RACE DISCRIMINATION AND HUMAN RIGHTS CLASS ACTIONS:

THE VIRTUAL EXCLUSION OF RACIAL MINORITIES FROM THE CLASS ACTION DEVICE

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I. INTRODUCTION

In the era of Jim Crow, racial minorities were segregated and excluded from participating in white society.[1] Minorities were segregated in public schools,[2] excluded from public accommodations,[3] excluded from participation on juries,[4] and excluded from living in certain areas.[5] Harkening back to that earlier time, racial minorities now are often excluded from using the class action device to bring civil rights claims.

This paper argues that courts are very tough in how they handle class certification decisions in race discrimination class actions. On the other hand, the courts are quite lenient in how they handle class certification decisions in human rights class actions. The paper tries to explain why this is the case. The paper argues that race discrimination class action cases should be treated in the same lenient fashion as the human rights cases.

In Part II of this paper, I set out some history regarding class actions. Part III sets out the basic requirements for certification of a class action. Part IV examines how the courts have treated human rights class actions in making class certification decisions.

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1. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 110 (3d ed. 1992) ("[N]o detail was too small in the frantic effort to seal off contact between blacks and whites . . . . The law had created two worlds, so separate that communication between them was almost impossible."); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 160 (1987) ("The modern order framed Mexican-Anglo relations in stark 'Jim Crow' segregation. Separate quarters for Mexican and Anglo were to be found in the farm towns. Specific rules defined the proper place of Mexicans and regulated interracial contact").

2. MONTEJANO, *supra* note 1, at 160 ("The emergence of a Mexican school system suggests definite patterns. The first 'Mexican School' was established in 1902 in Central Texas (in Seguin) and the practice continued unabated until Mexican ward schools existed throughout the state."); *see, e.g.*, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849) (approving segregation of African-Americans in public schools).

3. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate facilities for white and black passengers on trains); Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944) (upholding the exclusion of Mexican-Americans from amusement enterprise swimming pools).

4. *See, e.g.*, Hernandez v. State, 251 S.W.2d 531 (Tex. 1952) (stating that proportional representation of Mexican-Americans is not required in juries as long as there is no express discrimination).

5. *See, e.g.*, BELL, *supra* note 1, at 691 (discussing "restrictive covenants aimed at preventing blacks from purchasing property in white neighborhoods").

Part V compares the human rights cases to the courts' handling of race discrimination class actions and points out that the cases are treated differently. Part VI seeks to explain the differential treatment. Part VII argues that the race cases should be treated in the same lenient fashion as the human rights cases.

II. CLASS ACTIONS—HISTORY

In order to bring a lawsuit, someone must initiate the action. In order for an individual to bring an action, the injury must be sufficient to justify the lawsuit. Sometimes the injury is not enough to justify an individual action, even though the case might present an important social concern.[6] The classic situation is where a large group of individuals might have suffered small damages. The small damages suffered by an individual might not be enough to justify bringing an individual action, but the fact that a large number of persons might have been injured by illegal activity and the total amount of damages might be significant raises an important social concern. What is to be done in such a situation? Our legal system has dealt with this situation by developing the class action procedural device.[7] The class action makes it possible to bring a lawsuit to collect damages not simply for an individual, but damages for the entire group of injured people.[8] From the perspective of an attorney, class actions make economic sense since the attorneys would be paid out of the recovery.[9]

In a foundational article dealing with class actions, the authors saw the class action device — since it sought redress for group wrongs — as a vehicle for the vindication of "semi-public rights."[10] Collective litigation, then, may serve even loftier goals than just dispute resolution. In *NAACP v. Button*,[11] the Supreme Court recognized that collective litigation can be a form of political expression:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences;... It is... a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.... For such a group, association for litigation may be the most effective form of political association.[12]

In 1966, Rule 23 of the Federal Rules of Civil Procedure was amended in part to

6. Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22 (1996).

7. *See* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.")

8. JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 103 (2002) ("The concept of a class action is simple: a single case is brought by (or against) one or more persons that sue (or are sued) on their own behalf and also on behalf of others (the 'class' that are similarly situated.")

9. RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 698 (2006) ("Most plaintiff class actions are taken on a contingent fee basis, which means the lawyer is paid a percentage of what the claim recovers.")

10. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

11. 371 U.S. 415 (1963).

12. *Id.* at 429–31.

facilitate the use of the class action device as a way to vindicate social rights.[13] Explaining these changes, Abram Chayes' classic article on public law litigation observed that the class action device "seemed perfectly adapted" to achieve the objectives of "reformist litigators" in a range of cases, including civil rights actions.[14]

In the wake of these amendments, many class actions were brought. Professor Benjamin Kaplan gave an optimistic appraisal of these developments three years after the changes took place:

> There are some who are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiative and management. We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis, we are dealing with cases that are not handled by existing agencies, and I do not myself see any subversion of judicial process here but rather a fine opportunity for its accommodation to new challenges of the times. The class action takes its place in a larger search for pliant and sensitive procedures. I confess I am exhilarated, not depressed by experimentation which spies out carefully the furthest possibilities of the new Rule.[15]

III. CLASS ACTION REQUIREMENTS

In order to certify a class action, Federal Rule of Civil Procedure 23(a) requires that it satisfy the prerequisites of "numerosity," "commonality," "typicality," and "adequacy of representation."[16]

In addition, there must be an adequately defined class and the class representative must be a member of the class.[17] If the requirements are met, the plaintiffs must then establish that the cases can be subsumed under one of the types of classes permitted by Rule 23(b).[18] In this respect, the most popular type of class actions is a Rule 23(b)(3) class action which requires that common questions predominate over individual questions.[19]

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13. *See* Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982).

14. *Id.* at 27. Some of these changes were anticipated by Professor Fleming James when he observed:

> If the spurious class suit judgment were given broader binding effect, however, the device would obviously be a far more efficient one in minimizing litigation. It would, for example, be capable of compelling the settlement in a single lawsuit of all the claims arising out of widespread injury caused by a single untoward event . . . *and it would be a more effective device in dealing with race relations problems.*

FLEMING JAMES, JR., CIVIL PROCEDURE 500 (1965) (emphasis added), *quoted in* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 219 (4th ed. 2004).

15. Benjamin Kaplan, *A Prefatory Note*, 10 B. C. INDUS. & COM. L. REV. 497, 500 (1969).

16. FED R. CIV. P. 23(a).

17. JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 555 (1998).

18. FED R. CIV. P. 23(b).

19. TIDMARSH & TRANSGRUD, *supra* note 8, at 137–38.

IV. HUMAN RIGHTS CLASS ACTIONS

One of the most interesting developments in recent litigation is the use of the class action device to seek redress for human rights violations.[20] Human rights "are regarded as those fundamental and inalienable rights which are essential for life as a human being."[21] All people possess these rights by virtue of their being human and governments must recognize and protect these rights.[22] Litigants began to bring these actions by means of the Alien Tort Claims Act ("ATCA" or the "Act").[23] The Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[24]

In *Filartiga v. Pena-Irala*,[25] a Paraguayan torture victim brought an action against a Paraguayan police officer. The main question was whether torture constituted a "tort in violation of the law of nations" as required by the ATCA.[26] The Court of Appeals for the Second Circuit held that official torture is prohibited by the law of nations and is sufficient to establish jurisdiction under the ATCA.[27] Since *Filartiga*, federal courts have used the ATCA to assert jurisdiction over a wide range of human rights cases, including war crimes and genocide.[28] In addition to the ATCA, the Torture Victim Protection Act establishes a right to sue any individual who commits acts of torture or extrajudicial killing.[29]

The courts have not subjected human rights class actions to rigorous analysis in deciding whether they meet the Rule 23 requirements for class certification.[30] Consider some examples. In *Hilao v. Estate of Marcos*,[31] Philippine nationals brought a class action against Ferdinand Marcos, who had ruled the Philippines for fourteen years.[32]

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20. For more on the rise of international human rights litigation, see Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643; Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L. J. 1 (2002); Susan L. Karamanian, *New Challenges for the American Lawyer in International Human Rights*, 55 WASH. & LEE L. REV. 757 (1998); Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773 (2000).

21. REBECCA M. WALLACE, INTERNATIONAL LAW 175 (1986).

22. International Covenant on Civil and Political Rights, art. 2, sec. 1, *adopted by the United Nations General Assembly* Dec. 19, 1966, 999 U.N.T.S. 173 (entered into force on March 23,1976, and ratified by the United States on June 8, 1992) [hereinafter ICCPR] ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ."); Vienna Declaration and Programme of Action, para. 1, July 12, 1993, U.N. Doc. A/CONF. 157/23 ("Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.")

23. 28 U.S.C. § 1350 (2000).

24. 28 U.S.C. § 1350.

25. 630 F.2d 876 (2d Cir. 1980).

26. *Id.*

27. *Id.* at 884.

28. *See* Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L. L. 1, 6 (2002).

29. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)).

30. *See* Perl, *supra* note 20, at 779–84.

31. 103 F.3d 767 (9th Cir. 1996).

32. For more on the Marcos litigation, see Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re* Marcos *Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 B.C. THIRD WORLD L.J. 43 (1994); Ralph G. Steinhardt, *Fulfilling the Promise of* Filartiga*:*

The district court certified a class of 10,000 people defined as "[a]ll current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries, who between 1972 and 1986 were tortured, summarily executed or disappeared while in the custody of military or paramilitary groups."[33] The Ninth Circuit upheld the class certification.[34] The Estate of Marcos argued that the claims of the named plaintiffs were not typical of the claims of the class as required by Rule 23(a)(3) because there were "significant individual questions in each case related to... whether any compensable injury exist[ed]."[35] The Ninth Circuit rejected this argument holding that the question of whether any compensable injury existed for a particular class member was "virtually identical in each case."[36] That question was, "[d]id the victim experience pain and suffering from the torture, summary execution, or 'disappearance?'"[37] The court of appeals did not appear to subject this requirement to stringent analysis that is often found in cases that discuss the typicality requirement. Courts often hold that the typicality requirement is not satisfied where there are "factual differences from one class member to another."[38] Here it seems easy to imagine that the individual circumstances of the 10,000 members of the class might have varied significantly. For example, what type of injury was inflicted and by whom? How much pain was suffered? Another factor that suggests that the Ninth Circuit did not engage in a rigorous scrutiny of the class certification requirements is the court's failure to criticize the sufficiency of the district court's class certification analysis even though the district court failed to include a certification analysis in its class certification order.[39] Also, the court of appeals did not question the absence of specific findings regarding Rule 23(b)(3)'s requirements that common questions predominate over any questions affecting class members individually and that a class action is superior to other methods of adjudicating the case.[40]

Another example is *Jane Doe I v. Karadzic*.[41] In *Karadzic*, the district court certified a class of thousands composed of:

> all people who suffered injury as a result of rape, genocide, summary execution, arbitrary detention, disappearance, torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb Forces under the command and control of

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Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 YALE J. INT'L L. 65 (1995); Sol Schreiber & Laura D. Weissbach, *In re* Estate of Ferdinand E. Marcos *Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 LOY. L.A. L. REV. 475 (1998).

33. Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 46–47 (2000).

39. Perl, *supra* note 20, at 781.

40. *Id.* at 782-83. *See Hilao*, 103 F.3d at 774.

41. 176 F.R.D. 458 (S.D.N.Y. 1997). For more on the *Karadzic* litigation, see Alan Frederick Enslen, Filartiga's *Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997); Michele Brandt, Comment, Doe v. Karadzic: *Redressing Non-State Acts of Gender-Specific Abuse under the Alien Tort Statute*, 79 MINN. L. REV. 1413 (1995).

defendant [Radovan Karadzic] between April 1992 and the present.[42]

In analyzing the certification requirements, the district court concluded that there were common questions of law or fact for the proposed class.[43] Similarly, the court decided that the named plaintiffs' claims were typical of the class because they arose "out of the same alleged course of conduct."[44] Again, the court's analysis of these issues appears to be quite lenient. The discussion takes place in two very short paragraphs. The Supreme Court has recognized that the commonality and typicality requirements tend to merge.[45] Thus, courts often find commonality or typicality is not satisfied where there are differing factual circumstances among the various class members.[46] It seems clear that when discussing the proposed class in *Karadzic*, there would be a large range of differing factual circumstances among the thousands of class members, with differing injuries and circumstances under which those injuries were sustained.[47]

Human rights class actions brought by Holocaust victims also received favorable treatment from the courts. In 1996, Holocaust survivors brought three class actions against three Swiss banks seeking the recovery of World War II bank deposits.[48] The case arose because during World War II, Jews and other victims of the Nazis deposited money in Swiss banks in an effort to safeguard their assets in a neutral country.[49] At the conclusion of the war, the banks refused to return the money to the survivors or their heirs.[50] Plaintiffs sought to recover under an unjust enrichhment theory.[51] Plaintiffs settled the class actions for $1.25 billion.[52] Initially, the banks offered strong resistance, filing various motions to dismiss.[53] The judge treated these class actions in a very sympathetic manner. He issued no rulings on the motions and instead waited almost a year for the parties to settle the case.[54] The judge supervised a settlement meeting at a restaurant and convinced the litigants to settle.[55]

Holocaust survivors and their heirs also filed a class action against sixteen European insurance companies who had allegedly failed to pay out on life insurance

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42. 176 F.R.D. at 461.

43. *Id.*

44. *Id.* at 462.

45. Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

46. *See* In re American Medical Systems, 75 F.3d 1069, 1081–82 (6th Cir. 1996).

47. *See* Perl, *supra* note 20, at 780.

48. Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 604 (1999). For more on the Holocaust litigation, see JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST (2002); Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II*, 37 VAND. J. TRANSNAT'L L. 333 (2004); Michael J. Bazyler, *Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L. J. 64 (2001); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003).

49. Bazyler, *supra* note 48, at 607.

50. *Id.*

51. *Id.*

52. *Id.* at 608.

53. *Id.*

54. Bazyler, *supra* note 48, at 608.

55. *Id.*

policies.[56] Plaintiffs sought $1 billion dollars from each company.[57] Again, the defendants made motions to dismiss the case.[58] Significantly, the judge used the same tactic as the judge who dealt with the Swiss banks; he sat on the motions and waited for the parties to settle.[59]

Similarly, plaintiffs, who were forced into slave labor by the Nazis during World War II, recently brought actions in United States courts against German businesses.[60] Most complaints sought class certification, but were all settled for approximately $5 billion in total before the court reached any decision on the class certification issues.[61] This settlement was reached despite the fact that "certification of the[] claims as Rule 23 class actions would not have been a foregone conclusion."[62] Class certification was doubtful, if strict standards were applied, in light of numerous individualized issues.[63]

Thus, human rights class actions seem to have received lenient or favorable treatment in the courts. What is happening with respect to race discrimination class actions?

V. RACE DISCRIMINATION CLASS ACTIONS

Although Rule 23 was supposed to serve as a vehicle for civil rights actions, racial minorities have faced, and continue to face, significant obstacles in having cases certified as class actions. For instance, the courts have required that classes must be adequately defined.[64] The members of the class must be reasonably ascertainable. Historically, this requirement presented a problem for Mexican-Americans seeking to bring class actions. In *Tijerina v. Henry*,[65] a well-known Mexican-American civil rights advocate, Reis Lopez Tijerina,[66] sought to bring a class action on behalf of all "'Indo-Hispano, also called Mexican-American and Spanish-American'" persons in the state of New Mexico.[67] He was seeking to require the school boards to provide bilingual education.[68] The court held that plaintiffs had "failed to adequately define the class."[69] Plaintiffs had attempted to characterize the class as "having Spanish surnames, Mexican, Indian, and Spanish ancestry, and that the class speaks Spanish as a primary or maternal language."[70] The court found this to be "too vague to be

56. *Id.* at 609.

57. *Id.* at 610.

58. *Id.* at 611.

59. Bazyler, *supra* note 48, at 611.

60. Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L. J. 503, 503 (2002).

61. *Id.* at 509, 529.

62. *Id.* at 519.

63. *Id.* at 518–30.

64. *See* Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981).

65. 48 F.R.D. 274 (D.N.M. 1969).

66. *See generally* F. ARTURO ROSALES, CHICANO! THE HISTORY OF THE MEXICAN-AMERICAN CIVIL RIGHTS MOVEMENT 154 (1996) ("The rise of the Chicano movement had no greater symbol of defying the Establishment than Reis Lopez Tijerina.").

67. Tijerina v. Henry, 48 F.R.D. 274, 275 (D.N.M. 1969).

68. *Id.* at 278.

69. *Id.* at 276.

70. *Id.* at 275–76.

meaningful."[71] The Supreme Court declined to hear the case.[72] Justice Douglas, however, wrote a dissenting opinion where he pointed out the irony in this situation where those who discriminate are able to identify Mexican-Americans but not the courts.[73] The *Tijerina* court did not take a lenient approach to the class certification decision. In some areas the *Tijerina* objection to certification of a Mexican-American class was routinely raised.[74] Ironically, the courts took this position even though in *Hernandez v. Texas*[75] the Supreme Court recognized that Mexican-Americans constitute a class within the meaning of the Fourteenth Amendment to the United States Constitution.[76]

Another example of strict scrutiny of class requirements for minorities is the Supreme Court's decision in *General Telephone Company of Southwest v. Falcon*.[77] Falcon, a Mexican-American, who claimed that his employer did not promote him because of discrimination, sought to bring a class action on behalf of Mexican-Americans who were not promoted and Mexican-American applicants for employment who were not hired by his employer.[78] He claimed that the employer discriminated against Mexican-Americans on the basis of national origin.[79] At that time, the Fifth Circuit allowed victims of race discrimination to maintain an "across the board" attack on all unequal employment practices of the employer.[80] Relying on this authority, the district court certified a class including Mexican-American employees and Mexican-American applicants for employment who had not been hired.[81] The Fifth Circuit affirmed the class certification decision.[82] In reviewing the decision, the Supreme Court stated that courts must give "careful attention to the requirements of [Rule 23]."[83] In particular, Rule 23 requires that "'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'"[84] In this regard, plaintiff's claims were not typical of the other claims by Mexican-American employees or applicants. For instance, plaintiff's complaint failed to provide a sufficient "basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans."[85] Thus, the Supreme Court rejected the

71. *Id.* at 276.

72. Tijerina v. Henry, 398 U.S. 922 (1970).

73. *Id.* at 923–24.

74. *See* Richard Delgado & Vicky Palacios, *Mexican-Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393, 403 (1975).

75. 347 U.S. 475 (1954).

76. Hernandez v. Texas, 347 U.S. 475, 480 (1954). For recent analysis of *Hernandez*, see Michael A. Olivas, *Commemorating the 50th Anniversary of* Hernandez v. Texas, 25 CHICANO-LATINO L. REV. 1 (2005); Kevin R. Johnson, Hernandez v. Texas: *Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153 (2005).

77. 457 U.S. 147 (1982). For more on *Falcon*, see Daniel S. Klein, *Bridging the* Falcon *Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(A) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131 (2006).

78. Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 147 (1982).

79. *Id.*

80. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

81. *Falcon*, 457 U.S. at 147.

82. *Id.*

83. *Id.* at 157.

84. *Id.* at 156 (quoting East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

85. *Id.* at 158.

"across the board" doctrine and made it significantly more difficult for racial minorities to bring class actions to redress racial discrimination. After *Falcon*, many "courts have strictly refused to allow an employee asserting one type of employment discrimination from representing a class asserting other types."[86]

A recent study confirms that minorities continue to face significant problems in having cases certified as class actions. The study examined "all reported employment discrimination class action decisions issued in federal courts between January 1, 1998, and May 3, 2001, to determine the percentage of such cases that were certified as class actions."[87] "Of [thirty-nine] reported decisions involving rulings on motions for class certification in the employment context and allegations of race discrimination, courts denied certification in [twenty-seven] instances, or 69% of the time."[88] I have reproduced the research results of this study. (The cases are listed in the Appendix to this article.)[89] The cases show that the federal courts rigorously analyze the Rule 23 requirements for class certification in race cases. The opinions are often long, analyzing virtually every factor in Rule 23. Certification is typically denied because of too many individualized claims and issues. Consider some representative cases.

A. A Sampling of the Race Cases

In *Levels v. AKZO Nobel Salt, Inc.*,[90] the proposed class was denied class certification on the grounds that it failed to satisfy commonality, typicality, and that individual issues predominated over common questions. Plaintiffs were seven African-American employees of defendant AKZO, who alleged AKZO's supervisory employees created a hostile work environment for African-Americans by subjecting them to race discrimination.[91] AKZO owned and operated a salt mine in Cleveland, Ohio.[92] Some of the hourly employees engaged at the site worked on the surface under one set of managers, while others worked inside the mines under a different group of supervisors.[93] Only one of the plaintiffs worked in the mine; the remaining six worked primarily on the surface.[94] Plaintiffs sought to represent a class of African-Americans that included any future and seasonal employees.[95]

As for commonality, the court found that plaintiffs did not adequately demonstrate that there are questions of law or fact common to the class.[96] In this regard, the court questioned the commonality of the conditions faced by the surface and mine employees.[97] The court noted that "Plaintiffs make different allegations concerning work conditions at each location. With regard to surface work, Plaintiffs complain

86. RICHARD MARCUS & EDWARD SHERMAN, COMPLEX LITIGATION 268 (3d ed. 1998).

87. Steven J Rosenwasser, *Employment Discrimination Class Actions: The Importance of Case Selection*, 18 BNA EMPLOYMENT DISCRIMINATION REPORT 15 (2002).

88. *Id.*

89. *See infra* pp. 201–04.

90. 178 F.R.D. 171 (N.D. Ohio, 1998).

91. *Id.* at 173–74.

92. *Id.* at 173.

93. *Id.*

94. *Id.*

95. Levels v. AKZO Nobel Salt, Inc., 178 F.R.D. 171, 174 (N.D. Ohio, 1998).

96. *Id.* at 176.

97. *Id.* at 177.

about discriminatory harassment by fellow employees. With regard to underground work, Plaintiffs complain that supervisors participated in racial harassment or acquiesced in harassment occurring in their presence."[98] The Court relied on the fact that "[s]upervisors do not regularly switch between surface and mine work" to support its conclusion that there is insufficient commonality of experience here.[99] Under these circumstances, the court found that the commonality requirement was not met because plaintiffs' claims "relate to individualized claims of discrimination."[100]

As for typicality, the court found that the plaintiff's claims were not sufficiently typical. At the outset, the court observed that the plaintiff's claims are not typical of proposed class members who suffered discrimination in hiring, in as much as the plaintiffs did not allege race discrimination based on hiring practices.[101] Then the court analyzed the typicality of claims among employees in light of the surface/mine employee distinction holding that since "[i]n these positions, they are exposed to different co-employees, different supervisors, and different working conditions," they fail to show that their claims are typical of the claims of the class.[102]

Finally, since, as to AKZO, the action is solely for monetary damages, the court considered whether plaintiffs had met 23(b)(3) which requires a showing that common questions predominate over individual issues. The court found that individual issues predominated emphasizing "the nature of the conduct complained of: individual harassment, by the lack of similarity of persons who may have perpetrated the harassment and by the lack of similarity of damages involved."[103]

In *Boyce v. Honeywell, Inc.*,[104] African-American plaintiffs sought to certify a class action against their employer Honeywell, Inc. Plaintiffs alleged that Honeywell engaged in race discrimination against them in all aspects of employment.[105] The court found that the Rule 23(a) requirements of typicality and commonality were not met in view of a "vast array of individual circumstances."[106] For instance, one named plaintiff alleged that she was blacklisted, which would require "proof of circumstances unique to her."[107] For some plaintiffs, a particular promotion process was used, while for other plaintiffs it was not used.[108] In addition, the members of the class "were not subjected to the same decision making authority."[109] "Different supervisors made decisions using different procedures."[110] For all these reasons, the class could not be certified.

In *Zachery v. Texaco*,[111] the proposed class was denied certification on the grounds that commonality and typicality were not satisfied. Here, a class of African-American plaintiffs sought certification alleging a pattern and practice of racial discrimination

98. *Id.*
99. *Id.*
100. *Levels*, 178 F.R.D. at 177.
101. *Id.* at 178.
102. *Id.*
103. *Id.* at 179.
104. 191 F.R.D. 669 (M.D. Fla. 2000).
105. *Id.* at 670.
106. *Id.* at 676.
107. *Id.*
108. *Id.*
109. Boyce v. Honeywell, Inc., 191 F.R.D. 669, 676 (M.D. Fla. 2000).
110. *Id.*
111. 185 F.R.D. 230 (W.D. Tex. 1999).

which included denying "(1) promotions and opportunities for promotion, (2) comparable wages and raises, and (3) training opportunities on the basis of race."[112]

With respect to commonality, the court emphasized that "the proposed class is spread across fifteen states in seventeen separate business units, each of which... had varying degrees of autonomy over evaluation and promotion decisions."[113] Under these circumstances, the commonality requirement was not met since "this action would degenerate into multiple individual determinations for each individual proposed class representative."[114] Likewise, the class representatives failed to satisfy the typicality requirement since "it [was] foreseeable that [defendant] would raise specific evidence applicable only to each proposed class representative as to why he or she was not promoted or better trained."[115]

Similarly, in *Ramirez v. DeCoster*,[116] this proposed class was denied certification on the grounds that individual issues predominated over common issues. Commonality and typicality also were not satisfied. Mexican-American plaintiffs were a class of current and former employees of an egg processing facility, alleging racial discrimination which included "(1) subjective decision-making; (2) blatant disparate treatment regarding job placement, housing placement, the application of job performance standards, and access to medical services; and (3) the maintenance of a racially hostile work environment."[117]

As for commonality and typicality, the court discussed these requirements in the context of the plaintiffs' fraud and contract claims. The court found that since claims for fraud and breach of contract are "fact specific to each individual" they would require "individualized determinations."[118] Accordingly, they fail to satisfy the requirements of commonality and typicality.[119]

The court next turned to Rule 23(b)(3), which requires that common issues predominate over individual issues in order for the court to grant certification. Here, the court emphasized that plaintiffs "wish[ed] to certify a class that could consist of potentially 1,000 members who worked for different durations, in different positions, in different barns or plants, with different supervisors."[120] Given these facts, the predominance requirement was not satisfied "[b]ecause each worker's exposure to this subjective decision-making and hostile environment [would] vary in nature and degree, [and so] any trial on 'class' issues [would] quickly erode into a series of individual trials focused on issues specific to each worker."[121]

Finally, in *Bacon v. Honda of America Mfg., Inc.*,[122] the proposed class of African-American employees was denied certification on the grounds that it did not satisfy the requirements of commonality or typicality, and that individual issues predominated over

112. *Id.* at 235.
113. *Id.* at 239.
114. *Id.*
115. *Id.* at 240.
116. 194 F.R.D. 348 (D. Me. 2000).
117. *Id.* at 351–352.
118. *Id.* at 355.
119. *Id.*
120. *Id.* at 353 (citation omitted) (footnote omitted).
121. Ramirez v. DeCoster, 194 F.R.D. 348, 353 (D. Me. 2000).
122. 205 F.R.D. 466 (S.D. Ohio, 2001).

common questions. Plaintiffs alleged that Honda discriminated against them by denying them favorable positions, skilled positions, transfers and promotions.[123]

As for commonality, the court noted that the proposed class included over 800 African-Americans, from 4 different manufacturing plants and 39 different departments (which performed diverse functions).[124] Furthermore, the claims spanned a period of over 20 years during which the promotion practices changed.[125] Given these facts, the court held that the plaintiffs had not established that proof of any one class member's claim of disparate treatment would involve a common issue to the litigation.[126] Accordingly, the court concluded that plaintiffs had not shown that commonality existed regarding their claims of disparate treatment.[127]

Similarly, with respect to typicality, the court focused on "the diversity of Honda's operations and the use of decentralized decision making."[128] The claims of the named plaintiffs were not typical of the class in light of "the large number of factors which [were] considered in the promotion process, the diversity in the promotion processes used by the various departments... and the large number of coordinators or managers who [were] making the various decisions which impact[ed] the promotion process."[129]

The court next considered certification under Rule 23(b)(3), which requires that common issues predominate over individual ones.[130] The court determined that an individualized inquiry into the circumstances of each class member would be required to calculate compensatory and punitive damages.[131] Therefore, class certification under Rule 23(b)(3) would not be appropriate either.[132] The net effect of this failure to certify race class actions is to subordinate minorities. As shown above, the cases establish that courts are fairly lenient in their treatment of human rights class actions. Thus, there seems to be disparate treatment of the race cases. Such disparate treatment is troubling and raises the possibility that race is a factor in these cases. It may suggest that the courts do not see race as a serious problem that calls for resolution.

B. Race and Reparations/Human Rights Cases

There is some evidence that the race reparations/human rights cases might receive similar tough treatment by the courts. African-Americans have recently brought an action against the United States seeking reparations for the enslavement of African-Americans and subsequent discrimination against them "from the end of the Civil War to the present."[133] Although it was not a class action, the judicial system's treatment of

123. *Id.* at 468.
124. *Id.* at 478.
125. *Id.*
126. *Id.* at 478–479.
127. Bacon v. Honda of America Mfg., Inc., 205 F.R.D. 466, 479 (S.D. Ohio 2001).
128. *Id.* at 481
129. *Id.*
130. FED R. CIV. P. 23(b)(3).
131. *Bacon*, 205 F.R.D. at 487.
132. *Id.*
133. Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995). For more on reparations for slavery, see Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457 (2003); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

the case is revealing. The district court dismissed the complaint with prejudice and denied leave to amend.[134] The district court concluded that plaintiffs' claims were saved by sovereign immunity and opined that "[t]he legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."[135] The Ninth Circuit affirmed, holding that it was proper to dismiss plaintiff's complaint without leave to amend because it failed to identify the violation of any right and failed to establish subject matter jurisdiction or waiver of sovereign immunity.[136] In addition, the court of appeals found that plaintiff lacked standing because she was proceeding "on a generalized class-based grievance" and failed to allege "any conduct on the part of any specific official" or "specific program" that violated a "constitutional or statutory right and caused her a discrete injury."[137]

The trial court and the court of appeals did not deal with this complaint in a lenient fashion. It is very harsh to dismiss the complaint with prejudice without even giving leave to amend. The court did not sit on the motions and wait for the parties to settle. The case seems to be treated more harshly than other human rights/reparations cases.

VI. POSSIBLE EXPLANATIONS FOR THE DIFFERENT TREATMENT OF HUMAN RIGHTS CLASS ACTIONS AND RACE DISCRIMINATION CLASS ACTIONS

The case law shows that courts are fairly lenient in their treatment of human rights class actions. On the other hand, courts give strict scrutiny to race discrimination class actions. What might explain the different treatment? One possible explanation is that the dominant group does not perceive that race is a serious issue. A court's view of the merits of the underlying claims may influence the class certification decision.[138] Thus, if a court fails to see the issue of race as a legitimate problem, it may see no merit to the underlying claim. It, therefore, would be inclined not to certify a class action for race discrimination.

Indeed, there is reason to believe that courts fail to see the merit of the race claims. As one commentator has recently observed:

> When it comes to race cases, which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way. These biases, as well as others, inevitably influence courts' treatment of discrimination cases, and help explain why the cases

134. *Cato*, 70 F.3d at 1105 & n.2.

135. *Id.* at 1105.

136. *Id.* at 1106.

137. *Id.* at 1109.

138. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.12 (1978) (stating that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" and that "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims" (emphasis omitted) (citations omitted)); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 at 256 (2004) ("Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification.")

are so difficult to win.[139]

Given this, it is hardly surprising that one recent study has concluded that race discrimination in employment suits are "almost impossible to win in federal court."[140] Why do courts view the merits of the race cases with so much skepticism?

Critical theorists have recently argued that it is hard to correct the racism of our time because we do not perceive such racism.[141] We only understand the racism of more distant times and places. For instance, with respect to African-Americans, we are often shocked to see the racist way that blacks were depicted in earlier periods of our history. In the late eighteenth century, blacks were presented as "childlike, lazy, illiterate, and dependent on the protection and care of a white master."[142] In the early 1800's, whites in black face performed in minstrel shows and promulgated the stereotype of blacks as "inept urban dandies or happy childlike slaves."[143] Black women were depicted as a "mammy figure — cook, washerwoman, nanny, and all-around domestic servant — responsible for the comfort of the Southern white household."[144] After the Civil War, the newly freed slaves were stereotyped as "primitive and bestial" and "ready to force sex on any white woman they might encounter."[145] This vicious image helped justify the lynchings of thousands of black men.[146]

Similar images of the Mexican-American also developed over time. Following the war with Mexico in the 1800's, Mexicans were portrayed as "traditional, sedate, and lacking in mechanical resourcefulness and ambition."[147] Mexicans were depicted as "the 'good' (loyal) Mexican peon or sidekick, and the 'bad' fighter-greaser Mexican who did not know his place."[148] "The greaser coveted Anglo women and would seduce or rape them if given the opportunity."[149]

Each ethnic or racial group has been negatively stereotyped in various ways. How is this possible? We now see that these stereotypes are racist. Why did people not see it before? As Richard Delgado explains, we are only able to see and "condemn the racism of another place... or time."[150] "But that of our own place and time strikes us, if at all, as unexceptional, trivial, well within literary license."[151] "Racism is woven into the warp and woof of the way we see and organize the world."[152] "Racism forms part of the dominant narrative, the group of received understandings and basic principles

139. Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 556–57 (2001).

140. Wendy Parker, *Lessons In Losing: Race Discrimination In Employment*, 81 NOTRE DAME L. REV. 889, 940 (2006).

141. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGGINATION 4-5 (1994).

142. *Id.* at 5.

143. *Id.*

144. *Id.* at 6.

145. *Id.*

146. DELGADO & STEFANCIC, *supra* note 141, at 6.

147. *Id.* at 12.

148. *Id.*

149. *Id.*

150. *Id.* at 14.

151. DELGADO & STEFANCIC, *supra* note 141, at 14.

152. *Id.* at 15.

that form the baseline from which we reason."[153] "The only stories about race we are prepared to condemn, then, are the old ones giving voice to the racism of an earlier age, ones that society has already begun to reject."[154] Thus, many white persons fail to see the extent of racism in our country. For example, Richard Delgado has described the white majority's view on race in America as follows:

> Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely.... Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.[155]

Thus, whites see the world as a place where racism has been overcome.[156] In stark contrast to that world view is the outsider perspective. It holds that:

> [The history of] black subordination in America [is] a history "gory, brutal, filled with more murder, mutilation, rape and brutality than most of us can imagine or easily comprehend." This... history continues into the present, implicating individuals still alive. It includes infant death rates among blacks nearly double those of whites, unemployment rates among black males nearly triple those of whites, and a gap between the races in income, wealth, and life expectancy that is the same as it was fifteen years ago, if not greater. It includes despair, crime, and drug addiction in black neighborhoods, and college and university enrollment figures for blacks that are dropping for the first time in decades. It dares to call our most prized legal doctrines and protections shams – devices enacted with great fanfare, only to be ignored, obstructed, or cut back as soon as the celebrations die down.[157]

Minorities, then, view the world as still very much infected with racism. For instance, minority scholars describe a world where racial minorities experience

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153. *Id.*

154. *Id.*

155. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2417 (1989).

156. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1523, 1525 (1998). Vargas notes:

> The White ethnic immigrant narrative has helped to construct and reinforce a version of racism under which . . . Whites claim racial innocence . . . . [This narrative] reinforces the myth that racism . . . is not a serious injury or harm that can persist through history; and that racism and racist attitudes are not entrenched in current economic structures and social norms.

Id.

157. Delgado, *supra* note 155, at 2417–18.

numerous "microaggressions."[158] "Microaggressions" are "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' [of minorities]."[159] Members of the dominant group, however, seem to view racism as largely a thing of the past.

The philosophy of Hegel provides support and an explanation for the critical insight that we cannot see the racism of our time. Hegel's philosophy of history and his notion of the owl of Minerva is instructive. History is probably the most important aspect of Hegel's philosophy.[160] For Hegel, history has a goal.[161] Indeed, history reveals "the plan of providence."[162] Human beings, however, do not fully understand the reasons for their actions.[163] Because they do not comprehend the goal of spirit, they do not truly grasp the reason why they do one act and not another.[164] Reason "us[es] the passions of men to fulfill her own purposes."[165] Human beings are the "instruments of the world-spirit."[166]

As Charles Taylor explains, for Hegel:

> [M]an is never clear what he is doing at the time; for the agency is not simply man. We are all caught up as agents in a drama we do not really understand. Only when we have played it out do we understand what has been afoot all the time. The owl of Minerva flies at the coming of the dusk.[167]

Hegel's famous notion of the owl of Minerva "refers to the way that philosophy always comes too late, when the world is already slipping into dusk."[168] "We achieve wisdom about something only when it is fading, is passing into history."[169] The owl of Minerva represents the notion that we can understand what has happened in history only when a historical stage is played out.

This phenomenon, the owl of Minerva, should strike a familiar note with most people. For instance, we often meet people or experience events, but at the time fail to realize the important role these people or events will ultimately play in our lives. Only later, when our lives have played out more fully, will we realize the significance of these persons and events. For example, some person that we meet by chance will help us land a job at some future date. Later, we realize the significance of our earlier encounter with that person.

The application of these ideas to the class action situation is fairly straightforward. The racism and injustice of our time is hard to perceive because the owl of Minerva has

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158. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1565 (1989).

159. *Id.*

160. *See* Frederick C. Beiser, *Hegel's Historicism*, *in* THE CAMBRIDGE COMPANION TO HEGEL 270 (Frederick C. Beiser ed., 1993).

161. *See* CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 95 (1979).

162. *Id.*

163. *Id.* at 98.

164. *See id.*

165. *Id.*

166. TAYLOR, *supra* note 161, at 99.

167. *Id.* at 122.

168. RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 86 (1995).

169. *Id.*

not yet flown. The courts disfavor the race class actions because they are unable to see the merits of the claims. Our historical stage has not yet passed. It is possible that we may eventually come to see these recent decisions as unjust or racist, just as we now recognize the old stereotypes as racist. I think that we can more easily see the racism or injustice of the older case *Tijerina* because that historical stage has played out more fully. It now seems obvious that Mexican-Americans should constitute an adequate definition of a class.

On the other hand, the human rights class actions receive more favorable treatment. We are able to perceive those injustices because of the distance in time (e.g. Nazi Germany) and geography (e.g. the Phillipines). The courts see merit to the underlying claims. The courts are therefore more willing to facilitate or certify those class actions. We can see the injustices from other times and places — those historical stages have been played out and we have achieved wisdom in those situations.

VII. WHAT IS TO BE DONE?

The resistance to the certification of class actions brought by racial minorities may simply reflect that we are living in hard times for civil rights. In recent years, we have witnessed a number of important obstacles in the law of civil rights: the struggle over affirmative action,[170] the English-only movement,[171] the outlawing of bilingual education,[172] anti-immigrant legislation,[173] the limitation of civil rights as a result of the United States' response to the attacks of September 11th,[174] and so on.

In the view of some critical theorists, perhaps we should not be surprised by this state of affairs. Indeed, Derrick Bell has recently argued that "racism is an integral, permanent, and indestructible component of this society."[175] Consistent with this view, Richard Delgado contends that the American legal system is inherently racist.[176] Accordingly, some critical theorists argue that racial minorities cannot rely on litigation to bring about social change or to establish rights.[177] In fact, some critical theorists

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170. *See* TIMOTHY DAVIS, KEVIN R. JOHNSON & GEORGE A. MARTÍNEZ, A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH 321–406 (2001).

171. *See, e.g.*, BILL PIATT, ¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990); Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

172. *See, e.g.*, Kevin R. Johnson & George A. Martinez, *Forging our Identity: Transformative Resistance in the Areas of Work, Class, and the Lawa: Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000).

173. *See, e.g.*, Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

174. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U.L.J. 5 (2005); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002).

175. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL ix (1992).

176. *See* Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T. M. COOLEY L. REV. 361, 364 (1998).

177. *See* Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 55–56 (1995); George A. Martínez, *Legal Indeterminacy, Judicial*

believe that resorting to litigation may actually help bring about racial subordination.[178]

Courts should treat race discrimination class actions in a more lenient way. We have seen that human rights class actions receive favorable treatment. The race cases are analogous to the human rights class actions and should be treated in a similar fashion. Indeed, race discrimination cases are human rights cases. The United States has signed and ratified the International Convention on the Elimination on All Forms of Racial Discrimination.[179] The right to be free from race discrimination is therefore a human right.[180] Given this, courts should be more willing to certify race discrimination class actions.

In addition, the perspective of minorities or outsiders should influence the construction and understanding of the legal system—including the procedural system.[181] If the current procedural system operates to subordinate racial minorities, then it should be reconstructed to correct that problem.[182] The current interpretation of Rule 23 clearly operates to subordinate the interests of racial minorities as they attempt to seek redress for race discrimination. The failure to certify race discrimination class actions is particularly egregious since class actions were originally supposed to be a form of litigation that was to advance the interest of minorities. The Rule 23 analysis, therefore, must be revised in order to prevent the subordination of racial minorities.

The courts have been very hospitable to the use of class actions in certain business contexts (e.g., securities cases). As the Third Circuit explained in *Eisenberg v. Gagnon*,

> Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.' '[T]he interests of justice require that in a doubtful case... any error, if there is to be one, should be committed in favor of allowing a class action.'[183]

The Supreme Court has facilitated the use of the class action device in the context of securities litigation by recognizing the "fraud on the market" theory. The adoption of this doctrine allowed the use of the class action procedure in securities cases because without the doctrine, individual issues of reliance might predominate and therefore prevent class wide handling of the reliance issue.[184] In the same way, the courts ought

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Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 U.C. DAVIS L. REV. 555 (1994).

178. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

179. *See* International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 392 (entered into force Jan. 4, 1969, and ratified by the United States June 24, 1994).

180. *See* Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare 'Reform,'* 71 S. CAL. L. REV. 547, 572 (1998) (documenting that there is an "international human right to freedom from discrimination based on race, ethnicity, and national origin").

181. *See* ROY L. BROOKS, CRITICAL PROCEDURE xxiii (1998).

182. *See id.* at xxiv.

183. 766 F.2d 770, 785 (3d Cir. 1985) (citations omitted).

184. *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988). *See also* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 203 (3d ed. 1989) (In recognizing the "fraud on the market" theory, "the Court promoted the use of the class action to redress Section 10(b) violations. If the Court had required positive proof of individualized reliance from each plaintiff, individual issues may have predominated over the common ones, thereby precluding the pursuit of class actions in this context.")

to facilitate the use of the class action device in race cases.

In this regard, procedural requirements have sometimes been relaxed in the Rule 20 joinder context to allow race discrimination claims to go forward. Rule 20(a) provides that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief... arising out of the same transaction... and if any question of law or fact common to all these persons will arise in the action."[185] The leading case interpreting Rule 20 in a racial context is *Mosley v. General Motors Corp.*[186] In *Mosley*, Nathaniel Mosley and nine other persons joined in bringing an action against their employer General Motors and their union alleging race discrimination in hiring, promotions, and terms of employment.[187] The key issue was whether the claims arose out of the same transaction for purposes of Rule 20.[188] The district court found that the claims did not satisfy Rule 20 since "the ten employees did not work together and had been injured in different ways by different conduct at different plants."[189] The plaintiffs' joint actions "presented a veriety [sic] of issues having little relationship to one another."[190] The court of appeals reversed the district court on this point, holding that "Rule 20 would permit all reasonably related claims for relief... to be tried in a single proceeding."[191] The court explained that the claims arose out of the same transaction since each of the "plaintiffs alleged that he had been injured by the same general policy of discrimination."[192] The court might have taken a tougher stance and found that the claims did not arise out of the same transaction because of the differing circumstances of alleged discrimination.[193] Instead, the *Mosley* court staked out a "generous attitude toward permissive joinder" in the racial context.[194] In the same way, the courts should take a generous and more lenient approach in making decisions on whether they certify class actions alleging race discrimination.

This is a suggestion to help bring about a more just, rational society. If the majority group is alerted, for example, to the possibility of injustice or racism in these class certification decisions, then perhaps they can pursue a more rational course of action and correct the problem. According to Hegel, the state must achieve rationality.[195] But the state conforms to reason on the basis of human action that is "not really conscious of what it is doing."[196] The rational state, then, "does not come about

185. FED R. CIV. P. 20(a).

186. 497 F.2d 1330 (8th Cir. 1974).

187. *Id.* at 1331.

188. *Id.* at 1332.

189. TIDMARSH & TRANSGRUD, *supra* note 8, at 72.

190. Mosley v. General Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974).

191. *Id.* at 1333.

192. *Id.*

193. *See* MARCUS & SHERMAN, *supra* note 14, at 32:

> It appears in *Mosley* that the claim of each of the ten plaintiffs is based on different events by which that plaintiff was allegedly discriminated against as to promotion, conditions of employment, failure to hire, etc. It also seems likely that different G.M. employees were responsible for the alleged acts of discrimination against each plaintiff. How then, can the right to relief which each plaintiff asserts be considered to arise out of the "same transaction[?]"

Id.

194. TIDMARSH & TRANSGRUD, *supra* note 8, at 73.

195. *See* TAYLOR, *supra* note 161, at 123.

196. *Id.*

by some men seeing the blueprint of reason and building a state on the basis of it."[197] Therefore, even if somehow we could have learned the proper structure of the rational state before its proper time, we would have been unable to apply it.[198] The rational state can only be achieved and understood at the proper time "because it involves a growth of reason" and such "growth has to have taken place before we can understand it."[199] Even if one tried to tell people about the rational state ahead of time, "they would have been powerless to effect it, for it could not have been understood much less identified with by their contemporaries."[200] One cannot "transcend one's age."[201]

This may raise a problem for this class action project. To the extent that one tries to explain and understand events before the owl of Minerva has flown – that is, explain events in advance – one may be trying to transcend one's time period. Hegel's philosophy of history seems to suggest that even if the argument set forth in this paper is correct, we may be unable to understand and act on these suggestions. We may not have achieved the "growth in reason" that will allow us to accept these suggestions and insights into the nature of our society. Nevertheless, we have to try to overcome the "time-warp aspect of racism."[202] We must make an effort to perceive the racism or injustices of the present day.

VIII. CONCLUSION

During the time of Jim Crow, racial minorities were sealed off and excluded from participating in white society. In a manner reminiscent of that earlier time, racial minorities now are often excluded from using the class action device to bring civil rights claims.

This paper argues that the courts are very tough in how they handle class certification decisions in race discrimination class actions. On the other hand, the courts are quite lenient in how they handle class certification decisions in human rights cases. The paper offers an explanation as to why this is the case. The paper argues that race discrimination class action cases should be treated in the same lenient fashion as the human rights cases.

197. *Id.*
198. *See id.*
199. *Id.*
200. TAYLOR, *supra* note 161, at 123.
201. *Id.* at 124.
202. DELGADO & STEFANCIC, *supra* note 141, at 15.

APPENDIX

Table of race discrimination class action cases
(in employment context) from 01/01/1998-05/03/2001

Name	**Cite**	**Date**	**Treatment**
Adams v. Henderson	197 F.R.D. 162 (D. Md. 2000)	11/01/2000	Certification denied (numerosity not met, damages predominate, and individual issues predominate)
Allen v. Chicago Transit Authority	163 F. Supp. 2d 953 (N.D. Ill. 2001)	04/06/2001	Denial of certification upheld (neither commonality nor adequacy were present)
Allison v. Citgo Petroleum Corp.	151 F.3d 402 (5th Cir. 1998)	08/18/1998	Denial of certification upheld (damages predominate)
Artis v. Greenspan	158 F.3d 1301 (D.C. Cir. 1998)	10/20/1998	Denial of certification upheld (plaintiff failed to exhaust administrative remedies)
Bacon v. Honda of Am. Mfg.	205 F.R.D. 466 (S.D. Ohio 2001)	03/07/2001	Certification denied (no typicality, no commonality, no adequacy of representation, and damages predominate)
Bostron v. Apfel	182 F.R.D. 188 (D. Md. 1998)	08/24/1998	Certification denied (neither commonality nor typicality were present)
Boyce v. Honeywell, Inc.	191 F.R.D. 669 (M.D. Fla. 2000)	02/17/2000	Certification denied (no commonality, no typicality, and no adequacy of representation)
Burrell v. Crown Cent. Petroleum, Inc.	197 F.R.D. 284 (E.D. Tex. 2000)	11/21/2000	Certification denied (damages predominate)
Caridad v. Metro-North Commuter R.R.	191 F.3d 283 (2d Cir. 1999)	07/30/1999	Denial of certification reversed
Cruz v. Coach Stores, Inc.	202 F.3d 560 (2d Cir. 2000)	01/20/2000	Denial of certification upheld (no numerosity, no commonality, no typicality, and no adequacy of representation)

Culver v. City of Milwaukee	202 F.3d 272 (7th Cir. 1999)	10/15/1999	Denial of certification reversed; remanded for further determination
Curtis v. Citibank, N.A.	226 F.3d 133 (2d Cir. 2000)	09/19/2000	Denial of certification affirmed (plaintiffs failed to file motion timely)
Daniels v. Federal Reserve Bank of Chicago	194 F.R.D. 609 (N.D. Ill. 2000)	03/28/2000	Certification granted
Drayton v. Western Auto Supply Co.	203 F.R.D. 520 (M.D. Fla. 2000)	12/06/2000	Certification granted
E.E.O.C. v. Frank's Nursery & Crafts, Inc.	177 F.3d 448 (6th Cir. 1999)	04/23/1999	Denial of certification reversed
Faulk v. Home Oil Co.	184 F.R.D. 645 (M.D. Ala. 1999)	03/09/1999	Certification denied (damages predominate)
Gaines v. Boston Herald	998 F. Supp. 91 (D. Mass. 1998)	03/30/1998	Certification granted
Jefferson v. Ingersoll Int'l Inc.	195 F.3d 894 (7th Cir. 1999)	10/25/1999	Certification vacated (district court needs to determine whether damages predominate)
Lang v. Kan. City Power & Light Co.	199 F.R.D. 640 (W.D. Mo. 2001)	03/01/2001	Certification denied (neither numerosity nor commonality were present)
Lemon v. Int'l Union of Operating Engineers	216 F.3d 577 (7th Cir. 2000)	06/09/2000	Certification vacated (district court abused discretion in certifying without providing class members with personal notice and a chance to opt-out)
Levels v. Akzo Nobel Salt, Inc.	178 F.R.D. 171 (N.D. Ohio 1998)	01/07/1998	Certification denied (no numerosity, no commonality, no typicality, and damages predominate)

Lott v. Westinghouse Savannah River Co.	200 F.R.D. 539 (D. S.C. 2000)	05/25/2000	Certification denied (no commonality, no typicality, and no adequacy of representation)
Lowery v. Circuit City Stores, Inc.	158 F.3d 742 (4th Cir. 1998)	09/14/1998	De-certification upheld (district court did not abuse standard of discretion in determining that a class action would be unfair and inefficient)
McClain v. Lufkin Indus., Inc.	187 F.R.D. 267 (E.D. Tex. 1999)	03/31/1999	Certification granted
Miller v. Hygrade Food Prods. Corp.	198 F.R.D. 638 (E.D. Pa. 2001)	01/29/2001	Certification denied (individual issues predominate)
Morgan v. United Parcel Service of America, Inc.	143 F. Supp. 2d 1143 (E.D. Mo. 2000)	06/26/2000	Motion to de-certify class is denied as moot
Ramirez v. DeCoster	194 F.R.D. 348 (D. Me. 2000)	03/31/2000	Certification denied (damages predominate, and individual issues predominate)
Reyes v. Walt Disney World Co.	176 F.R.D. 654 (M.D. Fla. 1998)	02/03/1998	Certification denied (neither commonality nor typicality were present)
Robinson v. Metro-North Commuter R.R. Co.	197 F.R.D. 85 (S.D.N.Y. 2000)	09/27/2000	Certification denied (individual issues predominate, and no adequacy of representation)
Robinson v. Sears, Roebuck & Co.	111 F. Supp. 2d 1101 (E.D. Ark. 2000)	07/03/2000	Certification granted
Robinson v. Sheriff of Cook County	167 F.3d 1155 (7th Cir. 1999)	02/08/1999	Denial of certification upheld (no adequacy of representation)

San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio	188 F.R.D. 433 (W.D. Tex. 1999)	06/12/1999	Certification granted; settlement approved
Smith v. Texaco, Inc.	88 F. Supp. 2d. 663 (E.D. Tex. 2000)	03/07/2000	Certification granted
Thomas v. Albright	139 F.3d 227 (D.C. Cir. 1998)	03/27/1998	Certification granted; settlement approved
Thornton v. Mercantile Stores Co.	13 F.Supp.2d 1282 (M.D. Ala. 1998)	07/31/1998	Certification denied (dismissed without prejudice)
Walker v. Mortham	158 F.3d 1177 (11th Cir. 1998)	10/28/1998	Renewed motion to grant certification denied; remanded to trial court
Williams v. Ford Motor Co.	187 F.3d 533 (6th Cir. 1999)	08/09/1999	Denial of certification upheld (no specific allegations provided by plaintiffs)
Young v. Magnequench Int'l, Inc.	188 F.R.D. 504 (S.D. Ind. 1999)	08/23/1999	Certification denied (no numerosity, and no adequacy of representation)
Zachery v. Texaco Exploration and Prod., Inc.	185 F.R.D. 230 (W.D. Tex. 1999)	03/18/1999	Certification denied (no commonality, no typicality, and no adequacy of representation)