

Legal Storytelling: Derailing a Civil Rights Legacy: The Chronicle of the Second Underground Railroad¹

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I was sitting in my office, reading short reflection pieces² submitted by students in my Racism and American Law seminar. It was the late afternoon when I heard a gentle knock on my door, followed by “Professor Crenshaw?” I recognized the melodious voice instantly and asked my visitor to come in. DeVine Taylor entered, greeting me with a smile and soft, warm eyes.

“Mr. Taylor,” I said, “What has it been, about ten years since I saw you last?”

“Indeed, Geneva,” he observed, “a dozen years, I believe. I’m sure you can understand my reluctance to drop by after contributing to your well-publicized resignation from Harvard Law School.”³

“Mr. Taylor, although your last note was devastating in its terseness and clarity,⁴ I have grown to be thankful for the wisdom, borne of painful

* Boalt Hall (University of California School of Law) J.D., 2001; B.A., University of California, Berkeley. This piece is dedicated to Professor Derrick Bell, whose ideas and characters inspired this fictional work. This piece originated as a short paper in Professor Stephanie Wildman’s course on Sex Discrimination and the Law, Boalt Hall, Fall 1999.

1. This Chronicle employs two fictional characters created by Bell. Geneva Crenshaw, who narrates this chronicle, is an experienced civil rights attorney and is the sole African American law professor at an elite law school (presumably Harvard). DeVine Taylor is the president of one of America’s most successful Black businesses. See Derrick Bell, *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, in AND WE ARE NOT SAVED, 140 (1989) [hereinafter *DeVine Gift*].

2. Many progressive law professors, including Derrick Bell, find that assigning short reflection pieces improves the quality of learning in their classrooms. See Derrick Bell, *A Pre-memorial Message on Law School Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 205, 206 (1997) (crediting Charles Lawrence for suggesting that short reflection pieces be included as a pedagogical tool in law classrooms).

3. See Bell, *DeVine Gift*, *supra* note 1, at 146. See also DERRICK BELL, *CONFRONTING AUTHORITY* (1994) (reviewing the events that led to Bell’s resigning from a tenured position at HLS over the School’s failure to hire women of color faculty).

4. See Bell, *DeVine Gift*, *supra* note 1, at 146-147. Taylor writes the following to Crenshaw:

As a token minority law teacher, Geneva, you provided an alien institution with a façade of respectability of far more value to them than any aid you gave to either

experience, that the 'DeVine Gift' granted me. I suspect you are not here merely to catch up on old times. How can I help you?"

"This time," Taylor replied, "I'm not here to teach you a lesson.⁵ Rather, I wish to consult you on a matter of great concern to me because I lack clear answers."

"I'm curious," I responded. "Please explain."

Taylor sat down in the chair beside my desk and stated, "Well, as much as I have been a critic of affirmative action—because such policies tend to produce greater benefits for the institutions that adopt them than they do for the people of color whom they purport to assist⁶—I am also greatly frustrated by the lack of viable alternatives to affirmative action in post-civil rights America. For example, despite the fact that the DeVine Gift exposed the agenda of White dominance that underlies Harvard's refusal to hire minority faculty beyond a self-defined tipping point,⁷ such embarrassing incidents failed to produce progressive change."

"Aside from Lani Guinier's appointment, I have not really kept up with the goings-on at Harvard," I said. "What are you referring to?"

"I was thinking about the composition of the student body, Geneva. Harvard Law School enrolled 61 African American first-year students in 1978—the year *Bakke*⁸ was decided, but in 1998 the School enrolled only 45, more than a 25% decrease.⁹ Yet, no one seems to have noticed."

I thought for a moment. "I don't know if I find it comforting or discouraging DeVine, that you too may suffer from naivete on the issue of affirmative action. I can't say I'm surprised by the expediency of my former school's commitment to diversity post-*Bakke*. Actually, I predicted it twenty years ago.¹⁰ As you know, many of us back then saw *Bakke* as a

minority students or the cause of black people. . . . I am happy to see that the DeVine Gift has served its intended purpose. I wish you success in your future work.

5. *See id.*

6. *See id.* at 154.

7. *See id.* at 153. In Bell's Chronicle, the tipping point is the point at which institutional support for affirmative action in faculty hiring ceases (regardless of how well qualified the next applicant of color is) because of the fear that the White identity of the school will be threatened. For a detailed account of the tipping point phenomenon, see Derrick A. Bell, Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 *NOVA L.J.* 319 (1986). For an analysis of how a tipping point adversely impacts Asian Americans in the context of law school admissions, see William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 *ASIAN L.J.* 29 (2000).

8. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (reversing judgement of the California Supreme Court that it was unlawful for the University of California to ever consider race in its admissions process.)

9. *See Black Enrollments Drop at Harvard Law School*, 23 *J. BLACKS IN HIGHER EDUC.* 135, 135 (Spring 1999).

10. Derrick A. Bell, Jr., *Introduction: Awakening After Bakke*, 14 *HARV. C.R.-C.L. L. REV.* 1, 5 (1979). Bell observes:

Minority admissions programs survived the *Bakke* litigation, but minorities lost the ability to argue entitlement to such programs as a matter of legally cognizable right. Where past intentional discrimination is not proved, post-*Bakke* minorities must rely on

major set back, and we were pleasantly surprised by how much some universities were committed to diversity.”

“It is interesting that you mention this,” Taylor interjected, “because the proposal I came to discuss had its origins in just this sort of post-*Bakke* anxiety. As you recall, the Court held that it was unconstitutional for UC Davis’ Medical school to set aside a designated number of seats for a minority admission track that was separated from the rest of the applicant pool.¹¹ At the same time, the Court did not hold that UC Davis’ numerical set-aside for the powerful and well-connected—through the Dean being given a designated number of discretionary admits—was also impermissible.”

“Ahh, yes,” I said, “I remember Blackmun commenting on the Court’s failure to squarely face the lack of fairness and racial inequities caused by alumni preferences.¹² I also remember that in the celebrated Harvard Admissions Program, cited by Justice Powell as a model of how to take race into account in a constitutionally permissible manner, alumni preferences were the proverbial elephant in the living room: unavoidably obvious, yet no where to be found in the discussion of plus factors for Idaho farm boys, violinists or football players.”¹³

“Your memory is as sharp as ever, Geneva,” Taylor commented. “The reason I bring it up is that there was a small group of progressive activists who secretly met after *Bakke*. They were concerned that our courts and

the interest of schools in exercising their discretion to admit a small number of minority students whose numbers will be dictated by the school’s interest in diversity, rather than on either the magnitude of past racial wrongs or on the minority students’ potential for future achievement.

See also Bell, *DeVine Gift*, *supra* note 1 at 154-55. Bell comments on the *Bakke* case:

Rather than overhaul admissions criteria that provided easy access to offspring of the upper class and presented difficult barriers to all other applicants, officials claimed they were setting lower admissions standards for minority candidates. This act of self-interested beneficence had unfortunate results. Affirmative action now “connotes the undertaking of remedial activity beyond what normally would be required. It sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief.” At the same time, the affirmative-action overlay on the overall admissions standards admits only a trickle of minorities. These measures are, at best “a modest mechanism for increasing the number of minority professionals, adopted as much to further the self-interest of the white majority as to aid the designated beneficiaries.”

(citing Derrick Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 8, 17 (1979)).

11. See *Bakke*, 438 U.S. at 315-20.

12. See *id.* at 404 (Blackmun concurring). Blackmun argued:

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

13. See *id.* at 321-324.

institutions of higher learning would eventually display a greater commitment to alumni preferences than to racial and ethnic diversity. The group's ambitious plan was to bring together students of color—who without alumni preferences had little chance of being admitted into elite colleges under current 'merit' criteria that so heavily emphasize standardized tests¹⁴—and progressive outsider alumni of Ivy League colleges. The idea was to create a program of sham adoptions that were legally sound, whereby students of color in their junior year of high school would be 'adopted' by outsider alumni who lived in the same community. Eventually, the organization decided to devote its energies to apply political pressure on colleges to make affirmative action programs meaningful. Thus, the program was quietly disbanded before it ever got started."

"I do remember once hearing a whisper about such a program," I said. "But at the time I thought it was a joke, a civil rights urban legend." I got up to close my door, mindful of the fact that the Federalist Society's office was just down the hall.

"Well, after Proposition 209¹⁵ and the Fifth Circuit's *Hopwood*¹⁶ decision, a younger, more desperate generation of civil rights activists clandestinely met to revisit the idea. The project is called SURE, the Second Underground Railroad for Education. SURE asked me if the DeVine Gift could be used to provide the discreet networking and behind-the-scenes help necessary to get the project off the ground."

My eyes widened. "Please, Mr. Taylor, tell me more."

"I'd be glad to Geneva. I've been studying alumni preferences to see whether the magnitude of White privilege associated with them is large enough that the SURE plan could constitute a viable channel of opportunity for students of color. What I found should interest you. The extent of alumni preferences may have actually increased since *Bakke*. For example,

14. For a critique of standardized testing generally, see Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). For arguments that the LSAT is racially biased, see William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J. L. & FEMINISM 1 (2000); William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000); Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993); David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979).

15. Proposition 209, now CAL. CONST. art. I, § 31, was passed by the voters of California in November 1996, and prohibits race-conscious affirmative action in public employment, education and contracting. For background information on the political fight over Prop. 209, see e.g. LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* (1998); NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999).

16. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that the University of Texas Law School's race-conscious affirmative action program violates the Fourteenth amendment under a strict scrutiny test, and that preserving diversity is not a compelling governmental interest). The states in the Fifth Circuit are Texas, Louisiana and Mississippi.

for most of the 1970's about 12% of the class at Yale were children of alumni, whereas in the 1980s and 1990s it is closer to 24% of each entering class.¹⁷ At schools like Harvard, Yale, Princeton and Dartmouth, legacy admission rates are routinely more than double that of the general applicant pool.¹⁸ Far more Whites have gained admission to the ten most elite colleges and universities through alumni preferences than have all Blacks and Chicanos combined through affirmative action.¹⁹ And, as you can probably guess, 96% of all living Ivy League alumni are White,²⁰ so you can imagine how alumni preferences have skewed the distribution of opportunity at America's elite colleges and universities."

"But DeVine, what about the public universities where affirmative action is banned? Presumably, this is where legacy admissions would add insult to injury the most."

"Well," Taylor responded, "I recently attended a Critical Race Theory conference where Professor Olivas noted that 20% to 30% of students admitted to Texas A & M University receive a boost in admissions for nothing more than being the son or daughter of an alum.²¹ A 1997 bill that would have banned public universities in Texas from favoring alumni died in committee.²² The University of California Regents also refused to approve a motion that would prohibit granting admission preferences to the children of donors.²³ Now, as far as whether legacy admissions would pass constitutional muster under the Equal Protection Clause, am I correct, Professor Crenshaw, in concluding that alumni preferences are on firmer ground than are race conscious affirmative action programs?"

"Let me see, DeVine," I said. "A couple years ago my research assistant gathered some materials on this subject for part of a law review article that I never got around to writing. Yes, here's the file. In addition to the implicit approval of alumni preferences in *Bakke*, the Fifth Circuit Panel in *Hopwood* also deemed it permissible for public universities to take into

17. John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J. L. & SOC. PROBS. 491, 499 (1993).

18. See *id.* at 503, 505, 506 n. 94.

19. Aida Hurtado, et al., *Becoming the Mainstream: Merit, Changing Demographics, and Higher Education in California*, 10 LA RAZA L.J. 645, 669 n.106 (1998) (citing LAURA I. RENDON, ACCESS IN A DEMOCRACY: NARROWING THE OPPORTUNITY GAP 9 (1997)). This statistic has been cited elsewhere, and appears to originate from a 1991 study by Sociology Professor Jerome Karabel and the Institute for the Study of Social Change at UC Berkeley. See Elaine Woo, *Belief in Meritocracy an Equal-Opportunity Myth*, L.A. TIMES, Apr. 30, 1995, available in 1995 WL 2041512.

20. See Sturm & Guinier, *supra* note 14, at 995 n. 184.

21. Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 1012 (1999). See also Woo, *supra* note 19 (noting that at the University of Virginia 57% of legacies were offered admission, compared to 36% overall).

22. Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81, 92 (1998-99).

23. See *id.* at 91 n. 48.

account an applicant's 'relationship to school alumni.'²⁴ Perhaps even more revealing is the Office for Civil Rights' (OCR) investigation of claims of discrimination against Asian Americans by Harvard.²⁵ OCR concluded, 'While these [legacy] preferences have an adverse effect on Asian-Americans, we determined that they were long-standing and legitimate, and not a pretext for discrimination.'²⁶

"That seems like a non sequitur to me," Taylor interjected. "The more long-standing a practice of discrimination is, the less an institution would have a need to find a new pretext to discriminate for the simple reason that its well-established practices are already so successful at preserving the status quo. None of this answers the question of whether or not alumni preferences should be justified."

"I don't disagree with you," I said, smiling. "The Secretary of Education went even further, proclaiming that alumni preferences are consonant with America's 'principles of justice and equity.'²⁷ Also, you should know that case law on point indicates that colleges would only need to satisfy a rational basis test²⁸ to justify preferences for alumni children."²⁹

"I see," Taylor said, "And my experience is that this standard can be more aptly termed an irrational basis test, depending on what kind of privilege is threatened. Thank you for your expertise, Geneva. Does this mean that you think I should grant the DeVine Gift to SURE?"

"Hmm," I replied, "While I think it is an imaginative plan, and although it warms me to think that such a time-honored emblem of the 'ideological hegemony of white racism'³⁰ could be turned around to crash the party of White privilege, I'm afraid the SURE plan will most likely fail to improve opportunities for students of color."

24. 78 F.3d at 946.

25. Lamb, *supra* note 17, at 501-513 (citing Statement of Findings of Office for Civil Rights, Compliance Review 01-88-6009-9).

26. *See id.* at 502.

27. *See id.*

28. *See* HERMA HILL KAY & MARTHA S. WEST, SEX-BASED DISCRIMINATION, 29-30 (4th edition, 1996) ("This standard of review, known as the 'rational relationship' test, is very lenient. In practice, it permits the use of most legislative classifications. . . .As Professor Gunther noted, during the years of the Warren Court, the two-tier standard was characterized by an upper-level 'scrutiny that was strict in theory and fatal in fact' and a lower-level test exhibiting 'minimal scrutiny in theory and virtually none in fact.'") (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

29. *See, e.g.,* Rosenstock v. Governors of the University of North Carolina, 423 F.Supp. 1321 (M.D. N.C. 1976) (sustaining defendant's motion for summary judgment by holding alumni preferences to a rational basis standard). In *Rosenstock*, the University of North Carolina held out-of-state applicants who were the children of alumni to lower admission standards than other out-of-state applicants because out-of-state alumni contributed about 45% of all alumni gifts to the school. *Id.* at 1323, 1327.

30. Bell, *The DeVine Gift*, *supra* note 1, at 156 (quoting Manning Marable, *Beyond the Race Dilemma*, NATION 428, 431 (1981)).

Taylor looked down. “While I wasn’t sure you would endorse the SURE plan, I wonder why you think it will fail.”

“Well, DeVine, it has to do with the history behind alumni preferences, why they came to prominence in the first place. As you recall, the mass migration of millions of Jews and Catholics to America in the first decades of the twentieth century threatened the Ivy colleges’ identity as an aristocratic White enclave.³¹ Alumni preferences were combined with newly minted character tests, photograph requirements, interviews, and the like, to place a ceiling on Jewish enrollments.³² Thus, I worry that the SURE plan would cause colleges to implement character checks or whatever else is necessary to derail the Second Underground Railroad.”

“But Geneva,” Taylor asked, “Why would the Ivy colleges go to such lengths if the DeVine Gift could guarantee that SURE alumni gave money to these schools at rates and amounts equal to or even higher than other alumni? Wouldn’t that take away the colleges’ financial incentive to discriminate against SURE applicants relative to other legacies?”

“Interesting question,” I replied. “It is true that supporting the financial interests of the college is the most often cited reason for rationalizing alumni preferences.³³ And yet, I believe you are oversimplifying the nature of the economic interest involved in preserving White privilege.”

“Please explain, Geneva.”

I leaned back in my chair. “Well, even if SURE alumni contributed to Ivy endowments at higher rates than other alumni, I do not think it is correct to assume that the economic behavior of other donors would remain constant if SURE successfully changed the composition of the student bodies at Ivy League schools. The very success of the SURE program might cause the much more numerous and influential conservative White alumni to threaten withdrawal of support. If the White establishment perceived a threat to the value of an Ivy League credential, as they did with Jewish enrollments eighty years ago,³⁴ then the influence of the DeVine Gift would be neutralized by these masters of reality.”³⁵

31. Lamb, *supra* note 17, at 493-495.

32. *Id.*

33. See *Rosenstock*, 423 F.Supp. at 1327.

34. Lamb, *supra* note 17, at 493-495.

35. The phrase “masters of reality” is taken from *Griggs v. Duke Power Company* 401 U.S. 424, 433 (1971) (holding that it was not permissible under Title VII of the 1964 Civil Rights Act for an employer to require employees to graduate from high school or pass a standardized intelligence test when neither requirement was significantly related to job performance, and when the imposition of such requirements had a substantially adverse impact on African American applicants). Chief Justice Burger, writing unanimously for the Court, criticized the excesses of credentialism: “History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.” *Id.* at 433.

"I can even imagine," I added, "that our Law and Economics colleagues at one mid-west university might try to smoke-out SURE applicants by replacing alumni preferences with a system of sealed bids in which applicants (and their parents) would indicate how much they would be willing to pay for their education.³⁶ After all, our colleagues would argue that such a policy is an effective use of pricing to solve the problem of excess demand, and that the marketplace should determine which applicants' selection would ensure the highest net value added for the school."

DeVine Taylor said, raising his eyebrow, "You don't have to spell out which groups are bound to come out ahead under such a bidding war, I see your point. But do you think the SURE program could be successful in the sense that it might finally explode the myth that elite college admissions are allocated according to meritocratic criteria?"

"Actually," I mentioned, "this is where I perceive the greatest danger of the SURE plan. By framing the issue as one of how alumni preferences *depart* from the ideal of the meritocracy, I am afraid that we might further entrench the status quo definition of merit that tends to judge people not by the content of their character, but by a one-size-fits-all regime of standardized tests.³⁷ This underinclusive notion of merit would seal the fate of the next generation of students of color.³⁸ For example, the UC Regent resolution to end donor preferences was spearheaded by none other than Ward Connerly.³⁹ His publicized stance against such preferences gives him a great deal more credibility as he tries get other states like Washington (where he was successful) and Florida to eliminate race-conscious affirmative action."

"Well Geneva," Taylor said, "I appreciate your thoughts. It appears that this time you have given me the gift of insight. Thank you. Do you have any suggestions about where the resources of the DeVine Gift might be better spent?"

36. Cf. ROBERT KLITGAARD, CHOOSING ELITES 51-55 (1985) (discussing and critiquing a hypothetical market-based college admission policy).

37. See *supra* note 14 for critiques of standardized tests.

38. See Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1017 (1996). West argues:

Plenty of institutions which purport to be meritocratic in fact are not—witness the preferences for alumni legacies and faculty children in college admissions. This argument 'from hypocrisy' has its political and logical justification. But it also has its costs. The major cost is that it distracts the defenders of affirmative action from the work of mounting a critique of the value of meritocracy itself. In fact, it further entrenches the value of meritocracy by highlighting departures from it, if anything.

39. See Kelley, *supra* note 22, at 92 n.53. UC Regent Ward Connerly led the Regents to adopt Resolution SP-1 in July 1995, which prohibited taking race and ethnicity into account in admission decisions to the University of California. Connerly was also Chair of the campaign for Prop. 209. For background information on Connerly, SP-1 and Prop. 209, see CHAVEZ, *supra* note 15, at *passim*.

“DeVine,” I said, “It’s interesting that you ask that question. I just spoke with some friends at Berkeley who recently founded the Center for Social Justice at Boalt Hall.⁴⁰ The Center’s programs include social justice mentoring and a lunch-time speakers series to make legal education more meaningful.⁴¹ They have also organized a social justice law school curriculum and serve as a think tank on social problems.

“What social problems are being addressed by the Center for Social Justice right now, Geneva?”

“Actually, DeVine, you may have heard about efforts in states like Ohio, Florida and Minnesota to make bar examinations more difficult to pass,⁴² a development that clearly would have a disparate impact on students of color.”⁴³ Next year the Center for Social Justice will bring in Professor Joan Howarth⁴⁴ as a Scholar in Residence to oversee a writing seminar that will investigate the role of the bar exam in shaping the legal profession.”

“Thanks Geneva, I’ll contact the Center about sponsoring an event or activity. In any event, I must be going. But, I’ll call you later, and thanks for everything.”

40. For information on the activities and origins of Center for Social Justice, visit their website. See Center for Social Justice, Boalt Hall School of Law, UC Berkeley (visited Dec. 7, 2000) <<http://www.law.berkeley.edu/cenpro/centers/socialjustice.html>>.

41. See *id.*

42. This issue was the subject of the Society of American Law Teachers’ (SALT) Conference at Golden Gate University Law School in September 1999. See *SALT’s San Francisco Conference Re-examines the Bar Exam*, SALT EQUALIZER 8-12, 17-18 (Dec. 1999). See also SALT’s website at <<http://www.scu.edu/law/salt>>.

43. See generally Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996).

44. For Howarth’s work on the bar exam, see Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927 (1997).

