The Derrick Bell Reader

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Edited by
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The Derrick Bell Reader

Introduction

The bespectacled, 59-year-old law professor leaned back in his chair and looked out his office window, a pensive expression clouding his scholarly, unlined features. Outside, groups of students walked across a grassy quad framed by stately, traditional buildings. One, wearing a maroon sweatshirt with "Harvard" emblazoned on the front, gesticulated animatedly to a friend on their way to a morning class.

Viewing, almost breathing in, the bucolic scene, he smiled. He loved teaching and felt that a college campus was as close to a fountain of youth as he would ever get. And it didn't hurt that the world believed the school where he now held a named chair was the finest in the world. That young woman out there, black like him, might be in law school one day. She might excel, even aspire to be a law professor. How receptive would that world be to candidates like her?

He reached for a yellow pad and began scribbling notes for the talk he planned to give at the student rally scheduled for noon. It had been at least two weeks since he had written a letter to the dean with copies to every faculty member. Coming at the end of a full year of unsuccessful efforts by student groups, the letter announced his decision to take an unpaid leave until the school hired and tenured a woman of color. He had not made that letter public, but neither had he heard back from the dean or the faculty. Their silence, as he had learned from earlier protests, was tantamount to rejection.

A few faculty members had privately expressed concern as to how he would pay his bills. He replied quietly that at this point, he was more concerned about saving his soul. A well-meaning faculty friend came by his office, closed the door, and told him that he and his wife would pay one month of his home mortgage, insisting that Bell keep the payment confidential. Bell thanked him and promised to get in touch if he needed the help. He never did. The friend did not understand that Bell needed his

public support for his protest far more than his private financial aid. A former student, now a member of the faculty, did call and offer to join Bell in his protest. Bell responded that he appreciated his offer, but urged him to remain on the faculty, where he was developing a clinical program that the students badly needed.

Believing it might be useful to the student activists and faculty of color, he gave the letter to the leaders. One of them, Keith Boykin, negotiated an exclusive to the New York Times, *resulting in a front-page story that very morning. Keith predicted, accurately as it turned out, that the media would be out in force covering the rally.*

While styled a protest, his action turned out to be a deferred resignation. For that was what he would, in effect, be doing by taking an unpaid leave until the school hired and tenured its first female law professor of color. His colleagues, mainly confident white men, were unlikely to yield to what they would see as pressure tactics, especially from the school's first tenured African American law professor, someone who wrote provocative, counterintuitive essays on race and racism rather than more traditional law review articles loaded with footnotes about contracts, corporations, and other mainstream legal subjects.

No matter that his text on race and the law, first published in 1973 and then in its third edition, had been adopted for civil rights courses across the country. His many writings, including a trade book based on a Harvard Law Review Foreword, *were widely read, and his courses were among the most popular in the law school. None of these accomplishments would move more than a small number of the faculty to take seriously his insistence that the absence of women of color on the faculty deprived the school of unique perspectives.*

In part because of his continuing efforts, five other black men now served on the faculty, three of them tenured. Paradoxically, their long-resisted presence now served as proof to most observers that the faculty did not discriminate and would, as they promised, hire a woman of color when one surfaced who met their standards.

He stood up and began to pace. He had good friends on the faculty. If even one or two of those with prestigious reputations were to agree to join his protest, its prospects would have been much improved. His colleagues might see that many black woman lawyers, including some teaching at other schools, easily met their standards—something he could not say for some of his colleagues who had not written a thing in years but

nevertheless adamantly opposed the appointment of one black woman after another, many of whose names he had brought forward himself.

But he stood alone. A few of his liberal colleagues had told him, in private, that they were with him. But when it came time to vote, most invariably melted away, switching sides or abstaining. As a result, no black woman candidate was able to gain the requisite vote.

Despite all the battles, mostly lost, he realized that he would really miss this place, particularly the students, many of whom showed him a level of love and respect that brightened even the more difficult times. "Is it possible," he muttered to himself, "that some of my friends are right, and with almost fifteen years of service here, I can do more working from within?" He smiled, recalling that he had rejected similar advice more than thirty years earlier when he had chosen to leave the Justice Department over its ultimatum that he resign from the NAACP and that he had asserted for years that civil rights lawyers and activists need to stand ready to supplement petitions, lawsuits, and other forms of polite supplication with street protests and other forms of militancy. He turned to his computer and began writing his speech to what he expected would be a large and supportive gathering of students.

Birth of an Activist-Scholar

Derrick Bell grew up in a black neighborhood of Pittsburgh known as "The Hill." The oldest of four children, Bell credits his mother for inspiring him to work hard, succeed, and stand ready to challenge unjust authority. He cites conversations with his father for his early training in the white man's world. Both parents insisted that because of racial discrimination, black people had to be twice as good to get half as much. His father, born in Alabama, had been forced to leave as a teenager. Attending a county fair, and snapping a small toy whip, he had angered two white boys who, proclaiming that "no nigger should have a whip," whipped him with a bull whip they were carrying. He later came upon them without the whip and beat up both of them. Fearing for his safety, his family sent him north to stay with relatives in Pittsburgh. There he met Bell's future mother, whose plans for a college education were postponed permanently when the two married in early 1930. Bell was born in November.

After graduating from public high school in 1948 and Duquesne University in Pittsburgh in 1952, Bell served two years in the Air Force, including one in Korea. He returned to his home city to study law at the University of Pittsburgh, earning his degree in 1957. In addition to family support, Bell cites his experience delivering newspapers during his high school years as a key source for his interest in law. Two of his customers were lawyers and a third, the only black judge in western Pennsylvania. Bell was impressed by their lifestyle and valued the encouragement they and their wives provided.

In his class of 120 students, he was the only black, and in the school, only one of three. In those days, the school had no women students of any race. Bell was a determined student, studying long hours, speaking up in class, and earning good grades that won him a position on the school's law review. He published several pieces in his first year on the review, impressing his contemporaries enough that they selected him associate editor in chief.

As graduation loomed, the young Bell's academic credentials carried little weight in his home town, whose leading law firms did not then hire blacks. The few black practitioners were not able to take on a young, inexperienced lawyer, and he had little interest in setting up an office on his own. On the recommendation of a few of his professors, he gained a position in the Honor Graduate Recruitment Program recently established at the United States Department of Justice, where he worked for a year on appeals by men seeking exemption from the draft as conscientious objectors.

Because of his continued interest in racial issues, he obtained a transfer to the newly formed Civil Rights Division in 1958, but his tenure there proved short. After several months, his superiors learned that he was a member of the NAACP. Considering this affiliation to be a conflict of interest, and probably fearful of controversy with southern members of Congress, they demanded that he surrender his two-dollar membership. When he refused, they took him off race cases and assigned him to perform routine work, moving his desk to the hall outside his former office. He took their hint, and muttering a few choice words about *Sweatt v. Painter,* soon resigned.

Returning to Pittsburgh, he obtained a position as executive director of the local branch of the NAACP, a nonlegal position. While working there, he met Thurgood Marshall, then director of the organization's legal arm, the NAACP Legal Defense and Education Fund, when the famous

lawyer visited Pittsburgh on a speaking tour. Marshall knew about Bell's resignation from the Justice Department and, impressed with the young attorney-without-portfolio, offered him a position on his staff. Bell immediately accepted, moved to New York, and soon was working on important civil rights cases with a small but elite cadre of four attorneys: Thurgood Marshall, Constance Baker Motley, Jack Greenberg, and James Nabrit III. It was an ideal position, one he recognized he would have not obtained had he not challenged the Justice Department's conservative personnel policy.

During his years with the fund, 1960–1966, Bell litigated or supervised almost three hundred school desegregation cases throughout the South. During these dangerous and unsettled times, local police officials kept close track of his activities in their towns, and federal judges not only rejected his arguments—although they were based on settled legal principles—but would also turn their backs on him while he was arguing in open court.

Travel was risky, particularly when Bell went to meet with clients in rural areas where the roads were narrow and often unmarked. Even plane flights could be harrowing. On one occasion, a snow storm prevented his plane from landing in Jackson, Mississippi. It landed instead in Memphis and Bell took a late night train that was crowded and unheated. Cold and tired, he tried to call a local attorney to come for him. Unwittingly, he had entered a telephone booth in the whites-only waiting room. White policemen showed up and dragged the young attorney off to jail, where he spent the night.

Bell left the Legal Defense Fund in 1966 but continued his school desegregation work as deputy director of the federal Health, Education, and Welfare Department's Office for Civil Rights. By this time, he had become interested in teaching law, but inquiries to several schools led nowhere. In 1967, Bell agreed to serve as the first executive director of the newly established Western Center on Law and Poverty, a public interest and litigation center sponsored by the University of Southern California Law School in Los Angeles, California. His new position afforded him the opportunity to run a public interest law program as well as to teach civil rights as an adjunct professor at USC.

He moved his family to Los Angeles and settled in for what he thought would be a long stay. Then, the urban rebellions broke out across the country in the wake of Dr. Martin Luther King's assassination in the spring of 1968. Soon, many law schools, along with corporations and

government agencies, recognized the need to add a few blacks to their all-white professional staffs. Bell began receiving urgent expressions of interest from a half-dozen top schools. Following a personal recruitment effort by its then dean, Derek Bok, he agreed to join the Harvard Law faculty in the fall of 1969 with the understanding, as the dean put it, "that he would be the first, but not the last black" they would hire.

Finding His Voice

The next few years were filled with challenges. These included the usual ones a new professor faces. He had to come to terms with teaching and students, earn his colleagues' respect, and write enough to justify his position on the faculty. But his status as the school's first and only black professor added a special dimension. Black students flocked to him, seeking his advice and consolation. White students recognized his interest and willingness to spend time with them. His office was seldom quiet.

He also had to earn the respect of many skeptical white and some black students who wondered—even if they did not say it—if his status as an affirmative action hire meant that he was not as qualified as the other professors. Bell worked hard at his teaching, developing innovative approaches to constitutional law and race courses. Over time, his courses became among the most popular in the curriculum.

The faculty proved more resistant. He and his colleagues differed over many issues, particularly faculty hiring and promotion. They also differed in their background and experiences. Not only were they white and Bell black. Class separated them as well. Bell, unlike many on the Harvard Law faculty, had not come from a well-to-do family, attended a prestigious college and law school, and clerked for a U.S. Supreme Court justice. Few of them considered race and racism, his areas of teaching and scholarship, of significant intellectual value.

Bell's contract provided that, as a senior recruit, he would come up for tenure at the end of his second year. Although he had published a number of essays in law reviews, publication was not a consideration in the tenure decision. Rather, tenure would be based on his teaching and mentoring of students. His civil rights course had gone well, but in response to some black students' concerns about no blacks teaching in the basic curriculum, he had agreed to teach a large first-year criminal law course. Choosing to focus on what he felt were inadequacies in this course, the

chair of the appointments committee counseled him to defer the tenure decision for a year while he strengthened his teaching in that course. After consulting with his wife, Jewel, he decided to ignore this advice and go up for tenure at the agreed time. "After all," she reminded him, "Harvard needs us more than we need Harvard." His wife's grasp of the situation proved accurate. The faculty tenure vote was affirmative and Bell became the first black law professor at the Harvard Law School.

Two years later, Bell published the first edition of his text, *Race, Racism, and American Law.* Its success seemed to lessen rather than increase interest in hiring more blacks. Frustrated, Bell threatened to resign unless the school honored the "first but not last" promise the dean had made to him when he had been hired. A second black man, C. Clyde Ferguson, was appointed, but the dean made it clear that Bell's resignation threat had nothing to do with it.

Bell's activism did not come at the cost of his writing. A few years later he published two law review articles of startling originality that won him widespread attention in the law school world. The first was "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," published in *Yale Law Journal* in 1976. Bell had became convinced that the black community did not need—or, in many cases, want—busing, the school desegregation remedy that civil rights lawyers had been pursuing for at least a dozen years. Instead, they wanted better schools. This kind of talk was heresy within the NAACP, which at that time was staunchly committed to enforcing the mandate of *Brown v. Board of Education,* their great legal breakthrough.

Bell sounded what turned out to be one of his signature themes: the conflict of interest inherent in much public interest litigation. American law requires a flesh-and-blood plaintiff, usually an ordinary person, with "standing"—a specific, concrete grievance with a specific actor or defendant. Much public interest litigation, however, is maintained by specialized litigation centers, like the NAACP Legal Defense Fund or the National Organization of Women. These litigators must represent victims of the policies they want to change. The idea is to file a case challenging the unjust policy, determined to take it to the Supreme Court in the hope that it will announce new law.

In all this, the attorney's overarching objective is to change the law. He or she wants to bring about a great breakthrough, one that will move things in the direction the litigation center wants. For example, when feminist attorneys litigated and won the abortion decision, *Roe v. Wade,*

they were as interested in the legal principle of reproductive privacy as the fortunes of the plaintiff, Roe. And when Thurgood Marshall and his colleagues at the NAACP Legal Defense and Education Fund argued *Brown v. Board of Education,* they were as interested in establishing the principle that separate but equal schools violated the Fourteenth Amendment as they were in improving the lives of the specific parents who brought suit and of their children.

What Bell noticed was that in many school desegregation cases, what the black community wants and what the law-reform-bent lawyers want are subtly different. The clients want better schools, while the lawyer wants integrated schools. In the early years after *Brown,* these objectives coincided. Later, they did not. What if desegregating a large school district results in the loss of many jobs by black teachers and administrators? What if the district closes down the black school, which formerly served as a refuge and nerve center for the black community, and buses black school children to hostile white schools located on the other side of town? Can an attorney, in good conscience, advocate for a remedy that his or her law-reform organization believes is best but that the client community does not really want or need? Or must he or she be guided exclusively by the client's interest, and, if so, how does one go about ascertaining what that interest is?

While the legal community was considering those issues, Bell published a second article a few years later in the pages of the *Harvard Law Review.* Entitled "*Brown v. Board of Education* and the Interest Convergence Dilemma," this second article explored a further aspect of that famous case, namely, its place in history and what brought it about. Bell began by asking why the Supreme Court decided the famous case when it did. After all, Bell's old organization, the NAACP Legal Defense Fund, had been arguing school desegregation cases for decades and had been either losing or winning only narrow, incremental victories. Yet, in 1954, the Court declared that in pupil assignment cases, separate is never equal.

What caused the Court to take this audacious step just then? Most Americans, indeed most lawyers, probably thought that American society had finally achieved a moral breakthrough and realized that separation was demeaning and harmful to black school children. The Court merely followed suit. Bell's answer—that international appearances and the self-interest of elite whites dictated that blacks receive a spectacular breakthrough—provoked cries of outrage and condemnation as being too cynical.

Still, it rang true for many of his readers and constituted an early, and impressive, statement of a key critical theme—revisionist history. It also may have opened a breach between Bell and many conventional liberals in the law school world. After his first major article in *Yale Law Journal* came out, discussing the conflict of interest between lawyer and client in public interest litigation, Bell recounts how Paul Bator, a famous colleague, made a trip to his office. Bator told Bell that he had read the article and had come by to congratulate him. "This is really good," he said. Few of his colleagues reacted that way to his realist demotion of *Brown v. Board of Education,* a mainstream of liberal jurisprudence and a crown jewel of American legal thought.

A New Challenge: University Administration and Politics

Soon after publication of the Harvard article, Bell's life took a different turn. During a sabbatical year teaching at the University of Washington Law School in Seattle, he received an invitation from Eugene Scoles, a former dean at the University of Oregon Law School, to come to Eugene for a visit and perhaps put his hat in the ring for the deanship there. Bell liked Eugene and the school, and with the reluctant approval of his wife and three now teenage children, he decided to apply for and was named to the position.

Life in Eugene proved eventful and full of new challenges. Bell had to learn how to conduct faculty meetings, decide upon pay raises for the faculty, raise funds from alumni and wealthy patrons, and deal with the usual range of student complaints. He seems to have been a successful, if somewhat unconventional, dean. Despite an administrative style that featured an emphasis on teaching and increasing student and faculty diversity, he lasted five years, considerably longer than the average. In particular, he seems to have been a better fundraiser than anyone expected.

The many demands of a dean's life did, however, require putting aside his scholarship. For the first few years, he wrote little, none of it pathbreaking. Then, one day the telephone rang. It was the president of the *Harvard Law Review,* inviting him to compose the prestigious annual Foreword to the 1984 Supreme Court issue. His draft was due in a matter of months and could deal with any issue having to do with recent Supreme Court developments.

Such an honor comes rarely to a legal scholar. Bell, wondering where he would find the time, finally agreed and then began casting about for a novel approach and a focus. All the previous Forewords featured the predictable cases-and-policies format that identified various emerging or implicit models in Supreme Court jurisprudence and weighed in on the side of the author's favorite. Bell hit upon the idea of using legal storytelling, discussing legal problems and issues in the form of dialogues between himself and a fictional super-lawyer, Geneva Crenshaw, who had known Bell in their former lives when they had practiced law at the NAACP Legal Defense Fund, but whose life since that time had taken a dramatic turn. The two old friends discuss racial remedies, the search for justice, affirmative action, and many other topics—all in the pages of *Harvard Law Review.* Bell later turned the format of his fictional chronicles into a series of books, one of which, *Faces at the Bottom of the Well,* briefly made it onto the *New York Times* bestseller list.

Bell resigned his position as dean when he and his faculty found themselves in fundamental disagreement over the hiring of a young Asian American teaching candidate, whom the appointments committee had listed third in a list of over one hundred candidates for an open teaching position. When the top two candidates declined, instead of offering the position to the Asian woman, the committee convinced a majority of faculty to reopen the search. Knowing she was fully qualified and convinced that hiring the school's first Asian American law professor was the right thing to do, Bell announced his resignation effective at the end of the school year.

Paradoxically, Bell's Supreme Court Foreword had just come out, so his academic star had never shone more brightly. His wife, Jewel, who had taken a position heading a University of Oregon academic support program for minority students, wanted another year to continue her work. To accommodate her wish, Bell remained in Eugene but accepted an invitation to deliver a series of lectures at other law schools around the country. Then John Ely, a former colleague at Harvard serving as dean at Stanford Law School, invited Bell to visit and teach constitutional law there for the spring semester.

Bell had taught the subject at Harvard and was both an accomplished teacher and a well-known scholar in that field, so the assignment seemed like a good idea. His wife could wind up her work and the children could complete the school year in Eugene. Bell rented a room in the home of a

Stanford Law School administrator and commuted many weekends back to Eugene.

When school started, Bell found himself in front of a class of new students. At Stanford, Constitutional Law is a required first-year course to which students are assigned. Of three sections, two were taught by members of the regular faculty. As he had done at Harvard, he used a standard casebook but emphasized that to understand the Constitution, one had to keep in mind that the Framers were men of wealth with investments in land, slaves, manufacturing, and shipping. The document they fashioned served their primary interest in protecting vested property. When students suggested that he was being too hard on the Framers, he referred them to the classic work of Charles Beard, *The Economic Interpretation of the Constitution*. The students were unfamiliar with Beard and uncomfortable with any criticism of the country's origins, particularly from this unknown visitor from Oregon.

After a few weeks, Bell noticed that a number of students were not attending his class. Then he received an invitation from a student group inviting him to join other faculty members in a series of enrichment lectures about current constitutional issues. Asked to speak on race, Bell readily agreed, considering it an indication of his acceptance in his new community, and set about preparing his speech. His happiness turned to chagrin a little later when a delegation of black law students visited him to warn him that the lecture series was actually designed by a faculty member who, without discussing it with him, accepted student complaints that Bell was teaching them constitutional law in a strange and unconventional way. The lecture series, in short, was aimed at rectifying his own perceived weaknesses as an instructor.

The black students wanted to protest the series and Bell urged them to do so, promising to express his outrage with the dean. When at the start of the first lecture the black students condemned the series as racist, the lecturer refused to go on and the series was promptly canceled. In addition, Bell learned that in clear violation of school rules, the other two constitutional law teachers had permitted his students to sit in on their classes. The faculty member who had set up the lecture later apologized to Bell, explaining that every teacher loses a class from time to time, and he was just trying to ensure that Bell's students would not miss out on the basics of this important course.

Bell explained that every black teacher potentially loses the class when he or she walks in and students see an unfamiliar black face. The chal-

lenge is to prove that competent teaching can come in all colors, and the lecture series as well as other faculty who had allowed his students to attend their classes had interfered with Bell's effort to do just that.

Dean Ely apologized and urged Bell to forget the incident. After pondering this advice, Bell resolved instead to make an issue of it. In a long column entitled "The Price and Pain of Racial Remedies," published in *The Stanford Lawyer,* Bell described the incident and challenged the Stanford community to reflect on what it meant about themselves and the school's racial climate. In addition, with the help of a few friends teaching at other law schools, he prepared and mailed letters detailing the incident to law school deans across the country, urging that to avoid similar situations that could destroy a young, inexperienced teacher, they schedule the matter for discussion at their faculty meetings.

After responding at first defensively, Stanford took Bell's challenge to heart, holding a series of town hall meetings to discuss the institution's own receptiveness to innovative teaching, racial minorities, and diverse viewpoints. The self-searching continued well after Bell left Stanford.

Over the years of his deanship, Harvard had made it clear that he would be welcome to return there. Hoping that his academic achievements would provide him with a status that had eluded him during his earlier time at Harvard, he decided to do so.

Back at his old school, Bell resumed his teaching, writing, and advocacy on racial issues. By then, three additional black men were teaching at Harvard Law School, but no woman of color. Prompted by women students of color, Bell reluctantly came to agree with their position that a black man, like him, or a white woman, like those few on the Harvard faculty, could not fully understand the pressures women of color faced in law school and would encounter in practice. The school needed law professors who could both serve as role models for minority women and provide unique perspectives to the law school community at large.

Bell, who had championed the cause of minority hiring both at Harvard and at Oregon, began assisting a group of progressive students urging Harvard to hire its first woman professor of color. He refused to accept his faculty colleagues' usual excuses: "The pool is so small." "All the good ones have a myriad of opportunities, some paying much more than we can offer." "We may have to wait a while until really good ones come along—you don't want us to sacrifice quality, do you? How fair would that be for the students, white or black?"

Tenured professors from other law schools often received invitations to spend a semester or a year in what are referred to as "look-see" visits, trial periods during which the Harvard faculty could interact with them and see if they measured up. During the 1989–90 school year, a black woman from a top school came for one of these visits. Bell felt she had brought all the qualities that had prompted the years-long effort. The faculty disagreed. The student advocates were disappointed; Bell, disgusted. With the school year drawing to a close, he announced that he would take an unpaid leave of absence until Harvard Law School hired its first woman of color.

His decision did not come lightly. His wife, Jewel, his major support for thirty years, was seriously ill with breast cancer. She did not oppose this latest action, but wondered why he was always the one who took risks to protest what he considered racial injustices. Bell, devastated by her death three months later, remained determined to see his battle through.

For the next year, Bell supported his children and himself with lectures, book royalties, and consultancies. He then sought and obtained a second year of leave, but the school warned him about a university rule limiting tenured members of the faculty to two consecutive years of absence. During that year, John Sexton, a former student who had taken Bell's class years earlier while a Harvard law student, got in touch with Bell. Now dean at New York University Law School, Sexton offered Bell a visiting position at the school, which he accepted.

A year later, his situation still unresolved with no woman of color appointed, Bell asked Harvard for a further extension. The answer came back quickly: denied. Bell's appeals were unsuccessful. Sexton offered to request his faculty to vote Bell a tenured appointment. Bell declined, but indicated his willingness to teach on a year-to-year basis. Sexton worked out the details, referring to Bell as the Walter Alston of legal academe. (Alston had managed the Brooklyn and later the Los Angeles Dodgers for twenty years, never receiving more than a one-year contract.) Bell is now working on his fourteenth year of one-year contracts.

New York University turned out to be a good home for Bell. He continues to be popular with the students, who flock to his courses. He developed what he calls a participatory teaching method that enables students to learn by doing, as they would in a clinical course, and by teaching one another. In addition to his demanding teaching schedule and

several lectures at other schools, Bell has completed nearly a book a year in his period at NYU, an extraordinary pace for a law professor, young or old.

As a permanent visitor, Bell does not attend faculty meetings or participate in faculty governance—which, he ruefully admits, helps keep him out of trouble. When he turned sixty-five, his second wife, Janet, whom he married in 1992, raised money to establish an annual Derrick Bell Lecture. Attended by a huge and growing crowd of former students and current friends, the Bell Lecture features an invited speaker discussing Bell's work in the context of current developments in race law. He rides the subway to the law school on the days he teaches but does most of his writing at home. Now in his mid-seventies, Bell has no plans to retire and will continue teaching and writing as long as his health permits.

Major Themes in Bell's Writing

Easily among the most productive and innovative legal scholars of his generation, Bell has pioneered at least three areas of scholarship: critical race theory, narrative scholarship, and economic-determinist analysis of racial history. In the law school world, he has few peers. In the world of public affairs, he stands with Cornel West and his former students Charles Ogletree and Patricia Williams. As a teacher and innovator of classroom methods, he stands alone.

A great many young scholars view him as a model, but he himself seems to have had no academic mentor who shepherded his early career. Even William Hastie discouraged him from entering the civil rights field on the theory that *Brown v. Board of Education* had solved everything. His inspiration is W. E. B. Du Bois, a black genius who wrote prodigiously and whose views on race and American society brought rejection by black leaders and harassment by the government. Judge Robert L. Carter is a life mentor, admired for his many accomplishments in law and his willingness to recognize new developments and reassess even strongly held earlier views.

This book is divided into fifteen chapters, each corresponding to a theme or emphasis in Bell's writing. The excerpts cover a wide range of topics, from revisionist history and interest convergence to school desegregation

and black nationalism. Some are written in elegant expository prose; others, in the narrative form for which Bell is famous.

Each section opens with a short introduction by the editors, describing the material to follow and placing it in the context of Bell's thought. Most of the excerpts contain very few footnotes; the reader seeking the full versions is encouraged to consult them at any major law library or bookstore.

This volume collects works of Bell that we considered either exemplary —his best work—or illustrative. Bell has written over one hundred articles and ten books. Accordingly, we were forced to make some hard choices and left out some very good material. A bibliography at the end of the book contains a list of his works, as well as information regarding the Derrick Bell Archive at the NYU Bobst Library.

[Eds. The actual letter Bell wrote, announcing his intention to take an unpaid leave as a protest against his school's refusal to hire its first black woman law professor, appears in chapter 6, this volume.]

Prologue

The Chronicle of the Constitutional Contradiction

Excerpted from one of Bell's signature volumes, And We Are Not Saved, *this famous Chronicle serves as an entry point for Bell's work. Clearly and simply written, it introduces Bell's fictional interlocutor and alter ego, Geneva Crenshaw, as well as several of Bell's themes that the reader will meet elsewhere in this book—economic determinism, racial realism, revisionist history, and the role of white racism in maintaining the country's social equilibrium. It also introduces legal storytelling, a device Bell pioneered to render complex legal concepts comprehensible to the average reader.*

In the Chronicle, Geneva time-travels back to the Constitutional Convention of 1787. Once there, she challenges the Framers to reconsider the contradiction they are creating as they incorporate slavery into the U.S. Constitution, which promises liberty and justice for all.

At the end of a journey back millions of light-years, I found myself standing quietly at the podium at the Constitutional Convention of 1787. . . . The three dozen or so convention delegates looked tired. . . . They knew this was a closed meeting, and thus could not readily take in the appearance, on what had just been an empty platform, of a tall stranger—a stranger who was not only a woman but also, all too clearly, black.

. . . .

"Gentlemen," I said, "my name is Geneva Crenshaw, and I appear here to you as a representative of the late twentieth century to test

whether the decisions you are making today might be altered if you were to know their future disastrous effect on the nation's people, both white and black."

For perhaps ten seconds, a shocked silence reigned. Then the chamber exploded with shouts, exclamations, oaths. . . . A warm welcome would have been too much to expect, but their shock at my sudden presence turned into an angry commotion unrelieved by even a modicum of curiosity.

. . . When I remained standing, unmoved by their strong language and dire threats, several particularly robust delegates charged toward the platform, determined to carry out the shouted orders: "Eject the Negro woman at once!"

Suddenly the hall was filled with the sound of martial music, blasting trumpets, and a deafening roll of snare drums. At the same time a cylinder composed of thin vertical bars of red, white, and blue light descended swiftly and silently from the high ceiling, nicely encapsulating the podium and me.

. . . As each man reached and tried to pass through the transparent light shield, a loud hiss broke out, quite like the sound that electrified bug zappers make on a warm summer evening. While not lethal, the shock each attacker received was sufficiently strong to knock him to the floor, stunned and shaking.

The injured delegates all seemed to recover quickly, except one who had tried to pierce the light shield with his sword. The weapon instantly glowed red hot and burned his hand. At that point, several delegates tried to rush out of the room either to escape or to seek help—but neither doors nor windows would open.

"Gentlemen," I repeated, but no one heard me in the turmoil of shouted orders, cries of outrage, and efforts to sound the alarm to those outside. Scanning the room, I saw a swarthy delegate cock his long pistol, aim carefully, and fire directly at me. But the ball struck the shield and ricocheted back into the room. . . .

At that, one of the delegates, raising his hand, roared, "Silence!" and then turned to me. "Woman! Who are you and by what authority do you interrupt this gathering?"

"Gentlemen," I began, "delegates, . . . fellow citizens, I—like some of you—am a Virginian, my forefathers having labored on the land holdings of your fellow patriot, the Honorable Thomas Jefferson. I have come to urge that, in your great work here, you not restrict the sweep of Mr.

Jefferson's self-evident truths that all men are equal and endowed by the Creator with inalienable rights, including 'Life, Liberty and the pursuit of Happiness.'" It was, I thought, a clever touch to invoke the name of Thomas Jefferson who, then serving as American minister to France, was not a member of the Virginia delegation. But my remark could not overcome the offense of my presence.

"How dare you insert yourself in these deliberations?" a delegate demanded.

"I dare," I said, "because slavery is an evil that Jefferson, himself a slave owner and unconvinced that Africans are equal to whites, nevertheless found introduced 'a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other.' Slavery, Jefferson has written, brutalizes slave owner as well as slave and, worst of all, tends to undermine the 'only firm basis' of liberty, the conviction in the minds of the people that liberty is 'the gift of God.'"

. . . .

A hush settled in the group. No one wanted to admit it, but Jefferson's ambivalence on the slavery issue obviously bore meaning for at least some of those in the hall. . . .

"The stark truth is that the racial grief that persists today," I ended, "originated in the slavery institutionalized in the document you are drafting. Is this, gentlemen, an achievement for which you wish to be remembered?"

Oblivious to my plea, a delegate tried what he likely considered a sympathetic approach. "Geneva, be reasonable. Go and leave us to our work. We have heard the petitions of Africans and of abolitionists speaking in their behalf. Some here are sympathetic to these pleas for freedom. Others are not. But we have debated this issue at length, and after three months of difficult negotiations, compromises have been reached, decisions made, language drafted and approved. The matter is settled." . . .

. . . "Sirs," I said, "I have come to tell you that your compromises will not settle the matter of slavery. And even when it is ended by armed conflict and domestic turmoil far more devastating than that you hope to avoid here, the potential evil of giving priority to property over human rights will remain. Can you not address the contradiction in your words and deeds?"

"There is no contradiction," replied another delegate. ". . . Life and liberty were generally said to be of more value than property, . . . [but] an

accurate view of the matter would nevertheless prove that property is the main object of Society."

"A contradiction," another delegate added, "would occur were we to follow the course you urge. We are not unaware of the moral issues raised by slavery, but we have no response to General Pinckney, who has admonished us that 'property in slaves should not be exposed to danger under a Govt. instituted for the protection of property.'"

"Of what value is a government that does not secure its citizens in their persons and their property?" inquired another delegate. "Government, . . . was instituted principally for the protection of property and was itself . . . supported by property. . . . The security the Southern states want is that their negroes may not be taken from them."

"Your deliberations here have been secret," I replied. "And yet history has revealed what you here would hide. The Southern delegates have demanded the slavery compromises as their absolute precondition to forming a new government."

"And why should it not be so?" a delegate in the rear called out. "I do not represent the Southern point of view, and yet their rigidity on the slavery issue is wholly natural, stemming as it does from the commitment of their economy to labor-intensive agriculture." . . .

"Then," I countered, "you are not troubled by the knowledge that your Southern colleagues will defend this document in the South Carolina ratification debates by admissions that 'Negroes were our wealth, our only resource'?"

"Why, in God's name," the delegate responded, "should we be troubled by the truth, candidly stated? . . . The blacks are the laborers, the peasants of the Southern states."

At this, an elderly delegate arose and rapped his cane on his chair for attention. . . . "If a record be made, that record should show that the economic benefits of slavery do not accrue only to the South. Plantation states provide a market for Northern factories, and the New England shipping industry and merchants participate in the slave trade. Northern states, moreover, employ slaves in the fields, as domestics, and even as soldiers to defend against Indian raids."

I shook my head. "Here you are then! Representatives from large and small states, slave states and those that have abolished slavery, all of you are protecting your property interests at the cost of your principles. . . . Are you not concerned with the basic contradiction in your position: that you . . . in fact represent and constitute major property holders? Do you

not mind that your slogans of liberty and individual rights are essentially guarantees that neither a strong government nor the masses will be able to interfere with your property rights and those of your class? Future citizens of this nation will hold this contradiction, between what you espouse and what you here protect, against you."

"Unless we continue on our present course," a delegate called out, "no nation will come into existence whose origins can be criticized. These sessions come about because the country is teetering between anarchy and bankruptcy." . . .

"Indeed," I said, . . . "I understand the nature of the crisis that brings you here, but the compromises you make on the slavery issue are—"

"Young woman!" interrupted one of the older delegates. "You say you understand. But I tell you that it is nearly impossible for anybody who has not been on the scene to conceive what the delicacy and danger of our situation . . . [have] been. I am President of this Convention, drafted to the task against my wishes. I am here and I am ready to embrace any tolerable compromise that . . . [is] competent to save us from impending ruin."

. . . .

"Thank you, General Washington," I responded. "I know that you, though a slave owner, are opposed to slavery. And yet you have said little during these meetings. . . . Future historians will say of your silence that you recognize that to throw the weight of your opinion against slavery might so hearten the opponents of the system, while discouraging its proponents, as to destroy all hope of compromise. This would prevent the formation of the Union, and the Union, for you, is essential."

"I will not respond to these presumptions," said General Washington, "but I will tell you now what I will say to others at a later time. The new document contains some things, I will readily acknowledge, that never did, and I am persuaded never will, obtain my cordial approbation; but I did then conceive, and do now most firmly believe, that in the aggregate it is the best constitution that can be obtained at this epoch, and that this, or a dissolution, awaits our choice, and is the only alternative."

"Do you recognize," I asked, "that in order to gain unity among yourselves, your slavery compromises sacrifice freedom for the Africans who live amongst you and work for you? Such sacrifices of the rights of one group of human beings will, unless you arrest them here, become a difficult-to-break pattern in the nation's politics."

"Did you not listen to the general?" This man, I decided, must be James Madison. . . .

"I expect," Madison went on, "that many will question why I have agreed to the Constitution. And, like General Washington, I will answer: 'because I thought it safe to the liberties of the people, and the best that could be obtained from the jarring interests of States, and the miscellaneous opinions of Politicians; and because experience has proved that the real danger to America & to liberty lies in the defect of *energy & stability* in the present establishments of the United States.'"

"Do not think," added a delegate from Massachusetts, "that this Convention has come easily to its conclusions on the matter that concerns you. . . . Many of us share concerns about basing apportionment on slaves as insisted by the Southern delegates. . . ."

. . . .

"Even so," I said, "the Convention has acquiesced when representatives of the Southern states adamantly insisted that the proposed new government not interfere with their property in slaves. And is it not so that, beyond a few speeches, the representatives of the Northern states have been, at best, ambivalent on the issue?"

"And why not?" interjected another delegate. "Slavery has provided the wealth that made independence possible. . . . At the time of the Revolution, the goods for which the United States demanded freedom were produced in very large measure by slave labor. Desperately needing assistance from other countries, we purchased aid from France with tobacco produced mainly by slave labor. The nation's economic well-being depended on the institution, and its preservation is essential if the Constitution we are drafting is to be more than a useless document. . . ."

. . . "The real crisis you face," I said, "should not be resolved by your recognition of slavery, an evil whose immorality will pollute the nation as it now stains your document. Despite your resort to euphemisms like *persons* to keep out of the Constitution such words as *slave* and *slavery,* you cannot evade the consequences of the ten different provisions you have placed in the Constitution for the purpose of protecting property in slaves.

. . . .

"Gentlemen," I continued, "how can you disagree with the view of the Maryland delegate Luther Martin that the slave trade and 'three-fifths' compromises 'ought to be considered as a solemn mockery of, and insult to that God whose protection we had then implored, and . . . who views with equal eye the poor African slave and his American master'? . . ."

"Again, woman," a Northern delegate assured me, "we have heard and considered all those who oppose slavery. Despite the remonstrations of the abolitionists—of whom few, I must add, believe Negroes to be the equal of white men, and even fewer would want the blacks to remain in this land were slavery abandoned—we have acted as we believe the situation demands."

"I cannot believe," I said, "that even a sincere belief in the superiority of the white race should suffice to condone so blatant a contradiction of your hallowed ideals."

. . . .

Finally, a delegate responded to my challenge. "You have, by now, heard enough to realize that we have not lightly reached the compromises on slavery you so deplore. Perhaps we, with the responsibility of forming a radically new government in perilous times, see more clearly than you in hindsight that the unavoidable cost of our labors will be the need to accept and live with what you call a contradiction. . . . This contradiction is not lost on us. Surely we know, even though we are at pains not to mention it, that we have sacrificed the rights of some in the belief that this involuntary forfeiture is necessary to secure the rights for others in a society espousing, as its basic principle, the liberty of all.

. . . "It grieves me," he continued, "that your presence here confirms my worst fears about the harm done to your people because the Constitution, while claiming to speak in an unequivocal voice, in fact promises freedom to whites and condemns blacks to slavery. But what alternative do we have? Unless we here frame a constitution that can first gain our signatures and then win ratification by the states, we shall soon have no nation. For better or worse, slavery has served as the backbone of our economy, the source of much of our wealth. The colonies condoned it, just as the Articles of Confederation recognized it. The majority of the delegates to this convention own slaves and must have that right protected if they and their states are to be included in the new government."

He paused and then asked, more out of frustration than defiance, "What better compromise on this issue can you offer than that which we have fashioned over so many hours of heated debate?"

. . . .

I thanked the delegate for his question and then said, "The processes by which Northern states are even now abolishing slavery are known to you all. What is lacking here is not legislative skill but the courage to recognize the evil of holding blacks in slavery. . . . You fear that unless the

slavery of blacks receives protection, the nation will not survive. And my message is that the compromises you are making here mean that the nation's survival will always be in doubt. For now in my own day, after two hundred years and despite bloody wars and the earnest efforts of committed people, the racial contradiction you sanction in this document remains and threatens to tear this country apart."

"Mr. Chairman," said a delegate, a colonel from the deep South, "this discussion grows tiresome and I resent to my very soul the presence in our midst of this offspring of slaves. If she accurately predicts the future fate of her race in this country, then our protection of slave property, which we deem essential for our survival, is easier to justify than in some later time when, as she implies, negroes remain subjugated even without the threats we face.

. . . .

"It's all hypocrisy! . . . Our Northern colleagues bemoan slavery while profiting from it as much as we in the South, meanwhile avoiding its costs and dangers. And our friends from Virginia, where slavery began, urge the end of importation—not out of humanitarian motivations, as their speeches suggest, but because they have sufficient slaves, and expect the value of their property will increase if further imports are barred. . . . We speak easily today of liberty, but the rise of liberty and equality in this country has been accompanied by the rise of slavery. . . ."

. . . .

"So, Colonel," I interrupted, "you are saying that slavery for blacks not only provided wealth for rich whites but, paradoxically, led also to greater freedom for poor whites. . . . In effect, what I call a contradiction you deem a solution. Slavery enables the rich to keep their lands, arrests discontent and repression of other Englishmen, strengthens their rights and nourishes their attachment to liberty. . . . You preserve the rights of Englishmen by destroying the rights of Africans. . . .

. . . .

"The Colonel," I continued, "has performed a valuable service. He has delineated the advantages of slavery as an institution in this country. And your lengthy debates here are but prelude to the struggles that will follow your incorporation of this moral evil into the nation's basic law."

"Woman! We implore you to allow us to continue our work. While we may be inconsistent about the Negro problem, we are convinced that this is the only way open to us. You asked that we let your people go. We cannot do that and still preserve the potential of this nation for good—

a potential that requires us to recognize here and now what later generations may condemn as evil. And as we talk I wonder—are the problems of race in your time equally paradoxical?"

I longed to continue the debate, but never got the chance. Apparently someone outside had summoned the local militia. I turned to see a small cannon being rolled up, pointing straight at me. Then, in quick succession, the cannoneer lighted the fuse; the delegates dived under their desks; the cannon fired; and, with an ear-splitting roar, the cannonball broke against the light shield and splintered, leaving me and the shield intact.

My mission over, I returned to the twentieth century.

CHAPTER 1

Economic Determinism and Interest Convergence

What accounts for the uneven trajectory of black fortunes, with periods of advance followed inexorably by ones of steady retreat? The selections that follow illustrate one of Bell's signature theses—that it is white interests, particularly economic ones, and not advancing morality or the imperatives of law that call the tune. Some of the selections make this point by means of a broad review of black history, showing that what we call civil rights breakthroughs really came about because of white needs. One, reprinted from the Harvard Law Review, *focuses on a single case,* Brown v. Board of Education. *The concluding selection asks what would happen if blacks threw in the towel and let whites commit acts of racism, but only after paying a racial licensing fee that would go to improve conditions in the black community. As the reader will see, Bell not only puts forward his audacious thesis; he documents it by resort to both history and imaginative thought experiments.*

White Superiority in America

Its Legal Legacy, Its Economic Costs

A few years ago, I was presenting a lecture in which I enumerated the myriad ways in which black people have been used to enrich this society and made to serve as its proverbial scapegoat. I was particularly bitter about the country's practice of accepting black contributions and ignoring the contributors. Indeed, I suggested, had black people not existed, America would have invented them.

From the audience, a listener reflecting more insight on my subject than I had shown, shouted out, "Hell man, they did invent us." The audience responded with a round of applause in which I joined. Whether we are called "colored," "Negroes," "Afro-Americans," or "blacks," we are marked with the caste of color in a society still determinedly white. . . .

Racial discrimination has placed and continues to place a heavy burden on all black people in this country. A major function of racial discrimination is to facilitate the exploitation of black labor, to deny us access to benefits and opportunities that would otherwise be available, and to blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims.

But the costs and benefits of racial discrimination are not so neatly summarized. Two other inter-connected political phenomena emanate from the widely shared belief that whites are superior and have served critically important stabilizing functions in the society: First, whites of widely varying socio-economic status employ white supremacy as a catalyst to negotiate policy differences, often through compromises that sacrifice the rights of blacks. Second, even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered

33 Vill. L. Rev. 767 (1988). Used by permission.

more willing to accept their lesser share by an unspoken but no less certain property right in their "whiteness." This right is recognized and upheld by courts and society like all property rights under a government created and sustained primarily for that purpose.

Let us look first at the compromise-catalyst role of racism in American policy-making. When the Constitution's Framers gathered in Philadelphia, it is clear that their compromises on slavery were the key that enabled Southerners and Northerners to work out their economic and political differences.

The slavery compromises set a precedent under which black rights have given way throughout the nation's history to further white interests. Those compromises are far more than an embarrassing blot on our national history. Rather, they are the original and still definitive examples of the ongoing struggle between individual rights reform and the maintenance of the socioeconomic *status quo*.

Why did the Framers do it? . . .

They felt—and likely were right—that a government committed to the protection of property could not have come into being without the race-based slavery compromises placed in the Constitution. The economic benefits of slavery and the political compromises of black rights played a major role in the nation's growth and development. In short, without slavery, there would be no Constitution to celebrate. This is true not only because slavery provided the wealth that made independence possible, but also because it afforded an ideological basis to resolve conflict between propertied and unpropertied whites.

According to historians, including Edmund Morgan[1] and David Brion Davis,[2] working-class whites did not oppose slavery when it took root in the mid-1660s. They identified on the basis of race with wealthy planters, even though they were and would remain economically subordinate to those able to afford slaves. But the creation of a black subclass enabled poor whites to identify with and support the policies of the upper-class. And large landowners, with the safe economic advantage provided by their slaves, were willing to grant poor whites a larger role in the political process. Thus, paradoxically, slavery for blacks led to greater freedom for poor whites, at least when compared with the denial of freedom to African slaves. Slavery also provided propertyless whites with a property in their whiteness.

My point is that the slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Consider only a few examples:

- The long fight for universal male suffrage was successful in several states when opponents and advocates alike reached compromises based on their generally held view that blacks should not vote. Historian Leon Litwack reports that "utilizing various political, social, economic, and pseudo-anthropological arguments, white suffragists moved to deny the vote to the Negro. From the admission of Maine in 1819 until the end of the Civil War, every new state restricted the suffrage to whites in its constitution."[3]
- By 1857, the nation's economic development had stretched the initial slavery compromises to the breaking point. The differences between planters and business interests that had been papered over 70 years earlier by mutual dangers could not be settled by a further sacrifice of black rights in the *Dred Scott* case.[4]

Chief Justice Taney's conclusion in that case that blacks had no rights whites were bound to respect represented a renewed effort to compromise political differences between whites by sacrificing the rights of blacks. The effort failed, less because Taney was willing to place all blacks—free as well as slave—outside the ambit of constitutional protection, than because he rashly committed the Supreme Court to one side of the fiercely contested issues of economic and political power that were propelling the nation toward the Civil War.

When that war ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves, but actually to protect its victory. But within a decade, when another political crisis threatened a new civil war, black rights again gave way in the Hayes-Tilden Compromise of 1877. Constitutional jurisprudence fell in line with Taney's conclusion regarding the rights of blacks *vis-à-vis* whites even as it condemned his opinion. The country moved ahead, but blacks were cast into a status that only looked positive when compared with slavery itself.

. . . Throughout our history, whites of widely varying socio-economic status have employed deeply set beliefs in white supremacy as a catalyst to negotiate and resolve policy differences, often through compromises that sacrifice the rights of blacks.

A connected point is that even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share by an unspoken but no less certain property right in their "whiteness." This right is recognized

and upheld by courts and society like all property rights under a government created and sustained primarily for that purpose.

In the post-Reconstruction era, the constitutional amendments initially promoted to provide rights for the newly emancipated blacks metamorphosed as the major legal bulwarks for corporate growth. The legal philosophy of that era espoused liberty of action untrammelled by state authority, but the only logic of the ideology—and its goal—was the exploitation of the working class, whites as well as blacks.

Consider *Lochner v. New York*,[5] where the Court refused to find that the state's police powers extended to protecting bakery employees against employers who required them to work in physically unhealthy conditions for more than 10 hours per day and 60 hours per week. Such maximum hour legislation, the Court held, would interfere with the bakers' inherent freedom to make their own contracts with the employers on the best terms they could negotiate. . . .

For blacks, of course, we can compare *Lochner* with the decision in *Plessy v. Ferguson*.[6] In that case, the Court upheld the state's police power to segregate blacks in public facilities even though such segregation must, of necessity, interfere with the liberties of facilities' owners to use their property as they saw fit.

Both opinions are quite similar in the Court's use of Fourteenth Amendment fictions: the assumed economic "liberty" of bakers in *Lochner,* and the assumed political "equality" of blacks in *Plessy.* Those assumptions, of course, required the most blatant hypocrisy. Both decisions, though, protected existing property and political arrangements while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*).

Efforts to form workers' unions to combat the ever-more-powerful corporate structure failed because of the active antipathy against blacks practiced by all but a few unions. Excluded from jobs and the unions because of their color, blacks found jobs as scab labor during strikes, a fact that simply increased the hostility of white workers that should have been directed toward their corporate oppressors.

The Populist Movement in the latter part of the nineteenth century attempted to build a working-class party in the South strong enough to overcome ruling class exploitation. But when neither Populists nor the conservative Democrats were able to control the black vote, they agreed to exclude blacks entirely through state constitutional amendments,

thereby leaving whites to fight out elections themselves. With blacks no longer a force at the ballot box, conservatives dropped even the semblance of opposition to Jim Crow provisions pushed by lower-class whites as their guarantee that the nation recognized their priority due to their whiteness.

Southern whites rebelled against the Supreme Court's 1954 decision declaring school segregation unconstitutional precisely because they felt it endangered the long-standing priority of their superior status to blacks. . . . But in the late twentieth century, the passwords for gaining judicial recognition of the still viable property right in being white include "higher entrance scores," "seniority," and "neighborhood schools." Consider, as well, the use of impossible-to-hurdle intent barriers to deny blacks remedies for racial injustices where the relief sought would either undermine white expectations and advantages gained during years of overt discrimination, or expose the deeply imbedded racism in a major institution, such as the criminal justice system.

The continuing resistance to affirmative action plans, set-asides, and other meaningful relief for discrimination-caused harm is based in substantial part on the perception that black gains threaten the main component of status for many whites: the sense that as whites, they are entitled to priority and preference over blacks. The law has mostly encouraged and upheld what Mr. Plessy argued in *Plessy v. Ferguson* was a property right in whiteness, and those at the top of the society have benefitted because the masses of whites are too occupied in keeping blacks down to note the large gap between their shaky status and that of whites on top.

. . . .

Today—even in the midst of outbreaks of anti-black hostility on our campuses and elsewhere—an increasing number of working-class whites are learning what blacks have long known: that the rhetoric of freedom is no substitute for economic justice.

True, it may be that the structure of capitalism . . . will never provide real economic justice for all. But in the beginning, the Constitution deemed those who were black as the fit subject of property. The miracle of that document—too little noted today—is that those same blacks and their allies have in their quest for racial justice brought to the Constitution much of its current protection of individual rights.

The challenge is to move the document's protection into the sacrosanct area of economic rights, this time to insure that opportunity in this sphere

is available to all. Progress in this critical area will require continued civil rights efforts, but may depend to a large extent on whites coming to recognize that their property right in being white has been purchased for too much and has netted them only the opportunity, as C. Vann Woodward put it, "to hoard sufficient racism in their bosoms to feel superior to blacks while working at a black's wages."

. . . .

The cost of racial discrimination is levied against us all. Blacks feel the burden and strive to remove it. Too many whites have felt that it was in their interest to resist those freedom efforts. That temptation, despite the counter-indicators provided by history, logic and simple common sense, remains strong. But the efforts to achieve racial justice have already performed a miracle of transforming the Constitution—a document primarily intended to protect property rights—into one that provides a measure of protection for those whose rights are not bolstered by wealth, power, and property.

NOTES

1. Edmund Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (1975).

2. David Brion Davis, The Problem of Slavery in the Age of Revolution: 1770–1820 (1975).

3. Leon Litwack, North of Slavery: The Negro in the Free States 1790–1860, at 79 (1967).

4. Dred Scott v. Sandford, 60 U.S. 393 (1857).

5. 198 U.S. 45 (1905).

6. 163 U.S. 537 (1896).

Brown v. Board of Education and the Interest-Convergence Dilemma

The year was 1959, five years after the Supreme Court's decision in *Brown*. If there was anything the hard-pressed partisans of the case did not need, it was more criticism of a decision ignored by the President, condemned by much of Congress, and resisted wherever it was sought to be enforced. Certainly, civil rights adherents did not welcome adding to the growing list of critics the name of Professor Herbert Wechsler, an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence. Nevertheless, Professor Wechsler chose that time to deliver Harvard Law School's Oliver Wendell Holmes Lecture raising new questions about the legal appropriateness and principled shortcomings of *Brown* . . . .

Courts, Wechsler argued, "must be genuinely principled, resting with respect to every step . . . on analysis and reasons quite transcending the immediate result that is achieved."[1] . . . Wechsler found difficulty with Supreme Court decisions where principled reasoning was in his view either deficient or, in some instances, nonexistent. He included the *Brown* opinion in the latter category.

Wechsler concluded the Court in *Brown* must have rested its holding on the view that "racial segregation is, *in principle,* a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." Yet, Wechsler found this argument untenable because it seemed to require an inquiry into the motives of the legislature, a practice generally foreclosed to the courts.

93 Harv. L. Rev. 518 (1980). Used by permission.

Wechsler then asserted that the legal issue in state-imposed segregation cases was not one of discrimination at all, but rather of associational rights: "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." And concluding with a question that has challenged legal scholars, Wechsler asked:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?[2]

The Search for a Neutral Principle: Racial Equality and Interest Convergence

Scholars had little difficulty finding a neutral principle on which the *Brown* decision could be based. Indeed, from the hindsight of a quarter century of the greatest racial consciousness-raising the country has ever known, much of Professor Wechsler's concern seems hard to imagine. To doubt that racial segregation is harmful to blacks, and to suggest what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not have existed then. Professor Charles Black, therefore, correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion. Black's major premise is that "the equal protection clause of the Fourteenth Amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states."[3] The equal protection clause clearly bars racial segregation because segregation harms blacks and benefits whites in ways too numerous and obvious to require citation.

Logically, the argument is persuasive, and Black has no trouble urging that "[w]hen the directive of equality cannot be followed without displeasing the white[s], then something that can be called a 'freedom' of the white[s] must be impaired."[4] It is precisely here, though, that many whites part company with Professor Black. Whites may agree in the ab-

stract that blacks are citizens entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied effectively without altering the status of whites. The extent of this unwillingness is illustrated by the controversy over affirmative action programs, particularly those where identifiable whites must step aside for blacks they deem less qualified or less deserving. Whites simply cannot envision the personal responsibility and the potential sacrifice inherent in Professor Black's conclusion that true equality for blacks will require the surrender of racism-granted privileges for whites.

This sober assessment of reality raises concern about the ultimate import of Black's theory. On a normative level, as a description of how the world *ought* to be, the notion of racial equality appears to be the proper basis on which *Brown* rests, and Wechsler's framing of the problem in terms of associational rights thus seems misplaced. Yet, on a positivistic level—how the world *is*—large segments of the American people do not deem racial equality legitimate, at least to the extent it threatens to impair the societal status of whites. Hence, Wechsler's search for a guiding principle in the context of associational rights retains merit in the positivistic sphere, because it suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration.

Although no such subordination is apparent in *Brown,* it is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after *Brown,* this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted,

will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

In assessing how this principle can accommodate both the *Brown* decision and the subsequent development of school desegregation law, it is necessary to remember that the issue of school segregation and the harm it inflicted on black children did not first come to the Court's attention in the *Brown* litigation: blacks had been attacking the validity of these policies for 100 years. Yet, prior to *Brown,* black claims that segregated public schools were inferior had been met by orders requiring merely that facilities be made equal. What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?

The decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. Advanced by lawyers for both the NAACP and the federal government, this point was not lost on the news media. *Time* magazine, for example, predicted that the international impact of *Brown* would prove scarcely less important than its effect on the education of black children: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'"[5]

Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivalled those that took place at the conclusion of World War I. Their disillusionment and anger found poignant expression when black actor, Paul Robeson, in 1949 declared: "It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country, the Soviet Union, which in one generation has raised our people to the full human dignity of mankind."[6] It

is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts.

Finally, some whites realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization in the South.

. . . For those whites who sought an end to desegregation on moral grounds or for the pragmatic reasons outlined above, *Brown* appeared to be a welcome break with the past. When the Supreme Court finally condemned segregation, however, the outcry was nevertheless great, especially among poorer whites who feared loss of control over their public schools and other facilities. Their fear of loss gained force from the sense that they had been betrayed. They relied, as had generations before them, on the expectation that white elites would maintain lower class whites in a societal status superior to that designated for blacks. In fact, legislatures initially established segregated schools and facilities [in many cases] at the insistence of the white working class. Today, little has changed. Many poorer whites oppose social reform as "welfare programs for blacks" although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.

Interest-Convergence Remedies under Brown

The question still remains as to the surest way to reach the goal of educational effectiveness for both blacks and whites. I believe that the most widely used court-ordered programs may in some cases be inferior to plans focusing on "educational components," including the creation and development of "model" all-black schools. . . . The remedies set forth in the major school cases following *Brown*—balancing the student and teacher populations by race in each school, eliminating one-race schools, redrawing school attendance lines, and transporting students to achieve racial balance—have not in themselves guaranteed black children better schooling than they received in the pre-*Brown* era. Such racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination. Plans relying on racial balance to foreclose evasion have not eliminated the need for

further orders protecting black children against discriminatory policies, including resegregation within desegregated schools, the loss of black faculty and administrators, suspensions and expulsions at much higher rates than white students, and varying forms of racial harassment ranging from exclusion from extracurricular activities to physical violence. Antidefiance remedies, then, while effective in forcing alterations in school system structure, often encourage and seldom shield black children from discriminatory retaliation.

The educational benefits of mandatory assignment of black and white children to the same schools are also debatable. If benefits did inure, they have begun to dissipate as whites flee in alarming numbers from school districts ordered to implement mandatory reassignment plans. In response, civil rights lawyers sought to include entire metropolitan areas within mandatory reassignment plans in order to encompass mainly white suburban school districts where so many white parents sought sanctuary for their children.

Thus, the antidefiance strategy was brought full circle from a mechanism for preventing evasion by school officials of *Brown*'s antisegregation mandate to one aimed at creating a discrimination-free environment. This approach to the implementation of *Brown,* however, has become increasingly ineffective; indeed, it has in some cases been educationally destructive. A preferable method is to focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation or preservation of model black schools.

. . . .

Desegregation remedies that do not integrate may seem a step backward toward the *Plessy* "separate but equal" era. Some black educators, however, see major educational benefits in schools where black children, parents, and teachers can harness the real cultural strengths of the black community to overcome the many barriers to educational achievement. As Professor Laurence Tribe argued, "[J]udicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity."[7]

This is not to suggest that educationally oriented remedies can be developed and adopted without resistance. Policies necessary to obtain effective schools threaten the self-interest of teacher unions and others with vested interests in the status quo. But successful magnet schools may provide a lesson that effective schools for blacks must be a primary goal

rather than a secondary result of integration. Many white parents recognize a value in integrated schooling for their children but they quite properly view integration as merely one component of an effective education. To the extent that civil rights advocates also accept this reasonable sense of priority, some greater racial interest conformity should be possible.

NOTES

1. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959).

2. Id. at 34.

3. See, e.g., Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421 (1960).

4. Id. at 429.

5. See Derrick Bell, Racial Remediation: An Historical Perspective on Current Conditions, 52 Notre Dame Law. 5, 12 (1976).

6. D. Butler, Paul Robeson 137 (1976) (unwritten speech before the Partisans of Peace, World Peace Congress in Paris).

7. Laurence Tribe, American Constitutional Law § 16-15, at 1022 (1978) (footnote omitted).

The Role of Fortuity in Racial Policy-Making

Blacks as Fortuitous Beneficiaries of Racial Policies

. . . .

The involuntary sacrifice of black rights can serve as a catalyst enabling whites to settle serious policy differences. I now see that these silent covenants that differ so much in result are two sides of the same coin. The two-sided coin with involuntary racial sacrifice on the one side, and interest-convergent remedies on the other can be called: racial fortuity.

Racial fortuity resembles a contract law concept: the third-party beneficiary. In brief, two parties may contract to provide goods or services to a third. For example, a husband wishing to have flowers delivered to his wife on a weekly basis contracts with a florist to provide this service. If the florist fails to do so, the husband can sue, but a large and complicated body of law governs when the wife can sue the florist. While she was the intended beneficiary, she was not a party to the contract and may not even have known about it.

One aspect of this body of law is clear. The contracting parties must intend to confer a benefit on a third-party. As one court put it, "The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, the third party may sue on the contract."[1] Thus, in many states, the wife could sue the florist. If the benefit were incidental, however, the third party has no right of recovery.

. . . .

Sometimes the parties are identifiable. Often, though, one finds no technical contract as such. Rather, policy makers weigh various options and come to agreements or silent covenants. The *Brown* decision reflects the Supreme Court justices' consensus that for reasons of foreign policy and domestic tranquility constitutional protection for segregation must end. At the Constitutional Convention, the Framers sacrificed black hopes for freedom because they knew that they could not gain support for the Constitution unless it recognized slavery and protected slave owners' property in slaves.

As I have said, racial policy actions may be influenced, but are seldom determined, by the seriousness of the harm blacks are suffering, by the earnest petitions they have argued in courts, by the civil rights bills filed in legislative chambers, or even by impressive street protests. None of these change blacks' status as fortuitous beneficiaries. As with incidental beneficiaries in contract law, "The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon."[2] Racial fortuity.

But, aren't racial policies often justified as remedies for discrimination? Didn't Lincoln's Emancipation Proclamation, by its very terms, claim to abolish slavery? Didn't the post–Civil War Amendments grant rights of citizenship to the former slaves? And didn't *Brown v. Board* grant the relief the NAACP lawyers sought by striking down racial segregation in the public schools?

All true, but these commitments came about when those making them saw that they, those they represented, or the country could derive benefits that were at least as important as those blacks would receive. Blacks were not necessary parties to these commitments. Lincoln acted in an understanding with his generals and other supporters that if he abolished slavery, it would disrupt the Confederate work force, foreign governments would not enter the Civil War on the side of the Confederacy, and Union armies could enlist the freed slaves to fill their badly depleted ranks.

The post–Civil War Amendments were adopted with the understanding that by doing so, Republicans would maintain control of the federal government for years to come. And the Supreme Court determined to decide *Brown* as it did because it agreed with the State Department that invalidating segregation in the public schools would benefit the nation's foreign policy. While blacks complained bitterly when each of these "civil

rights" arrangements was not enforced because policy makers moved on to new concerns, blacks were, as fortuitous beneficiaries, unable to gain meaningful enforcement despite their good faith expectation that commitments set out in the law, even in the Constitution, would be honored.

. . . .

Whites as Fortuitous Beneficiaries of Racial Policies

While the economic, political, and psychic benefits whites gained from slavery and segregation are demonstrable, the real costs to whites of those benefits are unacknowledged. As with blacks, most whites are not directly engaged in racial policymaking. This is true even though the racial policymakers are usually white, and whites generally identify with these policymakers assuming their influence is pivotal—as it often is. But their preferences, often their insistence on laws that undermine black rights and provide legal standing to various forms of discrimination, do not ensure the maintenance of these discriminatory policies when conditions change. In this sense, whites too are fortuitous beneficiaries to the racial policies that they seek and hold dear.

Recall how Jim Crow laws that would eventually segregate blacks in every aspect of public life began to emerge out of a series of unofficial racial agreements between white elites and poorer whites who demanded laws segregating public facilities to insure official recognition of their superior status over blacks with whom, save for color, they shared a similar economic plight. For the most part, courts readily upheld these laws.

Then in the late 1940s, policy makers and the Supreme Court began to revoke support for segregation in its most blatant forms. President Truman, under pressure from civil rights groups, issued executive orders providing for equal treatment and opportunity in the armed services, and abolishing racial discrimination in federal employment. The Supreme Court began finding unconstitutional rather obvious infringements on basic rights to vote. Courts struck down white primaries through which southern whites excluded blacks from meaningful participation in electoral politics. Resisting whites saw these decisions as peremptory revocation of policies they considered permanent. Yet while deeming themselves the prime motivations for policies of white preference, whites could no longer use the law to require continued enforcement of white preferences.

Thus, whites, too, became fortuitous beneficiaries of racial policies adopted and abandoned for reasons beyond race.

Racial Fortuity and Reparations

In light of foreign and domestic concerns that likely influenced the *Brown* decision, consider what interest-convergence factors might move policymakers to look favorably on the reparations-for-slavery claims that have drawn media and scholarly attention. After affirmative action, reparations could become the next area of major racial activism and controversy.

. . . .

Reparations has a history that began even before the Civil War. Its proponents have been many and their arguments varied, but in general they assert: 1) slaves were not paid for their labor for over 200 years, depriving their descendants of their inheritance; 2) the descendants of slave owners wrongfully inherited the profits derived from slave labor; 3) the U.S. government made and then broke its promise to provide former slaves with 40 acres and a mule; 4) systematic and government-sanctioned economic and political racial oppression since the abolition of slavery impeded and interfered with the self-determination of African Americans and excluded them from sharing in the nation's growth and prosperity; 5) the reparations that Germany gave to Jews and the United States to Native Americans and Japanese Americans are precedents for the payment of reparations to African Americans.

Opponents dismiss racial reparations as a pipedream. None of those who were slaves or slave masters is still alive. Serious procedural barriers bar suits intended to require the descendants of slave owners to pay the descendants of slaves. Yale Law School Professor Boris Bittker conducted a thorough review of the legal difficulties facing reparations litigation, concluding that it is highly unlikely that blacks living today will obtain direct payments in compensation for their forebears' subjugation as slaves before the Emancipation Proclamation.[3]

Hidden by the often outraged opposition to reparations is that this country compensates for generalized loss all the time: certainly large corporations through bankruptcy laws, re-structuring, tax provisions, and—in the case of some worthy corporations like Chrysler or Lockheed—outright

government grants. The Japanese reparations program and that sought by blacks differ, but even so, the Japanese precedent might be helpful to black reparations' advocates.

As I write, Harvard Law Professor Charles Ogletree, Charles Garry, Johnnie Cochran, and a host of other lawyers have filed a reparations suit against the City of Tulsa and the state of Oklahoma on behalf of hundreds of survivors of the total destruction of Greenwood, the prosperous black section of that city, in 1921. Plaintiffs filed litigation following failure of negotiations for a reparations settlement. The history is clear. In 1921, a young black man who had accidentally stepped on the toe of a white female elevator operator was charged with molesting her. Fearing he might be lynched, armed black men volunteered to help the sheriff protect the youth. A scuffle with whites resulted, shooting started, and two blacks and ten whites were killed. When the outnumbered blacks retreated to the black community, whites looted hardware and sporting goods stores, arming themselves with rifles, revolvers, and ammunition. Large groups of whites and blacks fired on each other. Whites then decided to invade what they called "Niggertown" and systematically wipe it out.

To accomplish this end, more than 10,000 armed whites gathered, 60 to 80 automobiles filled with armed whites formed a circle around the black section, while airplanes were used to spy on the movements of blacks and—according to some reports—drop bombs on the blacks. Black men and women fought valiantly but vainly to defend their homes against the hordes of invaders who, after looting the homes, set them on fire. Blacks seeking to escape the flames were shot down.

Fifty or more blacks barricaded themselves in a church where they resisted several massed attacks. Finally, a torch applied to the church set it ablaze, and the occupants began to pour out, shooting as they ran. Several blacks were killed. The entire black belt became a smoldering heap of blackened ruins. Hardly a shanty, house, or building was left standing. Domestic animals wandering among the wreckage were the only signs of life. Unofficial estimates put the death toll at 50 whites and 150 to 200 blacks, many of whom were buried in graves without coffins. Other victims incinerated in the burning houses were never accounted for.

In recent years, the City of Tulsa raised a memorial to the victims of the massacre, but the city is actively defending against the litigation. The judge in the case granted the plaintiffs' request to take depositions of some of their clients, all of whom are in their 80s or older in order to pre-

serve critical testimony about the tragedy. . . . The Tulsa litigation, by narrowing reparations claims to a specific and undeniable racial attack that caused the deaths of countless blacks and the destruction of a whole community, quiets opponents and exerts pressure for relief.

According to Randall Robinson: "The issue here is not whether or not we can, or will, win reparations. The issue rather is whether we will fight for reparations, because we have decided for ourselves that they are our due."[4] Here is the activist strategy for responding to the restraints of racial fortuity. It is based on the conviction that a cause is worth pursuing despite the obstacles of law and public opinion. The pursuit can create conditions that convince policy makers, unmoved by appeals to simple justice, that relief is a prudent necessity.

NOTES

1. See, e.g., Cherry for Use of Trueblood v. Aetna Cas. & Sur. Co., 300 Ill. App. 392, 21 N.E.2d 4 (3d Dist. 1939).
2. Id.
3. Boris Bittker, The Case for Black Reparations (1973).
4. Randall Robinson, The Debt 206 (2000).

The Racial Preference Licensing Act

At an elaborate Rose Garden signing ceremony witnessed by the many right-wing groups that worked for its passage, the President assured the nation that the new Racial Preference Licensing Act represented a realistic advance in race relations. "It is," he insisted, "certainly not a return to the segregation policies granted constitutional protection under the 'separate but equal' standard of *Plessy v. Ferguson*." "And," he added, "it is no more than an inopportune coincidence that the Act was passed exactly a century after the Court announced the *Plessy* decision. Rather, the new law embodies a bold new approach to the nation's oldest problem. It does not assume a nonexistent racial tolerance, but boldly proclaims a commitment to moral justice through the workings of a marketplace undisturbed by government interference."

Indeed, the new Act ratified discriminatory practices that by the early 1990s had become the de facto norm. Under the new Act, all employers, proprietors of public facilities, and owners and managers of dwelling places on application to the federal government could obtain a license authorizing the holders or their agents to exclude or separate persons on the basis of race and color. The license itself was expensive, though not prohibitively so. After obtaining a license, the holder was required to pay to a government commission a tax equal to three percent of the income derived from employing, serving, or selling to whites during each quarter in which a policy of racial preference was in effect.

Holders were required to display their licenses prominently, and to operate their businesses in racially selective fashion. Discrimination had to

Foreword: The Final Civil Rights Act, 79 Cal. L. Rev. 597 (1991).

be practiced on a nonselective basis. Licenses were not available to those not planning to discriminate but seeking to use a license as a form of insurance against discrimination suits. Minority group members carried the burden of proof when charging discrimination against a facility not holding a license, but the minority group members could meet that burden with statistical and circumstantial as well as direct evidence. Under the Act, successful complainants were entitled to damages and attorney's fees.

. . . License fees and commissions were placed in an "equality fund" used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide scholarships for black students seeking college and vocational education. To counter charges that black people would be segregated and would never gain any significant benefit from the equality fund, the commission overseeing collection and distribution of license fees consisted of five members—each a representative from a major civil rights organization—appointed by the President to their posts for three-year terms.

The President committed himself and his administration to effective enforcement of the new Racial Preference Licensing Act. He warned that those found guilty of discriminating without a license or who failed to comply with the license provisions were subject to civil penalties as stiff as those under the RICO statutes.

"It is time," the President declared, "to bring hard-headed realism rather than well-intentioned idealism to bear on our long-standing racial problems. Policies adopted because they seemed right have usually failed. Actions taken to promote justice for blacks brought injustice to whites without appreciably improving the status or standards of living for blacks, particularly those members of the group who most needed protection.

"Within the memories of many of our citizens, this nation has both affirmed polices of racial segregation and advocated polices of racial integration. Neither approach has been either satisfactory or effective in furthering harmony and domestic tranquility. Today, I sign what may be the final civil rights law. It maximizes freedom of racial choice for all our citizens while guaranteeing that people of color will benefit either directly from equal access or indirectly from the fruits of the license taxes paid by those who choose policies of racial exclusion.

"I respect the views of those who vigorously opposed this new law. And yet the course we take today was determined by many forces too

powerful to ignore, too popular to resist, and too pregnant with potential to deny. We have vacillated long enough. We must move on toward what I predict will be a new and more candid and collaborative relationship among all our citizens. May God help us all as we seek in good faith a new way of resolving our oldest and most ineluctable problem."

Debating the Final Civil Rights Act

To: Ms. Geneva Crenshaw (proponent and drafter of the Act)
Electronic Mail Route 47-782

Dear Geneva,

My God, woman! What are you trying to do to me? . . . Your allegorical racial chronicles, despite their rather radical critiques of the civil rights movement, have become quite well-known both among lawyers and laypersons. As you predicted, they have stirred a healthy and much-needed debate. . . .

But give me a break! . . . Your odious proposal will earn me permanent enmity from the civil rights community. Of course, the right-wing conservatives whom you accurately designate as the sponsors and supporters of this anti–civil rights law will hail me as the "The Black Savior" of racial reform.

. . . But suggesting a black-bonus-based return to state-supported racial segregation is simply going too far. God may be dead, but the Fourteenth Amendment, though wounded by the current Supreme Court, still lives.

Realistically,
Derrick

To: Professor Derrick Bell

Dear Doubting Thomas,

Oh ye of little faith! Even after all these years, you remain as suspicious of my truths as you are faithful to the civil rights ideals that events long ago rendered obsolete. Whatever its cost to your relationship with your civil rights friends, why can't you accept the inevitability of my Final Civil Rights Act*?*

As to the viability of the Fourteenth Amendment, or, for that matter, any civil rights law, you—not I—wrote that the first Rule of Race Relations Law is that:

Racial remedies are the outward manifestations of unspoken and perhaps unconscious conclusions that such remedies—if adopted—will secure, advance, or at least not harm the interests of whites in power.

What I assume you are saying is that while blacks struggle for legal protection against one or another form of racial discrimination, the country responds only when the requested relief will serve some societal interest deemed important to whites. Virtually every piece of civil rights legislation beginning with the Emancipation Proclamation supports your position.

. . . .

Your second Rule of Race Relations Law, if you remember, is that:

The benefits to blacks of civil rights policies are often symbolic rather than substantive, and when the crisis that prompted their enactment ends, they will infrequently be enforced for blacks, though in altered interpretations they may serve the needs of whites.

. . . .

Now, I can hear you asking, "How do the rules justify my Racial Preference Licensing Act, which looks like a new, more subtle, but hardly less pernicious 'separate but equal' law?" Let me try and explain.

Derrick, today as it did in the mid-1890s, the Supreme Court is reacting to a range of social forces that are hardening racial attitudes. Whites, as they did a century ago, are concluding that the country has done enough for its racial minorities. The never-vigorous enforcement of civil rights laws has slowed, encouraging open violations and discouraging victims from filing complaints they fear will only add futility and possible retaliation to their misery.

What the President calls the Final Civil Rights Act *is, in fact, a manifestation of your Rule Two. The society—or much of it—has tired of its commitment to protect blacks against the preference of whites. It believes that the return of legal protection of racially discriminatory policies is in its interest. And it seeks to give that interest legitimacy by claiming that the notion—suggested early in theory—that whites have a right of nonassociation should be recognized in law.*

However, the Act is attractive to many whites because it seems

to contain provisions that conform to an inversion of your Rule One. That is, because of the Equality Fund, they are able to rationalize a return to legalized segregation by viewing this as the necessary means to reach the black reparations end long sought by black groups.

Your challenge is to determine whether in this, as in any seemingly hostile, racial policymaking lies unintended potential that African Americans can exploit. Think about it, Derrick. Legislation like the Final Civil Rights Act *may be all African Americans can expect, and could prove all that they need.*

Prophetically,
Geneva

To: Ms. Geneva Crenshaw
Electronic Mail Route 47-782

Dear Geneva,

Even as a vehicle for discussion, I cannot accept the legalized reincarnation of Jim Crow. Too many of our people suffered and sacrificed to bury those obnoxious signs: "Colored" and "white." . . . Your Final Civil Rights Act *will simply squander our high principles in return for a mess of segregation-tainted pottage. Victory on such grounds is no victory at all.*

Resolutely,
Derrick

To: Professor Derrick Bell

Dear Derrick,

Tell me: What principle is so compelling that you continue your support for obsolete civil rights strategies while ignoring the contemporary statistics regarding black crime, broken families, devastated neighborhoods, alcohol and drug abuse, out-of-wedlock births, illiteracy, unemployment, and welfare dependency? Segregation was hateful, but if I knew that its return would reduce the devastation of black communities to the ante-desegregation levels, I would think such a "trade" entitled to serious thought, not self-righteous dismissal.

. . . You and other civil rights policymakers must realize that you have been formulating your strategies without any real assessment of the continuing importance of racial subordination of black people

to the stability of the American economic and political system. It is not that you civil rights advocates do not admit the existence of racism. You know it exists and assert on every public occasion that no social fact in America is more salient than racial difference. You readily and pessimistically recount the developments marking the end of the second reconstruction and the parallels with the end of the first reconstruction a century ago. But you do not see the critical connection between the social subordination of blacks and the social stability of whites.

"The fact is, friend, you do not have forever to see my point."

"What!" I said, startled. I had been reading Geneva's words from my computer screen when I became conscious of a low, melodious voice saying those very words. I turned, and. . . .

There she was. Seated on the small couch in my study, her over six-foot, slender frame gave her a regal presence. Geneva's strong features were framed by her intricately braided hair that was now quite gray and made a striking contrast with her still smooth skin that was almost translucent in its blue-black glory. She greeted me with that smile of hers that conveyed both warmth and authority.

"Welcome," I said, trying to mask my shock with what I hope was savoir-faire. "Is it now your practice to visit folks who are still at work at 2 a.m.?"

"If you spent more time worrying about our people and less meddling in my business, we would all be better off and I would not have to visit you at any time.

. . . .

"I decided our computer correspondence was inadequate to convey the real significance of the *Final Civil Rights Act.*"

"Well," I said, "I am more than delighted to see you, but you did not have to come back to lecture me about the reasons for the continuing and increasingly virulent vitality of American racism. I understand, moreover, the importance of race as a stabilizing force in American society. . . ."

. . . .

". . . Racism is more than a group of bad white folks whose discriminatory tendencies can be controlled by well-formed laws, vigorously enforced. It is a nonnegotiable essential element of America as we know it. Belief in the superiority of their whiteness leads many whites to accept unthinkingly a status that is often as disadvantaged as that involuntarily

held by blacks. It is tied to the existing economic system and serves as a principal stabilizer of that system."

"Whatever happened to 'We Shall Overcome'?"

"Racist opposition has polluted and transformed the dream that phrase once inspired into a myth that comforts and distracts you from the harsh racial reality that is closing in around us and ours."

. . . Geneva continued. "Don't you see? Just as parents used to tell children stories about the stork to avoid telling them about sex, so we hold to dreams about a truly integrated society. . . . In his recent book, *Love's Executioner and Other Tales of Psychotherapy,*[1] Dr. Irvin Yalom reports that a fundamental principle in psychotherapy is the inevitability of death for each of us and for those we love. He describes the myriad ways we devise to escape or deny the terrible reality of death. . . . We chuckle and agree with Woody Allen when he says, 'I'm not afraid of death. I just don't want to be there when it happens.' The fact is, 'full awareness of death ripens our wisdom and enriches our life.' A dying patient recognized this when he stated, 'though the *fact,* the physicality of death destroys us, the *idea* of death may save us.'[2]

"Derrick, the analogy is not exact, but just as death is inevitable and inherent in life, so racism in America, while not inherent, is intractable. It is socially constructed, but no less real. We must deal directly with American racism, just as we do with death. Civil rights advocates and their organizations must face the unavoidable truth that this nation's social stability is built on a belief in and a determination to maintain white dominance. Racism is the manifestation of this deeply entrenched determination. It plays a key role in a capitalist society where the growing gap between the wealth of the rich and the poverty of the rest of the populace is both large and obscene. But even a total reform of our economy would not erase—and might intensify—the need of whites to measure their self-worth by maintaining blacks in a subordinate status."

"Geneva. What you are saying sounds like a prescription for terminal despair. As applied to your Racial Preference Licensing Law, it is simply too risky."

"It is risky," Geneva agreed, defiantly. "It is an approach with risks quite like those we must face as we seek the salvation in life that comes when we accept the reality of death."

"But, Geneva, if death and racial subordination are inevitable and unavoidable, if all our efforts and accomplishments will come to nothing,

then what is the meaning of life and what then is the value of working for civil rights?"

Geneva brightened. "As discouraging as that sounds," she explained, "it seems to me that when we ask that question aloud, we are dealing directly with the unstated question that has bedeviled us all along. Out in the open, we can forthrightly deal with the seeming paradox of a people long oppressed by law continuing to look to law for remedies that elude our grasp, deceive our minds, and frustrate our hopes."[3]

. . . .

"I agree with the need for a more realistic perspective, Geneva, but how do you move from realism to your Racial Preference Licensing Law?"

"In the face of disaster, the person who is truly liberated from the fear of death looks for redeeming possibilities. Civil rights advocates, freed of the 'We Shall Overcome' syndrome, should and can make a similar assessment of all racial policies—including the Racial License Preference Act.

"Consider that by authorizing racial discrimination, the Act removes the long-argued concern that civil rights laws deny a right of nonassociation. By requiring the discriminator to publicize his actions and to pay all blacks a price for that 'right,' the law may dilute both the financial and psychological benefits of racism. Most whites pay a tremendous price for their unthinking and often unconscious racism, but they are less willing to make direct payments for the privilege. Today, even the worst racist denies that he is a 'racist.'

"Black people, moreover, will no longer have to divine whether an employer, realtor, or proprietor wants to exclude them. The license will give them—and the world—ample notice. Those who seek to discriminate without a license will place their businesses at risk of serious, even ruinous, penalties.

"It may seem crazy, but racism is hardly based on logic. We need to fight racism with racism the way a forest ranger fights fire with fire. . . .

. . . .

"Civil rights advocates must face up to the racial realities of American social and economic stability and try to structure initiatives and responses in the light of the racial world as it is rather than as they would like it to be."

. . . .

Geneva, still smiling, stood, ready to head toward the door when she delivered this last zinger. Bending to give me a kiss, she said, "Write soon. You are as impossible as ever, but I've missed you nonetheless."

The usually squeaky door to my study opened and closed silently as she departed. My two large Weimaraner hounds—usually alert to the slightest sound—had slept soundly through Geneva's visit.

Could I have fallen asleep and imagined what had happened? But no. There on my monitor was all of our conversation, miraculously transcribed and ready to insert into my now completed chapter. The notion of a license to practice racial discrimination in the 1990s seemed absurd, but no more so than the reality of worsening racism as we approach the twenty-first century.

NOTES

1. Irvin Yalom, Love's Executioner and Other Tales of Psychotherapy (1989).
2. Id. at 7.
3. See id. at 12.

CHAPTER 2

Racial Realism

The pieces in this chapter, which opens with Bell's famous Space Traders Chronicle, sound a second signature theme in Bell's writing—the permanence of racism. If whites in this country hold most of the power and manipulate civil rights advances for blacks to maintain their ascendancy, no force known to humanity is likely to change this state of affairs. Hoping for more is foolhardy; the best one can do is come to terms with one's destiny and find what meaning one can in struggle itself. Power ineluctably asserts and reasserts itself, treating ruthlessly those (like Paul Robeson) who get in its way. Yet, a certain nobility attends refusing to submit meekly to one's fate. And, by mobilizing its own resources, the black community even without white help may accomplish much for its own, for example, its children. Bell thus addresses the "so what" question about what blacks should do in light of their predicament. He also describes his role in inspiring a movement, Critical Race Theory, that struggles with many of these issues.

The Chronicle of the Space Traders

Hypotheticals are a staple of discussion in law school classrooms. . . . Building on this foundation, I began extending these fictional stories to reflect the contradictions and dilemmas faced by those attempting to apply legal rules to the many forms of racial discrimination. . . . I am not sure who coined the phrase "Critical Race Theory" to describe this form of writing. I know that I have received more credit than I deserve for the movement's origins. I rather think that this writing is the response to a need for expressing views that cannot be communicated effectively through existing techniques. And I agree with two major writers of this genre regarding the purpose and goal of narrative writing:

> Legal storytelling is a means by which representatives of new communities may introduce their views into the dialogue about the way society should be governed. Stories are in many ways more powerful than litigation or brief-writing and may be necessary precursors to law reform. They offer insights into the particulars of lives lived at the margins of society, margins that are rapidly collapsing toward a disappearing center. This is not true just of our times. In Biblical history, storytellers for oppressed groups told tales of hope and struggle—for example, that of the Promised Land—to inspire and comfort the community during difficult times. Reality could be better—and, perhaps, will be. Other storytellers have directed their attention to the oppressors, reminding them of a day when they would be called to account. Stories thus perform multiple functions, allowing us to uncover a more

The Power of Narrative, 23 Legal Stud. F. 315 (1999). Used by permission.

layered reality than is immediately apparent: a refracted one that the legal system must confront.[1]

. . . .

The Space Traders' Solution

1 JANUARY.

The first surprise was not their arrival. The radio messages had begun weeks before, announcing that one thousand ships from a star far out in space would land on 1 January in harbors along the Atlantic coast from Cape Cod to North Carolina. . . . The first surprise was the ships themselves. The people who lined the beaches of Cape Cod saw huge vessels, the size of an aircraft carrier, which the old men in the crowd recognized as being pretty much like the box-shaped landing craft that carried Allied troops to the Normandy beachheads during the Second World War. . . . Then came the second surprise. The leaders of this vast armada could speak English. Moreover, they spoke in the familiar comforting tones of a former U.S. president, having dubbed his recorded voice into a computerized language-translation system. After the initial greetings, the leader of the U.S. delegation opened his mouth to read his welcoming speech. . . . But before he could begin, the principal spokesperson for the space people . . . raised a hand and spoke crisply, and to the point.

And this point constituted the third surprise. Those mammoth vessels carried within their holds treasure of which the United States was in most desperate need: gold, to bail out the almost bankrupt federal, state, and local governments; special chemicals capable of unpolluting the environment, . . . and a totally safe nuclear engine and fuel, to relieve the nation's all-but-depleted supply of fossil fuel. In return, the visitors wanted only one thing—and that was to take back to their home star all the African Americans who lived in the United States.

They would wait sixteen days for a response to their offer. That is, on 17 January—the day when in that year the birthday of Martin Luther King, Jr., was to be observed—they would depart carrying with them every black man, woman, and child in the nation and leave behind untold treasure. . . . Then the visitors turned and glided back over the waves to their ships.

The phones of members of Congress began ringing. . . . A definite split opened up in the nature of the calls—one that reflected distinctly different perceptions of the Space Traders. Most white people were, like the welcoming delegation that morning, relieved and pleased to find the visitors from outer space unthreatening. . . . On the other hand many American blacks had seen the visitors as distinctly unpleasant, even menacing in appearance. While their perceptions of the visitors differed, black people all agreed that the Space Trade looked like bad news and burned up the phone lines urging black leaders to take action against it.

"Will the blacks never be free of their silly superstitions?" whites asked one another with condescending smiles. "Here, in this truly historic moment, when America has been selected as the site for this planet's first contact with people from another world, the blacks just revert to their primitive fear and foolishness." . . .

It was a time of crisis. Not only because of the Space Traders' offer per se, but because that offer came when the country found itself in dire straits. Decades of conservative, laissez-faire capitalism had emptied the coffers of all but a few of the very rich. The nation that had funded the reconstruction of the free world had given itself over to greed and willful exploitation of its natural resources. Massive debt had curtailed all but the most necessary services. The air was so polluted that the sick and elderly had to wear special masks whenever they ventured out-of-doors. In addition, supplies of crude oil and coal were almost exhausted. . . . Though few gave voice to their thoughts, many were thinking that the trade offer was, indeed, the ultimate solution to the nation's troubles.

2 JANUARY.

. . . As soon as the President heard the space visitors' proposition on television, his political instincts immediately locked into place. . . . He had framed the outline of his plan by the time his cabinet members gathered at 8 o'clock the next morning.

His cabinet contained no blacks. . . . Although he had followed the practice of keeping one black on the Supreme Court, it had not won him many minority votes. Furthermore, the few black figures in the party always seemed to him overly opportunistic and, to be frank, not very smart. But now, as the cabinet members arrived, he wished he had covered his bases better.

In the few hours since the Space Traders' offer, the White House and the Congress had been inundated with phone calls and telegrams. The President was not surprised that a clear majority spontaneously urged acceptance of the offer. . . . At least a third of the flood of phone calls and faxes urging quick acceptance of the offer insisted that loss of what the nation would relinquish—its African American citizens—was as worthwhile as what it would receive. The statements accurately reflected relations at the dawn of the new century. . . .

. . . .

[The President] had asked Gleason Golightly, a conservative black economics professor, to attend the meeting. Highly intelligent, Golightly seemed to be truly conservative, not a man ready to sing any political tune for a price. His mere presence as a person of color at this crucial session would neutralize any possible critics in the media, if not in the black civil rights community. . . .

"I think we all know the situation," the President said. "Those extraterrestrial beings are carrying in their ships a guarantee that America will conquer its present problems and prosper for at least this new century."

"I would venture, sir," the Vice-President noted, "that the balance of your term will be known as 'America's Golden Age.' Indeed, the era will almost certainly extend to the terms of your successor."

The President smiled at the remark and, on cue, so did the cabinet. "The VP is right, of course," the President said. "Our visitors from outer space are offering us the chance to correct the excesses of several generations. . . . They are offering not only a solution to our nation's present problems but also to what might be called the great American racial experiment. That's the real issue before us today. Does the promise of restored prosperity justify our sending away fifteen percent of our citizens to Lord knows what fate?"

"There are pluses and minuses to this 'fate' issue, Mr. President," interjected Helen Hipmeyer, Secretary of Health and Human Services. . . . "A large percentage of blacks rely on welfare and other social services. Their departure would ease substantially the burden on our state and national budgets. Why, the cost of caring for black AIDS victims alone has been out of sight. On the other hand, the consternation and guilt among many whites if the blacks are sent away would take a severe psychological toll with medical and other costs that might also reach astronomical levels. To gain the benefits we are discussing, without serious side effects, we must have more justification than I have heard thus far."

"Good point, Madame Secretary," the President answered, "but every opportunity comes with risks."

"I've never considered myself a particularly courageous individual, Mr. President." It was the Secretary of the Interior. . . . "But if I could guarantee prosperity for this great country by giving my life or going off with the Space Traders, I would do it without hesitation. And, if I would do it, I think every red-blooded American with an ounce of patriotism would as well." The Secretary sat down to the warm applause of his colleagues.

His suggestion kindled a thought in the Secretary of Defense. "Mr. President, the secretary's courage is not unlike that American men and women have exhibited when called to military service. . . . It is a call a country makes on the assumption that its citizens will respond. I think that is the situation we have here except that instead of just young men and women, the country needs all of its citizens of African descent to step forward and serve." More applause greeted this suggestion.

The Attorney General got the floor. "Mr. President, I think we could put together a legislative package modeled on the Selective Service Act of 1918. Courts have uniformly upheld this statute and its predecessors as being well within congressional power to exact enforced military duty at home or abroad by United States citizens. . . . But if the mail [Congress is] receiving is anything like ours, then the pressure for passage will be enormous."

. . . .

"What are your thoughts on all this, Professor Golightly?" asked the President. . . .

. . . .

"As you know, Mr. President. . . . I sincerely believe that black people needed to stand up on their own feet, free of the special protection of civil rights laws, the suffocating burden of welfare checks, and the stigmatizing influence of affirmative action programs. . . . Still I disagree strongly with both the Secretary of the Interior and the Attorney General. What they are proposing is not universal selective service for blacks. It is group banishment, a most severe penalty and one that the Attorney General would impose without benefit of either due process or judicial review. It is a mark of just how far out of the mainstream black people are that this proposition is given any serious consideration. Were the Space Traders asking for any other group, white women with red hair and green eyes, for example, a horrified public would order the visitors off the planet without a moment's hesitation. . . .

"Mr. President, I cannot be objective on this proposal. I will match my patriotism with that of the Secretary of the Interior. But my duty stops short of condemning my wife, my three children, my grandchildren, and my aged mother to an unknown fate. You simply cannot condemn 20 million people because they are black, and thus fit fodder for trade, so that this country can pay its debts, protect its environment, and ensure its energy supply. I am not ready to recommend such a sacrifice." . . .

. . . .

[After further discussions, Golightly continued as follows:]

"You and your cabinet must place this offer in historical perspective. This is far from the first time this country's leaders have considered and rejected the removal of all those here of African descent. Benjamin Franklin and other abolitionists actively sought schemes to free the slaves and return them to their homeland. Lincoln examined and supported emigration programs both before and after he freed the slaves. Even those Radical Republicans who drafted the Civil War Amendments wondered whether Africans could ever become a part of the national scene, a part of the American people. . . . Moreover, with all due respect, Mr. President, acceptance of the Space Traders' solution will not bring a century of prosperity to this country. What today seems to you a solution from heaven will instead herald a decade of shame and dissension mirroring the moral conflicts that precipitated this nation into its most bloody conflict, the Civil War. The deep, self-inflicted wounds of that era have never really healed. Their reopening will inevitably lead to confrontations and strife that could cause the eventual dissolution of the nation."

"You seem to assume, Professor Golightly," the Secretary of the Interior interrupted, "that the Space Traders want African Americans for some nefarious purpose. Why do you ignore alternative scenarios? Perhaps they have selected them to inhabit an interplanetary version of the Biblical land of milk and honey. Or, more seriously" the Secretary said, "they may offer your people a new start in a less competitive environment, or"—he added, with a slight smirk in the President's direction—"perhaps they are going to give your people that training in skills and work discipline you are always urging on them." . . .

"I think we get your point, Professor," the President replied smoothly. "We will give it weight in our considerations. Now," he said, rising, "we need to get to work on this thing. We don't have much time." He asked the Attorney General to draw up a rough draft of the proposed legislation by the end of the day. . . .

Long after the others had departed, Gleason Golightly sat at the long conference table. . . .

. . . .

"Oh, Golightly, glad you're still here. I want a word with you." Golightly looked up. The Secretary of the Interior, at his most unctuous, eased himself into the seat beside him.

"Listen, old man, sorry about our differences at the meeting. I understand your concerns."

Golightly did not look at the man and, indeed, kept his eyes on the wall throughout their conversation. "What do you want, Mr. Secretary?"

The Secretary ignored Golightly's coldness. "You could tell in the meeting and from the media reports that this Trade thing is big, very big. There will be debate—as there should be in a great, free country like ours. But if I were a betting man, which I am not because of my religious beliefs, I would wager that this offer will win approval. . . ."

"Why don't we simply follow your suggestion, Mr. Secretary, and tell everyone that the Space Traders are going to take the blacks to a land of milk and honey?"

The Secretary's voice hardened. "I don't think even black people are that stupid. No, Gleason, talk about patriotism, about the readiness of black people to make sacrifices for this country, about how they are really worthy citizens no matter what some may think. We'll leave the wording to you. . . ."

"And then?" Golightly asked, his eyes never moving from the wall.

"We know some blacks will escape. I understand some are leaving the country already. But if you go along with the program, Gleason, and the Trade is approved, the President says he will see to it that one hundred black families are smuggled out of the country. You decide who they are. They'll include you and yours, of course.

. . . .

. . . "Think about it, Golightly. It's the kind of deal we think you should go for."

3 January.

The Anti-Trade Coalition, a gathering of black and liberal white politicians, civil rights representatives, and progressive academics, quickly assembled early that morning. . . . The members drafted a series of legal and political steps designed to organize opposition to the Space Traders' offer.

. . . They drew up plans for direct action protests and boycotts, and, in the event that worse came to worst . . . massive disobedience.

. . . .

Professor Gleason Golightly sought the floor to propose an alternative response to the Trade offer. . . .

As he moved toward the podium, a wave of hostile murmuring broke out whose justification, Golightly acknowledged: "I am well aware that political and ideological differences have for several years sustained a wide chasm between us. But the events of two days ago have transformed our disputes into a painful reminder of our shared status. I am here because, whatever our ideological differences or our socio-economic positions, we all know that black rights, black interests, black property, even black lives are expendable whenever their sacrifice will further or sustain white needs or preferences. . . . This tradition overshadows the national debate about the Space Traders' offer and may well foretell our reply to it.

. . . .

. . . "Although you have labored here unselfishly to devise a defense against what is surely the most dangerous threat to our survival since our forebears were kidnaped from Africa's shores, I think I have a better way, and I urge you to hear it objectively and without regard to our past differences. . . . The only way we can deflect, and perhaps reverse a process that is virtually certain to result in approval of the Space Traders' offer, is to give up the oppositional stance you are about to adopt, and forthrightly urge the country to accept the Space Traders' offer."

. . . .

. . . Golightly waited until the audience quieted, then continued. "A major, perhaps the principal, motivation for racism in this country is the deeply held belief that black people should not have anything that white people don't have. Not only do whites insist on better jobs, higher incomes, better schools and neighborhoods, better everything, but they also usurp aspects of our culture that have sprung from our very subordination. . . . Whites' appropriation of what is ours and their general acquisitiveness are facts we must make work for us. Rather than resisting the Space Traders' offer, let us circulate widely the rumor that the Space Traders, aware of our long fruitless struggle on this planet, are arranging to transport us to a land of milk and honey—a virtual paradise. Remember, most whites are so jealous of their race-based prerogatives that they oppose affirmative action even though many of these programs would re-

move barriers that exclude whites as well as blacks. Can we not expect such whites . . . to go all out to prevent blacks from gaining access to an extraterrestrial New Jerusalem? . . . Mark my words, our 'milk and honey' story will inspire whites to institute such litigation on the grounds that limiting the Space Traders' offer to black people is unconstitutional discrimination against whites!"

. . . .

Justin Jasper, a well-known and highly respected Baptist minister, came to the microphone. "I readily concede Dr. Golightly's expertise in the psychology of whites' thinking. Furthermore, as he requests, I hold in abeyance my deep distrust of a black man whose willing service to whites has led him to become a master minstrel of political mimicry. But my problem with his plan is twofold. First, it rings hollow because it so resembles Dr. Golightly's consistent opposition in the past to all our civil rights initiatives. Once again, he is urging us to accept rather than oppose a racist policy. And, not only are we not to resist, but we are to beg the country to lead us to the sacrificial altar. God may have that power, but Dr. Golightly is not my God!"

A master orator, the Reverend Jasper quickly had his audience with him. "Second, because the proposal lacks truth, it insults my soul. In the forty years I have worked for civil rights, I have lost more battles than I have won, but I have never lost my integrity. Telling the truth about racism has put me in prison and many of my co-workers into early graves. The truth is, Dr. Golightly, that what this country is ready to do to us is wrong. . . . I can speak only for myself, but . . . I do not choose to save myself by a tactic that may preserve my body at the sacrifice of my soul. Until my Lord calls me home, I do not want to leave this country even for a land of milk and honey. My people were brought here involuntarily, and that is the only way they are going to get me out!"

The Reverend Jasper received a standing ovation. After thanking them, the minister asked everyone to join in singing the old nineteenth-century hymn, "Amazing Grace." . . .

. . . .

With the hymn's melody still resonating, the coalition's members voted unanimously to approve their defensive package. . . . Leaving the hall, everyone agreed that they had done all that could be done to oppose approval of the Space Traders' offer. As for Golightly, his proposal was dismissed as coming from a person who, in their view, had so often sold out black interests. . . .

. . . .

. . . Golightly had failed, and he knew it. Sure, he was smarter than they were—smarter even than most whites; but he had finally outsmarted himself. At the crucial moment, when he most needed to help his people, both whites and blacks had rejected as untrustworthy both himself and his plans.

4 JANUARY.

In a nationally televised address, the President sought to reassure Trade supporters that he was responding favorably to their strong messages, and to blacks and whites opposed to the Trade that he would not ignore their views. . . .

. . . .

"Of course, I am aware of the sacrifice that some of our most highly regarded citizens would be asked to make in the proposed trade. While these citizens are of only one racial group, absolutely no evidence whatsoever indicates that the selection was intended to discriminate against any race or religion or ethnic background. No decisions have been made, and all options are under review. The materials the Traders have offered us are genuine and perform as promised. Early estimates indicate that, if these materials were made available to this nation, they would solve our economic crisis, and we could look forward to a century of unparalleled prosperity. . . ."

. . . .

5 JANUARY.

. . . .

Media and business polls all reported tremendous public support for the Trade—unhappy but hardly unexpected news for the nation's richest and most powerful men. First, blacks represented 12 percent of the market and generally consumed much more of their income than did their white counterparts. No one wanted to send that portion of the market into outer space—not even for the social and practical benefits offered by the Space Traders.

Even those benefits were a mixed blessing. Coal and oil companies were not elated at the prospect of an inexhaustible energy source. Similarly, businesses whose profits were based on sales in black ghetto communities

—or who supplied law enforcement agencies, prisons, and other such institutions—faced substantial losses in sales. The real estate industry, for example, annually reaped uncounted millions in commissions on sales and rentals, inflated by the understanding that blacks would not be allowed to purchase or rent in the area. Even these concerns were overshadowed by fears of what the huge influx of gold to pay all state debts would do to the economy, or to the value of either the current money supply or gold.

Most business leaders understood that blacks were crucial in stabilizing the economy with its ever-increasing disparity between the incomes of the rich and the poor. They recognized that potentially turbulent unrest among those on the bottom was deflected by the continuing efforts of poorer whites to ensure that they at least remained ahead of blacks. If blacks were removed from the society, working and middle-class whites —deprived of their racial distraction—might look upward toward the top of the societal well and realize that they as well as the blacks below them suffered because of the gross disparities in opportunities and income.

Many of these corporate leaders and their elected representatives had for years exploited poor whites' ignorance of their real enemy. Now, what had been a comforting insulation of their privileges and wealth posed a serious barrier to what a majority saw as a first priority: persuade the country to reject the Trade. A quick survey of the media and advertising representatives was not encouraging. "It would be quite a challenge," one network executive said, "but we simply can't change this country's view about the superiority of whites and the inferiority of blacks in a week. I doubt you could do it in a decade." Even so, the corporate leaders decided to try. They planned to launch immediately a major media campaign—television, radio, and the press—to exploit both the integration achieved in America and the moral cost of its loss. . . .

Newspaper and magazine publishers promised supportive editorials, but the Vice President and other government representatives, in line with the administration's pro-Trade leanings, argued that the immediate political gains from accepting the Trade would translate into business benefits as well.

. . . .

"We need your financial support," the Vice President told corporate leaders, "but our polls show most white voters favor the Trade and the administration is under increasing pressure to do the same. . . ."

"However enticing such benefits of the Trade may be," countered a census expert from a major foundation, "the real attraction for a great

many whites is that it would remove black people from this society. My staff and I have interviewed literally thousands of citizens across the country, and, though they don't say it directly, it's clear that at bottom, they simply think this will be a better country without black people. I fear, gentlemen, that those of us who have been perpetuating this belief over the years have done a better job than we knew."

"I must add what you probably already know," the Vice President responded. "The Administration is leaning toward acceptance of the Space Traders' offer. . . . [The President] knows that the working and middle-class white people in this country want the blacks to go, and if they get a chance to express their real views in the privacy of a polling place, the Trade plan will pass overwhelmingly."

"Bullshit!" roared a billionaire who had made his fortune in construction. "I'm sick of this defeatist talk! . . . Everyone says that money talks. Well dammit, let's get out there and spend some money. If this thing goes to a public referendum, we can buy whatever and whoever is necessary. It sure as hell will not be the first time," he wound up, pounding both fists on the long conference table, "and likely not the last."

. . . The business leaders began making specific plans to suspend all regular broadcasting and, through 16 January, to air nothing but anti-Trade ads and special Trade programs.

6 January.

Although the Television Evangelists of America also owned jets, they understood that their power lay less in these perks of the wealthy than in their own ability to manipulate their TV congregations' religious feelings. So, after a lengthy conference call, they announced a massive evangelical rally in the Houston Astrodome which would be televised over their religious cable network. The Trade offer was the evangelists' chance to rebuild their prestige and fortunes. . . . They would achieve this much-desired goal by playing on, rather than trying to change, the strongly racist views of their mostly working-class television audiences. True, some of the preachers had a substantial black following, but evangelical support for the Trade would not be the evangelists' decision. Rather, these media Messiahs heralded it as God's will.

The Space Traders were, according to the televised "Gospel," bringing America blessings earned by their listeners' and viewers' faithful dedication to freedom, liberty, and God's word. . . . True, a sacrifice was re-

quired if they were to obtain God's bounty—a painful sacrifice. But here, too, God was testing Americans, his chosen people, to ensure that they were worthy of His bounty, deserving of His love. . . . That night, millions of messages, all urging acceptance of the Space Traders' offer, deluged the President and Congress.

7 January.

Groups supporting the Space Traders' proposition . . . had set in motion the steps necessary to convene a Constitutional convention in Philadelphia. . . . And there, on this day, on the site of the original Constitutional convention, delegates chosen by the state legislatures quickly drafted, and by a substantial majority passed, the Twenty-seventh Amendment to the Constitution of the United States. It declared:

> Without regard to the language or interpretations previously given any other provision of this document, every United States citizen is subject at the call of Congress to selection for special service for periods necessary to protect domestic interests and international needs.

The amendment was scheduled for ratification by the states on 15 January in a national referendum. If ratified, the amendment would validate amendments to existing Selective Service laws authorizing the induction of all blacks into special service for transportation under the terms of the Space Traders' offer.

. . . .

10 January.

In the brief but intense pre-election day campaign, the pro-ratification groups' major argument exhibited an appeal that surprised even those who made it. Their message was straightforward:

> The Framers intended America to be a white country. The evidence of their intentions is present in the original Constitution. . . . We have concluded—as the Framers did in the beginning that our survival today requires that we sacrifice the rights of blacks in order to protect and further the interests of whites. The Framers' example must be our guide. Patriotism and not pity must govern our decision. . . .

In response, a coalition of liberal opponents sought to combine pragmatism and principle in what they called their "slippery Trade slope" argument. First, they proclaimed that trading away a group of Americans identifiable by race is wrong and violates our basic principles. The coalition aimed its major thrust, however, at the self-interest of white Americans: "Does not consigning blacks to an unknown fate set a dangerous precedent?" the liberals demanded. "Who will be next?"

. . . .

Astutely sidestepping the Trade precedent arguments, the response focused on the past sacrifices of blacks. "In each instance," they contended, "the sacrifice of black rights was absolutely necessary to accomplish an important government purpose. These decisions were neither arbitrary nor capricious. Without the compromises on slavery in the Constitution of 1787, there would be no America. Nor would there be any framework under which those opposed to slavery could continue the struggle that eventually led to the Civil War and emancipation."

. . . .

In countering the anti-Trade contention that the sacrifice of black rights was both evil and unprecedented, pro-Traders claimed, "Beginning with the Civil War in which black people gained their liberty, this nation has called on its people to serve in its defense. Many men and women have voluntarily enlisted in the armed services, but literally millions of men have been conscripted, required to serve their country and, if necessary, to sacrifice not simply their rights but also their lives. As for the argument that the sacrifice of black rights in political compromises was odious racial discrimination, pro-Trade forces contended that "fortuitous fate and not blatant racism" should be held responsible. . . . "All Americans are expected to make sacrifices for the good of their country. Black people are no exceptions to this basic obligation of citizenship. Their role may be special, but so is that of many of those who serve. The role that blacks may be called on to play is, however regrettable, neither immoral nor unconstitutional."

. . . The "racial sacrifice as historic necessity" argument made the pro-Trade position irresistible to millions of voters—and to their Congressional representatives.

11 January.

Unconfirmed media reports asserted that U.S. officials tried in secret negotiations to get the Space Traders to take in trade only those blacks currently under the jurisdiction of the criminal justice system—that is, in prison or on parole or probation. Government negotiators noted that this would include almost one half of the black males in the 20-to-29-year-old age bracket.[2] Negotiators were also reported to have offered to trade blacks locked in the inner cities. . . . In rejecting the American offer, the Space Traders warned that they would withdraw their proposition unless the United States halted the flight of the growing numbers of blacks who —fearing the worst—were fleeing the country.

In response, executive orders barred blacks from leaving the country until the Space Traders' proposition was fully debated and resolved. "It is your patriotic duty," blacks were told by the White House, "to allow this great issue to be resolved through the democratic process and in accordance with the rule of law." To ensure that the trade debate and referendum were concluded in a "noncoercive environment," all blacks serving in the military were placed on furlough and relieved of their weapons. State officials took similar action with respect to blacks on active duty in state and local police forces.

. . . .

14 January.

The U.S. government announced that as a result of intensive negotiations with Space Trader leaders, the visitors had agreed to amend their offer and exclude from the Trade all black people who were seventy years old and older, seriously handicapped, ill, or injured. In addition, a thousand otherwise-eligible blacks and their immediate families would be left behind as trustees of black property and possessions, all of which were to be stored or held in escrow in case blacks were returned to this country. Each of the thousand black "detainees" was required to pledge to accept a subordinate status with "suspended citizenship" until such time as the "special service inductees" were returned to the country. The administration selected blacks to remain who had records of loyalty to the conservative party and no recorded instances of militant activity. Even so, many of those blacks selected declined to remain. "We will, like the others," one

black who rejected detainee status said, "take our chances with the Referendum."

15 January.

By 70 percent to 30 percent, American citizens voted to ratify the constitutional amendment that provided a legal basis for acceptance of the Space Traders' offer. In anticipation of this result, government agencies had secretly made preparations to facilitate the transfer. Some blacks escaped, and many thousands lost their lives in futile efforts to resist the joint federal and state police teams responsible for rounding up, cataloguing, and transporting blacks to the coast.

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17 January.

The last Martin Luther King holiday the nation would ever observe dawned on an extraordinary sight. In the night, the Space Traders had drawn their strange ships right up to the beaches and discharged their cargoes of gold, minerals, and machinery. They closed the doors. As the sun rose, they began to arrange in long lines some twenty million silent black men, women, and children, including babes in arms. First, the Traders directed the inductees to strip of all but a single undergarment. Then the doors swung open. Ahead, the traders directed them toward the yawning holds where they would be swallowed by what Milton might have described as a "darkness visible." Behind them, the U.S. guards, guns in hand, stood watch. There was no escape, no alternative. Heads bowed, arms now linked by slender chains, black people left the new world as their forebears had arrived.

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NOTES

1. Richard Delgado & Jean Stefancic, Derrick Bell's *Chronicle of the Space Traders: Would the U.S. Sacrifice People of Color If the Price Were Right?*, 62 U. Colo. L. Rev. 321 (1991).

2. David Savage, *1 in 4 Young Blacks in Jail Or in Court Control, Study Says,* L.A. Times, Feb. 27, 1990, p. 1, col. 1, at § A.

Racial Realism

Black people's struggle for freedom, justice, and dignity is as old as this nation. . . . In spite of dramatic civil rights movements and periodic victories in the legislatures, black Americans by no means are equal to whites. Racial equality is, in fact, not a realistic goal. By constantly aiming for a status that is unobtainable in a perilously racist America, black Americans face frustration and despair. Over time, our persistent quest for integration has hardened into self-defeating rigidity.

Black people need reform of our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists. By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, blacks can refine the work of the Realists. Rather than challenging the entire jurisprudential system, as the Realists did, blacks' challenge must be much narrower—to the principle of racial equality. This new movement—Racial Realism—is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.

. . . Racial Realism is to race relations what Legal Realism is to jurisprudential thought. The Legal Realists were a group of scholars in the early part of the twentieth century who challenged the classical structure of law as a formal group of rules that, if properly applied to any given situation, lead to a right—and therefore just—result.[1] . . . Realists accept a critical and empirical attitude towards the law, in contrast to the formalists who insist that law is logically self-evident, objective, a priori valid, and internally consistent. . . . They stress the function of law, rather than the abstract conceptualization of it.

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24 Conn. L. Rev. 363 (1992). Used by permission.

Closely linked with the Realists' attack on the logic of rights theory was their attack on the logic of precedent. No two cases, the Realists pointed out, are ever exactly alike. Hence a procedural rule from a former case cannot simply be applied to a new case with a multitude of facts that vary from the former case. Rather, the judge has to choose whether or not the ruling in the earlier case should be extended to include the new case. Such a choice basically is about the relevancy of facts and is never logically compelled. Decisions about the relevance of distinguishing facts are value-laden and dependent upon a judge's own experiences.[2]

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As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the "rule of law"—abstract principles lead to legal results that harm blacks and perpetuate their inferior status. Racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise. Consider, for example, *Regents of the University of California v. Bakke*.[3] Relying heavily on the formalistic language of the Fourteenth Amendment, and utterly ignoring social questions about which race in fact has power and advantages and which race has been denied entry for centuries into academia, the Court held that an affirmative action policy may not unseat white candidates on the basis of their race. By introducing an artificial and inappropriate parity in its reasoning, the Court effectively made a choice to ignore historical patterns and contemporary statistics, and flee from flexible reasoning. Following a Realist approach, the Court would have observed the social landscape and noticed the skewed representation of minority medical school students. It would have reflected on the possible reasons for these demographics, including inadequate public school systems in urban ghettos, lack of minority professionals to serve as role models, and the use of standardized tests evaluated by "white" standards. Taking these factors into consideration, the Court very well may have decided *Bakke* differently.

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Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: "Racial Realism." This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgment enables us to avoid despair

and frees us to imagine and enact racial strategies that can bring fulfillment and even triumph.

Legal precedents we thought permanent have been overturned, distinguished, or simply ignored. All too many of the black people we sought to lift through law from a subordinate status to equal opportunity are more deeply mired in poverty and despair than they were during the separate but equal era. Despite our successful effort to strip the law's endorsement from the hated Jim Crow signs, contemporary color barriers are less visible but neither less real nor less oppressive. Today, one can travel for thousands of miles across this country and never come across a public facility designated for "colored" or "white." Indeed, the very absence of visible signs of discrimination creates an atmosphere of racial neutrality that encourages whites to believe that racism is a thing of the past.

Today, blacks experiencing rejection for a job, a home, a promotion anguish over whether race or individual failing prompted their exclusion. Either conclusion breeds frustration and eventually despair. We call ourselves African Americans, but despite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction or affront.

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As a veteran of a civil rights era that is now over, I regret the need to explain what went wrong. Clearly we need to examine what it was about our reliance on racial remedies that may have prevented us from recognizing that these legal rights could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form. The question is whether this examination requires us to redefine goals of racial equality and opportunity to which blacks have adhered for more than a century. The answer must be a resounding "yes."

Traditional civil rights law is highly structured and founded on the belief that the Constitution was intended—at least after the Civil War Amendments—to guarantee equal rights to blacks. The belief in eventual racial justice, and the litigation and legislation based on that belief, was always dependent on the ability of believers to remain faithful to their creed of racial equality, while rejecting the contrary message of discrimination that survived their best efforts to control or eliminate it.

Despite the Realist challenge that demolished its premises, the basic formalist model of law survives. . . . The message the formalist model

conveys is that existing power relations in the real world are by definition legitimate and must go unchallenged.

. . . Nearly every critique the Realists launched at the formalists can be hurled at advocates of liberal civil rights theory. Precedent, rights theory, and objectivity merely are formal rules that serve a covert purpose. Even in the context of equality theory, they will never vindicate the legal rights of black Americans. . . .

. . . The practice of using blacks as scapegoats for failed economic or political policies works every time. The effectiveness of this "racial bonding" by whites requires that blacks seek a new and more realistic goal for our civil rights activism. It is time we concede that a commitment to racial equality merely perpetuates our disempowerment. Rather, we need a mechanism to make life bearable in a society where blacks are a permanent subordinate class. Our empowerment lies in recognizing that Racial Realism may open the gateway to attaining a more meaningful status.

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While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to those we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that imaginative, unabashed risk-takers refuse to be trampeled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.

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A final remembrance may help make my point. The year was 1964. It was a quiet, heat-hushed evening in Harmony, a small, black community near the Mississippi Delta. Some residents were organizing to ensure implementation of a court order mandating desegregation. Walking with Mrs. Biona MacDonald, one of the organizers, up a dusty, unpaved road toward her modest home, I asked where she found the courage to continue working for civil rights. . . . "Derrick," she said slowly, seriously, "I am an old woman. I lives to harass white folks." . . .

Mrs. MacDonald did not say she risked everything because she hoped or expected to win out over the whites who, as she well knew, held all the

economic and political power and the guns as well. Rather, she recognized that—powerless as she was—she had the courage and determination "to harass white folks." Her fight, in itself, gave her strength and empowerment in a society that relentlessly attempted to wear her down. Mrs. MacDonald did not even hint that her harassment would topple whites' well-entrenched power. Rather, her goal was defiance and gained force precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

. . . Mrs. MacDonald understood twenty-five years ago the theory that I am espousing now for black leaders and civil rights lawyers to adopt. If you remember her story, you will understand my message.

NOTES

1. See Elizabeth Mensch, "The History of Mainstream Legal Thought," in *The Politics of Law* 18-20 (David Kairys ed., 1990).

2. Id. at 22.

3. 438 U.S. 265 (1978).

Who's Afraid of Critical Race Theory?

As I see it, critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it. Radical assessment can encompass illustration, anecdote, allegory, and imagination, as well as analysis of applicable doctrine and authorities. . . .

. . . .

"Who's Afraid of Critical Race Theory?" The interrogatory poses indirectly two questions. First, what *is* critical race theory? And second, what *ought* critical race theory to be? The distinction is useful even though the dividing line between the descriptive (what is) and the prescriptive (what it ought to be) can be quite fine.

The answers to what *is* critical race theory are fairly uniform and quite extensive. As to what critical race theory *ought* to be, the answers are far from uniform and, not coincidentally, tend to take the form of outsider criticism rather than insider inquiry. As to the *what is,* critical race theory is a body of legal scholarship, a majority of whose authors[1] are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law. Those critical race theorists who are white are usually committed to the overthrow of their own racial privilege.

Critical race theory scholarship is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity. The work is often disruptive because its commitment to anti-racism goes well beyond civil rights, integration, affirmative action, and other liberal measures. This is not to

U. Ill. L. Rev. 893 (1995).

say that critical race theory adherents automatically or uniformly "trash" liberal ideology and method. Rather, they are highly suspicious of the liberal agenda, distrust its method, and want to retain what they see as a valuable strain of egalitarianism which may exist despite, and not because of, liberalism.

As this description suggests, critical race theory scholarship exhibits a good deal of tension between its commitment to radical critique of the law (which is normatively deconstructionist) and its commitment to radical emancipation by the law (which is normatively reconstructionist). Angela Harris views this tension—between "modernist" and "postmodernist" narrative—as a source of strength because of critical race theorists' ability to use it in ways that are creative rather than paralyzing.[2]

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Most critical race theorists are committed to a program of scholarly resistance that they hope will lay the groundwork for wide-scale resistance. Veronica Gentilli puts it this way: "Critical race theorists seem grouped together not by virtue of their theoretical cohesiveness but rather because they are motivated by similar concerns and face similar theoretical (and practical) challenges."[3] To reiterate, the similar concerns referred to here include, most basically, an orientation around race that seeks to attack a legal system which disempowers people of color.

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Critical race theorists strive for a specific, more egalitarian, world. We seek to empower and include traditionally excluded views and see all-inclusiveness as the ideal because of our belief in collective wisdom. For example, in a recent debate over "hate speech," both Chuck Lawrence and Mari Matsuda made the point that being committed to "free speech" may seem like a neutral principle, but it is not.[4] Thus, proclaiming that "I am committed equally to allowing free speech for the KKK and 2LiveCrew" is a non-neutral value judgment, one that asserts that the freedom to say hateful things is more important than the freedom to be free from the victimization, stigma, and humiliation that hate speech entails.

We emphasize our marginality and try to turn it toward advantageous perspective building and concrete advocacy on behalf of those oppressed by race and other interlocking factors of gender, economic class, and sexual orientation. When I say we are marginalized, it is not because we are victim-mongers seeking sympathy. Rather, we see such identification as one of the only hopes of transformative resistance strategy. However, we remain members of the whole set, as opposed to the large (and growing)

number of blacks whose poverty and lack of opportunity have rendered them totally silent. We want to use our perspective as a means of outreach to those similarly situated but who are so caught up in the property perspectives of whiteness that they cannot recognize their subordination.

I am not sure who coined the phrase "critical race theory" to describe this form of writing, and I have received more credit than I deserve for the movement's origins. I rather think that this writing is the response to a need for expressing views that cannot be communicated effectively through existing techniques. In my case, I prefer using stories as a means of communicating views to those who hold very different views on the emotionally charged subject of race. People enjoy stories and will often suspend their beliefs, listen to the story, and then compare their views, not with mine, but with those expressed in the story.

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. . . Critical race theory writing embraces an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies. Indeed, even a critical race theory critic finds that the "clearest unifying theme" of the writing is "a call for a change of perspective, specifically, a demand that racial problems be viewed from the perspective of minority groups, rather than a white perspective."[5] We use a number of different voices, but all recognize that racial subordination maintains and perpetuates the American social order. The narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritative. The voice exposes, tells and retells, signals resistance and caring, and reiterates the most fearsome power—the power of commitment to change.

Given all of this, you will not be surprised to learn that the legal academy has not warmly embraced critical race theory, particularly at the faculty level. Indeed, a small but growing body of work views critical race theory as interesting, but not a "subdiscipline" unto itself and therefore amenable to mainstream standards. These writers are not reluctant to tell us what critical race theory *ought* to be. They question the accuracy of the stories, fail to see their relevance, and want more of an analytical dimension to the work—all this while claiming that their critiques will give this writing a much-needed "legitimacy" in the academic world.

In a major critique, Daniel Farber and Suzanna Sherry urge critical race theorists to tell stories that are "accurate" and "typical," and then

go on to "articulate the legal relevance of the stories" by "includ[ing] an analytic dimension."[6] The authors seem unaware of the bizarre irony in their pronouncement that "we know of no work on critical race theory that discusses psychological or other social science studies supporting the existence of a voice of color."

They do not tell us just what such a study would look like, and why centuries of testimony by people of color regarding their experiences, including individuals like Frederick Douglass, W. E. B. Du Bois, Charles Wright, and Toni Morrison, are not measure enough. Farber and Sherry also "find little support for the general claim that traditional [academic] standards are inherently unfair to work by women and minorities," and contend that "creating literature has little nexus with the specific institutional traits of law schools." They urge critical race theory writers to include more "traditional" scholarship in their approach.

Perhaps critical race theory's sharpest critic is Randall Kennedy, whose blackness lends his critique a super legitimacy inversely proportional to the illegitimacy bequeathed to critical race theory. Kennedy notes the "insurgent" quality of minority scholars whose "impatience" has succeeded in making the race question a burning issue as never before in legal academia.[7] But, he says, the writings of critical race theory reveal "significant deficiencies"; they "fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars of color produce a racially distinctive brand of scholarship."

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At a time of crisis, critics serve as reminders that we are being heard, if not always appreciated. For those of us for whom history provides the best guide to contemporary understanding, criticism is a reassurance. The reason for this reassurance is contained in this final observation.

It was in the early years of African slavery, after the point where the nation decided that slaves were essential for the exploitation of the land's natural resources, but before the techniques of enslavement had been perfected. As a part of the subjugation process, newly arrived Africans were separated from those of the same tribe. They were barred from using their native language or practicing their customs. While required to learn sufficient English to understand the white masters who would rule their lives, penalties for actually learning to read and write were severe. Despite the dangers, we know that many of the enslaved did acquire basic literacy skills. The Bible was often their primer as well as the primary access to their adopted religion, Christianity.

The Africans were allowed to sing. It is said that many had voices that were pleasant to the ear, and their singing in the evening after a day of hard labor in the fields or in the master's house seemed an innocent relaxation for the slaves and their owners. It was a long time before the masters learned, if they ever did, that the slaves used their songs as a means of communication: giving warning, conveying information about escapes planned and carried out, and simply for uplifting the spirit and fortifying the soul. It was even longer before the Spirituals won recognition as a theology in song, a new interpretation of Christianity, one far closer to the original than that of those who hoped the Bible would serve as a tool of pacification, not enlightenment.

At some point, white scholars must have heard the Spirituals. It is easy to imagine their reaction. Even the most hostile would have had to admit that the sometimes joyous and often plaintive melodies had a surface attraction. The scholars would have concluded, though, that the basically primitive song-chants were not capable of complex development and were certainly too simplistic to convey sophisticated musical ideas. The music, moreover, was not in classical form, likely deemed a fatal defect. Indeed, the slave songs were not even written down by their unknown composers.

Whatever they were, the critics would conclude, these songs were not art. The music offered no potential for intellectual inspiration as opposed to purely emotional satisfaction. Of course, the critics might concede, in the hands of classically trained composers and musicians, the Spirituals might serve as folk melodies from which true art might be rendered. Stephen Foster was said to have done this, and later Antonin Dvorak, and still later, George Gershwin. Many others followed. A few of them credited the genius in the slave songs, but most simply took what they wanted and called it their own without acknowledging the sources that, when asked, they deprecated and denied.

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Comparing critical race theory writing with the Spirituals is an unjustified conceit, but the essence of both is quite similar: to communicate understanding and reassurance to needy souls trapped in a hostile world. Moreover, the use of unorthodox structure, language, and form to make sense of the senseless is another similarity. Quite predictably, critics wedded to the existing legal canons will measure critical race theory, employing their standards of excellence, and find this new work seriously inadequate. Many of these critics are steeped in theory and deathly afraid of

experience. They seek meaning by dissecting portions of this writing—the autobiographical quality of some work, and the allegorical, story-telling characteristic in others. But all such criticisms miss the point. Critical race theory cannot be understood by claiming that it is intended to make critical race studies writing more accessible and more effective in conveying arguments of discrimination and disadvantage to the majority. Moreover, it is presumptuous to suggest, as a few critics do, that by their attention, even negative attention, they provide this work with legitimacy so that the world will take it seriously. Even if correct, this view is both paternalistic and a pathetically poor effort to regain a position of dominance.

I hope that those doing critical race theory, when reviewing these critiques, will consider the source. As to a response, a sad smile of sympathy may suffice. For those who press harder for explanations, both Beethoven and Louie Armstrong are available for quotation. When questioned about the meaning of his late quartets, Beethoven dismissed the critics with a prediction: "it was not written for you, but for a later age." And when asked for the meaning of jazz, Armstrong warned, "Man, if you don't know, don't mess with it."

NOTES

1. Critical race theory's founding members are usually identified as Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams.

2. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction,* 82 Cal. L. Rev. 741, 743 (1994). Richard Delgado, one of critical race theory's original writers, lists as among the attributes of critical race scholars the following:

> (1) insistence on "naming our own reality"; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform.

Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter,* 76 Va. L. Rev. 95, 95 n.4 (1990).

3. Veronica Gentilli, Comment, *A Double Challenge for Critical Race Scholars: The Moral Context,* 65 S. Cal. L. Rev. 2361, 2362 (1992).

4. *See generally* Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* 1990 Duke L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 Mich. L. Rev. 2320 (1989).

5. Daniel A. Farber, *The Outmoded Debate over Affirmative Action,* 82 Cal. L. Rev. 893, 904 (1994).

6. Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives,* 45 Stan. L. Rev. 807, 809 (1993).

7. Randall L. Kennedy, *Racial Critiques of Legal Academia,* 102 Harv. L. Rev. 1745, 1748 (1989).

Racism Is Here to Stay

Now What?

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on. Armed with a perspective on our society that I call Racial Realism, we can insulate ourselves from despair based on our subordinate status. We will then be free to imagine and activate racial strategies that can bring fulfillment and even triumph.

My thesis is jarring, I think, because for too long we have comforted ourselves with the myth of "slow but steady" racial progress. In fact, our racial status in this country has been cyclical—legal rights are gained, then lost, then gained again in response to economic and political developments over which blacks exercise little or no control. Civil rights law has always been a part of rather than an exception to this cyclical phenomenon.

Because the dimensions of this cycle remain uncharted, we who advocate on behalf of the nation's colored people seem trapped in a giant, unseen gyroscope. Even our most powerful efforts are unable to divert it from its preplanned equilibrium or alter its orientation toward dominance for whites over blacks. The symbols change, but our status remains fixed. Society's stability strengthens rather than weakens by the movement up through the class ranks of the precious few who too quickly are deemed to have "made it."

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35 How. L.J. 79 (1991). Used by permission.

In 1895, Booker T. Washington, another black man who had risen from the bottom—slavery itself—gained an instant and lasting status in white America by declaring in his now famous Atlanta Compromise speech that black people should eschew racial equality and seek to gain acceptance in society by becoming useful through trades and skills, developed through hard work, persistence, and sacrifice. Whites welcomed Washington's conciliatory, non-confrontational policy, and deemed it a sufficient self-acceptance for the society's involuntary subordination of blacks in every area of life. . . .

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Similarly, the most sought-after black spokespersons today are those whose views undermine affirmative action and underestimate the effects of contemporary racism—while placing the blame for blacks' ever-worsening state on characteristics that are far more the result of condition than color. Again, their homilies of self-help are not bad in themselves. They are simply grossly unrealistic in an economy where millions, white as well as black, are unemployed and where racial discrimination in the workplace is as entrenched (if somewhat less obvious) than it was when employers posted signs, "no negroes need apply."

For white people in denial, how sweet it must be for them when a black person stands in a public place and condemns as slothful and unambitious those blacks who are less successful simply because they refused to get out there and make it as the speaker did. . . .

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Actually, I am reluctant to characterize these black pseudo "Horatio Algers" as "conservatives." Hell, I consider myself a conservative. I relied on the courts as a civil rights lawyer to teach the law to the next generation of lawyers, even as the number of black folk living in poverty and dying the same way continued to mount. . . .

But Booker T. Washington and his contemporary counterparts are a reflection of and not the cause of our racial malaise. They comfort whites but should not distract blacks from the real causes of our condition. Stated simply, the deeply shared need in this nation to maintain blacks in a subordinate status serves to maintain stability and solidarity among whites whose own social and economic status varies widely. As a result, progress in our effort to gain racial equality is so hard to achieve and so easy to lose—precisely because rights for blacks are always vulnerable to sacrifice to further the needs of whites.

That is why the hard earned progress we make by enacting civil rights laws or winning cases in the courts is so transitory. Indeed, what we call "progress" in civil rights invariably depends more on the perceived benefits to whites of our proposed racial reforms than on the degree of injustice actually suffered by blacks or other people of color.

Lord knows we want progress, and we must work for it on both an individual and group level. . . . But progress is often more symbolic than real. In politics, it is tempting to look at the number of black mayors and overlook that most preside over cities with eroded tax bases, departed businesses, and entrenched civil servants. The plight of black mayors reminds us that we, as black people, gain access to political positions the way we gain access to all white neighborhoods—when the housing stock is run down, maintenance is expensive, and past abuse and mismanagement by whites make effective governance impossible for blacks who, of course, will be blamed for their failure to set things right.

In business, all but a few of our corporate executives are staff people with plenty of public exposure, little real authority, and always at risk when the need to cut budgets is high or the interest in maintaining a "minority presence" is low. We boast that we have black millionaires, but most made their money in entertainment and sports because their talents and skill entertained millions of whites and enabled some of those whites to earn billions.

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Millions of Americans, white as well as black, face steadily worsening conditions: poverty, unemployment, health care, housing, education, and the environment. The gap in national incomes has reached the point that those in the top fifth earn more than their counterparts in the bottom four-fifths combined.

Shocking. And yet, conservative white politicians are able to gain and hold even the highest office despite their failure to address seriously any of these issues. They rely instead on the time tested formula of getting needy whites to identify on the basis of their shared skin color. . . . Whites rally on the basis of racial pride and patriotism to accept their often lowly lot in life and vent their frustration by opposing any serious advancement by blacks.

It works every time. It worked when rich slave owners convinced the white working class to stand with them against the danger of slave revolts—even though slavery condemned white workers to a life of economic deprivation. It worked after the Civil War when poor whites

fought social reforms and settled for segregation rather than see those formerly enslaved blacks get ahead. It worked when most labor unions preferred to allow the plant owners to break their strikes with black scab labor rather than allow blacks to join their unions.

It is working again as whites, disadvantaged by high stakes entrance requirements, fight to end affirmative action policies that, in fact, have helped more whites than blacks.

The reasons for this "Caucasian commitment" are likely both numerous and complex. But a crucial factor seems to be the unstated understanding by the mass of whites that they will accept large disparities in economic opportunity so long as they have a priority over blacks and other people of color for access to whatever opportunities are left.

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Even those whites who lack wealth and power are sustained in their sense of racial superiority by policy decisions that sacrifice black rights. The subordination of blacks seems to reassure whites of an unspoken but no less certain property right in their "whiteness." This right receives judicial recognition like all property rights under a government created and sustained primarily for that purpose. Thus, from the beginning of slavery, masses of whites have supported programs that were contrary to their economic interest as long as those policies provided them with a status superior to that of blacks. . . . Consider the case of a dirt poor southern white, shown participating in a Ku Klux Klan rally in the movie *Resurgence,* who declared: "Every morning, I wake up and thank God I'm white." For this person, and for others like him, race consciousness, manifested by his refusal even to associate with blacks, provides a powerful explanation of why he fails to challenge the current social order.

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"You made it despite being black and subject to discrimination," the question goes, "so why can't the rest of 'them' do the same?" For those who pose it, the question, carries its own conclusion. . . . Providing conservatives with fodder for their anti–civil rights arguments, though, is not the only or most dangerous threat that the success of some blacks poses. Robert L. Allen in his 1969 book, *Black Awakening in Capitalist America,* reminds us that the growing gap in income and status between those blacks who are making it and those who are not tracks developments in colonial countries where the colonizers maintained their control by establishing class divisions within the ranks of the colonized.

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While his book was written prior to the affirmative action era, Allen would argue that such policies co-opt a portion of the black middle class who, without their privileged positions, might provide leadership to the black masses who are now locked in poverty-stricken areas from which their potential leaders have been permitted to escape. Separated from their benighted brethren by social class and economic status, the black middle-class are often objects of deep suspicion rather than role models for those locked in poverty-based despair.

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History, I am afraid, will look at our freedom efforts as child-like, trusting, believing, and hopelessly naive. Growing up means coming to confess that many of those civil rights battles we thought we won all too frequently were transformed before our eyes into new, more sophisticated barriers for the ever elusive equality.

All now acknowledge that hopes for *Brown v. Board of Education* and the civil rights laws and precedents that followed were too optimistic. Few may agree with me that our racial equality goals may never be realized. While we must continue to work hard on individual issues of racial discrimination, we must address the reality that we live in a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society —a culture from whose inception racial discrimination has been a regulating force for maintaining stability and growth and for maximizing other cultural values.

Deep down, most of us working in civil rights know this is as true as is the seldom acknowledged fact that each of us is going to die. Indeed, one finds a revealing similarity between how individuals deal with death and how civil rights activists deal with the minuscule possibility that "we shall overcome." . . . This is neither a prescription of despair, nor a counsel of surrender. It is not an approach without risks, quite like those we must face as we seek the salvation in life that comes when we accept the reality of death. . . .

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Here, at least, is a more realistic perspective from which to gauge the present and future worth of our race-related activities. Freed of the stifling rigidity of "live forever, we shall overcome" thinking, we may be less ready to continue blindly our faith in traditional, integration-oriented remedies as the ideal, despite the evidence accrued over the years that such policies seem to work only when it is in the interest of whites for them to work.

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You may think, "it is easy to criticize, but what would you suggest?" At the least, we should adopt the medical professions' creed: "First, do no harm." We all know better than to think racial subordination can be ended tomorrow. We need to recognize that a yearning for racial equality is fantasy. Short of the extreme of a too-bloody revolution (we know who would suffer the most), history and personal experience tell us that any forward step is likely: 1) to drive blacks backward eventually, and 2) to contribute to the reinforcing myth many white and some black Americans embrace that theirs is an ultimately successful (read humane) existence.

You will note a seeming inconsistency that plagues my argument. On the one hand, I urge you to give up the dream of real, permanent racial equality in this country. On the other hand, I urge you to continue the fight against racism. One experiences an understandable desire to choose one or the other as valid. . . . But it is not a question of pragmatism or idealism. Rather, as a former student discerned it, it is a question of both recognition of the futility of action . . . and the unblinking conviction that something must be done, that action must be taken.

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The racial philosophy that we must seek is a hard-eyed view of racism as it is and our subordinate role in it. We must realize with our slave forbearers that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression even if that oppression is never overcome. Recall the question I put to that Mississippi Delta organizer walking up a dusty, unpaved road nearly 40 years ago. I asked where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window. Her answer (that she lived to harass white folks) didn't say she hoped or expected to win out over the all-powerful whites. Rather, she intended to use courage and determination as a weapon, a form of self-expression regardless of any likelihood of success—a form of defiance more potent precisely because she understood fully the oppressors' power and their willingness to use it.

Mrs. MacDonald understood many years ago what I have been trying to convey to you today. She avoided discouragement and defeat because at the point that she determined to resist her oppression, she was triumphant. Nothing the all powerful whites could do to her would diminish her triumph. . . .

Paul Robeson

Doing the State Some Service

Born in 1898, Paul Robeson rose from humble beginnings to become one of the most distinguished Americans of the twentieth century. No mere celebrity, Robeson was a modern-day Renaissance man. After graduating with Phi Beta Kappa honors from Rutgers University, where he twice received All-America football awards, he attended Columbia Law School and practiced briefly at a large law firm before becoming discouraged by the racism he encountered there.

He turned to the theater and, performing in Eugene O'Neill's plays during the early 1920s, established himself as a brilliant actor. His tremendous bass-baritone voice gave him access to concert stages, and for two decades he was hailed as one of the greatest bass-baritones in the world. In the course of his many travels abroad, he was lionized. He played the title role in the 1943 Broadway production of *Othello,* which ran a record 296 performances. His acting in that play earned him, in 1944, the Academy of Arts and Letters' Gold Medal for best diction in the American theater and the Donaldson Award for best actor.

Robeson championed the cause of the oppressed throughout his life, insisting that as an artist he had no choice but to do so. A trip to the Soviet Union early in his career had made him a life-long friend of the USSR, which in 1952 awarded him the Stalin Peace Prize. Following World War II, when he took an uncompromising stand against segregation and lynching in the United States and advocated friendship with the Soviet Union, his enemies mounted a long, intense campaign against him. Thereafter he was unable to earn a living as an artist in the United States and

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was also denied a passport. Finally in 1958 he was allowed to go to Great Britain. He returned in 1963 in ill health and spent the last years of his life in seclusion. He died at age 78 in 1976. In my view he was one of our greatest heroes.

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Paul Robeson's life, like great art, is treasured as much for the images it evokes as for the story it portrays. At one level, one can view the obvious parallel of Robeson's contributions with those of other well-known blacks who paid a large price for their outspoken challenges to racial injustice. At another level, with Robeson's life as model, the significant but less well-known sacrifice of other blacks can be more easily recognized and appreciated.

Consider Tommie Smith and John Carlos. In accepting their gold and bronze medals in the 1968 Olympics, these black athletes mounted the victory podium and, as the national anthem played, bowed their heads, black gloved fists thrust high in protest against racial strife in America. Their protest was memorable, coming as it did at the height of the black power movement. It became a defining symbol—along with the urban rebellions—of black people's unwillingness to accept patiently the discrimination which the Supreme Court had outlawed a dozen years before.

While virtually all black people cheered the protest, most whites were appalled. They applauded when the U.S. Olympic Committee indignantly dismissed Smith and Carlos from the team. Both men suffered through years of job discrimination by employers and boycotts by sports promoters. It was the usual penalty imposed on blacks who failed to combine their success with deference acknowledging their subordinate status in life.

Significantly, the retaliatory actions against Smith and Carlos have not dimmed the memory of that event. Back in the early 1970s, I was about to publish the first law school text devoted to issues of race and racism. As both epigraph and notice that the book would treat discrimination as the evil it is rather than a subject that would be examined "neutrally," I included a photograph of the Smith-Carlos protest and dedicated the book to all those who throughout this country's history have risked its wrath to protest its faults. I called the black athletes' protest:

> The dramatic finale of an
> Extraordinary achievement
> Performed for a nation which
> Had there been a choice

Would have chosen others, and
If given a chance
Will accept the achievement
And neglect the achievers.
Here, with simple gesture, they
Symbolize a people whose patience
With exploitation will expire with
The dignity and certainty
With which it has been endured . . .
Too long.

The Olympic achievements of Carlos and Smith and the meaning of the nation's reaction to their protest are made clear by comparing them with Paul Robeson's experience. The lesson is clear. No degree of success or superiority in athletics, art, or scholarship insulates black criticism of white racism against swift and certain retaliation. Indeed, the higher the public platform provided by the society's recognition of that success, the more certain that whites will react to criticism, even though undeniably true, as an unforgivable betrayal. Robeson's experience then provides a prophetic paradigm for us all. And yet, Robeson's outspoken stance against American racism, even his too trusting attraction to communism and Russia, served well both the nation and its black citizens.

During World War II, as in earlier conflicts, blacks were at first excluded or segregated. The racial pattern was set at the start of the Revolutionary War when the Continental Congress proclaimed that it would not recruit Indians, vagabonds, or Negroes. When the enemy's challenge became threatening and the number of whites willing to serve proved too small, blacks were called upon and responded without rancor or regret. At war's end, the achievements were accepted and the achievers neglected; except that "neglect" inaccurately describes the reign of lynching and terror that was the black man's portion after each of the wars, including World Wars I and II.

World War II had devastated Western colonial powers. Nonwhite peoples were demanding an end to capitalist occupation and exploitation by Western nations. Communism offered a powerful alternative that both challenged and evoked great fear in this country. Paul Robeson, an international figure, by giving voice both here and abroad to what every black person knew about racism and capitalist exploitation, invested that knowledge with a legitimacy that spurred serious opposition.

And, as if that were not enough, Robeson preached the doctrine unholy to guardians of the status quo that the working classes, black and white, were not only brothers, but suffered the same exploitation, a truth quite intentionally (and all too easily) hidden from lower-class whites by appeals to racism propounded by upper-class whites from the earliest days of American history to the present. Any assumption that Robeson's right of free speech encompassed such inflammatory truths proved naive in the extreme. When he proclaimed, as he did in his autobiography, *Here I Stand,* that the enemies are the "white folks on top," and dared suggest that American blacks might not so compliantly fight for America in some future war against a non-racist country, the retaliation that followed was fierce.

Policy-makers in this country recognized and determined to eliminate this formidable black. When Robeson in 1950 demanded to know why his passport had been canceled, State Department officials said it was because he refused to sign the non-Communist affiliation oath, but they promised to return it if Robeson would sign a statement promising not to make any speeches when he was abroad. He refused.

Robeson was barred from leaving the country and denied access to concert halls and lecture platforms at home. But his message had been heard. And if far fewer rank and file Americans heeded his advice than he had hoped, far more policy-makers than have ever acknowledged it learned from Robeson that to preserve the Union and their preeminent positions in it, a twentieth century equivalent of the Emancipation Proclamation would be necessary.

In an effort to limit the effect of Robeson's speeches condemning American racism, policy-makers and the media recruited well-known blacks to refute them. . . . Among them was the baseball hero Jackie Robinson, who had benefitted from Robeson's work against discrimination in professional baseball. He testified against Robeson before the House Committee on Un-American Activities. The baseball player's prepared statement was carefully worded only to condemn as "silly" Robeson's assertion that blacks would not fight for this country. He defended Robeson's right to his personal views and acknowledged the real injustices blacks suffer.

Robeson's enemies really didn't care what Jackie Robinson said. His appearance was comment enough—especially to the press, which eagerly reported the negative in Robinson's remarks, while ignoring the more positive balance. In their turn, the leaders of the major civil rights orga-

nizations deemed it important to prove their own loyalties by condemning Robeson. Walter White, Executive Director of the NAACP, in a devastating article in *Ebony* magazine, described Robeson as a "bewildered man who is more to be pitied than damned."

Paul Robeson, while a lawyer deeply committed to civil rights, never had his name on any of the legal briefs in the school desegregation litigation that led in 1954 to the Supreme Court's decision in *Brown v. Board of Education.* Indeed, as those cases slowly made their way through the courts in the early 1950s, the government's campaign against Robeson had succeeded in portraying him as an enemy of his people and a pawn of Communist Russia. And yet, it is clear today that his strong condemnations of American racism were as effective as any of the arguments propounded by lawyers who have received credit for their roles in that landmark litigation. Robeson had stated the unthinkable. By urging blacks not to reject communism until the free world proved it offered a better deal, he enabled NAACP legal brief-writers to warn the Supreme Court that the "Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue."

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By the time black protests and marches of the 1960s made *Brown* more than a symbol, Paul Robeson was on the sidelines, another in a long list of blacks sacrificed to the cause of racial equality in a land seemingly determined to destroy those who most believe in its ideals.

One wonders. What if Robeson were speaking out now? Even at the peak of his career, Paul Robeson at mid-century did not command the massive celebrity enjoyed by some well-known blacks today. A national poll found that the three most popular Americans are black: retired General Colin Powell, Masters champion Tiger Woods, who is also part Asian, and basketball great Michael Jordan. Their popularity spans across age, regional, professional, racial and political subgroups. They are better known among Democrats than President Clinton, and more popular among Republicans than House Speaker, Newt Gingrich. Powell, Woods, and Jordan are multimillionaires with income and wealth beyond anything Paul Robeson could have imagined.

Each of these men identifies with black Americans. Powell has voiced support for affirmative action while Woods has criticized the exclusionary practices of most private country clubs. Jordan makes commercials for the Negro College Fund. What if these men emulated Paul Robeson and launched campaigns castigating America for the racism that most