COLOR BLINDNESS, HISTORY, AND THE LAW

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ANTHROPOLOGIST BRACKETTE WILLIAMS has said "only a fool stands in the middle of an intersection."[1] Well, having been that foolish for some time now in my own work, today I entertain yet another folly in order to share with you some loosely formed or, as my colleague Kendall Thomas might say, "mushy thoughts" about the relationship between law and the contemporary bid to consolidate and render unremarkable racial hierarchy. I say folly, of course, because my fantasy when I began this project was to present to you a tightly drawn, illuminating, and provocative analysis that pulls together themes of critical race theory and which is theoretical yet practical, sophisticated but accessible, collective yet original, antiessentialist yet grounded, with refrains from intersectionality and interesting interventions on structure and agency; and all in a nice, original, and neat package.

My starting point is actually two somewhat disparate social texts: the popular political discourse on race and particularly the developing discourse on victimology, and 1994's celebration of the fortieth anniversary of *Brown v. Board of Education*.[2] In 1994 we had reproduced for us again and again by the media a particular celebratory narrative about how that case marks the historical moment when African Americans were finally granted full citizenship status within the American political community. According to that narrative, it will no longer be possible to say that the national subject can only be described in white terms. *Brown* completed a narrative about the ultimate inclusion of African Americans facilitated importantly by law. I suspect that along with the celebratory rhetoric there also will be attempts to address what will be called "contemporary

racial anomalies"—like the continuing material and political disparities between African Americans and the white community.

My particular interest here is to examine how this apparent contradiction is rationalized by neoliberal and conservative forces, and indeed how *Brown* itself has been deployed to do the ideological work of legitimating racial hierarchy. The project of legitimation has created a growth industry for a few ambitious African Americans who can provide the salve to soothe lingering doubts about whether the promise of *Brown* has really been fulfilled. Enterprising individuals such as Clarence Thomas, Thomas Sowell, and others fill that demand, providing a racially correct voice-over to narrate the story of black pathology and dependence that is produced by predictable social consequences.

Key exhortations to eschew victim-based demands are behind the appropriation of *Brown* as constituting a fundamental break with white supremacy. Through the force of this ahistoricism, this willful inattention to the historical operations of white supremacy, contemporary race hierarchy is assured of its historical grounding and represented as a natural outgrowth of cultural disability and economic dependence. My specific concern here is how law has come to endorse this narrative and how in doing so, it, too, presumes a discontinuity between the past and the present that its own analytics simultaneously deny.

Part of my goal, then, is to challenge the use to which *Brown* has been put, to reveal the continuity in law between the former period of explicitly endorsed, state-sponsored white supremacy, and today's more benign version of formal equality. Key to this project is uncovering the continuing viability and vitality of *Plessy v. Ferguson*, the case that enshrined the doctrine of separate but equal, rendering segregation consistent with the commands of the Fourteenth Amendment.[3] I seek to trace *Plessy*'s continuing presence in terms of its formalistic analytics, which illustrate the manipulability of concepts such as equality, and perhaps more important, I seek to name the social vision it endorses: the notion of a pre-private sphere in which some version of the market works to produce fair outcomes.

My point, however, is not simply to show that *Plessy* lives, but to suggest how law in its almost infinite flexibility can assist in legitimating hierarchy simply by labeling the realm of the social equal, declaring victory,

and moving on. To state it more simply, the same interpretive strategy deployed to legitimize segregation is now being deployed to immunize the racial status quo against any substantive redistribution.

I'd like to demonstrate this argument by returning to *Plessy* and by connecting its analytics and social visions to perhaps the definitive case in the postreform contemporary era, specifically *Richmond v. Croson*.[4] I want to suggest as well that *Plessy* shares the same ideological plane as another case, *Lochner v. New York*, that embodied the doctrine of freedom of contract that functions quite similarly to contemporary color-blind jurisprudence.[5] While *Lochner* has fallen into disrepute, color blindness and its social vision is resurrected in contemporary race jurisprudence. I conclude by suggesting the relevance of law in shaping discourse about race, and by placing critical race theory in opposition to this race jurisprudence.

Homer Plessy was the plaintiff in *Plessy v. Ferguson*, an 1896 case that challenged the constitutionality of a segregation statute in Louisiana. Homer Plessy was defined by the state of Louisiana as an octoroon. He challenged the segregation statute under the Fourteenth Amendment and actually made two separate arguments: first, that the race classification system that classified him as black basically deprived him of equal protection of the law due to the irrationality of the classification system, and second, that the statute was unconstitutional in that it segregated those defined as black from those who were defined as white.

Despite the rather clear design of these statutes to relegate blacks to a status of second-class citizenship, the Supreme Court upheld the constitutionality of the statute requiring segregation on trains. In order to do this, the court had to decide how to rationalize forcing African Americans into hot, noisy, engine cars as consistent with equality. The strategy they chose was to formalize equality basically to constitute only symmetrical treatment and then to render the social, material context of segregation as well as its effects—in this case, discomfort in unpleasant cars—private or unknowable. This strategy would be achieved through distinguishing between the civil, which was protected, and the social, which was not.

Civil equality, then, required formal equality—satisfied here by the symmetrical treatment of blacks and whites under the statute. Whites were not permitted to go to black cars and blacks were not permitted to go

to white cars. No inequality there. But of course, the cars were not equal, nor was the meaning of segregation for blacks and whites. The inequality of material dimensions did not figure in the analysis, apparently having been relegated to the private sphere to be worked out between blacks and the railroad (without noting that African Americans had little if any means of persuading the railroads to work out these problems). As far as the *meaning* of the statute was concerned, there was nothing in the statute that warranted the interpretation of its intent to imply inferiority. As the Court saw it, if blacks chose to interpret segregation in that way, then that was their choice. Whites would certainly not view the statute that way, had it been adopted by Reconstruction-era legislators.

Yet the heart of *Plessy*, in my view, was its admonition that law could not be looked to in order to bring about social equality. In the nature of things, the Fourteenth Amendment could not have been intended to ensure actual social equality. If social equality were to be achieved, blacks would essentially have to earn the respect of whites within the private social sphere. I call this racial marketplace ideology. In this market the state cannot interfere to redistribute racial value. Such redistribution is an illegitimate end that would upset the natural outcomes of the market. If blacks wanted social equality, they would have to get in there (in the market) and work for it. What interests me about this analysis is the ability to sustain a belief, in the face of massive racial subordination, that such a market was somehow free and that the social subordination of blacks was a neutral evaluation of their group work within that market. With all avenues for achieving a producing, competitive racial power foreclosed, this conceptualization was simply fantastical, yet it worked, at an interpretive level, to consolidate white racial power and to insulate that power for more than five decades.

The legal strategy of the pre-*Brown* civil rights cases was essentially to overturn the logic of *Plessy v. Ferguson*. In contemporary periods we tend to characterize *Brown* as having successfully interred *Plessy*. Quite clearly, separate but equal is no longer the law of the land. But I think it would be a mistake to focus solely on the rejection of the formal doctrine while failing to uncover the continuity of *Plessy*'s social vision and its analytic. By interrogating its contemporary race jurisprudence, it becomes clear that

the social vision and the analytics that constitutionalized the massive inequality of separate-but-equal is reincarnated in color-blind jurisprudence.

I can illustrate this claim by using one of the more controversial post-reform cases, that of *Richmond v. Croson*. Some of you may know that *Richmond v. Croson* was a case in which the Supreme Court struck down an affirmative action program that was adopted by the Richmond city council. The program was adopted in light of gross disparities between Richmond's black population, which was 50 percent of the total population, and the percentage of city contracts awarded to minority-owned businesses, which was less than 1 percent.

Richmond's majority black city council, based on their belief that this was not a natural consequence of some market but the reflection of substantial discrimination, adopted an affirmative action program that required 30 percent of state contracts and city contracts to be set aside for minority firms. The Supreme Court's first move in reviewing the constitutionality of this affirmative action program was to determine whether race classifications that burden whites would be subject to the same level of review as traditional classifications that burden people of color. The Court essentiality decided that race would be narrowly construed to basically represent simply skin color—devoid of any historical, political, or economic value, or determination, or history.

Having determined, then, that everyone was equal in the sense that everyone had a skin color, symmetrical treatment was satisfied by a general rule that nobody's skin color should be taken into account in governmental decision-making. Justice Sandra Day O'Connor, who wrote the opinion, then considered whether there was a compelling state interest to justify these classifications. She indicated that the city might have a compelling state interest if it could prove that the disparities were in fact the result of some kind of discrimination. Therefore, the question was whether or not those disparate numbers were simply the natural result of some undetermined market force, or whether they were actually the result of some past discrimination.

Richmond was no stranger to the Supreme Court. It had long been one of the most racially entrenched southern cities in the country and

often came before the Supreme Court in regard to race doctrine. It had been in front of the Court on any number of occasions on questions of discrimination in voting, discrimination in housing, and discrimination in schools—Virginia actually closed its schools rather than integrate them. Yet, in the Court's view, none of these examples of de jure discrimination had any bearing on the disparities that the programs sought to address. According to the Court's view, affirmative action, absent any factual base, was designed merely to correct for social discrimination and to privilege a few minorities at the expense of more deserving whites.

O'Connor's final pronouncement on the dearth of minority contractors was to feign ignorance and postulate that perhaps minorities simply didn't choose to become contractors in lockstep proportions to their percentage in the population (recall here *Plessy*'s discussion about choice). Thus, affirmative action was struck down, and if the logic stands, few other programs will stand constitutional muster.

When one examines *Croson* and *Plessy* together, their analytical similarities are striking. Both reduced the question of racial equality to mere formalism, completely abstracted from history or contract. The different meanings and experiences of whiteness and blackness are completely erased, with the categories formally construed to represent an ahistorical essential view of skin color. Both *Plessy* and *Croson*, then, required that the two categories be treated the same. That sameness in *Plessy* was to guarantee that blacks and whites were sent to separate cars; that sameness in *Croson* was to guarantee that the state must treat blacks and whites the same by not considering their race.

It is fairly obvious that treating different things the same can generate as much an inequality as treating the same things differently. Anatole France captured that inequality when he noted that the law in its majestic equality prevents the rich and the poor from sleeping under bridges.[6] Clearly, the law works in inequality when the rich will never seek that worldly pleasure, and the poor have no other choice. A similar denial of social power differentials between racial groups reproduces and insulates that very power disparity. Formal equality in conditions of social inequality becomes a tool of domination, reinforcing that system and insulating it from attack.

As troubling as Justice O'Connor's formalism was, what is more troubling is her distinction between public and private realms. Racial disparities in employment and housing and in other spheres absent some direct exclusive causal link are simply the consequences of a private market. Describing this as at best amorphous notions of societal discrimination, she determined that law cannot be deployed to alter those conditions unless there was a justification for assuming that those conditions were the result of some kind of defect in the market.

In this sense, this particular understanding of the market and the limitations of what state powers can do constitutes a key analytical move that also informs other Supreme Court doctrines—the particular image of the social spheres as free and open for individuals struggling to compete, unfettered by the state. This image of a private sphere was dominant in the pre–New Deal era in which the Court struck down, for example, labor legislation that sought to protect workers, by requiring wage and hour limitations, against exploitation at the hands of their employers. Freedom of contract is based similarly on a laissez-faire philosophy imagining a free market undisturbed by state power in which the individuals basically compete. In the Court's early view this free market necessitated that the state had to stay out of the competition. It could not adopt legislation that attempted to deal with some of the problems of exploitation. Thus, in a famous case, *Lochner v. New York*, the Supreme Court struck down as unconstitutional a health regulation limitating bakers' hours on the argument that the bakers freely chose to enter the contractual relations that resulted in their long hours. Such regulations violated their freedom of contract and constituted an impermissible attempt to redistribute bargaining power to employees from employers.

Legal realists showed that the competitive advantage the bakery owners had was neither natural nor prepolitical, but was a function of a preexisting set of rules of contract and property, rules that were the product of state power and just as easily could have gone the other way. It was, thus, no argument to say that the state could not get involved in the market because, in fact, the state was already there.

Laissez faire was to labor what color blindness is to African Americans. Justice O'Connor's statement in *Croson* that blacks simply choose not to engage in lucrative employment is essentially the same as the assumption in *Lochner* that bakers simply chose to engage in oppressive contracts. In both instances real material constraints are erased or ignored in the analysis in order to conclude that employees were free and that blacks and whites were treated equally.

Just as the realists showed that there was in fact no free market, much of critical race theory is attempting to show that there is no free market of race that determines relationships between blacks and whites. There is no free competition between blacks and whites in part because the law actually structures those relationships across a wide range of societal competitions over certain social resources.

To conclude, the doctrine of color blindness, along with the nineteenth-century market vision it endorses, uses and redeploys in the context of equal opportunity very narrow visions of equality and a specific contested vision of the notion of the private sphere. It not only works to legitimize material deprivations, but it also produces a particular ideological regime. That regime forces African Americans into articulating legitimate demands within the discourse of victimhood. Doing so is the only way that blacks can achieve political power: to show that there is a defect in the market and that the defect is constituted by an intentional, particular, state actor articulating its decision to discriminate solely on the basis of skin color—that is, essentially forcing black people to articulate themselves as perfect victims as against a perfect discriminator. Consequentially, when blacks are told that they should not be deploying the use of victimology as a way of articulating demands, they are essentially being forced into a catch-22. The only way one can achieve political power through this structure is to articulate ourselves as victims, yet the very articulation of ourselves as victims is a justification for rejecting our claim. In the law, it is clear that the end of interpretation is usually the exercise of state power. Such interpretation is produced by the ways state power, in fact, will be deployed in a particular context.

I think we need to be prepared to understand the distributive consequences of legal ideology, particularly legal ideology that produces social discourses of victimhood, and to reject the invisibility of law in structuring those discourses. In race matters, I think we need to be prepared relentlessly to show how, in fact, law matters.

NOTES

1. Opening remarks to her paper presented at the Race Matters Conference, Princeton, NJ, April 28–30, 1994. Intersection refers to Williams's conference panel's subject matter—the coming together of race, gender, and/or sexuality. It is also a word and a concept that I have used frequently in my own work to describe its focus on race, class, and gender.
2. *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).
4. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (Scalia, J., concurring).
5. *Lochner v. New York*, 198 U.S. 45 (1905) (overruled by *Ferguson v. Skrupa*, 372 U.S. 726 [1963]).
6. Anatole France, *Le Lys Rouge* (1894), in *Oeuvres* v. 2 (Paris: Editions Gallimard, 1987).