

Boston College Third World Law Journal

Volume 20

Issue 1 *Celebrating our Emerging Voices: People of Color Speak*

Article 13

1-1-2000

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Recommended Citation

Taunya Lovell Banks, *Race Talk: Patricia J. Williams' Seeing a Color-Blind Future: The Paradox of Race*, 20 B.C. Third World L.J. 183 (2000), <http://lawdigitalcommons.bc.edu/twlj/vol20/iss1/13>

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RACE TALK

TAUNYA LOVELL BANKS*

SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE. By PATRICIA J. WILLIAMS. New York: Noonday Press. 1998. Pp. 74.

How precisely does the issue of color remain so powerfully determinative of everything from life circumstances to manner of death, in a world that is, by and large, officially "color-blind"? What metaphors mark the hierarchies that make racial domination frequently seem so "natural," so invisible, indeed so attractive? How does racism continue to evolve, post-slavery and post-equality legislation, across such geographic, temporal, and political distance?¹

In 1997 the British Broadcasting Company (BBC) invited Patricia J. Williams, a Columbia University law professor and a columnist for *The Nation*, to deliver the Reith Lectures.² These lectures comprise Williams' slim book, *Seeing a Color-Blind Future: The Paradox of Race*. The same year that Professor Williams delivered her lectures, President Clinton called on the nation to engage in a conversation about race.³ In making this bold move the President failed to consider that we, the people of the United States, do not know the rules for engag-

* Copyright © 1999 by Taunya Lovell Banks, Jacob A. France Professor of Equality Jurisprudence, University of Maryland.

¹ PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 15 (1998).

² See Laura Kalman, *Race Matters*, N.Y. TIMES, May 10, 1998, § 7, at 31; Ursula K. Le Guin, *The Stories We Agree to Tell*, N.Y. TIMES, Mar. 12, 1995, § 7, at 6. Established in 1948, the Reith Lectures are given in memory of the BBC's architect and are broadcast in Britain to over a quarter of a million people. See *id.*

³ See William Powers, *Oh My!*, THE NEW REPUBLIC, Aug. 11 & 18, 1997, at 9. President Clinton in announcing the creation of the Commission said:

I want this panel to help educate Americans about the facts surrounding issues of race, to promote a dialogue in every community in the land, to confront and work through these issues to recruit and encourage leadership at all levels to help breach racial divides and to find, develop and recommend how to implement concrete solutions to our problems.

Id.

The Commission presented its report to the President on September 18, 1998, recommending, among other things, a permanent Presidential Council on Race to "monitor efforts and policies to promote racial reconciliation." See Steven A. Holmes, *Race Advisory Panel Gives Report to Clinton*, N.Y. TIMES, Sept. 19, 1998, at A7.

ing in race talk. Talking about race is a difficult endeavor because it involves "negotiating *real* divisions, . . . considering boundaries, . . . and . . . pondering our differences before we can ever agree on the terms of our sameness."⁴ In the five autobiographical essays that comprise her book, Williams engages in conversation—provoking narratives about black-white racial dynamics in the United States. Although she does not pretend to provide answers about how to achieve racial justice, her essays should provoke a lot of race talk among readers.

In the first essay, "The Emperor's New Clothes," Williams writes about her young son's experiences with the consequences of the contemporary color-blindness model.⁵ A nursery school teacher tells Williams that her son suffers from color-blindness, a medical condition, but an ophthalmologist finds nothing wrong with the child's sight.⁶ Only then does she uncover the real cause of her son's color-blindness.⁷ The "children ha[d] been fighting about whether black people could play 'good guys,' [and the "well-meaning" nursery school teacher tells the students that it] doesn't matter . . . whether you're black or white or red or green or blue."⁸ Rather than address the racial issue raised by the fight, the teacher tells her students that race is irrelevant.⁹ As a result of this lesson, Williams' son simply refused to identify color at all.

Neil Gotanda equates the non-recognition of race with a person who *pretends* to be medically color-blind.¹⁰ This feat requires the person first to "see" the color, [and] then pretend that the colors could not be seen."¹¹ The process involves consciously discounting something that one knows to exist, i.e., colors.¹² Rather than representing a progressive and moral view of a racially just society, the form of color-blindness espoused by the nursery school teacher actually privileges whiteness and "de-races" everything else.¹³

In the nursery school setting, race color-blindness does not operate in a race-neutral way. Some children already have preconceived

⁴ See WILLIAMS, *supra* note 1, at 6.

⁵ See *id.* at 3.

⁶ See *id.*

⁷ See *id.*

⁸ *Id.*

⁹ See WILLIAMS, *supra* note 1, at 8–9.

¹⁰ See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L. Q. 1135, 1140 (1996).

¹¹ *Id.*

¹² See *id.*

¹³ See *id.* at 1140–41.

notions about race, thus the controversy over whether black people can play *good* guys. The color-blind claim operates to reinforce the clearly stated notion that only whites can be good guys and that those of other races, especially blacks, cannot be good and, thus, are implicitly bad. Saying that race does not matter in that circumstance not only allows racial discrimination to continue, but also requires that we pretend a black person, like Williams' son, is socially raceless. The individual who is "de-raced" has two options: "follow an assimilationist approach, seeking adaptation to majority society . . . [or] be constitutionally condemned to a marginal existence in the future society."¹⁴

This version of color-blindness "carries no vision of racial fairness or racial justice for society; it is only a prohibition upon the government use of race."¹⁵ This alleged racial neutrality sometimes leads to absurd outcomes like the Fifth Circuit's decision in *Hopwood v. Texas*.¹⁶ In *Hopwood*, the federal appellate court announced that the Fourteenth Amendment mandated racial neutrality and applied a strict scrutiny standard of review to strike down a benign race-conscious admissions program instituted by the University of Texas Law School.¹⁷ The law school instituted the program to remedy past discrimination and ensure a more racially diverse student body.¹⁸ The court's approach in *Hopwood* ignores the legacy of discrimination stemming from decades of state-mandated racial segregation¹⁹ and allows white racial preferences to continue.²⁰

¹⁴ See *id.* at 1141.

¹⁵ Gotanda, *supra* note 10, at 1144 (citing *Hopwood v. Texas*, 78 F.3d 932, 939–40 (5th Cir. 1996)).

¹⁶ See generally *Hopwood*, 78 F.3d 932.

¹⁷ See *id.* at 940.

¹⁸ See *id.* at 934. At trial, the University of Texas offered five reasons for the race-conscious admissions programs, but the trial judge found only these two reasons constitutional. See *id.* at 938–39. The appellate court reversed, stating that "[r]acial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *Id.* at 934–35 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment)).

¹⁹ See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding that the University of Texas School of Law could not lawfully refuse to admit a black applicant on the ground that substantially equivalent facilities were offered by a state law school open only to blacks).

²⁰ See 78 F.3d at 946. The appellate court in *Hopwood*, while striking down racial preferences, approved alumni preferences where relatives of alumni were preferred over non-alumni: "An admissions process may also consider an applicant's home state or relationship to school alumni." See *id.* In doing so, the court ignored the fact that years of de jure

Although many progressive legal scholars agree with Gotanda and Williams that a racially just society is impossible, "absent recognition of the social significance of race," most scholars "tend[] to align race consciousness with consciousness of blackness," rather than whiteness.²¹ Barbara Flagg calls this phenomena "racial transparency": the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decision-makers intend to effect substantive racial justice.²²

"Race"²³ then only applies to non-whites, which explains why, according to Williams, the dominant society resents and represses "race matters," and why "race . . . tends to be treated as though it were an especially delicate category of social infirmity [analogous to some] unfortunate negotiation of social difference" like a physical disability.²⁴ The obstacle to racial justice posed by white racial transparency, or what Professor Williams calls the "phenomenon of closeting race,"²⁵ is an ongoing theme in her essays. Color-blindness, which, in reality, is a form of white racial transparency, makes it easier for the dominant society to ignore how the history of slavery and colonialism "continue[] to scar contemporary social arrangements with the transcendent urgency of their hand-me-down grief."²⁶

Williams argues that this legacy of race-based slavery and white colonialism should provide the context for discussing the "toll of racism and its lingering effects."²⁷ Without question, discussions of the race process, whether in the United States, the Caribbean, or other

and de facto racially discriminatory admissions practices at the law school resulted in an overwhelmingly white alumni body. *See id.*

²¹ *See* Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 955-56 (1993) (critiquing articles by Alexander Aleinikoff and Gary Peller advocating race-consciousness).

²² *See id.* at 957.

²³ I use the term "race" in quotation marks to remind the reader, as does anthropologist Ashley Montagu, that race is not only socially constructed, but laden with such heavy baggage that it should never be used except in quotation marks. *See* Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, July 25, 1994, at 50.

²⁴ *See* WILLIAMS, *supra* note 1, at 8-9.

²⁵ *See id.* at 8.

²⁶ *See id.* at 13.

²⁷ *See id.* at 14.

Americas, benefit from a colonial analysis that is grounded in the Atlantic slave trade, and the positionality of Africans and their descendants is crucial to any discussion of race in the Americas. However, an important, but unanswered, question is whether slavery and colonialism are the only contexts in which these discussions should take place.²⁸

Professor Williams admits, however, that conventional civil rights theories are ill-suited for the more complex world of the future where the “hybridizing of racial stereotypes with the fundamentalism of gender, class, ethnicity, and religion” are complicated further by global environmental and economic concerns. Rejecting the contemporary color-blind model, Williams argues that new ideas and approaches are needed to achieve a racially just society.²⁹ Unfortunately for the reader, she provides no concrete answers, using her essays instead to show us how much groundwork needs to be done.

I. THE EXOTIC OTHER

Color-blindness notwithstanding, whites explore racial differences too. In her second essay, “The Pantomime of Race,” Professor Williams explores how the process of pondering our differences, when exercised by whites, often turns into what she characterizes as a “fiercely co-optive [process which] degenerates into a taste for the ‘fauve’ and the ‘primitive’ . . . rather than appreciat[ion] of other worlds.”³⁰ To illustrate her point, Williams contrasts the national (and international) voyeurism that accompanied the criminal prosecution of O.J. Simpson for the death of his white wife with the relatively low-key news coverage of criminal trials involving such rich white men as John DuPont³⁸ and Alex Kelly.³²

²⁸ Some critical scholars criticize those critical race theorists who discuss racial subordination exclusively through the black-white paradigm as marginalizing not only Asian Americans and Native Americans, but “even persons who are hued white or black but who derive from cultural or geographic destinations other than Europe or Africa. . . . who identify as both black and Latina/o.” See Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 5 n.19 (1996); see generally William R. Tamayo, *When the “Coloreds” Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995) (discussing the limits of the black-white racial paradigm in the face of globalization).

²⁹ See WILLIAMS, *supra* note 1, at 14.

³⁰ See *id.* at 26.

³⁸ John DuPont is heir to the DuPont fortune. See *infra* note 32.

³² See WILLIAMS, *supra* note 1, at 19–20. John DuPont killed an Olympic wrestling champion who was living at his estate. See *id.* For years, DuPont, with the full knowledge of

All three are the extraordinary cases, but only the Simpson situation encompassed both murder and interracial sex. As Professor Williams correctly notes, it is the *interracial* relationship between the famous black male athlete and his white wife that exposes to the world the United States' racist obsession with interracial sex.³³ While many Americans agree that the Simpson case is more extraordinary than the other two cases, their reasons do not necessarily match.³⁴ Some see the Simpson case as a travesty of justice because his defense team invoked the so-called "'race card,' a term that trivializes the issues of race" and ignores the extent to which Simpson's fame and money allowed him partially to transcend race prior to his wife's murder.³⁵ Others argue that the Simpson case is extraordinary because his acquittal demonstrates not that justice is color-blind, but that green is the only color justice recognizes.³⁶ Sometimes a black man with sufficient economic resources can get the same quality of "justice" as a wealthy white man.³⁷

This form of public voyeurism often takes place on a smaller, but equally distressing, level. An example cited in Williams' book is how inappropriately dressed white tourists in Harlem drop into black churches on Sunday to "see the show."³⁸ Sated after hearing a few gospel hymns, the tourists leave disruptively and unthinkingly, without regard for the black congregants gathered for worship.³⁹ Professor

the police, "drove around his up-market neighborhood in an armored tank bristling with sophisticated weaponry." *See id.* Alex Kelly, with the help of his wealthy parents, fled the United States after a high school classmate accused him of rape. *See id.* at 19. He maintained a lavish lifestyle in Europe for ten years before being found and ultimately convicted. *See id.* At Kelly's first trial, an all-white jury failed to reach a consensus, despite eyewitness testimony and physical evidence. *See id.*

³³ *See id.* at 18.

³⁴ *See* Johnnie Cochran, *Simpson Case Showed Role Money Plays in Justice System*, BALT. SUN, June 10, 1999, at 19A.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See* Evan Moore, *New Wrinkle*, HOUS. CHRON., Nov. 17, 1996, at 1. An analogous example of what Johnnie Cochran calls "green justice" is the case of former Texas millionaire Cullen Davis whom a jury acquitted of the capital murder of his twelve-year-old stepdaughter, the murder of his estranged wife's boyfriend, and the attempted murder of his estranged wife, Priscilla. *See id.* Several years later, another jury acquitted Davis of conspiring to hire a hit man to kill some of the people responsible for his previous arrest. *See id.* Cullen Davis and the others involved were white. *See id.*

³⁸ *See* WILLIAMS, *supra* note 1, at 21.

³⁹ *See id.*

Williams characterizes the cultural tourist trade as commercialized voyeurism with blacks hyper-visible as the exotic other.⁴⁰

While her point is well-taken, her example is troubling because Williams' analysis suggests that the black congregants have no agency and, thus, play no part in promoting and benefiting from the tourists. Some black churches in Harlem welcome white tourists as part of their Christian mission.⁴¹ A few churches receive monetary benefit from tourist traffic which undoubtedly helps finance their charitable work.⁴² White majority churches in this country, as well as churches in other countries, capitalize on the tourist trade in much the same way.⁴³ Perhaps a topic for further discussion is whether the relationship between the white tourists and the Harlem churches is more complex than Professor Williams' narrative suggests. We might ask whether tourists generally visit the National Cathedral, the Vatican, Notre Dame, or St Patrick's Cathedral for the same reasons that white tourists visit the churches in Harlem, and if not, whether it should matter.

Instances of black *hyper-visibility* stand in marked contrast to those other occasions of black invisibility or self-erasure. Often blacks who work and socialize in upper levels of the dominant (and predominantly white) society experience "an assimilative tyranny of neutrality as self-erasure"—they become raceless.⁴⁴ To illustrate this point, Professor Williams relates the experience of a friend, a black woman lawyer, invited by her firm to dine at a previously all-white Christian male club.⁴⁵

As the only black person at a table served by all black help, the friend, according to Williams, struggled with "enjoying the fruits of her professional success" while "ignoring her family," acknowledging the black servers only by the sway of her body as the plates came and went.⁴⁶ The servers, while highly visible to the friend, were invisible to the others at the table.⁴⁷ When Williams' friend subsequently expressed her discomfort with the "social imbalance" to one of her white companions, the companion replied with an instant "insincere"

⁴⁰ See *id.* at 22.

⁴¹ See Frank Bruni, *At Harlem Churches, Flocks of Tourists; Drawn to Gospel, if Not Gospels, Foreigners Arrive by Busload*, N.Y. TIMES, Nov. 24, 1996, § 1, at 37.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See WILLIAMS, *supra* note 1, at 21.

⁴⁵ See *id.* at 26.

⁴⁶ See *id.* at 26–27.

⁴⁷ See *id.*

apology—the companion “just didn’t *know*, had just never *thought* about it.”⁴⁸

According to Williams, during the lunch the firm treated the black lawyer as raceless, and the servers, trained to be invisible to the diners, also were raceless.⁴⁹ Perhaps a distinction should be drawn, however, between the black lawyer’s feeling of racelessness and the invisibility of the waitstaff. At lunch the lawyer was an honorific white, but she remained raced. Her situation illustrates how class differences mediate race, even in the United States. Members of the waitstaff, who were from a different socio-economic class than the black lawyer, remained raced black, or non-white, because the association of blackness with servitude is a persistent stereotype.

On the other hand, some black racial conservatives, like United States Supreme Court Justice Clarence Thomas, would argue that Williams’ friend should not think of herself in racial terms. Justice Thomas might advise the friend “to [say to her]self, ‘I’m not a black person. I’m just a person’”⁵⁰—in other words, becoming the kind of cultural and racial assimilationist Professor Williams criticizes. By becoming raceless in this racial-conservative sense, the lawyer would not feel the need to seek what another black racial conservative, Shelby Steele, calls “a cheap form of redemption,” the invocation of black victim status to foster “white guilt.”⁵¹

Professor Williams might counter that the white companion’s denial of knowledge or understanding was merely an excuse for white silence about racism, as embodied in antidiscrimination law.⁵² Williams writes, “For white people, . . . racial denial tends to engender a profoundly invested disingenuousness, an innocence that amounts to the transgressive refusal to know . . . not to assign anything like blame.”⁵³ She argues that it is impossible for black people in the United States to be seen simply as raceless individuals when American

⁴⁸ See *id.* at 27.

⁴⁹ See WILLIAMS, *supra* note 1, at 26–27.

⁵⁰ See David G. Savage, *Clarence Thomas, Mentor*; BALT. SUN, June 27, 1998, at 4C (discussing how Justice Thomas acts as a mentor to black youths like Cedric Jennings, a teenager from Washington, D.C. whose struggle to enter an elite college is recounted in Ron Suskind’s book, *A Hope Unseen*).

⁵¹ See generally, e.g., SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990) (arguing strategies that emphasize black racial identity and that victimization and entitlement pose barriers to blacks entering mainstream America).

⁵² For a discussion of this point, see generally Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁵³ See WILLIAMS, *supra* note 1, at 27.

society is constantly bombarded with powerful, visual, racial symbolism that rivals spoken and printed words.⁵⁴ Once again, Williams' point, while well taken, overlooks the complexity of the example she uses. Professor Williams never explains why her friend felt constrained to ignore the black waitstaff, leaving me to wonder how much the black lawyer's actions stem more from her class discomfort rather than any racial discomfort. In some situations, socio-economic class mediates race, even for black people.

II. RACE AND CLASS UNCONFLATED

Professor Williams discusses the connection between race and class in her third essay, "The Distribution of Distress."⁵⁵ When whites acknowledge racial injustice, according to Williams, too often lower class whites, rather than the dominant society as a whole, take the blame for the injustice.⁵⁶ Thus, the brutal murder of James Byrd, Jr., in Jasper, Texas, was attributed by the mainstream media to Klan sympathizers portrayed as southern, poor, and ignorant, rather than to the reemergence of white racial violence in a society steeped in notions of white superiority.⁵⁷ Professor Williams, however, uses this essay to discuss the tendency of the dominant society to conflate race and class, especially when constructing black stereotypes.⁵⁸ Discussions of race and class often conflate the two categories, leaving the race *and* class aspects of a problem inadequately addressed.⁵⁹ At other times, class bias masquerades as race bias, with race operating as a palliative for glaring class inequities in the United States. Rather than condemning the exploitative form of democratic capitalism practiced in this country for high unemployment rates or bad living conditions, society blames blacks or immigrants, particularly non-white immigrants.⁶⁰

⁵⁴ See *id.* at 28.

⁵⁵ See *id.* at 31.

⁵⁶ See *id.* at 33.

⁵⁷ Surprisingly, even the Klan denied involvement in the brutal killing of Mr. Byrd. See *KKK to Rally in Town Where Man Was Dragged to Death; Group Says It Wants to Disavow Ties to Killing*, BALT. SUN, June 17, 1998, at 5A.

⁵⁸ See generally WILLIAMS, *supra* note 1, at 31-45.

⁵⁹ See *id.* at 34-35.

⁶⁰ In the late nineteenth and early twentieth centuries, European immigrant groups such as the Irish, Italians, Jews, and Eastern Europeans were blamed along with the usual suspects, non-white and undocumented immigrants. See generally, e.g., Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993) (arguing that resentment created

Adding to this confusion is the fact that, in this country, class designations are not raceless. When the news media writes or speaks of the underclass, the term immediately invokes a racialized image in the minds of most Americans, an image of black people. It seems that the terms "underclass" and "poor black people" are synonymous in the American mind, and yet there is a uniquely American form of class-blindness. We never consider who constitutes the "overclass, [t]hose who are deemed to have class versus those who are so far beneath the usual indicia of even lower class that they are deemed to have no class at all."⁶¹

Just as the "term *underclass* is a *euphemism* for blackness," middle-class is a *euphemism* for whiteness.⁶² Although Americans yearn to be upper-class, they disdain the upper-class label. Middle-class blacks "are sometimes described as 'honorary whites' or as those who have been deracinated in some vaguely political sense."⁶³ These "honorary whites," Professor Williams writes, "talk white," reminding us of Mari Matsuda's point about accent discrimination and how language, like phenotype or ancestry, impacts the ability to become "assimilated" in the United States.⁶⁴

Williams' discussion of the implicit presumption that middle-class means white provides another point for discussion. By focusing on race in the context of black-white relations, she fails to address interesting and extremely relevant questions: whether contemporary middle-classness is seen today as white *and* Asian, whether class is also a component of the Asian "model minority" myth,⁶⁵ and whether the construction of all Asians as perpetual foreigners precludes their absolute inclusion in middle-classness. The racialized construction of Asians as perpetual foreigners and, thus, as non-native English speakers may be too pervasive to overcome, even for Asians who "talk white." I raise this question to suggest that there may be other markers that determine whether honorary white middle-class status is conferred on non-whites.

by the model minority myth and the unfair competitor stereotype results in economically motivated racial violence rather than racial hatred).

⁶¹ See WILLIAMS, *supra* note 1, at 34.

⁶² See *id.* at 34-35.

⁶³ *Id.*

⁶⁴ See *id.*; see generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991) (discussing the application of antidiscrimination law to accent bias in employment and arguing that a pluralistic society should have a different standard).

⁶⁵ See generally *Racial Violence Against Asian Americans*, *supra* note 60.

Rather than discuss in depth the connections between a socially just society and recognition of economic and social rights for poor or working-class blacks, Williams demonstrates from personal experience how the conflation of race and class impacts even those honorary white, middle-class blacks. Professor Williams, a Columbia University law professor who “talks white,” applied over the telephone for a mortgage on a vacation house located in another state.⁶⁶ When the paperwork arrived for her signature, she noticed that the required Fair Housing Act document, used to monitor discrimination in lending practices,⁶⁷ listed her race as white.⁶⁸ When she informed the loan officer that she was black, the bank tried unsuccessfully to change the terms of the deal by increasing the mortgage interest rate and requiring down-payment.⁶⁹

The bank failed to evaluate Professor Williams on the basis of her individual credit-worthiness—what racial conservatives might call “individual merit,” a term they use in the college admissions context. Rather, the bank concluded that the presence of Patricia J. Williams, a black person, in a previously all-white neighborhood, would cause property values to fall, thus endangering its financial investment.⁷⁰ The bank relied on demographic data showing that “white flight,” the wholesale abandonment of neighborhoods by whites which results in a loss of vital community services, usually accompanies the arrival of black neighbors.⁷¹ This economic data recharacterized what had appeared to be a racially motivated decision as a rational economic judgment.⁷² The bank reasoned that it could legally discriminate based on economic rather than race considerations.

According to the bank, Professor Williams, the middle-class, white-talking, Columbia law professor, was a dangerous person. Her mere presence in the neighborhood created a financial danger to the bank and to her white neighbors. Evidently, the stereotype of black people as dangerous is not confined to the criminal arena.⁷³ Williams

⁶⁶ See WILLIAMS, *supra* note 1, at 38.

⁶⁷ See 12 U.S.C. §2803 (1996).

⁶⁸ See WILLIAMS, *supra* note 1, at 39.

⁶⁹ See *id.* at 38–41.

⁷⁰ See *id.* at 39.

⁷¹ See *id.*

⁷² See *id.* at 40–41.

⁷³ See generally, e.g., Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing black criminality); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentenc-*

writes, “[w]hite people fear black people in big ways, in small ways, in financial ways, in utterly incomprehensible ways.”⁷⁴ The mere presence of a black person in any context creates dangers to whites.

More importantly, Williams’ mortgage tale illustrates the failure of the racial conservatives’ individualized justice model to provide adequate remedies for group-based discrimination. The bank did not see Patricia Williams, the middle-class, white-talking law professor; rather it saw some nameless, faceless black person. Williams prevailed against the bank only because she threatened to sue—under the Fair House Act, discrimination based on membership in a racial group is unlawful.⁷⁵

Professor Williams’ housing tale is instructive for other reasons. The inability of blacks, without regard to socio-economic status, to obtain housing in good neighborhoods where real estate appreciates more quickly affects blacks’ ability, as a group, to attain and retain wealth. Education and personal wealth are tied to place of residence. Good public schools impact real estate values, and, for many middle class Americans, their home is their largest asset. If, regardless of socio-economic status, blacks lack equal access to housing, then they also lack equal access to wealth formation.⁷⁶ Poor schooling also affects job opportunities, another factor in the formation of wealth. Discriminatory lending institutions are not the only cause of blacks’ unequal access to housing; white and non-white community residents

ing, 4 AM. U. J. GENDER & L. 1 (1995) (examining stereotypes of black women as criminals).

⁷⁴ See WILLIAMS, *supra* note 1, at 41.

⁷⁵ See 42 U.S.C. §3605 (1996).

⁷⁶ For a more complete discussion of this point, see Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751, 761–62 (1996). (arguing that federal tax laws confer preferential treatment on those who own property that produces a gain on sale such as appreciated real estate, but discriminate against taxpayers who own inner-city slum real estate and are unable to deduct losses from capital assets). Moran also found that:

there is reason to believe that a higher percentage of black wealth than white wealth is invested in housing[;] it is indisputable that on average blacks have less equity in housing than whites, and black houses appreciate more slowly than white houses. Having more capital investments creates a greater opportunity to borrow against those investments and spend the loan proceeds on consumption.

Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629, 1637 (1998) (citing *A Black Critique of the Internal Revenue Code*, *supra*, at 677–78).

also engage in discriminatory behavior.⁷⁷ It is interesting to consider why other non-whites also seem willing to participate in the exclusion of blacks from desirable residential areas.

III. POST-MODERN RACE SCIENCE

"The War Between the Worlds," Williams' fourth essay, discusses the reemergence of race science, the rationalization of racism using scientific data. In the eighteenth and nineteenth centuries, "scientific" pronouncements about race and black inferiority in particular were used to justify slavery and to define who was white.⁷⁸ In the early twentieth century, courts used race science to determine which immigrants were "white" and thus eligible for naturalization.⁷⁹ These "scientific" theories were discounted long ago, or so I thought.

Professor Williams writes that "Black people find themselves responding endlessly to such [pseudo-scientific] studies before we can be heard on any other subject [R]acial science makes anyone who agrees with it intelligent, enhanced, informed, and empowered."⁸⁰ Today books like *The Bell Curve*,⁸¹ and academic discussions linking urban violence to race-based genetics repackage formerly discounted notions of scientific racism.⁸² The reemergence of race "science," like the earlier movement, is grounded in notions of white superiority and the continuing need to "race" and subordinate others. Surely, some of the long-standing resistance to affirmative action comes from people who want to perpetuate the goals of earlier generations.

⁷⁷ For a discussion of this point, see Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Racial and Plural Democracy*, 33 CAL. W. L. REV. 185, 200-01 (1997) (discussing residential segregation in a formerly white Los Angeles suburb and how newly arrived Asian and Latino residents "implicitly" participated with white residents in keeping blacks from buying homes in the area).

⁷⁸ See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 28-30 (1991).

⁷⁹ See *id.*

⁸⁰ WILLIAMS, *supra* note 1, at 49.

⁸¹ RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). For critiques of *The Bell Curve*, see generally *MEASURED LIES: THE BELL CURVE EXAMINED* (Joe L. Kincheloe et al. eds., 1996).

⁸² See Peter Maass, *Crime, Genetics Forum Erupts in Controversy; Critics Say Entire Subject is Racist*, WASH. POST, Sept. 24, 1995, at B1 (describing the controversial effort by some geneticists to find a link between genes and violent behavior). These geneticists believe there are genetic faults that predispose an individual toward violence and that, once identified, might be corrected through a variety of treatments, thus preventing criminal behavior. See *id.*; Juan Williams, *Violence, Genes, and Prejudice*, DISCOVER, Nov. 1, 1994, at 92.

The use of race science to perpetuate racial subordination is apparent in U.S. racial classification laws. Even contemporary discussions of the racial classification system used by the U.S. government seem framed in race science terms. Discussions centering around who is "white," who is "black," and whether the classification scheme should be expanded to include "biracial" or "multiracial" categories lose sight of the fact that race is socially, not scientifically, determined—a point the United States Supreme Court acknowledged in the 1920s.⁸³ Nevertheless, some Supreme Court Justices such as Justice Scalia occasionally lapse into race science.⁸⁴

Williams' critique of racial categories, while not clearly making this distinction, makes another important point. She argues forcefully that a biracial designation privileges the offspring of interracial (white and non-white) marriages as "between races."⁸⁵ In doing so, Williams underscores the widely accepted notion that blacks always occupy the

⁸³ See *United States v. Thind*, 261 U.S. 204, 208 (1923) (holding that an Asian Indian considered Caucasian is not white for the purposes of naturalization). The Court stated that "[i]n the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word 'Caucasian' but the words 'white persons,' and these are words of common speech and not of scientific origin." *Id.*

⁸⁴ Justice Scalia, during the oral argument in *Metro Broadcasting Inc. v. FCC*, twice characterized racial preferences as preferences based on "blood." See *Arguments Before the Court*, 58 U.S.L.W. 3623 (Apr. 3, 1990).

When Roger Wollenberg said:

the FCC affirmative action program provides a benefit to those who come from disad-vantaged backgrounds, Scalia pounced. "It's *blood*, Mr. Wollenberg, *blood*. Not background and environment," Scalia said. "It doesn't matter where the person of that race was raised, in the most privileged family, in the most exclusive residential community. *Blood*."

See David G. Savage, *High Court's Conservative New Guard Steers Debate*, L.A. TIMES, Apr. 1, 1990, at A1 (emphasis added).

Ultimately the Court, in a plurality decision, with Justice Stevens concurring, held that neither the FCC's minority enhancement credit policy nor the "distress sale" policy violates the equal protection guarantee implicit in the Fifth Amendment. See *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 597 (1990). Justice Scalia joined the dissenting opinions filed by Justices O'Connor and Kennedy. See *id.* at 602, 631. Subsequently, the Court overruled *Metro Broadcasting* in *Adarand Constructors v. Peña*. See 515 U.S. 200, 229 (1995). Ironically, Justice Scalia, concurring in part and concurring in the judgment, wrote: "In the eyes of government, we are just one race here. It is American." See *id.* at 239 (Scalia, J., concurring).

⁸⁵ See WILLIAMS, *supra* note 1, at 55-56. For a more detailed discussion of this point, see generally Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998).

bottom rung of the U.S. racial hierarchy.⁸⁶ Some critical scholars are beginning to question this claim.⁸⁷

Yet another point of discussion is whether blacks *always* occupy the bottom position in the U.S. racial hierarchy. There may be a danger in "privileging" the bottom rung status of blacks because implicit in this position is an assumption that blacks, due to their status, are racial innocents who cannot and do not engage in racially subordinating behavior toward other racialized groups.⁸⁸ A more critical examination of racial hierarchies within and among communities of color may indicate that, while blacks experience a specific anti-black bias, they do not always occupy the bottom rung of the U.S. racial hierarchy.

CONCLUSION

Professor Williams' final essay, "An Ordinary Brilliance: Parting the Waters, Closing the Wounds," is a call for racial justice and an end to racial stereotyping.⁸⁹ It is an appropriate way to end the lecture series that formed the basis of the book's essays. Nevertheless, I find the question she poses near the end of her fourth essay more relevant to the situation of black people in the United States today. Williams asks, in a question directed at both proponents and opponents of color-blindness, "How do we proceed in a world where race operates as a hidden scripting of rationalized irrationality, where myriad images of racial clichés perpetuate their unspoken subtexts of devaluation?"⁹⁰

This question provokes still another conversation about race. Advocates of color-blindness, in the spirit of Judge Richard Posner, might answer that courts should ignore racial differences, even though they know that race-based societal discrimination continues to flourish.⁹¹ Posner and others, with words sounding remarkably similar

⁸⁶ See WILLIAMS, *supra* note 1, at 56.

⁸⁷ See generally, e.g., Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?* 76 OR. L. REV. 347 (1997).

⁸⁸ For a discussion of this point, see generally Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L. J. 7 (1998) (arguing that both Asians and blacks engage in racially subordinating conduct toward other racialized groups).

⁸⁹ See WILLIAMS, *supra* note 1, at 61.

⁹⁰ *Id.* at 55.

⁹¹ See Terrence Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 676-79 (1975).

to those of Justice John Harlan, the originator of the color-blind legal language,⁹² claim that legal (as opposed to social) equality can be achieved only if law is truly color-blind.⁹³ However, an uncritical color-blind rule, as Professor Williams' essays so aptly illustrate, produces undesirable outcomes or consequences in a racially unjust society. Color-blindness ignores continuing racial inequalities and implicitly condones racial discrimination. Simply ignoring race will not make it go away.

We must find ways to live with and celebrate difference in order to become a pluralistic democracy. A necessary prerequisite, as Professor Williams suggests, is learning how and being willing to engage in meaningful and honest race talk. The only question is whether this country is willing to take the first step. Those who read *Seeing A Color-*

⁹² The color-blind language invoked today by affirmative action opponents comes from United States Supreme Court Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* more than one hundred years ago. See 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). Justice Harlan, in opposing laws that mandated racial segregation in public transportation, wrote: "There is no caste here. Our Constitution is color-blind." See *id.* at 559. The majority in *Plessy* approved a system of legalized racial segregation that conferred still fully unacknowledged privileges on the white majority and reinforced notions of white racial superiority. See *id.* at 551-52. According to Justice Harlan, legalizing white racial dominance was unnecessary because by 1896 whites already widely believed in black inferiority. See *id.* at 560-61. Harlan wrote:

State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

Id.

Justice Harlan's now famous words, standing alone, suggest that all races are created equal. Civil rights lawyers even used Harlan's language successfully to persuade the Supreme Court in *Brown v. Board of Education* that de jure racial segregation in public schools is unconstitutional. See generally 349 U.S. 294 (1954). The Court never uses Justice John Harlan's words, but the appellants' brief on reargument invokes Justice Harlan's words. See 49 LANDMARK BRIEFS & ARGUMENTS OF THE UNITED STATES: CONSTITUTIONAL LAW 554 (Philip B. Kruland & Gerhard Casper eds., 1975).

Although *Brown* signaled the death of the separate but equal doctrine coming out of *Plessy*, what constitutes equality or equal protection of the laws remains illusive. As Justice Powell, writing in *Bakke v. Regents of the University of California*, admitted equal protection of the laws, like equality, "is susceptible of varying interpretations." See 438 U.S. 265, 284 (1978). Thus, what constitutes equality or equal protection of the laws depends on who is doing the defining as well as the historical context of the equality claim. Today racial conservatives and other affirmative action opponents invoke Justice Harlan's words in fashioning a color-blind rhetoric to resist efforts to dismantle a system of privilege based primarily on "race." Ironically, this contemporary use of color-blind rhetoric by racial conservatives is closer to Justice Harlan's true intent in *Plessy*.

⁹³ See Sandalow, *supra* note 91, at 676-79.

Blind Future: The Paradox of Race will have plenty of material for this necessary race talk.

