jim Crow harmed their grandfathers." He adds,

The same system that delivers sky-high dropout rates combined with pitifully low achievement scores also insists on sucking up all the resources while doing it. Most African-American parents have no voice in the current system, no choice to get out of it and little hope to get their children the best possible education. That is what I call educational enslavement.¹

Both opinions invoke oppressive and inflexible "systems." While African-Americans are no longer saddled with the old plantation system, evidently many racial minority families feel saddled with another kind of seemingly inescapable system, at least that is one view from South Carolina's voucher wars.

This interesting debate among our southern neighbors is relevant for our own public discussions. After all, both sides of the voucher debate in Utah point to "systems" – voucher opponents defending the public school system; the other side, tired of being needlessly shackled by the system, favoring the right of self-determination for many Utah parents and their children. While certainly absent the horrific nature of the historic slavery experience, the voucher debate does possess similar moral and legal parallels. Both histories are about the human experience, and both issues touch the core of what it means to be free.

The Legal Parallel

It is no coincidence that *Brown v. Board of Education* and other important court cases in education have revolved around issues of race, equality, and freedom. Nor is it coincidence that all of these cases were decided using post-Civil War, slave-related jurisprudence. Indeed, the legal and moral basis of any issue involving educational freedom rests primarily on the fulcrum of the Fourteenth Amendment to the United States Constitution and a clear understanding of its historical context. The Fourteenth Amendment, Section I, reads,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Addressing separately the coercive aspects of both slavery and restrictive schooling laws, courts have consistently leaned on the Fourteenth Amendment's due process clause ("nor shall any state deprive any person of life, liberty, or property, without due process of law") to uphold personal and educational freedoms. It has played a crucial role in determining many important court decisions, not the least of which concern most education issues from parental rights and home schooling to desegregation and busing to students' rights and problems associated with discipline and curricula.

The due process clause, historically, has been a hotly debated subject in law. It has turned many a jurist on his head – conservatives using it to defeat President Roosevelt's New Deal proposals, with liberal jurists invoking another interpretation at the time, and liberals using it to create privacy rights leading to abortion on demand, with conservative jurists invoking another interpretation.

In a nutshell, the debate over the scope and real meaning of the due process clause falls into two camps. The first camp views the clause with an eye toward legal literalism, that is, when it says due *process* it means process – the right to a fair trial, competent council, jury of our peers, etc. This camp, for example, largely left the issue of slavery for states to decide. The second camp views the clause as having *substantive* meaning. "Life, liberty, and property" must be defined substantively before a determination of due process can be justly rendered. This camp, conversely, saw slavery as a basic violation of an individual's life, liberty, and property.

Legal scholar Michael J. Phillips provides a useful explanation of *substantive due process*,

In substantive due process cases, courts consider whether the benefits and burdens created by the challenged law are sufficiently fair to pass constitutional muster. To take an absurd example, suppose that State X imposes a \$50,000 fine for picking one's nose in public and imposes this penalty without anything resembling a trial or hearing. Objections involving the wrongfulness of criminalizing such behavior or the excessiveness of the penalty are substantive; objections involving the absence of a fair trial or hearing are procedural.²

Fundamental liberty interests protecting individuals from slavery and protecting parents from restrictive school laws arise out of this substantive due process legal doctrine. In both cases, an individual or a parent may not be deprived of his life, liberty, or property without due process of law wherein these three rights are properly defined and addressed. In the case of slavery, an individual has a recognized fundamental prior right as a free man. In the case of coercive and restrictive schooling laws, a parent has a recognized fundamental prior right to control the education of his or her children.

The Familial Parallel

The Fourteenth Amendment was passed into law in 1868 in response to underlying and continuing injustices involved with slavery. Slavery represented horrible and intolerable violations of personal and parental rights. Not only were African-Americans treated individually like animals and worse, generally they were not allowed to marry, they were not allowed the right and privilege to parent their children, nor were their children allowed the right and opportunity to care for their aged or sick parents. Slavery was and remains today the most anti-family social institution ever devised by man.

The diaries and journals of black slaves, though often overlooked in discussions about the Fourteenth Amendment, offer rich historical evidence regarding the brutalities imposed on African-American parents and their children. For the people living through it, the premise of slavery was simple: they were property not people, their children were the property of slaveholders, and anything resembling due process did not apply to them or their condition.

In her book *Neglected Stories*, Peggy Cooper Davis shares the autobiographical history of one former slave, James W.C. Pennington who wrote of his early childhood, "When I was about four years of age...I began to feel another evil of slavery – I mean the want of parental care and attention. My parents were not able to give any attention to their children during the day. I often suffered much from hunger and other similar causes. To estimate the sad state of a slave child, you must look at it as a helpless human being thrown upon the world without benefit of its natural guardians."

Ms. Davis elaborates on this burden,

Enslaved people's capacity to educate and socialize their children was as restricted as their capacity to meet their children's physical and emotional needs. This restriction cut deeply. Most enslaved parents could not send their children to school or choose or reject apprenticeship training for them. Their capacity to give their children home instruction or to supervise and control their daily activities was severely hampered. And these difficulties were compounded by an undermining of parental authority so persistent and insidious that it threatened to negate the good effects of whatever care and attention enslaved parents did manage to provide...

These messages of parental vulnerability and subordination were repeatedly burned into the consciousness of slave parents and children, undermining their sense of worth, diminishing the sense of family security and authority, eroding the parents' function as a model of adult agency and independence, and, most importantly...kindling a determination that freedom would entail parental prerogatives.³

The mere thought of parent-child separation was terrifying and demoralizing to slaves. Former slave Henry Brown wrote of the loss of his child to slave merchants,

These beings [children] were marched with ropes about their necks, and staples on their arms, and, although in that respect the scene was no very novel one to me, yet the peculiarity of my own circumstances made it assume the appearance of unusual horror. The train of beings was accompanied by a number of wagons loaded with little children of many different families, which as they appeared rent the air with their shrieks and cries and vain endeavors to resist separation which was thus forced upon them, and the cords with which they were thus bound; but what should I now see in the very foremost wagon but a little child looking towards me and pitifully calling, father! father!⁴

In a poem titled "The Slave Mother," Frances Ellen Watkins Harper⁵ elicits strong maternal emotions fearing the loss of her children at any time through the arbitrary whim of a slave master,

*I have but four, the treasures of my soul,
They lay like doves around my heart
I tremble lest some cruel hand
Should tear my household wreathes apart*

Commenting on the plight of black slaves from the view of a white abolitionist of that period, Angelina Grimke observed, "Parents are almost never consulted as to the disposition to be made of their children; they have as little control over them, as have domestic animals over the disposal of their young. Every natural and social feeling and affection are violated with indifference; slaves are treated as though they did not possess them."⁶

These stories and thousands more like them are the human backdrop that stimulated passage of the Fourteenth Amendment. The new abolitionist "system" encouraged and perpetuated by the Fourteenth Amendment is this: all people are human beings, all people come from families, and all parents and their children must be protected in their sacred relationships and collective opportunities to prosper.

Compare that new way of thinking to the old "system" of slavery: slave families were told by paternalistic slave owners that they knew what was in their best interests and, frankly, in the state interest; these families were constantly reminded how blessed they were for being taken care of and protected; slavery, they were told, was for their own good and the good of society. And this system had its strong defenders.

The Socio-Economic Parallel

Of all the insidious arguments in favor of slavery perhaps none is more relevant to our discussion of modern public school reforms, such as vouchers, than a pro-slavery defense known as "mudsill" theory.

Homebuilders both past and present know that mudsill is a pounded earthen floor prevalent in many primitive homes. Poor families who could afford a roof over their heads but not real wood floors under their feet created mudsills. The earth became floor. The term mudsill was eventually ascribed derogatorily to any poor person and mudsill theory in defense of slavery held that poorer classes were natural and essential to human progress. In other words, a certain poor class of people must always exist in society to do the hard labor so that privileged classes could move civilization forward.

The chief proponent of mudsill theory was a Civil War-era South Carolina planter and United States Senator named James Henry Hammond. In a speech delivered on the Senate floor in 1858, Senator Hammond explained,

In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads to progress, civilization, and refinement. It constitutes the very mudsill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mudsill.⁷

Hammond's contemporary, and a popular pro-slavery advocate, George Fitzhugh added paternalistically,

The Negro is but a grown up child, and must be governed as a child...The master occupies toward him the place of parent or guardian...The negro is improvident...He would become an insufferable burden to society. Society has the right to prevent this, and can only do so by subjecting him to domestic slavery...[T]hey would be far outstripped and outwitted in the chaos of free competition.⁸

Just a year after Senator Hammond delivered his incredulous defense of slavery, and one year before being elected president of the United States, Abraham Lincoln skillfully disassembled this argument during a speech before the Wisconsin Agricultural Society.⁹ At the heart of Lincoln's rebuttal was a rejection of the prevalent assumption among slave holders that "labor is available only in connection with capital – that nobody labors, unless somebody else, owning capital, somehow, by the use of that capital, induces him to do it." These minds, Lincoln says, "naturally conclude that all laborers are necessarily either hired laborers, or slaves." Furthermore, he emphasizes, this theory holds that once a hired laborer or slave, always a hired laborer or slave. In other words, slave holders held fast to a Marxist view of the world – the natural order of human economy is the "haves" and the "have nots." Though Marx chose the opposing team in this struggle, the method of both was identical: heavy-handed paternalism to "correct" the inequities of life. Marx chose the paternalistic system of the state to make things right; slave holders chose the paternalistic system of the plantation.

Lincoln's retort shattered both systems. Continuing his argument with an economic model that was both metaphorical and literal in meaning, he conceded that there is surely a relation between labor and capital, but held that there is no such relation between labor and capital as argued by the advocates of slavery, and that "there is no such thing as a freeman being fatally fixed for life" as either hired laborer or slave, and further, that "both of these assumptions are false, and all inferences from them groundless."

And in a statement destined to place both slavery and Marxism on the heap-bin of history, along with every other paternalistic "system" invented by man, he added, "Labor is prior to, and independent of, capital; that, in fact, capital is the fruit of labor, and could never have existed if labor had not first existed – that labor can exist without capital, but that capital could never have existed without labor." This was not an economic treatise offered; this was a moral imperative spoken. Lincoln was telling slave holders that all people, regardless of color, comprise the human family, no one was better than the other in their personhood, that the "haves" were no more human or no more important in life than the "have nots," and, significantly, that the latter were not inherently reliant on the former.

Lincoln's explanation touched on education. In the minds of slave holders, neither hired labor nor slaves were to be educated. For slave holders, the "education of laborers is not only useless but pernicious and dangerous." Hence, the only education that would be of any assistance to these classes would be education designed to reinforce their class position. Lincoln, with characteristic humor, described this paternalistic pedagogy, "[A] blind horse upon a tread mill is a perfect illustration of what a laborer should be – all the better for being blind, that he could not tread out of place, or kick understandingly." African-Americans free to choose their education was subversive to the plantation system.

But the psychology of paternalism was even more insidious. The slave holder was constantly reminding the slave of the slave's inferior position in life and the slave holder's benevolence. Author Stephen Kantrowitz deftly describes this "benevolence" of the expert (master) over the novice (slave),

Masters hoped that if they articulated the rules clearly enough and enforced them reliably, slaves would accept the legitimacy of their masters' authority. As one planter acknowledged, '[S]o long as the slave thinks he is unjustly held in bondage, just so long will he be impatient, unwilling and rebellious.' 'You must convince them you are not a tyrant but act on the principle of justice,' another explained. The plantation, in other words, must become a just and well-ordered world of familial devotion.

Nothing captured this ideal more precisely than the slave owners' language of paternalism. Slaves, essentially childlike, incapable of higher reasoning, and only haltingly responsive to moral tutelage, required the combination of kindness and discipline that only a father could provide. Since no slave parent's authority had any legal standing – slaves' children literally belonged to someone else – paternal responsibility fell to the slaveholder...But this paternalism characterized planters' fantasies far better than it did their society, for forbearance and benevolence could exist only in the space created by terror. At the core of paternalism, in other words, lay brutal coercion.¹⁰

Applying mudsill theory and its accompanying paternalism to the "system" of public schooling would be easy: a benevolent master comprised of experts selflessly sharing their high learning in the service of untrained parents in behalf of an "interested" state. Children would be seen as the mere creature of the state. Parents could not possibly be trusted to control their child's education nor should families be trusted with freedom over their own futures. This characterization would be especially true for families on the low end of the socio-economic scale. Poor families would be ripe for this sort of self-righteous paternalism.

In the good sense of Americans, led by Abraham Lincoln and rational abolitionists, passage of the Fourteenth Amendment stands contrary to mudsill theory and establishes the principle that all men and women are born free and that, as individuals and parents, they cannot be unduly restricted in their autonomy, in their familial relationships, nor deprived of the fruits of their labor without due process or equal protection under the law.

The Disquieting Parallel

Again, slavery was an unparalleled evil in world and American history. Our local public schools and their unique body of teachers are often blessings in the lives of Utahns. Certainly the common experience in our public schools is far removed from anything comparable to the inhumane experiences of slavery. As a personal experience, there are no sane comparisons.

Nonetheless, there are relevant, often poignant, parallels between the institution of slavery as a human system of external control and what we now face with the increasingly inflexible system of restrictive schooling. Wealthier families, and families of modest means simply willing to make extraordinary sacrifices for their children's educational well-being, have pursued the best education alternatives society can produce. Conversely, poor families have few alternatives. To eliminate these inequities, the current "system" of restrictive school laws responds by forcing all families into a one-size-fits-all system of schooling. For good or ill, school vouchers threaten this one-size-fits-all view. In fact, school vouchers are tools that eliminate inequities in educational opportunities and strips class status in support of the common good. The educational momentum produced by school vouchers may be an upward force for poor families, not a downward pressure on everyone.

The historic lessons of slavery inform our current debate over school vouchers. First, slave families were not allowed to control the educational opportunities of their children. They had no say in what their children were taught, when they were taught, who taught them, or in assisting in the teaching. One hundred and forty years later, public school parents are allowed to at least give some input, but they still do not exercise any semblance of real control within the "system."

Second, true freedom, educational or otherwise, came to slave families only as they escaped the plantation system. Today, nothing has changed. Educational freedom requires families to separate themselves, often needlessly, from the broader public school community. Our modern system of restrictive school laws forces a new kind of segregation upon families desiring the control of their children's education.

Third, the state interest and the common good were used as justifications to maintain control of the plantation system. The "special interests" of their day, the slave masters, taught their slaves that they were doing them and society a favor by controlling their lives. The special interests of our day make the same arguments in support of the status quo.

Fourth, slave holders ignored the United States Constitution and its protections of life, liberty, and the pursuit of happiness for all people. It took a constitutional amendment to more explicitly expose slave holders to this American concept of freedom. While statutory, school vouchers and other positive reforms in Utah offer the same sort of changes to our current restrictive schooling system.

And fifth, slavery was ultimately abolished by the courageous efforts of people of good will, unafraid of the consequences of freedom and trusting in the ability of all people to assume personal responsibility for their own actions. The "system" became subordinate to the people. The human experience was prized above efficiency and economy. And the interests of families and children were finally held sacred, above money: people bettering themselves became the goal. The system was forced to adapt to the real common good.

Our friends in South Carolina, on both sides of the issue, have helped Utahns to better understand what is at stake in the school voucher debate. One good turn deserves another – our Utah State Legislature set the example for the nation, and now segments of the nation set the example for us to dialogue with vision, courage, honor, and passion to make Utah a better place to live, work, and raise a family.

Endnotes:

- ¹ Richard L. Davis, "Educational choice as freedom," www.thestate.com, April 16, 2007.
- ² Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, Westport, Connecticut: Praeger, 2001, p.4
- ³ Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values*, New York: Hill and Wang, 1997, pg. 94.
- ⁴ *Ibid.*, pg. 103.
- ⁵ *Ibid.*, pg. 105.
- ⁶ *Ibid.*, pg. 108.
- ⁷ James Henry Hammond, Speech on Admission of Kansas, Address before the U.S. Senate (Mar. 4, 1858), in Cong. Globe, 35th Cong., No. Sess. 961-62; partially reprinted in *Slavery Defended: The Views of the Old South*, ed. Eric McKittrick (Englewood Cliffs, N.J.: Prentice Hall, 1963), pp. 121-25.
- ⁸ George Fitzhugh, "The Universal Law of Slavery," *The Black American: A Documentary History*, Third Edition, by Leslie H. Fishel, Jr. and Benjamin Quarles, Scott, Foresman and Company, Illinois, 1970. Also *Africans in America* series, Part 4, WGBH/PBS.
- ⁹ Abraham Lincoln, Address to the Wisconsin State Agricultural Society, September 30, 1859, Milwaukee, Wisconsin.
- ¹⁰ Stephen Kantrowitz, *Ben Tillman and the Reconstruction of White Supremacy*, The University of North Carolina Press, 2000.