

Draft Outline for June 2005 AALS Presentation  
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Neil G. Williams  
Loyola University Chicago

What's Race Got to Do with It?: Bailey v. Alabama,  
Glover v. Jewish War Veterans, and the Limitations and  
Possibilities of Contract Law

- I. Introduction.
  - a. A few years back I read an evaluation from a student who was aghast that I'd mentioned the race of a party to a case. My presentation will focus on whether the student made a valid point. Is it appropriate for courts (or for that matter law professors in a classroom setting) to take into account the race of parties, especially when the case appears to be decided on the basis of constructs of contract law whose application (at least on their face) appear to operate independently of considerations of race?
  - b. I will frame the discussion around two cases in the Murphy, Speidel, and Ayers casebook: Bailey v. Alabama, 219 U.S. 219 (1911) and Glover v. Jewish War Veterans, Post No. 58, 68 A.2d 233 (D.C. Mun. Ct. App. 1949).
  - c. In Bailey v. Alabama, as we will see, the Supreme Court mentions the Bailey's race (he's a black man) but makes a point of seemingly deciding the case as if his race didn't matter.
  - d. In Glover v. Jewish War Veterans, Post No. 58, the Court of Appeals doesn't mention Mrs. Glover's race (as we will see she almost certainly was African American) and decides the case based on a tailor-made illustration from the comments to the First Restatement of Contracts. Nonetheless, I will argue, taking into account the racial milieu in which the case was decided can help deepen our understanding of the limitations and the possibilities of the law of Contracts.
  
- II. Bailey v. Alabama, 219 U.S. 219 (1911) (Race Mentioned, But Court Claims It Doesn't Matter)
  - a. Around the beginning of the 20<sup>th</sup> Century it was a common practice in the South to give black laborers advances when they signed long-term agreements to work for an employer. In many cases, however, these arrangements were not truly "voluntary," since African Americans who weren't subject to employment agreements often faced arrest on charges

of loitering or vagrancy. On the other hand, once they signed one of these employment agreements, black Southerners were subject to imprisonment if they did not work for the employer for the entire duration of the contract by virtue of a statutory presumption that a breach of the employment contract was prima facie evidence of an intent to defraud the employer at the time the contract was executed. Alabama was a state that had enacted one of these statutes when Alonso Bailey had the misfortune of signing a contract to work as a farm hand for the Riverside Co. from December 30, 1907, to December 30, 1908, for a \$15.00 advance and a monthly salary of \$10.70. Supposedly without refunding the advance, Mr. Bailey left the employ of the Riverside Co. in early February 1908. In accordance with Alabama law, the jury was instructed that Mr. Bailey's breach of his employment contract was prima facie evidence that he entered into the contract with criminally fraudulent intent. To worsen matters, Mr. Bailey was prevented by an Alabama rule of evidence from using his own testimony to rebut the statutory presumption. Predictably, he was sentenced to 136 days of hard labor.

- b. Curiously, the majority decision made a point of mentioning Bailey's race in order to claim unconvincingly that it didn't matter: they purported to "dismiss from consideration the fact that the plaintiff in error was a black man." Indeed, despite the undercurrent of systematic racial oppression, the majority of the Justices went out of their way to emphasize that they were "view[ing] the legislation in the same manner as if it had been enacted in New York or Idaho" instead of in a Southern state at that peculiar juncture in our country's sordid racial history. To its credit, however, although this Lochner era Supreme Court was reluctant to confront the issue of racial oppression head on, it wasn't at all shy about dealing with the obvious assault on contractual freedom. The net effect of the statute was to transform breaches of contract into crimes. Betraying its professed obliviousness to considerations of race, the Court used language in the opinion that demonstrates it was well aware that Alabama was using the statute to perpetuate a form of quasi-slavery against former slaves and their descendants. Accordingly, the majority struck down the Alabama statute on grounds that it ran afoul of the 13<sup>th</sup> Amendment and a statute enacted by the Reconstruction Congress that prohibited "peonage."
- c. Intriguingly, Justice Holmes dissented from the majority in Bailey, taking his brethren to task for not approaching the case (as they professed to do) as if it had taken place in "New York or Idaho." Justice Holmes' position in Bailey v. Alabama is interesting because it arguably is at odds with two of his most famous pronouncements: (1) The idea that the life of the law is in "experience" not logic; and (2) The pronouncement that when one enters into a contract one simply promises either to perform or pay damages. This paradigm takes on an entirely different tone when one's inability to pay damages for the breach of

contract will result in a complete loss of one's liberty. The stark reality is that the option confronting Alonso Bailey was either to perform the personal services contract or go to prison.

- d. After all is said and done, our appreciation of Bailey v. Alabama is deepened when we take into account the racial context in which the case was being decided.

III. Glover v. Jewish War Veterans, Post No. 58, 68 A.2d 233 (D.C. Mun. Ct. App. 1949) (Court Doesn't Mention Race, But Does It Matter?)

- a. Set in the District of Columbia, the Glover case has its genesis in a \$500 offer of reward made by Post No. 58 (the "Post") of the Jewish War Veterans of the United States following the murder of Maurice L. Bernstein in June 1946. The reward was offered to "the person or persons furnishing information resulting in the apprehension and conviction of the persons guilty of [Mr. Bernstein's] murder." After arresting Jesse James Patterson, one of the suspects in the case, the police learned that the other assailant may have been Reginald Wheeler, who is identified in the opinion as the "boyfriend" of the daughter of Mrs. Mary Glover. Upon being visited by the police, Mrs. Glover provided authorities information about Mr. Wheeler's and her daughter's possible whereabouts, resulting in Mr. Wheeler's apprehension in Ridge Springs, South Carolina. After her attempt to collect the reward was refused, Mrs. Glover filed a law suit against the Post. At trial, Mrs. Glover and her husband honestly admitted that they didn't know about the offer of reward until at least a day after the interview with the police.
- b. Based on these testimonial admissions, the District of Columbia Municipal Court of Appeals dispatched Mrs. Glover's appeal by using apparently unassailable contractual logic. Pointing to sources like Williston and a tailor-made illustration from the First Restatement of Contracts, the court concluded that "there can be no contract unless the claimant when giving the information knew of the offer of the reward and acted with the intention of accepting such offer; otherwise the claimant gives the information not in the expectation of receiving a reward but rather out of a sense of public duty or other motive unconnected with the reward." In other words, one can't assent to (or give a performance in exchange for) an unknown offer.
- c. Unlike in Bailey v. Alabama, this court does not mention Mrs. Glover's race. Nor does it appear at first glance that it would be relevant for it to have done so, given that as a matter of black letter contract law the court's reasoning was unassailable. Nonetheless, over the years I've occasionally interjected race into my discussion of case by means of a hypothetical questioning whether the common law could or should respond IF it were established (1) that Mrs. Glover was African-American and (2) that the organization's refusal to pay Mrs. Glover the reward was grounded, at least in part, in considerations of race. The hypothetical is intended to spur a discussion over whether "neutral"

principles of contract law (like the rule in the Glover case, principles that are often clumped under the rubric of “freedom of contract”) are truly “neutral” to the extent they can be used to shield decisions that may reflect racial biases.

- d. But for purposes of using the Glover case for this conference, I first had to confront the possibility that perhaps my hypothetical was based on incorrect racial assumptions I made. Based on tidbits of information in the opinion, as well as its tone, I had convinced myself that Mrs. Glover was probably African American. What if turned out that Mrs. Glover was white? If that was in fact the case, the focus of my discussion at this conference might be on how even African Americans can make unjustified assumptions when reading decisions, ill-advisedly imagining racial demons where there are none.

#### IV. An Investigation Into the Racial Background of Glover v. Jewish War Veterans, Post No. 58.

- a. The Investigation. One of my research assistants made it her mission to ascertain Mrs. Glover’s race. My research assistant’s task was made all the more formidable by the fact that the name Mary Glover is so common, and Mrs. Glover’s maiden name (Mary Jones) even more so. In the 1930 census (the most recent census detail available to the public) there were six Mary Glovers listed as living in Washington, D.C. alone, and literally dozens of women named Mary Jones. But we have gathered key information from which we have been able to surmise that Mrs. Glover was indeed almost certainly African American. The key find was a newspaper picture of Reginald Wheeler, who indisputably was black. Indeed, it turns out that he was more than Mrs. Glover’s daughter’s “boyfriend,” as he was described in the appellate court opinion. Reginald Wheeler was her daughter’s *husband* at a time when interracial marriages were rare in this country and were even illegal in many jurisdictions, including South Carolina (the state to which Mr. Wheeler fled in the company of his wife). In providing information to the authorities, Mrs. Glover facilitated the arrest of her own son-in-law, who subsequently was executed for Mr. Bernstein’s murder.
- b. The newspaper accounts are a fascinating mirror of the racial attitudes of 1940s America. They are filled with stereotypic references to matters like “zoot-suited Negroes” and describe Reginald Wheeler as being captured cowering naked in a South Carolina cotton field. Against this backdrop it is not unimaginable that Mrs. Glover might have believed (rightly or wrongly) that the Post’s decision not to pay her the \$500 reward was based in part on her race. This would perhaps explain her persistence in maintaining the case against the organization, as well as a separate case (which she lost on the same legal theory) in which she sought a reward that had been offered by the District of Columbia government for information leading to the capture of Mr. Bernstein’s

murderers. See Glover v. District of Columbia, 77 A.2d 788 (D.C. Mun. Ct. App. 1951). However, even if Mrs. Glover felt she was being discriminated against, the structure of Contract law (as it was perceived at the time) would have silenced her by preventing her from addressing her concerns in this regard to the court.

- c. Of course, it may well be that the Post's decision not to pay Mrs. Glover the rewards had nothing to do with her race. For example, there might have been a perception that Mrs. Glover may have sheltered a family member whom she knew to be a murderer and therefore was morally undeserving of the reward. One might still wonder, however, why the Post was so readily willing to assume the worst about Mrs. Glover. Newspaper accounts at the time suggest that she and her daughter were unaware that Reginald Wheeler was suspected of murder when he left D.C. for South Carolina. Were the Post's reasons for denying Mrs. Glover the reward money in any way racially motivated? If Mrs. Glover were to have felt she was being discriminated against, might not that perception itself have been a reflection of her own racial biases? We will never know the answers to these questions because black letter Contract law shut down these lines of inquiry. But these are the precisely the kinds of questions we need to be discussing if we are going to heal our racially divided society.
- d. In any event, the chilly reception Mrs. Glover received when she sought the rewards for Reginald Wheeler's capture stands in stark contrast to the eagerness of group after group to heap \$70,000 of reward money on Ashley Smith (a white woman) for her recent efforts in helping bring the Atlanta courthouse killer (Brian Nichols, an African American) to justice. There has been no attempt by any of the various entities offering rewards to deny Ashley Smith recovery on the happenstance that she may not have been aware of their particular offer of reward.

V. What Can Be Gained from Discussing Race in relation to cases like Glover v. Jewish War Veterans, Post No. 58?:

- a. The basic Contracts course is essentially a collection of stories that shape the way we and our students think about this area of the law and many of the more important relationships in our society. Contract law establishes a framework for how we go about telling these stories. Appreciating the context in which cases are decided can be the basis for exploring Contract law's limitations and (more importantly) its possibilities in addressing concerns of race that continue to challenge contemporary society.
- b. In particular, cases like Glover can be used as a backdrop for a general discussion of the relationship between the principle of "freedom of contract" and the anti-discrimination norm, perhaps the most important statutory limitation on that principle. One of the basic roles of the common law is to serve as this society's central conscience, a repository

of our basic values and mores. But can the anti-discrimination norm be squared with the basic structure of the common law of Contracts? Or is this area of the law (at least in this regard) a rigid relic of the past out of step with contemporary mores and values?

- c. Given the iron-clad rule of Contract law invoked by the court in Glover, perhaps the law of Restitution is the most practical common-law theory for addressing the particular concerns raised by my Glover hypothetical: One arguably is unjustly enriched to the extent one has received a benefit for which one would be willing to pay but for the race of the party who conferred the benefit.
- d. More broadly, I propose that accommodations be made in the basic structure of the common law of Contracts itself, so that a new section in the Third Restatement of Contracts would recognize that “no one may discriminate on the basis of race while entering into, performing, enforcing, or terminating any contract.”