Derrick Bell, "Racial Realism," *Connecticut Law Review* 24, no. 2 (Winter 1992): 363-380.

Racial Realism

Derrick Bell

The struggle by black people to obtain freedom, justice, and dignity is as old as this nation. At times, great and inspiring leaders rose out of desperate situations to give confidence and feelings of empowerment to the black community. Most of these leaders urged their people to strive for racial equality. They were firmly wedded to the idea that the courts and judiciary were the vehicle to better the social position of blacks. 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' focus must be much narrower—a challenge to the principle of racial equality. This new movement is appropriately called Racial Realism, and it is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.

Reliance on rigid application of the law is no less damaging or ineffectual simply because it is done for the sake of ending discriminatory racial practices. Indeed, 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 common-law rules that, if properly applied to any given situation, lead to a right—and therefore just—result. The Realists comprised a younger generation of scholars—average age forty-two—who were willing to challenge what they viewed as the rigid ways of the past. More than their classical counterparts, they had been influenced by the rapid spread of the scientific outlook and the growth of social sciences. Such influence predisposed the Realists to accept a critical and empirical attitude towards the law, in contrast to the formalists who insisted that law was logically self-evident, objective, a

priori valid, and internally consistent. The great majority of the movement's pioneers had practical experience which strengthened their awareness of the changing and subjective elements in the legal system. This awareness flew in the face of the Langdellian conception of law as unchanging truth and an autonomous system of rules.

The Realists took their cue from Oliver Wendell Holmes who staged a fifty year battle against legalistic formalism. According to Holmes's scientific and relativistic lines of attack, judges settled cases not by deductive reasoning, but rather by reliance on value-laden, personal beliefs. To Holmes, such judges engineered socially desirable policies based on these beliefs which, like all moral values, were wholly relative and determined by one's particular environment. Realist notions also were grounded in the views of the Progressives during the 1890s. Concerned with social welfare legislation and administrative regulation, the Progressives criticized the conceptualization of property rights being expounded by the United States Supreme Court. Creating a remedy based upon the finding of a property right was the Court's way of subtly imposing personal and moral beliefs. Abstraction was the method the Court used to accomplish its purpose. The Realists stressed the *function* of law, however, rather than the *abstract conceptualization* of it.

The Realists also had a profound impact by demonstrating the circularity of defining rights as "objective," which definition depended, in large part, on a distinction between formalistically bounded spheres be- tween public and private. Classical judges justified decisions by appealing to these spheres. For example, an opinion would justify finding a defendant liable because she had invaded the (private) property rights of the plaintiff. But such a justification, the Realists pointed out, was inevitably circular because there would be such a private property right if, and only if, the court found for the plaintiff or declared the statute unconstitutional. The cited reasons for decisions were only results, and as such served to obscure the extent to which the state's enforcement power through the courts lay behind private property and other rights claims.

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 decisions about relevancy are never logically compelled. Decisions merely are subjective judgments made to reach a particular result. Decisions about the relevance of distinguishing facts are value-laden and dependent upon a judge's own experiences.[12]

The imperatives of this Realist attack were at least two: first, to clear the air of "beguiling but misleading conceptual categories" so that thought could be redirected towards facts (rather than nonexistent spheres of classism) and ethics. If social decision-making was inevitably moral choice, policymakers needed some ethical basis upon which to make their choices. And second, the Realists' critique suggested that the whole liberal worldview of private rights and public sovereignty mediated by the rule of law needed to be exploded. The Realists argued that a worldview premised upon the public and private spheres is an attractive mirage that masks the reality of economic and political power. This two-pronged attack had profoundly threatening consequences: it carried with it the potential collapse of legal liberalism. Realism, in short, changed the face of American jurisprudence by exposing the result-oriented, value-laden nature of legal decision-making. Many divergent philosophies emerged to combat, not a little defensively, the attack on law as instrumental, not self-evidently logical, and "made" by judges, not simply derived from transcendent or ultimate principles.[17]

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. A paradigm example presents itself in the case of *Regents of the University of California v. Bakke*. 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,[19] 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, to ignore contemporary statistics, and to ignore 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.

Bakke serves as an example of how formalists may use abstract concepts, such as equality, to mask policy choices and value judgments. Abstraction, in the place of flexible reasoning, removes a heavy burden from a judge's task. At the same time, her opinion appears to render the "right" result. Thus, cases such as *Bakke* should inspire many civil rights lawyers to reexamine the potential of equality jurisprudence to improve

the lives of black Americans.

The protection of whites' race-based privilege, so evident in the *Bakke* decision, has become a common theme in civil rights decisions, particularly in many of those decided by an increasingly conservative Supreme Court. The addition of Judge Clarence Thomas to that Court, as the replacement for Justice Thurgood Marshall, is likely to add deep insult to the continuing injury inflicted on civil rights advocates. The cut is particularly unkind because the choice of a black like Clarence Thomas replicates the slave masters' practice of elevating to overseer and other positions of quasi-power those slaves willing to mimic the masters' views, carry out orders, and by their presence provide a perverse legitimacy to the oppression they aided and approved.

For liberals in general, and black people in particular, the appointment of Clarence Thomas to the Supreme Court, his confirmation hearings, and the nation's reaction to Professor Anita Hill's sexual harassment charges, all provide most ominous evidence that we are in a period of racial rejection, a time when many whites can block out their own justified fears about the future through increasingly blatant forms of discrimination against blacks.

The decline of black people is marked by a precipitous collapse in our economic status and the frustration of our political hopes. An ultimate rebuff and symbol of our powerlessness is President Bush's elevation of one of us who is willing to denigrate and disparage all who look like him to gain personal favor, position, and prestige. Here, historical parallels contain a fearful symmetry. In 1895, Booker T. Washington, another black man who had risen from the bottom—in Washington's case that bottom was slavery itself—gained 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 the society by becoming useful through trades and work skills developed through hard work, persistence, and sacrifice.

Whites welcomed Washington's conciliatory, nonconfrontational policy and deemed it a sufficient self-acceptance for the society's involuntary subordination of blacks in every area of life. The historian, Louis R. Harlan, informs us that Booker T. Washington, in his own way, was a double agent. While preaching black humility to whites, Washington, privately fought lynching, disenfranchisement, peonage, educational discrimination, and segregation. It is not even a close question, however, that no amount of private support for black rights could undo the damage of Washington's public pronouncements.

The Booker T. Washington speech marked a watershed in race relations at the close of the nineteenth century. There is more than ample reason to believe the Clarence Thomas appointment and confirmation

proceedings that followed will mark and mar the status of blacks well into the twenty-first century. Certainly the high and low drama in those hearings contained enough racial symbols to challenge analysts for years to come.

In the first phase of the confirmation hearings, Justice Thomas's testimony provided a definitive illustration of waffling, obfuscation, and disingenuousness. Thomas, and those who prepared him for his appearance, assumed—accurately as it turned out—that his seat on the nation's most prestigious Court could be secured by ignoring every politically controversial statement that he had ever said or written, while recalling precisely everything his grandfather did for him.

The hearings also provided further proof that even the most accomplished blacks can be ignored with impunity when they seek to challenge an exercise of white, conservative power. Thus, the opposition to the Thomas appointment by some of the most prestigious black, legal academics including Charles Lawrence, Stanford; Drew Days, Yale; Christopher Edley, Harvard; Dean Haywood Burns, CUNY Queens, and Patricia King, Georgetown, easily was neutralized by a collection of Thomas's childhood friends, former staff members, and well-meaning but confused blacks who, unaware of and unconcerned about his record or the anti-black stance of the conservative whites supporting him, nevertheless "hoped for the best" as they supported Thomas because he was a "brother."

The second phase of the confirmation hearings provided further proof that black people, notwithstanding their growing numbers in the middle class, are at risk of remaining in a subordinate status. I consider the nationally-televised Senate proceedings an American morality play, conducted under circumstances that forced both Judge Clarence Thomas and Professor Anita Hill to disparage each other's character regarding matters of deeply personal conduct. The battle, fought in front of the upper echelons of the white power structure, was unwinnable from the start and desired by neither combatant. Its proximate cause was the President's hypocrisy in using race to shield his effort to stack the Supreme Court with conservative judges, and the Senate's insensitivity to women's growing awareness and resentment of sexual harassment in the workplace.

The hearings were a reminder of how frequently in American history blacks became the involuntary pawns in defining and resolving society's serious social issues. Recall that black's rights were sacrificed when the Framers built slavery into the Constitution in 1787 to enable the forming of a new and stronger government. Their rights were sacrificed again in the Hayes-Tilden Compromise of 1877 to avoid another Civil War.

Clarence Thomas, a black man who overcame humble beginnings and

gained professional eminence by embracing the self-help ideology of those who have aided his climb, became a symbol of the crumbling of the judicial nomination process, in which conservativism is more important than professional eminence. Anita Hill, a silenced victim of alleged unwanted sexual overtures of a former supervisor and mentor, became the unwilling agent through which opponents of the nominee hoped to. block President Bush's plan to stack the court with his followers.[27]

Rather than face repetition of the embarrassing and trauma-filled confirmation process, the administration and the Senate likely will try to avoid another gruelling battle if a Supreme Court seat becomes vacant in the future. And as a result of the hearings' focus on the meaning of sexual harassment in the workplace, many men, particularly at the professional level, will speak with considerable thought about matters of sexuality to female colleagues and subordinates. Both reforms are much-needed. As in the Reconstruction Era, blacks will serve as the involuntary sacrifices whose victimization helps point white society and their country in the right direction.

Beyond symbolism though, the message of the Thomas appointment virtually demands that equality advocates reconsider their racial goals. This is not, as some may think, an over-reaction to a temporary set-back in the long "march to freedom" blacks have been making since far before the Emancipation Proclamation. Rather, the event is both a reminder and a warning of the vulnerability of black rights and the willingness of powerful whites to sacrifice and subvert these rights in furtherance of political or economic ends. I speak here not of some new prophetic revelation. Rather, these are frequently stated, yet seldom acknowledged truths that we continue to ignore at our peril.

What was it about our reliance on racial remedies that may have prevented us from recognizing that abstract legal rights, such as equality, 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? I predict that this examination will require us to redefine goals of racial equality and opportunity to which blacks have adhered with far more simple faith than hard-headed reflection.

I would urge that we begin this review with a statement that many will wish to deny, but none can refute. It is this:

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 acknowledgement enables us to avoid despair, and frees us to imagine and implement 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.

There is little reason to be shocked at my prediction that blacks will not be accepted as equals, a status which has eluded us as a group for more than 300 years. The current condition of most blacks provides support for this position. It is surely possible to use statistics to distort, and I do wish for revelations showing that any of the dreadful data illustrating the plight of so many black people is false or misleading. But there is little effort to discredit the shocking disparities contained in these reports. Even so, the reports have little effect on policy-makers or the society in general.

Statistics and studies reflect racial conditions that transformed the "We Have a Dream" mentality of the 1960s into the trial by racial ordeal so many blacks are suffering in the 1990s. The adverse psychological effects of nonexistent opportunity are worse than the economic and social loss. As the writer, Maya Angelou, put it recently:

> In these bloody days and frightful nights when an urban warrior can find no face more despicable than his own, no ammunition more deadly than self-hate and no target more deserving of his true aim than his brother, we must wonder how we came so late and lonely to this place.

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, although in bankrupt form. *Bakke,* as well as numerous other decisions that thwart the use of affirmative action and set-aside programs, illustrates that notions of racial equality fit conveniently into the formalist model of jurisprudence. Thus, a judge may advocate the importance of racial equality while arriving at a decision detrimental to black Americans. In fact, racial equality can be used to keep blacks out of institutions of higher education, such as the one at issue in *Bakke.* By reasoning that race-conscious policies derogate the meaning of racial equality, a judge can manipulate the law and arrive at an outcome based upon her worldview, to the detriment of blacks seeking enrollment.

The message the formalist model conveys is that existing power relations in the real world are by definition legitimate and must go un-challenged. Equality theory also necessitates such a result. 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.

Outside of the formalistic logic in racial equality cases, history should also trigger civil rights advocates to question the efficacy of equality theory. After all, it is an undeniable fact that the Constitution's Framers initially opted to protect property, including enslaved Africans in that category, through the Fifth Amendment. Those committed to racial equality also had to overlook the political motivations for the Civil War Amendments—self-interest motivations almost guaranteeing that when political needs changed, the protection provided the former slaves would not be enforced. Analogize this situation with that presented in *Bakke.* Arguably the Court ruled as it did because of the anti-affirmative action rhetoric sweeping the political landscape. In conformation with past practice, protection of black rights is now predictably episodic. For these reasons, both the historic pattern and its contemporary replication

require review and replacement of the now defunct, racial equality ideology.

Racism translates into a societal vulnerability of black people that few politicians—including our last two presidents—seem able to resist. And why not? 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.

Some blacks already understand and act on the underlying rationale of Racial Realism. Unhappily, most black spokespersons and civil rights organizations remain committed to the ideology of racial equality. Acceptance of the Racial Realism concept would enable them to understand and respond to recurring aspects of our subordinate status. It would free them to think and plan within a context of reality rather than idealism. The reality is that blacks still suffer a disproportionately higher rate of poverty, joblessness, and insufficient health care than other ethnic populations in the United States. The ideal is that law, through racial equality, can lift them out of this trap. I suggest we abandon this ideal and move on to a fresh, realistic approach.

Casting off the burden of equality ideology will lift the sights, providing a bird's-eye view of situations that are distorted by race. From this broadened perspective on events and problems, we can better appreciate and cope with racial subordination.

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 the victims of that system 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 there are imaginative, unabashed risk-takers who refuse to be trammeled 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.

I am convinced that there is something real out there in America for black people. It is not, however, the romantic love of integration. It is

surely not the long-sought goal of equality under law, though we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now. The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as our slave forebears, 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.

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 Harmony residents, in the face of increasing white hostility, were organizing to ensure implementation of a court order mandating desegregation of their schools the next September. 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 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. "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 and intended to use courage and determination as weapons "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 its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

Mrs. MacDonald 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. Mrs. MacDonald understood twenty-five years ago the theory that I am espousing in the 1990s for black leaders and civil rights lawyers to adopt. If you remember her story, you will understand my message.

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