BOOK ANNOTATIONS

BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW. By Daniel A. Farber and Suzanna Sherry. New York and Oxford: Oxford University Press, 1997. Pp. 195.

In Farber and Sherry's short, provocative book, they claim to expose dangerous trends in the legal scholarship associated with what the authors call "radical multiculturalism." (p.5). These "radicals" include critical legal scholars, critical race theorists, and feminist theorists. Although the authors acknowledge that they are not treating a unified critical movement, they link the scholars they criticize through the radicals' adherence to the theory that truth is socially constructed ("social constructionism"), a view that leads the radicals to reject the belief in objective standards and merit. According to social constructionism, "reality is socially constructed by the powerful in order to perpetuate their own hegemony." (p.23). The authors claim to share the radicals' progressive goals but believe that social constuctionism and related doctrines hinder the attainment of those goals.

The authors' method is to present a general framework for the evaluation of radical multiculturalism and then to use extensive quotation and paraphrase to demonstrate that the radicals espouse views that, taken to their logical conclusions, are ultimately both self-defeating and racist. Farber and Sherry leave it to philosophers to expose the flaws in the epistemological theories underlying radical multiculturalism; they aim only to demonstrate its political shortcomings. (p.50).

Rejecting conventional philosophical criteria for establishing the truth of assertions about social reality or history, the radicals instead rely on personal narratives that are intended both to shock the reader into sympathy with the narrator and to call into question conventional perspectives on or portrayals of minority behavior. The authors point out that, having replaced a commitment to truth with the Foucaultian critique of power, the radicals can only compel readers to recognize the value of their stories by asserting the "authenticity" of the experiences they relate. (pp.12, 78).

The authors, however, identify a number of problems with story-telling. First, the stories radical law professors tell tend to be atypical or distorted by self-interest. (p.12). Second, the stories are based on personal experience. Their significance derives from their ability to reflect the wider experiences of the community whose experience they claim to represent metonymically. It is thus impossible to criticize these stories without attacking the author's authenticity as a representative of her group. (p.12). Third, stories invite numerous and conflicting interpretations. The authors demonstrate that the radicals themselves engage in vituperative personal

attacks as each claims exclusive authority to interpret the stories at the heart of their movement. (pp.73-74). Finally, because radicals are unconcerned with truth, the authors claim that they often fabricate crucial elements of their stories and, as a result, mislead their audiences about the social conditions about which they report. (p.102).

The authors repeatedly return to their argument that radical multiculturalism leads inevitably to anti-Semitic and anti-Asian views. The argument is based on the radicals' rejection of criteria for hiring and promotion based on merit. Jews and Asians have gotten ahead in American society in the past few decades by virtue of their "merit" as conventionally measured, but the radicals claim that such criteria are designed to benefit privileged groups. (p.11). Although the radicals never make their suspicions of Jews and Asians explicit, the authors claim that racism follows inevitably from their rejection of merit: "[R]adical multiculturalism implies that Jews and Asian Americans are unjustly favored in the distribution of social goods. These anti-Semitic and racist implications of radical multiculturalism are unavoidable. . . ." (p.11). By simply positing that those who succeed must have benefitted from the unequal distribution of power, the radicals avoid the "hard questions about the causes of differential success rates." (p.56). It is not clear, however, how the authors answer those hard questions. They at times seem poised to invoke arguments akin to those articulated in Charles Murray and Richard Herrnstein's *The Bell Curve*, but instead they adopt a safe, neutral position by pointing to the "disturbing reality" that society has failed to give blacks the skills they need. (p.130). They thus provide no suggestions as to how this societal failure occurred.

But the radical position may not have the racist implications the authors claim. As the authors themselves acknowledge, current standards of merit are not completely objective or apolitical. (p.53). The authors ignore the mainstream scholarship of authors as diverse as Robert Darnton, Peter Gay, Jürgen Habermas, and Reinhart Koselleck, who suggest that the Enlightenment tradition, to which the authors are so dedicated and from which the concept of merit derives, was itself a class-based movement with motives that could hardly be described as politically neutral. The multiculturalist critique does not target the abstract category of merit, but "merit" as it has been historically deployed. Radicals recall the innumerable instances in which claims to objectivity have masked the workings of power relations. The fact that Jews and Asians have enjoyed more success than other minorities in meeting current standards of merit thus can be explained in a number of ways that are not racist towards either Jews and Asians or towards other minorities.

The radicals are not merely racist, according to the authors, they are also paranoid and totalitarian. Seeing conspiracies behind every corner, the radicals assume racist or sexist motives to underlie every action or decision undertaken by their opponents. (p.65). They are also quick to accuse

each other of treason. Substituting politics for truth, the multiculturalists subordinate individuals to the interests of the group. According to the authors (or, at least, according to the dictionary they consult), this is the quintessence of totalitarianism. (p.105).

In their conclusion, the authors suggest avenues for reconciliation between liberals and radicals. Crediting critical legal scholarship for having exposed the failings of legal formalism, the authors contend that the radicals ignore mainstream legal scholars whose views are not so easily dismissed. (pp.131-132). The mainstream, according to the authors, is occupied by scholars such as themselves who subscribe to legal pragmatism, a position that is sensitive to context and history, but also receptive to empirical claims. In a most-likely doomed attempt to heal wounds, the authors point out the virtues of some of the scholars they have criticized and list multiculturalists whose works do not suffer from the flaws of the radicals. Their attempts at bridge-building are unlikely to succeed, however, because of two major flaws in their readings of radical multiculturalism.

As the authors point out, the radicals did not invent social constructionism. (p.4). This epistemological position evolved out of legal realism and critical legal studies. Like critical legal studies, critical race theory and other versions of radical multiculturalism are not systematic philosophies but strategic theoretical and political interventions. There are reasons why the radicals do not pursue their positions to logical conclusions. The authors misunderstand their subject when they write about radical multiculturalism as an ideology. (p.8). Farber and Sherry also misconstrue the strategy of story-telling, in part because, being legal scholars and not literary critics, they are insensitive to the textual complexity of the works of writers such as Derrick Bell and Richard Delgado.

The book begins with a discussion of Derrick Bell's "The Space Traders," an allegory in which Bell imagines aliens offering the United States "untold treasure" in return for the surrender of all Blacks. In the story, Jews organize to defend Blacks, but the Jews are motivated by self-interest, since they fear that if all the Blacks are gone, they will be the next likely targets for racial discrimination. The story is meant to be illustrative of any number of things, including Black suspicion of Jews and other liberals and progressives who seem to support minority rights. Bell's narrative technique allows him to speak with multiple voices, none of which can be unproblematically said to be his own. Despite their later claim that the message behind narratives is unclear, the authors draw the conclusion that this story has an unmistakable moral: "Jews don't really desire black equality; they want to keep blacks around as convenient targets to deflect white gentile anger." (p.4).

Rather than opposing their own belief in objective truth to the radicals' social constructionism, the authors might have pursued the alternative approach of subjecting the radicals' central analytic categories to immanent

critique. What becomes of critical race theory when we consider that "race" itself is socially constructed, as Kwame Anthony Appiah has argued? What becomes of radical feminism when we consider that not only "gender" but "sex" is socially constructed, as postmodern feminists such as Judith Butler, Eve Kosofsky Sedgwick, and Drucilla Cornell have argued? The answers to these questions suggest the difficulties radical scholars face when they try to apply postmodern theory to legal problems, but they also suggest that the road to a progressive future lies beyond both traditional liberalism and identity politics.

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JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW. By Elyn R. Saks with Stephen H. Behnke. New York and London: New York University Press, 1997. Pp. 264.

An argument for providing differential treatment for criminal defendants with multiple personality disorder ("MPD") follows from a simple syllogism. Defendants with MPD are insane; defendants who are insane ought to be treated differently than those who are not. Therefore, defendants with MPD ought to be treated differently. While most critics of the insanity defense seize upon the second premise of this argument, Elyn Saks believes that the fatal flaw lies in the first. In *Jekyll on Trial: Multiple Personality Disorder and the Criminal Law*, Saks contends not that defendants with MPD are sane or ought to be treated as such, but rather that "insanity" as defined by the existing body of criminal law does not encompass MPD. (p.4). Although Saks credits Stephen H. Behnke with "recrafting" her manuscript "from beginning to end," she also stresses that the "ideas and arguments" in the book are hers and that Behnke actually holds views on criminal law very different from her own. (p.xiii). Indeed, her views are unusual, and, while they may not ultimately prevail either among either legal scholars or in U.S. courts, Saks nevertheless presents an original and challenging approach to the problem of MPD and the criminal law.

Tracing the history of the insanity defense from the 1843 English *M'Naghten's Case* up to the account provided by the American Law Institute in 1985, Saks attempts to demonstrate that the defense is incompatible with MPD. According to *Jekyll on Trial*, insanity typically vitiates a guilty verdict only if defendants either cannot understand that their actions are wrong or are incapable of conforming their behavior to the law. (p.3). The insanity defense is thus a claim that the defendant's impairment prevents the formation of a guilty intention (*mens rea*), a necessary element of criminality.

According to Saks, people with MPD do not typically fit neatly within the borders of the common law definition of insanity. Individuals with MPD, while they may shift in and out of varied personas, are generally in

some form of control of their behavior at all times, and except in rare cases, can draw distinctions between right and wrong. (p.4). Unlike the schizophrenic or manic-depressive, the person with MPD is, more or less, like a number of sane persons in one body.

Regardless of the validity of categorizing MPD as a form of legal insanity, Saks believes that the symptoms of MPD still provide a legitimate basis for a defense in a criminal trial. (p.5). The significant challenge is thus to discern what constitutes a case of MPD. Saks begins this task by consulting the *Diagnostic and Statistical Manual of Mental Disorders*, which identifies MPD with the presence of two or more identities or personalities, at least two of which take control of the body recurrently, causing periods of amnesia of varying length and degree. She then attempts to explicate this definition with quotations from a number of persons with MPD as well as from those who treat them. (pp.9-14).

Saks next addresses the question of the legal sanity of the alternative personalities ("alters") from a philosophical perspective. (p.40). She contends that alters can be viewed as either different people, different personalities, or different parts of one complex, dissociated personality. Although Saks seems to favor the first possibility, she concludes that the question is largely irrelevant. (pp.104-105). The basis of criminal responsibility is a showing of blameworthiness, and a person with MPD generally cannot be held criminally responsible under any of the competing theories, because her conscious state is dissociated to the point where solitary, rational decision-making has become impossible. (p.106).

Rather than treating MPD as a form of legal insanity, Saks understands the MPD defense by drawing an analogy between MPD and involuntariness. (p.101). That is, the actions of persons with MPD are quite similar to other circumstances in which criminal behavior has been found to be involuntary, such as the actions of sleepwalkers or persons under hypnosis. (p.97). However, Saks suggests that the similarity can only be perceived if we look at these conditions in a novel manner: all are characterized by the presence of a consciousness that lacks control of the physical body. As applied to MPD then, one personality/person may not have control of her own movements when another alter is "awake." (pp.120-136).

Saks may be credited for the creativity of her solution and also for the thoroughness of her discussion of its consequences. She recognizes that people with MPD will be held responsible for their crimes if their alters all knew of and acquiesced in the criminal behavior (p.108) or, less plausibly, if the alters are sufficiently organized to justify the application of a theory of group liability. (p.113). Additionally, Saks discusses related issues, including competency to stand trial (pp.141-157) and the capacity for and justification of various types of punishment. Her discussion of the death

penalty is remarkably—and disappointingly—politically neutral. (pp.163-171).

Saks thus contends that, although the insanity defense as commonly understood does not incorporate MPD, defendants with MPD should nevertheless receive differential treatment. Such an approach is appropriate, despite that fact that many clinicians and experts in the field of psychology do not recognize MPD as an illness unto itself. (pp.36-37). These "skeptics" frequently characterize MPD as either a variant of other psychological disorders, a factitious disorder (brought on consciously or unconsciously), or merely an example of malingering (i.e. "faking it"). (pp.16-17, 21-38). Saks acknowledges that the skeptics have some basis for their beliefs. As Saks belatedly admits in the appendix to her book, the results of assessment tests can be falsified by the skilled malingerer, and the few physiological tests that have been performed have been equivocal at best. (pp.197, 200-204). Skeptics also point out that reported cases of MPD tend to be identified by a relatively small number of clinicians in only certain locations, and that the known symptoms of MPD have evolved over time. (p.26).

In response to the skeptics, Saks presents her own empirical data, indicating that a few of the major symptoms of MPD are routinely diagnosed and that many of the screening tests are reliable. (pp.26-31). Unfortunately, this evidence is not entirely persuasive. One of the commonly-diagnosed symptoms she notes is a history of childhood trauma, which may be too vague a category to be of empirical value. Moreover, the data from the screening devices she discusses is only valid if malingerers can be ruled out (which Saks admits is not feasible) (pp.197, 200) and if the tester can assume that the results achieved represent necessary symptoms of MPD. Circular reasoning seems unavoidable here.

Finally, Saks' recommendation that defendants who are acquitted at trial be civilly committed is not convincing. Conceding that some jurisdictions will have problems with civil commitment on the basis of a finding of involuntariness due to MPD, Saks offers two suggestions. First, these jurisdictions can simply "[c]hange the law." (p.135). Second, the jurisdictions can bypass the inconsistencies in the existing body of law by adopting a procedure for commitment separate from the determination of criminal responsibility. (p.135). While her second suggestion is more realistic, Saks leaves it unsupported by evidence.

Minor flaws aside, Saks' conclusions in *Jekyll on Trial* are much less controversial than the arguments by which she arrives at them. Saks closes her book with a discussion of how famous, fictional cases of MPD would be resolved under her account. Dr. Jekyll would face a significant term of imprisonment due to his knowledge and control of his changes; Norman Bates, the star of the *Psycho* films, would be found innocent. Still, Saks

emphasizes that persons like Bates would hardly go free. Like most defendants with MPD, Bates would be acquitted at trial but would need extended psychiatric treatment. (p.192).

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