

## RACIAL REALISM OR RACIAL DESPAIR?

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ON first reading Professor Derrick Bell's article, *Racial Realism*,<sup>1</sup> I was reminded of a story that I heard several years ago. In this story, there is a black man who has been sentenced by a white judge for some minor infraction. After the sentence is announced, the man looks at the judge and says, "You have taken away my job, my house, my wife, my kids, and my freedom; is there anything else you want?" The judge leans across the bench, looking at the defendant, and says, "Do you have any dreams?" In Professor Bell's article, he describes the continued subjugation of African Americans, citing the problems in housing, employment, and schools, and the loss of liberty and life itself. The response suggested by the article is to give up the dream of equality. And what is promised in its place is a release from despair. This is a promise "Racial Realism" cannot keep.

The core message of *Racial Realism* is that the racial domination and subjugation of blacks in America is immutable. Bell contends:

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

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1. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

ment racial strategies that can bring fulfillment and even triumph.<sup>2</sup>

Bell's aim is to free blacks from the psychological burden of despair. The goal of "Racial Realism" is therefore limited. The despair, according to Bell, is not caused by actual racial domination that blacks experience, but by the false belief that things can get better and that eventually equality will be achieved. He asserts that it is the *rhetoric* of equality that keeps these false hopes alive in black America and prevents us from acknowledging the reality of racial domination. According to Racial Realism, therefore, it is the false hope for equality, and not racism, that must be vanquished.<sup>3</sup>

*Racial Realism* is a provocative and thoughtful piece, written in an elegant style that adds to its power. It draws on a number of areas, from philosophy, politics, law, and history. Using broad strokes, Professor Bell both describes and explains the conditions of African Americans in society today. This all comes together as he takes what he describes as a "hard-eyed" view of this reality—*Racial Realism* concludes that racial subordination of blacks in this country is a permanent fixture of our society. Bell tries to support these troubling claims by attacking equality logically and pragmatically. He looks to history for proof that there has been no real change in racial domination in our society. He would have blacks continue to struggle, not for equality or to transform racial domination, but in order to "harass white folks."<sup>4</sup> Despite the power of his message—seemingly plausible, given the current state of race relations—I will argue that he fails on all fronts to support his claim and that his message must be rejected.

In Part I, I will examine Professor Bell's logical critique of equality; in Part II, I will focus on his pragmatic critique; and in Part III, I will examine Bell's treatment of hope and power.

## I. THE LOGICAL CRITIQUE OF EQUALITY

Bell begins his attack by setting his sights on formal equality, using what I call his logical critique.<sup>5</sup> He argues that formal equality—the idea that rights protection can be grounded on an objective foundation of principles—is merely an abstract concept that is not only incoherent and indeterminate, but also a tool of domination in the

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2. *Id.* at 373 (original in italics).

3. *Id.* at 377-78.

4. *Id.* at 379.

5. *See id.* at 376-77.

hands of powerful whites. He situates his attack on formal equality within the larger critique of rights, drawing heavily on the Legal Realist and the Critical Legal Studies movements.<sup>6</sup> According to Bell, liberals use the rights rhetoric of transcendent “objective principles”—such as “equality”—to hide the subjective value choices judges must adopt when making decisions.<sup>7</sup>

The claim of objective rights—principles that can logically deliver the correct answer to moral questions—is important to the legitimacy of the liberal role of judges and the rhetoric of rights. It is when Bell is deconstructing formal equality and rights rhetoric that his arguments are most persuasive. He draws our attention to the hidden choices that must be made by judges shielded behind the language of rights and equality. But he develops implications of these insights that are both surprising and unconvincing. Bell seems to suggest the following: Because formal equality cannot be grounded in objective transcendent knowledge, it should be abandoned. And because formal equality should be abandoned, we should also abandon substantive equality—the idea that “equality” can be established and assessed through the actual, substantive results of the law. But neither of these implications is sound. Regarding formal equality, though objectivity may be important to the legitimacy of liberalism, as Bell properly notes, it does not follow that the lack of this foundation entirely destroys all legitimacy for value choices based on principles that we as a society adopt.

Even if we accepted the need to abandon formal equality completely, it does not entail a need to abandon substantive equality. Courts can and have employed a substantive equality standard free of any “formal” standard that affects the conditions of subjugation of blacks. However, Bell does not explicitly address the issue of substantive equality. Although at times he seems to conclude that equality in the broadest sense—formal and substantive—must be abandoned, at other times he implies that substantive equality alone may succeed as a

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6. It is not clear if Bell believes there are objective foundations on which values can be grounded. However, it seems clear that rights cannot be grounded in a transcendent objectivity because no such foundation can be proven. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 333-42 (1979); Drucilla Cornell, *Taking Hegel Seriously*, 7 CARDOZO L. REV. 139 (1985); Mark V. Tushnet, *An Essay of Rights*, 62 TEX. L. REV. 1363 (1984).

7. Bell, *supra* note 1, at 367-68. Bell, like many of the proponents of Critical Legal Studies, erroneously assumes that the absence of an objective foundation leaves only the personal preferences of the individual as a basis for reasoning and decisionmaking. See *infra* notes 9-11 and accompanying text. For an excellent discussion of this issue, see BERNSTEIN, *supra* note 6, at 16-20.

standard for transforming racial domination. He does not explain this inconsistency.<sup>8</sup> Whether substantive equality can serve a legitimate role in rights protection is an important question that must be addressed before "equality" is summarily rejected.

One reason why Professor Bell believes that the lack of an objective foundation means that we have to drop formal equality may be that he accepts what Bernstein has called the "Cartesian Anxiety": either there is some transcendent grounding for our principles or we are doomed to relativism, where everything is a matter of power and personal preference.<sup>9</sup> But as Bernstein and others cogently demonstrate, there are other ways to give values and principles legitimacy. Principles and values need not be objective or relative.<sup>10</sup> Although Bell is right to argue that the values and rhetoric we use do leave choices to be made, he fails to see that despite real choice, we are nonetheless constrained by the values we embrace and the conversations in which we engage.<sup>11</sup>

Bell's logical critique does not help us to choose between competing principles or theories and assessing the application of a value. Yet

8. Bell at least approves of the use of substantive equality, even though he is silent on its ability to function as a basis for legally-driven change. See Bell, *supra* note 1, at 369-70 (criticizing the use of "abstraction" rather than "flexible reasoning" in *Bakke*); see also *infra* notes 14-17 and accompanying text. His complaint—which implies a rejection of any ultimate reliance on substantive equality—seems to be that the courts have failed to use this value consistently. See *id.* at 367 n.12.

9. See BERNSTEIN, *supra* note 6, at 18-19.

10. *Id.* at 19. A growing number of commentators share this perspective. However, they often differ as to the proper basis for values and principles. Many call for principles to be validated through a process of communicative dialogue that is free from domination. See, e.g., Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 298-99 (1985). Others note that the language we use, itself, both frees and constrains us. See, e.g., Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1369-70 (1986) ("[I]nterpretation of statutes and constitutions must . . . be more confined" than interpretation of "great literature."). Still others insist that it is a serious mistake to assume that we experience life as we experience philosophy. See, e.g., SIR ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* at xxxiii-xxxiv (1969); John Denver, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825 (1987); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980-84. And some assert that the major flaw of both rational objectivism and relativism is that they are centered on the notion of a radically autonomous rational self which does not exist. See, e.g., ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS*, 191-235 (1975).

11. Language is not just a tool that we use. It is also constitutive of who we are and the world in which we live. We experience our world and come to be who we are through language and conversation. See FRED R. DALLAMAYR, *TWILIGHT OF SUBJECTIVITY* 220-54 (1981); HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* 59-69 (1976); UNGER, *supra* note 10, at 111-13.

unless one embraces relativism, there must be some way of judging and choosing among these different theories and principles.<sup>12</sup> Although Bell flirts with relativism, he rejects it. He accepts that there are ways of legitimately deciding moral issues and criticizing others.<sup>13</sup> For example, he cites *Griggs v. Duke Power Co.*<sup>14</sup> as an example of the Court's use of "flexible reasoning"<sup>15</sup> to arrive at the correct result.<sup>16</sup> Bell also suggests that Racial Realism would aid in delivering a more correct result.<sup>17</sup>

Bell's logical critique is correct to suggest that moral issues cannot be mechanically compelled by objective principles. Moral judgment and moral choices will have to be made and defended on some other basis. If the goal is to end racial domination, substantive equality may provide a more legitimate choice than formal equality.<sup>18</sup> Ultimately, the struggle over which language we use, though it does not resolve all the issues, is also a struggle over the kind of world in which we want to live.

At this time in our legal and racial history, it seems clear that formal equality must be rejected as an adequate way of transforming racial domination; but not for the logical reasons that Bell sets forth. Formal equality *should* be rejected because it has become a better tool for maintaining—rather than ending—the status quo of racial domina-

12. The notion that if there are not transcendent objective foundations on which to base our decisions, then there is no basis for our decisions except our unrestrained personal choices, is what Bernstein calls the Cartesian Anxiety. See *supra* text accompanying note 9.

13. See Bell, *supra* note 1, at 367. One of the problems with relativism is that it destroys the possibility of critique, thereby leaving the status quo unchallenged. See BERNSTEIN, *supra* note 6, at 220-21.

14. 401 U.S. 424 (1971).

15. See Bell, *supra* note 1, at 367 n.12. Bell does not define "flexible reasoning," but he appears to be referring to the Court's consideration of the history, conditions, and power relations between blacks and whites, in making judicial decisions.

16. I believe that Bell would consider a correct result one that moves us away from white domination and black subjugation.

17. See Bell, *supra* note 1, at 377.

18. See Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). I am aware that there are many different notions of substantive equality. Which concept of substantive equality we have or should adopt is of considerable controversy. However, most liberal commentators and liberal members of the Court have long accepted the notion that equality must have a substantive content. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326-27 (1978) (Brennan, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 247-48 (1962) (Douglas, J., concurring).

tion. However, this pro-status quo use was not always the case. For example, during the Jim Crow period, formal equality served a transformative value for lessening racial domination.<sup>19</sup> This is a pragmatic assessment of the role of "equality," however, not a logical one. I will now turn to Bell's pragmatic critique.

## II. THE PRAGMATIC CRITIQUE OF EQUALITY

Professor Bell shifts to his pragmatic analysis as he moves into a discussion of legal cases.<sup>20</sup> From this perspective, he is no longer concerned with the logical foundation of the value or rhetoric of equality, but with how it affects the lives of subordinated blacks.

The pragmatic analysis is much more significant in determining whether there is merit to Bell's claim that the goal of "equality" should be abandoned. Most people will not and should not abandon their values or goals simply because these aims do not rest on an objective, logical foundation. Bell claims that, aside from the issue of formal equality, the true condition of subjugation and subordination of blacks has never really improved, and never will. This claim is much more devastating and far-reaching than the earlier claim that formal equality is unattainable. It is the heart of the foundation for Racial Realism: If the goal of equality does not bring even *some* progress for the black situation, there is no reason to rely on it. Upon examination, though, it becomes clear that this claim is simply wrong, robbing Racial Realism of most of its value.

Even if equality is unobtainable, as long as we can make substantial and real improvements in the status quo, equality as a regulative ideal would maintain much of its force.<sup>21</sup> If the ideal goal of equality could help us move from slavery to non-slavery, with or without Jim Crow laws in place, this would be progress. This would justify using equality as an *ideal*, even if it would never be a *reality*—especially if

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19. See generally Crenshaw, *supra* note 18, at 1376-81. In the struggle today, one of the major issues is, what is the proper concept of equality that we as a society should adopt? The conservatives embrace formal equality, not because it is logically compelled, but because it helps to maintain the status quo of racial dominance. Progressives embrace substantive equality because it is useful in challenging the status quo of racial dominance. Bell's analysis in deconstructing the objectivity of formal equality is useful because it makes it clear that either formal or substantive equality is a reflected choice in values. It is appropriate, then, to argue why one value is better than the other. The answer can no longer be based on some claim of objectivity.

20. Bell, *supra* note 1, at 369-70.

21. For a discussion of how values, as a regulative ideal that cannot be achieved, can help guide our choices and be transformative, see BERNSTEIN, *supra* note 6.

the alternative were to maintain the condition of slavery. The issue of whether equality can be achieved or not is irrelevant from a pragmatic view. This pragmatic reason for accepting equality as an ideal would fail only if it could not help improve the status quo.

The pragmatic attack on equality has force only if it can be shown that equality has no positive transformative value for addressing black subjugation, or that equality rhetoric makes things worse. Bell cites *Regents of the University of California v. Bakke*<sup>22</sup> as the ultimate example of how "equality" in fact has been used to hurt blacks.

As every civil rights lawyer has reason to know . . . abstract principles lead to legal results that harm blacks and perpetuate their inferior status. Racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise. A paradigm example presents itself in the case of *Regents of the University of California v. Bakke*.<sup>23</sup>

Bell goes on to add that "cases such as *Bakke* should inspire many civil rights lawyers to reexamine the role of equality jurisprudence in its potential to improve the lives of black Americans."<sup>24</sup>

Bell is critical of the civil rights community for relying on these abstract legal principles. Not only is such reliance ill-founded, goes his critique, but the reliance worsens the condition of the black community.

Although it seems clear that *Bakke* was wrongly decided for the reasons Bell suggests, it does not support his position that equality cannot have a transformative role in addressing the needs of black Americans. What *Bakke* demonstrates is that a conservative Court was able to ignore the present and historical conditions of blacks in using formal equality to limit the claims of blacks. Justice Powell wrote the majority opinion that accepted an abstract notion of equality of which Bell is critical. However, four members of the Court, as well as the civil rights community, rejected "formal equality" as the correct standard to apply in this case and argued for a standard that Bell seems to accept.<sup>25</sup>

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22. 438 U.S. 265 (1978).

23. Bell, *supra* note 1, at 369.

24. *Id.* at 369-70.

25. See Brief of the American Civil Liberties Union, The ACLU of Northern California, The ACLU of Southern California, Amici Curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), in 99 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 459 (Philip B. Kurland & Gerhard Casper eds., 1978) [hereinafter Brief of the American Civil Liberties Union].

When Bell cites with approval the "flexible reasoning" used by the Court in *Griggs*,<sup>26</sup> he seems to have in mind something close to the substantive equality standard argued by Brennan and Marshall—and much of the civil rights community—in *Bakke*.<sup>27</sup>

But if the civil rights community was *not* attached to the false value of formal equality, the real injury in *Bakke* was not despair at the hand of the community's own false consciousness, but an injury at the hand of a conservative Court intent on maintaining the status quo. *Racial Realism* does not address this. Instead, Bell wrongly paints the civil rights community as ideological dupes, unaware of how abstract principles are used to visit damage on the black community.<sup>28</sup>

Bell suggests that what is wrong with the reliance on the rule of law in *Bakke* is that it allowed a conservative Court the discretion to choose to adhere to "neutral principles," thereby hurting the goal of racial equality. But choice is not the problem. There is no method that can eliminate choice, whether one calls it flexible reasoning, substantive equality, or Racial Realism. There are two serious problems with how formalism in general, and formal equality in particular, is used by the Court. The first problem is that the Court obscures what it is doing by denying that it is making choices in deciding cases. The second more serious problem is that the choices the Court makes under formalism often maintain racial domination. I believe it is better to make explicit that choices are being made—in fact, must be made—and then demand justification to support their selection. By accepting this approach, I would argue that a choice that maintains the status quo of racial domination cannot be justified and must be refuted.

Professor Bell, in broad strokes, collapses the nonformal aspects of equality into the suspect use of formal equality. He therefore concludes that all aspects of equality fail the black community. However, Bell's

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26. See Bell, *supra* note 1, at 367 n.12.

27. Brennan expressly rejects formalism and accepts substantive equality as appropriate in *Bakke*. See *Bakke*, 438 U.S. at 326-27 (Brennan, J., dissenting). In Marshall's opinion, Brennan conducts a careful history of racial subordination to support the rejection of formalism. See *id.* at 387-402 (Marshall, J., dissenting). More recently, Brennan, writing for a majority of the Court, adopted the use of what Bell would call flexible reasoning, again rejecting formalism. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3008-09 (1990).

28. See Bell, *supra* note 1, at 369-70, 373. Bell's criticism of the Court in *Bakke* is that it relied on abstract formalism instead of looking at the factual historical conditions of blacks. *Id.* at 369-70. But the latter is exactly what the civil rights community calls for. See Brief of the American Civil Liberties Union, *supra* note 25, at 460. Bell could address this by showing that it is not just formal equality that is the problem, but any notion of equality. This would be a much harder claim to argue and one about which Bell is at best ambivalent.



approach does not help us to determine if the value of equality plays either a role of transformation or a role of maintaining the status quo. From a pragmatic perspective, these are the measures that one must use in accepting or rejecting a value, goal, or institution. Professor Crenshaw, for instance, has made such an examination and found that the answer is mixed. In taking a historical look at the courts and equality, she has determined that the courts, like most institutions and values, have played both a transformative role and a role of maintaining the status quo.

Professor Crenshaw argues that in examining the role of equality, one must both avoid logical idealism and look at the practical transformative role of equality. She is explicitly critical of the Crits for failing to examine the transformative role.<sup>29</sup> While she accepts much of the Crits' logical attack on rights. But she rejects the idealism implicit in the Crits' analysis, which is also central in Bell's analysis. She notes that the dominant cause of black subjugation is not wrong beliefs by blacks, as argued by Bell and the Crits, but racism and the coercive power that whites exercise over blacks to frustrate blacks' interests.<sup>30</sup>

Returning to the focus on the pragmatic question—has the use of rights rhetoric been valuable in the struggle against racial domination?—Crenshaw's convincing answer is that rights rhetoric has both legitimized domination and transformed it.<sup>31</sup> In answering, she shows the error of both extreme claims: that rights rhetoric is *only* a tool of domination, and that rights rhetoric is *always* a benefit to blacks. "Critics also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands and may also serve an important function in combating the experience of being excluded and oppressed."<sup>32</sup>

In specifically addressing the role of formal equality, Crenshaw notes that during the Jim Crow period, when racial barriers were formal, the removal of those barriers was significant and transformative. She argues that, in this historical context, the use of formal equality

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29. See Crenshaw, *supra* note 18.

30. *Id.* at 1349-87.

31. See *id.* In response to the same question, Professor Williams notes that it is not the assertion of rights that has done the most harm to the struggle to end racial domination, but the lack of commitment to rights. See Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) [hereinafter Williams, *The Obliging Shell*]; Williams, *supra* note 18.

32. Crenshaw, *supra* note 18, at 1357.

changed the status quo:

The response to the civil rights movement was the removal of most formal barriers and symbolic manifestations of subordinations. Thus, "White Only" notices and other obvious indicators of the societal policy of racial subordination disappeared—at least in the public sphere . . . . Removal of these public manifestations of subordination was a significant gain for all Blacks, although some benefitted more than others. The eradication of formal barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage. Yet despite these disparate results, it would be absurd to suggest that no benefits came from these reforms . . . .<sup>33</sup>

This is a useful critique of and correction of Bell's position, which at times suggests that rights have served only a negative role in the struggle against racial domination. Crenshaw posits that the rhetoric has been used both to maintain and legitimize, as well as undermine, racial domination. In examining whether rights rhetoric in general can be useful in the struggle against racial dominance, she argues that the Critics' ideological attack on rights is of limited use, especially when one looks at the pragmatic use of rights by black America. Ask not if rights rhetoric is logically grounded or free of being appropriated by others to legitimize domination; rather, ask if rights rhetoric can be used to transform.

While Bell focuses on the use of formal equality by the Court in *Bakke*, Crenshaw takes a historical look at the use of formal equality during the early days of the Civil Rights struggle. Although she is critical of the use of formal equality today, she finds it had a real transformative effect in a different context. Bell's claim, on the other hand, is not that formal equality is not adequate today, but that it never has been a positive goal or value. But as he himself must recognize, the formal equality that we may rightly criticize today would have been almost unimaginable to the slave or the slave master two hundred years ago: blacks were once the property of white slave masters, a fact that Bell does not acknowledge in his analysis.

*Racial Realism* fails to examine the transformative role of equality. Worse, it does not seriously address any alternative. While Profes-

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33. *Id.* at 1378.

sor Bell is aware of the dangers of rights rhetoric, he does not acknowledge the risk in giving up this language. This latter risk is all the more problematic, given the racial power imbalance. Professor Williams, in her critique of the attack on rights, reminds us that it is not the exercise of false rights that has injured blacks, but the denial to blacks of rights extended to others.<sup>34</sup> Bell's idealism causes him to identify the problem of despair as a psychological problem in the minds of black people, rather than as a material problem rooted in the structure of racism.<sup>35</sup> Because of this position, Bell offers no serious alternative to help protect blacks from racist power.

Bell's pragmatic voice would say that because things cannot be improved and equality may make things worse, we should drop equality altogether. The primary benefit Racial Realism offers in exchange for the rights language, including equality, is rescue from despair.<sup>36</sup>

However, it is not the belief in equality that pushes the black community toward despair, but the conditions of subjugation and subordination that blacks experience every day in the United States. Racial Realism does not address these concerns and indeed suggests that nothing can be done, as the current state of racial domination is a permanent fixture of American life. Racial Realism's solution is to accept this state and give up the false dream of equality.

Bell is aware that his claim that things have not and will not improve ultimately turns on the present and historical conditions of blacks in this country, and not on how a given Court ruled.<sup>37</sup> He turns our

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34. Williams also argues that even with the problems of rights, minorities are better off with the rights rhetoric than without. See Williams, *The Obliging Shell*, *supra* note 31.

Although Bell appears to assert that the entire rhetoric of rights should be abandoned, he is ambivalent on this point. While he is critical of the incoherence and lack of objectivity of rights, and insists that rights rhetoric harms blacks, he also asserts that blacks must find ways to press for their rights. He does not state what those rights are, or how they differ from the rights he has been criticizing. One reading of Bell is that he, like Crenshaw and others, is calling for a substantive notion of rights that has a transformative potential in our concrete condition. I would suggest that those rights would look very much like a concept of substantive equality.

Professor Grillo, in a very thorough article, argues that the abandonment of the formality of rights can hurt women in divorce proceedings. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

35. This is not to suggest that there is a radical disjunction between the material and the psychological. Instead, I am arguing that one cannot understand or address the problem of despair without looking at the material conditions.

36. When Bell shifts to his pragmatic voice, he continues to be unclear about whether he believes that substantive equality is as destructive and ineffective as formal equality. His specific example uses formal equality, while his conclusions are in much broader terms.

37. See Bell, *supra* note 1, at 374-75, 378.

attention to the current state of black America to drive home his case. He cites discouraging facts and figures to show that the disparity between blacks and whites in a number of categories has increased in the last twenty years.<sup>38</sup> When one looks at these figures, they give Bell's claim of immutable subjugation a gloss of plausibility. Looking at the condition of African Americans today, it is hard to dispute that there is a real and persistent inequality between whites and blacks. Although there might be controversy about the causes of this condition, there is little dispute about the alarming gap between blacks and whites. Those of us who care about race relations have reason to feel malaise and frustration. We are losing ground.

From this reality, it does not follow that no progress has been or can be made. Nor should we discount as "irrelevancies"<sup>39</sup> the victories that have been won. Our past is often the best source of information about our future. It is for this reason that Bell argues that there has not been any "real" improvement in the past. Over the last twenty years, there have been serious setbacks in the gains made toward equality. Things are bad. They are likely to get worse.

The pragmatic question is not, "Are things bad?" They are. The question is, "Can there be any chance of improving the racial subjugation of blacks, and can equality be a positive factor in this effort?" History suggests that things have and can improve and, equally important, that our efforts will influence the future.<sup>40</sup> There have been real improvements in the past, and the rhetoric of rights and equality have played a positive transformative role.

If one compares where we are today with where we were at the turn of the century, the disparity between blacks and whites has improved in almost every category.<sup>41</sup> It is not our failure over the last 300 years that haunts us; it is the losses over the last twenty years that push us toward despair. These losses have been real and painful. But a long look at the past, a look that Bell declines to make, reveals that the claim of "no progress" is a serious exaggeration. We are not where we

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38. *Id.* at 374 n.30.

39. *Id.* at 373.

40. *See infra* note 45 and accompanying text.

41. For example, in 1900, blacks ages 5-19 enrolled in school at the rate of 31%, compared with 54% for whites. In 1970, 89% of blacks were enrolled, compared with 91% for whites. Life expectancy for blacks in 1900 was 33 years, for whites 47 years. In 1970, these figures were 65 years for blacks and 72 years for whites. HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 55, 369-70 (Part I Bicentennial Ed. 1975).

had reason to hope we would be in the 1990s. But we are also not where we were in the 1890s.

### III. RACIAL REALISM: HOPE AND DESPAIR

The goal of Racial Realism is to free blacks from the elusive dream of equality. Professor Bell wishes to wake us from the "We have a dream" mentality of the 1960s.<sup>42</sup> It is obvious that he uses this language to challenge both the false consciousness of the black community and the Civil Rights Movement. But it is not at all clear who suffers from this illusion, or even what the illusion is. Bell argues most forcefully against formal equality and abstract legal principles. But he does not try to show—nor do I believe he can show—that there is widespread attachment to such concepts in the black community. Certainly the black community does not believe in the inevitability of equality. Its members live the statistics that Bell cites. Racial Realism, then, would strip away the idea of equality—but it would still leave untouched the structure—and presence—of racism that dominates black life.

"Do the Right Thing,"<sup>43</sup> Spike Lee's film, captures the sense of the black community's attitude toward rights in America. During one scene, there is a confrontation in a lower-middle-class black community, between Buggin Out, one of the local blacks, and Cliton, a white yuppie who is unknown in the neighborhood. The yuppie accidentally rolls his bicycle over Buggin Out's new, hip Air Jordan sneakers. When Buggin Out challenges Cliton and asks him why he has a house in Buggin Out's neighborhood, and on his side of the block, Cliton answers that this is a free country and he can live where he pleases. Buggin Out's response: "A free country? Awww Shit! I should fuck you up just for that stupid shit alone."

The idealism of Racial Realism suggests that if we free ourselves from the false theory of equality, we will not suffer from despair—even though our children will continue to die from disease or gun play, and our lives will continue to be circumscribed by white domination. Despite claims to the contrary, this in fact seems to be a message of despair rooted in "idealism."

The most despairing part of *Racial Realism* is not its attack on equality, but the claim that there is no hope in transforming racial domination in our society. Bell contends that there has not been, nor

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42. Bell, *supra* note 1, at 375.

43. DO THE RIGHT THING (Universal Studios 1989).

will there ever be, any improvement in the subjugation of blacks because of the power relation between blacks and racist whites. According to Bell's perception, blacks are viewed as simply ineffective and unable to influence their own lives. We can never hope to be more than simple pawns in the hands of powerful whites. The efforts by blacks to change this situation are absorbed by whites, who merely appear to accommodate these efforts without changing the status quo.<sup>44</sup> How can this be a message of hope?

In fact, this conception is disempowering. Bell greatly exaggerates the power of whites and undervalues the power of blacks. While it is undoubtedly true that conservative whites, and the Republican Party in particular, have used racism to consolidate power for their own interest, it is not true that blacks are powerless or that whites are all powerful. Indeed, the example Bell gives of the nomination of Clarence Thomas to the Supreme Court—to demonstrate blacks' lack of power—can easily be re-interpreted as an indication of blacks' affirmative power.

The nomination of Thomas by President Bush was a cynical move that nonetheless recognized that blacks could influence the outcome of these events. Thomas' judicial record on civil rights was sparse. But piecing together Thomas' writing and speeches, it seems clear he will not be sympathetic to many civil rights claims. I agree with Bell that Thomas does not have the interest of blacks at heart. During the Senate confirmation hearings, Thomas went to great lengths to obscure his stance on key civil rights issues. Without clarifying his position, he ultimately was confirmed by the Senate to the Supreme Court—by the smallest margin in history. Almost everyone recognized that the position the black community took on the nomination would be important. It seems fairly obvious that one of the reasons Thomas obscured his position on civil rights was to avoid losing black support.<sup>45</sup> The black community supported Thomas' nomination by almost two-to-one. The support from the black community was critical to his success. I believe that if there had been a consensus in the black community in opposition, as there was with Bork, there would be no Justice Thomas today. Bell might be able to show that blacks either misused their power to support Thomas or that blacks were manipulated. But even the ac-

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44. Bell, *supra* note 1, at 370-71.

45. When Bork was nominated to the Supreme Court by President Reagan, his explicit hostility to constitutional protection of civil rights alienated the black community. The consensus that formed in opposition to Bork was significant in his defeat.

knowledge that the White House felt the need to manipulate suggests the recognition of power.<sup>46</sup>

Because Bush and other powerful conservative whites won in the Thomas nomination, Bell can argue that blacks would have been powerless to stop Bush. However, this position is incorrect.<sup>47</sup> There are many examples of blacks influencing events to *defeat* conservative white interests. A recent example is the passage of the 1991 Civil Rights Bill.<sup>48</sup> Despite strong and vocal opposition from conservative whites, including President Bush, blacks were able to prevail in getting the 1991 Civil Rights Bill passed.<sup>49</sup>

While it is true that racism is often used both to resolve white conflicts and to resist change that would benefit blacks, it is wrong to suggest that blacks are merely pawns in the hands of powerful whites. Blacks in America may not be able to control their destiny, but often we have been able to influence events to our advantage in the face of powerful white opposition. Even as slaves, blacks were able to influence events central to their lives. At the beginning of the Civil War, for example, Lincoln was determined to limit the war issue to preservation of the Union. But black slaves and freed blacks were able to undermine this effort and to commit the country to a position on slavery.<sup>50</sup> To the freed slave and the slave master, this cannot be dismissed as an "irrelevance."

It cannot be proven through a mere litany of examples that blacks one day will be treated as equals in America. Indeed, Bell has tried to anticipate any counter-examples to his position that there will be no improvement in the status quo by dismissing any apparent victory as "no more than temporary peaks of progress, short lived victories that slide into irrelevance."<sup>51</sup> Racial Realism attributes to blacks what one

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46. The Thomas hearings were a complex set of events involving the confluence of race, gender, and class issues. For a good discussion of some of these issues, see Emma C. Jordan, *Why Rush to Vote on Thomas?*, N.Y. TIMES, Oct. 8, 1991, at A25. I also believe that it is plausible that if Thomas clearly demonstrates the kind of hostility to black rights and to the interest in creating a consensus in the black community, the next black conservative put forward by white conservatives will not be treated as well.

47. See *supra* note 45.

48. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

49. It is interesting to note that the Act, in part, restores to civil rights adjudication what Bell refers to as "flexible reasoning," applied in *Griggs*. See Bell, *supra* note 1, at 367 n.12; *supra* note 15 and accompanying text.

50. See 1 IRA BERLIN, FREEDOM, A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867, at 2-3 (1985).

51. Bell, *supra* note 1, at 373.

writer calls "surplus powerlessness."<sup>52</sup> But there is something urgently wrong with the position Racial Realism suggests—that blacks are powerless. It is not only wrong, it is a position of despair, robbing blacks of all hope<sup>53</sup> of changing the conditions of subjugation and domination. And Bell's insistence that history supports his position is false.<sup>54</sup> Though historically the power equation between blacks and whites has not been even close to "equal,"<sup>55</sup> blacks *have* influenced and even defeated powerful white interests.

There is a tension, if not a contradiction, between Bell's claim that blacks are powerless and that the condition of domination has not changed and will not change, and his assertion that the attachment to equality has limited the struggle against racial domination. The implication of the second proposition is that, in some way, there must be a method of successful struggle against racial domination. If blacks give up the attachment to equality, Bell seems to suggest that this might produce an improvement in the black condition. The contradiction is not avoided, however, by calling for a shift in the psychological state of blacks, by reducing their "despair."

As one nears the end of *Racial Realism*, Professor Bell takes a surprising turn. His analysis pushes toward despair, cynicism and apathy. While he accepts the immutability of the bleak status quo, he is not ready to accept apathy. He calls for continued struggle based on a qualified existentialism. He challenges blacks to continue to struggle

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52. MICHAEL LERNER, SURPLUS POWERLESS, THE PSYCHO-DYNAMICS OF EVERYDAY LIFE . . . AND THE PSYCHOLOGY OF INDIVIDUAL AND SOCIAL TRANSFORMATION x-xi (1991). The author describes how this position both misdescribes the world and also reduces the power of those who accept the assertion of their surplus powerlessness.

53. Bell seems to understand that there can be serious dangers in destroying the hope of a people. He unconvincingly argues that the reality that things cannot get any better will not produce hopelessness, but will free us from despair. Bell, *supra* note 1, at 377-78.

Bell is correct to be concerned about hope. In a recent set of studies, it has been shown that hope is the most important factor in people changing their lives for the better, including doing better in school, on the job, or dealing with serious illness. Hope was a positive factor even when it was not based on a realistic appraisal of the situation. See Daniel Goleman, *Hope Emerges as Key to Success in Life*, N.Y. TIMES, Dec. 24, 1991, at C1.

The problem is that Racial Realism speaks in a voice that would destroy the hope, except for those capable of accepting the existential fate, that even though their life effort cannot produce any positive change, they must make the effort.

54. See Crenshaw, *supra* note 18.

55. There are a number of issues packed into this claim. First, white and black interests are not solid and distinct entities, as the formulation suggests. This effort to end white domination is not simply a black issue. Nor is the effort to maintain it simply a white issue. Part of the problem with the formulation of white and black interest or power is that it ignores the actual and potential overlap. Bell acknowledges this potential in *AND WE ARE NOT SAVED* (1987).



without what he sees as the false hope of improving race subordination. While there is something quite beautiful, and even spiritual, about Bell's existentialist position that we must be willing to struggle without the comfort of hope, this call suffers from the same fate as much of existentialism. It is difficult for most people to sustain without more. Professor Bell seems to recognize this and qualifies this position by trying to give more.

Bell suggests that blacks should struggle not for change, but to harass white people. This qualification not only fails to give the call to struggle a more solid grounding, it also destroys the beauty of his existentialist call. This new grounding for struggle is delivered through Mrs. McDonald. She is a humble, poor, elderly black woman, who struggles against rich, powerful, racist white men. Without the hope of change she continues her struggle, but as she puts it, "I am an old woman. I lives to harass white folks."<sup>56</sup>

There is something appealing about Mrs. McDonald, but it is not that she lives to harass white people. It is that she is harassing powerful, rich, racist white men. Indeed, if Bell had told us of a powerful black who lived to harass weak, vulnerable, white children, we would find such a figure repugnant.

To sustain a struggle, there must be a sense of for what and against what we are struggling. In our society, where racial domination persists, we have reason to struggle against the status quo of racial subordination and for our individual and collective humanity.

#### IV. CONCLUSION

Although *Racial Realism* is helpful in its deconstruction of formal equality and rights, I believe it must be embraced or rejected for pragmatic reasons. The standard I would use is: does it help to address the problem black America faces? Based on my understanding of Racial Realism, I believe the answer is no.

One reason for my position is that Racial Realism incorrectly defines the problem as despair caused by false expectations. Its idealism leaves the structure of racism unchallenged. It assumes that the frustration blacks experience is caused by an attachment to the illusion of equality. But the main problem—as noted previously<sup>57</sup>—is not blacks' attitude about equality, but the condition of our lives because of ra-

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56. Bell, *supra* note 2, at 378.

57. See *supra* notes 37-39 and accompanying text.

cism. Racial Realism does nothing to address this problem, and, indeed, argues that nothing can be done. Ultimately, it fails to address the concrete conditions of racism, thereby leading us closer to despair.

There is something curious and disturbing about Racial Realism. It would have us dismiss all victories as false and all defeats as real; Bell would rescue us from the disappointment of unobtainable expectations by removing all expectations. He paints a bleak picture of the present through which he condemns us to live without a future and without dreams. In essence, Bell asks us to accept, as a matter of faith, the fatalism and despair that Racial Realism attempts to remedy. Racial Realism, however, not only fails to address the real problem of racism, but it is also unsuccessful in avoiding despair. Indeed, it may not only add to our despair, but may also diminish our humanity. Does it empower? Does it transform? By its own terms, Racial Realism maintains that blacks are powerless. By its own terms, it asserts that transformation is not possible. By its own terms, it is an attitude we should reject.

Despite this criticism, I believe there are some important messages in Bell's existentialism. I would rephrase his message:

*We cannot know if we will achieve equality or even progress toward equality in a concrete sense. Despite this, it is important to struggle to assert our humanity and equal worth, even when there are not institutions to support our claim and when powerful forces oppose such a claim.*<sup>58</sup>

Professor Bell's claim that we will never achieve equality does contain a useful message. It reminds us that we should not expect to reach equality soon and that our struggle and expectations should reflect this. There probably was a period when people did believe equality was within their immediate grasp. This assumption may have been rational at different times in our history. But Bell is right to argue that it is not rational now, and that holding onto such a belief could cause frustration and despair. If this were all of Bell's message, there would be reason to embrace it. But when he argues that equality never will be achieved and that there cannot be any real progress in the condition of racial domination, it loses its positive value.

It is difficult to imagine any circumstances that would justify giving up equality as a transformative value. Equality is not just a set of

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58. I would reject both the suggestion that blacks live to harass whites because we like to, and the claim that we know that things always will be the same.

conditions in the world. It is central to our being. Even in the face of unequal conditions in the world, our humanity requires that we accept and assert our equal worth as people. We all know of people smarter, richer, more beautiful and more powerful than we, but we do not believe this makes them better. When we hear the statement, "He thinks he is better than everyone else," we immediately know that such an assumption is wrong. Because equality is so central, it appears to be "self-evident." It is a foundation we are seldom called upon to define or defend. Without doing an adequate job of either, it seems obvious that to give up equality as a value is giving up our soul—a message that we should not accept.

