

AFFIRMATIVE (RE)ACTION: ANYTHING BUT RACE

KATHERYN K. RUSSELL*

In my first-year contracts course we were assigned *Williams v. Walker-Thomas Furniture Co.*¹ This was a 1965 District of Columbia Circuit case involving contracts of adhesion. At issue was an installment contract for furniture, which had a clause that allowed the seller to demand payment in full at any time. If the buyer's payments were delinquent, the seller had right of replevy.² When Ora Williams, a Black woman, fell in arrears on her payments, the furniture store sued her. Despite the objectionable clause, the lower court upheld the contract.³ As a first year law student, the court's reasoning was startlingly illogical. As I would soon learn, over and again, there is a difference between what is "legal" and what is "just."⁴ Ultimately, the U.S. Circuit Court for the District of Columbia determined that "unconscionability"—evidenced by gross inequality between parties—is a basis for voiding a commercial contract and remanded the case.⁵

* Assistant Professor, *University of Maryland at College Park*; Ph.D., 1992, *University of Maryland at College Park*; J.D., 1986, *University of California, Hastings College of Law*; B.A., 1983, *University of California at Berkeley*. The author wishes to thank Jamin Raskin, Associate Dean of the American University, Washington College of Law, for the invitation to participate in this Conference.

1. 350 F.2d 445 (D.C. Cir. 1965).

2. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 & n.1 (D.C. Cir. 1965) (noting that Williams had charged \$1800 worth of merchandise from 1957 to 1962, and made \$1400 worth of payments, yet Walker-Thomas sought to replevy *all* items Williams had purchased when she defaulted on \$500 stereo).

3. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964) (recognizing that contract may have been "irresponsible," but finding that governing D.C. legislation prevented court from providing relief).

4. See, e.g., Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 132 (1987) (arguing that Latin word "lex," which is root for "legal" does not encompass abstract ethical dimensions of law which are found in Latin word "jus," which is root for "justice").

5. *Walker-Thomas*, 350 F.2d at 449-50. *But see id.* at 450 (Danaher, J., dissenting) (blaming Williams for her legal predicament, noting that stereo is luxury item not properly purchased with "relief funds").

It was not until I had moved to the D.C. metropolitan area and unexpectedly driven past the Walker-Thomas Furniture Co., that I fully appreciated the extra-legal dimensions of the case. The store was in a poor and run down section of northeast D.C.

The *Walker-Thomas* case came to mind when I received a letter from Dean Jamin Raskin, inviting me to participate on a panel entitled, "Creditor and Debtor Races: Is it Time to Get Beyond Race? Can We? How?" Panelists were asked to ponder Justice Scalia's pronouncement in *Adarand Constructors, Inc. v. Peña*⁶: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution *there can be no such thing as either a creditor or debtor race.*"⁷ Justice Scalia's wholesale rejection of contractual language to describe Black/White race relations is oddly telling. His choice of words indicates his awareness that for many people, Blacks in particular, the relationship between Blacks and Whites is a creditor-debtor relationship—one involving "gross inequality" between the parties.

Just as it was true for Ora Williams and similarly situated poor people, Blacks in the United States have been forced to rely on the courts as a forum of last resort for racial relief. In part, Blacks have sought relief for being part of a relationship with terms "unreasonably favorable"⁸ to Whites. Affirmative action has been one form of relief. Recent decisions by the Court, however, in particular the *Adarand* decision, make it clear that race is being neutralized in state and federal anti-discrimination law.⁹ The Court's most recent attempts at race neutralization have been in the areas of employment¹⁰ and voting rights.¹¹

Justice Scalia mistakenly equates the racial hatred that produced U.S. chattel slavery with proactive measures taken to combat slavery's

6. 115 S. Ct. 2097 (1995).

7. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring) (emphasis added).

8. *Id.*

9. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2475 (1995) (holding that voting districts may not be gerrymandered on purely racial bases); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2045-56 (1995) (remanding case with order that district court weaken its school desegregation orders as Court determined that state was in compliance with Constitution); see, *Shaw v. Reno*, 113 S. Ct. 2816, 2823, 2828 (1993) (finding that though congressional policy, as manifested in Voting Rights Act, prohibited dilution of minority voting strength, facially neutral state legislation that provided minority voting districts must have some rational basis other than pure racial separation to meet sufficient justification under Fourteenth Amendment's Equal Protection Clause).

10. See *Adarand*, 115 S. Ct. at 2118 (discussing differences in proof of "social" and "economic" disadvantage and relating such differences to minorities' problems with meeting necessary scrutiny).

11. *Miller*, 115 S. Ct. at 2488.

continuing remains.¹² Underlying his statement is the assumption that the debt for slavery has been adequately redressed. Notably absent from Scalia's commentary is any reference to how this debt has been repaid. Is thirty years of affirmative action legislation sufficient redress for almost ten times that many years of slavery, and one hundred years of Jim Crow legislation?

I think most people in this country would like nothing more than to "get beyond" race. Unfortunately, being tainted by this country's racial prism is not a matter of individual choice. The Black versus White racial schism is part of the core that defines the United States.¹³ This schism qualifies as what sociologist Emile Durkheim labeled a "social fact."¹⁴ To alter this acute social reality, we must first acknowledge it. Only then can we deal squarely with race. Taking account of race is required "get beyond" race.¹⁵ This brings the discussion to the question at the core of the symposium panel—does race still matter? This Essay will explore how and why race matters and how affirmative action and ultimately the Supreme Court are implicated.

I. MICROAGGRESSIONS, MACROAGGRESSIONS, DISCRIMINATION, AND DENIAL

Professor Peggy Davis uses the term "microaggression" to describe the daily, interpersonal, non-verbal racial slights that Blacks experience.¹⁶ Examples of racial slights by Whites include the failure to make eye contact with Blacks and other gestures which indicate

12. *Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring). Justice Scalia proclaimed: "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery. . . . In the eyes of government, we are just one race here. It is American." *Id.* at 2119.

13. One need look no further than the poll data on racial attitudes about the verdict in the *California v. Simpson* case, No. BA 297211 (Los Angeles County, Super. Ct. Oct. 3, 1995). See, e.g., Clarence Page, *Dramatic Racial Divide Runs Deep After O.J. Verdict*, GREENSBORO NEWS & RECORD (N.C.), Oct. 12, 1995, at A11 (recognizing polls that showed from trial's beginning that "most Whites thought Simpson was guilty and most Blacks thought he was innocent" but that verdict brought forth most "dramatic divide"); Eric Zorn, *Focus on: Simpson Verdict Fallout; Cruel Honesty Prompts Many to Lash Back*, SUN-SENTINEL (Ft. Lauderdale), Oct. 14, 1995, at A19 (noting that racial divergence in polls shows that "racial animosity runs deeper" than believed).

14. EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 13 (1982). Durkheim defines a "social fact" as "every way of acting, fixed or not, capable of exercising on the individual an external constraint" or "every way of acting which is general throughout a given society, while at the same time existing in its own right independent of its individual manifestations." *Id.*

15. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring). Justice Blackmun commented, "[I]n order to get beyond racism, we must first take account of race." *Id.* (Blackmun, J., concurring).

16. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (discussing White versus Black perceptions of judicial system).

disrespect (e.g., failure to hold a door or elevator open, non-acknowledgement of a greeting, physical distancing in public spaces).¹⁷ Microaggressions co-exist with macroaggressions. Macroaggressions have been defined as insults or pejorative statements and/or actions by Whites against Blacks.¹⁸ Macroaggressions, unlike microaggressions, are not directed at any particular Black person. Nevertheless, they cause harm.

Two recent incidents provide examples of macroaggressions. The Minnesota Educational Computing Corporation sells a computer game entitled "Freedom!" Players begin the game as illiterate, Southern Black slaves who seek to obtain the necessary skills to work their way toward freedom.¹⁹ The game was made available to Tempe, Arizona elementary school students. Parental consent was not required to play the game and students were allowed to play it without teacher supervision. The parents of an eleven-year old Black student, who was humiliated by White classmates while playing the game, filed a civil rights law suit against the school district.²⁰ In a second incident in Greenwich, Connecticut, five White high school seniors printed a coded message "Kill All Niggers," which appeared in their school yearbook.²¹ The students, who were barred from graduation, denied any malicious intent.²²

Some might dismiss these incidents as innocent, unintentional slights at best and isolated, rare incidents at worst. Others may conclude that Blacks are hypersensitive, paranoid, and looking for racism in all the wrong places. This conclusion might be tenable if microaggressions and macroaggressions were the only evidence of racial harm. They exist, however, alongside undeniable racial discrimination. Empirical data attest to the existence of racial discrimination in a number of arenas, including commercial lending,²³ employment,²⁴ and policing in minority communities.²⁵

17. *Id.* at 1568.

18. See generally Kathryn K. Russell, *The Racial Hoax: The Law as Affirmation*, 71 IND. L.J. 593 (1996) (discussing macroaggressions).

19. *School's Computer Game on Slavery Prompts Suit*, N.Y. TIMES, Aug. 28, 1995, at A4, A10.

20. *Id.*

21. Jacques Steinberg, *Racist Message Reveals Town's Rift*, N.Y. TIMES, June 21, 1995, at B4.

On a personal note, in September 1995, I attended a meeting at the Department of Justice's Federal Bureau of Prisons office. During a break, two of us searched out the ladies room and were led out *into the stairwell* to a door which read "Women." We looked at one another, puzzled as to why the restroom was in the stairwell. The person directing us stated that the bathrooms were built during Jim Crow for Black workers, who were not permitted to use the rest rooms on the main floor.

22. *Id.*

23. See Peg Brickley, *Loan-Denial Rates Could Draw Scrutiny of Justice Department*, ROCHESTER BUS. J., June 23, 1995, at 1 (reporting discrepancy in rate of loans approved for Blacks and

The failure of some Whites to see the harm Blacks experience (White denial) by microaggressions, macroaggressions, and discrimination is rooted in the two groups' distinct racial realities.²⁶ On one side, Blacks exist in a world with microaggressions, macroaggressions, and overt racial discrimination. On the other side, Whites inhabit a relatively colorless world and are hard pressed to "see" Black racial reality. These vastly different realities may shed some light upon the divergence of opinion on the necessity and viability of affirmative action. Whites understandably take offense to complaints about racial abuses that they do not participate in, do not experience as part of daily life, and do not see others experience. This reality makes it easier for Whites to excuse racial abuses as random and fleeting. Further, it allows them to deny harm and concomitant responsibility. By contrast, Blacks understandably take offense to White attempts to neutralize or dismiss racial harms. The fact that Whites as a group are unaware of the daily racial tolls that Blacks pay, does not negate the harm. Not surprisingly, this divergence in life experiences places us at a crossroads on what to do about affirmative action.

II. AFFIRMATIVE ACTION AND ITS RED HERRINGS

Two of the symposium panelists, Richard Kahlenberg and Mark Hager, expressed support for abolishing affirmative action "as we know it" and adopting class-based affirmative action in its place. Underlying this proposition are several assumptions that raise numerous questions. First, a class-based analysis suggests that class is

Whites at some of nations largest banks); Steven A. Holmes, *Lawsuit Sees Bias Where Nations Bank Sees None*, N.Y. TIMES, June 11, 1995, at D1 (stating that Nations Bank rejected 17.5% of its Black mortgage applicants compared with 3.3% of its White mortgage applicants); Michael Porter, *The Rise of the Urban Entrepreneur*, INC., May 16, 1995, at 104, 104 (postulating that states must attempt to revitalize inner cities to put minorities on equal footing).

24. See *Evansville Hospital Worker Claims Racism*, COURIER J. (Louisville, Ky.), Sept. 9, 1995, at A7 (reporting that Black hospital employee accused superintendent of not stopping racial slurs against him by other employees and by patients' families); Jane Stancill, *Town Owes Workers Back Pay*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 6, 1995, at B5 (discussing lawsuits filed by 38 department workers claiming racial discrimination).

25. See Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, at A3 (describing behavior of five police officers who spent years "beating, robbing, lying and planting phoney evidence" in poor black neighborhoods).

26. This experimental gap is perhaps most dramatically illustrated by the mirror opposite opinions expressed by Blacks and Whites regarding the O.J. Simpson verdict. For example, *The Washington Post*, October 4, 1995, published 26 articles on the verdict reflecting the polarity of opinions along racial lines. See, e.g., Joel Achenbach, *Unanimous Decision Leaves Nation Divided*, WASH. POST, Oct. 4, 1995, at A27; Richard Cohen, *America's Racial Divide*, WASH. POST, Oct. 4, 1995, at A25; Paul Duggan, *Washington Comes To a Stop; Then Pent-Up Emotions Start Spilling Out*, WASH. POST, Oct. 4, 1995, at A1; Howard Kurtz, *Hung Jury in the Court of Public Opinion*, WASH. POST, Oct. 4, 1995 at B1; Tom Shales, *A TV Nation, Together and Divided*, WASH. POST, Oct. 4, 1995, at B1.

a more appropriate basis for affirmative action than race. To effectively argue that class should trump race as a criterion for affirmative action, minimally requires proof that being low income is a greater obstacle to overcome than being a minority. One panelist offered the hypothetical case of a middle class Black student and a poor White student, with similar academic credentials, who apply to an educational institution. He argued that admission should be granted to the White student from an economically disadvantaged background. This argument assumes that it would be easier for the Black student to "transcend" her race than it would be for the White student to "transcend" her economic standing. This proposition begs for empirical support. The middle class Black student versus the poor White student, sets up a false dichotomy. The class over race resolution assumes that there is a greater need to integrate poor Whites into the professional work force than middle income Blacks. Given that Blacks are disproportionately low income, this assumption is questionable. More importantly, for centuries Blacks were denied admission to institutions because of their Blackness, without regard to their financial means.

Second, the argument for class-based affirmative action treats income and wealth as one and the same. The more appropriate comparison would be to examine the ratio between Black and White wealth.²⁷ The data on wealth shows a tremendous gap between Black and White net worth, which includes property ownership and financial assets.²⁸ Wealth also includes what economists call "human capital."²⁹ This is the ability to afford certain middle-class amenities, like travel, private schools, and cultural exposure. Determining the wealth ratio, therefore, would be critical to an assessment of economic hardship as a basis for affirmative action. Insofar as wealth impacts the probability of completing school, this Black-White disparity may affect matriculation.

Third, the proposal for class-based affirmative action dichotomizes complex issues. Race and class do not exist in isolation, rather they intersect. Further, there are more than two racial groups. Using the college admissions hypothetical, how would a class-based scheme treat

27. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

28. For example, it is estimated that the median Black middle-class family has \$34,380 compared with \$77,782 for the median White middle income family. *Id.* at 197.

29. University of Chicago economist Gary Becker defines human capital as encompassing capital which "yield[s] income and other useful outputs over long periods of time." GARY S. BECKER, *HUMAN CAPITAL* 15 (1993). This includes education and access to Medical care. *Id.* at 15-16.

an Asian from a lower class family competing against a Black from a middle-class family?³⁰ What about a middle-class Asian competing against a lower class Black student? In support of class-based affirmative action, Kahlenberg commented that Blacks and other minorities would benefit disproportionately because they are disproportionately poor. While this is true, such an analysis denies the reality of the role race plays in American life. Specifically, it summarily rejects White skin privilege and Black skin underprivilege.

Even in a class-based affirmative action scheme, the question of race resurfaces. What if a university admissions office were faced with applications, from a middle-class White student and a middle-class Black student who have similar test scores and grades? Does this mean that race can no longer be used as a consideration? Can we assume that the two students, one White, one Black, have overcome similar odds, and are now equal? This sounds farcical. Also, it denies the present American racial reality for Blacks—replete with microaggressions, macroaggressions, overt discrimination, and White denial.

The suggestion that class should replace race as a basis for affirmative action is an appealing solution for the wrong reasons. It seems clear that there are many types of hardship, which are worthy of affirmative action, one of them being poverty. The apparent impetus for class-based affirmative action, however, is to assuage the fears of the “angry, White male.” One of the panelists suggested that class-based affirmative action is politically palatable, whereas race-based is not. This argument appears shortsighted. There are more poor people than there are middle-class people. Are the latter really willing to give up their privilege to the former? A class-based paradigm simply shifts the critique of affirmative action from race versus merit to class versus merit. This would create another group of dissenters—angry, privileged Whites. Further, to paraphrase a question posed by Robert Chang, Professor, “What will be done about the angry minority?” Is not this proposed scheme a rejection of the political worth of minorities? Finally, even if we redefine affirmative action schemes to place class at the center, we still cannot avoid the issue of race. So, the “solution” of implementing class-based affirmative action is really no solution at all. It would only forestall, temporarily, the question of what to do about race.

30. See generally Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1996) (discussing racial identity as process).

Thus, the above discussion offers a cursory critique of the argument for class-based affirmative action. In sum, shifting the basis of qualification toward class and away from race can only offer short-term success, if any. Until we as a society address the problem of racial discrimination—in its many incarnations—against Blacks in particular and minorities in general, any legislative or judicial solutions offered will be unsatisfactory. Until we deal with these issues front and center, we can expect nothing more from the United States Supreme Court than a “mess of pottage.”³¹

31. James Weldon Johnson, *The Autobiography of An Ex-Colored Man*, in THREE NEGRO CLASSICS 511 (John H. Franklin ed., 1965) (using phrase to describe racial predicament of Black man who is passing for White).