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**A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation**

A CRITIQUE OF PROFESSOR DERRICK A. BELL'S THESIS  
OF THE PERMANENCE OF RACISM  
AND  
HIS STRATEGY OF CONFRONTATION

LEROY D. CLARK\*

INTRODUCTION

Professor Derrick A. Bell's book, *Faces at the Bottom of the Well: The Permanence of Racism*,<sup>1</sup> challenges tenets and ideals deeply held by civil rights organizations and by the larger liberal-integrationist community. Professor Bell charges that white society has never relinquished, and more importantly, will never relinquish, a deep-rooted racism, and that there has been, even in recent history, no true diminution in racial discrimination.

I will endeavor to counter Professor Bell's claims by examining the historical record and by interpreting current American culture. Critics have yet to give Professor Bell's claims the fully objective assessment they merit,<sup>2</sup> although one can always characterize the dispute as a "glass is half empty or half full" problem.<sup>3</sup> I will therefore confront something quite deeper which is

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\* Professor of Law, Catholic University Law School. I received excellent research assistance from Ms. Maria Sepulveda while she was a third year student at the Catholic University Law School. I also appreciate the careful reading and suggestions of Napoleon Williams and Professor Harold A. McDougal.

1. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) [hereinafter *FACES*].

2. See, e.g., Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 *STAN. L. REV.* 1133 (1993) (book review); Tracy E. Higgins, *Derrick Bell's Radical Realism*, 61 *FORDHAM L. REV.* 683 (1992) (book review); Stephen Reinhardt, *Guess Who's Not Coming to Dinner!!*, 91 *MICH. L. REV.* 1175 (1993) (book review); Willy E. Rice, *Review of Faces at the Bottom of the Well*, 24 *TEX. TECH. L. REV.* 1141 (1993) (book review); Book Note, *And We Will Not Be Saved*, 106 *HARV. L. REV.* 1358 (1993). Randall Kennedy made a limited criticism of what he saw as Professor Bell's moral failing in *Faces* in not repudiating Louis Farrakhan, head of the Nation of Islam, as an anti-Semite. See Randall Kennedy, *Derrick Bell's Apologia for Minister Farrakhan: An Intellectual and Moral Disaster*, 2 *RECONSTRUCTION* (No. 1, 1992).

3. I appreciate the point made by Richard Delgado, that there may be no "one 'true' understanding of meaning or culture." 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, 327 (1991). The problem is illustrated very neatly by one of Professor Bell's own sources, in which Professor Bell relies on ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 102 (1992) for factual support of his claims that blacks continue to suffer racial disadvantages. See Derrick Bell, *Political Reality Testing*, 61 *FORDHAM L. REV.* 1033, 1034 (1993). However, Hacker wrote an article the same year his book was published, entitled *The Myths of Racial Division*, *NEW REPUBLIC*, Mar. 23, 1992, at 21. The table of contents described it as follows: "Fears of a racially driven America are overblown. The statistics on crime, the family, affirmative action, and SAT scores show the races are actually converging." *Id.*

at stake, something unspoken, but implicit in *Faces*: its perspective, its attitude toward the future, and its view of the roles of strategy and law in race relations.

Fortunately, Professor Bell develops many of the issues from *Faces* more explicitly in his latest publication, *Confronting Authority: Reflections of an Ardent Protester*,<sup>4</sup> and in his many law review articles; thus, I will also focus on these works. I will not attempt a book review, but rather, a construction of an alternative vision and approach, drawing largely on my involvement—along with Professor Bell—in the civil rights movement.

I write this article in ambivalence, but with a sense of urgency. The ambivalence comes from criticizing the work of a one-time working colleague, who gained my sincere respect because of his unquestioned concern for the black plight. I do not doubt that Professor Bell has written, as he always does, with honesty. But it is precisely because he is a man of profound integrity, a man labeled the “founder of Critical Race Theory,”<sup>5</sup> that his pronouncements may have an unprecedented powerful influence, especially on developing minority scholars.<sup>6</sup> Moreover, books and public appearances have made him a very visible figure who reaches an audience beyond legal academe; his ideas also impact the views of other critical, black commentators.<sup>7</sup> The urgency, therefore, comes from my sense that Professor Bell’s work propagates a damaging and dampening message which must be confronted and rejected if we are to fashion our future creatively.

#### THE BELL THESIS

Professor Bell’s main thesis in *Faces* is that “racism is an integral, permanent, and indestructible component of this society.”<sup>8</sup> America ended slavery, but “the fact of slavery refuses to fade along with the deeply embedded personal attitudes, and public policy assumptions that supported it for so long.”<sup>9</sup> Blacks experience poverty at higher levels than whites, and “racial discrimination in the workplace is as vicious—if less obvious—than it was when employers posted signs ‘no negroes need apply.’”<sup>10</sup>

4. DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994) [hereinafter *CONFRONTING AUTHORITY*].

5. *CRITICAL RACE THEORY: THE CUTTING EDGE* 583 (Richard Delgado ed., softback ed. 1995). This is the only book compiling the works of many contributors writing in this vein.

6. See Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 427 (1990). (“People react to Derrick Bell and his storytelling in predictably diverse ways. People of color, particularly progressive minority scholars, have been drawn to his work . . .”).

7. Professor Bell was the first tenured black professor at Harvard Law School, and his resignation from the law school in protest, written about in *CONFRONTING AUTHORITY*, *supra* note 4, was a media event. Toni Morrison, winner of the Nobel Prize for literature, echoed Bell’s claim that blacks may face a holocaust. See *Morrison's Prophecy and Paradise*, WASH. POST, Mar. 5, 1995, at B1. Professor Harry Edwards, sociologist at the University of California, cites Bell’s “permanent racism” thesis in *Playoffs and Payoffs: The African-American Athlete as an Institutional Resource*, in *THE STATE OF BLACK AMERICA* 83 (1994).

8. *FACES*, *supra* note 1, at ix.

9. *Id.* at 3.

10. *Id.* at 5.

Professor Bell believes blacks ignore history's lesson that the *permanent* subordination of blacks to whites is a necessary component of a stable America. Black efforts are largely irrelevant; whites allow only minimal black progress, for the exclusive purpose of satisfying white interests.<sup>11</sup> Professor Bell tries heroically, but I believe futilely, to avoid the despair which he knows naturally flows from his thesis: that one attains a certain freedom simply from knowing the truth and deciding to struggle on anyway. Even if illegitimate white power can never be dislodged, one can, as one of Professor Bell's clients once stated, live solely to "harass white folks."<sup>12</sup>

In *Faces*, Professor Bell does not prove his thesis through documentation of historical and contemporaneous facts. Instead, he reverts to the style of one of his earlier books,<sup>13</sup> creating fictional scenarios designed to predict how whites might defeat or subordinate black interests. In the chapter, "The Afrolantica Awakening," a land mass arises off the coast of South Carolina. Efforts by the U.S. and other governments to occupy the land fail because the air pressure does not support human life. Miraculously, only African-Americans survive in the atmosphere.<sup>14</sup> A debate ensues as to whether all African-Americans should emigrate to the new "promised" land. Congressional legislation to provide every black émigré with twenty thousand dollars is defeated, in part because "all [whites] were unnerved" by the prospect of blacks founding a new nation.<sup>15</sup> In fact, some whites react by violently attacking the black community.<sup>16</sup> Some blacks, nonetheless, mount an armada of ships to sail to the new land, but just before they reach the shore, Afrolantica sinks back into the sea.<sup>17</sup> The blacks are disappointed, yet ultimately overjoyed, because they looked "for something better."<sup>18</sup> As they return, they remember the words of Frederick Douglass that America is their land also, and hope that perhaps, somewhere in the word "America" is the word "Afrolantica."<sup>19</sup>

11. Professor Bell notes that:

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.

*Id.* at 12.

12. *Id.* at xii.

13. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

14. *FACES*, *supra* note 1, at 35. "Miraculously" is not used casually, for one black minister interprets the phenomenon as a gift from God, similar to the Hebrew experience in *Exodus* 13:21. *Id.* Also, God has fully protected African-Americans who migrate by making it physically impossible for whites to pursue them. *Id.* Professor Bell finds it necessary to make sure that not even a small number of whites can pursue the blacks, because, as he says in another writing, which amplifies *Faces*, we all know that a minority, like the white one in South Africa, can dominate a majority. Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103, 1103 (1993) [hereinafter *Permanence of Racism*].

15. *FACES*, *supra* note 1, at 42.

16. *Id.*

17. *Id.* at 45.

18. *Id.* at 42-46.

19. *Id.*

Professor Bell's conflicted dream is an old one; he notes the history of failed efforts, by blacks and whites, to have blacks leave America.<sup>20</sup> The story's end is somewhat ambiguous, since whites don't defeat the "conspiracy" of blacks to leave America. Rather, some unknown force comes into play.<sup>21</sup> The effort alone empowers the blacks, consistent with Professor Bell's thesis that a group should struggle even when the struggle is futile. They return with a renewed commitment to find accommodation in the land of their perpetual bondage.<sup>22</sup>

#### A CHALLENGE TO PROFESSOR BELL: WHY NOT ACTIVELY ADVOCATE EMIGRATION?

Professor Bell lacks the conviction of his dire assessment. If indeed America is irremediably racist, and blacks in America inevitably are doomed to a living hell, then Professor Bell should advocate emigration of all blacks. At a minimum, he should encourage the only other honorable, dignified solution: for blacks to cease having children if they elect to remain in America. Indeed, advocacy of black emigration is even more imperative in light of Professor Bell's speculation that blacks may face a final genocidal attack by whites.<sup>23</sup> Further, Professor Bell hypothesizes that the abuse of blacks is a prop which keeps society stable; the elimination of the prime victims—blacks—would lead to ethnic warfare. If so, Professor Bell should rejoice at the opportunity to prove his theory, and expressly urge blacks to leave, taking that prop out from under society. Why waste time in a futile effort to get equal when you could get even?

One reason Professor Bell does not explicitly embrace emigration, but raises it in the ambivalent disguise of fiction, is the dismal failure of such efforts in the past. Historically, blacks relocate when they believe it is in their interest: during the years 1940 to 1960, over three million blacks emigrated from the South in search of greater freedom.<sup>24</sup> Blacks have never generated a substantial movement to go abroad, functionally stating that America today is as much their product as anyone's. Unfortunately, Professor Bell did not intend a serious discussion of emigration, since *Faces* is largely devoid of strategy discussion. "Afolantica" is merely another note being played in the music of despair.

#### THE INTEREST CONVERGENCE DILEMMA OR THE CHARACTER AND INTELLIGENCE DEFECT IN WHITES

Professor Bell argues that whites, perceiving a benefit for themselves, control black progress towards equality.<sup>25</sup> A corollary to this theme is

20. *Id.* at 43.

21. *Id.*

22. *See id.* at 45-46.

23. *See* Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 587 (1993).

24. David L. Lewis, *The Origins and Causes of the Civil Rights Movement*, in *THE CIVIL RIGHTS MOVEMENT IN AMERICA* 3 (Charles W. Eagles ed., 1986).

25. *FACES*, *supra* note 1, at 7 ("We are, as I have said, disadvantaged unless whites perceive

"Racism's Secret Bonding": whites, especially poor and working class whites, ignore their common class interests with poor and working class blacks in their avid search to bond with other whites against blacks.<sup>26</sup>

These last notions come together in "The Space Traders."<sup>27</sup> If "The Afrolantica Awakening" is Professor Bell's suppressed dream of wholesale emigration, then "The Space Traders" is his nightmare of wholesale expulsion. In the story, a strange unrecognizable group from another planet comes to America and proposes a deal: if all African-Americans are forced on to their spaceships for a return to their home star, they will provide gold, chemicals to cleanse the environment, a safe nuclear engine, and fuel. The offer comes during a conservative administration not supported by blacks (read Reagan-Bush). The Space Trader's proposal is debated, but exclusively in terms of the interests of whites. Whites recruit a black conservative professor (Golightly) to urge blacks to agree to leave. Golightly is promised a personal escape before the mass expulsion. Golightly urges black leaders to support the proposal as a trick to get whites to oppose it. The black leaders distrust Golightly and dismiss his strategy. Finally, the administration argues that it is blacks' patriotic duty to leave America for the general welfare, and achieves a constitutional provision to accommodate the same.

"The Space Traders" is Professor Bell's projection of a future holocaust for African-Americans. I prefer to relate the story to the American past, and confront the question of whether, lurking in the wings for blacks, there is an American version of the Nazi "final solution." From one perspective, the secession of the Southern States from the Union, which precipitated our Civil War, is as close as America has come to the ominous threat to expel blacks that Professor Bell creates fictionally in "The Space Traders." Rebellious white southerners proposed taking black slaves into a separate land—the plantation. The pay-off to the North was the end of strife and conflict over the importation of slaves, and the end of a nation divided into territories where slaves could or could not be owned.

The actual history of this near "holocaust" for blacks contradicts Professor Bell's predictions. White abolitionists saw the Confederates as the "Space Traders" of their day, and fought a bloody and costly Civil War to successfully prevent blacks from being carried off into the continued hell of slavery. None of this history of positive white involvement in ending slavery is recognized in *Faces*; rather, Professor Bell excoriates "television writers" of Alex Haley's novel, *Roots*, for creating "good white folks" who "eased the slaves' anguish," thus absolving white viewers from "recognizing American slavery as

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that nondiscriminatory treatment for us will be a benefit for them."). The theme was also developed in: Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (noting that the decision holding governmental racial segregation unconstitutional was valuable to whites because full access to black talents and participation would enhance the general economy and present the proper face to emerging independent African countries).

26. *FACES*, *supra* note 1, at 147-57.

27. *Id.* at 158-94.

a burden on the nation's history."<sup>28</sup> The eminent historian, John Hope Franklin, claimed that many abolitionists were committed to ending slavery out of moral and religious conviction, without concomitant limited personal self-interests.<sup>29</sup> By contrast, Professor Bell, in an article, asserts that the constitutional amendments freeing the slaves and giving them the vote were designed to keep the Republican party in office.<sup>30</sup>

Milner Ball, writing, ironically, to defend Professor Bell from criticisms made by Randall Kennedy, said: "[P]eople possessed by an ideology 'are simply no longer able to see certain facts.'"<sup>31</sup> This statement may well capture Professor Bell's dilemma. He appears to be operating out of a tightly wound ideology that most whites cannot be trusted, even—if one is referencing poor whites—to act in their *own* best interest—and that whites always subvert black interests.

This ideology requires Professor Bell to proclaim, and more importantly, believe, that "[n]obody can free us but ourselves,"<sup>32</sup> and that "few whites are ready to actively promote civil rights for blacks."<sup>33</sup> Thus, *Faces* includes blacks martyred or exiled during the freedom struggle.<sup>34</sup> There is, however,

28. *Id.*

29. John Hope Franklin had the following comment on the abolitionists and the Civil War:

The end of the war marked a victory for the abolitionists. At no time in the nation's history had a "pressure group" done so much to shape public opinion and then to move opinion to action. For a generation they had labored untiringly, suffering abuse and even bodily harm. With them, however, it was a moral crusade and they were blind to personal indignities and insensible to suffering.

JOHN H. FRANKLIN, *FROM SLAVERY TO FREEDOM* 294-95 (3d ed. 1967). It has been argued that Lincoln stated that the war was primarily to preserve the Union. Lincoln's public statements were designed, in part, to deter the four southern states from joining the seven that had already seceded because that would have made the winning of the Civil War more difficult or impossible. James McPherson, winner of the Pulitzer prize for his history of the Civil War, *BATTLE CRY FOR FREEDOM: THE CIVIL WAR ERA* (1988), argues that black emancipation required a war, and only Lincoln and his party had the state power to raise an army and prosecute such a war. James M. McPherson, *Who Freed the Slaves*, 2 *RECONSTRUCTION* 35, 36-37 (No. 3, 1994).

30. Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 *VILL. L. REV.* 767, 773 (1988) ("When the Civil War ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves, but actually to protect its victory.") [hereinafter *White Superiority*].

31. Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 *HARV. L. REV.* 1855, 1856 (1990) (quoting KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 36 (1968)).

32. Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 *UCLA L. REV.* 1037, 1037 (1990) [hereinafter *Racial Reflections*]. Professor Bell claims that in teaching a seminar on civil rights one summer, he repeated the phrase so often that those in the class presented him with a T-Shirt with the phrase emblazoned on it.

33. *FACES*, *supra* note 1, at 4.

34. Professor Bell names Nat Turner, Marcus Garvey, Paul Robeson, and W.E.B. Du Bois. *FACES*, *supra* note 1, at 20-21. Professor Bell mistakenly groups Malcolm X with Medgar Evers as "blacks who were killed because they had the gumption to tell the truth about the conditions blacks live in in this country." *Id.* at 20. Evers was a martyr (I had been working with him the day he was assassinated by a white fanatic). See Ronald Smothers, *White Supremacist Is Convicted of Slaying Rights Leader in 63'*, *N.Y. TIMES*, Feb. 6, 1994, at 1. Some speculate that the New York police were involved in Malcolm's assassination. See GEORGE BREITMAN ET AL., *THE ASSASSINATION OF MALCOLM X* 294 (3d ed. 1991). The persons convicted of his murder, however, were black members of the Black Muslims. *Id.* at 7. There was strong evidence that the Black Muslims had targeted Malcolm as a traitor after he spoke out against their leader, Elijah Muhammed, and started a rival organization. See KARL EVANZZ, *THE JUDAS FACTOR: THE PLOT TO KILL MALCOLM X* 277-79 (1992).



no mention of the hundreds of white students who joined the civil rights movement in dangerous areas in the South during the 1960s, or of those like Michael Schwerner and Andrew Goodman, who were murdered because of their involvement.<sup>35</sup> Ostensibly sympathetic white female characters appear in only two instances in *Faces*, and both are stick figures designed to underscore Professor Bell's themes of black danger, pain, and impending defeat.<sup>36</sup>

Nowhere in *Faces* or *Confronting Authority* is there a recognition of the long history of *effective* white cooperation with blacks in ending segregation, such as the fact that two major civil rights organizations, the NAACP and the Urban League, originated with whites and blacks acting cooperatively.<sup>37</sup> Nowhere in either book is there a recognition of white financing of the civil rights movement. Black lawyers, like Charlie Houston and Thurgood Marshall, theorized the legal battle to end state-enforced racial segregation, but when Professor Bell and I were lawyers for the NAACP Legal Defense Fund, at least one third of the lawyers were white.<sup>38</sup>

Indeed, from the very beginning, some talented and dedicated whites have been critical actors producing positive results in the black freedom struggle. That they may only have been the "few" whites that Professor Bell claims would "actively support civil rights for blacks" does not defeat the point. Most movements began with a "few." The larger public, white *and* black, becomes educated and drawn toward their direction. Those few, however, must possess special resources; they must, like President Lincoln, occupy a pivotal position, or must be especially dedicated, strategically smart, and talented.<sup>39</sup>

35. JACK GREENBERG, *CRUSADERS IN THE COURTS* 301-02 (1994).

36. In the chapter, "The Last Black Hero," *FACES*, *supra* note 1, a militant black leader (Jason) becomes involved romantically with a white woman (Sheila), but the thrust of the story is the excruciating sense of rejection and betrayal that a black woman (Neva), also emotionally involved with Jason, feels when she learns of the interracial relationship. In the chapter, "Divining a Racial Realism Theory," *id.* at 89-108, the author meets a white woman who has formed an organization designed to protect blacks from America's upcoming attempt at racial genocide.

37. W.E.B. Du Bois and other blacks created the Niagara movement in 1905 to begin an assault on racial segregation. DAVID L. LEWIS, *W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868-1919*, at 315-16 (1993). The group joined with whites to create the NAACP in 1910. *Id.* at 387. Du Bois became the director of publicity and research and whites occupied other offices. *Id.* at 406-07. The National Urban League, created in 1911, had black officers and white philanthropic financial support. FRANKLIN, *supra* note 29, at 448-49.

38. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 94-96 (1987); see also J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 281 (1993) (referring to Charles H. Houston and Thurgood Marshall as "the architects of the modern legal civil rights movement"). For data on the NAACP Legal Defense Fund, Inc., see GREENBERG, *supra* note 35, at 519-22. Many of the white lawyers were graduates of prestigious law schools who could have entered private practice at a much higher income.

39. This is not to suggest a "top down" form for seeking social change. Indeed, activists during the civil rights movement had a bottoms-up style—an effort was made to educate the victims and get them in motion towards resolution of their problems. As that prime practitioner of the art of organizing, Bob Moses of the Student Non-Violent Coordinating Committee (SNCC), said, "The traditional left keeps talking about coalitions and leaders, but always from the top. . . . The people don't need spokesmen or decision makers, just the confidence to try to represent themselves." TERRY H. ANDERSON, *THE MOVEMENT AND THE SIXTIES* 83 (1995). Strategies are needed today which could have the same effect, but the environment of the 1990s is much more complicated than that of the 1960s.

One would not expect a heroic, self-sacrificing stance, which is by definition unique, from the bulk of the white American public. Naturally, the masses of whites, and their leaders, will embrace a direction more rapidly when their interests are fostered. That does not, per se, stamp whites as having low character, for blacks as a group are no different than whites in that regard. Blacks completely sacrificed their own interests only when they were forced to do so—during slavery. While black and white interests can diverge, there is no inherent antagonism when there is a simple demand for racial integration.<sup>40</sup> Whites and blacks may benefit in different ways and thus have different motivations for seeking racial equality, but in the long run, both groups will enjoy a less strife-ridden, more harmonious society.<sup>41</sup> Indeed, why bemoan the fact, as Professor Bell does, that white interests can be fostered while black interests are served? Blacks should give the highest priority to circumstances which satisfy mutual interests; those advances will be the most stable and enduring.

Professor Bell's observation about the absence of class consciousness by whites who objectively share problems with blacks is not a new insight, for much has been written on the mystery of America's resistance to recognizing a class structure.<sup>42</sup> Nor do I agree with his implication, in at least one article,

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40. I do not include all forms of affirmative action as a part of the "simple demand" for equality and will comment later on this problem. See *infra* text accompanying notes 107-10. There is speculation that whites can retreat to the suburbs, finance their needs locally, and reduce federal government resources for coping with inner city problems through reductions in federal taxation. See THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION—THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 215-55 (1991). Minorities, however, are not easily isolated in a highly urbanized society, for disabilities in one group can spill over to another. Whites have a stake in reducing crime emanating from minorities, because they are increasingly the victims of interracial offenses, like robbery. Cf. Keith D. Harries, *Black Crime and Criminal Victimization, in THE CRIMINAL JUSTICE SYSTEM AND BLACKS* 37, 37-49 (Daniel Georges-Abeyie ed., 1984). Current approaches to crime (an unprecedented prison building program) are increasingly costly. See Scott Christianson, *Our Black Prisons, in THE CRIMINAL JUSTICE SYSTEM AND BLACKS, supra*, at 259. Minorities may also constitute a health threat to the surrounding suburbs—minority street walking prostitutes have a high incidence of AIDS and they service some males from the suburbs. See *Study Says Crack Addicts Selling Sex for Drugs Are Spreading AIDS Virus*, WASH. POST, Nov. 24, 1994, at A24. We have not stemmed the influx of illegal immigrants. Recent proposals to bar them from education may be unconstitutional and barring them from basic welfare and social services may only lead to an increase in crime. See *Plyer v. Doe*, 457 U.S. 202 (1982). Moreover, there is a stake in educating and upgrading the skills of minorities because they will be a larger proportion of the available manpower in the future. *Id.* at 221.

41. Whites, for example, could support the integration of a police force in urban areas after the 1960s because many race riots of that period were due to friction between white police and blacks who perceived them as an "alien" occupying force. Whites wanted to avoid riots because riots increased costs of policing, put an extra burden on the criminal courts, and occasioned losses to white owned businesses. Blacks could support the integration of urban police forces because young blacks with less than a college degree got well paid and stable employment. The goal of both communities were achieved—the police force in many cities were integrated and the only major race riot since the 1960s was in 1992 in Los Angeles, surrounding the Rodney King incident. (If there had been at least one black policeperson present during the King incident, it is unlikely that the brutality, with its racial epitaphs, would have occurred). Race riots may be an anguished cry from an oppressed community, but they are never an organized, disciplined search for social change. The white and black communities have profited from the absence of riots over a 20 to 25 year period, albeit in different ways.

42. See, e.g., LEONARD REISSMAN, CLASS IN AMERICAN SOCIETY (1959). Indeed, one author says that the idea of classes was so anathema to Americans as to be "America's forbidden thought." PAUL BLUMBERG, INEQUALITY IN AN AGE OF DECLINE 53 (1980).

that racism is the paramount factor in the absence of class awareness.<sup>43</sup> Undoubtedly other factors like Americans' steady belief—at least until recently—in the myth of unlimited mobility, the absence of a history of a hereditary aristocracy, and America's high standard of living after World War II, explain much of the belief that one's future is not unfairly controlled by one's class level.<sup>44</sup> However, the absence of class consciousness is not a phenomenon "owned" exclusively by whites. Despite strong forces compelling racial solidarity amongst blacks, such as racial segregation, E. Franklin Frazier, in his celebrated book, *Black Bourgeoisie*,<sup>45</sup> showed the multifarious and strenuous ways in which a black elite separated itself from poor and working class blacks. The black middle class today may be more race-conscious than the class that Frazier wrote of, but I doubt that they feel a great deal of common cause with poor or working class whites.

#### A QUALIFIED LOOK AT THE NEED FOR BLACK LEADERSHIP

If Professor Bell meant that blacks should be the catalysts to furthering their freedoms, or that they should occupy visible leadership roles, I would agree. That qualified statement is probably true of any movement to end discrimination and oppression. The victims of oppression first become aware of the details of their victimization, and then take that knowledge to communities lacking such experience. Blacks had to assume leadership positions so that young blacks were not trapped by maligning racial stereotypes that blacks lacked leadership capacity.<sup>46</sup> While black leadership and an aroused black community are necessary conditions for the further realization of freedom, it is not accurate, historically or strategically, to say it has been, is, or ever will be a *sufficient* condition for freedom.<sup>47</sup>

43. *White Superiority*, *supra* note 30 (mentioning no factors, other than racism, to explain why whites who lack wealth and power accept their circumstances without protest).

44. See BLUMBERG, *supra* note 42, at 9-64.

45. E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* (1957). See especially Chapter IX, "Society: Status Without Substance." *Id.* at 195-212.

46. I was not privy to the full range of the disaffection between Professor Bell and Jack Greenberg, a white, who was the Executive Director of the NAACP Legal Defense & Educational Fund, Inc. for a number of years, but it is my guess that the issue of blacks being in leadership positions for the reasons stated would have been important to Professor Bell. Jack Greenberg labeled black student opposition to his teaching a civil rights course at Harvard Law School, and their demand for a black professor, as "racist" and noted that Professor Bell "counseled and encouraged" the black students. GREENBERG, *supra* note 35, at 502. If that label of "racist" was meant to apply to Professor Bell, I categorically reject it. Greenberg may have experienced genuine pain over the controversy, given his many years of service, but he undervalued the legitimate desire of the black students for a role model or to have the Harvard faculty further integrated. Responses like Greenberg's, unfortunately, only reinforce Professor Bell's suspicions of whites, even when they are functionally in the posture of an ally.

47. Fortunately, Elaine Jones and Hugh Price, black leaders respectively of the NAACP Legal Defense & Educational Fund, Inc. and the Urban League, are unequivocally committed to such a direction. See *Racism Only Part of Problem, New Urban League Head Says*, WASH. POST, July 25, 1994, at A8. The article reported that "[Price's] remarks were a departure from the stance of many other civil rights leaders who have advocated keeping some political distance from whites. Price emphasized 'racial inclusion.'" *Id.*; see also Nat Hentoff, *A Black Response to Black Bigotry*, WASH. POST, July 23, 1994, at A21. Mr. Hentoff lauded Elaine Jones's statement that it was appropriate and necessary for black leaders to denounce any black leader who engaged in anti-Se-

One need not fear that reality. Despite abundant examples of prejudiced whites defeating the interests of blacks and other minority groups—for much of what Professor Bell relies on is historical fact<sup>48</sup>—this simply means that there must be a painstaking, careful identification of the whites who should be recruited, worked with, and most of all, trusted. Intelligence and precision in selecting trustworthy whites builds effective coalitions. Such racially cooperative coalitions will model a movement's predicted future—one in which differences are acknowledged and respected, while striving together for cooperative living.

#### THE HISTORY OF BLACK PROGRESS

I must now address the thesis that there has been no evolutionary progress for blacks in America. Professor Bell concludes that blacks improperly read history if we believe, as Americans in general believe, that progress—racial, in the case of blacks—is “linear and evolutionary.”<sup>49</sup> According to Professor Bell, the “American dogma of automatic progress” has never applied to blacks.<sup>50</sup> Blacks will never gain full equality, and “[e]ven those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance.”<sup>51</sup>

Progress toward reducing racial discrimination and subordination has never been “automatic,” if that refers to some natural and inexorable process without struggle. Nor has progress ever been strictly “linear” in terms of unvarying year by year improvement, because the combatants on *either* side of the equality struggle have varied over time in their energies, resources, capacities, and the quality of their plans. Moreover, neither side could predict or control *all* of the variables which accompany progress or non-progress; some factors, like World War II, occurred in the international arena, and were not exclusively under American control.

With these qualifications, and a long view of history, blacks *and* their white allies achieved two profound and qualitatively different leaps forward toward the goal of equality: the end of slavery, and the Civil Rights Act of 1964. Moreover, despite open and, lately, covert resistance, *black progress has never been shoved back, in a qualitative sense, to the powerlessness and abuse of periods preceding these leaps forward.*<sup>52</sup>

mitic diatribes. He added: “[Jones] also said it was time for Jews and blacks to again work together in projects to try to define the nation’s agenda instead of continuing on their separate ways.” *Id.*

48. See, e.g., Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (recounting the defeat of efforts by an Indian tribe to recover lands protected by federal statute).

49. *Permanence of Racism*, *supra* note 14.

50. Professor Bell quotes approvingly from NATHAN HUGGIN, *BLACK ODYSSEY, THE AFRO-AMERICAN ORDEAL IN SLAVERY* 244 (1977). *FACES*, *supra* note 1, at 197.

51. *FACES*, *supra* note 1, at 12.

52. Additionally, many temporary setbacks were ultimately reversed, and when setbacks occurred around some activities or in some geographical areas, progress occurred in other activities or areas. Some setbacks cannot be ascribed exclusively to some indelible racism in the white public, but may have been due to legitimate differences about policy directions, the product of questionable strategy on the part of black leadership and/or their allies, or the product of negative

## THE FIRST QUALITATIVE LEAP

For two-thirds of American history, African-Americans were, as a matter of law and practice, the property of white slave-holders from birth until death. Professor Bell commented on the ending of this institution: "Two centuries after the Constitution's adoption, we did live in a far more enlightened world. Slavery was no more."<sup>53</sup>

That must be the most tepid understatement ever about the ending of the most violent and debasing condition that blacks ever suffered in this country. Slaves worked six and sometimes seven days a week. Idle slaves could be flogged, and some were maimed after a failed escape. Families were separated, and black females were forced into sexual concubinage. Slaves owned nothing, their movement was strictly circumscribed, and they were kept illiterate as another form of control.<sup>54</sup>

Ending this degrading institution was a profound qualitative leap toward freedom, and it was never reversed. White southerners did regain control of the legislatures, and imposed racial segregation. Racial segregation, however, was a far cry from the total domination of slavery. Moreover, blacks seized the opportunity to take many steps, within the confines of segregation, that became the seeds of the next great leap forward into freedom in the 1950s and 1960s. The newly freed blacks trekked North and West—not an option under slavery—and there gained critical political leverage.<sup>55</sup> Independent black churches, possible only after the Civil War, developed a debate between a conservative wing concerned with the hereafter, and a more progressive wing that sought to use the church as an agency for ameliorating the constrictions in black life.<sup>56</sup> From the latter, one Martin Luther King sprang forth, galvanizing blacks and the whole nation for the next leap towards freedom.

During Reconstruction, black legislators established a free public school system. Even though whites imposed segregation on the public schools, they did not abolish them. By 1900, 1.5 million black children were overcoming the illiteracy imposed on their parents and grandparents in slavery.<sup>57</sup>

Shortly after the imposition of racial segregation, blacks turned to the United States Supreme Court for relief from its legal strictures. There were losses at first, the most notable being *Plessy v. Ferguson*,<sup>58</sup> upholding racial

factors adversely affecting the entire country across racial lines. All of these factors will be addressed later.

53. FACES, *supra* note 1, at 2.

54. FRANKLIN, *supra* note 29, at 192-205.

55. David Levering Lewis argues that the blacks in the North began to be the difference in Democrats winning over Republicans when the latter party abandoned the racial and economic interests of the black community. Lewis, *supra* note 24. This "cumulative impact of balance of power politics [along with other factors like rising black income and coalitions with organized labor] primed much of the nation for an end to segregation." *Id.* at 13.

56. FRANKLIN, *supra* note 29, at 163, 227, 309-10, 561.

57. *Id.* at 546-47.

58. 163 U.S. 537 (1896). The Court initially appeared to be an avenue of relief. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court held that it was unconstitutional to bar blacks from juries. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down an ordinance

segregation under the "separate but equal" doctrine. As blacks gained more organizational sophistication, the Court, gradually but progressively, struck down segregation in voting,<sup>59</sup> in housing,<sup>60</sup> and in graduate schools.<sup>61</sup> The culmination was *Brown v. Board of Education*,<sup>62</sup> which fully repudiated the *Plessy* doctrine and held that state sanctioned racial segregation violated the 14th Amendment.

#### SECOND QUALITATIVE LEAP FORWARD

The black-led, and white-supported, civil rights movement gathered momentum in the late 1950s and early 1960s through marches, "sit-ins"—which breached racial segregation in public establishments—and the development of legal strategies to provide cover and protection. White Americans were shocked by the vicious resistance of small pockets of rabid southern racists to the disciplined non-violent protests of blacks, and public opinion began to move toward support for racial equality.<sup>63</sup> Key whites in the media, especially television, influenced this shift in public opinion by portraying black grievances in a sympathetic and appealing light.<sup>64</sup> The movement culminated in 1960s legislation prohibiting racial segregation and discrimination in public accommodations,<sup>65</sup> employment,<sup>66</sup> voting rights,<sup>67</sup> and housing.<sup>68</sup> This was

that was intended to prevent Chinese from operating laundries. However, in a number of cases the Court was not supportive of black interests. In *United States v. Reese*, 92 U.S. 214, 217 (1875), the Court held that the 15th Amendment did not confer the right to vote on anyone, but merely barred the states from giving preference to one citizen over another on the ground of race. Subsequently, the Court voided the Civil Rights Act of 1875 on the ground that the 14th Amendment allowed the federal government to outlaw racially discriminatory acts by a State, but not private individuals. *The Civil Rights Cases*, 109 U.S. 3 (1883).

59. The Court declared state provisions which limited voter registration to persons whose grandfathers were qualified to vote prior to the Civil War unconstitutional. *Guinn v. United States*, 238 U.S. 347, 367-68 (1915). The Court next invalidated a law which excluded blacks from participating in the Democratic primary. *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927). It let a decision stand which held that blacks could not be excluded from even a primary run by private parties. *Smith v. Allright*, 321 U.S. 649 (1944). Some southern state legislatures hastened to remove the imprimatur of state legislation from all primaries, but the Court still refused to allow exclusion of blacks. *See Elmore v. Rice*, 72 F. Supp. 516 (E.D.S.C.), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

60. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (declaring an ordinance limiting where blacks could reside unconstitutional).

61. *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

62. 347 U.S. 483 (1954).

63. Large groups of whites in southern cities did not actively join the attacks, as had been the case in some race riots against the black community earlier in the century. *See MARTIN LUTHER KING, JR., WHY CAN'T WE WAIT* 106-07 (1964) (commenting on Dr. King's Birmingham campaign).

64. One commentator called television "the chosen instrument of the black revolution." Thomas Cripps, *Film, in SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 159 (Jannette L. Dates & William Barlow eds., 1990).

65. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 243 (codified as amended at 42 U.S.C. § 2000e (1988)).

66. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e (1988)).

67. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 445 (codified as amended at 42 U.S.C. § 1971 (1988)).

68. Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 81 (codified as amended at 42

the next qualitative leap forward, and there has been *no* massive backsliding into the rank forms of segregation and discrimination that characterized the pre-1960 period.

Professor Bell treats the post-1960s claims of progress as an illusion: discrimination simply became more covert, but equally efficient.<sup>69</sup> The facts, however, viewed with a holistic perspective, largely refute this claim.<sup>70</sup>

The most thorough analysis of black-American status since Gunnar Myrdal's *An American Dilemma* in 1944, is *A Common Destiny—Blacks and American Society*.<sup>71</sup> The report covers the period from 1940 through 1986, and is more comprehensive than the studies Professor Bell relied on in recent law review articles.

*A Common Destiny* answers Professor Bell's central question in *Faces*: Contemporary views of the status of black-white relations in America vary widely. Perspectives range from optimism that the main problems have been solved, to the view that black progress is largely an illusion, to assessments that the nation is retrogressing and moving toward increased racial disparities. To some observers, the present situation is only another episode in a long history of recurring cycles of apparent improvement that are followed by new forms of dominance in changed contexts: the level of black status changes, it is said, but the one constant is blacks' continuing subordinate social position. To other observers, the opposite is correct: long-run progress is the dominant trend.<sup>72</sup>

*A Common Destiny*, however, concludes that the overwhelming majority of black-Americans made substantial progress since 1940:

Over the 50-year span covered by this study, the social status of American blacks has *on average* improved dramatically, both in absolute terms and relative to whites. The growth of the economy and public policies promoting racial equality led to an erosion of segrega-

U.S.C. § 3601 (1988)).

69. CONFRONTING AUTHORITY, *supra* note 4, at 4 (describing the period after slavery and segregation as "the current mockery of equal opportunity").

70. Here I take issue with the style of *Faces*—given the sweep of Professor Bell's conclusions. Storytelling may be an excellent device to vividly illuminate insights, and to give voice to hitherto suppressed or ignored perspectives. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). However, the central claims of *Faces* cry out for an objective assessment of American history and the sociology of racial interactions. Professor Bell, however, is an able and prolific writer, and I have resorted to his articles for the factual and historical support for his claims. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 374 n.30 (1992) (recounting data showing comparative unemployment and poverty rates between blacks and whites) [hereinafter *Racial Realism*]; *Racial Reflections*, *supra* note 32, at 1037-44 (using data to illustrate the erosion of earlier civil rights advances).

71. A COMMON DESTINY—BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter A COMMON DESTINY]. It is the report of a 22-member committee, which surveyed all research on the status of black-Americans, checked its validity and interpretations, and did fresh research where needed. See *id.* at 559-69. The 22 members were lawyers and academics with impeccable credentials in the social and behavioral sciences. They were supported by a staff and consultants (amongst whom was Professor Bell). See *id.* at 586.

72. *Id.* at xi (emphasis added).

tion and discrimination, making it possible for a substantial fraction of blacks to enter the mainstream of American life.<sup>73</sup>

Just five decades ago, most black Americans could not work, live, shop, eat, seek entertainment, travel where they chose. Even a quarter century ago—100 years after the Emancipation Proclamation of 1863—most blacks were effectively denied the right to vote. . . . Today the situation is very different.<sup>74</sup>

The Committee acknowledged that “the great gulf that existed between black and white Americans in 1939 . . . has not closed,” because one-third of blacks “still live in households with incomes below the poverty line.”<sup>75</sup> Yet the study reported that 92% of blacks lived below the poverty line in 1939.<sup>76</sup> A 60% drop in poverty is an astounding improvement, by any measure, and is an even faster movement out of poverty than that of the white public that was also suffering from the ravages of the economic depression of the 1930s.<sup>77</sup> Some reduction of black poverty occurred when blacks secured higher paying jobs in defense industries during World War II. But the passage of the 1964 Civil Rights Act brought a significant reduction in racial employment discrimination. By 1984, blacks had \$9 billion more per year in real income, adjusted for inflation, than they would have had if they had remained arrayed throughout the occupational spectrum as they were before the Act.<sup>78</sup> A new black economic elite developed through movement into higher paying employment in the private sector and away from employment in government, the clergy, and civil rights organizations; this new elite should sustain their progress and finance opportunities for their young.<sup>79</sup>

The number of black elected officials increased from a few dozen in 1940 to 6,800 by 1988, and the number of black public administrators went from 1% in 1940 to 8% in 1980.<sup>80</sup> No white elected official has openly supported racial segregation since Governor Wallace in the early 1960s, a testament, in part, to the substantial increases in black voter registration and voting, due to the Voting Rights Acts of 1957, 1960, and 1965.<sup>81</sup>

One could also show decreases in racial segregation in education, housing, and other aspects of American life, coupled with the virtual disappearance of

73. *Id.* at 4.

74. *Id.* at 3.

75. *Id.*

76. *Id.* at 27.

77. Sixty-five percent of whites were below the poverty line in 1939. By the time of the Committee report, the figure was nine percent for whites. *Id.*

78. Alfred W. Blumrosen, *The Law Transmission System and the Southern: Jurisprudence of Employment Discrimination*, 6 *INDUS. REL. L.J.* 313, 338 (1984).

79. See James P. Smith & Finis R. Welch, *Black Economic Progress After Mydal*, in *EQUAL EMPLOYMENT OPPORTUNITY* 179 (Paul Burstein ed., 1994).

80. *A COMMON DESTINY*, *supra* note 71, at 15-16.

81. For the history of George Wallace, see MICHAEL KAZIN, *THE POPULIST PERSUASION, AN AMERICAN HISTORY* 229-38 (1995); see also Richard Saks, Note, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 *CHI.-KENT L. REV.* 245, 251-52 n.33 (1990) (citing a U.S. Commission on Civil Rights report that voter registration among blacks in seven southern states increased from 29.3% prior to passage of the Voting Rights Act of 1965 to 56.6% by 1972).



racial exclusion in public accommodations—all due to enforcement of the new legislation. It is true, racial discrimination has not been totally eradicated.<sup>82</sup> But, Peter F. Drucker summarizes:

In the fifty years since the Second World War the economic position of African-Americans in America has improved faster than that of any other group in American social history—or in the social history of any country. Three-fifths of America's blacks rose into middle-class incomes; before the Second World War the figure was one-twentieth.<sup>83</sup>

I doubt that Professor Bell believes that racial discrimination should have totally disappeared. But what, then, accounts for Professor Bell's statements that "the civil rights gains, so hard won, are being steadily eroded"; that it has been "more than a decade of civil rights setbacks in the White House, [and] in the courts";<sup>84</sup> and that the civil rights movement is "a movement now brought to a virtual halt"?<sup>85</sup>

Professor Bell was not looking at the total sweep of black progress since the 1960s, but was dismayed by the hostility towards—or lack of support for—civil rights displayed during the twelve years of the Reagan and Bush administrations.<sup>86</sup> Ex-president Jimmy Carter appointed a record number of black attorneys to the federal courts.<sup>87</sup> Reagan and Bush returned to the old style, appointing few minorities and women to the federal bench. Further, their appointees often proved unsympathetic to the arguments of civil rights organizations.<sup>88</sup> Reagan and Bush were the only presidents who opposed passage of

82. Alex M. Johnson, Jr., *Bid Whisk, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1411 n.38 (1993) (unemployment rates are significantly higher for African-Americans than for whites); see also A COMMON DESTINY, *supra* note 71, at 49-51 (estimating that "in any metropolitan area, one-quarter to one-half of all rental inquiries by blacks are met with clearly discriminatory responses"); Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 592 (1993).

83. Peter F. Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, Nov. 1994, at 62.

84. FACES, *supra* note 1, at 3, 5.

85. Derrick Bell, *A Hurdle Too High: Class-Based Roadblocks to Racial Remediation*, 33 BUFF. L. REV. 1 (1984).

86. See NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988) (exploring the many ways in which the Reagan administration was hostile to civil rights). One strong indication that Professor Bell was reacting primarily to Reagan and Bush is that he felt the need to raise the question of whether his dire predictions about the irremediable racism of the American public was embarrassed by the election of President Bill Clinton. See Derrick Bell, *Political Reality Testing*, 51 FORDHAM L. REV. 1033 (1993). There he acknowledges that Clinton had reversed the style of the two previous presidents in that he has made strong statements of a commitment to equal opportunity for blacks. Professor Bell, however, in his characteristic distrustful stance, charged that Clinton was "silent" on two fronts: he did not address the disproportionate unemployment of blacks and he did not confront whether general social reform is impeded by racism. *Id.* at 1033, 1036. My point, however, is that if racism is as deep and structural as Professor Bell argues, then the election of one president should not call for an explanatory comment.

87. President Carter tripled the number of black judges from 12 to 38. GREENBERG, *supra* note 35, at 472.

88. *Id.* at 380. Professor Bell and I are particularly critical of President Bush's cynical, indirect attack on affirmative action, by nominating Clarence Thomas, a black, to the United States Supreme Court and then calling the marginally qualified Thomas, the "best person at the right

the 1964 Civil Rights Act, and the only presidents who vetoed civil rights legislation in the 20th century.<sup>89</sup> They also used subtle, and sometimes not so subtle, "racial codes" to covertly organize whites to break the Democratic party's hold on the presidency, especially in the South.<sup>90</sup>

Even given this executive branch hostility to civil rights, the Congress, the branch of government much more vulnerable to the electorate, consistently and *successfully* opposed or reversed actions that undermined civil rights. Congress amended and improved the Voting Rights Act in 1982.<sup>91</sup> Congress overrode the veto of one of the most popular presidents in modern times, Reagan, and passed the Civil Rights Restoration Act in 1986.<sup>92</sup> The enforcement machinery of the Fair Housing Act, prohibiting racial discrimination in the sale or rental of housing, was substantially improved by amendment in 1988.<sup>93</sup> A bill barring discrimination in employment and public accommodations for the disabled, a disproportionate number of which are blacks, passed in 1990.<sup>94</sup>

The major "setbacks," to which Professor Bell refers, were several United States Supreme Court cases which limited the scope of statutes prohibiting discrimination in employment, or which created proof problems for plaintiffs.<sup>95</sup>

time," meaning the best "black" attorney in the nation. John E. Yang and Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST, July 2, 1991, at A1; see also CONFRONTING AUTHORITY, *supra* note 4, at 160. Thomas' prime credentials were his hostility to civil rights and a willingness to attack black leadership. See *Racial Realism*, *supra* note 70, at 363, 369-74 (observing that black scholars find Thomas unsupportive of civil rights).

89. See Doug Freeland, *The Senate-Bush: The Polls Give Him Excellent Chance*, HOUS. POST, Oct. 11, 1964, at § 12; see also David S. Broder, *Reagan Attacks the Great Society*, N.Y. TIMES, June 17, 1966, at 41.

90. See EDSALL & EDSALL, *supra* note 40, at 137-53, 198-214.

91. See 42 U.S.C. §§ 1971-1974 (1988).

92. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 706, 794, 42 U.S.C. §§ 6107, 2000d-4a) (Supp. 1990). See SENATE COMM. ON LABOR AND HUMAN RESOURCES, CIVIL RIGHTS RESTORATION ACT OF 1987, S. Rep. No. 64, 100th Cong., 1st Sess. 1-2 (1987), reprinted in 1988 U.S.C.C.A.N. 3, 3-4. The Senate Report notes that the purpose of the Restoration Act was to reverse the Supreme Court's decision in *Grove City College v. Professor Bell*, 465 U.S. 555 (1983), which held that anti-discrimination laws only applied to specific federally-funded programs and not to the entire institution which conducts the federal program.

93. 42 U.S.C. §§ 3601-3616 (1988 & Supp. V 1993). Section 3501 (c), (e) of the Act allowed the Justice Department to sue on behalf of an individual, thus ending the limitation to "pattern and practice" litigation. Section 3612(d)(2) provided that the Department of Housing and Urban Development could secure an expeditious hearing before an administrative judge. *Id.*; see also James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1088-90 (1989).

94. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1988 & Supp. V 1993). Blacks are disproportionately below the poverty line and "[i]n addition to increased mortality, almost every form of disease and disability is more prevalent amongst the poor." A COMMON DESTINY, *supra* note 71, at 394. Blindness is higher amongst blacks than whites, and blacks have less coverage under public or private health insurance than whites (22% vs. 14% non-coverage) and thus they suffer more from illnesses and diseases which could have been detected and treated earlier through preventive health care. *Id.* at 417, 430.

95. The record of the U.S. Supreme Court is mixed. On occasion, it rejected arguments of the Reagan Justice Department that would have undermined or limited civil rights. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (upholding as legal a voluntary affirmative action plan designed to increase representation of women in areas traditionally underrepresented); *United States v. Paradise*, 480 U.S. 149 (1987) (holding constitutional a judicially imposed affirmative action plan which required 50% of Alabama's state police promotions to go to blacks until a given rank reached 25% black); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421

Congress passed a bill in 1991 which reversed *all* of the adverse decisions by the Court.<sup>96</sup> This history of Congressional repudiation of executive and judicial hostility to civil rights and, indeed, the extension of civil rights to new areas, is not noted in either of Professor Bell's two books.<sup>97</sup>

Why, if society is as irremediably racist as Professor Bell alleges, can Congress, which constantly sounds out the public, confidently pass this wide range of pro-civil rights legislation? The answer is that the overwhelming majority of white Americans underwent attitude changes in the last thirty years, generally relinquishing crude or unadulterated racial prejudice. A majority of whites no longer believe in the racial inferiority of blacks, and believe blacks should not be discriminated against in employment, schools, and access to public and private accommodations.<sup>98</sup> Professor Bell's books contain no mention of the extensive opinion poll data showing less racial prejudice. Indeed, his books, especially *Confronting Authority*, portray the white public as massively, and often incomprehensibly and stupidly, committed to racism.

A fuller account of *Confronting Authority* is now appropriate. The book recounts Harvard Law School's failure—or refusal—to hire a black female for the faculty, and Professor Bell taking a leave in protest until such a hire was made. Leaves at the law school are limited to two years; thus, he lost his tenured position.

Professor Bell acknowledges that, from one point of view, his protest was a failure; the Harvard Law School did not appoint a black female within the two year deadline he set. Indeed, the school hired four white males during his leave-in-protest.<sup>99</sup> Harvard eventually offered a teaching position to a black female, but long after Professor Bell's dramatic confrontation had lost its

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(1986) (ruling that blacks who were not actual victims of discrimination by a union in the past may be beneficiaries of an affirmative action plan, rejecting the arguments of Reagan's Solicitor General to the contrary).

However, later cases were decidedly hostile to civil rights interests. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (holding that Title VII, barring employment discrimination, does not protect American citizens employed abroad by U.S. companies); *Martin v. Wilks*, 490 U.S. 755 (1989) (opening consent decrees to attack by persons claiming "reverse discrimination" in employment); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (easing the burden of proof for employers in responding to plaintiff's development of a prima facie case of employment discrimination by way of disparate impact); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (refusing to allow suit for claims of racial discrimination on the job on the grounds that § 1981 of the 1866 Civil Rights Act is limited to discrimination in hiring); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that the plaintiff was not the prevailing party and entitled to attorney fees, even though the employer discriminatorily took gender into account in an employment decision, when the employer could prove that it would have come to the same adverse decision regarding the plaintiff).

96. President Bush vetoed a similar bill in 1990 claiming that it would impose unfair quotas. See Carl Cannon et al., *House Passes Civil Rights Bill; But Veto Likely, Senate Favors Law by Slim Margin*, DET. FREE PRESS, June 6, 1991, at 1A; see also Civil Rights Act of 1991, Pub. L. No. 102-166, H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 1991. The legislation went further than repudiating the Supreme Court cases and gave plaintiffs a right to compensatory and punitive damages which could go as high as \$300,000. *Id.*

97. Professor Bell may have submitted his manuscript of *FACES*, *supra* note 1, for publication before he knew the outcome of the fight over the 1991 legislation. But by the time he was working on *CONFRONTING AUTHORITY*, *supra* note 4, he had to have known of its passage.

98. *A COMMON DESTINY*, *supra* note 71, at 118-21.

99. *CONFRONTING AUTHORITY*, *supra* note 4, at 85.

visibility.<sup>100</sup> I believe that this intense and bitter fight at Harvard,<sup>101</sup> which Professor Bell felt he lost, coupled with the interregnum of the Reagan-Bush administration's hostility to civil rights and appointments to the U.S. Supreme Court, combined to induce a profound pessimism in Professor Bell.

While Professor Bell calls himself a "racial realist," he is really a dedicated idealist who has had his abiding and total faith in the law and legal institutions deeply disappointed. Professor Bell admits he believed that racial discrimination would largely disappear once the Supreme Court ruled that governmentally enforced racial segregation was unconstitutional.<sup>102</sup>

In this belief, Professor Bell exhibits a characteristically American attitude, namely that law and legal institutions can "fix" any problem, no matter how complex, immediately and simply. Because of this belief, we treat the Supreme Court as the pinnacle of power in legal institutions, and fight desperately when nominees signal one political direction or another.<sup>103</sup> Gerald N. Rosenberg, however, argues that the Court is not as powerful an institution as one might imagine when it comes to changing strongly entrenched societal behavior.<sup>104</sup> The Court's coercive powers are minimal, and it functions largely through symbolism. Thus, the racial desegregation of public schools proceeded at a slow pace under federal court enforcement of constitutional provisions, and accelerated only when Congress gave federal agencies resources and detailed enforcement power.<sup>105</sup> Moreover, Rosenberg notes that the dilution of the reform goals of the Supreme Court also occurred around abortion, environmental pollution, reapportionment, and the constitutional rules governing the processing of criminal defendants. A significant portion of the public disapproves of the Supreme Court pronouncements on these subjects; thus, the Court's rulings are undermined and diminished at the enforcement level.

Lifetime appointment does not wholly immunize the Court from day-to-day politics.<sup>106</sup> Members of the Court, aware of their vulnerability to public

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100. See Lois Romano, *We've Heard That . . .*, WASH. POST, Mar. 14, 1995, at E3 (quoting the Dean of Harvard Law School that an offer had been made to Professor Lani Guinier). I believed that the Harvard Law School would make an offer to a black female professor, but I also believed that Professor Bell's style of protest backfired, and delayed the process as administrators dug in their heels to protect what they would term, "high standards."

101. For an account of a wide range of antagonism and hostility at the time of Professor Bell's confrontation, see ELEANOR KERLOW, *POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* (1994).

102. See Derrick Bell, *Legal Storytelling—The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2394 (1989) ("Most of us thought that the 1954 Supreme Court decision in *Brown v. Board of Education* would close the book on racial discrimination and open a new era of opportunity that knew no color line.").

103. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 3-22 (1994).

104. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

105. Racial desegregation of public schools increased 1% per year from 1955 to 1965 when the federal courts were enforcing *Brown*. Desegregation was greatly accelerated after 1965 when the Department of Health, Education, and Welfare began to use new enforcement tools provided by the 1964 Civil Rights Act. See GREENBERG, *supra* note 35, at 380-81.

106. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1979 (1990) (arguing that the formal safeguards of life tenure and salary protection for Supreme Court Justices "do little to ensure judicial independence").

opinion, exercise restraint when a ruling might confront strong public sentiment.<sup>107</sup> This may make for decisions that minorities believe deserve their interests, such as some that Professor Bell has criticized.<sup>108</sup> But the Court's posture has also *protected* minorities. Professor Bell has pessimistically speculated that, by disingenuous argument, the employment discrimination portion of the 1964 Civil Rights Act could be held unconstitutional.<sup>109</sup> That speculation wholly lacks credibility because simple equal opportunity is a bedrock of today's political landscape. In the "real world," the Court sustained the constitutionality of the portion of the 1964 Act that prohibited racial discrimination in public accommodations, relying on the Commerce Clause.<sup>110</sup> Professor Bell is not engaged here in serious prognostication about future Supreme Court developments; it is merely another variation on the theme of unbounded racial fear.

#### OTHER FORMS OF DISCRIMINATION

Were Professor Bell pursuing an objective assessment, as opposed to pursuing moral denunciation, he might have compared race discrimination's progress—or lack of progress—with sex or other forms of discrimination. White females were never subjected, as were blacks, to the full degradation of slavery, but sexism is, arguably, as pervasive and resistant to total elimination as racism. One could forget that white and black females received the right to vote a half-century after the freed black males.<sup>111</sup> When Congress considered outlawing employment discrimination based on race in the 1960s, southern congressmen added sex discrimination as a ploy to make the legislation seem wholly unpalatable.<sup>112</sup>

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107. Spann goes further and argues that the Justices of the Supreme Court perform the institutional role of protecting minority interests weakly because the Justices are likely to be persons strongly imbued with majoritarian perspectives, either consciously or unconsciously. *Id.* at 1982-90.

108. See *Racial Realism*, *supra* note 70, at 369-70 (criticizing the Court for failing to adopt arguments that would have sustained affirmative action plans in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), and *Croson v. City of Richmond*, 488 U.S. 469 (1989)). It is possible to argue that in *Bakke* and *Croson* the Court appropriately required the development of an adequate record of prior discrimination before a governmental entity could use race as basis for granting benefits. The Court, however, could not be oblivious to the growing public perception of affirmative action as "unfair preferences." See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (refusing to order busing of children between cities and suburbs at a time when a substantial public hostility began to develop around disruption of neighborhood schools).

109. Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CALIF. L. REV. 597, 589-90 (1991).

110. *Katzenbach v. McClung*, 379 U.S. 294 (1964). Even Richard Epstein, who questions this expansive interpretation of the Commerce Clause, admits that it is "wildly inconceivable" that any constitutional attack on the anti-discrimination principle would be sustained, because it is so firmly a part of our political and legal culture. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 5-6 (1992). Professor Bell would no doubt reference the conservatives on the Court invalidating federal gun control legislation in *United States v. Lopez*, 115 S. Ct. 1624 (1995), on Commerce Clause grounds, as an opening wedge.

111. The 15th Amendment, granting ex-slaves (males) the right to vote, was adopted in 1870. The 19th Amendment granting females the right to vote was adopted fifty years later in 1920.

112. See J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966).

Twenty-five years after the prohibition of sex discrimination in employment, the annual income of females was 64% of male income.<sup>113</sup> Indeed, gender inhibits personal—as opposed to family—income more than race: the average white female college graduate earns less than the average male high school graduate.<sup>114</sup> Perhaps “gender-bonding” is stronger than Bell’s “racial-bonding.” Black females illustrate the diminution of race as an organizer of income, and the continued potency of gender. Black females, who earned only 41% of what white females earned in 1939, now approximate the income of white females.<sup>115</sup> Marriage to white males blunts some of the suppression of white female income, which is underscored by the disproportionate number of single female parents who fall below the poverty line.<sup>116</sup> However, some females endure terrible mental and physical abuse in relationships, and it must be denigrating to many females to know, at an unspoken level, that a society forces you into what should be an intimate relationship as a mechanism of economic survival.

Indeed, sexism may resist change *more* than racism. Sexism, unlike racism, has existed in practically all societies. Racist slavery in America was a straight-forward economic exploitation. Sexism, however, may have a more complex psychological cast since economic resources are often shared, and indeed, the giving of financial sustenance and gifts may be a part of the way that men maintain their dominance over women. Racism, in the past, thrived on fragile and false stereotypes sustained primarily by keeping blacks and whites ignorant of one another and separated; thus, the stereotype could be broken down through increased information, education, and peer-like interaction. Sexism, however, is developed and *reinforced* in the most intimate of relationships; thus, interaction alone does not disrupt female subordination. Gender development dominates personality so that views of the other sex may not be as episodically developed as one’s racial perspectives.<sup>117</sup> A decrease in sexism may call for a reorganization of personality by both males *and* females, which is more difficult to achieve than dissolving racial stereotypes.<sup>118</sup>

113. There are a number of variables which account for some of that gap (e.g. males have greater seniority, or hold more dangerous and better paying jobs), but most analysts agree that some of the gap is not explained by those non-discriminatory factors. See, e.g., DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 162 (1989).

114. *Id.* at 163.

115. By 1984, black women’s weekly wages were 97% of the wages of white women. A COMMON DESTINY, *supra* note 71, at 197.

116. RHODE, *supra* note 113, at 2 (two thirds of indigent adults are females).

117. One expects conservatives to more readily exhibit attitudes of racism, sexism, and homophobia because embracing the status quo or treating long-standing hierarchial relationships as “natural” and inevitable are attitudes which support these forms of prejudice. However, Terry H. Anderson recounts how black and white male civil rights activists, firmly committed to eradicating race discrimination, treated female activists’ calls for inclusion of a feminist agenda in the demands for reform with mockery and derision. ANDERSON, *supra* note 39, at 313-15.

118. There is a risk here of too broad, and thus inaccurate generalizations, since there is no uniform “woman’s experience” unconditioned by class, race, sexual orientation, and other factors. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). The fact that these two phenomena have different sources and characteristics must make the experience of black women especially unique and complex since they experience them simultaneously. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365. Trina Grillo and Stephanie M. Wildman might argue, contrary to

The point is that blacks have no monopoly on the slowness or incompleteness of anti-discrimination law as a reorganizer of deep and complex social habits.<sup>119</sup> Neither slavery, racial segregation, nor sex discrimination was produced or maintained exclusively by law. They were contributed to and reinforced by practically *every* societal institution. A reorientation in virtually every institution is necessary for complete or permanent change: a reorientation in the way we educate our children in schools and in families with respect to differences, in the ideas we advance in our media and in our cultural organs, in the way that we relate socially in friendships and in voluntary organizations, and in the way that churches and synagogues carry forth their moral messages. This is not to suggest that the problem of discrimination is too massive or wholly unmanageable. Indeed, just the opposite is suggested. Persons can work in small and large ways from wherever they are to reduce the problem of discrimination, even without the aid of the law.<sup>120</sup>

#### THE LARGER PROBLEM

The major de-stabilizers that blacks face may not be racial discrimination, but may, indeed, be problems sweeping the whole society that are merely aggravated for blacks, who have relatively fewer financial and human capital resources on average. Improvements in the economic status of blacks relative to whites slowed after the 1970s, but the overall economy also stagnated for whites after that period.<sup>121</sup> Professor Bell, in *Faces*, leaves the impression that all retardation in improvements of black circumstances is due solely to racism. At no point does he acknowledge neutral, non-racial forces, like the condition of the general economy, as determining black prospects.

America now has a shrinking middle class and an increased economic gap between high-paid and low-paid workers. During the 1980s, middle class living standards declined, and more Americans fell below the poverty line.<sup>122</sup>

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my conclusion, that comparisons between racism (or white supremacy) and sexism usually result in a failure to understand the power and significance of racism in the lives of people of color. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397.

119. The covert evasion of the anti-discrimination laws protecting blacks of which Professor Bell complains also exist with respect to other groups ostensibly protected by the anti-discrimination laws. Studies show that there is still widespread covert job discrimination against Hispanics. See Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-skilled, Entry-level Jobs*, 26 U. MICH. J. L. REF. 403, 404 n.4 (1993) (citing a 1990 study by the Urban Institute).

120. Any white is free to inform a black about an employment, consultant, or business opportunity and thus break the cycle in which blacks are locked out of opportunities that pass by word of mouth. Blacks, with some selectivity and psychological risk, are free to explore the possibility of a closer social relationship with whites who appear receptive. My speculation is that some whites would welcome such an approach, but are leery of being too aggressive themselves for fear of appearing patronizing. One would hope that some day the groups would be equal in resources and power and thus could develop reciprocal relationships more naturally, but one can work toward that end in small and incremental ways.

121. Real weekly earnings (in constant dollars) of all males, on average fell from \$488 in 1969 to \$414 in 1984. A COMMON DESTINY, *supra* note 71, at 7. The percentage of all Americans living in poverty increased from 11.2% in 1974 to 13.5% by 1986. *Id.* at 8.

122. John C. Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1290, 1362-64.

Wealth is now more concentrated at the top: four fifths of the share lost by the poorest families went to the richest fifth of the population, and the top 1% of the population's after-tax share of income rose from 7% in 1977 to 11% in 1990.<sup>123</sup> White males are a good barometer of the economic climate, since race and gender do not suppress their income. The median inflation-adjusted income of white males, who were their families' only breadwinner, fell 22% between 1976 and 1984.<sup>124</sup> We've experienced cyclical recessions, and many white collar persons experienced unemployment for the first time. An estimated 37 millions persons have no health insurance.<sup>125</sup> Well-paying blue collar jobs in mass production industries have disappeared faster than any other jobs, and blacks who flocked to these industries during World War II are affected disproportionately.<sup>126</sup> College graduates fare better than non-college graduates, but even in the "improving economy" of the last two years, many of the jobs created are low-paying. Thus, college graduates are forced into sales clerk positions, and those persons with only sales clerk credentials, like many young blacks, are forced into unemployment.<sup>127</sup> Law school graduates today, unlike the situation twenty or thirty years ago, sometimes cannot find employment.<sup>128</sup> Even employed persons suffer undue stress and anxiety: two incomes are now treated as a necessity, and many persons are severely overworked, with little time for family.<sup>129</sup>

Professor Bell's sense of futility may arise because our training in civil rights law does not help answer the two toughest questions America faces. First, can the economy be organized to reduce polarization in income and render overall greater economic security?<sup>130</sup> Second, can Americans be made

123. KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* ix (1990).

124. *Id.* at 18.

125. Eric L. Robinson, *The Oregon Basic Health Services Act: A Model for State Reform?*, 45 VAND. L. REV. 977, 983 (1992).

126. Drucker, *supra* note 83, at 53, 62.

127. See Barry Bluestone, *The Inequality Express*, AMERICAN PROSPECT, Winter, 1995, at 81, 84 ("Most businesses are not introducing technology that requires vastly improved skill. Many are simply paying less for the same skills they have been using all along while others are hiring better educated workers at lower wage rates to do the work previously relegated to lesser educated employees.").

128. William Gifford, *Help Not Wanted: Law Students Face Tight Job Market*, LEGAL TIMES, Dec. 31, 1990; see also Laura Blumenfeld, *Law of Diminishing Returns: Students Cram for Bar Exam While Job Rejection Letters Pour In*, WASH. POST, July 30, 1991, at C1 (describing the job market for recent law school graduates as "the toughest job market for lawyers in anyone's recent memory").

129. See generally JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991) (discussing the emergence of a complex scheme of societal pressures over the last few decades).

130. In his essay, *Political Reality Testing: 1993*, 61 FORDHAM L. REV. 1033, 1035 (1993), Professor Bell asks a question about reversing adverse trends in the economy as if there were absolutely no possible answer:

[President Clinton] has promised to create more jobs, but how do you create unskilled and semi-skilled jobs at decent wages in an economy where such jobs are either disappearing because of technology or export to foreign countries, or are occupied by the hundreds of thousands of legal and illegal immigrants who are willing to work for sub-standard wages?

*Id.* There have been, on the contrary, some excellent proposals, but they are not generated by lawyers. See, e.g., MARTIN L. WEITZMAN, *THE SHARE ECONOMY* (1984) (proposing that moving



politically conscious of questions which may involve recognizing class interests? Anti-discrimination law alone may be insufficient, given the spectrum of issues facing the black community. We, as lawyers, must resort to economists, political scientists, and social psychologists to begin to fashion answers to those tough questions.

#### LESSONS FROM THE MOVEMENT: BROAD BASED COALITIONS

The civil rights movement, however, may provide some insights. The genius of that movement was its openness to involvement by as broad a spectrum of the black and white public as wished to make a contribution. Its message of mutually beneficial racial harmony changed public attitudes and the way institutions functioned.

The labor movement of the 1920s and 1930s also had this character. The New Deal, which realized many labor union goals, eventually was accepted by a broad base of the public, so much so that Franklin Roosevelt was re-elected more times than any president who was not constitutionally limited to two terms. The task is more formidable today because issues are more complex and multifaceted than the straight forward propositions that blacks were entitled to equal treatment under the law, or that unions should have had a right to organize. But broad, mass-based organizing and public acceptance are the main elements needed today, and they must be revived before any significant reform is possible.

This perspective renders Professor Bell's implicit endorsement of "Black Power"—the "Nobody will save us but ourselves" philosophy—particularly dysfunctional, given the current character of problems facing blacks and American society as a whole. Believing that blacks alone must free themselves is a sure route to Professor Bell's despair.<sup>131</sup> Solving the massive economic dislocation described above requires enlisting allegiance and support from a broad spectrum of the public. Too much emphasis on the interests of one's own group disrupts the ability to draw the American people into a sense of its true collective interests.

We, as blacks, have, for many understandable reasons, contributed to the over-emphasis on black nationalism in the recent past. The Civil Rights Movement, for example, had to throw off condescending, paternalistic white leadership. However, excessive trumpeting of "Black Power," without supporting resources or strategy, destroyed some organizations, like the Student Non-Violent Coordinating Committee.<sup>132</sup> Many whites found better things to do

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employees from fixed wages to shares in profits would expand employment and restrain inflation).

131. Martin Luther King, Jr., almost as if anticipating the stance now taken by Professor Bell, said that he could acknowledge the appeal and the psychological value of the call for "Black Power," but that it was ultimately, a "nihilistic philosophy born out of the conviction that the Negro can't win. It is, at bottom, the view that American society is so hopelessly corrupt and enmeshed in evil that there is no possibility of salvation from within." HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY: 1954-1992*, at 199 (1993).

132. *Id.* at 196-203. Sitkoff noted that "[b]y 1967, without white support and financial backing, the SNCC [Student Non-Violent Coordination Committee] was bankrupt and reduced to some two score hard-core militants." *Id.* at 203.

with their time and money when they were repeatedly told that they were not needed and that *all* of them were, irretrievably, the enemy. We must reverse that theme, because the right wing has profited—particularly in electoral politics—from playing out a kind of group counter-attack of “we the hard-working, family-oriented, (white) Americans” against all those irresponsible, tax-eating “others.”<sup>133</sup> Economic anxiety reinforces racial hoarding of opportunities and benefits; black progress is keyed to progress in society as a whole toward economic security.

#### BELL'S CONFRONTATION MODEL

Broad-based, cooperative activity is, however, the antithesis of the model of the single heroic individual that Professor Bell admires so much in *Confronting Authority*. Professor Bell cannot advance the solo confrontation as a superior strategic approach, so he offers the solace of knowing that one acted with integrity. That is not enough for most of us, and certainly not enough for blacks as a people. If a situation is truly unfair, discriminatory, or oppressive, we are *obligated* to pay careful attention to the strategy for changing it, or we must accept the fact that our actions are basically futile—however much we seek to congratulate ourselves for our courage.<sup>134</sup>

Professor Bell cites Paul Robeson and Martin Luther King, Jr. as exemplars of his model for singular courage. From my perspective, they functioned in almost diametrically opposite fashions. Paul Robeson fits Professor Bell's model of a man of courage who took on the white society and the “powers that be” in open confrontation, and in often highly symbolic action. He all but adopted support of Marxism in a time when anti-communist hysteria was high, and he sacrificed his profession and career as an artist. One might respect Paul Robeson, but we must be candid about his strategic failures. He supported a doctrine which failed in the countries he thought were superior to America, he was not largely embraced by the black community, and he had no massive

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133. This right wing tactic was not simply a response to increased nationalism in the black community. It is also an affirmative effort to divert the white public from focusing on the true sources of their economic anxiety by having them believe that the small amounts of federal revenue (relatively) that goes into welfare and other anti-poverty programs is the source of their disempowerment and lack of economic security. Any effort at building mass support will probably be met with covert race-baiting tactics. Professor Bell correctly predicted in 1982 that a future Congress (like the current one) could consider scuttling affirmative action programs out of political motives. See Derrick A. Bell, Jr., *Preferential Affirmative Action*, 16 HARV. C.R.-C.L. L. REV. 855 (1982) [hereinafter *Preferential Affirmative Action*].

134. In *Confronting Authority*, Professor Bell acknowledges that Professor Laurence Tribe, a colleague at the Harvard Law School, actively supported greater racial and gender integration of the faculty. He expresses disappointment, however, that Professor Tribe did not join him in resigning from the faculty. CONFRONTING AUTHORITY, *supra* note 4, at 121-23. Professor Bell admits that Tribe's resignation might not have “moved the faculty to action,” but he suggests that Tribe missed the “unique feeling” of being a courageous latter day Thoreau. *Id.* There are two comments: First, a basic tenet of the civil rights movement was that no one has the authority to prescribe for another individual what “heroic” actions he or she should undertake. Secondly, and more importantly, “heroic” actions, which merely fritter away resources or power, would *undermine* the goal of integrating the Harvard faculty. Professor Tribe and the blacks who remained on the faculty may have had more of an impact on the offer being made to a black female than Professor Bell did in his high-profile resignation.

impact in terms of changing the institutions that oppressed the black community.<sup>135</sup>

Martin Luther King cannot be described in *any* of those terms. King always worked well within the context of the black masses and, indeed, drew his strength from their allegiance to him. He worked within a spiritual and religious context that was familiar to and supported by his followers. King possessed individual courage<sup>136</sup> and integrity, but he was not a "solo actor." He was counseled, and actually influenced, by members of his organization and a few whites outside the organization.<sup>137</sup> He also carefully attended to strategy and the need to bring persons to a level of action and cooperation. Both King and Robeson were concerned about the excesses of uncontrolled capitalism, but only King had the strategic sense and capacity to start a "Poor People's Campaign." King was not interested in some defiant gesture of rubbing the noses of white Americans in their racism. King invited whites to join in a direction that would do as much for their moral and material welfare as it would for blacks. Because of his perspective, King developed a viable, active movement involving a broad spectrum of blacks and whites. King, therefore, unlike Robeson or anyone who would emulate Bell's singular confrontation model, achieved a profound change in the level of discrimination and oppression experienced by blacks.<sup>138</sup>

#### GOALS FOR THE FUTURE

The desirable economic goals are clear. There must be a redistribution of wealth, by means which the majority of the public see as benefiting them; thus, race-specific affirmative action plans will play a minor role.<sup>139</sup> We must reduce poverty and banish unemployment for the unskilled as well as for professionals. We must retard the loss in real wages, so that a person's income can fulfill the basic needs for shelter, food, medical care, and education. Very importantly, we need to enhance dignity in the workplace and remove the insecurity that employment can be lost precipitously.

135. For a criticism of Robeson's impact, see HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL: A HISTORICAL ANALYSIS OF THE FAILURE OF BLACK LEADERSHIP* 285-301 (1967).

136. I had been in meetings with King in which he expressed a sense of urgency about moving forward because he had a sense of his own personal vulnerability. Yet he never, to my knowledge, called for armed body guards.

137. See DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1953). King's most "intimate confidants" in the SCLC were Ralph Abernathy, Andrew Young, and Dorothy Cotton. *Id.* at 584. He also frequently sought counsel from a white attorney, Stanley D. Levinson. *Id.* at 116-17, 418-20.

138. I have tried to support these claims. See Leroy D. Clark, *A Tribute to Dr. Martin Luther King, Jr.: A Man of Peace and Wisdom*, 2 *WIDENER J. OF PUB. L.* 431 (1993).

139. I do not quarrel with the moral justification for affirmative action programs, for in a truly superior article, Professor Bell makes a persuasive case. See *Preferential Affirmative Action*, *supra* note 133. However, the most disadvantaged blacks below the poverty line do not have the credentials to benefit from most affirmative action programs. I agree with Professor William J. Wilson that the black poor would be benefitted more through universal, non-race-specific programs (like social security) which are easier to mount and sustain politically. See WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 109-24 (1987).

How should we pursue these simple, clearly beneficial goals? Many civil rights lawyers, myself included, are probably closet leftists who were surprised by the massive collapse of the economies of the major socialist countries. We must now educate ourselves through the economists and non-lawyers writing about the prospects for economic justice in a private property economy. Charles Derber recently outlined a way to pursue the beneficial goals identified above, because of interesting developments in the business sector.<sup>140</sup> He points out, however, that “progressives of all stripes, as well as much of the population, have been seduced by the politics of the ‘cultural wars’ and have left economics to the economists, with the attendant negative consequences.”<sup>141</sup> He also notes that black, women’s, and other movements have engaged in “a shift from economic and class issues to identity-based cultural politics,” thereby ceding the field of economic restructuring to the business sector.<sup>142</sup>

Derber claims that American business is moving in two fundamentally contradictory directions. One is “contingent capitalism,” which can “intensify greed, social dislocation, ugly racial divisions and extreme class inequality.” The other is “cooperative capitalism,” which “offers the seeds of a new idea of community in America and a potential solution to the specters of violence, family dissolution, poverty, and social breakdown that haunt the nation.”<sup>143</sup>

In cooperative capitalism, a business creates loyalty in its work force and customers by a commitment to shared values in the community, which sometimes takes precedent over profits. The business empowers workers, giving them more autonomy in how work is performed. Organizational decisions are made jointly by management and labor, thus reducing the need for a tier of supervisors to engage in surveillance. Various forms of employee-owned businesses are developing, as an outgrowth and extension of this approach.<sup>144</sup>

Derber warns, however, that “contingency capitalism” is a wholly contradictory direction that is competing with cooperative capitalism. Here, businesses replace permanent workers with contingents who are temporary, part-time, or designated as “independent contractors”—a designation which allows employers to avoid paying social security taxes for the worker. Secondly, companies further reduce the core of permanent employees through downsizing and contracting out, thus disrupting expectations of continued long-term employment. Finally, the corporations cut back on long-term, fixed obligations to employees, and revert to speed-ups and management by stress.

Derber believes that we are at a critical crossroads regarding the structure of the economy, and that there are legislative measures which can encourage

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140. Charles Derber, *Clintradictions: Clinton, Cooperation, and the Contradictions of Capitalism*, TIKKUN, Sept./Oct., 1994, at 15-18, 107-08.

141. *Id.* at 15.

142. *Id.* at 108.

143. *Id.* at 15.

144. Derber notes that employees now own over 10% of the average Fortune 1000 company and have majority ownership in 2,000 firms such as Avis and United Airlines. The prediction is that within six years employees will own a controlling share (15%) of one quarter of all public companies. *Id.* at 16-17.

and support the cooperative capitalism direction. He believes that President Clinton's communitarian concerns could be realized through his embracing cooperative capitalism and informing the American public of these two fundamentally different directions facing the nation. Derber concludes that "[t]he ultimate success of [the black, women's, and other identity movements] and those of progressive citizens and community groups, depends on coalescing around a movement for a new genuinely democratic and cooperative economy."<sup>145</sup>

#### A FINAL WORD

Despite Professor Bell's prophecy of doom, I believe he would like to have his analysis proven wrong. However, he desperately leans on a tactic from the past—laying out the disabilities of the black condition and accusing whites of not having the moral strength to act fairly. That is the ultimate theme in both of his books and in much of his law review writing. That tactic not only lacks full force against today's complex society, it also becomes, for many whites, an exaggerated claim that racism is the sole cause of black misfortunes.<sup>146</sup> Many whites may feel about the black condition what many of us may have felt about the homeless: dismayed, but having no clear answer as to how the problem is to be solved, and feeling individually powerless if the resolution calls for massive resources that we, personally, lack. Professor Bell's two books may confirm this sense of powerlessness in whites with a limited background in this subject, because Professor Bell does not offer a single programmatic approach toward changing the circumstance of blacks. He presents only startling, unanalyzed prophecies of doom, which will easily garner attention from a controversy-hungry media.<sup>147</sup>

It is much harder to exercise imagination to create viable strategies for change.<sup>148</sup> Professor Bell sensed the despair that the average—especially

145. *Id.* at 108.

146. See, for example, William J. Wilson's development of the non-racial factors which now influence the fortunes of blacks, especially those in the underclass. WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978).

147. Harold McDougall notes that

[there is a tendency in] the media to present news in dramatic and personalized form, focusing on individuals and their personalities . . . rather than on political, economic and process factors. . . . This . . . encourages the untutored consumer to view events as carried on by super-personalities and reinforces his or her own feelings of powerlessness and disengagement.

Harold A. McDougall, *Lawyering and the Public Interest in the 1990's*, 60 *FORDHAM L. REV.* 1, 13 (1991) (citations omitted).

148. I do not embrace the broad scale attack which Judge Harry Edwards made on non-traditional legal scholarship emanating from the Critical Legal Studies (CRITS) movement in *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992). The CRITS have contributed enormously to defining the true power dynamics that underlie the law, and Critical Race Theory has been powerful in its exploration of the psychology and politics of racism. However, it is disappointing that much of what I have read is aimed primarily at consciousness raising (like Professor Bell's latest work) and rarely advances pragmatic or programmatic legal strategies that could be used by reform activists in litigation or legislative development. See my minor comments in *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 *HOW. L.J.* 259 (1993). One wonders: are the demands of day-to-

average black—reader would experience, so he put forth rhetoric urging an “unremitting struggle that leaves no room for giving up.”<sup>149</sup> His contention is ultimately hollow, given the total sweep of his work.

At some point it becomes dysfunctional to refuse giving any credit to the very positive abatements of racism that occurred with white support, and on occasion, white leadership. Racism thrives in an atmosphere of insecurity, apprehension about the future, and inter-group resentments. Unrelenting, unqualified accusations only add to that negative atmosphere. Empathetic and more generous responses are possible in an atmosphere of support, security, and a sense that advancement is possible; the greatest progress of blacks occurred during the 1960s and early 1970s when the economy was expanding. Professor Bell’s “analysis” is really only accusation and “harassing white folks,” and is undermining and destructive. There is no love—except for his own group—and there is a constricted reach for an understanding of whites. There is only rage and perplexity. No bridges are built—only righteousness is being sold.

A people, black or white, are capable only to the extent they believe they are. Neither I, nor Professor Bell, have a crystal ball, but I do know that creativity and a drive for change are very much linked to a belief that they are needed, and to a belief that they can make a difference. The future will be shaped by past conditions and the actions of those over whom we have no control. Yet it is not fixed; it will also be shaped by the attitudes and energy with which we face the future. Writing about race is to engage in a power struggle. It is a non-neutral political act, and one must take responsibility for its consequences. Telling whites that they are irremediably racist is not mere “information”; it is a force that helps create the future it predicts. If whites believe the message, feelings of futility could overwhelm any further efforts to seek change. I am encouraged, however, that the motto of the most articulate black spokesperson alive today, Jesse Jackson, is, “Keep hope alive!” and that much of the strength of Martin Luther King, Jr. was his capacity to “dream” us toward a better place.

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day litigation incompatible with the long gestation period for most scholarly writing? Are the problems seen as too massive to be responsive to minor “reform” efforts or “tinkering” with the law? Richard Delgado says that “Critical Race thought is marked by deep discontent with liberalism, a system of civil rights litigation and activism characterized by incrementalism . . . [and] virtually every essay . . . [is] an effort to go beyond the legacy of mainstream civil rights thought to something better.” CRITICAL RACE THEORY, *supra* note 5, at 1. I ask “beyond” to what? Structures of oppression and the status quo cannot be changed in any fundamental way by mere consciousness raising. Strategic directions for action are essential. I am perplexed by the paradox of a substantial increase of progressive scholars and a concomitant absence of concrete assistance to practicing activists. Others share my concern: See Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1751, 1764 n.12 (1994) (“Critical race scholars have lagged in their analysis of practice [as opposed to theory].”). John O. Calmore explains in a memo covering his article, *Racialized Space and the Culture of Segregation: Hewing a Stone of Hope from a Mountain of Despair*, 143 U. PA. L. REV. 1233 (1995) that he wrote, “to represent an application of critical race theory to progressive practice . . . as at least a footnote in rebuttal to Anthony Alfieri’s claim.”

149. FACES, *supra* note 1, at 200.