

## THE INCREASING SIGNIFICANCE OF GENES: REPRODUCING RACE

KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY. By Dorothy Roberts. New York, New York: Pantheon Books, 1997. Pp. 373. \$26.00.

*Reviewed by Tracey L. Meares\**

### I.

In her new and provocative book, Dorothy Roberts collects stories. There are many, but here are two notable ones. The first involves an African woman and her husband. They live in Italy. A few years ago, in order to obtain assistance in becoming pregnant and carrying a child to term, the couple went to an Italian clinic that specializes in ultramodern reproductive technologies. The clinic helped the couple by providing them with a donor egg and then fertilizing the donated egg with sperm from the couple. The resulting fertilized egg was then implanted into the African woman's womb.

There would seem to be nothing especially remarkable about this particular "miracle baby." After all, the first such birth occurred about twenty years ago, and there have been thousands since. Nonetheless, this particular birth received national media attention. Why? The reason is that the African woman from Italy gave birth to a *white* child. The child is considered white because both the woman who donated the egg and the African woman's husband are white. The African woman, as the gestational mother, provided no genetic material to the child she bore. The couple, it turns out, deliberately chose the race of the child because they believed that their child "would have a better future if it were white." Although most parents who utilize in-vitro fertilization deliberately choose the race of their children, those choices do not cause fanfare of any kind. So why did this particular birth cause a stir? To answer this question, Dorothy Roberts tells a second story.

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This story takes place in the United States under far different circumstances. In an attempt to pressure pregnant drug users into treatment, law enforcement officials from Charleston, South Carolina, in collaboration with the Medical University of South Carolina (MUSC), instituted a policy of prosecuting pregnant women if their babies tested positive for illegal drugs. Forty-two South Carolinian mothers were arrested under the policy between 1989 and 1994. All but one of them were Black, and the one non-Black in the group had a Black boyfriend (a fact noted by the nurse in charge of the program). Some of the women were arrested within hours of having given birth. They were taken to jail in handcuffs and leg shackles, still bleeding from delivery.

In her new book, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, Dorothy Roberts argues that these stories share a common element. She claims that these stories provide the basis for the case that "the meaning of reproductive liberty must take into account its relationship to racial oppression."<sup>1</sup> Roberts says "books on racial justice tend to neglect the subject of reproductive rights; and books on reproductive freedom tend to neglect the issue of race."<sup>2</sup> Because of these gaps, we cannot begin to understand the uproar over a Black woman and her white husband deliberately choosing to carry and give birth to a white child or the impetus behind a program such as the one implemented in South Carolina. To fully understand these stories we must consider an analysis such as the one that Roberts provides us. In seven compelling and fascinating chapters, Roberts traces her argument. Although much of the book's content has appeared elsewhere in the form of law review articles,<sup>3</sup> the organization of the book is fresh, and the style is inviting to even the non legally-trained reader.

The material in the book proceeds chronologically. The first chapter, entitled "Reproduction in Bondage," considers the numerous and brutal methods that were used and supported by law to constrain and limit the reproductive autonomy of Black women who were slaves. Roberts demonstrates powerfully how Black women were forced to become "breeders" of additional slaves—their own children. Roberts also explains how the rule of "hypo descent," law constructing the American notion of race, and as a consequence, slavery, all but abrogated the right of Black women to parent their children because slave children always were in danger of being sold

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<sup>1</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997).

<sup>2</sup> ROBERTS, *supra* note 1, at 4.

<sup>3</sup> See Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996); Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607 (1995); Dorothy E. Roberts, *The Genetic Tie*, 62 U CHI. L. REV. 209 (1995); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

away from their mothers. Chapter one also sets up a problem that Roberts refers to again later in the book—the “maternal-fetal” conflict that was expressed when slaveholders who wanted to whip pregnant slaves forced these women to lie face down on the ground over a hole in the ground dug to allow room for their pregnant bellies in an attempt to protect the child. Roberts uses this example to show that the maternal conflict is not, contrary to the claims of some feminist scholars, new. Although advances in modern medicine such as ultrasound make it much easier for us to imagine the fetus apart from its mother, Roberts shows that the method slave masters used to beat pregnant slaves created the same conflict between Black women and their unborn children.

In chapter two, “The Dark Side of Birth Control,” Roberts recasts the well-known connection between Margaret Sanger’s Birth Control movement of the twenties and thirties and the Eugenics movement of the same era in terms of racial dynamics. She charts the tension that many Blacks of that time experienced as they tried to reconcile their desire to control the numbers of poor people born into their communities by promoting access to birth control with the sometimes racist undertones of the Eugenics movement. She points out that it was racist fears that ultimately popularized birth control and in the process increased women’s access to it.

In the third chapter, “From Norplant to Contraceptive Vaccine,” Roberts brings the material on birth control up to date by exploring the marketing and promotion of long-acting birth control methods such as Norplant and Depo Provera to poor, Black women. She argues that rather than enhancing reproductive freedom, as many feminists have claimed is the case with respect to these birth control methods, Norplant and Depo Provera are used to truncate Black women’s childbearing options.

In chapters four and five, Roberts tackles the policies that have been debated on the front pages of the newspapers: criminalization of drug use (crack use in particular) by pregnant women, and policies designed to encourage women on welfare not to have (or prohibit them from having, depending on your perspective) additional children. These policies, Roberts claims, disproportionately affect women of color. Thus, Roberts argues, the connection between these policies and constraints on the reproductive choices of women of color is unavoidable. But Roberts pushes the argument further than that. She argues that the Blackness of those who are targeted for control is what makes such policies acceptable in the first place. She argues further that these policies are merely the latest in the long list of laws, programs, and policies that devalue Black motherhood.

Chapter six, the most thought-provoking in the book, is forward-looking. In this chapter Roberts links the use of new reproductive technology, such as in vitro fertilization, to the devaluation of Blackness and the simultaneous pursuit, primarily by white men, of privilege associated with whiteness. To make this argument Roberts relies on the juxtaposition of several widely reported news items and asks us to examine both what was

said and the unspoken assumptions. What is revealed by the silences is particularly challenging, as I will explore below. Finally, in chapter seven, Roberts tells us how we should address the problems, puzzles, and conundrums she has explored, telling us how to rethink our conception of reproductive freedom.

In all, *Killing the Black Body* is an impressive piece of work and a very good read. The book's primary strength is the critical manner in which Dorothy Roberts brings together news clips, historiography, examples of public policy, and other more personal stories to back up her claims about the ways in which race and racial politics affect how we make decisions about constructing and creating relationships with those who are closest to us—our spouses, our children, our parents. Many of us do not stop to think about why it feels important to have children that are genetically related to us. To the extent that we do think about it, we may resort to a familiar story about biological impulses. We assume that the desire to propagate our genes is "hard-wired." In like manner, many of us do not question the individualistic assumptions on which the recipe for success in America is predicated.<sup>4</sup> Even if we think that some kind of structural reformation is necessary to achieve real equality in this country, we may be persuaded by arguments that suggest that policy should help people who receive public aid make more "responsible" decisions such as delaying childbirth—perhaps even indefinitely—until having children is "affordable."<sup>5</sup> By bringing together in one place issues we often discuss at the dinner table in a disaggregated fashion (family caps, the war on drugs, race selection in adoption, the link between the lack of birth control and poverty) and drawing unobvious connections between these issues, Roberts jostles us out of some of these easy assumptions. It is in jostling and shocking that Roberts is most effective. It is impossible to read this book without thinking critically about what Roberts has said—and possibly changing your thinking as a result of the enterprise.

Roberts expects more out of her readers at the end of the day, however. Certainly she wants to challenge, but she also wants to convince. However, the book's strength—its use of narratives and images to reveal previously unexplored effects of race—is also its weakness. Challenging is not the same as persuading, and Roberts wants to convince readers that we can change our approach to decisions we may previously have thought innate and unchangeable. More than that, Roberts wants readers to agree that her reconceptualized vision for reproductive liberty—and the means to achieve it—are right. Whether the reader is convinced by Roberts' exposition in

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<sup>4</sup> John Kenneth Galbraith referred to these assumptions about the way the economy works as the "Conventional Wisdom" in his book, *THE AFFLUENT SOCIETY* (1971).

<sup>5</sup> For an interesting commentary on this problem, see Christopher Jencks and Kathryn Edin, *Do Poor Women Have a Right to Have Children?*, *AMERICAN PROSPECT*, Winter 1995, at 43.

chapter seven depends a great deal, I think, on how persuaded the reader is by the first six chapters. This review will focus on two of them. I will first address Roberts' exploration of the devaluation of Black motherhood, the centerpiece of which is encapsulated in chapter four, "Making Reproduction a Crime," with an exploration of the implementation of a program in South Carolina that resulted in a large number of women being prosecuted after their newborns tested positive for drugs. Next, I will address Roberts' excavation of the "genetic tie," which she treats in chapter six, "Race and the New Reproduction." I use the term excavation deliberately because it is the best way to describe how Roberts digs deep under what seems relatively permanent in order to reveal something that, while old, is very new to us.

I hope to show through a brief treatment of these two issues that Roberts more than makes the case that the meaning of reproductive liberty must take into account its relationship to racial oppression. I also hope to show in this Essay that the analysis of some of the phenomena that Roberts explores in her book is more complicated than even she has shown. Class differences between Blacks and whites are important, and much of Roberts' analysis depends upon these differences. Roberts, however, does not similarly point out class differences among Blacks themselves. This failure to uncover the heterogeneity of Black public opinion and Black politics clouds some of the conclusions that Roberts draws. At the same time, the lack of class analysis limits unnecessarily the strength of Roberts' vision of reproductive liberty. By pointing out some of these complexities, I hope to enrich Dorothy Roberts' important account of the connection between race and reproductive liberty. I also hope to show that by considering some of these complexities, Roberts' vision might be extended in important ways.

## II. DEVALUATION OF BLACK MOTHERHOOD

In chapter four of her book, Dorothy Roberts claims that the criminalization of reproduction, as illustrated by the story of the South Carolina mothers, occurs because "society does not view [poor, Black] women as suitable mothers."<sup>6</sup> This claim rests on the groundwork Roberts lays in the first few chapters of her book, in which she shows that the policies that constructed American chattel slavery and the discriminatory treatment of Black women that occurred even after Emancipation make the criminal policies she analyzes in chapter four possible. Additionally, Roberts argues that criminal punishment of poor Black women who take drugs and decide to carry their children to term devalues Black motherhood in general. It is both evidence for and part of the engine driving the lower esteem in which society holds Black mothers.

Roberts points out that there is an alarming trend in criminal prosecutions of women whose babies test positive for drugs. She argues that the

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<sup>6</sup> ROBERTS, *supra* note 1, at 152.

impetus for these policies cannot possibly be concern for the babies of these women and that the real reason these policies are implemented is because the politics of race in America facilitate them. Roberts first argues that the prosecutions have occurred coincident to the rise in the use of crack, an illegal drug that statistics show is used disproportionately by Black people. Roberts questions the concern surrounding crack use by arguing that the panic over the problems associated with crack were greatly overblown compared to other drugs such as cocaine.<sup>7</sup> She then adds that the concern over maternal use of crack was also greatly overblown.<sup>8</sup> Next, she claims quite persuasively that the media uproar over both general and maternal crack use set the stage for state intervention. Some of these interventions were extremely punitive. Roberts focuses on two especially harsh policies: (1) a case in which a Florida woman was prosecuted for "delivering" cocaine to her children through their umbilical cords in the seconds following their births; and (2) the South Carolina program highlighted earlier in which forty-two women were prosecuted when their babies tested positive for drugs.

Roberts' analysis of the South Carolina program is the centerpiece of chapter four. She argues that this program was clearly discriminatory, and she links the discrimination in the program to the devaluation of Black motherhood. Here is an outline of her argument: first, the patient pool at MUSC, the only hospital that serves indigent Black patients in Greenville County, South Carolina, contains disproportionate numbers of poor, Black women. Second, although the purpose of the program supposedly was to protect babies exposed to drugs in the womb, law enforcement officials singled out only MUSC and only Medicaid patients in the obstetrics clinic for the program. Third, South Carolina officials made no real effort to ensure that the pregnant drug users had access to drug treatment. How is it, Roberts asks, that only these patients were targeted when there is evidence (in Florida, at least) that white women use illegal drugs at the same rates as Black women? Roberts argues that racial politics enabled the prosecution of poor, Black drug users. She points to comments made by one of the architects of the program, Charles Condon, who is now South Carolina's attorney general, for support: "[T]here's not enough political will to move after pregnant women who use alcohol or cigarettes. There is, though, a

<sup>7</sup> While the amount of media attention it received may not have been justified, it is quite clear that the harms associated with crack, both for the user and in the communities in which its sale often are concentrated, can be quite severe—more severe even than the problems associated with the use of a drug like cocaine from which crack is derived. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290-91 (1995) (noting that there are important differences between crack and powder cocaine); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, (forthcoming, AM. CRIM. L. REV.) (documenting the harms to communities of concentrated poverty caused by the sale of crack cocaine).

<sup>8</sup> This argument is more convincing than the previous one. See *infra* text accompanying notes 14-15, explaining the harms associated with maternal drinking of alcohol, which is not criminalized.

political basis for this interagency program. Leaders can take a position against crack.”<sup>9</sup> Roberts asks us to imagine a scenario in which forty-two white, suburban mothers were dragged in chains from suburban hospitals hours after having given birth. If we cannot imagine it, then Roberts has made the point, right?

Like Michael Tonry, who has argued that the War on Drugs’ hugely disparate impact on urban Black Americans was entirely foreseeable,<sup>10</sup> Roberts argues well and persuasively that the South Carolina program predictably affects minority poor women and that the program’s architects must have foreseen this consequence. An argument can be made that the effectiveness of a law enforcement program that produces racially asymmetrical outcomes is compromised when those outcomes are spatially concentrated in communities of concentrated poverty.<sup>11</sup> For example, I have shown that when viewed through the lens of social organization theory, which grounds the prevalence of crime in community-level phenomena rather than an individual’s characteristics, traditional deterrence-worshipping approaches to crime that attempt to manipulate an individual offender’s incentives to commit crime by heaping more severe punishment on a particular offense may *confound* that goal. When traditional forms of punishment like imprisonment are concentrated on individuals from communities that are disproportionately poor, there will be predictable negative consequences—more broken families, higher levels of unemployment, general reduction of community economic well-being, and other conditions that disrupt social organization. This process will ultimately discourage law-abiding residents from working collectively to prevent their own victimization and from transmitting law-abiding values to their children.

Roberts, however, relies on a more obvious criticism of the program—rather than providing drug using mothers with an incentive to seek treatment, the South Carolina program was more likely to drive these mothers away from treatment. After considering Roberts’ arguments, a reader has strong doubts that the program will achieve the goals its promoters have set for it. But Roberts seeks to do more than simply convince us that the program is an ill-considered idea. She argues that the reason why such an ill-considered program could be enacted and implemented in the first place is that Black women are not valued as mothers and that the prosecutions themselves further devalue Black motherhood. Roberts writes: “It is the right to choose that is burdened by criminalizing conduct during pregnancy. . . . Race has historically determined the value society places on a woman’s

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<sup>9</sup> ROBERTS, *supra* note 1, at 178 (quoting a Charleston solicitor).

<sup>10</sup> See MICHAEL H. TONRY, *MALIGN NEGLECT* (1995).

<sup>11</sup> See Tracey L. Meares, *It’s a Question of Connections*, 31 VAL. L. REV. 579 (1997); Meares, *supra* note 7.

right to choose motherhood. The devaluation of Black motherhood gives the right to decide to bear a child unique significance."<sup>12</sup>

The linchpin of her argument has two facets. One, it is hard to argue that the criminal policy helps Black children; and two, many groups of pregnant women expose their children to harm *in utero* without being subject to criminal sanctions. Roberts notes that the most telling evidence of the state's disregard for the health of Black infants is its failure to respond adequately to the abominable rates of Black infant mortality. For example, in 1992, the infant mortality rate among Blacks was 16.8 per thousand births compared to 6.9 for whites, and in Washington D.C., the mortality rate among Black infants is triple that for the nation as a whole.<sup>13</sup>

Roberts argues that if the state really cared about Black children there would be greater national commitment to provide prenatal health care rather than to prosecute poor mothers who abuse drugs. One easy response to this point is that there are many ways of helping Black children. The fact that the state has chosen to criminalize maternal crack use instead of urge national prenatal health care does not mean that the state is indifferent to Black children's well-being. The problem with this response, Roberts' work suggests, is that it is hard to believe that the state desires to help those children by choosing a method that will so obviously backfire. Roberts wants to convince us that the reason for this choice is related to the mothers' race.

For those who are not convinced by part one of her argument, she turns to part two, that there are many other maternal activities that are more harmful to babies than smoking crack. Consider the effect on an unborn child of drinking excessive amounts of alcohol. It is estimated that 1 in 600 children are born each year with permanently debilitating conditions associated with fetal alcohol syndrome.<sup>14</sup> Roberts reminds us that fetal alcohol syndrome is the leading known cause of mental retardation.<sup>15</sup> Although drinking during pregnancy is increasingly frowned upon, and although many women are subject to social sanction for doing so, they are not punished by the criminal justice system like mothers who smoke crack. Of course, alcohol is legal and crack is not, but that fact merely begs Roberts' question. Roberts would likely reply that the main reason mothers who drink are not subject to criminal punishments is that white women are far more likely to drink than to use crack. Thus, society comes up with alternative, non-criminal methods to control the harm that these women do to their unborn babies. Even granting the illegality of cocaine, Roberts shows

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<sup>12</sup> See ROBERTS, *supra* note 1, at 182.

<sup>13</sup> *Id.* at 183-84.

<sup>14</sup> See The National Organization of Fetal Alcohol Syndrome, *Fetal Alcohol Syndrome Fact Sheet*, <<http://www.nofas.org/maternal.htm>>.

<sup>15</sup> ROBERTS, *supra* note 1, at 177.

that mothers who use crack are punished more severely than are non-pregnant crack users, because they are subject to additional punishment for taking drugs while pregnant.<sup>16</sup> It is the fact of their pregnancy that exposes them to greater sanction. And this fact is what Roberts relies on for her conclusion that the policy devalues Black motherhood.

Roberts makes a challenging argument. Still, a certain logical leap is necessary in order to reach the conclusion that *Black* motherhood is devalued because there has not yet been a move to criminally punish women who drink while pregnant, while examples of criminal punishment for women who use illegal drugs exist. First, the point about the potentially greater harm that alcohol causes to unborn children does not mean that cocaine use by pregnant women is innocuous. Research shows that cocaine use during pregnancy can cause quite serious harm to unborn babies.<sup>17</sup> It is true that the jury is still out on the permanence of complications caused by maternal drug use; however, the consequences of the use in combination with the fact that use of crack cocaine *is* illegal certainly justify concerns for maternal illegal drug use.

Second, we have to consider the fact that all illegal drugs do not cause identical harm to unborn babies. Different rates of use of different illegal drugs could justify distinctions. Roberts points to data showing that equal numbers of Black women and white women used drugs while pregnant. These data also show that white pregnant women tested positive more frequently for marijuana than Black women (14.4% of white women vs. 6% for Black women), but Black women tested positive more frequently for cocaine than white women (7.5% of Black women vs. 1.8% of white women).<sup>18</sup> If there is reason to consider cocaine use more "serious" than marijuana use—both public opinion and penalties for use of the two drugs seem to reflect that sentiment—then the different rates of usage of these two drugs could explain the different treatment users receive.<sup>19</sup>

<sup>16</sup> We might think that this type of prosecution is simply inefficient. It is "double dipping" to prosecute pregnant drug abusers twice. A more efficient regime would focus on maternal alcohol consumption precisely because it is not already criminal and causes at least as much, if not more harm, to unborn children.

<sup>17</sup> See Fonda Davis Eyler, Marylou Behnke, Michael Condon, Nanci Stewart Woods & Kathleen Wobie, *Birth Outcome From a Prospective, Matched Study of Prenatal Crack/Cocaine Use: I. Interactive and Dose Effects on Health and Growth*, 101 PEDIATRICS 229-37 (1998); Fonda Davis Eyler, Marylou Behnke, Michael Condon, Nanci Stewart Woods & Kathleen Wobie, *Birth Outcome From a Prospective, Matched Study of Prenatal Crack/Cocaine Use: II. Interactive and Dose Effects on Neuro-behavioral Assessment*, PEDIATRICS (1998).

<sup>18</sup> Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1435 n.85.

<sup>19</sup> See The Gallup Organization, *The Office of National Drug Control Policy: Consult With America: A Look at How Americans View the Country's Drug Policy* (Mar. 1996) (showing that 51% of respondents believe crack cocaine is the biggest problem in the country today, compared to 6% mentioning marijuana); see also Tracey L. Meares, *Place and Crime*, (forthcoming, CHI.-KENT L. REV.) (noting the differences in treatment by the criminal justice system of different types of drugs).

Medical research also justifies differential treatment. While cocaine may not cause birth defects as severe as those caused by alcohol, it often causes greater problems for newborns than marijuana. Roberts never even mentions the fact that Black women are much more likely than white women to use an illegal drug that is more harmful to their babies. This omission makes her analysis less convincing to those who know something about this area than it would be if she were more willing to discuss points that cut against her.

There are obvious non-race based reasons behind the use of policies that are directed primarily at pregnant crack users. Yet, it also is true that the women subject to criminal policies that compromise their decision to continue to carry their babies to term are more likely to be poor and Black. Because it appears that these women are rather uniquely affected, does this mean that *Black* motherhood is devalued, as Roberts has argued? To answer this question, we must ask: Devalued by whom?

Roberts answers this question by claiming that "society" finds these prosecutions acceptable. Although she does not state it outright, when Roberts refers to "society" it is likely that Roberts is referring primarily to the non-Black majority. In order to conclude with Roberts that society devalues Black motherhood, we must believe that non-Blacks think that pregnant Black crack users are representative of "Black motherhood."

Work by sociologist Larry Bobo demonstrating that non-Blacks—whites anyway—tend to negatively stereotype all Blacks might help to support Roberts' claim. For example, Bobo shows that although the prevalence of the beliefs that formed the foundations of "Jim Crow" racism (the notion that Blacks are innately inferior to whites) is fading fast, a new belief system among whites has formed.<sup>20</sup> Unlike Jim Crow racism, the new belief system features a claimed commitment to equality in principle without a similar commitment to policies to implement changes that can assist the achievement of greater equality between Blacks and whites.<sup>21</sup> Bobo calls these new beliefs "laissez-faire" racism. He explains that laissez-faire racism depends upon the persistence of anti-Black stereotypes. He points to a 1990 study showing that whites tend to perceive Blacks as more likely than themselves to be unpatriotic, violence prone, unintelligent, lazy, and preferring to receive welfare rather than work.<sup>22</sup> Bobo argues that these stereotypes drive the support among whites for punitive welfare reform and abrogation of affirmative action. If he is right, then it is also likely that white attachment to those stereotypes supports Roberts' claim that subjecting Black mothers to criminal punishment for drug use is

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<sup>20</sup> See Larry Bobo, *The Color Line, the Dilemma, and the Dream*, in CIVIL RIGHTS AND SOCIAL WRONGS (J. Hingham ed., 1997).

<sup>21</sup> *Id.* at 38-40.

<sup>22</sup> *Id.* at 40.

predicated in part on negative assumptions about Blacks. The reason why this work helps support Roberts' claim is that society (as I suspect she defines it) devalues Black motherhood through general stereotyping. The respondents who make negative assumptions about Blacks in the relevant categories of conduct assume that all Blacks are likely to engage in the same deviant behavior. This point suggests at the very least the lesser value—in the eyes of whites—of Black people. Thus Roberts might be able to use this work to say that because the policies she criticizes are tied to negative stereotyping, they devalue Black motherhood, since Black mothers are, most often, the ones who reproduce Black people.

There is something to this. But there is a problem with the assumption that the whites who stereotype Blacks are the members of "society" whose views are the only ones pertinent to societal devaluation of Black motherhood. Society is complicated and, of course, it is not exclusively white. We must also examine the role that Black people played in the enactment and promulgation of policies like South Carolina's. Does the Black community identify with the women Roberts describes?<sup>23</sup> It would be inconsistent with Roberts' argument, I think, if it turned out that a substantial number of Black people are part of the "society" that condemned the poor, Black mothers who take drugs while pregnant and supported the very policies that Roberts has so persuasively argued are ineffective. What if it turns out that many Black people—including Black women—think that Black mothers should be encouraged to stop using drugs and penalized if they fail to do so?

Roberts points out that both Professor Randall Kennedy of Harvard and the police chief of Charleston, South Carolina, two Black men, have made arguments in support of the program which attempts to coerce women into treatment by threatening them with criminal penalties for failing to choose treatment. Roberts claims that Black people are very skeptical of the criminal justice system, and she criticizes these two men for their failure to recognize the skepticism she notes. She also argues that the opinions of two Black men do not make the program any less racist. It turns out, though, that these two men are not alone. Roberts' dismissive stance toward Kennedy and Greenberg does not take account of the fact that public opinion surveys suggest a strong conservative bent among Blacks in matters of drug law enforcement. For example, the 1988 National American Election Study indicates that 82% of Blacks, compared to 74% of whites, sup-

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<sup>23</sup> Obviously, the idea of the "Black community," like the notion of "society" is complex. I intend a notion of community that relies upon connections between Black people based on consensual group identity and similarity of experience. When group identity is strong, the experiences of one individual in the group are sometimes very important to all individuals in the group. Thus, it is possible that many Black individuals see the treatment of Black maternal drug users as a phenomenon that affects them personally in important ways. For a theoretical and empirical explanation of the notion of a community, see MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AMERICAN POLITICS* 75-84 (1995) (explaining the concept of "linked fate").

ported increased federal spending on the War on Drugs.<sup>24</sup> Additionally, The Joint Center for Political and Economic Studies, a Washington think tank devoted to research on issues of concern to African Americans, recently found that 75% of a national sample of Black people surveyed supported so-called “three-strikes” laws despite the fact that those polled must know that such penalties will be disproportionately borne by Black people.<sup>25</sup> These data certainly undermine the argument that Blacks do not believe they will benefit from increased law enforcement.

One should not, however, take what I have just said as an argument that Black public opinion indicates that the vast majority of Blacks wholeheartedly favor criminalizing maternal drug use or even the War on Drugs. My own empirical research on public opinion and drug law enforcement suggests that Black opinion on drug law enforcement is complex.<sup>26</sup> With respect to drug law enforcement, I have shown that Blacks, those who are poor especially, are much more likely than whites to hold a position I call “Dual Frustration.”<sup>27</sup> Individuals who fall into this category tend to be older, African American women—many of them mothers, no doubt. These mothers want better crime control and law enforcement in their neighborhoods, but they are concerned about the way increased law enforcement affects their children. These data are relevant to what Black Americans think about the criminalization of maternal drug use. While the Black women surveyed in the General Social Survey may not want their pregnant neighbors to be subjected to the harsh treatment accorded in South Carolina, they may well criticize the decisions of pregnant women from their communities who take illegal drugs.

It is true that the circumstances in many communities of concentrated poverty make life difficult for the people who live there. But it is also true that, despite these difficulties, many of the women who live in these communities do not take drugs while pregnant.<sup>28</sup> Such women might well adopt a hard line against maternal drug use. Sociologist Elijah Anderson explains that many of these women would occupy a position in the community that

<sup>24</sup> *Id.* at 183, Table 8.1.

<sup>25</sup> See Michael A. Fletcher, *Study Tracks Blacks' Crime Concerns; African Americans Show Less Confidence in System, Favor Stiff Penalties*, WASH. POST, April 21, 1996, at A11.

<sup>26</sup> See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997).

<sup>27</sup> *Id.* at 140.

<sup>28</sup> See ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (1990). Anderson details the clash between “decent” values—hard work, family life, the church, and law-abiding behavior—held by some families in the community he researched and “streetwise” values—drug culture, unemployment, little family responsibility, and crime—held by other families. Sociologist William Julius Wilson argues that most Black families are committed to what could be called “decent” values. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 51-86 (1997).

Anderson refers to as an “old head.”<sup>29</sup> They are often perplexed and frustrated by the conduct that is a part of the drug culture, conduct that is all too prevalent in many poor urban neighborhoods. Such women, who are committed to law-abiding values, may well support the very regimes Roberts criticizes. They may support these policies not just because they think they will cause drug abusers to make different decisions, but because they are interested in signaling to each other and the outside world that drug use during pregnancy is emphatically *not* what Black motherhood is about. Thus, Roberts’ failure to criticize the mothers whose plight she describes undermines some of the force of her argument. The point is this: Those who argue that Blacks obviously benefit from “get tough” approaches to drug law enforcement ignore the nuances within Black opinion that I have identified in my own research. Yet I also think that critics of “getting tough” like Roberts stand on a weak foundation when they claim that there is a lack of support for law enforcement among Blacks.

Roberts’ argument that Black motherhood is devalued by certain criminal law policies relies upon a class-based analysis. We ought to ask, then, whether it is *Black* mothers or *poor* mothers who are devalued. Class is, of course, a slippery concept.<sup>30</sup> By emphasizing its importance to the issues Roberts raises, I do not mean to suggest that it is simple to assess—wealth, income, education, occupation, and consumption are all relevant.<sup>31</sup> Nor do I want to suggest that it is easy to separate class and race. The very fact that they are so intertwined in this country is an indication of their multiplicative rather than additive nature. Despite these issues, I think it would be useful to complicate Roberts’ analysis by engaging the interaction between race and class. For example, reconsider the hypothetical that Roberts asks us to ponder: Can you imagine a white woman dragged in leg shackles from a suburban hospital hours after birth? I admit that it is hard for me to imagine. But can we imagine middle-class Blacks being dragged from suburban (or urban) hospitals? Can we imagine poor white women being subject to the South Carolina policy? I have a hard time imagining a middle-class woman of any race being dragged from a hospital in chains. At the same time, it is not so difficult for me to imagine a poor white woman subjected to the South Carolina policy. I think Roberts would agree. She explains in great detail in chapter two that poor white women were also subject to eugenic sterilization and higher rates of experimental gynecological surgery than were their middle-class counterparts.

Perhaps because criminal law policy—especially policies connected with the War on Drugs—are so obviously racialized, it is easier than it probably should be for Roberts to conclude that it is intended to devalue

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<sup>29</sup> ANDERSON, *supra* note 28, at 73-76.

<sup>30</sup> See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 Tex. L. Rev. 1847, 1863-94 (1996) (describing the various components of class analysis).

<sup>31</sup> *Id.*

Black motherhood without a more thorough treatment of class dynamics. But I was intrigued by a policy she pointed to but did not analyze in depth that might have shed some light on the question of class. Roberts notes that "the most common penalty for a mother's prenatal drug use is the permanent or temporary removal of her baby."<sup>32</sup> An analysis of this phenomenon, in conjunction with the material Roberts already presents in her book, would be extremely useful. Because these civil actions are common and because the numbers are no doubt much higher than the criminal prosecutions of Black women whose newborns test positive for drugs, the decision of child and family welfare services to remove a child from his or her mother could really substantiate the claim that Black motherhood is being devalued. Removal more directly implicates an embedded belief that Black women lack mothering skills than do the scattered examples of criminal prosecutions, because it occurs under the freighted auspices of "abuse" and "neglect."<sup>33</sup> These actions also help to highlight the role class plays in the evaluation of motherhood. Drug use interacts in important ways with class because poor mothers are less likely to get good prenatal care and even good basic nutrition. All of these factors combine to produce an assessment of a woman's ability to mother.

These procedures cry out for greater analysis precisely because, unlike the criminal cases, they do not make headlines except in the most extreme circumstances. The process appears seductively straightforward. After all, it might be in the "best interests of the child" to remove him or her "temporarily" from a poor mother who takes drugs and is really not "capable" of providing good care. And if it is in the child's interests, shouldn't we expect to see children who display the obvious signs of fetal alcohol syndrome removed from mothers? We need information about the demographics of these removals to know what role race plays in this policy that is so obviously connected to assessments of parenting. Are pregnant Black women who use drugs more likely to have their children removed by the state than their white counterparts? Are their children taken away for longer periods of time? Are they more likely to have their parental rights terminated?

In addition to answering the previous questions, it would be useful to ask questions of the Blacks affected by the removal process: what do Black people think about these removals? What role do Black social workers play in this process? In contrast to overwhelmingly white officials, such as prosecutors in the criminal justice system, state social workers are themselves often Black. Any assessment of what "society" thinks about poor, Black mothers who take drugs and Black motherhood in general should

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<sup>32</sup> See ROBERTS, *supra* note 1, at 159.

<sup>33</sup> See generally Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505 (1992).

take account of their role and view in the removal process. And what about family members who come to the children's rescue? Many grandparents and aunts and uncles are saddled with the responsibility of children whose mothers are in jail or who have been removed by the state.<sup>34</sup> An analysis of this unseen and largely silent phenomenon would have highlighted the role of class as well as race in constructing the perceptions of motherhood, and it would have strengthened Roberts' argument concerning the devaluation of Black motherhood.

### III. THE GENETIC TIE

The willingness of Black grandparents and aunts and uncles to take in and parent their daughters' and siblings' children as if these children were "their own" is an important part of the story Roberts tells in what I think is the most exciting and thought-provoking chapter in her book. One of the most interesting things about chapter six, "Race and the New Reproduction," is Roberts' claim that the "genetic tie"—our relationships with those to whom we typically consider ourselves to be closest to, such as our parents and children—depends a great deal on the construction of race in American society. Roberts argues that, in contrast to whites, Blacks place much less stock on the importance of the genetic tie (the biological connection between a parent and a child). She explains that "the social and legal meaning of the genetic tie helped to maintain a racial caste system that preserved white supremacy through a rule of racial purity."<sup>35</sup> The genetic tie between a Black slave mother and her child made that child Black, and therefore a slave, no matter that the child also may have had a genetic tie to a white slaveholder. In contrast, it was argued that if a white woman had a racially mixed child, she played a role in corrupting the white race, as only white women could produce white children.<sup>36</sup>

Roberts uses this contrast in relative weight that the above culture of the time placed on the genetic ties to parents based on race to help us to see that all genetic ties were not equal, as we would otherwise think. After all, each parent, slave mother and slaveholder father, contributed an equal amount of genetic material to create the child in question. Roberts shows, however, that social construction played a role in interpreting the importance of the connections. The value of using the term genetic tie is in its obvious grounding in biology. The policies of hypo descent were assumed to be natural, following Bobo's notion of Jim Crow racism. By using a scientific term (and an implicit invocation of "natural" law) to describe a completely socially constructed phenomenon, Roberts helps the reader to see parallels between historical policies constructing race and the continuing

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<sup>34</sup> See Juliet Bruce, *Kinship Families: Caring for Children Outside the Foster Care Arena*, WASH. POST, April 22, 1997, at D5.

<sup>35</sup> ROBERTS, *supra* note 1, at 267.

<sup>36</sup> *Id.* at 268.

relevance of race in the decision we make concerning our reproductive decisions today. Roberts then explains that because the notion of white superiority was grounded in biological terms and supported by law, Black Americans have resisted grounding self identity in biological terms because of this—history of the social construction of the genetic tie. Instead, Black Americans have “developed a race consciousness rooted in a sense of peoplehood” supported by politics rather than genetics.<sup>37</sup>

Dorothy Roberts uses these ideas to create an innovative and imaginative analysis of the role that race plays with respect to new reproductive technologies. While some claim that new reproductive technologies, such as gestational surrogacy and in-vitro fertilization, should be praised and welcomed for their potential to allow the infertile to have access to the possibility of producing children that are genetically related to them, Roberts reveals a different view of the use of these methods. First, she exposes distributional inequities to show that even though poor, Black women are the most likely group to be infertile, this group has the least access to these innovative technologies. Second, and much more interestingly, she shows that the use of these technologies are bound up with an obsession for genetic ties that reinforce the value of “whiteness” and devalue “Blackness.”

Roberts demonstrates the second point through a compilation of cases and news items. To bolster her argument that the new reproductive technologies rest on an underlying ideology of whiteness, she notes that whites and white women in particular will subject themselves to the long, painful ordeal that is necessary for IVF treatment before resorting to adoption because it is so important to them to have a genetically related child. And, moreover, white couples will consider adopting a child of almost any other race (assuming they cannot get a white child) before they will consider adopting a Black child.<sup>38</sup>

Roberts identifies a further index for the value of whiteness: the fact that in a few instances when white women have used artificial means to conceive and through clinic negligence have borne racially mixed children, these births have been viewed as freaks by the media. In these cases it is true that the women involved had contracted to be inseminated with their (white) husband’s sperm, so a mixed race child is an immediate indicator of the fertility clinic’s failure to fulfill the contract.<sup>39</sup> But Roberts argues that the fact that the sperm came from someone of the wrong race added a new dimension of harm. “This second harm to the mother was the fertility clinic’s failure to deliver a crucial part of its service—a white child.”<sup>40</sup>

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<sup>37</sup> *Id.* at 261.

<sup>38</sup> *See id.* at 273.

<sup>39</sup> In contrast, if a mix-up had been with another white man’s sperm, it might have taken quite a while before anyone noticed that breach. In fact, it may never have been noticed.

<sup>40</sup> ROBERTS, *supra* note 1, at 252.

The case which opened this Essay is another example Roberts uses to demonstrate the value of whiteness that is connected to new reproductive technologies. What was so outrageous about a Black mother choosing to bear a white child when white couples make a similar choice almost every time they engage the services of a fertility clinic? Roberts implies that the source of the outrage is in the fact that white children should be genetically tied—and therefore *belong*—to whites only. A final, intriguing example Roberts mentions is the fact that maternal surrogates who are to provide both eggs and gestation services are valued according to their characteristics. A Black surrogate is not interchangeable with a white one. This means that feminist opponents of surrogacy miss something important when they claim that surrogacy is objectionable because it commodifies and treats women as fungible. To the contrary, Roberts argues, “Surrogacy . . . is so troubling precisely because its commercial essence lays bare how our society actually *does* value people.”<sup>41</sup>

These examples are not without problems—one reason white people are not as willing to adopt Black infants is because of the position against transracial adoption taken by the National Association of Black Social Workers, and no doubt the circus surrounding the sperm mix-ups was due partly to the fact that they were so publicly obvious. Nevertheless, these cases, especially the surrogacy example, demonstrate the ways in which race might drive the decisions of so many of the people who avail themselves of the new reproductive technologies. However, the strength of Roberts’ case depends, I think, on whether she is right about both the fact that white people are very much invested in genetic ties and the fact that Black people are much less invested in them. Many would argue that these dynamics are driven mainly by the fact that couples just want a child that is “like” them. Just as most people partner with individuals of their own race, they are more likely to want children who look like themselves. Under this view, given that there are so few white children to adopt relative to the numbers of white couples who want them, white couples are more likely to choose new reproductive technologies to achieve this goal. Blacks on the other hand, would not have to utilize such extreme strategies because there are plenty of adoptable Black children. And, as it turns out, Black middle class couples do adopt at rates disproportionate to their numbers in the population.<sup>42</sup>

Roberts shows, moreover, that economic barriers prevent Blacks from utilizing the new reproductive technologies to the same extent as middle-class whites. But surely this is also true of poor whites, and it does not tell us very much about what Blacks would do if they had the money. If it was more affordable, Blacks, like whites, might demonstrate that they place just

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<sup>41</sup> *Id.* at 279 (emphasis in original).

<sup>42</sup> See Zanita Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 Harv. Black-Letter J. 39 (1993).

as much stock in genetic ties as whites do.<sup>43</sup> Roberts anticipates this point and notes that the use of reproductive technologies may be a function of self-selection as well as economics. Even middle-class Blacks do not use reproductive technologies as much as their white middle-class counterparts. She explores a number of reasons, in addition to economic barriers, for Blacks' lower rates of usage of the new reproductive technologies. For example, she highlights the history of reproductive counseling and sickle-cell screening, and she shows that what was supposed to be a strategy to help Blacks ended up being a tool to abuse them. This history, along with other examples of medical experimentation, such as the infamous Tuskegee syphilis experiment, may lead Blacks to distrust the new reproductive technologies. Roberts suggests that retelling stories about these incidents reinforces Black distrust of doctors and the government, and she points to these fears as "rational explanations for reluctance" to utilize processes such as in-vitro fertilization. She also notes there may be less rational explanations, such as a woman's attribution of her infertility to fate or God's will. Such a woman will be less likely to seek an answer in science.<sup>44</sup>

I was intrigued by Roberts' almost passing reference to "less rational" reasons for the failure of Black women to utilize modern reproductive technologies. More analysis of this last point would have been extremely beneficial for two reasons. First, the way that Roberts presents the reliance of some (many?) Black women on faith in God to address fertility issues reveals that unanalyzed class dynamics are at work. Second, this idea that Black women would sit by passively and "accept" fate is somewhat inconsistent with the image of their resistance that Roberts sets out in the first chapter of her book. As to the first point, Roberts quotes Elizabeth Heitman, a public health expert, who says, "If infertility is one in a series of negative, seemingly irreversible events in a woman's life, she may be more likely to attribute it to fate or God's will than seek to address it in science."<sup>45</sup> Who are these women who are most likely to be overwhelmed with insurmountable hurdles? Poor, less educated Black women, I suspect. Is their lack of education, combined with their faith, the reason why their reluctance to turn to science for help is considered less rational than reluctance driven by the specter of the Tuskegee experiments? No doubt many poor, Black women often feel overwhelmed by their lives, and many seek refuge in their religion. But it is probably a mistake to conflate their recourse to faith with passively *accepting* their fate. The centrality of religion in the lives of many Black women leads them to address infertility by rely-

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<sup>43</sup> We might soon get new data on this last point, as several states require IVF to be covered by health insurance. See Note, *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092 (1996).

<sup>44</sup> ROBERTS, *supra* note 1, at 259-60.

<sup>45</sup> ROBERTS, *supra* note 1, at 260 (quoting Elizabeth Heitman, *Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer* 6 STAN. L. & POL'Y REV. 94 (1995)).

ing on faith in God. This is consistent with taking an active role in addressing the problem.

This centrality of church and prayer life to many Black women leads to the second reason why more analysis of the issue of "God's will" as a factor in reproductive decision-making and its relevance to the importance of the genetic tie to Black people.<sup>46</sup> Although it may be common for many Americans to mistake deep faith for a lack of education, middle-class and educated Black women, like their poorer counterparts, are very churched. Their church participation is a key part of playing a role in the Black community in a way it may not be in non-Black communities.<sup>47</sup> These middle-class women may be just as likely as poorer women to believe that the use of new reproductive technologies is simply not "God's best" and should therefore not be chosen lightly.<sup>48</sup>

I suspect that to many Black women, especially those who are churched, fate and God's will are not interchangeable concepts. Women guided by faith rely on and assert their faith as a source of guidance with their problems. This aspect of faith is consistent with the image of Black woman as "tigress" that Roberts presents in chapter one, where she details the strategies of resistance adopted by slave women to avoid bearing their master's children and to keep control of the children that they did bear, and stands in contrast to the image of passive acceptance that Heitman's comment implies. What I am suggesting here is that faith is more often a part of the story of a Black woman's resistance than it is an aspect of acceptance. But more than that, I am suggesting that faith is entirely consistent with the desire of Black women to have a genetically tied child. Given that the church is central in the lives of Black women, further analysis of the relationship between religion and the election to use reproductive technology by Black people would have provided an interesting addition, and possibly a counter-story, to the one Roberts tells to explain Blacks' seeming disinterest in these options.

Roberts grounds this aversion of Blacks to the genetic marketing aspect of the new reproduction in their resistance to defining personal identity

<sup>46</sup> Analysis of General Social Survey data for the years 1988 through 1991 (the only years between 1972 and 1994 that the question was asked), shows that 72.4% of Black women were members of a church or synagogue compared to 67.1% of white women. That difference in the prevalence of active prayer life (defined here as praying several times per day) was more stark: 42% of Black women reported praying several times a day compared to 29.7% of white women. The comparisons between educated Black and white women are equally stark. Eighty percent of Black women reported praying between once and several times a day, compared to 58.5% of white women. The data analysis and extraction program for these percentages can be found at <<http://csa.berkeley.edu:7502/cgi-bin/hsda?haracsda.3+gss94c>>.

<sup>47</sup> See C. ERIC LINCOLN AND LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* 154 (1990) (arguing that the Black church is the central institution in many African Americans' lives).

<sup>48</sup> I quote a comment of a friend in a group of faithful, middle-class women with whom I discussed this Essay.

in biological terms.<sup>49</sup> She contends that it is just less important to Blacks than whites to have genetically related children. While the centrality of kinship networks in the Black community is well-known, and while the increasing interest among Black people in Afrocentrism helps to bolster Roberts' claim that "Black people's search for their ancestral roots [often focuses] on cultural rather than genetic preservation."<sup>50</sup> I am less confident that Black people are not keenly interested in the genetic tie. Maybe Blacks have historically looked to political and cultural ties to define the group precisely because whites monopolized genetic ties. Just as Roberts argues that whiteness could only be transmitted through genes, some argue that Blackness can *only* be transmitted through "culture." This notion is at the heart of the transracial adoption debate, as Roberts explains.<sup>51</sup> Of course, as she notes, these arguments are mirror images.

Roberts spends less time, however, acknowledging the potential *desire* for Black people to appropriate the genetic tie for themselves, implicitly arguing against that idea. Economic barriers have precluded many Black people from demonstrating their investment in genetic ties, and it is really too early to tell how many Blacks will attempt to use these procedures once the full effect of insurance coverage is felt. Interestingly, of the Black couples I am aware of who are trying in-vitro, more than a few have expressed their reasons for doing so in terms of genetic ties—not to perpetuate kids who just look like they do, but genetically tied children who can help them to "perpetuate strong, Black families." I mention these couples not in an attempt to refute Roberts' claim about the numbers of middle class Blacks who use new reproductive technologies, but to highlight their reasons for doing so. Consistent with Roberts' claims about the importance of relational ties among Blacks, most of these couples also want to adopt. But they do not view adoption as a substitute for genetic ties. To these couples, the desire for genetically tied children, and adopting orphaned Black children, exist on an equal plane.

#### IV. CONCLUSION: A NOTE ON ROBERTS' "MEANING OF LIBERTY"

After her wide-ranging and insightful assessment of the way that race shapes Black women's reproductive choices, Roberts concludes with a chapter in which she attempts to reconcile the interests in insuring that both liberty and equality are appropriately valued in reproductive decision making. Roberts begins by asserting that "the dominant view of liberty reserves most of its protection for only the most privileged members of society" because that "approach superimposes liberty on an already unjust social

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<sup>49</sup> See ROBERTS, *supra* note 1, at 261.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 272-76.

structure.”<sup>52</sup> This means that we are all protected from the most egregious government intrusions. But it also means that those of us with the least means of exercising choices are not guaranteed the means to be able to make them. Roberts relies on this last point to persuasively argue that defining liberty in terms of freedom from government interference with private decisions has meant that the many battles over reproductive liberty have centered on whether government can limit a woman’s access to abortion or birth control rather than on challenging government programs that limit a poor woman’s ability to have a child. Sometimes, Roberts writes, liberty values are explicitly privileged over equality values in the debate over reproductive liberties. She quotes scholar John Robertson, who argues that “the demands of equality should not bar access for those fortunate to have the means [to access new reproductive technologies].”<sup>53</sup> Roberts notes that many who defend this view claim that it is necessary to protect individuals against the vagaries of totalitarianism. But, Roberts cautions, unless we focus on the interests of poor women in making reproductive decisions, we will continue to ignore, and perhaps worsen, inequality.

Roberts herself is not unconcerned about totalitarianism. She regards liberty as a key component in ensuring that Black women maintain autonomy over their procreative decisions. Roberts advocates, however, a view of liberty that goes well beyond simply a right to be free from negative interference. She believes that it should also include,

the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of self-determination. Under this postliberal doctrine, the government is not only prohibited from penalizing welfare mothers or crack-dependent women for choosing to bear children; it is also required to provide subsistence benefits, drug treatment, and medical care.<sup>54</sup>

Anyone who believes that government should play a greater role in facilitating human flourishing would have difficulty disagreeing.

What is interesting is that Roberts grounds this vision in attention to race consciousness. “Racism has stunted Americans’ imagination of reproductive freedom and stymied development of liberating reproductive policies that would benefit everyone. Only by exploding racism’s hold can we hope to envision and achieve reproductive justice.”<sup>55</sup> Attention to the racial inequities in the programs and processes Roberts has identified surely would be useful and beneficial. But will attention to racial inequities do the

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<sup>52</sup> See *id.*

<sup>53</sup> *Id.* at 297 (quoting JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 226 (1982)).

<sup>54</sup> *Id.* at 309-10.

<sup>55</sup> ROBERTS, *supra* note 1, at 311.

work that Roberts claims for it? I am not so sure, and the heterogeneity of class and political sensibilities among Blacks that I pointed to earlier may be an indication of the limitations of such a view. Greater attention to class inequities is also necessary to achieve the vision that Roberts promotes. And it is more likely that such a vision will be more politically acceptable. After all, much of the work that Roberts asserts must be done will be situated in the legislature, not the courts. Universal remedies often demand more universal arguments. In the case of enhancement of reproductive liberty, we all will benefit from seeing the ways in which both race and class inhibit progressive policies for reproductive autonomy.

EXCAVATING THE "CHINESE WALL": TOWARDS A SOCIO-HISTORICAL  
PERSPECTIVE ON THE DEVELOPMENT OF UNITED STATES  
IMMIGRATION ADMINISTRATION AND CHINESE EXCLUSION

LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING  
OF MODERN IMMIGRATION LAW. By Lucy E. Salyer. University of  
North Carolina Press, 1995. Pp. 338. \$17.95.

*Reviewed by Estelle T. Lau\**

I. INTRODUCTION

In 1893, the Supreme Court issued its seminal immigration decision *Fong Yue Ting*<sup>1</sup> which held that a nation has the right to deport aliens lawfully residing within its borders. Justice Brewer dissented, but reaffirmed a sovereign nation's right to exclude. He stated that a national government has control of all matters relating to other nations and therefore has the power to build, what he called, a "Chinese wall." He argued that "the national government has the power to build a Chinese wall around our borders and absolutely forbid aliens to enter."<sup>2</sup>

At the time that Justice Brewer wrote his dissent he may not have been aware of the particular accuracy of his choice of metaphors. Burgeoning research now recognizes the irony of Justice Brewer's predictive choice of imagery by demonstrating that the United States' immigration administrative processes and Chinese immigrant identities are products of their mutual confrontation and interaction. We have started to find that with the pronouncement as a nation of our right to exclude and to deport, we truly began to build a Chinese wall.

Lucy Salyer's book, *Laws Harsh as Tigers*<sup>3</sup> provides a needed, though limited, starting point in our archeological excavation of this Chinese wall. In this Essay, I describe how Salyer's book appears to challenge traditional

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<sup>1</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>2</sup> *Id.* at 738.

<sup>3</sup> LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).