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Book Reviews: Bodies of Law by Alan Hyde

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BOOK REVIEWS

BODIES OF LAW. By Alan Hyde. Princeton, N.J.: Princeton University Press, 1997. 278 pp. $49.95 (cloth); $16.95 (paper).

Alan Hyde's *Bodies of Law* examines the myriad forms which the body takes in legal discourse. Professor Hyde argues that the law constructs the human body in many different, often conflicting ways, for various political ends. For example, the body is a machine for the compensation of workplace accidents, but an object of desire for the regulation of topless dancing. It is a "master symbol" over and through which society wages its battles. (p. 8) It is simultaneously the site of human unity and the locus of stigma and differentiation, by constructions such as race, gender, and the public and private spheres which Hyde views as at least partially artificial. The author offers no alternative to this pastiche of images; rather he asserts that the elusiveness of one "natural" body makes such a miscellany inevitable. There is no body *per se*, Hyde tells us, but rather each incarnation of it in law is a political construction. Through this work, Hyde hopes both to uncover the fabricated nature of the body in law and to liberate people through various depictions of their form, thus generating discourse.

He succeeds in both ends. Professor Hyde elucidates the regulating, desire-displacing, and purging functions of the legally constructed body by drawing upon detailed and diverse examples. In so doing, he references a range of authorities, from Sigmund Freud to Audre Lord, and feminist film critic Laura Mulvey to U.S. Supreme Court Justice Anthony Kennedy. Hyde concludes his work with a call for a new level of discourse which he envisions as a "body fantasia"—an expanded envisioning of the body in law based on empathic understanding. Hyde's careful and thorough analysis does not extend to this final prescriptive chapter. The merger of a "body fantasia" multiplicity of possible body constructs with vaguely defined empathy does not logically follow from Hyde's analysis, and succumbs to many of the weaknesses he highlights in contemporary rights theory. Body fantasia is, nonetheless, an interesting concept; one which would benefit from greater elaboration and a more thorough examination of its legal application.

I. ANALYSIS OF THE BODY IN LEGAL DISCOURSE

A. Regulation

Hyde focuses on three functions which the constructed body in legal discourse enables: Regulation, Desire, and Abjection. The body primarily serves as a means of "Foucauldian regulation"[1] in our consumer capitalist society. (pp. 76–79) Historically, this construct was established through the depiction of the "body as machine" to allow recovery for workplace injury. (p. 19) Cases such as *Hawkins v. McGee*[2] contain no mention of the plaintiff's suffering, and make no calls for sympathy. Instead, courts depicted workplace injury cases as suits dealing with property, where an employer was liable for damaging the plaintiff's body part cum property. (pp. 31–32)

The idea of body as property carries over into more recent civil rights cases, which Hyde argues still allow people to be regulated into the political-economic status quo. (p. 50) Property ownership of our bodies means that we are both commodified and exempted from empathy or responsibility for others. Thus, the law allows us both to sell our blood for taxable income (p. 58), and refuse to consent to donate our own or our child's bone marrow (a process which is virtually harmless to the donor) to save a half-brother's life. (p. 89) The conception of the body as property also gives people the right to control this property and keep "trespassers" out. The current debate over abortion and a woman's right to choose provides a vivid example of this tension between the body as property and individual rights.

Hyde points out the contradictory nature of various incarnations of the body as property. While we own our bodies for purposes of income or refusal of assistance, these ownership rights can be limited. Configuring the body as property means that we can be made the property of someone else, as in slavery, (p. 95) or that the law can determine that another's property rights, such as "the body" of society, outweigh the individual's interest in self-ownership.[3]

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[1] Hyde discusses Foucault's analysis of the "normalizing" function of a discourse of labor markets to obscure the power relations and domination in our economic system. (p. 78, discussing Lecture by Michel Foucault (Jan. 14, 1976) *in Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon ed., 1980).

[2] 84 N.H. 114 (1929).

[3] Hyde asserts that this assessment of society's interest in medical research as greater than the plaintiff's interest in his discarded spleen underlies the California Supreme Court's decision in *Moore v. Regents of California*, 793 P.2d 479. (p. 69)

B. Desire

Hyde argues that the legal construction of the desirable[4] body reinforces the existing social patriarchal order and state power by fetishizing body parts as marketplace commodities, and by displacing desire so that certain bodies and body parts are rendered searchable by their absence from the discussion. The commodification of the body occurs through the multiplication of body images, the use of the body as a symbol for internal human qualities, and the positing of the female body, often pornographically, as the "legible or perfect body." (p. 113) This commodification is seen, for instance, when employers may require employees to exhibit their bodies in particular ways, such as by wearing revealing uniforms or makeup. (p. 118)

In this way, the law functions like mainstream culture in subjecting all bodies, but particularly those of women, to the "male gaze"[5] of consumers. Hyde argues convincingly that this eroticization of women in the marketplace reentrenches the sexes in separate spheres, thereby confining women to the less powerful private sphere even when they are publicly displayed. (p. 115) Although employers are limited by constitutional and statutory anti-discrimination laws, the general power of employers to control employee appearance means that women's bodies are often displayed as "man's own private Disneyland." (p. 117) In contrast, legal discourse indicates that male bodies should not be the object of desiring gazes, for fear of posing a threat to the hierarchy of gender and sexual orientation.[6] Thus, for example, Robert Mapplethorpe's explicitly erotic photographs of naked male body parts should be censored. (pp. 148–50)

Hyde endorses a countervailing "right in employees to control their own body." (p. 124) This concept would incorporate the currently neglected issues of power and domination into legal discourse about the body. (p. 132) It would also reveal the subtext of gender and racial discrimination underlying these employer-employee struggles. Courts have mimicked this discrimination by delineating the extent of permissible employer control based on subjective factors such as the perceived naturalness of certain body parts. One court, for instance, found that American Airlines' prohibition of a flight attendant's cornrow hairstyle was not race discrimination because hair is a mutable characteristic.[7] (p.

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[4] Hyde defines desire to include "all relations in which someone wants to see, be close to, understand, possess the body of another but that are not characteristically experienced as relations of economic exchange." (p. 109)

[5] Hyde is informed here by the popular culture feminist theorist Laura Mulvey.

[6] Because the consumer's gaze is inherently "male" in Hyde's analysis, erotic images of men inevitably open up questions of gay desire.

[7] *See* Rogers v. American Airlines, 527 F.Supp. 229 (S.D.N.Y. 1981).

125) Legal inventions such as "immutable" characteristics ignore the strong arguments for the social construction of race, gender, and other categories used to classify the human body. (p. 126)

In a second manifestation of the body's desirability function in law, Hyde argues that legal discourse eradicates the body in Fourth Amendment search and seizure cases, thus displacing desire, and allowing for the invasion of the human body "object" by the "subject" societal body: "[L]aw will often be represented as human while the body is represented as a thing." (p. 155). The human body is equated with a suitcase or office to be searched, or as Hyde quotes from the 1991 case *Rodrigues v. Furtado*[8]: "Search warrants for appellant's apartment and vagina were issued . . . . " (p. 165) As the female body is the most displayed and desirable commodity, so is the vagina the most fetishized, alienated, and searchable body part. Further, as women are believed to be less individual actors than men in a patriarchal society, so are their bodies deemed more searchable as compared to others, for instance because of a husband or boyfriend's known drug dealing. (p. 171)

Hyde contrasts the "searchable legal vagina" with the "unsearchable penis," focusing on the case of *Harrington v. Almy*, where a police officer accused of child sexual abuse was granted the possibility of recovery after being fired for refusing to submit to a penile plethysmograph.[9] (p. 174) This portion of Hyde's analysis seems somewhat strained, as the plethysmograph has been widely discredited for evidentiary purposes, whereas a physical search will either reveal the sought-after objects or not. Moreover, as Hyde himself admits, the juxtaposition of the *Rodrigues* and *Harrington* cases is "obviously unfair" as the circumstances surrounding the searches and the nature of the litigation (criminal versus civil) render these cases quite different. (pp. 174–75) A more relevant comparison to the gendered invasion of vaginal searches might be made to cavity searches in general, and whether discussion of rectal exams defies gender distinction.

Finally, Hyde demonstrates how the concealment of the human body in the legal discourse regarding punishment precludes empathy for the punished and allows crime to be controlled. (p. 191) Punishment, once publicly carried out, is privatized[10] and camouflaged in our "kinder, gentler" age. But it is punishment nonetheless—inflicted by the communal will on an individual. Hyde asserts that the eradication of the body

[8] 950 F.2d 805, 807 (1st Cir. 1991).

[9] 977 F.2d 37 (1st Cir. 1992). A plethysmograph measures male sexual arousal while the subject watches various sexually explicit slides. According to Hyde, it has been widely criticized as failing to provide relevant evidence in cases involving sex offenders, and its manufacture has been largely discontinued. (pp. 173–74)

[10] Hyde's argument is evident in other contemporary penal trends, such as the demands by victims' families to watch the executions of their loved ones' murderers.

in punishment discourse culminates in Justice Kennedy's recent opinion upholding the Constitutionality of involuntary administration of psychotropic medications to inmates without a prior judicial hearing.[11] (p. 196)

C. Abjection

In the final portion of his analysis, Hyde explores the law's construction of the diseased or "other" human body, used ritually to purge society and expel from it those considered to be outsiders. (p. 206) The societal body is able to construct and enforce its own boundaries by instilling fears in people different from us, such as people with diseases, drug users, or those seen as racially different. Hyde sees this border-patrolling function of the body as a secondary level of meaning in the Supreme Court's ruling that federal customs employees could be required to give urine samples for drug testing.[12] (p. 208) Thus, legal discourse erases the presence of the individual human body in question while simultaneously personifying the law and the state. (p. 242)

II. CALL FOR A NEW DISCOURSE OF "BODY FANTASIA"

Professor Hyde concludes his analysis of the body in legal text and thought with a proposal for a new kind of discourse which he calls "body fantasia." Hyde defines body fantasia as "image-production," signifying something both visually perceptible and constructed. (p. 263) This proposed new discourse would expand the possibilities for discussing, seeing and legally contextualizing the body, and would respond to Hyde's "postmodern plea for the multiplication of body performances," which he sees as the only route to individual freedom. (p. 123)

Hyde centers his conception of body fantasia on empathy, or the visualization of another's corporeal humanity. (p. 265) Such legal analysis would take "communion with another person" as its primary end. (p. 263) Hyde uses the *Bowers v. Hardwick*[13] case, in which the Supreme Court upheld a state anti-sodomy law, to illustrate his theory. Wrongly decided under a traditional construction of the body as property (i.e., a zone of privacy or liberty rights), the case could be reconfigured in a body fantasia framework to focus on human love and connection rather than discussion of abstract rights.

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[11] *See* Washington v. Harper, 494 U.S. 210 (1990).
[12] *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
[13] 478 U.S. 186 (1986).

III. CRITIQUE OF HYDE'S BODY FANTASIA THEORY

Hyde's description and analysis of the treatment of "body politics" in law is both relevant and insightful. America today is obsessed with the body, whether in near-pornographic advertising images, the battle over abortion, or the national obsession with racial distinctions and other types of perceived difference. Professor Hyde helps us navigate and comprehend the various ways in which this obsession is invented by and reinforced through law. He combines a broad base of legal doctrine with postmodern philosophy and feminist theory. His analysis both reveals the body's function in social regulation and perpetuation of power differentials based on class, gender, or race, and creates the possibility of new kinds of body discourse and greater freedom of individual expression.

His prescription of body fantasia appears at first to solve the problems currently confronting legal discourse by multiplying the possible legal constructions of the body. This plethora of potential images would free legal discourse from its stereotypical precedentiary visualizations, and give legitimacy to new conceptions. By revealing and accepting the contradictory nature of various constructions, body fantasia would explicitly incorporate the political subtexts heretofore underlying the legal body.

However, by grounding his theory in a vaguely drawn notion of empathy, Hyde dooms his vision of body fantasia to suffer the same fate as much of the existing legal doctrine he criticizes. At best, this call for a new discourse based on judicial empathy in visualizing the body is, as Hyde himself admits, "impossibly utopian" (p. 266) as it is questionable whether we can ever truly feel another's pain.[14] Hyde offers no suggestions about how, if even possible at all, an empathic reasoning would play out in the courts.

More significantly, a body fantasia based on empathy is equally abstract in its notion of the body as are property zones of liberty and privacy. The nebulousness of this empathic visualization, and a focus on human love, makes this theory vulnerable to the same weaknesses and contradictions as a rights-based theory about the body. For example, some forms of love may not be legally recognized (such as gay and lesbian relationships), and a person can be entrapped as the object of another's love,[15] much as Hyde argued that a person whose body was property could be owned by someone else. (p. 95)

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[14] *See, e.g.*, ELAINE SCARRY, THE BODY IN PAIN (1985).

[15] This is particularly likely to happen to women whose bodies have been constructed by law and society as desirable and able to be taken. A notion of "loving her too much" underlies much crime against women, whether it be domestic violence or celebrity stalking.

Nonetheless, the very addition of a new concept such as body fantasia to legal discourse expands personal expression and has value regardless of its weaknesses as a replacement for existing problematic discourse. Hyde's body fantasia may help bring us closer to understanding the "secret code" of experiences and roles "written on" our own and others' bodies.[16] (p. 265)

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[16] *See* JEANETTE WINTERSON, WRITTEN ON THE BODY 89 (1992).

RE-DEFINING REPRODUCTIVE FREEDOM

KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY. By Dorothy Roberts. New York: Pantheon Books, 1997. 312 pp. $26.00 (cloth).

Reproductive freedom is at the heart of women's equality. Women who cannot control when they will conceive and how many children they will have cannot be free and equal participants in family, social, political and economic life. Nor can they take advantage of the equal rights women have won in the courts and the legislatures. Without reproductive autonomy, guarantees of equality elsewhere are illusory.

America has a long and deplorable history of oppressing and abusing women's right to control their reproductive destiny. For years, proscription of abortion forced women to rely on dangerous and even life-threatening procedures. While restrictions on abortion forced women to carry pregnancies to term, other practices such as irreversible surgical sterilization, restrictive welfare policies and even criminal punishment have been implemented to ensure that women—especially poor women—do not become pregnant in the first place. Not until *Griswold v. Connecticut* in 1965 did the Supreme Court first protect women's reproductive freedom by invalidating an archaic Connecticut criminal law that prohibited the mere use of birth control.[1] The Court's 1973 decision in *Roe v. Wade*, which provided a constitutional guarantee of a woman's right to choose abortion, emerged from a long and remarkable battle to include a right to sexual privacy among Americans' individual liberties.[2]

Volumes have been written about women's epic—and ongoing—struggle to carve a sphere of privacy that places bedroom and womb beyond the reach of government.[3] By and large, the story is portrayed as one of women's triumph over governmental control of their bodies and their conceptions of morality: women have, after all, "won" the "right" to use contraceptives and to choose abortion (at least within the *Roe* framework).[4] Of course, from the moment of victory, the "victors" in these

[1] Griswold v. Connecticut, 381 U.S. 479 (1965).

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] *See, e.g.*, DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994).

[4] One strand of late 20th-century feminism rejects the idea that the availability of contraception and abortion has contributed to a more liberated female sexuality, arguing rather that heterosexual relations are by definition oppressive in a society where genders are unequal and that legal abortion enhances women's vulnerability to sexual coercion by men. *See, e.g.*, ANDREA DWORKIN, RIGHT-WING WOMEN 77–100 (1983); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 93–102 (1987).

battles have been looking over their shoulders, always acutely aware that their victories are hard-fought, narrowly won and constantly in danger of being overturned or denigrated by conservative courts and legislatures.[5] Nevertheless, most Americans view reproductive autonomy and privacy generally as resting on firm ground now that landmark cases such as *Griswold* and *Roe* are part of our constitutional pantheon.

For Dorothy Roberts, however, the traditional concept of reproductive autonomy that centers on the right to use contraception and choose abortion is far too narrow. In *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, Roberts explores what she perceives as a stark racial divide in the struggle for women's reproductive rights, a fault line that was formed early in America's history when slave owners forcibly bred, raped and otherwise exploited their female enslaved persons with the explicit approbation of law. Roberts chides feminists for tacitly adopting a narrow view of reproductive freedom and failing to address the myriad reproductive concerns of Black women. In Roberts's view, the history of the movement for reproductive autonomy has literally been whitewashed. While most middle- and upper-class white women may be content with the sexual and reproductive rights they have won, Roberts charges that Black women, whose use of contraceptives often has been written into law as an affirmative duty, are hardly beneficiaries of the movement for reproductive freedom. Rather, legal, societal and political barriers continue to prevent Black women from fully exercising their reproductive freedom. According to Roberts, Black women in America continue to experience the litany of horribles that the battle for reproductive freedom has eradicated for white women—including such degrading practices as mandatory sterilization.

Roberts believes that "[w]e are in the midst of an explosion of rhetoric and policies that degrade Black women's reproductive decisions." (p. 3) In chapters focusing on new birth control methods ushered in by technological advances, welfare proposals conditioning receipt of benefits on a woman's use of contraception, laws prohibiting federal funding for abortions, and criminal prosecutions of drug-addicted mothers for child

[5] The 25 years since *Roe v. Wade* have seen a constant barrage of anti-abortion legislation designed to circumvent Supreme Court rulings. These laws have, for the most part, been struck down, generating a new round of legislation and a new round of litigation. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (holding that statutes giving third parties veto power over a woman's decision to choose abortion were unconstitutional); Colautti v. Franklin, 439 U.S. 379 (1979) (striking down statute proscribing abortions when the fetus is or "may be" viable on void-for-vagueness grounds). In recent decisions, the Supreme Court has upheld significant restrictions on the right to abortion, and a plurality of the Court has indicated that it would abandon the trimester system of *Roe*. *See* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding bar on state employees performing abortions and bar on the use of public facilities for performing abortions, even when the patient pays for the abortion herself).

abuse, Roberts examines how modern reproductive policies threaten to shackle Black women to the degraded images of Black motherhood that have burdened their exercise of reproductive autonomy since the colonial period.

Roberts sets out to establish and explore the intersection between race and reproduction in order to change our conception of reproductive freedom. She urges us to see reproductive freedom as a matter of social justice, not merely of individual choice. Roberts notes that decisions regarding reproduction are made in a social context characterized by, among other things, substantial economic and educational inequalities. In Roberts's view, the harm from restrictive welfare laws and criminal prosecutions—which, she notes, disproportionately affect Black women—is not simply the incursion on each Black woman's decision-making. Rather, such laws also diminish the value of Black motherhood, which is in turn "a badge of racial inferiority worn by all Black people." (p. 310) In other words, the personal is political.[6]

According to Roberts, "[r]eproductive politics in America inevitably involves racial politics." (p. 9) Roberts seeks to link modern racial politics directly to the American historical backdrop of control and manipulation of Black women's bodies by both private individuals and government actors. To explore this bridge to the past, Roberts chooses as her vehicles of instruction several current reproductive policies that have sparked considerable debate. According to Roberts: "Highlighting the racial dimensions of contemporary debates such as welfare reform, the safety of Norplant, public funding of abortion, and the morality of new reproductive technologies is like shaking up a kaleidoscope and taking another look." (p. 6) By "taking another look" at reproductive freedom through provocative, racially-sensitive lenses, Roberts hopes to re-define the meaning of reproductive freedom to take into account its relationship to racial oppression.

Peeking into Roberts's freshly "shaken" kaleidoscope requires that we re-examine the significance of birth control to women's reproductive freedom. For most white women, access to birth control signifies a significant step toward individual autonomy and self-definition and is an integral aspect of privacy. However, Roberts notes that for Black women, the historical regulation of their childbearing to achieve certain social objectives largely overshadows whatever autonomy they might have gained by their access to birth control. Slavery "marked Black women from the beginning as objects whose decisions about reproduction should be subject to social regulation rather than to their own will." (p. 23) Roberts contends that the birth control and eugenic movements of the early

[6] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989).

1900s picked up where slavery left off, with some advocates in those movements calling for the reduction, if not the complete elimination, of certain races and ethnicities in order to improve society. Since the early 1900s, contraception and its more sinister cousin, surgical sterilization, have been used not to free Black women to pursue their goals and dreams, but deliberately to limit their procreation.[7]

According to Roberts, the false assumption underlying the often inhumane regulation of Black women's reproduction is that procreation, and not political, social and economic forces, is the cause of Blacks' condition in this country. She states: "America's recent eugenic past should serve as a warning of the dangerous potential inherent in the notion that social problems are caused by reproduction and can be cured by population control." (p. 59) Roberts explains that white myths and stereotypes concerning Black motherhood have long been used to justify white control of Black women's reproductive decisions. Images of Black women as unwed mothers, welfare queens, mammies and Jezebels, manufactured in popular culture and academic circles, have branded Black women as unfit for motherhood in whites' eyes and have been used by whites to justify the regulation of every aspect of Black women's fertility. In Roberts's opinion, today's lawmakers continue to craft reproductive policies with these stereotypes in mind. They have, in Roberts's view, utterly failed to heed the lessons of the past.

Roberts correctly notes the fallacy that Black reproduction is the sole cause of Blacks' social problems and that population control can miraculously cure those problems. Policies designed to reduce the number of babies born to welfare mothers, for example, may ultimately reduce the strain on the public budget to some degree, but pinning the blame for Blacks' social condition on Black fertility rates alone demonstrates a short-sighted and pernicious penchant for scapegoating and a failure to appreciate the magnitude and complexity of the problems that must be solved if Blacks are to experience equality in the exercise of reproductive and other freedoms.

It is equality, not liberty, with which Roberts is ultimately concerned. Roberts finds the traditional view of liberty—that individuals should be able to make choices free from governmental interference[8]—entirely wanting when it comes to reproductive freedom, particularly for Black women. According to Roberts, this construct of liberty as a "negative right" (p. 309) masks social prejudices and the maldistribution of wealth

[7] Roberts places Margaret Sanger, the strongest feminist advocate for birth control in the early part of the century, under fire for her eventual alliance with certain eugenic interests. However, Roberts ultimately dismisses the charge that Sanger was a racist: "It appears that Sanger was motivated by a genuine concern to improve the health of the poor mothers she served rather than a desire to eliminate their stock." (p. 81)

[8] *See, e.g.*, ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 121–31 (1969).

and education. It allows, and may even encourage, the coercion of Black women in their reproductive decision-making by concealing the racist origins of social practices that, while not overtly discriminatory on the basis of race, disproportionately deny Black women's reproductive freedom. Roberts advocates a group identity approach to reproductive freedom that is concerned with social harms as well as individual choice. She does not wish to abandon negative liberty altogether; it does, after all, protect against the abuse of government power and stress the value of self-definition, which are both critical to overcoming a history of denigration of Black women. However, Roberts clearly supports the primacy of equality over liberty. Roberts's ultimate goal is to "ensure the equal distribution of procreative resources in society." (p. 296)

Roberts advances "a notion of reproductive freedom that combines the values captured by both liberty and equality." (p. 305) Like other feminist scholars, she prefers a notion of positive liberty to the negative liberty that has allowed inequalities to flourish. She defines positive liberty rather loosely as "the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination."[9] (p. 309) For example, instead of prosecuting poor Black women for drug and child abuse, Roberts argues that the government should provide them with subsistence benefits, drug treatment and medical care. This assistance, in Roberts's view, is the minimum required for "reproductive justice." (p. 311) Thus, reproductive justice, as Roberts sees it, is achievable only through the pursuit of reproductive and sexual rights that are grounded not in a negative right of privacy, but in a positive concept of self-determination, rooted in equal justice and requiring social and economic support. Roberts would not lay the duty of supporting positive liberty solely at the doorstep of the government; she deems private actors equally responsible for distributing—or redistributing—the wealth of reproductive resources.

Much can be gained from Roberts's approach. Roberts's exploration of reproductive oppression during slavery and the eugenic movement of the early 1900s certainly provides ample reason to view with skepticism any public policies that seek to incorporate birth control as a stick to force compliance with government mandates. As Roberts convincingly demonstrates, poor women, who have little choice in the matter, have been beaten with such sticks for years. Roberts opens our eyes to a world in which access to contraception does not necessarily enhance reproduc-

[9] Other scholars have espoused the concept of positive liberty. *See, e.g.*, Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15 (1990). It gained substantial momentum as a result of the post-*Roe* attacks on abortion rights and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding, at least as to homosexual sodomy, a Georgia statute making all sodomy criminal).

tive freedom. In fact, for women dependent upon public assistance who "choose" to use contraception under the threat of loss of benefits or imprisonment, reproductive freedom is only an elusive dream. Roberts is surely correct that the lives of these women, who are disproportionately Black, are shaped by a constellation of factors: psychological, sociological, physiological and economic. Until they gain access to education, improved medical care and some level of subsistence benefits, equality will undoubtedly remain illusory.[10]

While these truths are incontestable, other aspects of Roberts's approach are not. She claims to be shaking up a kaleidoscope to offer a fresh look at reproductive freedom. Kaleidoscopes are, of course, characterized by endlessly changing colors and patterns. Roberts, on the other hand, sees only black and white and a single unceasing pattern—the use by whites of myths and stereotypes to justify their control over Black women's reproductive decisions. Roberts decries the use by some lawmakers of rhetoric to advance their views and policies. Unfortunately, Roberts sometimes falls victim to her own criticism, unleashing her own "explosion of rhetoric" (p. 3) and recognizable catch-phrases in an attempt to shock us into seeing her point.[11] Roberts invokes the dark specter of Nazism and "racial genocide"[12] (p. 21) as lurking behind coercive welfare policies and criminal punishment of crack-abusing mothers. She wants us to see "how the denial of Black reproductive autonomy serves the interests of white supremacy." (p. 5) She speaks of the "torture" (p. 122) of Black women's bodies and characterizes restrictive American welfare policies and proposals to encourage poor women to use advances in birth control technology as schemes in a "worldwide effort to reduce dark-skinned populations." (p. 143) Placed in Roberts's newly "shaken" but rather deliberately arranged kaleidoscope, birth control itself appears not as a positive step toward women's autonomy, but rather as a weapon being used in a race war with world-wide implications.

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[10] *See* ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM 390 (2d ed. 1990).

[11] Roberts does not shy away from stereotypes either. She appears to believe that the beliefs of "most" white Americans' concerning welfare were formed by reading conservative scholars such as Charles Murray (p. 113), that Meg Ryan's performance in the movie *When a Man Loves a Woman* helped to establish white Americans' vision of drug- and alcohol-abusing white mothers (p. 179), and that the popularity among whites of surrogate parenting soared after an episode of the *Phil Donahue Show* featured a blond-haired, blue-eyed baby (pp. 270–71). While these stereotypes do not begin to replicate the cruelty or harm of the stereotypes historically created by popular culture and fastened to Black women, they tend to undermine Roberts's arguments and her credibility.

[12] Roberts notes "a deep suspicion in the minds of many Black Americans that white-dominated family-planning programs are a form of racial genocide." (p. 21)

The evidence Roberts presents to demonstrate such overt racism often falls far short of her rhetorical charges. Take Norplant, the contraceptive device that consists of five matchstick-sized capsules implanted in a woman's arm that deliver contraceptive hormones continuously over a five-year period. According to Roberts, racial politics created Norplant, which she calls the "latest threat to reproductive autonomy." (p. 105) Roberts's evidence of eugenic and racist motivations for the creation and distribution of Norplant is exceedingly thin. Relying principally on allegations made by plaintiffs in class action complaints, Roberts pronounces that "Norplant may be hazardous to your health," and she claims that Norplant amounts to "torture" of Black women because it pumps "dangerous hormones" into their bodies. (p. 122) Yet Roberts herself points out that Norplant utilizes "the same type of progestin used in some birth control pills" (p. 105) and "can cause the same long list of bodily disruptions as the pill." (p. 122) Is the pill, therefore, also a form of torture? Roberts also brands the Population Council, which developed Norplant, a racist organization because, according to Roberts, it is "closely linked" (p. 141) with the eugenic movement. What is Roberts's basis for suggesting that the Population Council and the eugenic movement are closely linked? Forty-five years ago, the Population Council's president supported eugenics. What has occurred, and who has presided, at the Population Council since the 1950s seem not to concern Roberts at all.

Consider also Roberts's evidence concerning the following issues: restrictive policies aimed at public health clinics, coercive welfare proposals that seek to encourage or even mandate the implantation of Norplant, and criminal child-abuse prosecutions that condition a woman's freedom on the use of contraceptives. In 1988, the Department of Health and Human Services issued regulations prohibiting federally funded family planning clinics from advising patients that abortion is one of their options. Roberts charges that this so-called "Gag Rule" violates the autonomy of patients who rely on public clinics, patients who are disproportionately Black women. But as Roberts correctly notes, in 1993 President Clinton revoked the Gag Rule by executive order. Roberts also concedes that, to date, no proposed legislation offering bonuses to welfare mothers for the use of Norplant or mandating Norplant implantation or other birth control as a condition of receiving benefits has generated sufficient support to be enacted into law. While some women who abuse drugs during their pregnancies have been ordered as a condition of probation in criminal cases to have Norplant inserted, courts of appeals uniformly have rejected this form of punishment.[13] Roberts also admits that she cannot determine from any available data the number of women—

[13] Roberts notes: "No appellate court has ever upheld the imposition of any form of birth control as a condition of probation." (p. 195)

or, presumably, the number of Black, Hispanic or white women—who have been forced as a condition of probation to have Norplant inserted. The available data indicates only that, "[o]f four defendants ordered to use Norplant within its first year on the U.S. market, all were on welfare and three were nonwhite." (p. 196) This statistically irrelevant sample is not convincing proof of an overtly racist motivation behind forced Norplant implantation. Indeed, it tells us only that women who are poor have suffered the indignity of being told that they must not conceive any children for five years on pain of incarceration.

Roberts's historical and anecdotal evidence concerning the application of restrictive welfare and reproductive policies generally supports the notion that poor women of all races have been victimized.[14] As Roberts points out throughout the book, what makes such policies and punishments politically palatable is not only the race of the women affected, but also their poverty and marital status. For example, Roberts claims that crack mothers are penalized "because the combination of their poverty, race, and marital status is seen to make them unworthy of procreating." (p. 305) Thus, the larger threat is not only to poor Black women, but also to all poor and marginalized women who live under a regime that uses coercion and inducements to secure their "choice" not to procreate. In sum, if an agenda of racial genocide lurks behind modern reproductive policies, Roberts has failed to uncover it.

While Roberts is no doubt sympathetic to the plight of poor women in general, she is convinced that, when it comes to reproductive policies, class and race are "inextricably linked." (p. 110) Her theory is that by focusing myopically on the problem of Black welfare mothers, the media have created a powerful image that drives decisions concerning reproductive policies. She states: "The American public associates welfare payments to single mothers with the mythical Black 'welfare queen,' who deliberately becomes pregnant in order to increase the amount of her monthly check. The welfare queen represents laziness, chicanery, and economic burden all wrapped up in one powerful image." (p. 111) As a result, according to Roberts, "[w]hen Americans debate welfare reform, most have single Black mothers in mind." (p. 110) The link between race and welfare is firmly implanted in the American mind. More importantly, as Roberts also notes, welfare policies will always disproportionately affect Black women, since as a percentage of the population more Black women than white women rely on public assistance. Whether or not restrictive laws and proposals concerning welfare

[14] On several occasions, Roberts references Carrie Buck, the "feebleminded" white girl whose forced sterilization spawned the now-infamous declaration by Justice Oliver Wendell Holmes that "[t]hree generations of imbeciles are enough." Buck v. Bell, 274 U.S. 200, 207 (1927).

and reproduction are overtly or covertly targeted at Black women, these women will disproportionately bear the burdens and suffer the consequences of their enactment.

Roberts is correct that these pernicious images have affected our country's debates concerning welfare, reproduction and criminal justice. On a more tangible level, some evidence exists that these images also affect the solutions that are proposed for perceived problems. Unfortunately, Roberts does not allow her evidence simply to speak for itself. Roberts possesses the evidence to show convincingly that certain facially neutral proposals and laws do not have neutral effects.[15] Admittedly, an approach that focuses on disproportionate impact rather than intentional bias turns a dimmer spotlight on the plight of Black women. Nevertheless, sufficient evidence exists to alert us to racial bias.

Roberts's chapter on criminal justice and reproduction, which is the most provocative chapter in her book, is a good example. Roberts notes that growing numbers of women have been indicted after giving birth to babies who test positive for drugs, particularly crack cocaine. Roberts charges that prosecutors have indicted these women not to protect their fetuses, but "as a way of punishing Black women for having babies." (p. 154) After all, Roberts points out, the crime hinges not on the use of drugs but rather on the decision to have a baby. A woman who chooses to have an abortion in such circumstances can avoid prosecution altogether. According to Roberts, media sensationalism in the late 1980s and early 1990s of a "crack baby" epidemic "indelibly etched in the American psyche" (p. 159) the image of a Black mother incapable of caring for her child.[16] Roberts states that "[t]he monstrous crack-smoking mother was added to the iconography of depraved Black maternity, alongside the matriarch and the welfare queen. Crack gave society one more reason to curb Black women's fertility." (p. 157) Roberts charges that white prosecutors and judges, swept up in this media hype, launched an assault that has resulted in the "punishment of poor Black women who fail to meet the middle-class ideal of motherhood." (p. 179) Roberts believes that these prosecutors and judges literally "invented the crime of prenatal drug use in the 1980s in order to castigate poor Black mothers who smoke crack." (p. 187)

It is true that the wealth of evidence regarding maternal and child health conditions in the United States has been ignored in favor of a bizarre and inappropriate obsession with drug use by pregnant women. The focus on pregnant drug users seems quite hypocritical considering

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[15] *See* Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 329, 362.

[16] In Roberts's view, the media exaggerated the harmful effect of crack use on children. She states: "The data on the extent and severity of crack's impact on babies are highly controversial, to say the least." (p. 157)

the fact that many women use tobacco and alcohol during pregnancy, substances that can be just as harmful to the fetus. Yet society apparently accepts this maternal behavior much more readily. There have been two responses to the issue of maternal drug abuse, both punitive. The overtly punitive response, and the one that Roberts focuses on in her book, is seen in the criminal prosecution of pregnant substance abusers on charges ranging from delivering drugs to a minor to manslaughter or assault with a deadly weapon.[17] The second response to this problem, to which Roberts pays scant attention but which affects many more lives than will ever be reached through criminal prosecution, has been increased vigilance in the enforcement of civil child abuse and neglect laws against pregnant users of controlled substances.

These punitive responses demonstrate the validity of two important points that Roberts raises. The first point is that an approach to the problems of infant morbidity and mortality that focuses on maternal drug abuse will result in a disproportionate number of Black women being prosecuted for child abuse. Whether intended or not, the number of Black mothers who will be reported to authorities for suspected drug abuse will be substantially higher than the number of white mothers. Black women's disproportionate use of public hospitals and their more frequent contacts with government agencies will ensure that authorities are notified of their crimes, as will a myopic focus on crack abuse as opposed to other harmful drugs.[18] Indeed, as Roberts notes, the evidence shows that despite relatively equal rates of drug use, Black women are nearly ten times more likely than white women to be reported to state agencies for substance abuse during pregnancy.[19] (p. 175) Since none of the reporting laws passed in response to the problem of maternal drug abuse differentiate among the various illicit substances, marijuana users should not be treated differently than cocaine users. The relatively equal extent of drug use among Black and white women should generate equal numbers of reports to state agencies. The fact that the numbers are nowhere close to equal is evidence of race bias in reporting.

The punitive response to maternal drug abuse also demonstrates the validity of a second point Roberts makes—that negative liberty simply

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[17] This practice has been criticized on both legal and policy grounds as being unconstitutionally discriminatory and unlikely to deter substance abuse by pregnant users. *See, e.g.*, Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

[18] Roberts charges that "targeting crack use during pregnancy unfairly singles out Black women for punishment." (p. 178)

[19] *See also* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1204 (1990) (stating that in Pinellas County a black woman is 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy).

is not a sufficient response to the inequality that poor Black women continue to experience. Randall Kennedy, among others, has argued that criminal prosecutions of mothers who abuse drugs are a positive step toward achieving protection of Black children in the criminal justice system.[20] Kennedy agrees that Black women are prosecuted in such cases in disproportionately high numbers, but notes that if white mothers were disproportionately prosecuted for such crimes, it would be taken as proof that prosecutors care more about white babies than Black babies. Roberts disagrees that this prosecutorial focus is a positive development for Black mothers and children. Roberts has difficulty accepting that prosecutors and judges are acting in the best interest of Black children, given the historical use of criminal laws to subjugate Blacks. Women faced with the prospect that their disclosure of drug abuse to a physician will trigger a state child abuse and neglect reporting statute will hide their addictions or, worse, fail to seek prenatal treatment at all. Roberts correctly challenges the notion that putting mothers in jail will somehow lead to healthy children. Rather than punishing these women, Roberts believes that resources should be devoted to ending women's drug abuse before they become pregnant. That is a proposal that can be readily supported regardless of racial predicate or evidence of invidious discrimination.

Like criminal penalties, family cap laws that deny benefits to women who have a threshold number of children and proposals for coercing women to use contraception by limiting or denying subsistence benefits altogether are poor solutions to such social problems. These laws, which affect all poor women but affect Black women disproportionately, are a desperate response to a seemingly unending cycle of dependence. In their desperation, however, lawmakers have opted for a quick fix rather than a long-term solution. Autonomy requires a wide array of social supports that guarantee preconditions for self-realization such as shelter, food, day care, health care and education. Autonomy presumes the availability to each person of meaningful work and relationships as well as the opportunity for political, social and cultural engagement. In short, autonomy requires the equality promised by positive liberty.

While Roberts's notion of positive liberty generally portends well for poor women of all races, in a sense the concept of liberty as Roberts has constructed it may ultimately curtail reproductive freedom for some women. This negative aspect of Roberts's positive liberty comes through in her chapter entitled "Race and the New Reproduction," which examines new reproductive technologies, including surrogacy and in vitro fertilization. This chapter is a rather curious exception to the other

[20] *See* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

chapters of the book. Here there is no forcible contraception, no degrading formal sterilization or any other sort of government-mandated or privately supported curtailment of Black fertility. The new technology is not being used to restrict the liberty of Black women; in fact, its sole purpose is to expand the reproductive options available to women.

Roberts's interest in these new technologies and practices is driven not by her interest in reproduction in general, but rather by her "interest in the devaluation of Black reproduction." (p. 246) According to Roberts, just as policies that prevent births are shaped by race, so too are policies that assist births. That is so, according to Roberts, because these new technologies are "used almost exclusively by white people." (p. 251) Roberts worries that "[b]y strengthening the ideology that white people deserve to procreate while Black people do not, the new reproduction may worsen racial inequality." (p. 283) She sees in these scientific advances the ghost of "positive eugenics"—the notion that by increasing the number of births from "superior" parents, one can somehow improve society. (p. 283) Roberts readily acknowledges that the racial disparity in the use of new technologies "will hardly alter the demographic composition of the country." (p. 283) She also acknowledges that the market (infertile couples pay $8,000 to $20,000 for each pregnancy attempt, p. 253) and cultural differences (Roberts notes that even wealthy Black couples generally eschew these technologies, p. 259), not any overt or covert racism, appear to drive the availability and use of the new technology. The harm she sees is ideological in nature—the disproportionate use of new technologies by whites, according to Roberts, sends the message that the relative value of Blacks is less than the relative value of whites in America.

Apparently, not every woman's personhood and choice and self-determination merit protection and facilitation under Roberts's view of "reproductive justice." (p. 311) Indeed, Roberts seems untroubled by the conclusion that balancing the scales of "social justice" might require that the government restrict the availability of certain new reproductive technologies to white (and other) couples who can afford them. (p. 297) In other words, if some women stand to lose access to reproductive technologies that advance their autonomy, so be it. As she sees it, the value in these technologies lies in their "subversive potential" (p. 248)—their ability to help single women, lesbians and gay men circumvent legal barriers to parenthood. Roberts is disappointed that "[m]ost often they complete a traditional nuclear family by providing a married couple with a child." (p. 248) Whatever her view of the value of the new technologies, Roberts does not say how depriving some women of an aspect of their reproductive freedom advances the cause of poor Black women.

Are they likely to feel that their children are somehow more valued if a more affluent couple is prohibited from conceiving a child?[21]

In the end, Roberts wants race to take "center stage" in our deliberations about reproductive health policy. (p. 311) Her "new race consciousness" (p. 311) highlights the radically different experiences of the races where reproductive freedom is concerned and heightens our awareness of what it truly means to have reproductive choices. Roberts convincingly demonstrates that Black women have disproportionately suffered the effects of restrictive reproductive policies. Race surely has a place on the stage along with poverty and marital status, but as our history so ably demonstrates, making it the centerpiece of a concept of "reproductive justice" (p. 311) can be dangerous. The numerous injustices Black women have suffered should not be used to justify the subordination of other women's reproductive autonomy. The true test for Roberts's notion of positive liberty is whether it is strong enough to lift poor women of all races to autonomy without sacrificing other women's reproductive freedom.

—Timothy Zick

[21] Roberts dismisses barriers to transracial adoptions by claiming that white couples only seek to adopt as a "second-best alternative." (p. 272) Even when they do adopt, Roberts claims that they prefer white children. (p. 273)

ADMINISTERING SILENCE: DOMESTIC VIOLENCE, MADNESS, AND THE COURTS

CROWS OVER A WHEATFIELD: A NOVEL. By Paula Sharp. New York: Washington Square Press, 1996. 450 pp. $22.95 (cloth); $14.00 (paper).

Paula Sharp's novel *Crows Over a Wheatfield* is both a well-written, engaging work of fiction and a powerful indictment of the American legal system's failure to protect victims of domestic violence. Using deft and evocative prose, Sharp slowly unfolds a tale spanning thirty years that captivates her readers emotionally, investing them with an almost personal experience of domestic violence. She thoughtfully raises many of the moral and legal issues attendant to domestic violence involving children. *Crows* convincingly portrays the extremes of unethical attorney behavior and judicial prejudice which can undermine even the best written laws. The novel raises the larger question of whether a legal system based on adversarial attorneys and human judges can ever truly serve those often vulnerable and unheard people whom the law purports to protect. The novel is superbly written and its story is simultaneously absorbing, disturbing, and inspiring. *Crows'* only disappointment lies in Sharp's unrelenting portrayal of the "law" as an arbitrary and evil force without a commensurate discussion of what "law" really means.

Sharp divides the novel into four books, each portraying a stage in the lives of Joel Ratleer's children as told from the perspective of his daughter Melanie, the novel's narrator. Although virtually absent from the novel after the short first book, reflecting his physical absence from his children's adult lives, Ratleer's character drastically shapes his children's lives and remains an undercurrent throughout the novel, which ends shortly after his death. Book One also sets the stage for some of the complicated questions raised in *Crows*. First, what is the relationship between the law, madness, and violence; each of these elements deeply touches Joel's character. Three of the four books revolve around legal cases, creating a framework for considering how the law works in practice, how it addresses both madness and violence, and how it impacts the lives of real people. Second, to what degree does the inherent power of the law corrupt it and disempower victims. Each legal horror story that unfolds in *Crows* seems all too plausible in a world where courts of law laud Joel Ratleer's techniques. Sharp creates an effective foundation for the novel and its analysis of law and power by presenting Book One from the perspective of a young girl whose violent father is a highly successful attorney. This point of view elicits immediate sympathy and

sensitizes the reader to the particular impact of domestic violence on children. It also confounds Joel Ratleer's power as an attorney with his power as a parent, elucidating Melanie's understanding of her father as "the law" in both senses of the word. Melanie's perception of her father is grounded in his relationship with rules—both making them as a parent and manipulating them as an attorney—and she considers him an adversary at home as much as in court, saying "I almost never confronted my father, because I believed I could not prevail against him." (p. 24) Sharp reinforces this entangling of Joel's two roles with Melanie's reaction when she first sees her father argue a case in court:

> I recognized what my father was doing: it was a way he had, in the middle of a dialogue with Matt or Ottilie or me, of suddenly speaking nonsense, that did not at first sound like nonsense, with the intent of unbalancing and demeaning the listener. I wondered then how many of the ways he dealt with us at home were the practiced techniques of legal advocacy. (p. 42)

The isolation of the Ratleer home emphasizes the degree of power that Joel exercises over his family. A man with an overwhelming desire and talent for conquering and bending the will of others to his own, Joel Ratleer is a successful criminal defense attorney known for his ability to manipulate a jury. He is also an abusive and controlling figure in his wives' and children's lives who cannot accept any deviations between their wills and his own. Joel's first wife, Melanie's mother, dies of cancer when Melanie is seven years old. Joel almost immediately brings home his longtime mistress, twenty-three-year-old Ottilie, and their seven-year-old son Matt. The four of them live together in a "house built for the winter" (p. 6) in a physical environment as cold and isolated as the lives they lead. Melanie says of Wisconsin, "The land's flat vastness threatens that the world will go on endlessly the same, no matter how far you journey, that there is no escaping where you are." (p. 21) Melanie's relief at Matt and Ottilie's arrival underscores how well-developed her fear of her father is by age seven. Sharp powerfully and effectively characterizes the breadth of Joel Ratleer's violence by combining the simple statement, "My father was not, *primarily*, a physically abusive man," (p. 24) (emphasis added) with revelations throughout the novel of Ratleer's actually incredible physical brutality. The children are terrified of him and refer to him only as "Mr. Ratleer," a formality that emphasizes their emotional distance from him.

Ratleer's emotional abuse far surpasses the physical abuse. Convinced Matt is a child prodigy and as brilliant as Joel believes himself to be (upon which a former law school classmate comments, "no one's that

smart," (p. 38)) Ratleer takes extreme measures to control his son's development, including attempting to force him into a legal career, invading and trying to appropriate any hobbies that Matt independently discovers, and not only reading Matt's diaries but having his secretary type up the sections Ratleer considers particularly brilliant. Matt continually seeks escape—in a cabin in the woods, in an apartment above a new age store where he discovers drugs, and ultimately in madness following a near fatal LSD overdose. While the degree to which the madness was already lurking in Matt's physiology or psychology is never determined, Sharp does suggest that, like the trapped wolverine Ottilie and Melanie set free into the woods on the night Joel learns of Matt's psychosis, Matt must escape from his father's torturous control even if it means going into the wild. Faced with his son's illness, Joel remains utterly self-centered in the truest sense of the word. Melanie explains, "He did not understand my brother's illness as a tragedy that befell Matt. The tragedy was all my father's—how could the universe have suffered him to a have a son who was not whole?" (p. 58) This reaction parallels Joel's response to Melanie in a childhood incident where he moved to strike her as she was setting the table. She threw up her arms to defend herself, resulting in the fork in her hand being driven deep into Joel's forearm when he hit her; he angrily yells, "Look what you've done to me!" (p. 5) Joel consistently fails to recognize what he does to others and the consequences of his own actions. Reflecting upon her father and his later rejection of both Matt (because he is psychotic) and her (because she refuses to cut ties with Matt and Ottilie), Melanie says: "Whether my father loved Matt or any of us is a question that I am unable to answer to this day: I cannot imagine the quality of feeling my father experienced when he looked at a person whose will and separateness were unrecognizable to him." (p. 19)

Melanie feels that she largely escapes her father's scrutiny because of his obsession with molding Matt's future. Ironically, while Matt lingers in a succession of mental homes, it is Melanie who, without her father's support, proceeds to attend Joel's alma mater and become an attorney and judge. Due to the jump in time between Books One and Two—from age seven to Melanie's second judicial clerkship—some discontinuity exists in understanding why Melanie chooses law as a career, especially when she thoroughly rejects it later in the novel. Melanie's sole stated motivation is: "It was my driving ambition to become a federal judge, to write opinions that reverberated with the compassionate wisdom of Thurgood Marshall, that turned the law against itself in order to negate the wrongs wrought by the treacherous and neglectful Gods of earlier courts." (pp. 73–74) Yet she says early in Book One, "The law seemed like a terrible monstrosity to me, as far back as I can remember" (p. 7) and "I wanted Harper Lee's book [*To Kill a Mockingbird*] to end differ-

ently, with the defendant free and the law exposed as the evil thing it was, finally vanquished." (p. 25) While she may have pursued a legal career precisely so that she could expose the law's evil or vanquish her father (i.e., "out-Ratleer Ratleer" as Matt puts it, p. 50), what little is revealed of her actual legal career seems quite conservative and academic. Another possible explanation of her pursuit of law is that Melanie's childhood was so intruded upon by law, and her ability to think for herself so compromised by her father, that she did not know what else to do. She admits that others have projected onto her her entire life: "It is easy for those who have power to impute their own thoughts to the taciturn. Over and over, my career was championed by influential law partners, judges, presidents of the bar association, each imagining that I was what he wanted me to be." (p. 71) Unfortunately, the inability to understand better Melanie's own reasons for choosing and staying with law as a career prevents better analysis of why she ultimately finds it unsatisfactory and even stifling.

Book Two begins with Melanie's visit home to Wisconsin in 1977 upon completion of her second federal clerkship and after a successful battle with the same cancer that killed her mother (notably first presenting as a bruise). Sharp introduces a number of new and important characters in this book, contrasting the stark and isolated world of the Ratleers in Book One. Matt lives in a halfway house located in the town of Muskellunge, run by a local radical minister, John Steck. Steck, his free-spirited daughter Mildred (defined as "more progressive than *The Progressive*," p. 83), three other house residents, and Ottilie form the core of Matt's world. Matt and Melanie have grown distant, due both to Matt's mental illness and Melanie's sense of tragedy about it, and Matt shuns Melanie for most of this book. However, Matt is very close to and even "almost sane" around Mildred and her two-year-old son Ben. Mildred awaits the imminent return of Ben's father Daniel, a man she met and married in Brazil. When Daniel does arrive after their six-month separation, everyone finds Daniel perfect—everyone, that is, except Ottilie (who privately distrusts him) and Ben (who seems terrified of him). Only after Daniel accuses Matt of physically abusing Ben, thereby nearly destroying Matt's delicate world, does the truth begin to emerge: Daniel is not only abusing Ben himself, but he has also abused Mildred and is a man of many faces.

Unlike Joel Ratleer, Daniel is actually a weak man. While Joel resorts to legal threats in private arguments on occasion, such as the child custody threats against Ottilie, he has an inherent power which allows him effectively to dominate others and force people to accede to his will. In contrast, Daniel cannot dominate. While Joel's wives endured his violence (admittedly this choice reflects their own characters as well), Daniel cannot keep Mildred once he reveals his true character. Similarly,

while Joel's children did not dare to resist him, Daniel cannot control Ben, who firmly and immediately rejects him, until the courts force visitation. Without the power of the law behind him, Daniel's personal power is insufficient to control Mildred or his son.

Daniel does have the power of the law behind him in Book Three, however, which introduces the part of the novel most condemning of the legal system. Although Mildred once says that Daniel despises lawyers and does not believe in the adversarial system, (p. 84) Daniel recognizes the power he can gain over Mildred through the legal process and thus makes the law his "weapon of choice." (p. 274) The reader knows that justice, especially for Ben, requires that Mildred win the custody battle. However, in Book Three Sharp powerfully illustrates how harmful the legal *process* itself can be, regardless of the final ruling. Despite the serious allegations against Daniel, Judge Bracken's primary interest appears to be badgering Mildred into a settlement. He repeatedly stresses the irrelevance of wife-beating to parental fitness determinations (agreeing with Daniel's counsel's characterization of her as a "simpering, crying housewife" (p. 247)), points to Daniel's claimed Yale degree as evidence that he would not abuse his child, and threatens Mildred with a change of custody if she does not settle this "run-of-the-mill custody case." (p. 274) Mildred's attorney cannot convince Bracken that the case "is not about compromising between two parties to a lawsuit [but] about protecting a child." (p. 246) Bracken orders unsupervised visitations between Daniel and Ben despite objections that Bracken will be overturned on appeal for refusing to appoint a guardian. The visits torture Mildred as she watches them transform Ben from a happy to a troubled child. Further, Daniel gets a temporary restraining order against Matt based on false accusations of child abuse so that Ben is separated from the much healthier influence of the "insane" man whom he adores.

Bracken has been on the bench for fifty years and acts more like a dictator than an administrator of justice. He requires that civilians call him "the Judge" and proclaims himself "the president and vice president and secretary and treasurer" of his courtroom. (p. 243) Bracken raises the specter of outdated judges guided by their own perceptions of the world rather than by the spirit of the law. Mildred's lawyer warns Melanie before the case begins that a judge of Bracken's generation is likely to consider wife abuse a personal matter not appropriate for the courts. Interestingly, Sharp never actually reveals the laws that govern the custody battle. This, in addition to Bracken's frequent off the record manipulation of the parties (done to avoid appellate review) reinforces the idea that the judge actually considers himself immune from the law. Simultaneously, he believes he *is* the law. During a field trip ordered by Bracken, ostensibly to determine whether Mildred is an unfit mother because she smoked marijuana, but actually to display his power to make

such an order, Mildred finally realizes that the courts will never help her. She locks the judge and attorneys in a beer factory barn and escapes to safety with Ben, "kidnapping" him in the eyes of the law.

By taking charge, Mildred regains some of the power which the legal process had usurped from her. *Crows* clearly posits that the legal system has failed to protect victims of domestic abuse. Sharp's even more powerful point, however, is that the law can actually empower abusers when applied by prejudiced judges who discount victims' stories, ignore children, and fortify abusers' threats with judicial orders. Judge Bracken denies both Mildred and Ben a voice. Mildred is forced to follow court orders which imperil her child in order to avoid undermining her chances of receiving long-term legal protection. Even Melanie, while serving as reluctant co-counsel on the case, realizes that Mildred's lawyers "did not represent her in any real sense, or empower her at all." (p. 238) By flouting the law and taking her own route, Mildred refuses to accept Judge Bracken's denial of her voice or to accept his grant of power to Daniel. She becomes an "outlaw"—forced outside the law by its failure to protect her child.

In Book Four, the story jumps forward in time from 1977 to 1992. Melanie is now a federal judge designate after years on the state bench, Matt is doing better due to a new anti-psychotic drug and has a serious girlfriend and a "sane" best friend, and Ottilie has found love and a healthy relationship with John Steck, who continues to run the halfway house and place immigrants with fake social security numbers. The running commentary on the relationship between law and real life continues. For instance, Melanie wonders whether Matt and his girlfriend are aware that the law does not allow them to have sex because each is mentally ill and so incapable of legal consent; and Ottilie refuses to marry John even after she falls in love with him, in order to keep their relationship outside the reach of the law.

Melanie returns to Wisconsin on the eve of her federal judgeship, partially to attend her father's funeral. She quickly realizes that everyone is involved in something that they are reluctant to reveal to a federal judge. Eventually, Melanie discovers that Mildred, after escaping with Ben, began an underground railroad in the spirit of Harriet Tubman to provide safehouses and new identities to abused spouses and children. Matt and his mathematically brilliant friend Henry do computer work for the organization, while John and Ottilie shelter and assist victims. The analogy of Mildred's railroad to Tubman's resonates since Tubman, too, sought protection for the refugees of a legal system which failed them and had to rely on the willingness of strangers to subject themselves to that same system. The comparison is also appropriate in that slaves, like Sharp's characters, not only had the law used as a sword against them but were usually denied its protection as a shield. Similarly,

Mildred tells the story of a woman whose son-in-law held a gun to her head but who could not get the police to protect her because she had no "evidence." (p. 199) When the shadow of Daniel's legal threat clears as Ben turns eighteen, Mildred goes public with the railroad while publicizing a particularly brutal case of domestic abuse to which Melanie inadvertently alerts her.

Mildred does not portray herself or those protected by the Railroad as "victims"—by staying outside of the law, the Railroad does not become "a movement of the downtrodden." (p. 426) Mildred continues to undermine the supposed sanctity of the law through the Railroad, for example staging a domestic abuse divorce proceeding to demonstrate the degree of one judge's personal bias and hypocrisy in domestic violence cases. The judge, Hochwald, is outraged and denounces the use of the court's precious time, but the public and especially women are responsive to Mildred and the Railroad. The public reaction indicates that the social atmosphere about domestic violence has changed between 1977 and 1992. Regardless, *Crows* suggests that the situation is still bad enough in 1992 to require the Railroad and that the courts (especially those ruled by appointed judges) may not have changed at the pace of society. While plausible, Sharp is not fully convincing in this aspect, because she fails to discuss any changes in the law since 1977 and focuses almost exclusively on biased judges in both time periods. Her focus on extreme cases helps to stress the problem of judicial bias, whether extreme or subtle in presentation, but it does not educate the reader as to the real position of victims of domestic violence in the legal system today.

Indeed, the most notable shortcoming of *Crows* lies in Sharp's largely homogenized treatment of the "law" without the requisite consideration of what "law" means. The latter is needed to make this novel's social message, at least as it indicts the legal system, fully convincing. Domestically abusive characters invoke "the law" to create fear and exercise control—Joel and Daniel both threaten their wives with child custody battles to try to keep the women with them, and Daniel instigates child abuse charges against Matt to undermine his influence on Mildred. Batterers throughout the novel feed on judicial prejudice and hide behind the appearance of lawfulness to terrorize their wives and children. Attorneys like Joel Ratleer manipulate "the law" to win without regard for truth or justice, forcing justice-seeking attorneys like Mildred's to adopt Ratleer-like methods to achieve justice in the adversarial process. Legal outcomes become merely the sum of admissible evidence plus judicial prejudice or attorney-induced jury confusion.

Almost all of Sharp's condemning invocations of "the law" actually relate to human beings who purportedly enforce the law but actually warp it for their own purposes. Mildred's statement, "We are fighting the devil and the devil is the law," frames the novel and its presentation

of "the law" as not only unsympathetic to domestic violence victims but, in fact, hostile. However, it is important to note that actual laws are referenced only in an academic context, while the law in practice, i.e., the legal system and legal process, is what Sharp actually condemns for its tolerance of prejudice. While the slowness and formality of the American legal system, as well as its adversarial nature, are also implicated in the injustices wrought, Sharp clearly emphasizes the weakness of the legal system caused by its reliance on flawed humans to apply it. It is these figures who truly seem like Mildred's devils: defense attorneys like Joel Ratleer who only want to win, judges like Hochwald who use the law as a weapon to enforce their own prejudices. As a judge Melanie even kept a file of "questionable judges" until the task ceased to be rewarding for her (after the Clarence Thomas hearings), and policemen who adapt to new laws by finding ways to reduce the likelihood of legal challenge (for instance finding more review-proof means of charging suspects or mentally ill persons they have beaten).

The first potent image of "the law" as a person is Joel Ratleer. His children's metaphorical understanding of him as both "the law" and the devil divorces the concepts of law and justice early in the novel. Melanie describes Joel as willing to take any case (as long as it will get publicity), defending every client with equal zeal, and not believing in absolute right or wrong but "appear[ing] convinced of the sanctity of his vision whatever he argued." (p. 8) When Mrs. Lookingbell, a client who murdered three children in her care, arrives at Ratleer's door she tells Matt and Melanie, "I'm here because I've committed a terrible crime, and I'm told that if your father's my lawyer it won't matter whether I'm guilty or not." (p. 13) Ratleer engages in a number of unethical if not illegal means to win cases. In the Lookingbell case, Joel lies about his intent to call witnesses on the following Monday to mislead the prosecutor into interviewing witnesses over the weekend rather than preparing his summation. Not only does Joel succeed in humiliating and defeating the prosecutor, the summation he works on all weekend is reprinted in two textbooks on trial advocacy. He is clearly interested in his own public success rather than justice, truth, or even his clients' best interests—he refuses to allow psychiatric testing to determine whether Lookingbell is capable of standing trial until he gets his verdict. He employs false insinuations to such a degree that even his own clients cannot tolerate their implications. Lookingbell loses control when Joel makes outrageous claims about the man whose children she killed and screams out her confession during Joel's closing (although the judge silences her, placing greater value on the attorney's words than those of the truly affected). Despite all the evidence, the jury hangs, tellingly admitting that they "just got lost." (p. 53) Sharp creates an effective visual image of Ratleer's successful legal technique of conquering the truth rather

than exposing it: "The jury reentered the jury box to proclaim its defeat." (p. 54)

The judges, and to a lesser degree the police, also represent "the law" in *Crows*. The local police chief tells Melanie, "'[A]ll I have is this teeny little badge. You know what this is? It's the law. Do you know what the law is? I'm the law." (p. 225) Judges Bracken and Hochwald clearly consider themselves to be the law. But as Mildred's lawyer tells her, "[T]he face that leans over the bench, swaddled in black rayon, is not Solomon's. It's a *lawyer's*." (p. 229) Even Melanie realizes after long hours of legal study that she no longer pursues knowledge of the law but rather seeks "its weaknesses and vulnerabilities, the soft tunnels that if pressured, could crumble and bring the mighty edifices of the courts tumbling to the earth." (p. 324) Melanie herself must decide whether to remain within the law as a federal judge or to move outside it with Mildred and the Railroad. She must decide, as Matt says, whether to be "a human being or a lawyer." (p. 232) (She voices the fundamental distinction between the two during Mildred's hearing: "As I spoke, I felt like pure lawyer, disembodied, gutted of my own pain, eviscerated of human feeling." (p. 299)) In fact, Melanie finds freedom in her father's death and inspiration in Mildred's work. She rejects both her federal appointment as well as the law and decides to stay in Wisconsin to work with the Railroad. In so doing she moves outside the law to repair the law's injustice, notably leaving the legal system she claims to have entered for the same reason (i.e., to repair its injustices). She also takes power back from her father by reinventing her own name—"Ratleer" now harks to the *Ratleer Chronicles* in which she documents the Railroad's work rather than her father's methods.

Another major theme in *Crows* deserving of mention is Sharp's intertwining of the concepts of law and madness. While Sharp only implicitly raises the question "What is law?", she clearly asks the question "What is madness?" Sharp challenges the reader to evaluate what society, including those people who serve as judges and juries, considers deviant. Joel is the first character to introduce the theme. After losing a case early in his career for failing to argue insanity for a young client who stole enough welcome mats from work over the years to carpet her front yard (even she was surprised Joel never argued insanity), Joel quickly learns to manipulate social conceptions of madness in the courtroom. In his famous Lookingbell summation, Ratleer paints the bewildered and burdened farmer who lost his children as a little insane—based largely on the fact that he plants a small wheatfield solely for the joy of seeing it ripple—while pointing to Mrs. Lookingbell's apparent stability and dependability to prove her sanity. However, Joel cannot deal with mental illness as a fact rather than a trial technique. While Joel celebrates his hour of victory in the Lookingbell trial, Matt fights for his life in the

hospital, the events nicely juxtaposed by the author's language. Lookingbell absconds and Matt disappears because neither can tolerate his methods, leaving Joel "alone before the cameras, answering reporters' questions with witty rejoinders, while he wondered where both his client and his son had gone." (p. 54) When Matt becomes insane, Joel rejects all further contact with him even when Matt needs his legal assistance. Sharp ultimately proposes that it is the law that is mad, especially in its treatment of domestic violence. Joel Ratleer, Daniel Munk, and a host of other abusive men are deemed sane and often highly respected by the public, while Matt and the other residents of the halfway house are shunned despite their true humanity. One character challenges: "[I've heard] reports that I'm 'mentally unstable.' Compared to who?" (p. 389) Fortunately, Sharp does not paint the picture too starkly, with the character of John Steck particularly evidencing the fact that men are not the enemy and that insanity is not a prerequisite of gentility.

If this novel fails at all, it is in Sharp's almost entirely negative portrayal of the "law" while her real focus is on the legal system which enlivens it. Of course, the latter is what actually impacts lives, but Sharp only makes passing reference to dedicated Railroad attorneys in a novel which otherwise convinces with an even hand. To her credit, Sharp attempts to portray the different faces that abuse can take—physical and emotional, overt violence and evil just below the surface, abusive fathers and abusive mothers, abusers who are part of a cycle of violence and those who begin one. She also demonstrates the different reactions of the abused, including most obviously the contrast between Ottilie (whose love for Joel pulls her back to him for eight years) and Mildred (who leaves quickly and feels her love for Daniel severed by his abuse of Ben). By telling many stories, even those as short as a letter to the Railroad, Sharp enables readers to identify with abused women rather than reacting with simplistic confidence about how they would respond to an abusive spouse. Disturbingly, however, the novel seems to conclude that women can *only* empower themselves outside the legal system which has silenced them and championed their abusers for so long.

Overall, Sharp's writing is evocative and rich in detail, full of imagery of life folding in on itself and reemerging. Melanie herself is constantly seeking evolution like a butterfly hoping to escape its cocoon. The story moves from the isolation of a single abused family to recognition of the prevalence of domestic abuse. *Crows* tells an engaging and disturbing story and urges upon the reader Mildred's message that we all must become personally involved to protect those hurt by domestic violence, especially the children. Those protected by the Railroad are the silenced—often unrecognized by society and unheard by courts. Sharp convincingly questions the ability of the legal system to respond to social problems like domestic violence when the noble and scholarly

concept of law (which Melanie studies and emulates) is reduced to practice by flawed human beings. She does not argue as convincingly, and perhaps she does not intend to do so, that the response of the legal system to domestic violence remains as inadequate today or that the only protection for its victims lies outside the law.

—Robin E. Ridler