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## And We Are Not Saved: The Elusive Quest for Racial Justice

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AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE. By *Derrick A. Bell*. New York: Basic Books. 1987. Pp. xii, 288. \$19.95.

If a book could be said to have a personality, then Derrick Bell's *And We Are Not Saved* could certainly be classified as a schizophrenic. Part fable, part legal scholarship, combining a pessimistic diagnosis of American race relations and a more optimistic prognosis for the eventual attainment of racial justice, Bell's latest work is simultaneously a frightening, objective demythologization of American civil rights law, and a brave and awful personal search "for completeness by allowing a dialogue with opposites within himself."<sup>1</sup> It is a search that is not entirely successful but one which yields provocative insights into the often contradictory thinking of a renowned legal scholar.<sup>2</sup>

*And We Are Not Saved* is an expanded version of the author's foreword to the *Harvard Law Review's* 1985 Supreme Court issue.<sup>3</sup> There, Bell, long known as an innovative legal writer,<sup>4</sup> created the character of Geneva Crenshaw, narrator of the *Civil Rights Chronicles* and foil to Bell's rapier-sharp dissection of current civil rights litigation strategies and their prospects for success. Through the telling of her chronicles, Geneva deftly decorticates the layers of myth and fantasy which envelop American civil rights law and proposes radical alternatives to traditional litigation strategies, thus allowing Bell to reconstruct the quest for racial justice from his vantage point as a disappointed and disillusioned veteran of that long march. Although Geneva eventually (and unconvincingly) converts to Bell's point of view, it is from the interplay of her cynical observations and Bell's tempered optimism that the book derives much of its dynamism.

The book-length version of the *Chronicles* is divided into three parts: *The Legal Hurdles to Racial Justice*, *The Social Affliction of Racism*, and *Divining a Nation's Salvation*. These are further subdivided into ten chronicles addressing the subjects of the constitutional foundations of racism (in *The Chronicle of the Constitutional Contradiction*), the limitations of civil rights litigation as a means of obtaining

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1. De Gidio, *Remarks on the Civil Rights Chronicles*, 3 HARV. BLACKLETTER J. 56, 56 (1986).

2. Bell is a professor at the Harvard Law School and former dean and professor at the University of Oregon School of Law. He has served in a number of governmental and public organizations including the United States Department of Justice and the National Association for the Advancement of Colored People (NAACP).

3. Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

4. See, e.g., Brittain, Book Review, 14 CONN. L. REV. 457 (1982); Freeman, Book Review, 90 YALE L.J. 1880 (1981); Wilhelm, Book Review, 79 MICH. L. REV. 847 (1981).

racial justice (in *The Chronicle of the Celestial Curia*), the dilution of black voting power (in *The Chronicle of the Ultimate Voting Rights Act*), the fallacy that desegregation promotes educational equality (in *The Chronicle of the Sacrificed Black Schoolchildren*), the economic barriers to racial equality (in *The Chronicle of the Black Reparations Foundation*), the dangers of affirmative action (in *The Chronicle of the DeVine Gift*), the potential for inter-racial cooperation (in *The Chronicle of the Amber Cloud*), relations between black men and black women (in *The Chronicle of the Twenty-Seventh-Year Syndrome*), black cultural autonomy and white cultural domination (in *The Chronicle of the Slave Scrolls*), and the ultimate emptiness of any racial reforms which are unaccompanied by fundamental changes in social and cultural values (in *The Chronicle of the Black Crime Cure*).

This sprawling, patulous approach to civil rights issues gains thematic strength and coherence from Bell's radical belief that because of the inherent limitations of litigation, past attempts to obtain racial equality have had but limited success and current strategies promise little more than the alleviation of isolated inequalities, leaving the overall situation of racial injustice unaltered.<sup>5</sup> Indeed, according to Bell, many of the solutions sought by civil rights groups exacerbate the misery of the victims of racial discrimination, rendering them more vulnerable to the injustices of a racist society.

This viewpoint is most powerfully expressed by Bell in his discussions of school desegregation and affirmative action.<sup>6</sup> Bell has previously<sup>7</sup> analyzed and critiqued the litigation strategies leading up to, and policies flowing from the Supreme Court's decision in *Brown v. Board of Education*.<sup>8</sup> *The Chronicle of the Sacrificed Black Schoolchildren*, in addition to developing these arguments, is a particularly stirring indictment of school desegregation and a poignant description of the plight of "invisible"<sup>9</sup> black schoolchildren who, more than a quarter-century after *Brown*, await, with the "[p]atience . . . necessary . . . for those who rely on the law"<sup>10</sup> the harvest of educational equality allegedly sown by the decision.

School desegregation, argues Bell, must be viewed as just one part of the civil rights litigation of the 1950s. Schools were seen as "the weak link in the 'separate but equal' chain" (p. 111). In their determi-

5. See also Bell, *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEXAS L. REV. 733 (1981).

6. These topics are addressed in chapters 2, 4, and 6.

7. See SHADES OF BROWN, NEW PERSPECTIVES ON SCHOOL DESEGREGATION (D. Bell ed. 1980); Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281 (1981); Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, (Comment), 93 HARV. L. REV. 518 (1980).

8. 347 U.S. 483 (1954).

9. P. 110 (citing R. RIST, *THE INVISIBLE CHILDREN* (1978)).

10. Bell, *An Issue On Race Relations — Foreword*, 61 OR. L. REV. 151 (1982).

nation to overturn that doctrine as it applied to a broad array of activities, civil rights litigators failed to consider the possibility that equality in education might best be accomplished through means other than desegregation. Experience suggests that, rather than depend on social science data demonstrating the adverse effects of segregation, civil rights activists should have persuaded the Court that "equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators."<sup>11</sup> A segregated school provided with adequate resources, sympathetic teachers, and a commitment to preserving and enriching black culture might better obtain the educational equality sought by *Brown*. Citing W.E.B. DuBois, Bell notes, "Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. . . . But other things seldom are equal, and in that case, Sympathy, Knowledge, and Truth, outweigh all that the mixed school can offer" (p. 121).

Although Bell does not expressly reject desegregation and racial balance as appropriate goals for school systems, his description of the aleatory effects of school desegregation — the closure of black schools, the firing of black teachers and demotion of black school administrators, the disruption of black student life, and the disappearance of black community and cultural values which black schools served to protect (pp. 109-10) — casts into doubt the contention that desegregation is an unalloyedly correct method of rectifying educational inequalities. Moreover, desegregation serves other purposes for white elites who fear the potential rebelliousness of discontented black masses (pp. 60-62) and who employ desegregation programs to achieve their own agendas (pp. 107-11).

Affirmative action programs have similarly resulted in only limited benefits for blacks, benefits which again accrue to white elites as well. These programs tend to benefit only a small number of blacks, usually those with greater degrees of education and skill. Noting William J. Wilson's argument that "affirmative action programs are not designed to deal with the problem of the disproportionate concentration of blacks in the low-wage labor market" (p. 48), Bell contends that affirmative action creates economic schisms within the black community, dilutes the achievements of successful blacks, and denies society's sympathy to that segment of the black community most deserving of support (p. 49).

Furthermore, the unspoken limits on affirmative action (*i.e.*, tokenism) create problems not amenable to court-ordered remediation. This is especially true, Bell ironically points out, in just those professional fields where blacks have made their greatest gains. For exam-

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11. P. 110 (quoting Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES IN SCHOOL DESEGREGATION* 27 (D. Bell ed. 1980)).

ple, Bell describes the dilemmas faced by black law professors who see the rejection of other qualified minorities as silent criticism of their own performances (p. 148). As token minorities on law school faculties, black professors must confront the possibility that their presence confers legitimacy and respectability upon racist institutions (p. 146). Even where they are able to overcome the judicial system's reluctance to impose affirmative action requirements on elite professions (p. 149), blacks must fear the gradual attainment of employment levels beyond the "tipping point,"<sup>12</sup> that is, beyond some theoretical point at which the white institution begins to lose its identity as "white," thus justifying, in the minds of white administrators, purposeful racial discrimination (pp. 151-56).

The limited success of desegregation and affirmative action, as well as the denial of even the meager benefits of such programs to the black underclass, is what leads Geneva or, more accurately, Bell to consider the alternatives to "the leaky boat of litigation" (p. 71). Yet aside from some casual references to Frances Fox Piven and Richard Cloward (who believe that mass protest is a better strategy than reform politics for empowering blacks) (p. 58) and an altogether unsatisfying discussion of Marcus Garvey's "back to Africa" movement (p. 187), these alternatives remain largely unexamined. Piven and Cloward are only two of a significant number of scholars, whose ranks include Paolo Freire and John Gaventa,<sup>13</sup> who argue that only rebellion can empower the large masses of poor, disenfranchised citizens of Western and Third World countries. Bell's treatment of these theories has the quality of a "straw man" argument, superficially presented in order to assert the ultimate correctness of his own preference for continued litigation. Similarly, Garvey's emigration proposals, while hardly a panacea for American racism, could have been more effectively employed to illustrate the depth of frustration and disillusionment now confronting civil rights activists.

The superficial examination of these alternatives to continued litigation lends Geneva's final conversion to Bell's viewpoint a somewhat shallow and unconvincing character. The tension between her desire for violent change and Bell's commitment to legal reform is a simmering conflict which remains unresolved until the final paragraphs of the book. Then, in a divine revelation which concludes her tales, Geneva discovers a "Third Way" (p. 251). She accepts that racial equality must be pursued through the traditional means of litigation but insists that economic equality be recognized as a concurrently achievable goal. Just as the civil rights movement has transformed the Constitu-

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12. See also Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986).

13. See, e.g., P. FREIRE, *THE PEDAGOGY OF THE OPPRESSED* (1972); J. GAVENTA, *POWER AND POWERLESSNESS* (1980).

tion from a document concerned with property rights into a document concerned with human rights (p. 252), the "Third Way" must now force the courts to develop a perspective emphasizing economic as well as political equality.

Just why the creation of such novel legal rights and remedies will have greater success than previous attempts to achieve racial justice is left unclear. But Bell is obviously optimistic. For him, the struggle against all forms of inequality — racial, sexual, and economic — is a battle from which "I never will turn back. Oh, I will go. I shall go. To see what the end will be" (p. 258).

This final outburst of unrestrained optimism stands in dire contrast to the bleak despair of the titular epigram<sup>14</sup> and is but one of the contradictory or ambivalent qualities in Bell's writing. While the use of Geneva as a noetic antithesis to the author's defense of litigation serves to illuminate and enucleate the tensions at the core of Bell's thought, the dramatized internal dialogue is often distracting. The conversations between Bell and Geneva are frequently strained, the prose often stilted and unnatural.<sup>15</sup>

Moreover, the artificial bifurcation of "Geneva" and "Bell" allows Bell to enjoy the luxury of not confronting the contradictory arguments in his analyses. It sometimes seems that where those contradictions are hard to resolve, Bell simply has his characters move on to a new topic of conversation or part company. Bell must have reveled in this freedom from the rigors of scholasticism, but he has gained that freedom at a cost to some of his arguments' clarity and cogency.

Finally, the diatribes in which Geneva and Bell engage occasionally do more to obfuscate than to elucidate current judicial policy. This is especially true in Bell's analysis of voting rights. This complex area of litigation is not well served by Bell's cursory and dramatized presentation. Nor do his footnotes sufficiently expand upon the fictionalized material. (In fact, Bell's footnotes are generally too pithy to be of great value.) It would be interesting and fruitful scholarship were Bell to bring his considerable analytical skills to bear on this issue in a more rigorous and methodical manner.

Yet, despite these flaws, perhaps because of them, *And We Are Not Saved* offers much that is thought-provoking, penetrating, and profound. Bell's apparent ambivalence towards and qualified acceptance of the wisdom of continued legal reforms represents a deep-seated frustration that many civil rights activists must experience in attempting to push America away from its racist roots and in the direction of a just society. Still, his ultimate faith is that of a man "with

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14. *Jeremiah* 8:20: "The harvest is past, the summer is ended, and we are not saved."

15. Bell himself seems to recognize this. See, e.g., Bell, *The Civil Rights Chronicles Revisited: Comments and Introduction*, 3 HARV. BLACKLETTER J. 46, 48 (1986) (where Bell describes his prose as "courageous legalese").

[his] mind set on freedom.”<sup>16</sup> Such faith may well prove to be our nation’s salvation.

— *Kevin Edward Kennedy*

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16. Bell, *A Hurdle Too High: Class-based Roadblocks to Racial Remediation*, 33 *BUFFALO L. REV.* 1, 2 (1984).