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# THE FORGOTTEN VICTIMS

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It is ironic that Professor Aleinikoff's moving (but ultimately unpersuasive) paper begins with a description of the Emmett Till tragedy. I share his horror at that incident and others like it, but I am afraid he has overlooked an important aspect of it. For what Aleinikoff, like so many others who see a racist behind every tree, fails to perceive is that his perspective and his proposals ignore and often exacerbate an even more pervasive problem. While no one would suggest that death is an appropriate penalty for whistling at a woman, Aleinikoff is apparently completely unaware that being whistled at can often evoke in women exactly the same fears of physical danger—and as a result of exactly the same combination of cumulateness, historical treatment, and present-day powerlessness—that he so cogently describes as the consequences of the “hate stare” or racial slurs. Not all women object to whistling, and in many circumstances it is obvious that the whistler is in no position to do physical harm. But where a woman walking alone in an underpopulated area is verbally accosted, she is at least as vulnerable to physical violence as a black in a similar situation. Aleinikoff, in his eagerness to empathize with the victims of racism, completely overlooks the victims of sexism. Similarly, his description of the young black man who felt resentful when a white woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being, but she fears for her physical safety. I, at least, would rather be snubbed than raped.

And let us put the Emmett Tills and Yusef Hawkins in perspective: there are probably more women forcibly raped every *day* than the total number of racially based hate crimes in a year. Aleinikoff points out that 3000 violent hate crimes were reported between 1980 and 1986 (only some of which involved race). During that same period, more than 500,000 women reported being raped.<sup>1</sup> And yet the government—and apparently Aleinikoff—does not even consider rape a hate crime. It is utterly unreasonable, and an illustration of the lack of seriousness that is accorded sex discrimination as opposed to race discrimination, to say that a crime of violence perpetrated by a man on

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1. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Timothy J. Flanagan & Maureen McLeod eds., 1982-87).

a woman solely because she *is* a woman does not fall into the same category as an assault on a black man committed solely because he is black. So in terms of hate-based violence, at least, blacks are better off than women: there is less of it and it is taken more seriously by the authorities.

Violence, and the fear of violence inspired by slurs or by whistling, is just one example among many where this is true. The attention and hand-wringing lavished on race relations by Aleinikoff and many others obscures the fact that by every measurement of formal equality, and by many measures of substantive equality, white women are further behind than black men (black women, unsurprisingly, are on the bottom). It leads us to focus our energies, our remedies, and our scarce resources on race discrimination, often at the direct expense of women.

I hope to do three things in my brief remarks today. First, I will suggest that Professor Aleinikoff's paper exaggerates the problem it addresses. Second, I will explain what I mean when I say that women are worse off than blacks. Third, I will give examples of how attempts to portray racism as the more serious problem directly and indirectly disadvantage women.

No one doubts that racism and race discrimination are still a problem today. But much of Professor Aleinikoff's discussion exaggerates the problem. While his statistics relying on "testers" to measure job or housing discrimination are probably reliable, his discussions of black and white attitudes leave much to be desired.

After carefully warning us not to rely on individual perceptions, which are necessarily partial, Aleinikoff appears to trust implicitly every single black account of perceived racism. Every slight, every averted eye, is racist in origin if it is so understood by the recipient. Every negative white attitude—from doubts about competence to reluctance to attend schools where blacks are the majority—is assumed to be racist; the possibility that affirmative action contributes to the former attitude and class-based animus to the latter is dismissed out of hand.

Donald Trump's ill-advised statement (although when has Donald Trump ever behaved advisedly?) that well-educated blacks have an advantage is labelled "incredible," but one need only look at affirmative action at work in academia to recognize the kernel of truth in Trump's conclusion. In both admissions and hiring, blacks have a significant advantage over whites with equal credentials. At my own institution, for example, up until two years ago black students were automatically admitted with a combined LSAT-GPA lower than the

scores of whites automatically rejected (now the same result is achieved constitutionally by creating a pool of "discretionary" applications and using race as a factor). At the University of California at Berkeley, the SAT scores for incoming freshmen over the last decade have averaged 1204 for whites and 921 for blacks; the overlap between the two populations is less than 15%.<sup>2</sup> In hiring, virtually every academic institution has hired minority candidates who lack many of the academic credentials required of white candidates under traditional standards of excellence. Moreover, under the law of supply and demand, minority scholars are often paid more than whites of similar seniority and ability.

Even Aleinikoff's use of statistics is open to question; in his article documenting the disparate prices paid for automobiles by blacks and women, Ian Ayres was careful to note that the worst offenders appeared to be salespeople of the same race and gender as the buyer.<sup>3</sup> And Aleinikoff's own statistics suggest that there is more prejudice against those perceived as foreigners than against blacks.

It would be easy—although as tedious for me as it would be for you—to rewrite Professor Aleinikoff's paper substituting sexism and sex discrimination wherever he discusses racism and race discrimination. But rather than rely on anecdotes, I will point out simply that at least blacks have achieved formal equality—a necessary prerequisite to substantive equality, but one which women still lack. There is currently no government activity, no right of citizenship, no employment or educational status that can be denied on the basis of race. All legal barriers to racial equality have been removed by Congress or the courts.

This is not yet true for gender equality. The federal government discriminates against women by banning them from almost 40% of the positions available in the military, including many positions classified as combat jobs even though they do not relate directly to combat.<sup>4</sup> A handful of states still maintain public colleges that are open only to men, and a federal district court recently upheld such state-supported segregated schools as constitutional.<sup>5</sup> Anti-discrimination laws are riddled with exceptions that permit private gender discrimination in situations where race discrimination is clearly prohibited. For exam-

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2. Vincent Sarich, *The Institutionalization of Racism at the University of California at Berkeley*, 4 ACADEMIC QUESTIONS 72, 73, 78 (Winter 1990-91).

3. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 846-47 (1991).

4. U.S. DEPARTMENT OF DEFENSE, *MILITARY WOMEN IN THE DEPARTMENT OF DEFENSE* v (6th ed. 1988).

5. *United States v. Virginia*, 766 F.Supp. 1407 (W.D. Va. 1991).

ple, Title VI<sup>6</sup> prohibits race discrimination in *any* program receiving federal funds while the analogous statute on gender, Title IX,<sup>7</sup> prohibits gender discrimination only in *educational* programs receiving federal funds. Title VII,<sup>8</sup> which prohibits discrimination in employment, allows sex but not race to be used as a bona fide occupational qualification, thus allowing employers to justify gender discrimination that would otherwise be prohibited.<sup>9</sup> Title VII also limits plaintiffs to equitable relief, but other statutes (such as section 1981) permit the victims of race-based but not gender-based employment discrimination to recover compensatory damages.

Women are also trailing black men on many measures of substantive equality. One 1986 study, for example, found that during the first half of the 1980s white women working full-time were paid an average of 65% of what similarly employed white men received while black men averaged 75% of white male wages. (Black women, of course, lost on both counts and received average pay only 59% of white male wages.)<sup>10</sup> A study by the Census Bureau in 1989 and 1990 reached similar conclusions.<sup>11</sup> After adjusting for educational level, another study determined that by 1980 "the adjusted differential between white and black men was less than half the difference between white men and white women."<sup>12</sup>

Finally, there are cultural attitudes toward women. I don't have any statistics, but I do have some rather unusual anecdotal evidence. I have a sixteen-month-old daughter, and as those of you who are parents probably know, that means I watch a lot of Sesame Street. As an enlightened children's show, Sesame Street is very careful to present a positive image for black children. There are a number of black characters on the show—all carefully referred to as African-American—and the uniqueness of black culture is explored. For example, in the past week I have seen two different portrayals of dinner in a black household, and in both the families were shown enjoying collard greens, black-eyed peas, and cornbread. Young black children were obviously meant to get the impression that their ethnic heritage was worth cherishing. But in both scenes a woman was shown cooking and serving the meal. What impression were young girls supposed to

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6. 42 U.S.C. § 2000d (1988).

7. 20 U.S.C. §§ 1681-88 (1988).

8. 42 U.S.C. §§ 2000e-2000e-17 (1988).

9. 42 U.S.C. § 2000e-2(e) (1988).

10. BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 69 (1986); accord SUZANNE M. BIANCHI & DAPHNE SPAIN, *AMERICAN WOMEN IN TRANSITION* 179 (1986).

11. See *White College Graduates Make a Third More Than Blacks*, L.A. TIMES, Sept. 20, 1991, at D5.

12. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 50 (1988).

get from that? Lest you think that these were isolated instances, I've also discovered that all of the regular muppet stars are male (I can't tell you what race they are, since they come in colors like blue or bright yellow), and that while language is carefully used to avoid the appearance of race bias, the show still uses "fireman" and "policeman" and the like. While I don't object to such terms, many feminists do, and parallelism would suggest that if it is appropriate to use "African-American," then "firefighter" and "police officer" should also be used.

By now, I'm sure many of you have dismissed my remarks as just another whining complaint about which minority group is most oppressed (although I doubt that most such complaints refer to Sesame Street as evidence). The difference is my purpose: I don't simply want to convince you that prejudice against women is more pervasive and difficult to eradicate than prejudice against blacks. What I do want to suggest is that the focus on race discrimination makes the problem of gender discrimination worse. It does so in two ways: it diverts attention and resources, and it leads to remedies that further disadvantage women. I hope one egregious example of each will suffice, given the time limitations.

Last week I read an unsurprising headline in a newspaper article: *White College Graduates Make a Third More Than Blacks*.<sup>13</sup> The article focused on how badly blacks are doing economically, and attributed the problems in large part to racism. Ironically, the article also gave the actual figures found by the study, appropriately arrayed to emphasize their importance. The article first noted that among men with four years of college, whites earned an average of approximately \$41,000 a year and blacks only \$31,000. Then it went on to say that the gap between similarly educated white and black women was "narrower," with white women earning just over \$27,000 and black women a bit over \$26,000. The article then gave similar figures for high school graduates. Despite the fact that black men earned considerably more than white women, the headline—and the remainder of the article—focused exclusively on the economic problems of blacks. The writer never even bothered to mention that his own figures showed women to be worse off, and used the difference between men and women only to suggest that black women were closer to their white counterparts than were black men. If a study that puts women at the bottom gets media attention only because black men earn less than white men, it is hopeless to expect any attention to be paid to the problem of gender discrimination.

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13. *White College Graduates Make a Third More Than Blacks*, *supra* note 11.

Finally, remedies proposed by those concerned with the lingering effects of racism often exacerbate the problems of sexism. A number of cities have established, or are considering establishing, black public school academies. I do not propose to enter the debate about whether such discriminatory schools are constitutional, or wise, but I would like to point out that many such schools have attempted to limit enrollment to black *males*. The race discrimination against whites may be justifiable as a remedy for past discrimination against blacks, but the sex discrimination cannot be so justified since it is against women, not men. Here the exclusive concern with racism directly translates into depriving black women and girls of the educational attention given to black men and boys. The argument in response that black males are in need of special educational settings has several flaws. First, it assumes that our public schools are doing an adequate job of educating other children, including black females, which is clearly not true. *All* children would benefit from the money and attention lavished on these proposed academies. Second, a parallel argument suggesting that white children would be better off in all-white schools—even if supported by substantial evidence—would be immediately rejected as racist and as ignoring the needs of black children. Even if there is a difference between excluding blacks and excluding whites, I see no difference between excluding blacks and excluding girls. Finally, the argument does not explain why black females, who are subject to twice the discrimination as black males, are not in similarly desperate educational straits. Thus it leaves one to wonder why the women have overcome these obstacles, and whether some of the educational difficulties of black men are of their own making. In any case, black male academies may aid black males, but they do so at the expense of black females.

On a somewhat less obvious level, the general move toward multiculturalism and diversity exalted by Aleinikoff and other proponents of affirmative action similarly privileges minorities over women. Islam, like many of the cultures that are to be included in order to affirm the cultural heritage of blacks and other minorities, is much more sexist than even the dominant culture in the United States. To glorify that culture is to elevate black men at the expense of all women.

It is these sorts of unintended but nevertheless common effects of a preoccupation with racism that has led me to offer this corrective. We should not neglect the problems of racial minorities in this country, but neither should we overstate them and thus compound the benign neglect that has so frequently been accorded gender discrimination.

## POSTSCRIPT:

As I was delivering this paper in Boulder, events were unfolding in Washington D.C. that further confirm my thesis. Clarence Thomas, a conservative black man nominated to the Supreme Court, was accused of sexual harassment by Anita Hill, a black female professor of law who had once worked for him. After press leaks forced the Senate Judiciary Committee to abandon its preferred course of sweeping the charges under the rug, the nation was treated to a televised spectacle as the Committee held hearings on the charges. Although the hearings were notable in many respects, the most fascinating aspect for my purposes was that Judge Thomas and his Senate supporters—most notably Senator Orrin Hatch—managed to turn a question of gender discrimination into an issue of race discrimination (the judge called it a “high-tech lynching” based on stereotypes about black sexuality). Never mind that Professor Hill is also black and that no black man was ever lynched for raping or otherwise sexually abusing a black woman. Judge Thomas and his supporters deftly “played the race card,” in the expectation that the Senate would be more afraid of apparent race discrimination—however fabricated the lynching—than of apparent sex discrimination. That expectation was confirmed when Judge Thomas was, demonstrating once again how we so often remedy race discrimination, real or perceived, at the expense of women.

*Professor Aleinikoff Responds:* It would be idle to dispute Professor Sherry’s claims that sexism is a serious problem in U.S. society and that current legal norms are not up to the task of combatting it. And I quite agree that scholars focussing on race discrimination must grapple with the question of whether the remedies they propose work to the disadvantage of other victimized groups. But I am saddened by Professor Sherry’s decision to make her case for the persistence of sexism by down-playing the evidence of deep-seated racism in this country.

I do not choose to respond here to Professor Sherry’s extravagant claims about me (for example, that I am “completely unaware that being whistled at can often evoke in women exactly the same fears of physical danger” as the “hate stare” frequently directed at blacks). Nor will I play the “comparative victimology” game that Professor Sherry embarks upon. It seems to me that there are too few legal academics writing on issues of subordination and oppression, and that it is a total waste of precious resources for those of us in these fields to spend time marshalling data in an inevitably fruitless attempt to show



which group has suffered, and continues to suffer, more.<sup>14</sup>

Rather than undertaking such divisive "comparative" work, it would be far more productive to begin to analyze the cross-cutting nature of oppressions. A number of scholars have argued that seeing the world in terms of just "race" or "gender" (or "class" or "sexual orientation") distorts the complex ways in which power is distributed and imposed. And I am eager to consider the ways in which my concentration on race has been incomplete (because it does not distinguish between racism directed at African-American women and African-American men) or even harmful to work being done by other progressive scholars focussing on other kinds of oppression. (Professor Sherry has not convinced me that my paper has had this effect.)

Apparently, Professor Sherry is unhappy that I have not chosen to write a paper about sexism and sex discrimination. That is hardly a complaint to which one can sensibly respond. She is correct that I have focussed on the problem of racism in U.S. society. To me, it is an underdiscussed, under analyzed issue. I tried to show how an appreciation of the current scope of racism in the United States might (and ought to) influence constitutional adjudication. No doubt a similar piece could be (and ought to be) written about sexism. It was, however, not the task I undertook in my contribution to this symposium.

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14. Cf. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (and Other-isms)*, 1991 Duke L.J. 397.